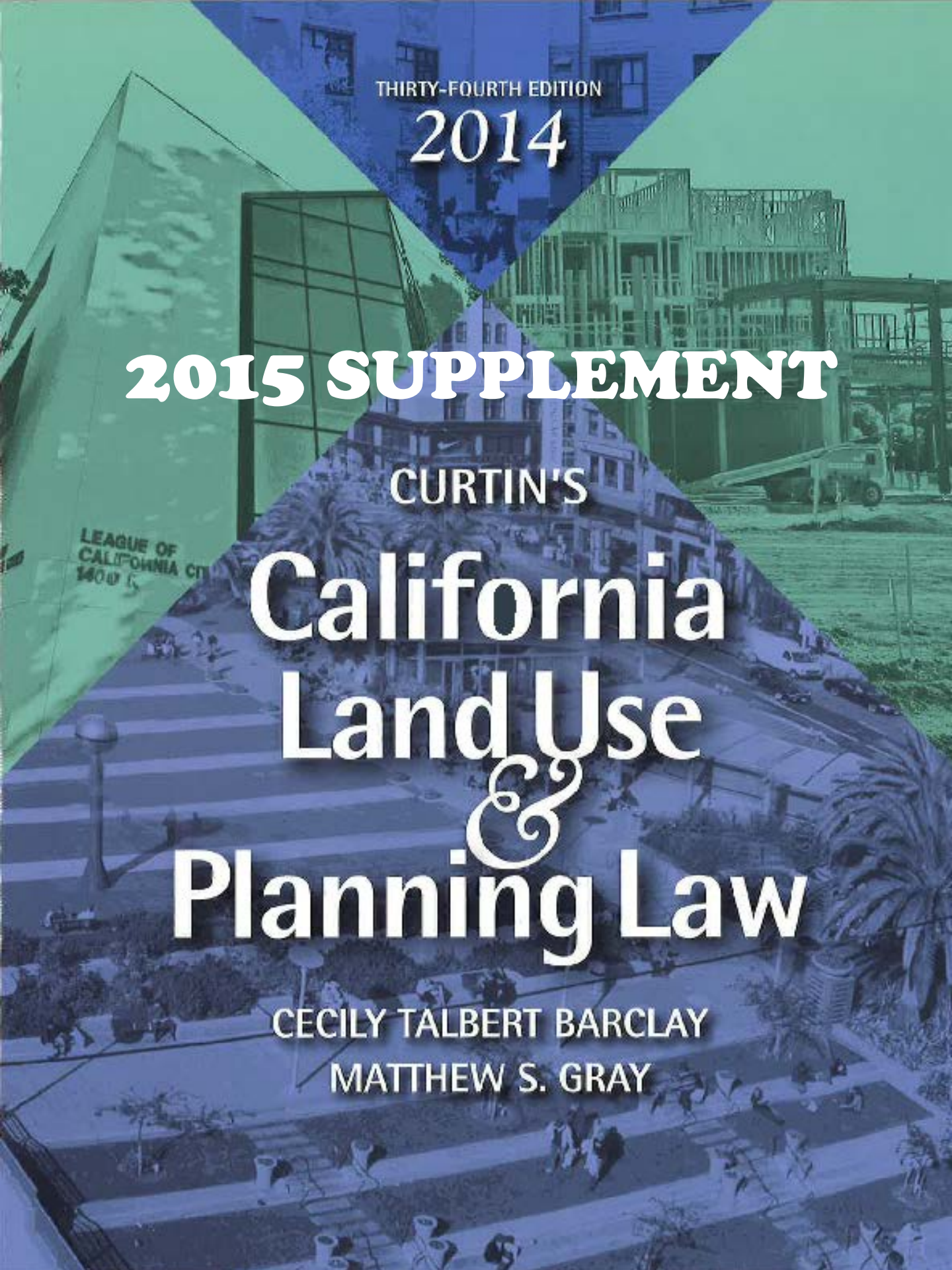
THIRTY-FOURTH EDITION
2014
2015 SUPPLEMENT
CURTIN'S
California
Land Use
&
Planning Law
CECILY TALBERT BARCLAY
MATTHEW S. GRAY

Use of this Supplement

Dear Reader:

This Supplement is intended for use in conjunction with Curtin's California Land Use & Planning Law, Thirty-Fourth Edition (2014). In lieu of publishing the Thirty-Fifth Edition in 2015, the authors have prepared a Supplement containing analyses of the most important decisions published in 2014 and 2015 (through May 1st) affecting California land use and planning. Chaptering of the Supplement is consistent with the Thirty-Fourth Edition for ease of reference; however, only those chapters for which we have identified significant case law are included in the Supplement. Moreover, although certain cases are referenced in multiple chapters, each case is listed only once in the table of contents, corresponding with the chapter in which the case is most thoroughly discussed. The Supplement does not include legislation or regulatory developments. Readers should anticipate that the most significant 2014 and 2015 cases (including those published after May 1st), legislation, and regulatory developments will be addressed in the Thirty-Fifth Edition to be published in early 2016.

Regards,

Cecily T. Barclay
Matthew S. Gray

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CHAPTER 2
General Plan

San Francisco Tomorrow v. City and County of San Francisco, 229 Cal. App. 4th 498 (2014)

State Planning and Zoning Law Does Not Require General Plans to Include Prescriptive Controls on Population Density or Comprehensive Building Intensity Limits

In *San Francisco Tomorrow*, plaintiffs challenging the Park Merced Development Project attacked the adequacy of the City and County of San Francisco's ("City") General Plan. Focusing on Government Code Section 65302(a)-(b), the plaintiffs alleged that the General Plan fails to meet the State Planning and Zoning Law's requirements for "population density" and "building intensity." The court rejected both arguments and affirmed the decision of the trial court. Regarding "population density," the court noted that the General Plan's Housing Element includes a table listing five categories of housing density and the types of zoning districts related to each category, along with average units per acre. This table, the court explained, works in conjunction with a map depicting housing density categories throughout the City, including Park Merced, such that one can determine average population density for the area covered. Importantly, the court rejected plaintiff's contention that the State Planning and Zoning Law requires a "prescriptive" density limit, and on the contrary, found that the law requires only a statement of recommended densities. In terms of "building intensity," the court found the General Plan's use of a map of citywide building heights and building bulk limits related to height to be adequate under the law. Height and bulk controls, including bulk controls triggered by height, satisfy the State Planning and Zoning Law without the need for floor intensity ratios or full-building bulk limits.

CHAPTER 4
Zoning

***Foothill Communities Coalition v. County of Orange* (Roman Catholic Diocese of Orange), 222 Cal. App. 4th 1302 (2014)**

Spot Zoning For Senior Project Upheld

"Spot-zoning" refers to the discriminatory zoning of a small parcel that is surrounded by land within a different zone. Some had thought the doctrine only applies where a small parcel is zoned more restrictively than the property surrounding it. But in the recently decided case of *Foothill Communities Coalition v. County of Orange*, the court of appeal concluded that spot zoning can be found where an isolated parcel is zoned either more *or less* restrictively than surrounding property. The court found, however, that the County's rezoning decision was supported by evidence in the record of its proceedings, and was therefore not unlawful spot zoning.

The County rezoned a parcel, owned by the Roman Catholic Diocese, for a senior housing project. The petitioner, an association of grassroots community groups and homeowners, challenged the project's approval and the rezone change, arguing it was impermissible spot zoning. The County responded that because the smaller parcel was zoned less restrictively than the surrounding property, the rezoning did not constitute spot zoning. But the court disagreed, stating that "the creation of an island of property with less restrictive zoning in the middle of properties with more restrictive zoning is spot zoning."

Nonetheless, the court rejected the argument that the rezoning was *impermissible* spot zoning. Not all spot zoning is impermissible, and it can be justified, the court said, where a "substantial public need exists" or if it is in the public interest. And here, the court found that the spot zoning was in the public interest based on the state legislature's encouragement of senior housing development and the County's own directives to develop senior housing in its general plan and ordinances. As a consequence, the court concluded that the county's spot zoning was permissible.

The petitioner further argued that the rezoning was inconsistent with the area's specific plan, but the court examined the evidence supporting the County's consistency finding and concluded that the finding was supported by substantial evidence.

Finally, the petitioner argued that the project's objective to provide "faith-based independent and assisted living facilities for seniors" violated the First Amendment's Establishment Clause. The court rejected this argument, finding that the project's approval and the zoning change had a secular purpose to provide needed senior housing, and that the zoning change would not have the primary effect of promoting religion nor would it foster any entanglement between government and religion.

***Eskeland v. City of Del Mar* (Scurlock), 224 Cal. App. 4th 936 (2014)**

The Applicability Of Variances To Nonconforming Structures

Neighbors challenged the City's grant of a variance for a hillside property on which the owners wished to tear down and reconstruct their home. The existing house did not comply with setback requirements, although it had conformed to the zoning code when originally built. Plaintiffs argued that the City's municipal code provision on nonconforming structures made it unlawful to expand a structural nonconformity, and that this provision took precedence over the more general provision allowing zoning variances. Observing that the City's construction of its own code is entitled to deference, the court

concluded that the City's interpretation of the nonconforming structure and variance provisions was reasonable and therefore upheld it.

T-Mobile South, LLC v. City of Roswell, Georgia, 135 S. Ct. 808 (2015)

U.S. Supreme Court Tells Cities To Explain A Cell Tower Denial In Timely Fashion, Even If In A Separate Document

The tension between demand for high-quality, ubiquitous cell phone service and opposition to cell towers in residential neighborhoods has resulted in significant disputes between wireless carriers and municipalities over siting of such towers. Typically, the fight begins and ends at a city council. Recently, however, one such dispute resulted in a U.S. Supreme Court decision, *T-Mobile South, LLC v. City of Roswell*, Georgia, No. 13-975, Jan. 14, 2015, which delved into procedural issues associated with denial of proposed cell towers and provided guidance to municipalities as to how and when such denials must be explained.

T-Mobile proposed to construct a cell tower (disguised as a 108-foot tall pine tree, as required by local ordinance) on a vacant residential property. As is often the case, there was substantial neighborhood opposition to the new tower based on concerns that it was not needed, that the technology was outdated, and that it was aesthetically incompatible with the neighborhood. The application was discussed at a public meeting and ultimately rejected by the City Council. After the meeting, the City sent a notice of the denial to T-Mobile but without any written explanation. Minutes of the Council meeting were published 26 days later, shortly before the deadline to file suit challenging the denial.

Approval or rejection of cell phone towers is addressed in the federal Telecommunications Act of 1996. In that Act, Congress delegated to the local governments the power to consider cell tower applications and required that a denial of an application "be in writing and supported by substantial evidence contained in a written record." T-Mobile argued that the denial, while in writing, did not contain any explanation and, as such, could not be supported by substantial evidence. The City argued that T-Mobile representatives were present at the public meeting and thus knew the reasons. On top of that, it claimed, the release of the meeting minutes 26 days later (and four days before a petition for judicial review was due) satisfied the Act's requirement of a written explanation. The Eleventh Circuit upheld Roswell's denial, and the Supreme Court granted certiorari to resolve a conflict between the circuits.

With a surprising degree of dissension on a seemingly simple issue, the Court addressed conflicting views in the courts of appeal and ultimately determined that a city need not include the rationale for its denial of a cell tower application in the denial document itself, provided it states those reasons with sufficient clarity in some other written record issued essentially contemporaneously with the denial. The Court did not set a precise time limit between the denial and the statement of reasons, but concluded that the 26-day delay between the notice of denial and release of the detailed minutes in this case did not satisfy the "essentially contemporaneous" standard. It reasoned that a near-contemporaneous statement of reasons was necessary because suit must be filed within 30 days, and the record must reflect the stated rationale in order to enable judicial review. Justice Sotomayor, who delivered the majority opinion, criticized Chief Justice Roberts' dissenting view, under which the locality would have been allowed to withhold its explanation for denial until after the lawsuit is filed. The majority opinion, in a sharply worded footnote, observed that such a practice would lead to post hoc rationalization by the public agency in its defense of its action.

Ultimately, the Court remanded the case for further proceedings, and the City of Roswell may well deny the application again, but this time in a letter with some explanation. The Court was painstaking in its refusal to even consider whether the denial was actually based on "substantial evidence," leaving to another day the question of whether a locality can deny a cell tower application based primarily on NIMBY concerns. The Court also offered little guidance on what sort of written record is needed to pass procedural

muster. It acknowledged that "a locality may rely on detailed meeting minutes as it did here," but suggested that "the local government may be better served by including a separate statement containing its reasons."

Walnut Acres Neighborhood Association v. City of Los Angeles, 235 Cal. App. 4th 1303 (2015)

Applicant Must Present Evidence Of Financial Hardship

A developer relying on financial hardship to obtain approval of an elder care facility exceeding the square footage permitted in a residential zone must present evidence of such financial hardship to sustain the required finding. Simply averring that a smaller project would not achieve economies of scale needed to provide adequate support services is inadequate.

In 2006, the City of Los Angeles adopted Municipal Code section 14.3.1 in order to consolidate the land use approvals required for eldercare facilities, including housing for Alzheimer's/dementia care, assisted living, and skilled nursing. L.A., Cal. Mun. Code § 14.3.1 applies as a permitting overlay to a site's underlying zoning. One required finding is that "strict application of the land use regulations on the subject property would result in practical difficulties or unnecessary hardships," the same finding required in many jurisdictions (including Los Angeles) to obtain a zoning variance.

The developer in *Walnut Acres* sought to construct a 50,289 square-foot, 60-guest-room elder care facility in a residential district, with 25 percent of the beds allocated to persons with Alzheimer's or dementia. Application of the relevant zoning provisions to the site would have limited the facility to 12,600 square feet and 16 guest rooms.

The zoning administrator approved the project over objections from neighbors. To substantiate Section 14.3.1's "undue hardship" requirement, the zoning administrator found that strict application of the code's requirements would, among other things, "result in significant underutilization of the site and would not permit the operator to achieve the economy of scale required to provide the level of on-site support services and amenities required for the elder care facility's unique population." The zoning administrator's decision was affirmed by the City Council's Planning and Land Use Management Committee.

The court of appeal concluded that the zoning administrator's undue hardship determination was not based on any actual evidence in the administrative record. Applying concepts derived from case law on variances, the court found that although financial hardship may constitute undue hardship, such a finding cannot be supported in the absence of evidence demonstrating that financial difficulties would result from application of the relevant zoning controls. While the developer asserted, and the zoning administrator found, that the facility would not be feasible at only 16 guest rooms, no specific evidence was provided to substantiate this claim. The zoning administrator testified that "it's just a matter of logic and practicality that . . . if you were to limit the site to 12,600 square feet, you would end up with a . . . maximum of 16 guest rooms. And with the level of support services that this type of facility needs, it really wouldn't be feasible." The court did not accept this as adequate evidence, citing other evidence in the record showing that elder care facilities were being operated in small homes with four to ten beds (although it was not clear what services were provided in those facilities). The court summarized its holding as follows: "because financial hardship is [the project proponent's] sole basis for unnecessary hardship, there must be some evidence supporting it."

Walnut Acres indicates that simply alleging that an elder care facility providing specific services cannot be operated economically within existing zoning regulations is inadequate to demonstrate undue financial hardship. Project proponents will need to submit economic data, market studies or other evidence to support a local agency's finding of undue hardship based on financial concerns.

CHAPTER 5
Subdivisions

Tarbet v. East Bay Municipal Utility District, 186 Cal. Rptr. 3d 387 (2015)

Vesting Rights Restrictions Of Subdivision Map Act Do Not Bind Water District

A water district is not subject to the same vesting rights as a local agency under the Subdivision Map Act. Thus, the Subdivision Map Act does not restrict a municipal utility district's authority to require an easement as a condition of providing water service to a residential lot on a newly-subdivided parcel. *Tarbet v. East Bay Mun. Util. Dist.*, 186 Cal. Rptr. 3d 387 (2015).

In 2005, the County of Alameda approved a parcel map which subdivided a parcel into three lots. A condition of approval required that each lot be connected to the East Bay Municipal Water District water system and the parcel map included an easement for a District water main. When the subdivider sought a letter confirming that water service would be available for each lot, the District indicated it would provide water service contingent upon compliance with its regulations.

Tarbet bought one of the lots and applied for water service. The District provided a water service estimate for installing a service connection, based on an additional 15-foot easement onto Tarbet's property for the installation and maintenance of a water main and drain valve. Tarbet rejected the requested easement, and the District consequently refused to provide service.

Tarbet filed suit seeking to compel the District to provide water service. Tarbet claimed that the District should be required to comply with the water service provision in the approved parcel map, which did not include the District's proposed easement. The trial court denied Tarbet's petition for writ of mandate and dismissed the case. The First Appellate District affirmed the trial court's decision.

The court found that the District, which was not a "local agency," was not subject to the same constraints as a local agency under the Subdivision Map Act. Rather, the County acted as the "local agency" under the SMA for purposes of the map approval process, and the Subdivision Map Act applies to the local agency only. Importantly, the District was not a "local agency" subject to the vesting rights restrictions of the Subdivision Map Act.

The court also found that the District did not waive its right to seek an easement by not asserting it earlier. To the contrary, the Subdivision Map Act does not require a water agency to agree to serve water to individual customers, or to acquire an easement from property owners for the purposes of providing water service. Thus, the District had no obligation to acquire an easement on the property at the time the parcel map was reviewed and approved.

