

2019

CALIFORNIA LAND USE & PLANNING SUPPLEMENT

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Use of this Supplement

Dear Reader:

This Supplement is intended for use in conjunction with *Curtin's California Land Use & Planning Law*, 36th Edition (2018). Pending publication of the 37th Edition in 2020, the authors have prepared this Supplement containing analyses of the most important decisions published in 2018 concerning California land use and planning. Cases are chaptered in the Supplement consistent with the 36th Edition for ease of reference. Readers should anticipate that published cases, state legislation, and state and federal regulatory developments through 2019 will be addressed in early 2020.

Regards,

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CHAPTER 1

Land Use Authority

Small Property Owners of San Francisco Institute v. City and County of San Francisco, 22 Cal. App. 5th 77 (2018)

Another San Francisco Ordinance Falls To The Ellis Act

Once again, the City and County of San Francisco has been found to have exceeded the limits of its authority under the Ellis Act in its efforts to deter conversion of residential rental units.

The Ellis Act prohibits local governments from “compel[ling] the owner of any residential real property to offer, or to continue to offer accommodations in the property for rent or lease.” (Gov’t Code § 7060(a).) Courts have held that the Ellis Act completely occupies the field of substantive eviction controls over landlords who withdraw units from the market and prohibits local ordinances that penalize the exercise of rights established by the statute.

The ordinance challenged in this case modified the City’s Planning Code to permit enlargement, alteration or reconstruction of nonconforming residential units in zoning districts where residential use was principally permitted, but imposed a 10-year waiting period for units that had been the subject of a “no fault” eviction. Small Property Owners of San Francisco Institute (“SPOSFI”) sued, claiming that the imposition of a 10-year waiting period penalized the exercise of the right to exit the rental business and therefore conflicted with and was preempted by the Ellis Act.

The City argued (1) SPOSFI could not state a facial challenge to the Ordinance; and (2) the imposition of the 10-year waiting period fell within the City’s authority to regulate land use and mitigate impacts on displaced tenants.

The court rejected both arguments. It found that SPOSFI did state a facial challenge to the Ordinance because, in every case where a property owner exercised its Ellis Act rights, the property owner had a locally imposed legal barrier of a 10-year waiting period to make alterations, and it did not matter that the waiting period occurred after the eviction rather than before. The court also held that the complete prohibition of alteration of a nonconforming unit for 10 years reached beyond regulating the particulars of a property owner’s proposed alterations and yet did not help displaced tenants — it therefore constituted an undue burden on the exercise of Ellis Act rights in violation of the Act.

CHAPTER 2 General Plan

Westsidiers Opposed v. City of Los Angeles, 27 Cal. App. 5th 1079 (2018)

Court Upholds the City of Los Angeles's General Plan Amendment for Mixed Use Development Project

The Second District Court of Appeal upheld the City of Los Angeles's General Plan amendment, which changed the land use designation of a proposed project site for a mixed-use development against challenges the decision was prohibited by the City Charter.

The developers filed a permit application with the City for the project, which consisted of the demolition of an automobile dealership and construction of an 800,000 square foot mixed-use project on a five-acre site in West Los Angeles that would include 516 residential units, 99,000 square feet of retail floor area, and 200,000 square feet of office floor area. Project approval required a General Plan amendment, a zoning amendment, multiple conditional use permits, a development agreement, and an environmental impact report. The City Council adopted ordinances approving the General Plan amendment and the project.

Plaintiffs challenged the approvals, alleging 1) the City Charter bars amending the General Plan for a single project site or single parcel, 2) the Charter bars the City from allowing a member of the public to initiate a General Plan amendment, and 3) the City failed to make the required findings.

Under the Charter, the General Plan may be amended by "geographic areas" that have a "significant social, economic or physical identity." The plaintiffs contended that a "geographic area" must be larger than a single lot and the Project site therefore did not qualify as a geographic area with significant or special identity. Relying on principles of statutory construction, the court rejected the plaintiffs' argument and concluded that the Charter did not limit the amendment process to a minimum area or number of parcels and that the court was "prohibited from implying any such limitation or restriction on the City's exercise of its power to govern municipal matters." The court concluded the City did not violate the Charter by amending the General Plan designation for a single parcel because the Charter did not clearly restrict the City's power to do so.

Plaintiffs also argued that the City did not make the required findings that the lot was a "geographic area" or that "the lot has a *significant* economic or physical identity." The court disagreed, noting that the City is not required to make explicit findings to support the General Plan amendment because the amendment is a legislative act. Regardless, the court held that the City did make explicit findings that the lot had unique characteristics because it was a transit-oriented district that necessitated higher density that would reduce vehicle trips and provide greater local amenities to the neighborhood.

Plaintiffs also argued that the City violated the Charter by allowing the project developers to initiate the General Plan amendment. The court summarily rejected this argument finding that the developer simply requested an amendment while the Director of Planning signed the form initiating the amendments as required under the Charter. Thus, the City did not violate the Charter because the Charter does not prohibit the City from receiving amendment requests from private parties.

CHAPTER 4

Zoning

Hauser v. Ventura County Board of Supervisors, 20 Cal. App. 5th 572 (2018)

Applicant Challenging Denial of Use Permit Must Prove It Is Legally Entitled to Permit

In an unsurprising decision, the Second District Court of Appeal upheld Ventura County's decision to deny a use permit that would allow tigers to be kept on property located within a half-mile of a residential area.

Background. Plaintiff Irena Hauser applied for a conditional use permit that would allow five tigers to be kept on a 19-acre parcel in an unincorporated area of Ventura County. The proposed project would include several tiger enclosures and an arena within a seven-acre area surrounded by a chain link fence. The plaintiff planned to use the tigers in the entertainment business and transport them for that purpose up to 60 times per year.

Neighbors strongly opposed the project and presented a petition to the county which contained roughly 11,000 signatures in opposition. The planning commission denied the permit application, and on appeal, the board of supervisors did the same, finding the plaintiff failed to prove two elements necessary for a use permit: that the project was compatible with the planned uses in the general area, and that it was not detrimental to the public interest, health, safety or welfare.

The Court of Appeal's Decision. The court of appeal upheld the trial court's decision rejecting the plaintiff's challenge. The court first explained that, as the permit applicant, the plaintiff had the burden to show she was legally entitled to a use permit. She had, however, failed to persuade the board of supervisors that the requirements for a use permit were met. In passing, the court stated that the board's determination that the requirements were not met did not have to be supported by substantial evidence because it is the absence of evidence of sufficient weight and credibility to convince the trier of fact that leads to that conclusion. Nevertheless, the court undertook a thorough review of the record and found that the board's decision was amply supported by substantial evidence.

The court noted that it would be appropriate to focus on the evidence that would tend to support the board's decision rather than the evidence that would tend to detract from it. Where the trier of fact has drawn reasonable inferences from the evidence, a reviewing court does not have authority to draw different inferences, even though they might also be reasonable.

Applying this standard, the court observed that the property was located in an area that contained a significant number of homes and that it was reasonable for the county to conclude that keeping tigers was not compatible with the area's use. This determination alone was sufficient to deny the permit application.

The court rejected the plaintiff's argument that the project was compatible with the area's open space zoning, declaring that a tiger compound surrounded by a chain link fence was not "open space." Nor was the plaintiff entitled to a use permit simply because similar projects had been approved in other residential areas.

The court also found ample evidence supporting a finding that the tigers posed a danger to the public. Rejecting the plaintiff's evidence that escaped captive-born tigers pose little risk to the public, the court cited evidence in the administrative record of numerous instances where tigers had escaped, and other instances where they had severely injured or killed people. The court noted that no matter what precautions might be taken to prevent the tigers from escaping, human error was foreseeable, if not inevitable.

The plaintiff further contended that the members of the board of supervisors violated board rules when they met outside of the public hearing with residents and representatives who opposed the project and that, as a result, the plaintiff did not receive a fair hearing before the board. However, the court found no violation because the board members disclosed the meetings as required by the board's rules. Furthermore, the court noted that board members have both a right and a duty to discuss issues of concern with their constituents. Moreover, the plaintiff had not shown clear evidence of actual bias or that her application was not denied on its merits.

J. Arthur Properties, II, LLC v. City of San Jose, 21 Cal. App. 5th 480 (2018)

Court Rejects Interpretation of Medical Marijuana Collective as a "Medical Office" under City's Zoning Code

The Sixth District Court of Appeal has held that a medical marijuana collective is not a "medical office" as defined in San Jose's Municipal Code.

Plaintiffs opened a medical marijuana collective in 2010 at a site zoned Commercial Office. At the time, San Jose's Municipal Code did not regulate any type of marijuana-specific uses and allowed medical offices in Commercial Office zoning areas. The City Council amended the Municipal Code in 2014 to regulate and permit medical marijuana uses in certain industrial zoning area but not in Commercial Office areas. Plaintiffs received a compliance order in 2014 stating that medical marijuana collectives were not permitted in Commercial Office zoning areas, effectively requiring them to discontinue their business at the site.

Plaintiffs sued, contending that their marijuana collective should continue to be allowed as a legal, nonconforming use. The Sixth District Court of Appeal disagreed. San Jose's Municipal Code defines medical office as "offices of doctors, dentists, chiropractors, physical therapists, acupuncturists, optometrists, and similar health related occupations, where patients visit on a daily basis." Plaintiffs argued that medical marijuana collectives should be considered medical offices because they provide a medical and health-related service. The court declined this broad interpretation, observing that medical marijuana collectives did not fall under any of the enumerated uses listed in the definition and that a medical marijuana collective is not a "similar health related occupation." Emphasizing that the enumerated uses typically involve the on-site treatment of patients by a physician or other professional, the court found no evidence that medical marijuana collectives provided a similar service. Instead, "members of collectives are patients of the physicians who prescribed marijuana."

Accordingly, the court held that the collective had never been a permitted use to begin with and hence could not be a legal nonconforming use.

City of Morgan Hill v. Bushey (River Park Hospitality, Inc.; Morgan Hill Hotel Coalition), 5 Cal. 5th 1068 (2018)

Zoning Ordinance Adopted to Make Zoning Consistent with General Plan May Be Rejected By Referendum

The California Supreme Court has resolved a split among the courts of appeal, concluding that citizens may bring a referendum to challenge a zoning ordinance even if the referendum would temporarily leave in place zoning inconsistent with the general plan.

