

Abstract of Stream Setbacks and the Law

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1. Setbacks and Buffers are a legitimate land use planning tool:

Big Creek Lumber Co. v. County of San Mateo, 31 Cal. App. 4th 418 (Cal. Ct. App. 1995) (upholding use of 1000 foot buffer between timber harvesting and residential zoning districts).

Court found that setbacks and similar buffers are among the tools counties may use in the interest of sound community planning. Because the propriety of the 1000-foot zone was a fairly debatable question, upon which reasonable minds could differ, the court concluded that the county's decision was not arbitrary, unreasonable, or substantially unrelated to public health or safety. Reasonable minds may differ about the specifics, but the county's action was based on information properly brought before it and "represents a reasonable accommodation of the competing interests."

Ehrlich v. City of Culver City, 12 Cal. 4th 854 (Cal. 1996) (noting that setbacks are common land use tools)

2. Setbacks can implement federal and state law:

1. Protect water quality: can be used as part of storm water pollution prevent plans required by Clean Water Act and State General NPDES permit regulating discharge of stormwater.

1. Protect wetlands and further goals of Clean Water Act §404, which regulates development activity on wetlands

2. Mitigate environmental impacts as required by California Environmental Quality Act

3. Takings Issues and Setbacks: Takings may be found if a setback does not substantially advance a legitimate governmental interest or if it deprives a property owner of all reasonable use of his/her property

1. The setback must substantially advance a legitimate government interest: In general, courts uphold a broad range of regulations designed to protect the environment and character of a community. Griffin Development Co. v. City of Oxnard, 39 Cal. 3d 256, 264 (1985) ("[C]ourts generally have emphasized the breadth of municipal power to control land use and have sustained the regulation if it is rationally related to legitimate state concerns . . .") (quoting Schad v. Mount Ephraim, 452 U.S. 61, 68 (1981)); Breneric Assocs. v. City of Del Mar, 69 Cal. App. 4th 166, 176 (1998) (review of governmental action is "deferential" where agency denies discretionary permit); Saad v. City of Berkeley, 24 Cal. App. 4th 1206, 1213 (1994), review denied, 1994 Cal. LEXIS 3913 (1994).

4. Establish the Legislative Requirement for a Buffer: Either through General

Plan, Zoning Ordinance or Both.

2. Build a record: Provide rationale for requiring buffers:
 - (1) Include information in the general plan or recitals in resolution adopting ordinance explaining why setbacks are important;
 - (1) prepare staff report documenting need for ordinance
 - (2) Include discussion of stream impacts in environmental review for project
3. Think twice about allowing public access: the Dolan v. City of Tigard, 512 U.S. 374 (1994), problem. Court upheld the validity of a setback prohibiting development within 15 feet of the floodplain along a creek because the development would increase impervious surface area and thereby contribute to potential flooding problems. However, the court struck down a condition allowing for public access within that setback on the ground that the condition was not “roughly proportional” to the impacts of the development on access. Need to make some showing that public access component is necessary to offset impact of development at issue.
2. Ensuring that a Setback Does Not Deprive Property Owners of All Reasonable Economic Use of Their Property.
 1. As long as some reasonable economic use remains, no taking should be found.
 2. Remaining use does not need to be “highest and best” use and does not need to allow developer to maximize profit; see MacLeod v. County of Santa Clara, 749 F.2d 541, 544 (9th Cir. 1984), cert. denied, 427 U.S. 1009 (1985) (upholding regulation that allowed existing grazing use to continue even though that use was unprofitable).
 3. Courts have upheld regulations that resulted in substantial diminution in property value. Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (no taking despite diminution in value from \$800,000 to a maximum of \$60,000, and property could not be used for any purpose permitted under city’s ordinance); Haas v. City & County of San Francisco, 605 F.2d 1117, 1120-21 (9th Cir. 1979), cert. denied, 445 U.S. 928 (1980) (no taking found where value of property was diminished from about \$2,000,000 to about \$100,000); Del Oro Hills v. City of Oceanside, 31 Cal. App. 4th 1060, 1081 (1995) 1081 (“[e]ven where there is a very substantial diminution in the value of land, there is no taking.”).
 4. Include a takings “savings” clause that ensures ordinance will not be applied so as to deprive property owner of all reasonable use of property. see also, Del Oro Hills v. City of Oceanside, 31 Cal. App. 4th 1060, 1076 (1995) (“an ordinance is safe from a facial challenge if it preserves, through a permit procedure or otherwise, some economically viable use of the property.”)