Finally, the District did not invade the County's authority to regulate the size of lots and placement of water service by demanding an easement. The court found that Tarbet offered no governing statutes, ordinances, or other authority that would require a contrary conclusion.

Ultimately, the court of appeal upheld the denial of Tarbet's claims and the dismissal of his case. If he wishes to obtain water from the District, he will need to comply with all of the District's conditions that are consistent with its regulations.

CHAPTER 6
California Environmental Quality Act (CEQA)

A. WHEN DOES CEQA APPLY?

Tuolumne Jobs & Small Business Alliance v. Superior Court, 59 Cal.4th 1029 (2014)

CEQA Compliance Not Required For Council-Adopted Land Use Initiative Measure

Developers, project opponents, agencies and courts often lose the forest for the trees when considering CEQA issues. A prime example is the conflicting appellate authority and public debate on the question of whether a city council's adoption of a voter-sponsored initiative measure is subject to CEQA.

In *Tuolumne Jobs & Small Business Alliance*, the California Supreme Court answered "no" to this question, in a decision that brings some welcome common sense to the CEQA world. Rather than focusing on the question of whether a council decision to adopt an initiative measure is ministerial, as lower courts have done, the court simply ruled that the language and intent of the Elections Code preclude application of CEQA.

At issue in the case was the "Wal-Mart Initiative," an initiative petition that proposed a specific plan for a Wal-Mart Supercenter. The city council adopted the initiative measure instead of placing it on the ballot. The council did not take any steps to comply with CEQA. Opponents sued, claiming the city should have. The trial court ruled for the city, the court of appeal ruled for the opponents, disagreeing with an earlier appellate decision that had reached the contrary result; and the California Supreme Court then took the case. Focusing on the fundamentals, the court upheld the city's action.

The court first examined the language of the Elections Code, which requires city councils and boards of supervisors to act quickly upon receipt of a qualified voter-signed initiative petition, and allows them to adopt the measure without alteration as an alternative to putting it on the ballot.

The court noted that the delay that would be required for CEQA review meant that CEQA compliance would essentially nullify these Election Code provisions. Further, even if time constraints permitted CEQA review, that review would be pointless, as the Elections Code does not give cities authority to reject a qualified measure or require alterations to lessen its environmental impacts.

The court also explored legislative history. It noted that the Legislature had failed to pass a handful of bills that would have required environmental review of voter-signed initiative measures, while adopting a law that allows preparation of a report to be completed within 30 days. The court found this evidence telling, and concluded that adoption of that law represented a legislative compromise, balancing the right of initiative with the goal of informing voters and local officials about potential consequences of an initiative's enactment: "Thus, when faced with competing bills, the Legislature enacted the bill that gave local governments the option of obtaining abbreviated review to be completed with the short time frame required for action on initiatives."

The court also addressed policy issues. The opponents argued that developers could use the initiative process to avoid CEQA review. The court responded by noting that the initiative power can also be used to thwart development. It concluded that: "these concerns are appropriately addressed to the Legislature. The process itself is neutral. The possibility that interested parties may attempt to use initiatives to advance their own aims is part of the democratic process."

Picayune Rancheria of Chukchansi Indians v. Brown, 229 Cal. App. 4th 1416 (2014)

Actions By The Governor Are Not Subject To CEQA

The Picayune Tribe, the operator of a casino in Madera County, brought an action against the Governor challenging the Governor's concurrence in the approval of a competing casino by the Secretary of the Interior under the Indian Gaming Regulatory Act. The Tribe claimed that the Governor's concurrence constituted an approval of a "project" subject to CEQA and that the Governor was required to comply with CEQA before issuing a concurrence. The lower court dismissed the case, finding that CEQA does not apply to actions taken by the Governor, and the court of appeal upheld that ruling.

The court of appeal described the case as presenting a single question: whether the Governor is a "public agency" for purposes of CEQA. By statute, CEQA applies "to discretionary projects proposed to be carried out or approved by public agencies." CEQA § 21080(a). Public agencies are defined as including "any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision." CEQA § 21063.

The court held that despite the inclusive language of the statute, nothing in its "explicit language" suggests the Legislature intended to encompass the Governor within the term "public agency" for purposes of CEQA. Because the Governor is not a "public agency" within the meaning of CEQA, there was no legal support for the suit, and the trial court properly dismissed it.

CREED-21 v. City of San Diego, 234 Cal. App. 4th 488 (2015)

CEQA Baseline Includes Post-Construction Physical Conditions Resulting From Emergency Repair Work

CREED-21 involved a storm drain repair project and related revegetation plan undertaken in the City of San Diego. The storm drain originally failed in 2009 and caused significant erosion along steep slopes that placed adjacent residences at risk due to potential slope failure. The City Engineer concluded that failure to immediately repair the storm drain would present an imminent risk to public safety. Based on this determination, the City approved an emergency reconstruction project pursuant to an exemption from CEQA due to emergency work (CEQA Guidelines § 15269(b)).

The emergency storm drain repair project was completed in 2010. After the completion of the storm drain (and the resolution of the emergency), the City pursued coastal and site development permits for the overall storm drain repair and site remediation project, which included a revegetation plan.

In evaluating the scope of the CEQA "project," the City concluded that the baseline included existing physical conditions resulting from the emergency repair work, such that the "project" consisted of only the revegetation plan, which the City determined would not result in a significant adverse effect on the environment. Accordingly, the City approved the revegetation work and related entitlements under the "common sense" exemption (CEQA Guidelines § 15061(b)(3)), and the exemptions for existing facilities and repair and replacement (CEQA Guidelines §§ 15301 - 15302). The notice of exemption covered both the prior storm drain repair and the revegetation plan.

CREED-21 challenged the City's approval, alleging the City improperly applied categorical exemptions to the revegetation project, and in doing so, failed to evaluate potentially significant environmental impacts. The superior court sided with CREED-21 and declared the permits invalid. The Court of Appeal reversed in part, concluding that the project was exempt from CEQA. The Court of Appeal determined the City's completion of the emergency repair work pursuant to CEQA's emergency exemption was "an intervening and superseding event" that changed the physical environment without any requirement for CEQA review of that work. Therefore, the CEQA baseline for the revegetation project shifted to physical conditions

existing subsequent to the emergency repairs notwithstanding the City's indication – prior to the emergency – that it would perform a more comprehensive CEQA analysis. The court further found that the revegetation plan indisputably would improve the site's physical conditions and the plan would not result in any adverse change in its physical conditions. Therefore, the court concluded there was substantial evidence to support the City's determination the revegetation plan was exempt from CEQA under the common sense exemption. The Court of Appeal affirmed the superior court's determination that the City had failed to demonstrate the appeal fee imposed on CREED-21 was authorized.

Saltonstall v. City of Sacramento (*Sacramento Basketball Holdings LLC*), 234 Cal. App. 4th 549 (2015)

Court Rejects Another Attempt To Stop New Kings Arena

Opponents of the new Sacramento Kings arena took another shot at halting the new Kings arena project, challenging the City's certification of the project EIR on a variety of grounds. But the Court of Appeal upheld the City's certification of the EIR, rejecting every one of the opponents' arguments. *Saltonstall v. City of Sacramento*, 234 Cal. App. 4th 549 (2015).

The Project.

The Sacramento Kings have played in Sleep Train Arena, located in the Natomas area of Sacramento, since it opened in 1988. In March 2013, an investor group presented a plan to acquire the Sacramento Kings, construct a new downtown arena in partnership with the City, and keep the team in Sacramento on a long-term basis. The City Council approved a preliminary nonbinding term sheet for development of a new entertainment and sports center in downtown Sacramento at the site of the Downtown Plaza. In 2013, the National Basketball Association approved the sale of the Kings to the investor group, reserving the right to acquire and relocate the franchise to another city if a new arena was not opened in Sacramento by 2017.

To facilitate meeting this deadline, the Legislature amended CEQA exclusively for the downtown arena project to expedite the environmental review process. The legislation also specifically allowed the city to prosecute an eminent domain action for the arena site prior to completing CEQA review.

Consistent with these accelerated deadlines, the city engaged in an expedited review process starting in April 2013. In January 2014, the city council adopted a resolution to acquire the site for the new arena by eminent domain and, in May 2014, certified the final EIR and approved the project.

Project opponents promptly sued, challenging the constitutionality of state legislation that modified several deadlines under CEQA. *The court of appeal rejected the opponents' constitutional challenge* to the state CEQA legislation. Undeterred, opponents filed this second action challenging various aspects of the CEQA review performed for the project.

Premature Commitment.

Opponents argued that the City committed itself to the downtown project before completing CEQA review by entering into the term sheet and prosecuting the eminent domain action prior to completion of environmental review. When a project will arguably have a significant impact, CEQA requires a public agency to prepare an EIR prior to making a decision that commits the agency to a "definite course of action" in regard to the project.

The appellate court found that the City had not committed itself to a definite course of action prior to certifying the EIR. The court concluded that the term sheet did not constitute an impermissible commitment to the project. The term sheet included a disclaimer that the city had no obligation to build, finance, or approve the project until it completed its environmental review and secured all necessary permits for the project. The term sheet further stated the City retained sole discretion to weigh the

environmental consequences and to reject the project entirely. Moreover, the term sheet was not a binding contract.

The court also concluded that the exercise of eminent domain prior to completion of the environmental review was both permissible under CEQA and explicitly sanctioned under the state legislation adopted for the Kings arena project.

Project Alternatives.

The court rejected opponents' argument that the City failed to study a reasonable range of alternatives by not considering a remodeled Sleep Train Arena. The City studied a "no project" alternative that would have continued use of Sleep Train Arena as well as a new arena in the Natomas area, and both of these alternatives failed to meet the City's objectives for the project to revitalize its downtown area. The court therefore concluded that the City sufficiently considered alternatives in the Natomas area and was not required to specifically study a remodeled Sleep Train Arena alternative.

Other CEQA Issues.

Opponents also argued that while the EIR had studied the timing and extent of traffic congestion on I-5 that would likely result from the project, it was defective for failing to study the impacts on interstate traffic on I-5. The court stated that the City had no obligation to separately consider the effect of the project on motorists subject to the same traffic conditions "simply because their trip origins and destinations might have been different than local commuters."

The court also rejected opponents' argument that the city failed to study post-event crowd safety and potential for violence because "mere speculation about possible crowd violence and its possible effect on the environment" does not require EIR review.

B. EXEMPTIONS FROM CEQA

***San Francisco Beautiful v. City and County of San Francisco*, 226 Cal. App. 4th 1012 (2014)**

Is The Possibility Of A Significant Effect Enough To Disqualify Projects From Qualifying For A Categorical Exemption?

In *San Francisco Beautiful*, the First District Court of Appeal found that the installation of 726 metal cabinets on city sidewalks as part of AT&T's fiber optic network expansion falls within a CEQA categorical exemption.

It first found that the project falls within the CEQA Class 3 exemption for the "installation of small new equipment and facilities in small structures." It then dispensed with petitioner's argument that the exemption was precluded by the "unusual circumstances" exception to the categorical exemptions as well as the argument that the City had improperly relied on mitigation measures in finding the project exempt.

City properly used a categorical exemption for the installation of new small cable boxes on urban city sidewalks.

The court explained that the Class 3 exemption in CEQA Guidelines section 15303 establishes exemptions for "installation of small new equipment and facilities in small structures." Petitioner argued that the project did not fall under this exemption because the project did not involve installation of equipment in previously constructed structures. The court quickly dispensed with this argument, holding that the terms of that provision do not limit installation of small new equipment and facilities to existing small structures. The court reasoned that if such a limitation had been intended, it could have easily been included in the

exemption but was not, and that the project was properly an "installation" for the purposes of the Class 3 exemption.

Petitioner failed to meet its burden to show that the project will have significant environmental impacts due to unusual circumstances.

Petitioner argued that even if the project fell within the Class 3 exemption, environmental review was necessary due to evidence that the project fell within the "unusual circumstance" exception. Once an agency determines that a project falls within a categorical exemption, the burden shifts to the challenging party to produce evidence showing that one of the exceptions which bars a categorical exemption applies. The court recognized that there is a split of authority regarding the standard of proof and the standard of review that applies to an agency's determination of whether a project falls within an exception to the categorical exemptions. However, the court held that under either of the standards, petitioners failed to meet their burden.

The court began by considering whether the project presented unusual circumstances. It found the plaintiffs failed to identify "any way in which the utility boxes would create impacts that [differed] from the general circumstances of the projects covered by the exemption." In considering this issue, the court took account of the context of the city's urban environment and all existing utilities on the public right of way. Noting that San Francisco is already replete with facilities located on the public right of way, the court found that the addition of 726 additional utility cabinets would not be "unusual."

Petitioner argued that because the project had a potential significant impact on aesthetics and pedestrian safety, the potential for these impacts itself constituted an unusual circumstance requiring preparation of an EIR. The court noted that while this issue was currently being considered by the California Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley*, the outcome of *Berkeley Hillside Preservation* would not be relevant to this case because the petitioner failed to even demonstrate a fair argument of significant impacts. In concluding that petitioner failed to produce evidence to support the exception, the court noted that the significance of an environmental impact is measured in light of the context in which it occurs and that the city is an urban environment with tens of thousands of buildings along the rights of way. Recognizing the petitioner's concern that the new cabinets might become targets for graffiti or public urination, the court nonetheless concluded that there was no basis to find that people are more likely to engage in those behaviors in the presence of the utility cabinets and thus there was no fair argument that the cabinets would create a significant environmental impact.

The court also noted that petitioner failed to provide "fact-based" evidence to support its argument that the project would have a significant environmental effect. Neither the residents' concerns nor the concerns raised by the government officials rose to the level of "fact-based evidence" that the cabinets would substantially degrade the existing visual character of the urban environment in which they would be placed.

The categorical exemption did not rely on mitigation measures.

The court also dispensed with petitioner's argument that the City improperly relied on mitigation measures, specifically review by the Department of Public Works, in concluding the project was categorically exempt from CEQA. The court explained that application review is required under the City's Public Works Order, and an agency may rely on generally applicable regulations to conclude that an environmental impact will not be significant under CEQA. Additionally, the memorandum of understanding submitted by AT&T was not a basis for the City's decision that the project qualified for a categorical exemption from CEQA, nor was it a mitigation measure for a significant effect on the environment. Thus, compliance with the City ordinance and the memorandum of understanding did not

constitute mitigation measures, and the City did not improperly rely on them in declaring the project exempt.

Save the Plastic Bag Coalition v. City and County of San Francisco, 222 Cal. App. 4th 863 (2014)

Plastic Bag Industry Loses Another CEQA Challenge To Local Ordinance

In the third such case to result in a published opinion, the plastic bag industry has lost its challenge to San Francisco's "single-use checkout bag" ordinance. As it did in an earlier challenge to Marin County's bag ordinance, the court of appeal held the city properly relied on CEQA categorical exemptions in enacting the ordinance and did not need to prepare an environmental impact report.

San Francisco's ordinance applies to all retail stores, including retail food establishments; imposes a new 10-cent charge for a single-use compostable plastic or recycled paper bag; and establishes an outreach and education program.

The Coalition made four arguments that the city improperly invoked CEQA categorical exemptions (Classes 7 and 8) that apply to regulatory actions to protect natural resources and the environment. First, it argued that the California Supreme Court, in *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155 (2011) had precluded any city larger than Manhattan Beach from relying on a categorical exemption to avoid preparing an EIR before enacting an ordinance restricting the use of plastic bags. Describing this argument as "perplexing," the court found nothing in the Supreme Court's opinion to support it.

Second, the court rejected, as it had in the Marin County case, the Coalition's argument that ordinances are not regulatory actions, and therefore that CEQA's categorical exemptions for "regulatory actions" could not apply.

Third, the Coalition argued that even if categorical exemptions would otherwise apply, "unusual circumstances" precluded the city's use of those exemptions. The court ruled that, even assuming a challenger-friendly "fair argument" standard applied to this question—an issue that the California Supreme Court is currently considering in another case—the Coalition had established no fair argument that unusual circumstances showed the plastic bag ordinance would harm the environment. Discerning two claims of unusual circumstances, the court began by rejecting as "unsupported theory" the assertion that tourists and commuters would not use, or would throw away, reusable bags. The court then rejected the Coalition's reliance on studies indicating that paper bags are more damaging to the environment than plastic bags, noting that the San Francisco ordinance is not a plastic bag ordinance, but rather is intended to reduce all single-use bags.

Finally, the court rejected the Coalition's argument that the ordinance's 10-cent charge was a "mitigation measure," and therefore could not be taken into account in determining whether categorical exemptions applied. The court concluded that the fee was integral to the ordinance and not a mitigation measure.

The San Francisco case, like the Manhattan Beach and Marin County cases before it, indicates that CEQA challenges are unlikely to derail carefully crafted single-use bag ordinances.

North Coast Rivers Alliance v. Westlands Water District, 227 Cal. App. 4th 832 (2014)

Renewal Of Interim Contracts For Delivery Of Central Valley Project Water To Districts An Ongoing Project Exempt From CEQA

A court of appeal has held that water districts' renewals of water distribution contracts for Central Valley Project water were exempt from CEQA under the statute's "ongoing projects" exemption as well as the categorical exemption for continued use of existing facilities.

Westlands Water District serves over 600,000 acres of farmland with CVP water. The CVP is a federal reclamation project built within the major watersheds of the Sacramento and San Joaquin river systems and the Delta.