Government Code Section 65860 requires a city's zoning ordinance to be consistent with the general plan. When a zoning ordinance becomes inconsistent due to a general plan amendment, the city must enact a consistent zoning ordinance within a "reasonable time." Gov't Code Section 65860(c).

Here, voters in the City of Morgan Hill rejected by referendum a zoning ordinance the city council enacted to bring zoning into consistency with its recently amended general plan. The city claimed that by rejecting the zoning ordinance, the voters essentially enacted inconsistent zoning in violation of Section 65860.

The court disagreed. It held that unlike an initiative or ordinance that enacts inconsistent zoning, a referendum that leaves inconsistent zoning in place simply does so for a limited period of time — "until the local government can make the zoning ordinance and general plan consistent in a manner acceptable to a majority of voters." So long as there are other consistent zoning designations available, or the local government has other ways to make the zoning consistent and general plan consistent, then such a referendum is valid.

Furthermore, the court interpreted the "reasonable time" provision of Section 65860(c) as providing localities some undefined time to act, and determined that the time taken for a single referendum rejecting a zoning ordinance did not violate this limitation.

Because the trial court had not addressed whether there were other viable zoning designations or other options for the city to resolve the inconsistency between the existing zoning ordinance and the general plan, the court remanded the case for further consideration of these issues.

CHAPTER 6

California Environmental Quality Act (CEQA)

Heron Bay Homeowners Association v. City of San Leandro (Halus Power Systems), 19 Cal. App. 5th 376 (2018)

Attorneys' Fees Can Be Awarded to CEQA Litigants Hoping to Preserve Their Home Values

Successful petitioners under CEQA who are motivated to file suit, in part, by their private financial interests are not necessarily ineligible for an award of attorneys' fees under the public interest fee statute.

Halus Power Systems sought approval from the City of San Leandro for a zoning variance to construct a 100-foot-tall wind turbine on a five-acre industrial parcel. The property is located in the San Francisco Bay Estuary, where many species of waterfowl and shorebirds, including four threatened or endangered species, reside. The property is also roughly 500 feet from the 629-unit Heron Bay residential development. The city approved the construction of the turbine based on a mitigated negative declaration, finding that the significant environmental effects of the project could be reduced to insignificance through eleven mitigation measures.

The Heron Bay Home Owners Association filed suit under CEQA, asserting that the city needed to prepare an EIR for the project. The trial court rejected the mitigated negative declaration, finding a fair argument that the project as mitigated would still have a significant effect on biological and aesthetic resources and noise. It entered judgment in favor of the HOA and directed the city to set aside its approvals and halt any further action on the project until an EIR was certified. Halus Power and the city did not appeal the decision, and Halus Power ultimately abandoned the project.

Heron Bay HOA then requested an award of attorney's fees under California Code of Civil Procedure section 1021.5, which authorizes an award of attorney's fees to the prevailing party in a case that enforces an important right affecting the public interest. The trial court awarded the HOA only part of the fees it sought finding that the HOA "had a significant financial incentive to initiate the litigation." The court found that the HOA members had brought the suit in part because they feared the turbine would cause their property values to decrease. But it also found that they were also motivated by "non-pecuniary" concerns for the project's impact on wildlife, aesthetics, health and noise levels. As a result, the court apportioned financial responsibility for their attorney's fees during the administrative proceedings entirely to the HOA, but because of the "different risks and much larger financial commitment" of CEQA litigation, it divided equally the responsibility for the fees the HOA incurred for the litigation between the HOA on one side, and the city and Halus Power on the other.

Halus Power and the city appealed the award of attorney's fees, arguing that a fee award was not appropriate because the value of the benefit to the members of the HOA (i.e., maintenance of their property values) far exceeded the financial burden of litigation.

The court of appeal disagreed. It found that any financial benefit to the home owners was speculative since the litigation was not certain to prevent construction of the turbine or even change the project, and preservation of property values was not immediately or certainly "bankable." And while the exact amount of personal benefit to the HOA members was uncertain, the fees could nevertheless be apportioned because the record supported an implied finding that the HOA's motivations to litigate were not purely financially self-interested. Thus, the court of appeal ruled, the trial court's apportionment and partial award of attorney's fees was not an abuse of discretion.

The court of appeal affirmed the trial court's award to Heron Bay HOA for a little over \$181,000 in attorney's fees for the CEQA litigation, which was less than half the amount that the HOA had requested. The court also awarded the HOA its attorneys' fees for successfully defending the appeal.

This decision exemplifies the rule that trial courts have considerable discretion in awarding and apportioning attorneys' fees under section 1021.5 based on the particular facts of each case. More importantly, it makes it crystal clear that CEQA plaintiffs that might avoid a decrease in their property values by successfully challenging a project are not cut off from recovering section 1021.5 attorneys' fees.

City of Long Beach v. City of Los Angeles (BNSF Railway Company), 19 Cal. App. 5th 465 (2018)

EIR For Railyard Did Not Adequately Analyze Air Quality Impacts

Rejecting most challenges to the environmental impact report for a new railyard near the Port of Los Angeles, a court of appeal nevertheless held that the EIR must be decertified because it did not adequately address air quality impacts in the vicinity of the new yard.

When BNSF Railway Company proposed the project, the port was served by on-dock railyards, one near-dock railyard five miles north of the port, and two off-dock railyards 24 miles north. Trucks are used to transport cargo containers between the port and the near-dock and off-dock railyards. One of the effects of the new near-dock railyard would be to substitute four-mile trips on surface streets for many existing 24-mile trips via freeway to and from the off-dock railyards. Project opponents concerned about the impacts of this shift in port truck traffic sued under CEQA.

The court held that crucial information regarding air quality was omitted from the EIR. The EIR showed that total particulate matter emissions from trucks would be reduced by the project compared to the no project alternative, because a four-mile truck trip is shorter than a 24-mile trip. But the court concluded the EIR did not adequately explain that in the vicinity of the proposed railyard, air quality would be substantially worse with the railyard than without it, and that the vicinity included homes and schools.

In addition, the EIR did not estimate how frequently or for what length of time the level of particulate air pollution in the area surrounding the new railyard would exceed the EIR's standard of significance. Rejecting the port's argument that it would be impractical to run the air quality model for every year of the railyard's projected operation, the court found that selecting a reasonable number of benchmark years for analysis might be acceptable, but that in this case, "the decision to perform only a single modeling run with a 50-year analysis range does not comply with CEQA."

The court also rejected one element of the EIR's analysis of cumulative air quality impacts, holding that the EIR did not adequately focus on the combined impacts of the proposed project and another large railyard expansion proposed by Union Pacific adjacent to the proposed project. The fact that independent CEQA analysis of the Union Pacific project had been delayed did not excuse the port from a focused, rather than general, discussion of two large railyard expansions proposed to be located next to one another.

As to another challenge to the EIR, the court upheld the analysis. Plaintiffs argued that the EIR was defective because it did not describe in its project description, or analyze as an indirect impact, the near-dock rail project's effect of freeing capacity at BNSF's existing off-dock "Hobart" railyard. They argued that the EIR was required to account for truck trips to and from the Hobart railyard that would result from its new excess capacity. The court was not persuaded, stating that the record supported the EIR's conclusion that a predicted level of economic growth would occur over the decades with or without the

near-dock rail project, and that the project was not necessary to enable BNSF to service anticipated growth at Hobart. Accordingly, the court concluded, any growth at Hobart would not constitute an indirect impact of the near-dock railyard.

The City of Long Beach case is consistent with a long line of CEQA decisions that focus with particular intensity on claims of air quality impacts to communities located near proposed emitters of diesel particulate and other toxic air contaminants.

Visalia Retail, LP v. City of Visalia, 20 Cal. App. 5th 1 (2018)

Size Limit on Retail Tenants Not Likely to Cause Urban Decay

A general plan policy that limited the size of retail tenants in certain areas of a city was not likely to cause urban decay and was not inconsistent with other general plan policies encouraging infill development.

The City of Visalia's general plan update included a policy that Neighborhood Commercial areas should be anchored by a grocery store and could not have individual tenants greater than 40,000 square feet. Visalia Retail, which owned property designated Neighborhood Commercial, filed a petition for writ of mandate seeking to invalidate the city council's certification of the EIR and adoption of the general plan update. Visalia Retail argued that the EIR should have analyzed the potential for the tenant size cap to cause urban decay and that the general plan was internally inconsistent. The superior court ruled in favor of the city, and the court of appeal upheld the superior court's decision.

Potential for Urban Decay

The petitioner argued that the EIR should have analyzed the potential for urban decay to result from the tenant size cap. The petitioner had submitted a report from a real estate broker that explained the policy would likely lead to vacancies, physical blight, and urban decay because, in his opinion, it was unlikely a grocery store anchor would be willing to lease a space that was smaller than 40,000 square feet. In support, the real estate broker stated in his report that (1) he was personally unaware of any grocers willing to build new stores under 40,000 square feet, (2) a typical grocery store for four grocery chains must be at least 50,000 square feet to be profitable, (3) 10,000–20,000-square-foot stores launched by a large grocery chain had been unsuccessful, and (4) three grocery stores in Visalia under 40,000 square feet had closed.

While an EIR does not need to study economic and social changes resulting from a project, physical changes to the environment that are caused by a project's economic or social impacts are environmental effects that must be considered under CEQA. The court of appeal concluded that the real estate broker's report did not provide substantial evidence that the 40,000-square-foot limit would cause urban decay in the form of significant physical effects on the environment.

The court explained that the real estate broker's report did not support an argument that no grocers would be willing to build stores under 40,000 square feet. The court noted that the report's conclusion was based only on the real estate broker's personal knowledge, the typical store size for four grocery chains, and one chain's experience with stores under 20,000 square feet. The court also noted that the report indicated that some grocers in some circumstances had built stores under 40,000 square feet, which contradicted the real estate broker's conclusion that no grocers would build stores under 40,000 square feet. Moreover, the court noted that the report did not provide a reason why the three stores in Visalia under 40,000 square feet had closed. Finally, the court determined that the real estate broker's report did not demonstrate that any vacancies in Neighborhood Commercial areas as a result of the tenant size cap would be so rampant as to cause urban decay.

