

**CITY OF ALBANY  
CITY COUNCIL AGENDA  
STAFF REPORT**

Agenda Date: 5/1/06

**SUBJECT:** Waterfront Planning Process, A Historical and Legal Perspective

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**BACKGROUND DISCUSSION OF A CITY'S RIGHT TO ENACT LAND USE REGULATIONS**

As a general principle, a city's use of its police powers forms a legal basis and provides a city with the authority for the enactment of all of its land use regulations. Exercise of this land use police power authority is designed to protect the public health, safety, and welfare of its residents. Thus, land use regulations are considered valid if they reasonably relate to the public welfare.

Justice William Douglas, speaking for the United States Supreme Court, described those police powers as follows:

*"The concept of the public welfare is broad and inclusive...[t]he values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that a community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."* Burman v. Parker (1954) 348 U.S. 26, 33.

California courts have long recognized Justice Douglas' statement "as a correct description of the authority of any state or city to enact legislation under the police power." [cite omitted] These broad police powers originated under common law, and have been set forth in the California Constitution Article 11 Section 7, wherein it states in part that cities have the power to "make and enforce within [their] limits all local police, sanitary, and other ordinances and regulations not in conflict with the general laws."

The City of Albany has exercised its police powers over the years when it enacted its General Plan, zoning ordinance, and other land use related regulations. These powers, while quite broad, still have to meet constitutional principles of due process and cannot infringe on constitutionally protected private property rights. The regulations, if ever challenged, are valid if they are reasonable, nondiscriminatory, and not arbitrary or capricious.

In the context of the Albany Waterfront, it appears that the land use regulations dating back to the pre 1960s era designated the waterfront area as a manufacturing zone.

Information from historical research indicates that at some point there was a munitions factory before there was a racetrack facility.

In 1978 the City of Albany completed a zoning ordinance review process. Section 216 Waterfront or Waterfront District was created. It stated that “[t]he purpose of the waterfront district is to provide for the water oriented uses called for in the Albany Waterfront Master Plan, as well as the Open Space Conservation, Parks, and Recreation and Commercial Recreation Uses outlined in the Albany General Plan, in the area west of Interstate 80 and Hoffman Boulevard.”

Section 216 enumerated the same waterfront commercial uses that have been carried forth in the zoning regulations since that time. The allowable uses are horse racing, golf, tennis, swimming, and other commercial spectator or participatory activities, and uses that are similar in nature, such as waterfront and sports related commercial sales and services; restaurants/bars; and commercial parking lots.

Public and quasi-public uses included marinas, boat launching ramps, and related uses; parks, golf courses, open space areas, and other recreational facilities; and public utility and public service structures and installations.

At different periods of time the racetrack operated tennis court facilities to the north of the racetrack structure, and a nine hole golf course in the infield of the racetrack area. As can be seen, the community, prior to 1978, made choices as to appropriate zoning uses that could be established at the waterfront. Notably, residential uses, general retail uses, or commercial uses, except those that were waterfront and sports related, were not determined to be appropriate uses for that area.

### **WATERFRONT PLANNING SINCE 1978**

The most comprehensive effort at waterfront planning for the privately owned property at the waterfront dates back to the 1980s. Catellus, a prior owner of the property, approached the City and agreed to fund a Program EIR study to determine the environmental consequences of a range of development alternatives. Catellus wanted to determine possible development options in anticipation of the 1997 lease termination date for the operator of the racetrack.

The program EIR studied a range of alternatives. On the one hand there was a park only alternative. On the other end of the spectrum an alternative included 4.2 million square feet of mixed use commercial, residential, and retail development. This process lasted over a five year period, ending in 1990. Catellus decided to extend the race track lease for an additional five year period and sold the property to Ladbroke in the early 1990s. Catellus did not submit any applications for development approvals prior to selling its interest in the property.

In reaction to the prospect of major development on the Golden Gate Fields property, a citizen initiative, known as Measure C, was adopted by the voters in November

of 1990. Measure C was designed to require voter approval for any major changes to the land use regulations at the waterfront. The proponents felt that this unique area should not be transformed to allow for different uses than were allowed at the waterfront unless the voters approved of the changes.

Although in 1994 the voters did approve a council measure to permit card room gaming within the racetrack structure, the City has not undertaken a comprehensive waterfront planning study in any form since the Catellus EIR. The closest that the City came to studying the waterfront area was in 2003 when the present owner, Magna, agreed to fund a community visioning process. That process commenced but was never completed.

Staff believes it is a fair statement to conclude that the City has not had the benefit of an in depth planning study of the waterfront in Albany's history, notwithstanding the Catellus EIR process.