The original contract between the Bureau of Reclamation and Westlands was entered into in 1963 and was to remain in effect for 40 years. The Improvement Act of 1992 provides that the Bureau "shall," upon request, renew existing long-term water service contracts for a period of up to 25 years—but only after the Bureau prepares a federal Environmental Impact Statement that examines the effects of implementing the Act on the environment. Delays in the completion of the EIS led the Bureau to enter into a series of interim two-year contracts with Westlands and other Districts. In December 2011, the Districts approved the two-year interim renewal contracts that were challenged in this case, finding that the renewals were exempt form CEQA on several grounds.

The appellate court concluded that CEQA's statutory exemption for ongoing projects approved before CEQA took effect applied. The court held that the applicability of the ongoing project exemption depends upon whether the challenged action is a normal, intrinsic part of the ongoing operation of a project approved prior to CEQA or is instead an expansion or modification of a pre-CEQA project. It concluded the exemption applied because the evidence in the record was sufficient to support a finding that the amount of water Westlands was entitled to receive through its existing facilities each year could be traced back to contractual commitments that were made before CEQA's effective date, November 23, 1970.

The court also held that the categorical exemption for continued use of existing facilities applied and that there was no basis for finding that an exemption was precluded by one of the exceptions to the categorical exemptions. The court first found the exception based on a reasonable probability of significant effects due to unusual circumstances did not apply. The petitioners argued significant effects would result because the diversion of more than 1 million acre-feet of water from the Delta each year could adversely affect threatened fish populations and fragile habitat in the Delta and that use of the water for irrigation could add to the salt and selenium buildup in the soil, and groundwater in the Westlands area. The court rejected this claim, determining that application of the correct environmental baseline to assess the project's impacts made it clear that petitioners had failed to show a reasonable possibility of a significant effect on the environment: The large volume of water distributed to the water districts and used for irrigation was clearly part of the existing environmental baseline for the district's ongoing operations and a potential for adverse change in the environment from these existing conditions was not shown. Further, even if were assumed some change from the existing environmental baseline might occur, the record evidence was insufficient to show that the brief period involved in the interim renewal contracts—only two years—would potentially have a significant environmental effect.

The court also rejected the argument that the interim renewal contracts triggered the exception for "successive projects of the same type" which may result in significant cumulative impacts. Petitioners claimed the successive contract renewals would create significant cumulative environmental damage over time, including salt and selenium buildup in the soil and groundwater, as well as harm to salmon, smelt and other endangered fish populations and their habitat in the Delta. The court concluded, however, that under the "unique statutory context" of the case, the short-term, interim renewal contracts did not amount to "successive projects of the same type."

Berkeley Hillside Preservation v. City of Berkeley (Logan), 60 Cal. 4th 1086 (2015)

California Supreme Court Upholds Most Commonly Used CEQA Categorical Exemptions

The California Supreme Court has issued its long-awaited decision in *Berkeley Hillside Preservation v. City of Berkeley,* No. S201116 (March 2, 2015). The Court's decision clears up some of the ambiguity that

surrounded the standard of review for challenges to CEQA exemptions under the unusual circumstances exception. In doing so, the Court rejected the controversial approach taken by the court of appeal and instead opted for a middle ground, balancing the interest in giving effect to the legislatively-mandated exemptions against CEQA's overarching goal of ensuring review of significant environmental effects.

Background.

The project at issue was a large house to be built in the City of Berkeley. The city granted a use permit and found the project exempt from CEQA under the Class 3 (construction and location of limited numbers of new, small facilities or structures) and Class 32 (in-fill development) exemptions. The city also determined that none of the exceptions to the categorical exemptions in CEQA Guideline § 15300.2 were triggered, including the exception for a "significant effect on the environment due to unusual circumstances." An organization sued, alleging, among other things, that the exemptions were barred by the unusual circumstances exception.

In a controversial decision, the court of appeal overturned the City's exemption determination, holding that the possibility that a proposed activity might have a significant effect on the environment "is itself an unusual circumstance," barring reliance on a categorical exemption.

A Potentially Significant Environmental Effect Alone Is Not Sufficient to Trigger the Unusual Circumstances Exception.

Recognizing that the court of appeal's ruling would have undermined use of categorical exemptions, contrary to the Legislature's intent, the California Supreme Court reversed. Considering the statutory text, the overall regulatory scheme, and the legislative purpose of exemptions, the Court held that a party bringing a challenge under the unusual circumstances exception must establish both 1) that there are unusual circumstances that justify removing the project from the exempt class; and 2) that there is a reasonable possibility of significant environmental impacts due to those unusual circumstances.

Traditionally, a party invoking the exception under this standard would establish an unusual circumstance by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to unusual circumstances. Alternatively, a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect. That evidence, the Court stated, "if convincing necessarily also establishes a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."

Nevertheless, the two prongs of the Court's standard (establishing an unusual circumstance and a reasonable possibility of a significant environmental impact due to unusual circumstances) are distinct and governed by separate standards of review.

Two Standards of Review.

The Court held that two different standards would apply to review. The agency's determination whether there are "unusual circumstances" is reviewed under the more deferential substantial evidence standard. Whether a particular project presents circumstances that are unusual for projects in an exempt class is an essentially factual inquiry. Consequently, reviewing courts, after resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, must affirm that finding if there is any substantial evidence, contradicted or contradicted, to support it.

A different approach applies to the question whether there is a reasonable possibility that an unusual circumstance will produce a significant effect on the environment. The Court reasoned that due to the close textual similarities between Public Resources Code section 21151 (describing the EIR requirement for

local agencies) and the language of the unusual circumstances exception, the less deferential "fair argument" standard used in *No Oil v. City of Angeles*, 13 Cal.3d 68 was appropriate. Accordingly, where there are unusual circumstances, agencies must apply the fair argument standard in determining whether the record shows a reasonable possibility of a significant effect on the environment. The reviewing court's function is to determine whether the project opponent submitted substantial evidence supporting a fair argument that a significant effect may occur.

The new standard created by the Supreme Court is not a total victory for local agencies and project proponents. The Court's standard charts a middle ground in two important respects: First, the standard requires that "unusual circumstances" be established, but allows evidence of significant environmental impacts to help demonstrate the existence of unusual circumstances. Second, the Court's approach applies two separate standards of review to different elements of the inquiry—the more deferential substantial evidence standard to the agency's determination whether there are unusual circumstances and the less deferential "fair argument" standard to whether there is a reasonable possibility of significant environmental effects.

It remains to be seen how this standard will play out and whether it will create new difficulties, but the Supreme Court has declined the invitation to undermine many of the most commonly used CEQA categorical exemptions.

C. NEGATIVE DECLARATIONS

***Citizens for the Restoration of L Street v. City of Fresno,* 229 Cal. App. 4th 340 (2014)**

Environmental Review Authority to Adopt a Negative Declaration Cannot be Severed From Project Approval Authority

In *Citizens for the Restoration of L Street* an appellate court ruled that the substantial evidence test, not the fair argument test, governs review of an agency's discretionary determination whether buildings or districts should be treated as historical resources under CEQA.

Background.

The case concerned a proposed residential infill development project in the City of Fresno that would demolish the Crichton Home, a site which was designated as a heritage property by the city's preservation commission in 2007. Under the city's code, heritage properties are not designated as historical resources in the local register, but are nonetheless worthy of preservation. The Crichton Home, however, had fallen into disrepair and most of its historic integrity had been lost.

The city's initial study found the project would not result in any significant environmental impacts and that the Crichton Home was not a historical resource. The preservation commission then considered and approved a mitigated negative declaration and issuance of a demolition permit.

Petitioners appealed the preservation commission's approvals, asserting that the commission did not have authority under the city code to make CEQA determinations. The city council denied the appeal, finding that the commission had the requisite authority to make a determination on the mitigated negative declaration, and upheld the commission's decision to approve it. Project opponents filed suit, alleging that the city had failed to comply with CEQA.

The substantial evidence standard, not the fair argument standard, applies to a public agency's determination of historicity.

Petitioners argued that the fair argument standard applies to review of the threshold question whether a building or site is a historical resource under CEQA. In petitioners' view, whether a project site contains a

building that is a historical resource should be reviewed under the same fair argument standard that applies to an agency's determination whether an environmental impact is significant.

The court rejected this argument, finding that the substantial evidence standard applied to the commission's determination of historicity. Relying on legislative history, the court concluded that CEQA's provisions concerning historical resources were intended to allow a lead agency to make a discretionary decision about the historic significance of certain resources. The position that only a fair argument is needed to demonstrate historic significance is inconsistent with that discretion. The court found that the preservation commission's determinations were supported by substantial evidence and consequently upheld the determinations.

CEQA permits delegating a lead agency's authority to a commission, but such delegation must be clear.

CEQA allows public agencies to delegate the authority to make a final CEQA determination and approve a project to a subordinate body, as long as they also provide for an appeal to the agency's elected decision-making body if it has one. Therefore, the court concluded, the city had the authority the delegate the authority to approve the mitigated negative declaration and the project to the preservation commission.

The court, however, also decided that the city had not delegated the authority to approve the mitigated negative declaration for the project to the commission. While the preservation commission had the authority to approve permits to demolish heritage properties, the court found it did not have decision-making authority over the project, nor was there any explicit delegation of authority to approve the mitigated negative declaration. The court was not persuaded that the preservation commission's authority to provide review and comments on permit actions gave it authority to approve or disapprove the mitigated negative declaration.

The court also rejected the city's alternative argument that the city council's subsequent denial of the appeal constituted a de novo review of the mitigated negative declaration and that this cured any defect in the proceedings before the preservation commission. The court found that the city council had failed to act as the decision-making body in approving the demolition permits and failed to abide by the notice procedures and make the findings required by CEQA.

Rominger v. County of Colusa, 229 Cal. App. 4th 690 (2014)

Evidence That Potential Future Uses Might Cause Significant Environmental Impacts Precludes Adoption of Negative Declaration For Approval Of Subdivision Map

At issue was a 159-acre property in a rural area of unincorporated Colusa County. The existing uses on the property were agricultural-industrial. In 2001, the county had approved general plan and zoning amendments that changed the designation of the property from agricultural-industrial to industrial use.

Eight years later, the project proponent applied for a tentative subdivision map that would divide the property into 16 parcels. The application did not include any specific development proposal.

The county adopted a mitigated negative declaration and approved the subdivision map, and the petitioner filed an action seeking a writ of mandate asserting, among other things, that the county had violated CEQA by failing to prepare an EIR before approving the subdivision map.

The subdivision was a CEQA project and not subject to the common sense exemption.

The county asserted that the subdivision was not a CEQA project and it was otherwise exempt under the common sense exemption. The court agreed with the county that nothing barred the county from arguing that the environmental review it conducted— adoption of a mitigated negative declaration—exceeded what was legally required. The court, however, agreed with the petitioner that the subdivision was a project

subject to CEQA. The court noted that the goal of subdividing is to make that property more useful, and with that potential for greater or different use comes the potential for environmental impacts; precisely the impacts with which CEQA is concerned.

The court also agreed with the petitioner that the project did not fall under the common sense exemption. The court stated that for the common sense exemption to apply, the county would have to show, based on the evidence in the record, that there was *no possibility* that the subdivision might result in a significant effect on the environment. The court found the county had made no such showing, however, and that it remained an "eminently reasonable possibility" that the creation of smaller parcels that are easier to finance would lead to development that might not otherwise occur.

A mitigated negative declaration was inappropriate because there was substantial evidence in the record sufficient to support a fair argument that the subdivision may result in significant traffic impacts.

The court held that the petitioner had met its burden of showing that the record contained substantial evidence supporting a fair argument that the subdivision might have significant environmental impacts related to traffic. In support of their comments on traffic impacts, the petitioner produced a letter from a traffic engineer pointing out that the county's trip generation figures were unrealistically low because they presumed no change in the number of trips generated by the existing agriculture/industrial uses. The letter explained that, due to a number of factors, trip generation would be better represented by assuming general light industrial uses which would result in ten times the trips assumed by the county's estimates. The letter went on to explain that the greater traffic generated under these projections could potentially have a significant impact on one particular intersection.

In response, the county argued that it would be impossible and inaccurate to attempt to quantify all potential future development that might occur within the subdivision and that its assumptions regarding trip generation were supported by substantial evidence. The court disagreed, carefully distinguishing the substantial evidence inquiry for EIRs and the fair argument standard that applies to negative declarations:

For our purposes, the question is not whether [the engineer's] opinion constitutes proof that the greater traffic generating industrial development will occur in the subdivision. Rather, the question is whether [the engineer's] opinion constitutes substantial, credible evidence that supports a fair argument that such development may occur and that, as a result, the greater traffic generated by such development may have a significant impact on the environment surrounding the project, and therefore an EIR was required.

The court found that the petitioner had met this burden and that none of the county's arguments supported a contrary conclusion.

Petitioner's arguments about impacts in other areas did not amount to a fair argument.

The petitioner claimed that there was a substantial evidence of a fair argument that the project might cause a significant impact in other areas in addition to traffic. The court rejected all these claims. Discussed below are two impact areas the opinion addressed in some detail:

Significance standard for loss of agricultural land.

In analyzing agricultural impacts, the county adopted a standard of significance that differed from the initial study checklist in Appendix G of the CEQA Guidelines. In particular, the county's standards did not treat the loss of prime farmland as a significant impact unless the land was also designated for agricultural land uses by the county. The petitioner claimed that the county had no right to apply a standard of significance different from the Appendix G checklist and that any loss of prime farmland should be treated as a significant impact.

The court rejected this argument for several reasons:

- The checklist form in in Appendix G is "only suggested, and public agencies are free to devise their own format for an initial study."
- CEQA grants agencies discretion to develop their own thresholds of significance.
- Appendix G provides only a "yes" or "no" answer to whether a project will convert prime farmland to non-agricultural use but does not address the issue of the significance of the impact. A lead agency still has to evaluate the evidence to determine whether the conversion of prime farmland constitutes a significant effect on the environment.

Mitigation of odor impacts.

The county found that because the project's future land uses are undetermined, the potential for odor impacts from the project were potentially significant. To address this, it adopted a mitigation measure requiring consultation with local agencies to determine what type of engineering controls or other odor-reduction measures could be implemented prior to the issuance of building permits.

The petitioner claimed that there was no indication that the engineering controls or other odor-reduction measures would be available or would reduce odor impacts to a less-than-significant level. To support this position, the petitioner presented a letter submitted by their air quality consultant that argued that the odor mitigation was not sufficient.

The court rejected both claims. First, the court concluded that the letter's arguments were too vague to amount to substantial evidence supporting a fair argument of significant odor impacts notwithstanding the adopted mitigation. The consultant failed to identify what types of odors could not be adequately mitigated with emissions control technology and what type of land uses might occur that could produce such odors.

The court rejected the petitioner's other claim that the mitigation was unenforceable and deferred. The mitigation required consultation and required the recommended measures to be installed.

D. ENVIRONMENTAL IMPACT REPORTS

***Citizens Opposing A Dangerous Environment v. County of Kern,* 228 Cal. App. 4th 360 (2014)**

Compliance With FAA Regulations Provides Adequate CEQA Mitigation For Aviation Safety Impacts

Reliance on compliance with FAA regulations as a mitigation measure to reduce impacts to air traffic safety to less than significant levels is appropriate under CEQA, according to the appellate court decision in *Citizens Opposing A Dangerous Environment*.

Two wind energy companies applied to Kern County for rezoning and a conditional use permit for mobile concrete batch plants that would be used to build and operate a wind farm in the Tehachapi Wind Resource Area. After performing an initial study, the county found that the wind farm project could result in significant impacts on the environment and that preparation of an EIR was warranted.

The county's draft EIR indicated that the project might pose a significant safety hazard to aircraft and gliders using the nearby Kelso Valley Airport. The county consequently included a mitigation measure that required the project proponents to obtain a "Determination of No Hazard to Air Navigation" from the FAA for each wind turbine before the county would issue building permits. The board of supervisors found that the mitigation measure reduced impacts to aviation safety to less than significant levels, certified the final EIR, and approved the applications.

Citizens Opposing a Dangerous Environment petitioned for writ of mandamus, challenging the county's certification of the final EIR and approval of the wind project. CODE claimed the mitigation measure's incorporation of compliance with FAA regulations was "legally infeasible," and did not adequately reduce hazards to aviation safety to less than significant levels. The court of appeal disagreed.

CODE contended the mitigation measure was legally infeasible because it would not keep the project from causing adverse impacts to aviation safety, but rather the county hid "behind the fig leaf of a non-existent federal preemption." The court of appeal found, however, that the measure's reference to the FAA's hazard determination process was appropriate. Under this process, the project sponsors were required to submit Form 7460-1, "Notice of Proposed Construction or Alteration" to the FAA and obtain a "no hazard" determination from the FAA in response to that submission. If the FAA were to respond with a hazard determination, the mitigation measure required that the project proponents work with the FAA to remedy the hazard before the county would issue a building permit. As the court observed, "A condition requiring compliance with regulations is a common and reasonable mitigation measure, and may be proper where it is reasonable to expect compliance."

Kern County also did not abdicate its responsibility to mitigate the impact to aviation safety by using compliance with FAA safety regulations as the benchmark. The court found that federal law "occupies the field of aviation safety," and exercises "sole discretion in regulating air safety." The relevant FAA regulations were enacted to establish standards for determining when a proposed structure would constitute an unsafe obstruction to aviation safety, and the process to make such an evaluation. As the court observed, these standards often apply to wind farms because the height of wind turbines often exceeds the reporting thresholds. That the FAA could not enforce the hazard/no hazard determination, because it does not have jurisdiction over land development, does not warrant finding the regulations inapplicable. Rather, the county, as the relevant land use authority, was required to do so by the mitigation measure through the exercise of its police power. Accordingly, the court found that the mitigation measure was legally enforceable, and suitably reduced any impact to aviation safety to less than significant levels.