General Plan Consistency

The petitioner also argued that the general plan was internally inconsistent. The petitioner claimed that the 40,000-square-foot limit conflicted with eight other policies and goals in the general plan, including a goal to promote infill development. The court of appeal rejected the petitioner's argument. The court concluded that the city council could have reasonably concluded that the tenant size cap would not impede infill development because tenants larger than 40,000 square feet were permitted in other areas of the city. The court also explained that the city could reasonably decide to restrict the nature of infill development in some areas in order to pursue other goals, such as encouraging smaller businesses or promoting pedestrian-oriented retail:

"In sum, just because the general plan declares a goal of promoting infill development does not mean *all* of its policies must encourage *all* types of infill development. General plans must balance various interests, and the fact that one stated goal must yield to another does not mean the general plan is fatally inconsistent. Few, if any, general plans would survive such a standard."

John R. Lawson Rock & Oil, Inc. v. State Air Resources Board, 20 Cal. App. 5th 77 (2018)

Air Resources Board's Regulatory Relief for Small Truck Fleets Violated CEQA

A court of appeal has held that the California Air Resources Board violated CEQA when it issued a "regulatory advisory" notifying small trucking operations that they need not meet ARB's regulatory deadline for retrofitting their truck engines, and that the regulation would soon be relaxed. The court rejected ARB's argument that it did not need to prepare the equivalent of an environmental impact report before issuing the regulatory advisory.

In 2008, ARB adopted its Truck and Bus Regulation, requiring retrofits or upgrades to large diesel vehicles so that their air pollutant emissions would not exceed those of model year 2010 or newer trucks. January 1, 2014, was to be the deadline for small fleets to bring at least one of their trucks into compliance. By October 2013, the vast majority of the 260,000 California-registered trucks were in compliance; of those that still needed retrofits, most were in small fleets. In November 2013, ARB decided to ease the rules applicable to small fleets, issuing a "regulatory advisory" that it would take no enforcement action against noncompliant truck operators before July 1, 2014, and that operators could rely on five regulatory changes ARB planned to adopt in 2014 that would make the Truck and Bus Regulation more lenient.

In 2014, ARB approved the revised regulations without preparing an EIR-equivalent CEQA document under its certified regulatory program. ARB reasoned: "The amendments only change the mid-term timing of clean-up of the truck fleet and, therefore, do not result in any increase in emissions compared to existing environmental conditions." A truck operator that had complied with the regulation on time sued, alleging ARB had violated CEQA and the Administrative Procedures Act.

Citing the California Supreme Court's decision in *Save Tara v. City of West Hollywood*, the court held that ARB violated CEQA when it approved the regulatory advisory in 2013, because it had publicly announced that the regulation would be changed and that its existing terms would not be enforced. In so doing, ARB significantly furthered its proposed 2014 regulatory changes in a manner that foreclosed alternatives or mitigation measures, including the alternative of not going forward with the project. Accordingly, CEQA compliance was required at that point.

The court ruled that that ARB was required to prepare the equivalent of an EIR for its relaxation of the Truck and Bus Regulation, based on the difference between future conditions with and without its

proposed regulatory change. The court cited CEQA's requirement that a lead agency discusses any inconsistencies between the proposed project and applicable plans, including the State Implementation Plan for air pollutant reductions and the state's plans for reductions in greenhouse gas emissions. Because there was a fair argument that ARB's action would conflict with these plans, at least in the short- to medium-term, an EIR-equivalent document was required.

The decision in *Lawson* demonstrates both the difficulties ARB faces in conforming its regulatory decisionmaking to the demands of CEQA and the heightened attention courts pay to air quality and greenhouse gas impacts.

Aptos Residents Assoc. v. County of Santa Cruz, 20 Cal. App. 5th 1039 (2018)

Court of Appeal Upholds Supplemental EIR that Includes Quantitative Greenhouse Gas Impacts Analysis

In *Aptos Residents Association v. County of Santa Cruz*, the court of appeal upheld Santa Cruz County's use of a CEQA exemption to approve a distributed antenna system (often referred to as a DAS) for the provision of cell service.

The court found that the project fit squarely within the intended scope of CEQA's Class 3 categorical exemption for small facilities and structures. The court also rejected petitioners' arguments that there was an applicable exception that would have precluded the use of the exemption.

Background

The project involved 10 microcell transmitters that would be used as part of Crown Castle's distributed antenna system. Each microcell consisted of a two-foot by one-foot antenna mounted on an extender pole that would be attached to an existing utility pole. Crown Castle submitted a separate permit application for each microcell. Raising concerns about health and aesthetics, residents began mounting opposition to the project.

The county jointly considered the applications for the microcells and determined that they fell within the Class 3 exemption for small structures. After conducting site visits and reviewing photo simulations, the county concluded that the microcells would not result in any visual or other environmental impacts. Residents filed suit, contending that the county's approval of the project violated CEQA.

The Court's Decision

The residents' petition claimed the county violated CEQA in several ways: by improperly segmenting the project; by finding the project fell within the Class 3 exemption; and by using an exemption where an exception barred an exemption. The court of appeal found these claims unavailing.

Improper segmentation

The court rejected petitioners' contention that because Crown Castle applied for a separate permit for each microcell, the project was improperly segmented. The county expressly considered the project to be the entire group of microcells and found that the Class 3 exemption was applicable to all of the microcells. The fact that Crown Castle filed a separate permit for each microcell unit was irrelevant. Applicability of exemption.

The Class 3 categorical exemption applies to "limited numbers of new, small facilities or structures" including "electrical, gas, and other utility extensions." The court found the project to fall squarely within

the class of projects intended to be covered by this exemption, recognizing that the exemption extends to multiple small structures in scattered locations.

Exceptions to the use of the exemption

Petitioners urged the court to find applicable several exceptions that would have precluded the use of the Class 3 exemption. The court declined, finding that that petitioners failed to meet their burden to identify evidence supporting an exception.

Cumulative impact exception. The cumulative impact exception bars an exemption where the cumulative impact of “successive projects of the same type in the same place, over time is significant.” Petitioners claimed that this exception should apply because AT&T intended to implement its own distributed antenna system in the area at some time in the future. The court rejected this argument as amounting to “mere speculation” as petitioners provided no evidence that AT&T was actually pursuing a project or any evidence of the location of AT&Ts would-be facilities.

Location exception. The CEQA Guidelines prohibit use of the Class 3 exemption if the activity may have an impact on an environmental resource of “hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state or local agencies.” The county’s zoning of the project area as “Residential Agricultural” did not meet this requirement as nothing in the zoning ordinance specifically designated the zone as “an environmental resource of hazardous or critical concern.”

Unusual circumstance exception. Under the CEQA Guidelines, an exemption cannot be used where there is “a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” The court found nothing unusual in microcells being built in rural areas, as such areas “clearly need utilities, including cell coverage.”

Don’t Cell Our Parks v. City of San Diego, 21 Cal. App. 5th 338 (2018)

Application of Small Facilities Exemption to Cell Tower in Neighborhood Park Upheld

Verizon Wireless obtained approval from the City of San Diego to construct a cell tower in a dedicated neighborhood park. The petitioner challenged the city’s decision that the facility was exempt from CEQA under the categorical exemption for small facilities, but the court of appeal upheld the city’s determination.

The court first rejected the petitioner’s argument the project did not qualify for the small facilities exemption because it was a stand-alone utility structure, rather than an urban infill development. While none of the examples of exempt facilities listed in the exemption directly applied, the court found the tower fell within the scope of the exemption: It is a small facility that is much smaller than the types of structures that are listed as examples, such as a residence, store, motel, office or restaurant.

The court also rejected the petitioner’s argument an exemption was barred by the “unusual circumstances” exception to the categorical exemptions. Under that exception, an activity cannot be found exempt where there is a reasonable possibility it will have a significant environmental effect due to unusual circumstances. The court found the circumstances were not unusual because at least 37 similar facilities are located in city parks. It also found that the city’s detailed analysis of biological, aesthetic, recreation and construction impacts supported the city’s finding there was no reasonable possibility the project would have a significant impact on the environment.

The petitioner's alternative contention that the "location exception" applicable to projects that may impact officially designated environmental resources of critical concern also failed, given the absence of any such designation.

Covina Residents for Responsible Development v. City of Covina, 21 Cal. App. 5th 712 (2018)

Mitigated Negative Declaration for Infill Project Upheld Against Claims Parking and Traffic Impacts Would Be Significant

The petitioner, CCRD, challenged the mitigated negative declaration for a 68-unit, mixed-use infill project. Its principal CEQA claims related to the project's parking and traffic impacts. The court of appeal found both claims were meritless.

The project's parking impacts were exempt from CEQA. Under Public Resources Code section 21099(d)(1), the parking impacts of qualifying infill projects within a half-mile of a major transit stop are exempt from CEQA. The court found the project easily qualified: it would be located in an urban area, on a site that had been previously developed, within a quarter-mile of a commuter rail station. As a result, any claim the project lacked adequate parking was barred. While the statute does not exempt impacts relating to air quality, noise, or safety impacts that may occur as secondary parking impacts due to resulting traffic congestion, the adequacy of parking itself is exempt from CEQA review.

The MND's review of traffic impacts was properly tiered from the applicable specific plan EIR. The mitigated negative declaration relied on the analysis of traffic impacts in the EIR certified for the city's Town Center Specific Plan. CCRD argued that the traffic impacts that might result from a shortage of project parking might be significant and that those impacts were not anticipated by the specific plan EIR. The court disagreed: The city had conducted a project-specific trip analysis and required the project to comply with relevant mitigation requirements for road improvements and CCRD had not identified any evidence showing this was insufficient.

Rodeo Citizens Ass'n. v. County of Contra Costa, 22 Cal. App. 5th 214 (2018)

Court Rejects Challenge to Refinery EIR's Project Description, GHG Emissions Analysis and Hazards Assessment

The county certified an EIR and approved a land use permit for a propane recovery project at an existing oil refinery. The project would modify some existing equipment and add other equipment to allow the refinery to recover butane and propane as a byproduct of the refining process and ship it by rail for commercial sale.