### **THE PREREQUISITES APPROPRIATE FOR A WATERFRONT PLANNING PROCESS**

After the City terminated the community facilitated process in 2003, discussion of waterfront planning somewhat diminished until Magna approached the City in 2005 and said it was interested in proposing modifications to the Waterfront land use regulations. It went further and indicated that through a venture partner, Caruso Affiliated, it expected to file applications requesting modifications to the General Plan and Zoning Ordinance so that a mixed use residential, commercial, and retail project could be approved. At this time, an official application(s) might be presented by late May.

The prospect of an application from the property owner and a developer caused an immediate anxiety within the community. Members of several organizations that have historically focused on waterfront related matters, and were a vocal constituency during the 2003 community visioning process that never was completed, renewed their efforts to express concerns about the effects and impacts of development at the waterfront.

For the last six months the waterfront has dominated the discourse in the Albany community. Over this time period Caruso Affiliated has been coordinating its own community process. Members of the Sierra Club, Citizens for Albany Shoreline, and Citizens for East Shore Parks have also conducted their own form of a community outreach process. Staff has found that the City is in a cross fire between two different and competing viewpoints for the Albany Waterfront area. An application for development approvals is anticipated and an initiative is being circulated by those opposed to large scale development.

At the moment, unless there is a change in course of action by Caruso Affiliated or the proponents of the initiative, the City will be processing a Caruso Affiliated application while an initiative vies to enact a much different vision for the waterfront. Neither of these two efforts is designed to provide the community and decision makers with a comprehensive overview of the complex issues that may influence any decision to modify the existing land use waterfront regulations.

Staff has concluded that the decision makers and the community are best served if the City can proceed with a planning process in the absence of both a development application and the initiative. Furthermore, staff has concluded that for such a process to proceed, the landowner must express to the City an interest in undertaking this planning process. If interested, the landowner should be prepared to share its vision of proposed changes including looking at possible development with and without the racetrack in operation. If the landowner is not inclined to endorse a city planning process instead of its specific project proposal, which would have an enormous effect on the waterfront area, then staff would view the processing of the application with circumspection. Processing a specific project proposal without the community being able to look carefully at a range of possibilities would not ultimately be in the community's best interests. The waterfront is too significant an area to review potential major land use regulatory changes in the sole context of a project application. A review process has a totally different flavor to it if it is undertaken because of a specific application rather than if the City is able to assess the waterfront in the absence of having to process an application.

Undertaking a city process at the same time the initiative is to be presented to the voters complicates a City review process and may affect the tenor of the City's process. A City process would study as one of the alternatives, a plan contemplated by the proponents of the initiative. The City process, unlike the process contemplated by the initiative, would be a broad spectrum waterfront planning process. The process contemplated by the initiative is an expression of one particular point of view. A specific plan, if created as contemplated by the initiative, would predictably be resisted by the landowner. It is unlikely that a specific plan, as contemplated by the initiative, would ever be implemented unless the property was purchased with public funds. Even if the proponents of the initiative continues with their efforts to qualify the initiative for an election, staff believes that the City would be best served by conducting its own planning process.

#### **EVALUATING THE APPROPRIATENESS OF MAJOR REGULATORY CHANGES AT THE WATERFRONT**

As a starting point, staff wishes to emphasize that the present zoning is legal and need not to be changed. Changes should only be made if the community determines that changes are desirable and in the best welfare interests of the community. Nothing mandates that the City change the present situation. Our community finds itself addressing waterfront issues because Magna has said it plans to submit a development application. We are not addressing waterfront issues because the community has said it wishes to initiate changes.

Evaluating whether changes are desirable and what may be the most appropriate changes requires that a broad range of technical, fiscal, and environmental information be blended with the community's expression of what values it wishes to articulate at the waterfront area. Our community is being asked whether it wishes to modify the values expressed in our present regulatory structure. Those values recognize the uniqueness of the waterfront area and the appropriateness for it to be accessible with lower levels of intensity of development than we see in other zoning districts in the City.

A City process should result in gathering and evaluating the technical information as it relates to a range of possible modifications to the zoning regulations. Then the community could determine what tradeoffs, if any, it wishes to consider for a range of possible modifications. This evaluation, done in thoughtful manner, would allow the community to understand what it should and can expect from a range of changes. The community could also gain an appreciation for what the benefits are that may be conferred on the property owner in the context of what the community can expect if the regulatory structure is modified.