Town of Atherton v. California High-Speed Rail Authority, 228 Cal. App. 4th 314 (2014)

CEQA Lawsuit Fails To Slow High-Speed Rail

Several parties, including the San Francisco Peninsula communities of Atherton, Menlo Park, and Palo Alto, challenged the California High-Speed Rail Authority's decision on where to route trains travelling between the Central Valley and the Bay Area. In *Town of Atherton*, the court of appeal upheld the Authority's program EIR for the routing, but rejected the Authority's argument that federal law preempted the application of CEQA.

The court upheld the program EIR the Authority relied on in deciding to approve a high-speed rail route through the Pacheco Pass and several Peninsula communities, rather than a northern route through the Altamont Pass, ruling that:

- The program EIR properly deferred detailed analysis of the impacts of elevating the tracks on portions of the route through the San Francisco Peninsula to a second-tier project-level EIR. Information developed shortly before the program EIR was certified showed that an aerial viaduct was the only feasible alignment in some areas of the peninsula. Petitioners argued that an analysis of the impacts of elevated tracks on peninsula communities should have been included in the program EIR's comparison of the route alternatives. Nevertheless, the court held it was appropriate for the Authority to review this "site specific" issue in a project-level EIR, rather than in the program EIR.

- Petitioners' challenge to the ridership model used in the EIR simply pointed out a "dispute between experts that does not render an EIR inadequate." The Authority was entitled to choose between divergent expert recommendations.
- The Authority was not required to study additional proposed alternatives, because they either were infeasible or were substantially the same as alternatives analyzed in the program EIR.

The Authority had asked the court of appeal to dismiss the case on the ground the federal Interstate Commerce Commission Termination Act preempts application of state environmental laws such as CEQA under these circumstances. Although the federal statute does not preempt all state and local regulations, the court noted that it creates exclusive federal regulatory jurisdiction and remedies over railroad operations. The court concluded, however, that state regulation was not preempted here, based on an exception to federal preemption which applies when a state acts as a "market participant."

This case was not analogous, the court reasoned, to a private railroad company seeking to build a rail line free of state regulations. Instead, the court wrote, the State itself would determine the high-speed train's route, acquire the necessary property, and operate the train. The Authority also had an "established practice" of complying with CEQA, and the 2008 voter-approved bond measure to fund the high-speed rail network included compliance with CEQA as a project feature. For these reasons, the court held the Authority was required to comply with CEQA.

***Citizens for a Sustainable Treasure Island v. City and County of San Francisco*, 227 Cal. App. 4th 1036 (2014)**

No Treasure For Challenger On Appeal: Treasure Island EIR Upheld

Three years after the San Francisco Board of Supervisors unanimously approved a major redevelopment project on Treasure Island and Yerba Buena Island, in *Citizens for a Sustainable Treasure Island* the court of appeal upheld the project's EIR.

In 2011, the board approved a comprehensive plan to redevelop a former naval station located in the middle of San Francisco Bay into a mixed-use community with updated infrastructure and amenities. A "project EIR" analyzed all phases of the project at maximum buildout. A court challenge alleged that the EIR contained insufficient detail to constitute a project EIR and, therefore, should have been prepared as a program EIR.

The court of appeal disagreed: All CEQA requires is that an EIR contain the requisite elements and a level of specificity sufficient for the proposal under consideration, both of which the court found were satisfied. Lead agencies, the court held, have the discretion to determine whether a program or project EIR should be prepared.

The court also rejected the challenger's assertion that the city improperly sought to short-circuit subsequent environmental review by preparing a project EIR, observing that courts apply the same substantial evidence standard in determining whether subsequent environmental review is required whether a project is initially evaluated in a program EIR or a project EIR.

Other attacks on the EIR also failed, including a claim it should have been recirculated in light of comments submitted by the U.S. Coast Guard about potential effects on regulation of ship traffic. The court concluded there was no significant new information that required recirculation because the parties met to discuss the Coast Guard's concerns, a project document and the EIR were revised in response to the comments, the Coast Guard expressed satisfaction with the changes, and no new significant adverse environmental impacts were shown.

Lotus v. Department of Transportation, 223 Cal. App. 4th 645 (2014)

Highway 101 EIR Felled By Redwoods

Caltrans's analysis of impacts to redwoods from realignment of a one-mile stretch of Highway 101 was rejected by the court of appeal because the EIR for the project failed to identify any significance threshold for impacts to redwoods and impermissibly labeled mitigation measures as project features.

Caltrans proposed to adjust the alignment of Highway 101 to allow industry-standard trucks to use the roadway and to improve its safety. Excavation, fill and new pavement would intrude on the structural root zones of at least 74 redwood trees. The EIR identified an extensive set of measures which had been "incorporated into the project to avoid and minimize impacts as well as to mitigate expected impacts." Because the EIR treated these measures as components of the project as proposed, it found that the project would cause no significant environmental impacts.

The appellate court found the EIR's analysis of impacts to the trees' root zones inadequate for two reasons. First, although the EIR provided detailed descriptions of the extent and depth of excavation, fill and pavement within the trees' root zones, it did not "include any information that enables the reader to evaluate the significance of these impacts," such as standards for determining whether trees would survive. In fact, the court found, "the EIR fails to identify any standard of significance, much less to apply one to an analysis of predictable impacts from the project."

Second, the court found that the "avoidance, minimization and/or mitigation measures" described in the EIR were not truly part of the project. Instead, they were mitigation measures, and CEQA requires that an EIR identify impacts before mitigation measures are incorporated in the project and then separately identify mitigation measures and discuss their effectiveness. As the court put it: "By compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA."

The court acknowledged that the "distinction between elements of a project and measures designed to mitigate impacts of the project may not always be clear." In a ruling that seemed to prove the point, the court found that the use of special paving material to avoid impacts to root zones clearly was not a mitigation measure while the use of special construction equipment for the same purpose plainly was a mitigation measure, without explaining the distinction between the two.

Two expert opinions cited in the EIR, which concluded that the project would have no significant impact on the root health of the redwoods, did not cure the defect, according to the court. The opinions failed to discuss the significance of the environmental impacts apart from the mitigation measures incorporated in the project and this meant the EIR "failed to consider whether other possible mitigation measures would be more effective."

The court's distinction between impact avoidance measures that may properly be included in a project description, and mitigation measures that must be separately considered, will prove difficult, if not impossible, to apply. Had the EIR identified a significance threshold for impacts to redwoods, perhaps the court would have viewed the "avoidance, minimization and/or mitigation measures" differently, because the EIR would have provided a context for them.

The decision in *Lotus* highlights the importance of thinking beyond customary, checklist-based significance thresholds, particularly for projects involving impacts to trees. Although the CEQA Guidelines Appendix G checklist addresses tree ordinances, habitats, "forest land" and "timberland," courts often focus on impacts to individual trees. A CEQA document that can be seen as giving short shrift to these impacts is a document in potential peril.

Friends of the Kings River v. County of Fresno, 232 Cal. App. 4th 105 (2014)

Conservation Easements Not Required As Mitigation For Loss Of Farmland

In *Friends of the Kings River*, the Fifth District Court of Appeal upheld the County of Fresno's adoption of an environmental impact report for a mining operation that will result in a permanent loss of 600 acres of farmland. Most notably, the court held that a county is not required to adopt an agricultural conservation easement as a mitigation measure for a project causing direct loss of farmland, even where agricultural conservation easements are economically feasible.

The subject of the appeal was the Carmelita Mine and Reclamation Project, a proposed aggregate mine and related processing plant in the Sierra Nevada Foothills. The 1,500-acre site has significant mineral deposits, and is currently used for growing row crops and stone fruit trees.

The petitioners, Friends of the Kings River, challenged both the project's EIR under the California Environmental Quality Act and the project's reclamation plan under the Surface Mining and Reclamation Act of 1975.

Friends first appealed approval of the project with the State Mining and Geology Board, which granted the appeal and remanded the reclamation plan to the county for reconsideration. The county approved a revised reclamation plan, and Friends appealed to the State Mining and Geology Board again. The board denied the second appeal.

While the first appeal was pending, Friends filed a CEQA lawsuit. The trial court denied the petition. On appeal, Friends argued that the trial court erred by ruling on the petition before it was ripe for review, and that the EIR was inadequate under CEQA for a plethora of reasons.

The court of appeal dismissed Friends' ripeness claim by finding that the State Mining and Geology Board's grant of Friends' first appeal did not affect the validity of the reclamation plan. Thus, the remand of the reclamation plan to the county for reconsideration did not affect the county's certification of the EIR or its approval of the project.

The court then addressed Friends' contention that the county failed to require adequate mitigation for the conversion of farmland in violation of CEQA. The court rejected Friends' argument, noting that the EIR recommended three mitigation measures, which the court upheld: maintaining the current agricultural use of the site until the land is prepared for mining; keeping 602 acres within the site but outside the surface disturbance boundary as an agricultural buffer zone for the life of the use permit; and that mine cells be reclaimed as farmland as adequate materials are generated to fill the empty mine cells.

The court also rejected Friends' contention that the county was required to establish agricultural conservation easements to mitigate the permanent loss of 600 acres of farmland. The court held that while a county must consider using agricultural conservation easements as a mitigation measure for direct loss of farmland, it is not required to adopt an agricultural conservation easement as a mitigation measure, even where such an easement is financially feasible.

Friends asserted a number of additional CEQA challenges, but those too failed, as the court found that there was substantial evidence to support the county's findings.

Fortunately for project proponents, this decision maintains the variety of mitigation alternatives available when a project will cause a loss of farmland. While recent case law indicates that agricultural conservation easements ordinarily should be evaluated as a potential mitigation measure, a lead agency has discretion to adopt other mitigation measures instead.

Sierra Club v. County of San Diego, 231 Cal. App. 4th 1152 (2014)

Greenhouse Gas Mitigation Measure Fails To Comply With County's General Plan Update

The California Court of Appeal recently invalidated the County of San Diego's climate action plan. The Court held that the CAP violated CEQA by failing to comply with a mitigation measure the County had previously adopted for its general plan update, which required detailed deadlines and enforceable measures to ensure targeted reductions in greenhouse gas emissions.

Background.

In 2005, then Governor Schwarzenegger adopted Executive Order S-3-05 setting statewide targets for reducing greenhouse gas emissions by 2010, 2020, and 2050. The state legislature then enacted Assembly Bill No. 32, which required that the California State Air Resources Board establish a statewide GHG emissions limit as the 2020 target.

The program EIR for the County's 2011 general plan update acknowledged the need to reduce GHG emissions to target levels by 2020. When it approved the update, the County adopted a group of climate change-related mitigation measures. Among those, Mitigation Measure CC-1.2 committed the County to preparing a climate action plan—CAP—with more detailed GHG emissions reduction targets and deadlines, as well as comprehensive and enforceable GHG emissions reduction measures to achieve specific reductions by 2020. The County subsequently prepared a CAP, which was intended to comply with Mitigation Measure CC-1.2.

The Sierra Club petitioned for a writ of mandate, alleging that the County did not prepare a CAP that included comprehensive and enforceable GHG emission reduction measures that would achieve reductions by 2020 as required by Mitigation Measure CC-1.2. The Sierra Club argued that the County instead prepared the CAP as a plan-level document that did not ensure reductions. The Sierra Club also alleged that CEQA review of the CAP project was performed after the fact, using an addendum to the general plan update program EIR, without: (1) public review, (2) addressing the concept of tiering, (3) addressing the County's failure to comply with Mitigation Measure CC-1.2, or (4) a meaningful analysis of the CAP's environmental impacts.

The Court's Analysis.

The court first rejected the county's statute of limitations defense. The County had asserted that Sierra Club's claim that the mitigation measures were not enforceable was barred by the statute of limitations because the Sierra club should have challenged the County's approval of the general plan update program EIR, not the CAP. The Court disagreed, noting that the Sierra Club was not challenging the validity of the program EIR or the enforceability of the mitigation measures contained in that document. Rather, the Court found, the Sierra Club was challenging the CAP project and was seeking to enforce a key mitigation measure set forth in the general plan EIR.

On the merits, the court held that the County had failed to proceed in a manner required by law in various respects. First, the court determined that the County had failed to adopt a CAP that complied with the requirements of Mitigation Measure CC-1.2, since the CAP did not include enforceable GHG emissions reductions required by Mitigation Measure CC-1.2. To the contrary, the CAP explicitly did not ensure the required GHG emissions reductions, and the County described the CAP strategies as recommendations. Further, the CAP contained no specific deadlines for reducing GHG emissions.

Second, the court determined that the County failed to make findings regarding the environmental impacts of the CAP project. Instead of conducting an environmental analysis, the County erroneously assumed that the CAP project was within the scope of the general plan update. However, no details or components of the

CAP project had even been created at the time of the general plan update as contemplated by Mitigation Measure CC-1.2.

Third, the court determined that the County had failed to incorporate mitigation measures directly into the CAP. One of the major differences between the CAP anticipated by Mitigation Measure CC-1.2 in the general plan update program EIR and the actual CAP as prepared was that the general plan update program EIR did not analyze the CAP as a plan-level document that itself would facilitate further development. As a plan-level document, the CAP is required by CEQA to incorporate mitigation measures directly into the CAP.

Finally, the court determined that substantial evidence supported the trial court's finding that the County was required to prepare a supplemental EIR for the CAP project. As noted above, the details of the CAP were not available during the program-level analysis of the general plan. Further, the general plan update program EIR did not contemplate that the CAP itself would be a plan-level document. As such, the CAP project was required to undergo environmental review.

The court thus concluded that the CAP did not fulfill the County's commitment under CEQA and Mitigation Measure CC-1.2 to provide detailed deadlines and enforceable measures to ensure GHG emissions reductions.

***Paulek v. California Department of Water Resources*, 231 Cal. App. 4th 35 (2014)**

Rule Barring Piecemeal Review Not Violated When Proposal Has Independent Purpose And Is Not An Integral Part Of Another Project

A recent California Court of Appeal decision involving the California Department of Water Resources' Perris Dam Remediation Project addresses recurring questions relating to the scope of a "project" under CEQA, and CEQA's requirement that an EIR consider the "whole of an action" that comprises the project under review.

In its draft EIR, the Department proposed three activities: remediating structural deficiencies in the Perris dam; replacing the dam's outlet tower; and constructing a new emergency outlet extension. In response to comments on the draft EIR, the emergency outlet extension was split off from the rest of the project, to be considered in a separate environmental review process, and the final EIR was limited to the structural remediation and outlet tower replacement components of the proposal.

Paulek challenged the EIR, claiming it was improper for the Department to carve the emergency outlet extension out of the project. The court of appeal rejected the challenge, finding that the emergency outlet extension was not needed to mitigate project-related impacts and that it could stand on its own as an independent project. The court also addressed some important questions regarding an agency's obligation to respond to comments on a draft EIR.

<u>No Link To Project-Related Impacts.</u>

Paulek argued that the decision to remove the new emergency outlet extension from the project left a significant project-related environmental impact unmitigated because flooding would occur in downstream areas in the event of an emergency water release without the outlet extension.

The court rejected this argument because neither the dam remediation or outlet tower replacement activities would cause or increase the risk of flooding. Because the project did not increase the baseline danger of downstream flooding, there was no obligation for the Department to mitigate that danger.

No Improper Project Segmentation.

Paulek next argued that the Department's action deferring the emergency outlet extension constituted improper segmentation of the project in violation of CEQA's rule prohibiting "piecemeal review" of a single project. The court rejected the argument, applying a multi-part test for determining whether proposed actions amount to independent projects:

- The need for an emergency outlet expansion was not a "reasonably foreseeable consequence" of dam remediation, nor did approval of dam remediation and outlet tower replacement legally or practically compel completion of an emergency outlet extension.
- There was no basis to conclude that emergency outlet expansion was a "future expansion" of the other actions that were proposed.
- The emergency outlet extension was not an "integral part of the same project" as the dam remediation and outlet tower replacement because the dam remediation and outlet tower replacement had an entirely different purpose than the emergency outlet extension

Adequacy of Response to Comments.

Paulek argued that the Department's response to the final EIR comments submitted were inadequate. In rejecting this claim, the court affirmed the following:

- A response to comments is only required with respect to comments from persons who reviewed the draft EIR. An agency is not required to respond to letters submitted before the draft EIR is completed, such as a letter commenting on the notice of preparation
- A "general comment" that does not provide any specific examples of how the draft EIR fails as a CEQA information document requires only a general response.
- An agency may provide a response to a comment by referring to the portions of the EIR that address the issue raised in the comment.

California Clean Energy Committee v. City of Woodland, **225 Cal. App. 4th 173 (2014)**

Program EIR's Analysis Of Urban Decay And Energy Impacts Found Inadequate

A Third Appellate District decision found the City of Woodland's EIR for a large regional commercial center inadequate, finding fault with its mitigation measures for urban decay impacts, its assessment of alternatives, and its analysis and mitigation of energy impacts.

Mitigation Measures for Urban Decay Impacts Inadequate.