The trial court found the EIR's air impact analysis inadequate but rejected the petitioner's other claims. Unsatisfied with that result, the petitioner appealed, but the court of appeal also ruled against the petitioner on those claims.

The project description was accurate and adequate. The petitioner contested the EIR's project description, arguing the project would involve more frequent processing of "nontraditional" crude feedstocks – such as imported tar sands and Bakken crudes -- which would contain higher levels of propane and butane, together with higher levels of dangerous chemicals that would increase emissions of air pollution. The court, however, found no support for the claim, concluding the evidence showed that the project was proposed and designed as an adjunct to existing operations, not to change the types or amount of crude oil that can be processed at the refinery. The project would allow recovery of butane

and propane produced by ongoing refinery operations, but it would not increase the amount of butane and propane that are produced, and would not change any of the other process units at the refinery.

An analysis of downstream GHG emissions would require undue speculation. The petitioner further argued the EIR was deficient because it did not analyze greenhouse gas emissions from combustion of the propane and butane that would be sold to downstream users. The EIR explained, however, that propane and butane have many non-fuel uses that generate negligible greenhouse gas emissions, and can also be used to replace fuels with higher emissions. Given the uncertainty regarding end uses, coupled with the highly changeable nature of the propane and butane market, any attempt to quantify downstream GHG emissions would be speculative, so a downstream emissions analysis was not required.

Public and environmental hazard impacts were adequately analyzed. Petitioner also challenged the EIR's findings that the project would not have a significant impact on the public or the environment from the handling and transportation of hazardous materials, including a claim that the EIR failed to analyze the project's contribution to the cumulative risk of rail-related accidents. The EIR concluded that because the project would add tank cars to existing trains, and not add new train trips, the cumulative risk of train accidents would not increase. The court found this explanation "not unreasonable." It also rejected petitioner's other arguments regarding hazard impacts, finding that the EIR's exceptionally detailed risk analysis was plainly sufficient.

Jensen v. City of Santa Rosa, 23 Cal. App. 5th 877 (2018)

Negative Declaration Survives Challenge Based on Non-Expert Opinion About Noise Impacts

Claims of significant noise impact unsupported by expert opinion, fact, or reasonable inference did not provide grounds for challenging a negative declaration.

The project, called the Dream Center, would provide emergency shelter for homeless youth and transitional housing for young adults, as well as counseling, health, education, and job placement services. The center would also provide outdoor recreational activities for residents, including a basketball area, pottery throwing area, and garden. The center would occupy a vacant building formerly used as a hospital. A wooden fence and landscaping separated the rear parking lot from an adjacent residential neighborhood.

The City of Santa Rosa adopted a negative declaration and approved a rezoning and conditional use permit for the project. Conditions of approval limited parking in the rear lot to employees during normal operating hours. The city's negative declaration relied on a noise study prepared by an engineering firm. The noise study concluded that noise impacts would be less than significant because noise would not exceed standards in the city's general plan or noise ordinance, and would not increase noise levels more than 5 dBA Ldn above existing conditions. (Ldn is the average day/night noise level.)

The petitioners, who lived near the project, asserted there was a fair argument the project would cause significant noise impacts from vehicles in the rear parking lot and from outdoor recreation activities. The petitioners based their main arguments on their own calculations using data taken from a noise study for a different project in the city called Tower Market, a 24-hour convenience store and gas station.

The court held that no substantial evidence supported the petitioners' claims.

First, the court found that the petitioners misused noise data from the Tower Market study. The petitioners took the Tower Market study's noise level estimates for passing vehicles, and argued that these estimates exceeded maximum noise levels that they had calculated. The court explained that the petitioners' calculations showed very little about noise impacts because they did not predict the average

noise level over a period of time. Further, the court noted, this methodology was not backed up by any expert opinion.

Second, the court concluded that the petitioners' argument regarding parking lot noise was grounded on speculation and hypothesis rather than fact, expert opinion, or reasonable inference. The petitioners asserted that cars and trucks could drive through the rear parking lot at all hours of the day and night. The court explained that this claim was "most improbable and not a fair inference from the evidence," particularly in light of the project characteristics and the conditions of approval. The court also noted that it was "obvious" that Tower Market and the Dream Center were not similar projects: The rear parking lot at the Dream Center would have much less frequent car traffic (especially at night, when employees would not be allowed to park in the rear parking lot) and would have minimal or non-existent truck traffic, as compared to a 24-hour market and gas station.

Third, the court rejected the petitioners' interpretation of the city's noise ordinance. The city's noise ordinance set forth base ambient noise levels based on a property's zoning and time of day. The petitioners treated these noise levels as thresholds of significance. The noise ordinance, however, specified that the base noise levels were intended to be used for comparative purposes, and noise level is one of twelve factors to be considered in determining whether a noise impact violates the noise ordinance.

Finally, the court rejected the petitioners' arguments that the noise from outdoor recreation activities (basketball, pottery, and gardening) would be significant. The court held that the petitioners' methodology was "vague and hard-to-grasp," was not a "legitimate factual or scientific basis for finding a significant impact," and was "not supported by expert opinion."

In this case, the petitioners' only evidence of significant noise impacts was their own calculations and lay opinion. The court held that this was not enough to support a fair argument of significant impact. The court's decision in *Jensen* indicates that petitioners challenging a negative declaration based on noise impacts or other technical issues will need to support their arguments with expert opinion.

County of Ventura v. City of Moorpark, Broad Beach Geologic Hazard Abatement District, 24 Cal. App. 5th 377 (2018)

Settlement Agreement for Beach Restoration Project Found Exempt from CEQA

The court of appeal upheld a settlement agreement between the City of Moorpark and the Broad Beach Geologic Hazard Abatement District, finding that the settlement agreement was statutorily exempt from CEQA. The court rejected the County of Ventura's argument that the settlement agreement and beach restoration project were separate, nonexempt projects under CEQA.

The district was formed to restore a 46-acre stretch of beach. The beach restoration project would require sand deposits of over 1.5 million cubic yards over a period of 20 years. During the project approval process, the city and district entered into a settlement agreement to address the city's concerns that hauling sand through the city would negatively impact residents.

The court of appeal rejected the county's argument that the beach restoration project and the settlement agreement should be treated as separate and distinct projects under CEQA. The court found that the district was formed with the mandate to make improvements to the beach to address geologic hazards and the beach restoration project and the settlement agreement, which addressed trucks hauling sand through the city, were "one piece of a single, coordinated endeavor to address erosion at Broad Beach, and is thus part of the whole of the action." The court further held that the settlement agreement and the

beach restoration project were a single project since the settlement agreement and restoration activities served a single purpose of abating a geologic hazard, and even if the beach restoration could be completed without the agreement, the two became linked when the settlement agreement was incorporated into the coastal development permit for the project.

Accordingly, the court of appeal upheld that the settlement agreement and held that the entirety of the beach restoration project, including the settlement agreement, was exempt from the requirements of CEQA.

World Business Academy v. CA State Lands Comm'n, 24 Cal. App. 5th 476 (2018)

Seven-Year Extension of Diablo Canyon Lease Held Exempt from CEQA

A court of appeal has rejected CEQA and public trust challenges to a State Lands Commission lease extension allowing the Diablo Canyon nuclear power plant to continue operating through 2025.

Pacific Gas & Electric Company plans to cease operating Diablo Canyon in 2025, when the plant's federal licenses will expire. The plant's cooling water intake and discharge structures are on state-owned submerged and tidal lands, for which the Commission had issued leases to PG&E expiring in 2018 and 2019. The Commission granted PG&E a consolidated lease extension through 2025, relying on CEQA's categorical exemption for continued operation of existing facilities.

CEQA's categorical exemptions are subject to several exceptions that can force a lead agency to prepare a negative declaration or an environmental impact report. The "unusual circumstances" exception applies "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Here, Diablo Canyon opponents argued that continued operation of the state's last nuclear power plant was rife with unusual circumstances that could cause significant environmental effects.

To show that the unusual circumstances exception applies, normally a challenger must show both: 1) unusual circumstances; and 2) a reasonable possibility of a significant environmental effect due to those unusual circumstances. Here, the Commission had made no finding regarding unusual circumstances. With no finding before it, the court of appeal elected to assume unusual circumstances did exist, and then proceeded to the second half of the test: whether there was a fair argument that the lease extension would cause significant environmental impacts.

The court began by holding that the baseline for its analysis consisted of existing operations under the lease. In so doing, the court followed an earlier case (*North Coast Rivers Alliance v. Westlands Water District*, 227 Cal. App. 4th 832 (2014)) that applied the same rule with respect to Central Valley Project water contract renewals.

The court then reviewed each factor the challenger claimed raised a fair argument of significant environmental effects — Diablo Canyon's size, location, impacts on human health and marine life, fuel rod storage, reactor embrittlement, risks from seismic events and terror attacks, and status as the state's last remaining nuclear plant — and found that none of these conditions would be changed by the lease extension. Because there was no fair argument of significant environmental effects from the extension, the court held the Commission did not violate CEQA.

Finally, the court rejected the challenger's claim that the lease renewal was inconsistent with the public trust, holding that the Commission's balancing "of the public trust rights to navigation, fisheries, and environmental protection against the public need for efficient electrical production" was not arbitrary, capricious, or procedurally irregular.

The opinion in this case is instructive in two respects. First, it reinforces precedent holding that however damaging an existing environmental condition is alleged to be, that condition is still the baseline under CEQA, and only a project-caused worsening of that condition is a CEQA concern. Second, the case is a reminder that if the lead agency fails to make findings supporting the conclusion that a proposed project involves no unusual circumstances, the court may assume the project *does* involve unusual circumstances. The court will then proceed to ask whether project opponents have raised a fair argument that the project will cause significant environmental effects. Although project opponents often cannot meet even this low threshold, lead agencies relying on potentially controversial categorical exemptions should minimize this risk by making findings regarding unusual circumstances.