A City process would include information about the present land value under the zoning regulations. The process would provide information about development that is possible under the zoning regulations in effect. This information would constitute baseline information against which any changes could be compared. The community could then measure benefits to and detriments from the range of alternatives being studied during the City's planning process. The community should see benefit from decisions modifying waterfront regulations. Said another way, if changes to the regulatory structure are made, those changes should reflect the City's best welfare and health interests. There is no reason for the community to approve any changes unless those changes are viewed as beneficial to the City. The challenge is to gather and evaluate the information so the community can make informed decisions about a range of choices, and not just choices presented by either the landowner or one constituency within the community.

An editorial in the March 31, 2006 edition of *The Journal* listed 10 categories of questions that should be addressed in a City planning process.<sup>1</sup> Staff believes *The Journal's* list is a starting point to build upon. Magna should be asked to share its vision of the future for the racetrack. Magna representatives have stated that Magna has no plans to close the racetrack, irrespective of whether they proceed with their Dixon project. If that is the case,

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1. How much extra revenue could the Caruso plan or similar development be expected to generate for the city in coming years?
  2. What will be the revenue needs of the city in future years, and how will those needs be met if development is not allowed along the shoreline?
  3. How would the proposed development impact traffic patterns around Albany and surrounding cities?
  4. What impact, if any, would the retail component of the project have on business in Albany, particularly ones on Solano Avenue?
  5. To what extent will the housing component of the project address the housing needs of the city in the future?
  6. If the racetrack were to close, what kind of development would be required to replace the lost revenues? Would that be possible if development were confined near the freeway?
  7. If the property owner were to sell the land, how much would it cost for the state to acquire it and create a park that would need to be maintained? How would this funding be provided, and what is the likelihood of this happening?
  8. What is the likelihood of the racetrack closing in the near future, given trends in the horseracing industry and the financial and strategic positions of Golden Gate Fields' owner, Magna Entertainment Corp.?
  9. In what ways would a public park serve the needs and interests of Albany's residents? What would distinguish it from other parks in the East Bay?
  10. What are other possible uses for the land if it remains in private hands?

then what does Magna plan in the way of changes at Golden Gate Fields? The Caruso proposal is concentrated at the northern end of the property, with some intrusion into the present structure. Prior owners and Magna have made precious few improvements to the facility in Albany. The community deserves to know what Magna plans for that facility. The community deserves to know what Magna's views are on gambling at the racetrack facility, and whether it cares what the community thinks about gambling. The community deserves to know what Magna might wish in the way of development should it decide to cease racetrack operations sometime in the future. These are the types of questions that would be addressed in a City planning process.

A City planning process would likewise address questions about what is the most feasible way to modify the regulations in order to provide the community with the open space and with the revenues that the initiative proponents identify as goals of the initiative. A City planning process has the best chance to also address what the City would have to do to achieve goals such as are expressed in the initiative.

Once all the information has been collected and discussed, then the City and the landowner can focus on the exact and the appropriate regulatory changes. The landowner's primary goal is to enhance the value of its property. The landowner is a corporation with fiduciary responsibilities to its shareholders. If the landowner could determine the intensity of development and the highest economic use for the property without regard to regulatory considerations, its development plan would probably be a vision that few in the community would find desirable.

Determining the goals of the City may be more challenging than deciphering the landowner's goals. The health and welfare of the City will require the community to define its aesthetic and open space vision for this unique waterfront area; its vision of the intensity of development; its desire to derive increased revenue for the City; its limits of acceptable tolerances for changes that might have a negative effect on the environment; and any number of other needs or concerns that the community has about the effects of changes in uses on the privately held waterfront lands.

## **CONCLUSION**

Staff views a City planning process as the best means for the community to explore what, if any, changes to the regulatory provisions are desired and make sense. Members of the public have said in the past that the City should not have to be reactive to a landowner proposal because it does not provide the community with all the information and choices. By and large staff agrees with that expressed point of view, although processing an application would certainly provide large amounts of information. The initiative, like a landowner application, would not provide the community with all the information and choices that the community deserves to have before it for consideration.

Since Magna owns this waterfront area, and since Magna wishes that the City consider changes to the City's regulatory structure, staff believes that the City process should be funded by the landowner. Staff is mindful that some members of the community, in particular those who support the initiative, worry that a City process would be corrupted by the landowner's money. Staff still feels that the taxpayer should not be burdened by the costs of planning, especially when the landowner requests the City to consider new regulations for the waterfront area. Staff believes that a City process can easily proceed without the source of the money influencing the planning process. The process will be transparent and nothing will change unless the voters approve of the changes. Albany is a small city and the wool will not be pulled over the intelligent eyes of this community.

Staff recommends that Council consider and pass the attached resolution.