The court found three of the city's proposed mitigation measures for urban decay impacts failed to commit Woodland to specific, concrete mitigation actions. For instance, one measure required the developer to contribute funds toward development of a "retail strategic plan." Another measure required the city to coordinate with the current owner of a retail mall in the city to prepare a strategic land use plan that would analyze potential viable land uses for the site. The court found such measures too vague and uncertain to provide any assurance that they might actually reduce urban decay impacts There was no evidence how development of such plans might stem the deterioration of other areas of city that was expected to occur as business shifted to the new commercial center.

Cities can adopt policies intended to encourage redevelopment, or a change in uses, in declining commercial areas in an effort to respond to expected urban decay impacts. The problem highlighted in the decision in this case, however, is that it is extremely difficult, if not impossible, for a city to commit to adopt such policies at the time it approves a proposed project that might cause such impacts.

Analysis of Energy Impacts Found Deficient.

The court found the EIR's assessment of energy impacts wholly inadequate. The EIR considered the building code's energy conservation requirements, but little else.

- *No analysis of transportation energy impacts*. The court chided the city for failing to follow Appendix F's suggestion to include a study of the project's projected transportation energy use requirements and its overall use of efficient transportation alternatives.
- *Insufficient consideration of construction and operational energy impacts*. The court noted that the EIR's consideration of building standards failed to address either construction or operational energy impacts for a project that transformed agricultural land into a commercial shopping center.
- *Energy impacts for key parts of project not considered*. The city conceded that it did not consider the construction or operational energy impacts of three hotels, a 20,000 square foot restaurant, three fast food restaurants, an auto mall, and 100,000 square feet of office space.

The heightened emphasis on the need to evaluate energy use is relatively new, and many EIRs still do not address the issue in any detail. The court's focus on the standards in Appendix F will undoubtedly lengthen the list of high visibility issues that must be evaluated in EIRs going forward and will likely provide fertile ground for challenging them.

City's Reasons for Rejecting Alternative to the Project Found Insufficient.

The court also found fault with the city's findings disapproving a mixed-use alternative. The draft EIR rejected the alternative as economically infeasible, but the city ultimately rejected the alternative as environmentally inferior to the proposed project. The EIR, however, did not contain any evidence that the mixed-use alternative's environmental impacts would be any worse than the proposed project's and in fact concluded that the mixed-use alternative would result in fewer impacts related to physical deterioration and urban decay.

SPRAWLDEF v. San Francisco Bay Conservation and Development Commission (Waste Connections Inc.), 226 Cal. App. 4th 905 (2014)

Economically Infeasible Project Alternatives Are Not "Reasonable" For Purposes of CEQA

SPRAWLDEF involved a challenge to the San Francisco Bay Conservation and Development Commission's ("BCDC") approval of an expansion to the existing Potrero Hills Landfill. Among SPRAWLDEF's arguments was a claim that BCDC's decision to reject a reduced-size alternative as economically infeasible violated a local ordinance. Specifically, SPRAWLDEF alleged that BCDC was required to adopt a reduced-size project that would not modify the relevant water course, as the local ordinance authorized such modification only if "no reasonable alternative" existed. The superior court granted SPRAWLDEF's writ petition on this sole ground, finding that BCDC's decision was not based on substantial evidence.

The Court of Appeal evaluated SPRAWLDEF's arguments as to the reasonableness of the reduced-size alternative in terms of CEQA case law pertaining to economic feasibility. Applying the CEQA feasibility analysis, the court presumed that an alternative cannot be considered reasonable if it is economically infeasible, and to that end, substantial evidence in the record supported BCDC's conclusion that the selected project alternative was the only economically-feasible approach. This evidence included analyses of projects of smaller sizes demonstrating that the landfill would realize significant reductions in both cost and revenue (i.e., revenue reductions of as much as 45%). Evidence further indicated that reductions in landfill size were not correlative with capacity, capital investment costs, or revenue, thereby further substantiating rejection of the reduced-size alternative. Based on the foregoing, the Court of Appeal reversed and directed the superior court to deny the writ of mandate.

Center for Biological Diversity v. Department of Fish and Wildlife, 234 Cal. App. 4th 214 (2015)

California Department of Fish and Wildlife's EIR for Fish-Stocking and Hatchery Program Upheld

A court of appeal has held that the first-ever environmental impact report for the state's fish hatchery and stocking programs complies with CEQA, but also found that three of the EIR's mitigation measures constituted "underground regulations" in violation of the Administrative Procedure Act. *Center for Biological Diversity v. California Department of Fish and Wildlife,* Third Appellate District Case No. C072486.

Since the late 19th century, the Department of Fish and Wildlife has been required by statute to conduct a massive fish hatchery and stocking program. But hatchery trout introduced into mountain lakes contribute to declining amphibian populations, and hatchery salmon and steelhead are causing hybridization, which reduces the genetic diversity and strength of the fish species. As the result of a CEQA lawsuit, the Department was required to prepare its first EIR on the state-mandated program; the Department also decided to include in the EIR several other programs, including one that authorizes fish stocking in lakes and ponds by private aquaculture facilities.

The Department prepared a program EIR that analyzed the program's species impacts on a statewide, rather than a site-by-site, basis. The EIR included protocols and plans for discovering and mitigating site-specific impacts at the nearly 1,000 water bodies the Department stocks and the 24 hatcheries it oversees. The EIR's baseline for environmental review, and its no-project alternative, was ongoing operation of the program as it had functioned from 2004-2008.

As for the private fish stocking programs, the EIR identified, and the Department adopted, new prerequisites and monitoring and reporting obligations for private vendors.

The Center for Biological Diversity alleged the EIR was inadequate for failing to perform site-specific review for each fish stocking site; deferring formulation of protocols and management plans; using the current stocking enterprise as the environmental baseline; and failing to consider a reasonable range of alternatives, including cessation of all hatchery and stocking operations. The court rejected each of these claims.

First, the court found the EIR adequate because it analyzed "every impact that reasonably could occur by stocking fish in any water body in the state based on information currently known. . . . Site-specific analysis will likely not reveal any unanticipated impacts; instead, it will reveal whether the impacts discussed in the EIR are occurring at that site." The court further held that nothing in CEQA required that the later site-specific reviews occur in a public process.

Second, the court found that the EIR identified sufficient performance standards for the future development of aquatic biodiversity management plans and hatchery genetic management plans, so that mitigation of species impacts was not impermissibly deferred.

The court easily dispensed with CBD's third claim, stating: "CEQA and case authority hold the baseline for a continuing project is the current environmental condition including the project, even if the project has not undergone prior environmental review."

The court gave equally short shrift to CBD's argument that the range of alternatives studied in the EIR was inadequate, and particularly that a no-stocking alternative should have been analyzed, given that the Department was required by statute to stock millions of pounds of fish each year.

Finally, an aquaculture industry association challenged three of the EIR's mitigation measures as regulations adopted without complying with the notice and procedure requirements of the state Administrative Procedure Act. The court agreed.

The three mitigation measures required Department biologists to evaluate water bodies proposed for private stocking and reject permits if they found adverse effects to key species, and required private aquaculture facilities participating in one program to monitor and report the existence of invasive species at their facilities.

The APA defines a "regulation" as a rule or standard of general application and bars the state from approving regulations without public notice and an opportunity for public comment. The Department argued that two APA exemptions – for a regulation that "relates only to the internal management of the state agency" and for one that "embodies the only legally tenable interpretation of a provision of law" – shielded the three mitigation measures from the APA process. The court rejected these arguments and required compliance with the APA.

This case is most notable for its strong endorsement of program EIRs that do not include site-specific analysis, but instead set the rules for conducting them; its reiteration of case law holding that existing conditions, measured over a period of years, represent an acceptable baseline for CEQA review; and its approval of to-be-developed management programs as CEQA mitigation measures.

E. SUPPLEMENTAL CEQA REVIEW

***Citizens Against Airport Pollution v. City of San Jose*, 227 Cal. App. 4th 788 (2014)**

Airport Challenge Does Not Fly: Court Upholds Use Of Addendum For Changes To San Jose Airport Master Plan

The City of San Jose's use of an addendum for recent modifications to the San Jose Airport's Master Plan was upheld by the court of appeal. In 1988, the City of San Jose began to prepare an update to its 1980 Airport Master Plan to accommodate projected growth in air traffic through a planning horizon year of 2010. The city completed an EIR for the Airport Master Plan update in 1997, and a supplemental EIR in 2003, and also adopted eight addenda to the EIRs from 1997 through 2010. In the eighth addendum, the city analyzed the potential impacts associated with proposed changes to the Airport Master Plan including: (1) changes in the size and location of future air cargo facilities; (2) replacement of previously planned air cargo facilities with 44 acres of general aviation facilities to accommodate a forecasted increase in use by large corporate jets; and (3) modification of two taxiways to improve access for corporate jets.

Citizens Against Airport Pollution filed suit to challenge the eighth addendum, claiming the changes to the Airport Master Plan amounted to a new project requiring preparation of a supplemental or subsequent EIR. The city responded that the proposed changes did not add up to a new project, but rather were adjustments to an existing plan that had already received environmental review, and therefore an addendum was appropriate.

Heavily relying on the principle that the standard for a court's review of an agency's use of an addendum to an EIR is "deferential," the court upheld the city's decision to adopt an addendum, finding substantial evidence in the administrative record that supported the city's determination that "the changes in the project or its circumstances were not so substantial as to require major modifications to an EIR."

The court considered, but declined to decide, whether the 1997 EIR should be considered a program EIR. Instead, the court found that the record contained substantial evidence that use of an addendum was appropriate, even assuming the 1997 EIR was a program EIR, because the proposed changes will not result in any new significant impacts or impacts that are substantially different from those described in the 1997 EIR and the supplemental EIR. As in the decision by the First District Court of Appeal in *Citizens for a Sustainable Treasure Island*, 227 Cal. App. 4th 1036 (2014), the court found that the substance of the EIR was more important than the name attached to the document, and that the standard for determining whether further environmental review is required the same for both a program and project EIR.

Turning to the substantive claims, the court rejected the claim that the addendum violated CEQA because it did not include the greenhouse gas analysis required by the 2010 amendments to the CEQA Guidelines. Following the reasoning in recent court decisions, the court observed that the potential environmental impacts of GHG emissions have been known since the 1970s and were widely known before the certification of the 1997 EIR and the 2003 supplemental EIR; as a result, the effect of GHG emissions was not "new information" that would trigger the need for further CEQA review.

The court further found that the proposed modifications did not warrant supplemental review of noise impacts, relying heavily on a detailed study comparing the noise analysis in the 1997 EIR and 2003 supplemental EIR to the noise levels projected with the proposed modifications in place. The challenger's air quality claim also fell flat, as the record reflected that the proposed modifications would neither increase the activity levels at the airport beyond those already identified in the Plan nor alter the capacity of the airport. Finally, the court agreed with the eighth addendum's conclusion that potential impacts to the burrowing owl did not warrant supplemental review, concluding that it could "reasonably assume" that the burrowing owl mitigation measures incorporated in the addendum "will maintain the environmental impacts on the Airport's burrowing owl population to a less than significant level."

F. CEQA LITIGATION

***Saltonstall v. City of Sacramento*, 231 Cal. App. 4th 837 (2014)**

Court Blocks Opponents' Shot At Halting New Kings Arena

The court of appeal recently upheld legislation modifying several deadlines for CEQA review of a project that includes a proposed new arena for the Sacramento Kings, rejecting a claim the statute violates separation of powers.

In 2013, the National Basketball Association approved the sale of the Kings to a local group planning to build a new downtown Sacramento entertainment and sports center, including an arena for the team. Yet the NBA also reserved the right to acquire and relocate the franchise to another city if a new arena does not open in Sacramento by 2017.

In response, the Legislature amended CEQA, exclusively for the downtown arena project, to expedite the environmental review process. The City of Sacramento complied with the accelerated deadlines, certified an environmental impact report, approved the arena project, and promptly was sued by project opponents.

The court of appeal rejected the opponents' constitutional challenge to the CEQA legislation, holding that the amendment does not materially impair the core function of the courts, the legal standard for finding a separation of powers violation.

First, the statute does not infringe on the courts' power to issue injunctive relief. The court of appeal acknowledged that the legislation changes the standards for injunctive relief in connection with the arena project, but ruled that the Legislature has the prerogative to specify which interests should be weighed against the benefits of a new arena. Indeed, the court reasoned, the Legislature has the constitutional right to exempt the arena project entirely from CEQA review, so it follows that the Legislature may determine which interests must be considered in deciding whether to halt its construction.

Second, the legislation does not unconstitutionally impose impossibly short deadlines on the courts. One statutory provision requires the Judicial Council to adopt a rule to facilitate completion of judicial review of the project's CEQA compliance within 270 days. The court upheld the challenged provision, noting that it imposes no penalty for judicial review that exceeds the specified period and thus is "suggestive" only.

On more than one occasion in recent years, the Legislature has treated large-scale sports venues differently for CEQA purposes. This decision reaffirms the Legislature's authority to do so.

Citizens for a Green San Mateo v. San Mateo Community College District, 226 Cal. App. 4th 1572 (2014)

CEQA Challenge To Tree Cutting Filed Too Late

Recent cases, including two California Supreme Court decisions, insist that the short statutory deadlines for filing CEQA lawsuits be strictly enforced. *Citizens for a Green San Mateo* is consistent with this trend. Reversing the superior court, the court of appeal held that a citizens' group sued too late to challenge tree removals at the College of San Mateo.

The college district had studied the impacts of implementing its facilities master plan in a 2007 CEQA initial study and mitigated negative declaration. The initial study explained that the project would change the aesthetic of the campus and "would result in the removal and pruning of an unknown number of trees." In 2007, the district issued a notice of determination after approving the project. In 2010, the district decided to remove trees along the campus's loop road and gave public notice of that decision, but did not issue a new NOD. Tree removals began in December 2010 and a citizens' group sued on July 1, 2011.

The court of appeal held that the petitioners had missed the CEQA statute of limitations in three different ways. First, because a notice of determination was filed and posted after the 2007 initial study was completed, opponents of tree-cutting had only 30 days from issuance of the 2007 NOD to file suit.

Second, even if the 2007 NOD had not triggered the statute of limitations, the suit was untimely under the 180-day statute of limitations, which began to run when the district made its decision in late 2010 to approve the contract for the trees to be cut.

Finally, the 1986 California Supreme Court decision in *Concerned Citizens of Costa Mesa*, 42 Cal. 3d 929 (1986) did not help the challengers. That case held that where a project was transmuted into a fundamentally different project with no formal agency decision, public notice or NOD, the 180-day statute of limitations was triggered on the date the challengers "knew or reasonably should have known" of the new project. Here, the tree cutting began on December 28, 2010—more than 180 days before the citizens' group filed suit. Therefore, their action was "time-barred even under a most generous interpretation of the statute of limitations."

Ventura Foothill Neighbors v County of Ventura, 232 Cal. App. 4th 429 (2014)

CEQA Notices of Determination Don't Protect Completed Hospital From Lawsuit And New EIR

In recent years the California Supreme Court has vigorously confirmed that when an agency files a Notice of Determination or Notice of Exemption after approving a project, CEQA's very short statute of limitations takes effect and any lawsuit filed after the deadline is barred. Nevertheless, the court of appeal in *Ventura Foothill Neighbors* held that due to an error in the EIR's description of the height of a new hospital building proposed at the county medical center two NODs were not sufficient to trigger the statute of limitations. The court held that neighbors could sue after they noticed the building was taller than they expected, and that the county must prepare a supplemental EIR on the height-related impacts of the building as constructed.

Ventura County's 1994 EIR on improvements planned for the medical center stated that the hospital building would be "up to 75 feet in height" but did not mention that if the height of rooftop parapets that

would screen equipment on the roof is counted, the total height would be close to 90 feet. The county filed an NOD and no lawsuit challenging the EIR was filed.

Construction was delayed, and in 2005 the county decided to change the location of the building within the medical center campus. The county prepared an addendum to the 1994 EIR which found no new impacts due to the change in location and again filed an NOD. Neither the addendum nor the NOD mentioned the height of the building. In 2008, during construction, neighbors whose views would be affected by the building in its new location inquired about its height and filed suit under CEQA, long after the expiration of the 30-day statutes of limitations that would normally have been triggered by the 1994 and 2005 NODs.

The court of appeal began by assuming that the height of the building "changed" soon after the EIR was certified, rather than that the EIR had failed to accurately describe the building's total height. In so doing, the court concluded that the failure of the 2005 addendum or NOD to describe this change in the building's height meant that the 2005 NOD did not trigger the 30-day CEQA statute of limitations. Accordingly, the neighbors could sue after they became aware of the actual height of the building and the county was required to prepare a supplemental EIR analyzing the impacts of, and mitigation for, the purported change.

The function of a statute of limitations is to put to rest any questions regarding the merits of an agency's actions. According to the California Supreme Court's recent decisions on CEQA's statute of limitations, the statute sets out a "bright line rule" that the statute of limitations applies regardless of the merits of a lawsuit brought to challenge an agency's actions. When an NOD is filed and the 30-day statute of limitations expires, an EIR is immune from subsequent challenge even if it is later discovered to have been inaccurate and misleading in its description of a significant environmental effect. The *Ventura Foothill* case demonstrates, however, that the "bright line rule" identified by the supreme court may not be so bright after all.

Further, the court noted, a Caltrans safety review revealed an accident history in the vicinity of the project that was twice the statewide average. Evidence of a heightened accident rate in the area supported a fair argument that doubling the traffic volume for two hours on event days, including one hour after dark, might have a significant impact on traffic safety.

Finally, the court found no error in the award of attorney fees to the association.