LandWatch San Luis Obispo County v. Cambria Community Services District, 25 Cal. App. 5th 638 (2018)

An Agency Can Take Over Preparation of the Record When a Petitioner that Elects to Prepare the Record Unreasonably Delays Preparing It

In a case brought under CEQA to challenge an agency determination or other action, the petitioner may elect to prepare the administrative record, subject to the agency's certification of its accuracy. The petitioner here filed an action challenging an exemption determination by the community services district for an emergency water supply project and notified the district it would prepare the record.

It took the petitioner nine months to provide the district with a draft administrative record index. The district notified the petitioner that a key document had been omitted and other documents should have been excluded because they postdated the approval. The district also notified the petitioner that in order to expedite the process, it had prepared a new index and would immediately certify the record based on that index.

Subsequently, at the petitioner's request, the court ordered that the record be augmented with additional documents and included in an appendix to the administrative record that the district had certified. After the petitioner failed to assemble the appendix, the district prepared the appendix itself.

Ultimately, the trial court denied the petition, finding that the district had properly determined the project was exempt from CEQA. The court awarded the district \$21,160 in costs for preparation of the record and the supplemental appendix.

On appeal, the petitioner objected that the cost award was improper because it had elected to prepare the record. Noting CEQA's 60-day time limit for preparation of the record, the court of appeal ruled that the petitioner had unreasonably delayed preparation of the record. As a result, the petitioner had forfeited its right to prepare the record, and it was appropriate for the district to step in and prepare the record itself.

California Water Impact Network v. County of San Luis Obispo (Justin Vineyards and Winery, LLC), 25 Cal. App. 5th 666 (2018), Protecting Our Water & Environmental Resources v. Stanislaus County, (2018) (unpublished)

Supreme Court to Decide if CEQA Review is Required for Well Permits

The Supreme Court of California has granted review of two cases to resolve a split among courts of appeal over whether the issuance of well permits pursuant to state standards is subject to CEQA.

At the forefront of these cases is whether the standards issued by the Department of Water Resources for well construction give local agencies any discretion when issuing well permits. Water is a critical resource in the state and with enactment of the Sustainable Groundwater Management Act in 2014, groundwater, particularly its sustainable withdrawal and quality, are issues receiving more attention. Consequently, the practice of ministerial approval of well construction permits by local agencies without discretionary environmental review have come under increasing scrutiny.

In both *California Water Impact Network* and *Protecting Our Water & Environmental Resources*, plaintiffs alleged that the counties' practice of treating approval of well construction permits as a ministerial action results in hundreds of permits being issued each year without CEQA review. The plaintiffs assert that this practice, and the counties' respective ordinances, violate CEQA because the state standards are not entirely objective, rather, they give the counties discretion to consider local environmental factors when issuing a permit. It is against this backdrop that the Court will consider both cases. The Court's decision will likely affect how well construction permits are reviewed and issued by local agencies throughout the state.

Water Code Section 13801 requires local agencies to adopt the minimum standards established by DWR for well construction. These standards, in DWR Bulletins No. 74-81 and 74-90, provide guidance on well construction, location, surface features, seals, casing materials and so forth with the goal of preventing groundwater contamination and pollution. Stanislaus County's well ordinance incorporates both DWR Bulletins, while San Luis Obispo County's ordinance only incorporates DWR Bulletin 74-81, though in practice, the county also applies the standards in DWR Bulletin 74-90.

Plaintiffs in the two cases argued that the DWR Bulletins require that the counties exercise discretion when issuing well permits. In *California Water Impact Network*, plaintiff argued that DWR's standards include consideration of the cumulative depletion of groundwater in approving or denying a permit. In *Protecting Our Water & Environment*, plaintiff relied on a provision in DWR Bulletin 74-90 requiring wells to be located an adequate horizontal distance from potential contamination sources.

The *California Water Impact Network* court ruled that San Luis Obispo County's process for issuing well construction permits was ministerial. The court examined the DWR Bulletins and found that nothing in the standards authorizes the county to consider the cumulative depletion of groundwater when issuing a well permit. The primary purpose of the DWR standards is to protect water quality, not quantity. Furthermore, the court stated that even if the County could impose additional requirements pursuant to DWR's standards, it had not exercised that authority.

The *Protecting Our Water & Environment* court reached an opposite conclusion. It identified a specific provision in DWR Bulletin 74-90 as requiring a local agency to use its discretion when reviewing a proposed well construction permit. Section 8(A) of the Bulletin pertains to well location and provides that "All water wells shall be located an *adequate* horizontal distance from known or potential sources of pollution and contamination" (emphasis added). Section 8(A) lists in a chart the recommended distances from various potential contamination sources but also states that appropriate distances for individual wells requires an evaluation of existing and future site conditions. The court found this language to require local agencies to make a subjective determination with regards to well location. What is "adequate" depends on specific features and local conditions of a well, not fixed standards or technical criteria and a local agency making this determination would use discretion to determine adequate spacing. Because Stanislaus County's well construction ordinance incorporates DWR Bulletin 74-90, the court held that issuance of well construction permits under the ordinance are a discretionary act subject to CEQA.

These cases tee up for the Court whether the DWR Bulletins for well construction contain purely objective standards or if subjective determinations are required to account for the different factors involved in permitting individual wells. Relatedly, the Court may also examine how the counties' ordinances

incorporate and implement the DWR Bulletins. Given the backdrop of these cases, the Court is also likely to opine on the policy and practical implications of its decision. As the *Protecting Our Water & Environment* court recognized, requiring Stanislaus County to complete a CEQA analysis on the hundreds of well permits issued each year may be burdensome and costly, but is required if the county has discretion to dictate how well construction is carried out.

The Court will first review *Protecting Our Water & Environmental Resources* and has deferred action on *California Water Impact Network* pending disposition of the former case.

Protect Niles v. City of Fremont, 25 Cal. App. 5th 1129 (2018)

Aesthetic and Traffic Issues in Historic Overlay District Necessitate EIR

A court of appeal has overturned a city's mitigated negative declaration for a small mixed-use development in a historic overlay district, holding that aesthetic and traffic issues require the preparation of an environmental impact report.

The proposed project, comprising 98 housing units and 3,500 square feet of commercial uses, was to be located in the Niles Historic Overlay District within the City of Fremont. The city approved a mitigated negative declaration for the project, finding that with mitigation incorporated, the project would cause no significant environmental impacts necessitating an EIR.

Residents sued, alleging that an environmental impact report was required because substantial evidence supported a fair argument that the project would cause significant impacts: due to 1) aesthetic incompatibility with the historic district; and 2) traffic impacts that were not acknowledged in the expert traffic report prepared for the city's analysis. The court of appeal upheld both challenges and required that an EIR be prepared.

Aesthetics. With respect to aesthetics, the court cited CEQA's express concern for aesthetic and historic environmental qualities, as well as case law holding that a project's context is vital to assessment of its aesthetic impacts. Here, members of both the public and the city's Historical Architectural Review Board had cited the project's "siting, massing, scale, size, materials, textures and colors" as inconsistent with the historic district's "small town feeling."

The court first held that a project's visual impact on a surrounding officially-designated historical district is an appropriate topic for aesthetic review under CEQA, and that such an aesthetic analysis does not undermine the separate scheme for CEQA review of environmental impacts on historical resources. Next, recognizing that aesthetic judgments are inherently subjective, the court observed that objections raised by HARB members and others "were not solely based on vague notions of beauty or personal preference, but were grounded in inconsistencies with the prevailing building heights and architectural styles of the Niles HOD." The court found that these personal observations constituted substantial evidence that the project would cause a significant aesthetic impact in the context of the historic district.

Traffic. The court next concluded that the city's expert traffic report could not prevail over individuals' observations of existing traffic conditions and predictions of hazards. The traffic report concluded that a new left-turn pocket in front of the project, while recommended, was not necessary, based in part on the posted speed limit. Commenters stated, however, that the posted speed limit was often ignored, and that without a left-turn pocket, the combination of high speeds, queued drivers waiting to turn left into the project, and a blind curve would result in dangerous conditions. The court identified these comments as substantial evidence supporting a fair argument that the project would create a traffic safety hazard.

Nor did the city's established significance threshold for deterioration in traffic level of service protect it from the need to prepare an EIR. The city acknowledged that with the proposed project, the level of service nearby would deteriorate from an unacceptable LOS E to a still worse LOS F, but under the city's significance thresholds, this did not constitute a significant impact. The court, citing residents' and officials' reports of extreme traffic backups under existing conditions, concluded that these comments "supported a fair argument that unusual circumstances in Niles might render the thresholds inadequate to capture the impacts...."

Conclusion

The *Protect Niles* decision highlights the importance courts can attach to comments by the public – on both non-technical and technical issues – where an agency proposes to rely on a negative declaration rather than an EIR. Because CEQA is designed to favor EIRs over negative declarations, plausible fact-based comments (as opposed to generalized complaints) can, depending on the circumstances, prevail over both expert reports and agency significance thresholds, leading to the need for an EIR.

San Franciscans for Livable Neighborhoods v. City and County of San Francisco, 26 Cal. App. 5th 596 (1st Dist. 2018)

EIR for Revisions to Housing Element Properly Used Future Population Projections as the Baseline

The court ruled the city did not err by certifying an EIR for revisions to its housing element that relied in part on 2025 population projections as a baseline. While the environmental baseline in an EIR should normally reflect existing conditions, use of a future-conditions baseline is permissible where an existing-conditions baseline would be misleading or without informational value.

After certifying an EIR, defendant City and County of San Francisco adopted a 2009 update to its general plan housing element. San Franciscans for Livable Neighborhoods challenged the adequacy of that EIR on several grounds, including that it improperly relied on population projections, rather than existing conditions, as an environmental baseline for its traffic and water supply impacts analysis. SFLN argued that the EIR's use of 2025 population projections by the Association of Bay Area Governments improperly inflated the baseline in an "analytical sleight of hand."

The court sided with the city, finding that a comparison of existing conditions with and without the housing element was not required. The city had not declined to consider the impacts of the housing element by suggesting that regional population growth was inevitable, as SFLN claimed. Rather, the EIR had discussed projected growth at length, and analyzed traffic and water supply impacts based on those projections.

The court viewed the housing element as a "growth-accommodating rather than growth-inducing" policy. The housing element update was thus distinguishable from other projects where approval would clearly lead to population growth in a previously undeveloped area. The court concluded that "when an amendment to a general plan takes a long view of city planning, the analysis of the amendment's impacts should do so as well."

