

5 Why Can Land Use Be Regulated? An Introduction to the Police Power

The broad powers enjoyed by both public health and planning officials are grounded in a legal principle called the “police power.” The police power is the inherent authority of a government to impose restrictions on private rights in the interest of the general security, health, safety, morals, and welfare.¹ To achieve these communal benefits, the state retains the power to restrict (within federal and state constitutional limits) private and economic interests, including freedom in uses of property.²

The police power is the natural prerogative of sovereign governments to enact laws, promulgate regulations, and take action to protect, preserve and promote public health, safety and welfare. In the words of the California Supreme Court: “The preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the legislature, within its police power, may take action.”³

The concept of the police power comes from common law, a body of judicially created law that spans from medieval England to the present day. In political theory, the police power describes the conditions under which a sovereign government can legitimately intrude upon a person’s autonomy, privacy, liberty, or property. The police power is an inherent authority of the states; the federal government does not have inherent police power. The states can delegate their police power to local governments. Some states have delegated the police power to local government in their state constitution, while others do so by statute. In California, the constitutional source of local government’s power to adopt and implement general plans is in Article XI, Section 7, which authorizes any city to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”⁴

The most common exercise of the police power over **real property** is a local or regional government’s adoption and enforcement of **zoning regulations**, building codes, and environmental protection regulations. One way to think about this is to consider that local governments use police powers to restrict a private property right so as to protect the common good.⁵



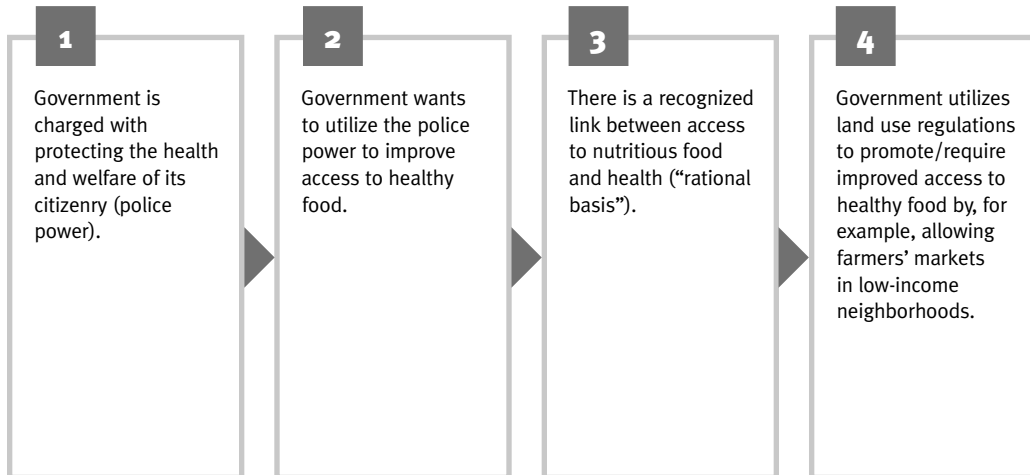
California’s use of the police power to legislate land use goes back to 1863, when a state law was passed that authorized San Francisco “to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases.”⁶ In 1866, San Francisco used this authority to ban slaughterhouses in a large section of the city. A slaughterhouse owner, Mr. Shrader, continued to operate his now-illegal slaughterhouse and was arrested and convicted. Mr. Shrader appealed his conviction to the California Supreme Court, arguing that his property rights had been violated. The Supreme Court disagreed, explaining that Mr. Shrader was complaining about having gone to jail for committing a misdemeanor, not because the use of his property had been made illegal.⁷ The court recognized that San Francisco’s exercise of the police power to restrict land use was appropriate, stating that “[property ownership] does not deprive the Legislature of the power of... regulating the conduct and relations of the members of society in respect to property rights.”⁸

The police power is broad in scope and quite elastic, expanding to meet the changing needs of modern life.⁹ Legislative action undertaken by government is legitimate so long as the exercise of the police power has a rational relationship to a legitimate governmental purpose such as protection of the public’s health, safety, or general welfare, and the rules/restrictions enacted will be upheld in court unless they are arbitrary, capricious, or entirely lacking in evidentiary support.¹⁰ In exercising its police power, a city has broad discretion in determining what is reasonable in endeavoring to protect the public health, safety, morals, and general welfare of the community.¹¹

City planning and zoning regulations were developed in response to public health needs; the history of land use applications of the police power to protect community health is long and well developed. Examples of how land use tools have been used to further public health goals include the development of industrial or manufacturing zones to separate noxious uses (such as slaughterhouses, petrochemical facilities, and the like) from residential and commercial areas; requiring sanitary sewers to be connected to all homes and public places; and the routing of freeways away from homes and schools to protect the air quality in these settings. While these are just a handful of examples to illustrate the interplay between land use controls and public health, they serve as a reminder of how much the physical and built environment affects human health.

This history of providing land use tools to further public health also provides a useful context for linking land use to issues like increasing access to healthy food or limiting access to unhealthy food. Government is empowered via its police power to address access to food just as it is empowered to control noxious uses, gain access to sanitation, and regulate air quality.

The following diagram describes the police power authority schematically:



The authority to regulate land use, then, is well established. However, governments must develop specific legal tools to implement this authority. Chapter 6 (“How Is Land Use Regulated?”) discusses the tools California governments – state, county, and city – use to plan for and regulate the use of land.

1 See “Police Power” at Answers.com, at www.answers.com/topic/police-power (accessed July 19, 2005) (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2004) and MERRIAM-WEBSTER’S DICTIONARY OF LAW (1996)).

2 See e.g., Marice Ashe et al., *Land Use Planning and the Control of Alcohol, Tobacco, Firearms, and Fast Food Restaurants*, Vol. 93, AMERICAN JOURNAL OF PUBLIC HEALTH, 1404-05 (2003); Birkenfeld v. City of Berkeley, 17 Cal.3d 129, 159 (1976); Crown Motors v. City of Redding, 232 Cal. App. 3d 173 (1991).

3 Patrick v. Riley, 209 Cal. 350 (1930) (upholding bovine tuberculosis control law).

4 CAL. CONST. art. XI, § 7.

5 Ashe at 1404.

6 1863 Cal. Stat. p. 540.

7 Ex Parte Shrader, 33 Cal. 279, 282 (1867).

8 *Id.* at 281–282.

9 Ashe at 1404. See also *Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

10 *Id.*

11 Carlin v. City of Palm Springs, 14 Cal. App. 3d 706, 711 (1971).