***Conway v. State Water Resources Control Board*, 235 Cal. App. 4th 671 (2015)**

Regional Water Quality Control Board's Adoption of Total Maximum Daily Load Does Not Require Full CEQA Analysis

A Court of Appeal has upheld the Regional Board's adoption of the total maximum daily load (TMDL) for concentration of pollutants in the sediment in McGrath Lake, rejecting the claim that TMDLs may not be stated in terms of concentrations of pollutants in lake bed sediments. *Conway v. State Water Resources Control Board*, 235 Cal. App. 4th 671 (2015).

The Clean Water Act requires states to identify polluted water bodies within their jurisdictions, and to set TMDLs for those water bodies. The TMDL is the maximum amount of pollutants that can be discharged into an impaired water body from point and nonpoint sources. California implements the TMDLs in California through the Porter-Cologne Water Quality Control Act.

McGrath Lake is a small, black dune lake located at the southern end of McGrath State Beach Park in Ventura County. It is located within the McGrath Lake subwatershed, which consists primarily of agricultural fields, petroleum facilities, park lands, public roads, and a closed landfill. McGrath Lake was

placed on the Clean Water Act Section 303(d) list on of impaired waters in 1998, 2002, and 2006 due to levels of organochlorine pesticides and PCBs.

In 2009, the Los Angeles Regional Water Quality Control Board set TMDLs for the lake through an amendment to the Los Angeles Basin Plan. The Board concluded that exposure of the McGrath Lake ecosystem to the organochlorine pesticides and PCBs in amounts exceeding the objectives and criteria had impaired beneficial uses, including aquatic life and recreational uses. The Basin Plan Amendment set TMDLs for contaminants from two primary sources: (1) agricultural runoff from surrounding fields that entered the lake largely through a Central Ditch; and (2) from lake bed sediment which could enter the lake by, among other ways, through desorption.

The TMDL for sediment was stated in terms of concentrations of pollutants in the sediment, not the concentration of pollutants in the lake's water column. While setting a goal of 14 years to achieve the TMDL for the lake bed sediment, the Basin Plan Amendment acknowledged that such a goal would not be achieved by natural attenuation, and that capping or dredging would be the possible methods of remediation.

The Basin Plan Amendment designated landowners within the lake's watershed as "cooperating parties," giving them two years from the effective date of the Amendment to enter into a Memorandum of Agreement with the Regional Board to implement the TMDL. If the cooperating parties failed to do so, the Basin Plan Amendment authorized the executive to assign responsibility for remediation to specific parties, and issue appropriate regulatory orders to those parties.

Adjacent landowners challenged the TMDL for the lake bed sediment, contending that the Basin Plan Amendment's adoption of TMDL for the lake sediment violated the Clean Water Act, California Water Code Section 13360, and CEQA. The petitioners argued that the Clean Water Act did not authorize the Regional Board to set load allocations expressed in terms of concentrations of pollutants in lake bed sediments.

The Court of Appeal rejected this argument, stating plainly: "The lake is its water and its sediment." Thus, the Court concluded, a sediment concentration-based TMDL was reasonable because lake bed sediment is not a distinct physical environment. The Court found persuasive the fact that there are no natural outlets to the lake, and thus sediments pollutants do not regularly flush out of the lake. The Court also noted that it was not technically feasible to accurately measure the levels of pollutants desorbing from lake bed sediments to the water column along the lake bottom.

The Court of Appeal also found that the TMDL was consistent with Clean Water Act regulations, which provide that the TMDL "can be expressed in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. § 130.2. The Court stressed that this provision gave the Regional Board broad authority to select and "appropriate measure", and that such selection was afforded deference, particularly where, as here, the EPA had reviewed and approved the TMDL.

The petitioners' claim that the TMDL inappropriately dictated the means of compliance under the Porter-Cologne Act fell similarly flat. The petitioners conceded that the Basin Plan Amendment did not expressly require dredging, but maintained that the 14-year deadline could only practicably be met by dredging, which would violate Section 13360(a) of the Water Code. The Court rejected this claim, finding: (1) Section 13360(a) did not apply on its face because the TMDL is neither a "waste discharge requirement or other order"; and (2) there is no violation of Section 13360 "where lack of available alternatives is a constraint imposed by present technology and the law of nature" rather than a Board-specified manner of compliance.

Finally, the Court found that the Regional Board's adoption of the TMDL did not violate CEQA because "[a] TMDL is an informational document, not an implementation plan." Because a TMDL represents a goal for the level of a pollutant, and the plan to implement this goal had not yet been developed, the Court found that full environmental analysis was not yet required.

CHAPTER 8
Endangered Species Protections

San Luis & Delta-Mendota Water Authority v Jewell, 747 F.3d 581 (9th Cir. 2014)

Ninth Circuit Upholds Biological Opinions Restricting Operations of the State Water Project & Central Valley Project

Delta Smelt Biological Opinion.

In March 2014, the Ninth Circuit issued its long-awaited decision in the latest round of the delta smelt litigation, upholding the 2008 Biological Opinion prepared by the U.S. Fish & Wildlife Service (FWS) for the combined operations of the Central Valley Project and the State Water Project. The Biological Opinion found that the projects would jeopardize the delta smelt, currently listed as an endangered fish species, and therefore imposed significant restrictions on the operation of the projects, which supply water to more than 25 million agricultural and domestic users in Central and Southern California. The court reversed most of the district court's decision, which had agreed with claims by numerous California water districts, water contractors and agricultural water users that the restrictions in the Biological Opinion were scientifically unsupported and in violation of the Endangered Species Act. *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581 (9th Cir. 2014). On January 12, 2015, the U.S. Supreme Court declined to review the Ninth Circuit's decision.

The Ninth Circuit recognized the "enormous practical implications" of its decision, but emphasized that it was required by the standard of judicial review to defer to the FWS's scientific determinations and judgment. The court also emphasized that the ESA's protections are "afforded the highest priorities by Congress, even if means the sacrifice of the anticipated benefits of the projects and of many millions of dollars in public funds." According to the decision, the ESA prohibits courts from making "utilitarian calculations to balance the smelt's interests against the interests of the citizens of California." Rather, the broader policy questions about the allocation of water resources in California lie "with Congress and the agencies to which Congress has delegated authority" and "ultimately, the populace as a whole."

Although the court upheld the Biological Opinion, it acknowledged that the document was rushed, incoherent ("a jumble of disjointed facts and analyses"), and "largely unintelligible." But the court blamed this problem largely on the district court, which had imposed strict and unrealistic time frames on the FWS for completing its analysis. The court also faulted the district court for having "overstepped its bounds" by failing to observe the proper standards for judicial review. While the ESA requires the use of "the best scientific and commercial data available," the court emphasized that this does not mean the best scientific data that is possible, and it also explained that the determination of what scientific data and methodology to use in a Biological Opinion is a matter within the FWS's expertise and discretion.

Based on these deferential principles of judicial review, the court held:

The district court erred in admitting declarations from experts hired by the parties, rather than confining its review to the administrative record that was before the FWS at the time it approved the Biological Opinion, as supplemented by limited testimony of experts appointed by the court to explain the highly technical material in the Biological Opinion.

The Biological Opinion did not err in establishing flow-based water pumping limits that relied on the number of smelt salvaged at project fish screening facilities. The FWS reasoned that salvage data typically is used to provide an indication of the number of fish that are entrained and killed in the water pumping facilities. But the district court ruled that the use of raw salvage numbers was improper, and that the

numbers should have been scaled to the smelt's overall population. The district court reasoned that the number of fish salvaged in any given year depends on the total smelt population, which can vary from year to year. While the Ninth Circuit acknowledged that the FWS could have done a more rigorous analysis to establish the pumping limits, it found that the evidence in the record supported the FWS's conclusions.

The Biological Opinion did not err in establishing the location of X2, which is the point in the Bay-Delta estuary where the salinity is two parts per thousand, and the center point of the Low Salinity Zone, which is considered suitable spawning habitat for the smelt. The location of X2 is critical because it is controlled by the amount of water pumped out of the Bay-Delta by the water projects. The court deferred to the scientific modelling conducted by the FWS, acknowledging that while the particular model used was flawed, the FWS explained the basis for using it and why other suggested modeling techniques also were flawed. The court stated: "The fact that the FWS chose one flawed model over another flawed model is the kind of judgment to which we must defer."

The court upheld the Biological Opinion's Incidental Take Statement, finding that it sufficiently explained the rationale for using separate data sets to establish different take limits for juvenile and adult smelt and for using an averaging methodology that the district court had found unsupported and overly restrictive.

The court upheld the Biological Opinion's analysis of the indirect effects of water project operations on delta smelt food supply, pollution, predation, aquatic vegetation, and toxic bacteria. Disagreeing with the district court, the Ninth Circuit examined the administrative record on each of these issues, and found that the evidence supported the FWS's conclusions that the water projects would cause adverse indirect impacts. The court emphasized: "we decline to review with a fine-toothed comb the studies on which the FWS relied in reaching its conclusions."

The FWS is not required to explain how the Reasonable and Prudent Alternatives set out in the Biological Opinion—which are required to reduce impacts to protected species when the FWS determines the species is jeopardized by a project—are economically and technologically feasible, and can be implemented in a manner consistent with the project's intended purpose and the authority of the Bureau of Reclamation (which operates the Central Valley Project). The court held that the FWS's consideration of these factors could be readily discerned from the record in any event.

The FWS is not required to segregate discretionary from non-discretionary actions when it considers the environmental baseline, which is the starting point for evaluating the impacts of a proposed project on a protected species.

Aside from the "enormous practical implications" of its decision as explicitly recognized by the Ninth Circuit, the decision is particularly noteworthy given the very high level of deference it affords to the federal agency's findings and determinations under the ESA. It remains to be seen whether the Ninth Circuit will consistently apply this same deferential standard of review to ESA challenges that claim that a Biological Opinion, rather than being overly restrictive, is not sufficiently protective against impacts to listed species.

Biological Opinion for Salmonid Species.

On December 22, 2014, the Ninth Circuit echoed its delta smelt ruling by upholding the companion Biological Opinion issued in 2009 by the National Marine Fisheries Service (NOAA Fisheries) covering the impacts on protected salmonid species from the combined operations of the Central Valley Project and the State Water Project. *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971 (2014). As in the delta smelt opinion, the court recognized the weighty practical implications of its decision, emphasizing that the water supplied by the projects "is essential to the continuing vitality of agriculture in the Central Valley, and some 25 million Californians depend on it for daily living." The court put the crux of the issue succinctly: "People need water, but so do fish."

Relying extensively on its prior delta smelt decision, the court reversed the district court and upheld the restrictions imposed on the projects by NOAA Fisheries' Biological Opinion, emphasizing the substantial deference that courts owe to the technical analysis and factual findings of the federal agency under the ESA, especially when complex scientific issues are involved.

The court first ruled that the district court exceeded the scope of its review by admitting expert declarations that were outside the administrative record that was before NOAA Fisheries when it issued the Biological Opinion and by substituting the analysis in those declarations for that of the agency. The court then went through each challenged provision of the Biological Opinion and found that the agency's findings and decisions were reasonable and supported by the evidence in the administrative record. As in the delta smelt decision, the court emphasized that the agency need not explain with precision why one particular measure to protect species was selected over other potential approaches. The court explained: "Rather, we give the agency flexibility to choose among several appropriate alternatives. We will uphold that choice so long as it is reasonably supported based on a review of the record as a whole."

This recent decision reinforces the highly deferential standard of review when a court assesses the validity of a Biological Opinion, as well as the difficult challenges California faces in supplying water to its large and growing populace. And as the court acknowledged, in all probability, this is not the end of the ESA litigation over the operation of the federal and state water projects: "This is not the first time we have addressed this conflict, nor is it likely to be the last."

National Resources Defense Council v. Jewell, 749 F.3d 776 (2014)

Bureau of Reclamation was Required to Consult with Federal Environmental Agencies Before Renewing Long-Term Contracts for Central Valley Project Water

In *Natural Resources Defense Council v. Jewell,* 749 F.3d 776 (9th Cir. 2014), the en banc Court of Appeals for the Ninth Circuit held that, under Section 7(a)(2) of the Endangered Species Act, the Bureau of Reclamation was required to consult with the United States Fish and Wildlife Service or the National Oceanic and Atmospheric Administration's National Marine Fisheries Service before renewing Central Valley Water Project contracts that could affect the delta smelt.

The Bureau of Reclamation manages California's Central Valley Project ("CVP"), which—through a series of dams, reservoirs, canals and pumps—diverts water from the Sacramento-San Joaquin River Delta and transports it to the Central Valley and Southern California. The delta smelt has been adversely affected by historical Delta water diversions, and is listed as a threatened species under the Endangered Species Act.

In 2004-2005, the Bureau prepared biological assessments concluding that renewal of contracts for CVP water would not adversely affect the smelt. The Fish & Wildlife Service concurred, concluding that although the new contracts would increase the use of Delta water, this would not adversely affect the smelt. The Service did not assess the contracts' potential effects on the smelt beyond the reasoning contained in Bureau's biological assessments. Plaintiffs challenged the validity of many of the renewed contracts on the ground that the Bureau had failed to adequately consult with the Service before renewing the contracts.

The district court held that the Bureau was not required to consult under Section 7(a)(2) prior to renewing some of the contracts because the Bureau's discretion in renegotiating these contracts was "substantially constrained." The en banc appellate panel disagreed. It pointed out that consultation is required whenever an agency has "some discretion" to take action for the benefit of a protected species. The obligation to consult, the court held, does not turn on the degree of discretion, but whether the agency has any discretion to act in a manner beneficial to a protected species or its habitat. Here, the court found, the Bureau had such discretion for, among other things, it could have refused to renew the contracts or

renegotiated the pricing scheme or timing of water distributions. The discretion retained by the Bureau in these matters triggered the obligation to engage in section 7(a)(2) consultation.

Light v. State Water Resources Control Board, 226 Cal. App. 4th 1463 (2014)

State Water Resources Control Board May Weigh the Use of Water for Public Purposes Against Commercial Use by Riparian Users and Early Appropriators in Determining Reasonableness of Commercial Use

A court of appeal, for the first time, has upheld the State Water Resources Control Board's authority to restrict valid pre-1914 and riparian water rights on the ground that their exercise has become an unreasonable use of water under current circumstances.

While it has long been accepted that California law requires that water be put to a use that is both beneficial and reasonable, what constitutes an "unreasonable use of water" has received little attention. This opinion, in finding the use in question to be unreasonable, is significant both for the principles it relies on and its articulation of the sideboards of the "reasonable use" requirement.

In April 2008, a particularly cold month during a dry year, young salmon were found stranded along the banks of the Russian River. Federal scientists concluded that the deaths were caused by the abrupt declines in water level due to diversions of water that was sprayed on vineyards and orchards to prevent frost damage. The salmon are classified as threatened or endangered under the Federal Endangered Species Act.

Following a series of hearings and the preparation of an environmental impact report, the State Water Resources Control Board adopted a regulation — Regulation 862 — that will likely require the reduction in diversion of water for frost protection under certain circumstances. Regulation 862 delegated the task of formulating regulations governing water use programs to local bodies comprised of diverting growers. The regulation declares that any water use inconsistent with the programs promulgated (and later approved by the Board) is unreasonable and prohibited.

Plaintiff growers challenged Regulation 862 contending that:

- The Board lacked authority to enact regulations on unreasonable use of water
- The Board lacked authority to limit water use by riparian and pre-1914 appropriators
- The regulation violated the rules of priority

The court of appeal found that Regulation 862 – which provides in part that "a diversion of water that is harmful to salmonids is an unreasonable use of water if the diversion can't be managed to avoid harm" – was valid and within the Board's authority. It also held that the regulation applied to riparian users as well as pre-1914 appropriators. The court concluded that while the Board cannot require pre-1914 appropriators and riparian users to obtain a permit, that does not mean that the Board cannot prevent such users from diverting water for a use the Board determines to be unreasonable. In that regard, the Board has authority to determine what has become an unreasonable use and prohibit such use.

The court reasoned that the "vested rights" doctrine does not prevent the Board from redefining existing beneficial uses as unreasonable. Consequently, the extent of a particular users' vested right to use water may change. "A riparian users' vested water rights extend only to reasonable beneficial water use, which is determined at the time of use." The court held that the Board has ultimate authority to allocate water in a manner inconsistent with a rule of priority when to do so is necessary to prevent the unreasonable use of water. According to the court, that power is buttressed by the State's obligation under the public trust doctrine that applies to all water rights.

The court stressed that the legislature has declared that the use of water for recreation and the preservation and enhancement of fish and wildlife resources is a beneficial use of water. It has thus recognized that the welfare of wildlife is a beneficial use on a par with the type of commercial uses that have traditionally been recognized as beneficial. Consequently, balancing the use of water for frost protection against the use for salmon habitat is the application of a fundamental policy decision within the power of the Board.

The opinion endorses the proposition that the Board has broad authority to determine reasonableness at any time and, based upon changed circumstances, may declare well established uses unreasonable and, therefore, waste and impermissible. It also suggests that the Board's determination of priority between two otherwise reasonable uses can result in the termination of one without the implication of a taking.