The lengthy opinion also rejected SFLN's numerous other challenges to the EIR concerning its impacts analysis for traffic and water supply, its baseline and impacts analysis for land use and visual resources, the city's decision not to recirculate the EIR, its alternatives analysis, and the feasibility of certain proposed mitigation measures.

Friends of Riverside’s Hills v. City of Riverside, 26 Cal. App. 5th 1137 (2018)

Possibility that Zoning Standards Might Be Violated in Final Design Did Not Mandate EIR at Tentative Map Stage

A project opponent’s argument that the project might violate zoning laws in the future is not sufficient to require a city to prepare an EIR under CEQA.

The Lofgrens requested a permit to build six single-family homes on an 11-acre parcel in Riverside. The proposed development was within the city’s RC – Residential Conservation Zone, which had unique zoning standards to preserve the area’s topographic conditions. These included two different sets of standards for lot size, dwelling density, and lot coverage depending on whether the development was “conventional” or a “Planned Residential Development.” City zoning laws allowed subdivisions qualifying as PRDs more flexibility to create smaller lots in existing neighborhoods and promoted clustering of lots on less sensitive sections of the property to preserve open space. The Lofgrens applied for a PRD permit with a six-lot tentative tract map and a list of mandatory project requirements that would qualify the project as a PRD.

In response to objections from Friends of Riverside’s Hills to their original application, the Lofgrens also submitted a revised five-lot subdivision map that complied with conventional zoning requirements. The City of Riverside approved the PRD permit, finding the project in compliance with all PRD standards for residential development in the RC Zone. The city conditioned the Lofgrens’ ability to obtain a grading permit on submission of a final tract map and evidence that natural features on steeper portions of the property were preserved as open space. The city also required that future building permits comply with RC Zone “superior design standards.”

The city adopted a negative declaration, concluding that the project did not conflict with any land use provisions that were adopted to avoid or mitigate environmental impacts.

Friends of Riverside’s Hills sued, contending an EIR was required because, in violation of RC Zone standards, the project would require excessive grading and did not cluster residential lots in the least steep portion of the site. Additionally, the organization alleged the city abused its discretion when it approved the permit because it did not provide evidence of the average slope of the lots and deferred the selection of superior design elements to the building-permit stage.

The court held that these claims were too speculative at the tentative map stage because the Lofgrens did not yet have a proposal for the final lot placement and finish grading. The claim that a project *might* violate zoning standards was not enough to require the city to prepare an EIR. The appropriate time for the petitioner’s CEQA challenge over RC Zone violations, the court said, would be when the city approved the grading permit for the proposed project. At that time, the Lofgrens would need to submit a final tract map that complied with RC Zone requirements. Only then would an EIR potentially be required based on deviation from zoning code standards.

Atwell v. City of Rohnert Park (Wal-Mart Stores, Inc.), 27 Cal. App. 5th 692 (2018)

Court of Appeal Holds that Petition Challenging Wal-Mart Project is Barred by Earlier Lawsuit Raising the Same Issues

The court of appeal held that the plaintiff’s challenge to the City of Rohnert Park’s reapproval of a Wal-Mart grocery store was barred by the doctrine of res judicata because a prior proceeding had raised the same issues.

In 2010, the City approved the Wal-Mart project. Following the City's approval, the Sierra Club and Sonoma County Conservation Action (SCCA) filed a petition challenging the project on grounds that it violated CEQA and conflicted with the City's General Plan Policy LU-7. Policy LU-7 sought to "encourage new neighborhood commercial facilities and supermarkets to be located to maximize accessibility to all residential areas. ... to ensure that convenient shopping facilities such as supermarkets and drugstores are located close to where people live and facilitate access to these on foot or on bicycles ... this policy will encourage dispersion of supermarkets rather than their clustering in a few locations."

While the plaintiffs in the 2010 proceeding alleged that the project conflicted with Policy LU-7 in their petition, the plaintiffs did not pursue the claim during the proceeding. The trial court ultimately granted the petition on the CEQA claims and ordered that the resolutions approving the Project be vacated, and that the Project be remanded for additional environmental review with respect to traffic and noise impacts.

The City prepared a revised EIR; however, the EIR did not alter the original EIR's analysis of the project's consistency with the General Plan. Following the City's reapproval of the project in 2015, the plaintiffs filed this current proceeding challenging the project's consistency with Policy LU-7. The trial court denied the petition finding that the petition was barred by the 2010 proceeding under the doctrine of res judicata.

The doctrine of res judicata applies where a claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding, the prior proceeding resulted in a final judgment on the merits, and the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceedings.

The court of appeal affirmed the trial court's finding that the prior and present proceedings both raised the claim that the project was inconsistent with Policy LU-7. The court rejected the plaintiff's argument that the actions raised distinct issues because the prior proceeding did not actually litigate the General Plan issue. Rather, the court held that the doctrine of res judicata applied to issues that could have been litigated, as well as to issues actually litigated, finding that "[n]othing in the record suggests appellants' current petition materially differs from the General Plan consistency claim raised in the [2010] Sierra Club action[.]"

The court also rejected plaintiffs' argument that no privity existed between them and Sierra Club and SCCA. Privity within the context of res judicata concerns a person's relationship to the subject matter of the litigation. The court found that "[t]his case raises issues of harm to the community – namely, the detrimental impact to neighborhood supermarkets caused by having one located in a large commercial area. ... Likewise, Sierra Club and SCCA brought their petition on behalf of its members who are part of the community." Accordingly, the court held that there was privity as the relationships of plaintiffs, the Sierra Club and SCCA to the subject matter of the litigation were identical.

The Inland Oversight Committee v. City of San Bernardino, 27 Cal. App. 5th 771 (2018)

Court Rejects Piecemealing Argument for Ordinances Passed to Encourage Downtown Development

Plaintiffs were barred from relitigating a CEQA challenge to modifications to a development proposal because the same claims had been raised and rejected in an earlier lawsuit.

The Development Proposal and Prior Litigation

In 1982, the City of San Bernardino approved a specific plan and certified an environmental impact report for a proposed residential development. Three years later, the city amended the specific plan to allow for

the construction of low- and moderate-income multi-family units where single-family units had been originally planned. The Highland Hills Homeowners Association filed suit challenging that change.

The HOA lawsuit resulted in a settlement agreement that, for over a decade, continued to evolve as development plans changed. A 2001 second addendum to the settlement (court-approved as a stipulated judgment) introduced a new application process to facilitate approval of future “minor modifications” to the project.

In 2014, the developer applied for approval of modified construction plans as minor modifications. The city’s development director agreed the changes were minor and approved them. At the request of the developer and the city, the trial court which had overseen the settlement agreement agreed that the proposed modifications were “minor” and therefore further action under CEQA was not required. The HOA appealed and the court of appeal upheld the trial court order.

Plaintiffs Barred from Relitigating CEQA Claims

While the appeal of the HOA lawsuit was pending, the HOA, along with two other organizations, filed a separate suit alleging that the city’s approval of the proposed changes under the minor modifications process was “illegal.” They claimed changes to the construction plans required further CEQA review in light of their environmental impacts. They also alleged that the modifications should not have been approved without preparation of a water supply assessment. The trial court dismissed the suit, and the appeals court upheld the dismissal.

The court explained that, in the CEQA context, “if two actions involved the ‘same general subject matter,’ but ‘involve distinct episodes of purported noncompliance,’ the doctrine of res judicata does not apply.” The HOA’s contention that the city violated CEQA by approving the development as a minor modification had, however, been addressed in the earlier lawsuit. The court there had rejected HOA’s arguments regarding each of the purported significant adverse environmental impacts that were alleged.

The court also held that the plaintiffs’ allegation that preparation of a water supply assessment was required for the modified development proposal rested on the premise that the modifications constitute a discretionary project requiring further CEQA review. The court in the first case had, however, determined that supplemental CEQA review was not required for the modification, and plaintiffs were barred from relitigating that finding.

Golden Door Properties v. Co. of San Diego, 27 Cal. App. 5th 892 (2018)

Court Rejects County Guidance Document’s Recommended Significance Standards for GHG Emissions

The court of appeal rejected San Diego County’s 2016 “Guidance Document” for preparation of climate change analysis reports to be used in CEQA documents.

In ruling the county had violated CEQA by adopting the Guidance Document, the court first found that the “efficiency metric” defined in the Guidance Document was designed to establish a recognized and recommended threshold of significance for use in CEQA documents. The county contended the Guidance Document merely suggested a methodology for evaluating GHG emissions. The court disagreed, however, pointing to the fact that the defined efficiency metric of 4.9 metric tons of CO₂ per service population per year established a single, quantifiable volume of omissions -- a level above which a project’s GHG impact would be significant, and below which the impact would be less than significant. The court then ruled that because the Guidance Document established a threshold of significance for

general use, under CEQA it was required to have been developed through a public review process and be adopted by ordinance, resolution, rule, or regulation. But it was not.

The court also found that the EIR for the county's general plan update included mitigation measures which required the county to prepare a climate action plan and to revise its guidelines for determining significance of GHG emissions based on that plan. But no climate action plan was in place when the county published the Guidance Document, nor was it circulated for public review as required by the county's CEQA guidelines.

Additionally, the court held that the efficiency metric in the Guidance Document was not supported by substantial evidence. The efficiency metric had relied on statewide standards, but there was no evidence showing why it would be sufficient for use by projects in San Diego County. The efficiency metric also did not account for variations among different types of development or explain why it would be appropriate to apply it evenly despite project differences.

Save Our Heritage Organisation v. City of San Diego, 28 Cal. App. 5th 656 (2018)

EIR Addendum Process Upheld Against Facial Challenge

The California Court of Appeal rejected a facial challenge to the EIR addendum process, and held that an agency is not required to make new findings in connection with approval of an EIR addendum.

Background

In 2012, the City of San Diego certified an EIR and approved a project to revitalize Balboa Park, a large urban park in the city. The project involved restricting vehicles from entering many of the central roadways and plazas, building a new road to bypass the car-free areas, and constructing an underground parking structure. Four years later, the city approved minor modifications to the project to account for changed conditions at the project site after the initial project approval, comply with current building and stormwater standards, accelerate the project construction schedule, and reduce project costs. The city adopted an addendum to the EIR, which concluded that a subsequent or supplemental EIR was not required.

Facial Challenge to Addendum Process Rejected

The petitioner claimed the addendum process described in the CEQA Guidelines conflicts with CEQA's public review requirements and is not expressly authorized by the statute. The court rejected both claims.

The court began its analysis by noting that the addendum guideline implements CEQA Section 21166, which sets forth conditions when project changes, changed circumstances, or new information requires the agency to prepare a subsequent EIR. The court explained: "the addendum process fills a gap in CEQA for projects with a previously certified EIR requiring revisions that do not warrant the preparation of subsequent EIRs. CEQA authorizes the Resources Agency to fill such gaps in the statutory scheme, so long as it does so in a manner consistent with the statute." The court determined that the addendum process is consistent with and furthers the objectives of CEQA "by requiring an agency to substantiate its reasons for determining why project revisions do not necessitate further environmental review."

The court also held that the absence of a public review process for addenda was not inconsistent with CEQA. Rather, it reflected the nature of an addendum as a document describing project revisions too insubstantial to require subsequent environmental review. Finally, the court noted that the Legislature's failure to modify CEQA to eliminate the addendum process in 35 years was a strong indication that it was consistent with legislative intent.

New Findings On Project's Significant Impacts Not Required

The petitioner also argued that the city was required to make new findings on the project's significant impacts when it approved the addendum. The court rejected this argument as well. The court held that nothing in the statute or Guidelines required new findings when an agency approves changes to a project based on an addendum. The court explained that the purpose of findings is to address new significant effects, but an addendum is only proper where there are no new significant effects; thus, no purpose would be served by requiring new findings to address the same significant effects that had already been addressed when the project was first approved.

High Sierra Rural Alliance v. County of Plumas, 29 Cal. App. 5th 102 (2018)

Determinations Regarding Compatibility of Residential Uses with Timberland Production are Ministerial and Hence Exempt from CEQA Review

The Third District Court of Appeal rejected a CEQA challenge to a county's general plan update, holding that a county's California Timberland Productivity Act finding that a residence or structure is necessary for timberland production zone management is not a discretionary act for CEQA purposes.

In December 2013, the County prepared a comprehensive update to its 1984 General Plan, along with an accompanying "first-tier" programmatic environmental impact report. The general plan focused on new population growth within specific geographic "Planning Areas" to prevent "rural sprawl" and preserve natural resources. The general plan update called for all new development to take place within, or next to, these Planning Areas. The EIR and general plan anticipated little population growth or construction outside of the Planning Areas due to historical development patterns and the new general plan policies.

Petitioner contended that the general plan update conflicted with the Timberland Act because the general plan determined that any residence on timberland production zone land is a compatible use with timberland production, so long as the parcel is at least 160 acres. It also claimed that CEQA review was required each time the County determined whether proposed residences were compatible with timberland use. The Court of Appeal rejected both arguments.

The Timberland Act imposes mandatory restrictions on parcels zoned for timberland production, limiting the permitted uses to "growing and harvesting timber and to compatible uses." Gov. Code § 51110 et. seq. Timberland production zones are regulated by state statutes, but local governments are required to enforce the zoning restrictions. Petitioner argued that the general plan update impermissibly determined that all residences are compatible with timberland production zoned land by including a policy confirming that any residence or structure on a parcel zoned for timberland production that is at least 160 acres is a compatible use. Petitioner contended that Government Code Section 51104 requires the County to make case-by-case compatibility determinations based on whether a residence is (1) necessary for management of timberland, and (2) not otherwise incompatible with underlying timber operations.

The court found that the County had been aware of the above Section 51104 requirements and had applied them to previous compatibility determinations. It concluded that the updated general plan policies concerning timberland production did not conflict with state law merely because they did not repeat Section 51104 in its entirety, and that the general plan policy requiring a finding that a residence or structure was compatible with the Timberland Act was sufficient.

The court also disagreed with petitioner's contention that the County engages in discretionary review under CEQA when determining whether proposed residences or structures are compatible with timberland production. Instead, the determination is classified as ministerial because the statutory guidance provided to local governments by the Timberland Act do not allow an agency to deny or

condition a building permit to mitigate environmental damage. The court also noted that the Timberland Act expressly exempts the County's decisions to put parcels in timberland production zones from CEQA review because the decision "involves the state law's authorization of residences and structures necessary for the management of these parcels" and the compatibility findings are governed solely by the Timberland Act. Thus, the court concluded that the County is not required to engage in discretionary review under CEQA each time it approves proposed structures that are compatible with timberland.

Alliance of Concerned Citizens Organized for Responsible Development v. City of San Juan Bautista, 29 Cal. App. 5th 424 (2018)

A Decision that Resolves All Claims Alleged in a Petition on the Merits Is an Appealable Final Judgment Even Though It Is Not Labeled as a Judgment

Plaintiff filed a petition for writ of mandate challenging the city's approval of a mitigated negative declaration for a gas station, convenience store, and quick serve restaurant. After hearing the case, the trial court issued a decision labeled "Peremptory Writ of Mandate and Interlocutory Remand for Reconsideration of Potential Noise Impacts." That decision required the city to set aside its approvals, and reconsider the significance of the project's potential noise impacts, before taking further action on the project. The plaintiff did not appeal from that decision.

In response, the city set aside its prior approvals, conducted a new noise analysis, adopted a new MND, and reapproved the project. The city then filed a return with the court describing the steps it had taken to comply with the peremptory writ of mandate. The court found the city had complied, and issued a decision labeled as "Final Judgment on Petition for Writ of Mandamus." The petitioner then filed an appeal from that decision.

The court of appeal found that the trial court's initial decision disposed of all issues raised in the petition and the substance and effect of that decision was that it was a final judgment for purposes of appeal. Even though that decision contained language stating it was not to be construed as the final judgment, its self-description was not determinative. A decision or order which does not leave any issues for further consideration except for whether its terms have been complied with is an appealable final judgment, regardless of label that is applied to it.

Because the court's initial decision was an appealable final judgment, plaintiff forfeited appellate review of the trial court's determinations by failing to file a timely appeal. Therefore, the court concluded that plaintiff's appeal from the court's subsequent decision that the city had complied with the trial court's peremptory writ of mandate was limited to the question whether the trial court had erred in finding the city had complied.

In an unpublished portion of the opinion, the court of appeal found that the plaintiff failed to satisfy its burden to prove that the new MND the city adopted failed to comply with CEQA.

Georgetown Preservation Society v. County of El Dorado, 30 Cal. App. 5th 358 (2018)

Opinions of Local Residents that Building Proposed Within Historic Area Would Have Negative Aesthetic Impact Was Sufficient to Trigger Need for EIR

Georgetown, a former gold rush camp located in the Sierra Nevada foothills, is a state historical landmark. The county approved a Dollar General chain discount store on Main Street, within the town's historic commercial district, relying on a mitigated negative declaration. Local residents objected, commenting that the building did not belong in a historic community, that the store's size and appearance

would have a negative aesthetic impact, and that the design of the building was incompatible with nearby historic buildings.

Not surprisingly, the county's decision to approve the project was followed by a lawsuit claiming that an EIR should have been prepared to evaluate the project's significant aesthetic effects. The court of appeal ruled for the opponents, and in its opinion, issued rulings on three important questions relating to evaluation of aesthetic impacts in a negative declaration, and the effect of comments by members of the public about such impacts.

Design review by the lead agency is not a substitute for CEQA compliance. The county had determined that the new store would not have adverse aesthetic impacts because it satisfied the criteria in the county's Historic Design Guide. On appeal, the county and developer argued that subjective opinions of several residents about the aesthetic merits of the project should not override the county's design review determinations. The court ruled, however, that design review under the zoning code is not a substitute for review of a project under CEQA. The design review process can provide relevant evidence, but when the agency is considering a negative declaration, it does not shield the project from review of its impacts under the fair argument standard.

Public comments can establish a fair argument that aesthetic impacts may be significant. The county and developer contended that public commentary by nonexperts should not be enough to support a fair argument that the project may cause significant aesthetic impacts. They argued that subjective opinions about aesthetic issues, standing alone, signal a public controversy, but are not evidence the impact is significant. The court disagreed, noting that a number of persons objected to the size and appearance of the building, asserting it was too big and too boxy or monolithic to blend in, and its presence would damage the look and feel of the historic town center. The county should have considered deferred to this body of evidence, according to the court, because it related to nontechnical matters on which residents were capable of giving an opinion, such as the building's size and general appearance. Further, its evidentiary value was enough to satisfy the "fair argument" test, which triggers an EIR. As the court put it: "Despite the subjective nature of aesthetic concerns, it is clear that the project may have a significant adverse environmental impact."

A lead agency cannot argue that evidence in the record was unfounded or not credible unless it made specific findings to that effect. When considering comments relating to potential environmental impacts, a lead agency may disregard evidence that is unfounded or not credible for other reasons. Here, the county argued that it had properly discounted the public comments the court cited due to their lack of foundation or credibility. The court held, however, that in order to preserve attacks on comments based on lack of foundation or credibility, the lead agency must have made findings showing it had rejected the evidence for those reasons. The county had not done so here.

Conclusion. Criticisms of a project's design or complaints about its attractiveness, standing alone, are not enough to show a significant aesthetic impact. While CEQA is concerned with adverse impacts on the human environment, it is unconcerned with aesthetic values that are merely a matter of personal preference. In this case, the evidence was sufficient to persuade the court that the aesthetic objections to the project rested on broader community values: The court found there was sufficient evidence "to show this project in this location might significantly impair the central district's unique and treasured Gold Rush character."

Sierra Club v. County of Fresno, 6 Cal. 5th 502 (2018)

California Supreme Court Sets Standard for Air Quality Impact Analyses Under CEQA

The California Supreme Court has overturned the environmental impact report for a mixed-use development project, holding that the EIR inadequately explained the human health consequences of significant air pollutant emissions that would result from the development. In so doing, the court has both clarified the standard of review that courts must apply to an EIR's explanation of significant environmental impacts, and increased the obligation of EIR preparers to provide those explanations.