CHAPTER 11
Regulatory Takings

Powell v. County of Humboldt, 222 Cal. App. 4th 1424 (2014)

Requiring Dedication Of Overflight Easement As Condition To Issuance Of Building Permits Is Not An Unconstitutional Exaction

A recent California Court of Appeal decision considered the argument that a county requiring property owners to dedicate an overflight easement as a condition to issuance of a building permit was an unconstitutional exaction. The court concluded that the owners could not establish a taking because they were unable to show that the government simply appropriating the overflight easement, instead of requiring it as a condition of approval for the permit, would have been an unconstitutional taking. *Powell v. County of Humboldt,* 222 Cal. App. 4th 1424 (2014).

In 1993, Humboldt County adopted an Airport Land Use Compatibility Plan for the Arcata-Eureka Airport. In 2004, the Powells purchased property roughly one mile from the airport, located in "Airport Compatibility Zone C" of the Airport Land Use Compatibility Plan. The Plan required that all owners of residential real property located in Zone C dedicate an overflight easement as a condition to issuance of a building permit. The purpose of these easements was to ensure that any improvement was compatible with the safe operation of the airport.

The Powells filed a petition for a writ of mandate contending that the overflight easement condition, as applied to their building permit application, was an unconstitutional exaction under *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. The appellate court concluded that the *Nollan/Dolan* analysis applied only if the public easement required as a condition of the permit was so onerous that it would have constituted a compensable taking if the property right had simply been appropriated by the government outside the permitting process. This required the Powells to establish, as a threshold matter, that the overflight easement condition completely deprived them of any beneficial use of their property, interfered with their investment-backed expectations, or was a permanent physical occupation of their physical property (a *per se* physical taking). Unless that test was satisfied, the court reasoned, the government was not demanding that the landowner trade a constitutional right—the right to just compensation for the taking of property—in order to receive a discretionary government benefit.

The court concluded that the Powells failed to provide evidence to meet this threshold requirement. They put forth no evidence that the easement deprived them of the beneficial use of their property or interfered with their investment-backed expectations. The court also found that the overflight easement was not a *per se* physical taking, reasoning that unless the overflight easement, by its express terms, authorized frequent incursions into the Powell's private airspace at altitudes causing noise and disturbance to the Powells, it would not amount to a taking under federal or state law. Because the easement did not expressly permit such overflights — and the Powells' property rights did not include a right to exclude airplanes from using the navigable airspace above their property in accordance with applicable safety regulations — the court found no basis to conclude that the overflight easement was a *per se* physical taking.

Property Reserve, Inc. v. Superior Court (Dept. of Water Resources), 168 Cal. Rptr. 3d 869 (2014)

Geological and Environmental Testing on Private Property That Amounts to an Intentional Taking Requires the Agency to File an Eminent Domain Complaint Prior to On-Site Testing

Department of Water Resources Must File Condemnation Case Before Undertaking Geological and Environmental Testing on Private Property

In *Property Reserve, Inc. v. Superior Court of San Joaquin County*, the Third District Court of Appeal ruled that if the State intends to acquire an interest in private property directly, "no matter how small an interest, the California Constitution requires it to initiate a condemnation suit that provides the affected landowner with all of his constitutional protections against eminent domain in that action." In this case of first impression, the court ruled that the "entry statutes" — the California Eminent Domain Law's precondemnation entry provisions — failed to pass constitutional muster where a state agency proposed to undertake extensive geological and environmental studies on private property without first filing an eminent domain complaint.

The State Department of Water Resources sought to study the geological and environmental suitability of hundreds of properties upon which it proposed to build a freshwater transport canal or tunnels to divert water from Northern California to Southern California to implement its Bay Delta Conservation Plan. The court of appeal held the State's request to enter onto private property to perform geological and environmental testing — prior to filing a complaint under the Eminent Domain Law — would effect a taking.

In compliance with the statutory procedure for precondemnation entry for testing purposes, the State filed a "master petition" seeking a court order granting it rights of entry from more than 150 owners of more than 240 land parcels totaling tens of thousands of acres. For all of the properties, the State proposed conducting environmental studies including mapping the properties and surveying botany, hydrology, plant and animal species, cultural resources, utilities, and recreational uses. The geological studies proposed for a portion of the parcels involved tests penetrating soil with rods one and one-half-inches in diameter in depths up to 200 feet, along with soil borings to depths of 205 feet which would leave bore holes six inches in diameter. At the conclusion of testing, the holes would be filled with "permanent columns of cement."

The superior court ruled the geological activities would constitute a taking only authorized in a *direct* condemnation action, not a *precondemnation* action. However, the superior court granted, subject to certain limitations, the State's request to enter private property to conduct environmental studies for up to 66 days during a yearlong term, with up to eight personnel during each entry. The State deposited $1,000 to $6,000 as "probable compensation" for "actual damages or substantial interference" with each property owners' use of their properties. But on appeal, the court of appeal found *both* types of precondemnation testing activities would affect takings of compensable property interests.

First, the court of appeal found the proposed geological testing would result in a "permanent physical occupation" constituting a taking *per se*, regardless of the "public interests" served.

Second, while acknowledging there is "no bright-line rule" for determining whether a temporary physical invasion constitutes a taking, the court found the proposed environmental study activities would work a taking because they "intentionally acquire a temporary property interest of sufficient character and duration to require being compensated." After weighing factors including whether the invasions were intended, the character of the invasions, the duration of the invasions, and the invasions' economic impact, the court determined the State had sought a "blanket temporary easement" that had to be acquired in a condemnation suit rather than through the precondemnation entry statutes.

Resolving a question of first impression, the court held the State's precondemnation entry statutes do not provide an "eminent domain proceeding" sufficient to comply with the constitutional limits on the State's exercise of the power to condemn property. If a public agency "intentionally seeks to take property or perform activities that will result in a taking," the California Constitution requires that it "directly condemn" the affected property interest in an authorized condemnation suit in which the landowner receives "all of his constitutional protections against eminent domain." The State's "acquisition of a property interest, permanent or temporary, large or small" requires direct condemnation of the property interest and payment of the property owner in a condemnation suit that gives the landowner "all of his constitutional protections against the state's authority."

The court concluded that the State's precondemnation entry statutes violate the California constitution because they do not provide the fully panoply of protections provided to a landowner in a condemnation suit.

The majority opinion was followed by a lengthy dissent in which one justice argued that the entry rights sought for geological testing did not effect takings and the entry statutes were constitutional, both facially and as applied. Invalidating the statutes would "force a public entity that initiates a large-scale public project ... either to put up the money for the entire property before determining its suitability" or "engage in two complete condemnation proceedings with their attendant costs."

Not surprisingly, given the importance of the issues involved, on April 22 the State Department of Water Resources filed a petition seeking review by the California Supreme Court.

***Levin v. City and County of San Francisco*, 2014 WL 5355088, 40.3:14-cv-03352-CRB (N.D. Cal. Oct. 21, 2014)**

Mandatory Relocation Payments Under Rent Control Ordinance Must Satisfy Nollan/Dolan

The Northern District of California has struck down part of San Francisco's rent control ordinance as an unconstitutional taking under the Fifth Amendment in *Levin v. City and County of San Francisco*, No. 3:14-cv-03352-CRB (N.D. Cal. Oct 21, 2014). The case may have important implications for monetary exactions in local land use permitting.

At issue in *Levin* were the relocation payments required by the 2014 amendments to the San Francisco rent control ordinance. Under the ordinance, owners of rent-controlled property were required to make certain payments for tenants evicted under the Ellis Act. Under the 2014 amendments to the rent ordinance, in order to withdraw the unit under the Ellis Act, property owners were required to pay the greater of the lump sum required under the original ordinance or an amount equal to twenty-four times the difference between the unit's current monthly rate and the fair market value of a comparable unit in San Francisco.

Plaintiffs, owners of rent-controlled properties in San Francisco, filed suit, bringing a facial challenge against the 2014 ordinance as violating the Takings Clause of the Fifth Amendment.

The court ruled in favor of the plaintiffs, finding that the 2014 ordinance constituted an exaction that violated the Takings Clause. The court first held that the San Francisco ordinance, which demanded monetary payment from the property owners in exchange for a permit to remove a unit from the rental market, had to satisfy the *Nollan/Dolan* requirements of essential nexus and rough proportionality. Next, the court found that the ordinance could not meet either of those requirements. Both steps in the court's analysis may prove important in future cases involving monetary exactions.

Extending the reach of *Nollan/Dolan*.

The *Nollan/Dolan* standard constitutes a special application of the unconstitutional conditions doctrine to the government's land use permitting power. The *Nollan* and *Dolan* cases specifically applied to adjudicative land use exactions involving a government demand for property owners to dedicate an easement as a condition of obtaining a development permit. The central concern in these two cases was that the government may use its substantial power in land use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the property.

The Supreme Court's 2013 decision in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013) expanded the reach of *Nollan* and *Dolan* to monetary exactions. Because of the direct link between the government's demand and a specific piece of real property, the Court held that the central concern in *Nollan* and *Dolan* was implicated and application of the standard to monetary exactions was appropriate.

Levin followed the *Koontz* logic in applying *Nollan* and *Dolan* to San Francisco's rent ordinance. In applying, *Koontz*, it made several significant holdings:

- *Levin* held that applying the *Nollan/Dolan* standard to the demand for relocation payments was appropriate because the demand for payments operated upon an identified property interest by directing the owner of a particular piece of property to make a monetary payment. Thus, even though the rent ordinance did not impose a deed restriction, a covenant, or even a lien on the property, the *Nollan/Dolan* standard still applied because the fees demanded were directed at a particular piece of property.
- Prior to *Koontz*, Ninth Circuit precedent held that the *Nollan/Dolan* standard was limited to *ad hoc* or adjudicatory exactions and did not apply to legislatively imposed exactions. *Levin* interpreted *Koontz* as removing the legislative/adjudicative decision and held that the rent ordinance relocation payments, despite being legislatively imposed, were nevertheless subject to the requirements of *Nollan/Dolan*.
- Prior to *Koontz*, it was thought that the *Nollan/Dolan* standard did not apply to facial takings claims. *Levin* read *Koontz* as abrogating this precedent in finding the rent ordinance unconstitutional on its face.

Applying the *Nollan/Dolan* standard.

Levin also provides an important discussion of the necessary relationship between the impact of the permitted action and the fee demanded under *Nollan/Dolan*. The court stressed that mere "but-for" causation is insufficient to satisfy the requirements of essential nexus and rough proportionality. The city argued that the relocation payment was justified because the property owner's withdrawal of a unit from the housing market "causes" the evicted tenant to be exposed to market rents. This justification, however, was not sufficient to meet the requirements of *Nollan/Dolan*. While an eviction arguably results in certain costs such as relocation costs, it does not cause the gap in affordability that the property owners were forced to pay under the 2014 ordinance. Thus, the court concluded, the monetary exaction demanded neither shared an essential nexus with nor was roughly proportional to the impact of the withdrawal of the rental unit.

CHAPTER 13
Initiative and Referendum

City of Patterson v. Turlock Irrigation District, 227 Cal. App. 4th 484 (2014)

Annexation To District Is Not Authorized For Sole Purpose Of Extending Right To Vote In District Elections

"No taxation without representation" is a powerful rallying cry, but it's not enough to justify an application for annexation of territory to a special district, according to recent court of appeal decision. *City of Patterson v Turlock Irrigation District*, 227 Cal. App. 4th 484 (2014). The court held that there is no statutory authorization for expansion of an irrigation district's territorial boundaries for the sole purpose of giving voting rights to consumers of the district's electrical services.

Turlock Irrigation District imposed a surcharge on electrical rates charged customers in a service area outside of the District's boundaries. Because they reside outside the District, electrical service customers in the City of Patterson were not eligible to vote in Irrigation District elections or sit on the District's board, and thus they were not represented in the Irrigation District's rate-setting process. Despite this lack of representation, they had to pay the surcharge on electrical rates.

The California Public Utilities Commission had authorized the Irrigation District to provide extraterritorial service in 2003 when it approved the District's acquisition of PG & E's electric distribution and transmission facilities in western Stanislaus County. Over eight years later, the city sought to obtain voting rights for its disenfranchised customers by asking the Stanislaus Local Agency Formation Commission to approve annexation of the area to the District.

The Irrigation District opposed the city's application for annexation and submitted a resolution to the LAFCO requesting termination of the proceedings, under Government Code § 56857(b), which allows proceedings for annexation of territory to a district to be terminated when justified by a financial or service-related concern.

The city responded by filing suit to challenge the validity of the Irrigation District's resolution. The city claimed that the financial and service concerns relating to provision of water for irrigation described in the resolution were not legitimate because the city's annexation application was limited to retail electrical service and would not expand the District's obligations relating to irrigation water. The trial court ruled for the District, concluding that its resolution requesting termination of the proceedings complied with the statute.

The city appealed and the Court of Appeal affirmed the trial court judgment. However, rather than basing its decision on the Irrigation District's resolution requesting termination of the annexation proceedings, it found the city's annexation application was legally deficient.

The court concluded the city's application failed to comply with the mandatory requirement in Government Code § 56653 that an application for annexation include a plan for providing services to the annexed territory that describes the services to be extended to the affected territory. The city's application did not, however, seek to extend services to the affected territory; it sought annexation solely for the purpose of obtaining voting rights for city residents.

The court noted at the outset of its opinion: "This appeal echoes a familiar cry from the American Revolution— 'No taxation without representation!'" But it explained that this "purported evil" that the city's application sought to redress had not been identified by the Legislature as a problem that annexation

of territory is intended to solve. The city's application was therefore fatally flawed because it was not based on a statutorily authorized reason for annexation, based on the statute's plain language.

CHAPTER 14
Local Agency Formation Commissions (LAFCOs): Local Agency Boundary Changes

Protect Agricultural Land v. Stanislaus County Local Agency Formation Commission, 223 Cal. App. 4th 550 (2014)

Challenge To Annexation Dismissed Due To Failure To Comply With Required Procedures

In *Protect Agricultural Land*, CEQA and other claims challenging a completed annexation were dismissed because they had not been brought in a reverse validation proceeding.

The Stanislaus County Local Agency Formation Commission approved annexation of land into the City of Ceres, relying on an EIR the City had prepared and certified. Protect Agricultural Land, a citizen's group, filed suit after the annexation was completed to challenge the decision, alleging that the LAFCO failed to comply with annexation law and with CEQA. However, PAL erred by filing the suit as a petition for writ of mandate. While a petition for a writ of mandate may be filed to challenge an annexation-related decision before the annexation is completed, a completed annexation may be challenged only in a "reverse validation" action, or a quo warranto proceeding filed by the Attorney General.

In validation and reverse validation actions, a court validates or invalidates a public agency's decisions, and the final judgment is binding on all persons who might have an interest in the outcome, whether or not they participated in the case. Validation actions may be brought by public agencies to validate certain types of decisions; reverse validation actions may be brought by challengers seeking to invalidate those decisions. The challenger must include specific language in the summons, ensure that the summons is published, and file proof of publication within 60 days of filing the complaint. If these requirements are not met, the proceeding must be dismissed on the motion of the public agency "unless good cause for such failure is shown." Code Civ. Proc. § 863.

Because PAL filed its action as an ordinary mandate case, rather than as a reverse validation action, and did not publish the summons, the trial court dismissed it. On appeal, PAL acknowledged that its annexation law claims were subject to reverse validation procedures, but argued that its failure to comply should be excused for good cause because PAL's attorney had researched the issue but had not discovered the validation procedure rule. The court found that counsel's mistake was not excusable. Longstanding case law had established that completed annexation decisions may be challenged only in reverse validation actions, and PAL's attorney's reliance on a single secondary source that did not mention the reverse validation requirement did not constitute adequate research.

The court then noted that PAL's CEQA claims were simply alleged as an additional basis for invalidating the completed annexation decision. Because they were part of a challenge to a completed annexation decision, the CEQA claims were also subject to validation procedures, and were also appropriately dismissed for failure to follow those procedures.

CHAPTER 19
Land Use Litigation

Roberson v. City of Rialto (Wal-Mart Real Estate Business Trust), 226 Cal. App. 4th 1499 (2014)

Lack of Prejudice Barred Relief Despite Defective Hearing Notice

An opponent of a Wal-Mart project was thwarted in his attempts to use an admittedly defective hearing notice as a basis for overturning project approvals. The court ruled that his claims were defeated by his failure to present evidence of prejudice and by a prior appellate decision. *Roberson v. City of Rialto*, 226 Cal. App. 4th 1499 (2014).

The City of Rialto approved a large retail project to be anchored by a Wal-Mart store. The city's notice of the council hearing was defective for failing to include the planning commission's recommendation that the council approve the project.

Two lawsuits followed, both seeking to have the project approvals overturned based on the defective notice. The first was brought by Rialto Citizens for Responsible Growth, a nonprofit corporation. The appellate court in that case cited Government Code section 65010, which states that procedural errors will not render a decision invalid "unless the court finds that the error was prejudicial and that the party complaining or appealing suffered substantial injury from that error and that a different result would have been probable if the error had not occurred." Because Rialto Citizens made no showing of prejudice, the appellate court denied relief.

The second lawsuit was brought by another project opponent, Marcus Roberson. He submitted a declaration claiming he did not attend the council hearing but would have done so and shared his views opposing the project had he known the planning commission had recommended approval. The *Roberson* court denied relief, on two grounds.

First, it ruled that Roberson failed to meet his burden to show prejudice. Robeson, who was represented by the same attorney as Rialto Citizens, did not show what evidence he would have submitted other than the evidence his attorneys had already submitted for Rialto Citizens (which had been found insufficient to demonstrate prejudice). The court distinguished cases involving either no notice at all or failure to give notice to an entire class of affected landowners. In those cases the defect was extreme, making it reasonable to presume a different result would have been probable had there been proper notice. Here, in contrast, the defect in the notice was minor and technical, and no prejudice was shown.

Second, the court held that Roberson's claims were barred under the doctrine of res judicata by the decision in the Rialto Citizens case. The defective notice claims in the two cases were identical. Roberson was in privity with Rialto Citizens, meaning the two parties shared the same interest; in that both parties were seeking to vindicate a public interest. Roberson's claim that he was protecting his individual interests was belied by his declaration stating that his opposition to the Wal-Mart store was based upon his view that "it is likely to harm the community," and that he brought suit to vindicate the public's interest in seeing that the city followed the noticed hearing procedures required by law. Because the cases involved the same issue raised by parties pursuing the same interest, the decision in the first case barred re-adjudication in the second.

Citizens for a Green San Mateo v. San Mateo Community College District, 226 Cal. App. 4th 1572 (2014)

CEQA Filing Deadlines Strictly Enforced

Recent cases, including two California Supreme Court decisions, insist that the short statutory deadlines for filing CEQA lawsuits be strictly enforced. *Citizens for a Green San Mateo* is consistent with this trend. Reversing the superior court, the court of appeal held that a citizens' group sued too late to challenge tree removals at the College of San Mateo.

The college district had studied the impacts of implementing its facilities master plan in a 2007 CEQA initial study and mitigated negative declaration. The initial study explained that the project would change the aesthetic of the campus and "would result in the removal and pruning of an unknown number of trees." In 2007, the district issued a notice of determination after approving the project. In 2010, the district decided to remove trees along the campus's loop road and gave public notice of that decision, but did not issue a new NOD. Tree removals began in December 2010 and a citizens' group sued on July 1, 2011.

The court of appeal held that the petitioners had missed the CEQA statute of limitations in three different ways. First, because a notice of determination was filed and posted after the 2007 initial study was completed, opponents of tree-cutting had only 30 days from issuance of the 2007 NOD to file suit.

Second, even if the 2007 NOD had not triggered the statute of limitations, the suit was untimely under the 180-day statute of limitations, which began to run when the district made its decision in late 2010 to approve the contract for the trees to be cut.

Finally, the 1986 California Supreme Court decision in *Concerned Citizens of Costa Mesa*, 42 Cal. 3d 929 (1986) did not help the challengers. That case held that where a project was transmuted into a fundamentally different project with no formal agency decision, public notice or NOD, the 180-day statute of limitations was triggered on the date the challengers "knew or reasonably should have known" of the new project. Here, the tree cutting began on December 28, 2010—more than 180 days before the citizens' group filed suit. Therefore, their action was "time-barred even under a most generous interpretation of the statute of limitations."

The Otay Ranch, L.P. v. County of San Diego, 230 Cal. App. 4th 60 (2014)

CEQA Cost Recovery Statute Includes Recovery Of Reasonably Necessary Attorney's Fees For Preparation Of Administrative Record

The Fourth District Court of Appeal in Otay Ranch upheld a trial court's award of costs to the County of San Diego for preparation of the administrative record. Petitioners were the former owners of a shooting range, who challenged the county's remediation plan under CEQA.

The Otay parties elected to prepare the administrative record for their CEQA claim, but after months of inaction and at the eleventh hour, they were unable to complete the record. With the Otay parties' approval, the county took over preparation of the record with just ten days to complete it. Given the history and complexity of the project, and how the records were maintained, the county determined that it did not have sufficient resources to complete the record in the time allotted and hired the attorney representing it in the litigation to help prepare the record. The county completed the record within the allotted ten days, but the Otay parties dropped the entire action the next day.

The county filed a memorandum of costs with the court seeking recovery of costs for preparation of the administrative record. The Otay parties moved to tax the county's costs associated with attorney and

paralegal time. The trial court found that the attorney and paralegal costs were reasonably necessary to prepare the record, and allowed the county to recover costs incurred after the county took over preparation of the record. The Otay parties appealed.

The court of appeal first found that the trial court did not abuse its discretion in finding that attorney and paralegal costs were reasonably necessary to preparation of the administrative record and were therefore recoverable. The court explained, "given the history and complexity of the documents and how the documents were maintained, we cannot conclude the trial court exceeded the bounds of reason in determining it was 'reasonably necessary' for the county's retained counsel and paralegals to prepare the administrative record, since the county did not have the resources or experienced personnel to prepare the record."

The court of appeal next took up the issue of whether attorney costs are recoverable in record preparation, as a matter of law. The Otay parties did not challenge the labor costs charged for county staff or law firm document clerks to assist with the preparation of the record but argued that time spent by attorneys could not be claimed. The court noted that under the Otay parties' position, an attorney's labor for preparation of an administrative record could never be recovered. The court found "no reason to differentiate between labor costs incurred by individuals directly employed by a public agency and those incurred by individuals employed by a private law firm retained by the agency, so long as the trial court determines the labor costs were reasonably and necessarily incurred for preparation of the administrative record." When the trial court finds that attorney and paralegal costs were reasonably necessary, as it did here, those costs are recoverable.

This case illustrates the general principle that costs reasonably necessary to prepare an administrative record are recoverable, and attorney and paralegal costs are no different than other costs. Important to note, the circumstances here involved a complicated history and a short window of time. Thus, cities and counties must ensure that if they do expect to recover attorney costs, they ensure that the use of an attorney is indeed necessary to compile a complete record.

Coalition for Adequate Review et al. v. City and County of San Francisco, 229 Cal. App. 4th 1043 (2014)

Public Agencies May Recover Costs Of Supplementing A Record, Even When Petitioners Prepare The Record Themselves

In *Coalition for Adequate Review*, the First District Court of Appeal held that even when a petitioner prepares a record, the lead agency may still recover reasonable costs of supplementing the record if required to ensure a statutorily complete record.

After prevailing in the case, the City of San Francisco filed a memorandum of costs for $64,144 for the administrative record and other costs it had incurred. The petitioners had elected to prepare the record themselves, as allowed by CEQA's provisions on record preparation. However, the city found the record the petitioners had prepared incomplete. After the city made efforts to facilitate petitioners' completion of the record, the city prevailed on a motion to supplement the record, because petitioners had omitted documents statutorily required to be included in the record. Preparation of the supplemental record led to the majority of the costs the city sought to recover.

The trial court denied all cost recovery, and the city appealed. The court of appeal reversed the trial court's decision, and remanded the case to the trial court for consideration of whether the costs incurred were reasonably necessary. The court noted that whether a claimed cost comes within the general cost statute, and is recoverable, is a question of law subject to de novo review, but whether a cost item, including preparation of an administrative record, was reasonably necessary to the litigation presents a question of fact for the trial court.

The court of appeal disagreed with the lower court's ruling that the petitioners' election to prepare the record precluded the city from recovering costs. The court held that a petitioner's election to prepare the record itself does not mean that the public agency may not recover supplemental record preparation costs, if the costs are required to ensure a statutorily-complete record. The court easily dispensed with the trial court's rationale that awarding sizable costs to the city would have a chilling effect on lawsuits challenging important public projects, noting that this rationale is refuted by CEQA provisions allowing an agency to recover costs.

In remanding the case to the lower court for consideration of the city's cost claims the court of appeal provided considerable guidance on how reasonable costs should be determined, noting the following:

- While reasonable labor costs required to prepare the supplemental record are recoverable, time spent reviewing the record "for completeness" is not.
- Excerpts of the administrative record prepared and submitted by the city to the trial court as an aid could qualify as photocopies of exhibits, which are recoverable costs.
- Messenger costs for transporting record materials could be recoverable as labor costs of assembling the record.
- Messenger costs for court filings could also be recovered, but postage and express delivery costs are expressly disallowed under the Code of Civil Procedure.
- The cost of the city's copy of the record could qualify as recoverable if "reasonably necessary."

***San Francisco Tomorrow v. City and County of San Francisco*, 229 Cal. App. 4th 498 (2014)**

Administrative Record In CEQA Case Properly Included Recordings Of Hearings On The Project By Board Of Supervisors Committee

In *San Francisco Tomorrow v. City and County of San Francisco*, the court of appeal considered a challenge to San Francisco's approvals for to the Park Merced project. 229 Cal. App. 4th 498 (2014) Among other issues, the court addressed whether the inclusion of certain documents in the administrative record was appropriate.

Over a ten month period, a board of supervisors committee, the Land Use and Economic Development Committee, held meetings to consider the Park Merced project and development agreement. The last of these meetings was held the morning of May 24, hours before the board considered and certified the EIR and the project. At the May 24 meeting, the committee discussed and approved amendments to the approvals and at the end of the hearing, the committee forwarded the amended documents to the board. On the afternoon of May 24, the board of supervisors heard the appeal of the EIR, denied the appeal, and approved the project.

Following the filing of their petition for writ of mandate in the superior court, appellants moved to "clarify the record," seeking to exclude the committee hearing transcripts from the administrative record. The trial court ordered that the transcripts of these hearings be included in the record.

On appeal, appellants contended that the trial court erred in including transcripts from the May 24 committee hearing in the administrative record. Petitioners argued that transcripts of the committee hearings were not relevant to the city's decision because these documents were not "before the decision maker"— the board of supervisors.

The court of appeal rejected the argument, noting that CEQA "contemplates that the administrative record will include pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to the development," and that the Legislature intended the courts to

avoid narrowly applying the categories of documents required to be included in the administrative record under CEQA.

The court held that the audio recording of the committee hearing and its transcription constituted written materials relevant to the agency's decision on the merits of the project and were therefore *required* to be included in the administrative record. The hearings, which undisputedly occurred before the board's decision was made, included testimony related to the project, and the recording of the hearings was available to members of the board, even though it was not formally submitted to them.

The court also ruled that the petitioners failed to demonstrate that they were prejudiced by the inclusion of the Committee transcripts in the administrative record, rejecting Petitioners' argument that any procedural violation of CEQA was presumptively prejudicial. The court held that "the burden of showing prejudice from any overinclusion of materials into the administrative record must be on the project opponents, who have the most to gain from any underinclusion."

Woody's Group v. City of Newport Beach, 233 Cal. App. 4th 1012 (2015)

Local Elected Official Cannot Appeal Land Use Approval And Then Adjudicate Said Appeal

In *Woody's Group, Inc. v. City of Newport Beach*, the Fourth District Court of Appeal held that the City Council of Newport Beach "violated two basic principles of fairness: you can't be a judge in your own case, and you can't change the rules in the middle of the game." Thus, a council member who appealed a planning commission decision to the city council could not participate in the appeal; nor could the city council consider the appeal at all when the council member had failed to pay the filing fee or otherwise follow the procedures in the municipal code. *Woody's Group v. City of Newport Beach*, 233 Cal. App. 4th 1012 (2015).

Woody's Wharf is a long-established restaurant and bar overlooking Newport Harbor. In September 2013, the Newport Beach Planning Commission approved a conditional use permit and variance to allow Woody's to install a patio cover, continue to operate until 2 a.m. on weekends, and allow dancing inside the restaurant. Four days after the approval, Newport Beach City Council member Mike Henn sent the city clerk an email with an "official request to appeal" because he "strongly believed" the approval was inconsistent with policies in the City's General Plan. The city council subsequently voted 4 to 1 to reverse the planning commission decision, with Henn in the majority.

Under the City's municipal code, an appellant from a planning commission determination must be an "interested party," post a fee, and use the proper form. The code contained no provision for appeals by city council members.

The court of appeal found that the appeal did not comport with due process because the council member who brought the appeal also took part in the decision. The court held that an interested party for the purposes of *bringing* the appeal cannot simultaneously be a disinterested person for the purposes of affording due process in *hearing* the appeal, where the council is acting in an adjudicatory capacity. The court invoked the "cardinal rule" that "a person cannot be a judge in his or her own case," and stated, "we will not assume the drafters of Newport Beach's Municipal Code intended to contravene a cardinal rule of justice in the absence of a clear statement of such remarkable intent."

The court also found that the city council violated its own municipal code by entertaining Henn's appeal because he did not comply with the procedures laid out in the code. The City argued that there was a longstanding practice of allowing council members to appeal without paying a filing fee because their appeals are taken for the benefit of the City's residents. The court rejected this argument, finding "no room for unwritten rules, policies or customs outside the municipal code or for the city council to give its

members special privileges to appeal." The court also rejected the trial court's rationale that the improper appeal was harmless because interested parties (such as local residents) would surely have filed appeals anyway.

The court concluded that a city council's consideration of an appeal not authorized under the municipal code required nullification of the council's decision rather than remand for reconsideration. The court ordered reinstatement of the planning commission's decision, thereby returning dancing and late nights to Woody's Wharf.

***City of Berkeley v. 1080 Delaware, LLC,* 234 Cal. App. 4th 1144 (2015)**

Failure To Challenge Affordable Housing Condition Barred Subsequent Claim Of Invalidity Of Enabling Ordinance Under Costa-Hawkins Act

While acknowledging that the City's affordable housing ordinance was no longer enforceable under the Costa-Hawkins Act, an appellate court dismissed a challenge to a permit condition requiring compliance with the ordinance because the owner failed to seek timely review of the permit condition through administrative mandamus. *City of Berkeley v. 1080 Delaware, LLC*, 234 Cal.App.4th 1144 (2015).

In 2004, the City issued a conditional use permit for construction of 51 residential rental units. One of the permit conditions required that 20% of the units be rented at rates affordable to below-median-income households pursuant to the City's affordable housing ordinance. Market conditions delayed construction of the building for several years, after which the owner declared bankruptcy and the property was acquired by 1080 Delaware through foreclosure. In the interim, the court in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles,* 175 Cal. App. 4th 1396 (2009), invalidated an affordable housing ordinance similar to the City's under the Costa-Hawkins Act, which generally precludes cities from restricting the initial rents that may be charged by landlords.

After 1080 Delaware notified the City that it viewed the affordable housing requirements as unenforceable in light of *Palmer/Sixth Street*, the City filed suit seeking a declaratory judgment that the permit condition remained valid and enforceable. In response, 1080 Delaware argued that the invalidity of the ordinance on which the permit condition was based necessarily rendered the condition itself invalid.

The appellate court disagreed. Although both parties agreed that the City's affordable housing ordinance was preempted under Costa-Hawkins insofar as it applied to rental units, the court held that 1080 Delaware was precluded from challenging the condition because the prior owner had failed to file a timely administrative mandate action seeking judicial review of the condition. The court relied on prior decisions holding that administrative mandamus is the exclusive method of challenging the validity of a permit condition, and failure to seek mandamus review within the applicable 90-day statute of limitations bars the developer from challenging 1the validity of the condition in a subsequent action.

The court also ruled that the permit condition remained enforceable against a subsequent owner of the property despite the intervening decision invalidating the enabling ordinance. The original owner waived the right to seek review of validity of the condition by failing to mount a timely mandamus challenge, and 1080 Delaware acquired the property with the same limitations and restrictions that bound its predecessor in interest.

***Save Our Uniquely Rural Community Environment v. County of San Bernardino* (Al-Nur Islamic Center), 235 Cal. App. 4th 1179 (2015)**

Court Upholds Award of Less Than 10% of Attorney's Fees for Prevailing CEQA Petitioner

The Fourth Appellate District upheld the trial court's award of less than 10% of the fees requested by the prevailing petitioner in a CEQA case, finding no abuse of the broad discretion accorded trial courts in awarding fees. *Save Our Uniquely Rural Community v. County of San Bernardino,* 235 Cal. App. 4th 1179 (2015).

Al-Nur Islamic Center proposed to build an Islamic community center and mosque in a residential neighborhood in an unincorporated area of San Bernardino County. The County of San Bernardino adopted a mitigated negative declaration and issued a conditional use permit for the project. Save Our Uniquely Rural Community Environment (SOURCE) filed a petition for writ of mandate challenging the approvals. The trial court granted the petition on just one of many grounds asserted, finding a CEQA violation for failure to study environmental impacts in the area of wastewater disposal. SOURCE moved for $231,098 in attorney fees.

The trial court granted the motion, but reduced the award to $19,176, noting that SOURCE had succeeded on only one of its six CEQA arguments and on none of its four conditional use permit arguments.

The court of appeal affirmed, holding that SOURCE failed to demonstrate any abuse of discretion. The extent of a party's success, the court stated, was a key factor in determining the amount of attorneys' fees to be awarded. Here, SOURCE had advanced multiple land-use and CEQA claims and sought an order setting aside the approvals pending preparation of an EIR. However, it succeeded solely on one of its CEQA claims and obtained only an order setting aside the approvals pending further review on the single issue of wastewater treatment. The trial court thus acted well within its discretion in reducing the requested fee award based on degree of success.

The trial court likewise did not abuse its discretion in finding several elements of the fees excessive, including 40 hours preparing a 14-page reply brief that consisted primarily of reiterating the arguments made in the opening brief; charging nearly $10,000 for a "run-of-the-mill" attorney fees motion; and billing 8.3 hours at partner rates for basic research on matters such as standards of review, "CEQA law and guidelines" and "requirements for opening brief."

Additionally, the court remarked that while SOURCE claimed its counsel's rate were reasonable for the Los Angeles area, it failed to show why those rates were reasonable in San Bernardino County. Absent a specific showing of why adequate lawyers in the local market could not be obtained, the trial court was justified in calculating attorneys' fees based on reasonable local market rates.

The court also found no justification for petitioner's request for a multiplier of two based on the purported risk assumed by the law firm, the complexity of the questions involved, or the superior skills allegedly displayed by its attorneys in presenting them.

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