The court also responded to challenges to the EIR's air quality mitigation measures. The court required that the EIR's claim of "substantial" pollution reduction through mitigation be supported with substantial evidence, but the court upheld mitigation measures that allowed for subsequent replacement based on new technologies and provided for implementation through future County review.

Facts

In the case presented to the Supreme Court, the County's analysis of criteria air pollutants appears to have been typical. The EIR generally explained the health impacts of exposure to ozone, particulate matter, carbon monoxide and nitrogen dioxide but, except for ozone, did not identify the concentrations at which symptoms would be expected. The EIR then quantified the tonnages of air pollutants that would be emitted each year as a result of the project, compared those amounts to the regional air district's tonnage-based significance thresholds, and concluded that the project's air quality impacts would be significant because the emissions would substantially exceed the thresholds. The EIR then identified mitigation measures that would reduce the emissions, but not enough to bring them below the thresholds. The EIR did not attempt to quantify the extent to which each of the project's air pollutant emissions might affect human health in the air basin.

Standard of Review

The Sierra Club and other parties challenged the EIR's discussion of air quality impacts as well as the mitigation measures it identified. The court began by addressing the standard of review courts must apply to such challenges. Under CEQA, courts are to apply a deferential "substantial evidence" standard of review to an EIR's factual determinations (e.g., which scientific methodology to use for analysis of a particular impact), but a non-deferential "de novo" standard to the question whether the agency preparing the EIR has followed the correct procedures. The court acknowledged that some questions that arise under CEQA are both factual and procedural, and create uncertainty regarding the appropriate standard of judicial review.

Where the question is whether an EIR's discussion of significant environmental impacts is adequate, the court identified "three basic principles":

- An agency has considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR;
- However, a reviewing court must determine whether "the EIR comports with its intended function of including 'detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project'; and
- The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency's factual conclusions. The court explained: "For example, a decision to use a particular methodology and reject another is amenable to substantial evidence review But whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial

evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence.”

The EIR’s Air Quality Discussion

Applying these principles, the court found the County’s EIR inadequate because it did not explain how the proposed project would change air quality in the air basin; did not indicate the concentrations at which PM, CO and sulfur dioxide would trigger health symptoms; and, even as to ozone, for which the EIR did identify concentrations that would trigger symptoms, the EIR did not identify how many parts per million of ozone would result from the project.

Briefs submitted to the court attempted to explain that the connection between emissions and human health that plaintiffs sought could not be provided given the current state of environmental science modeling. The court responded that this explanation should have been provided in the EIR rather than in litigation: “[I]f it is not scientifically possible to do more than has already been done to connect air quality effects with potential human health impacts, the EIR itself must explain why, in a manner reasonably calculated to inform the public of the scope of what is and is not yet known about the Project’s impacts.”

Mitigation Measures

The plaintiffs also challenged the EIR’s air quality mitigation measures on four grounds. The court upheld the first of these challenges, holding that the EIR lacked facts or analysis to explain its conclusion that the mitigation measures would “substantially reduce air quality impacts.”

The court rejected the plaintiffs’ three remaining challenges. First, the court approved a “substitution clause” in the mitigation measures that allowed the County to substitute new mitigation measures for those listed in the EIR if the new measures were shown to be equally effective. Whereas the plaintiffs considered this unlawfully deferred mitigation, the court responded that allowing future substitutions for equal or more efficient technology would promote CEQA’s goal of environmental protection. Second, the court rejected plaintiffs’ challenge to mitigation measures that would not reduce a project’s impacts below the threshold of significance. The court noted that under CEQA, agencies may approve projects that have significant unavoidable environmental impacts so long as they adopt all feasible mitigation measures and issue a statement of overriding considerations. Finally, the court held that the mitigation measures were not vague or otherwise unenforceable. The County’s Mitigation Monitoring Plan explained when in the development process the various mitigation measures were to be implemented and imposed the duty on the County to ensure that the measures were implemented. If the County were to fail in this duty, its abuse of discretion could be corrected in a court mandamus proceeding.

Conclusions

The *Sierra Club* decision reinforces the importance of careful explanations of significance determinations in EIRs, and in particular the importance of presenting the analytical connection between raw data and the resulting impacts to the physical environment. Every effort should be made to provide clear explanations in an EIR, including a discussion of the evidentiary basis for health-based significance standards, so that decision makers and members of the public can better understand the magnitude of a project’s contribution to risks to human health. Notably, the court recognized that an EIR need not be exhaustive, and perfection is not the legal standard. But this decision raises the bar for achieving legal adequacy under CEQA.

CHAPTER 7

Federal and State Wetland Regulation

Additional Clean Water Act Uncertainty: What is a “Discharge” of Pollutants?

Supreme Court Set to Consider What is a Discharge of Pollutants Requiring a Federal Permit

In 2018, courts and regulators grappled with another important threshold question under the Clean Water Act: assuming there is a “water of the United States,” what is a “discharge” of pollutants requiring a federal permit? EPA previously has stated that the Clean Water Act may apply to a discharge of pollutants from a point source (which is defined as any discernible, confined and discrete conveyance from which pollutants are discharged) that reaches a jurisdictional surface water such as a river, lake or bay, even if the discharge first flows through groundwater before reaching the surface. But the cases in 2018 were split on this issue and the agencies also appear to be rethinking their prior position as they have formally requested that interested parties submit comments on this issue. See 83 Federal Register 7126 (Feb. 20, 2018).

The 2018 Circuit Court Cases. In *Hawaii Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018) the County disposed of treated municipal wastewater into a set of underground injection wells – it was undisputed that some of the treated effluent flowed through underground springs to the Pacific Ocean. But the County argued that the Clean Water Act regulates only *direct* conveyances of pollutants from a point source to a surface water body, and not *indirect* conveyances that flow through groundwater before reaching the surface water body. The court flatly rejected this argument, emphasizing that the key question was whether pollution was in fact discharged from a point source (such as a well, pipe or channel) to a water of the United States, and that it was irrelevant whether groundwater acted as a conduit for the discharge.

In *Upstate Forever v. Kinder Morgan Energy Partners*, 887 F.3d 637 (4th Cir. 2018), the Fourth Circuit adopted a similar view. This case involved an underground pipeline that ruptured, resulting in the release of several hundred thousand gallons of gasoline, which then seeped through groundwater into various surface wetlands and waterways in the Savannah River watershed. The court emphasized that the Act’s plain language regulates point source discharges to a surface water body that flow through groundwater with a direct hydrologic connection to that water body. *But see Sierra Club v. Virginia Electric Power Co.*, 903 F.3d 403 (4th Cir. 2018) (relying on *Upstate Forever* to confirm that pollutant discharges to groundwater that end up reaching surface water can violate the Clean Water Act, but finding that the discharges at issue – which seeped through soil via rainwater – were too diffuse to constitute “point source” discharges that were subject the Act).

But the Sixth Circuit has taken a different view. In *Kentucky Waterways Alliance v. Kentucky Utilities Co.*, 905 F.3d 925 (6th Cir. 2018), the court expressly disagreed with the Sixth Circuit’s decision in *Upstate Forever* and the Ninth Circuit’s decision in *Hawaii Wildlife Fund*. The case involved pollution in coal ash ponds that seeped into groundwater and then reached a nearby lake. The court reasoned that groundwater is not a point source, but rather a diffuse medium that seeps in all directions, and that the Clean Water Act does not regulate the flow of pollutants through such nonpoint sources. The court thus concluded that the Clean Water Act “does not extend liability to pollution that reaches surface waters via groundwater.” See also *Tennessee Clean Water Network v. Tennessee Valley Authority*, 905 F.3d 436 (6th Cir. 2018) (same holding). The same judge dissented in both Sixth Circuit decisions, finding that the majority opinions conflicted with the Clean Water Act and agreeing with the positions articulated by the Fourth and Ninth Circuits.

With petitions for certiorari pending for both *Upstate Forever* and *Hawaii Wildlife Fund*, the Supreme Court granted review of *Hawaii Wildlife Fund* on February 19, 2019 to resolve this split among circuit courts.

National Association of Manufacturers v. Department of Defense, 138 S. Ct. 617 (2018)

Supreme Court Sends Challenges to Clean Water Rule to Federal District Courts

In a decision issued on January 22, the U.S. Supreme Court ruled in *National Association of Manufacturers v. Department of Defense* that challenges to the Obama administration's 2015 Clean Water Rule must be brought in federal district courts, rather than directly in the federal courts of appeals. The Court's decision will likely prolong the ongoing litigation over the validity of the Rule.

Shortly after the Court's decision, the Trump administration delayed the Rule's applicability date for two years while it works on rulemakings to rescind and replace the Rule.

The Clean Water Rule

The Clean Water Act establishes federal jurisdiction over "navigable waters," which the law ambiguously defines as "waters of the United States." This definition is critically important because it determines which water bodies are subject to the Clean Water Act's permit programs—including the National Pollutant Discharge Elimination System permit program under Section 402 of the Act, which is administered mostly by the states under the oversight of the Environmental Protection Agency, and the permit program governing the discharge of dredged and fill materials under Section 404 of the Act, which is administered by the U.S. Army Corps of Engineers.

The courts, federal regulators, and the regulated community have grappled with this cryptic definition for decades. In 2015, in an attempt to clarify the scope of Clean Water Act jurisdiction, EPA and the Corps jointly published the Clean Water Rule. Thirty-one states and numerous environmental and industry groups filed suit in various district and appellate courts to challenge the validity of the Clean Water Rule, with uncertainty over which courts had jurisdiction to hear the challenges.

The Supreme Court's Decision

In *National Association of Manufacturers*, the Supreme Court decided a relatively narrow issue: whether federal courts of appeals have original and exclusive jurisdiction to hear challenges to the Clean Water Rule, or, instead, such challenges must be brought in the federal district courts. Generally, challenges to EPA actions under the Clean Water Act must be brought in federal district courts, but the Act provides that challenges to seven specified EPA actions must be brought in the federal courts of appeals. EPA and the Corps argued that challenges to the Clean Water Rule fell within two of those exceptions to district court jurisdiction.

In a unanimous opinion, the Supreme Court rejected the agencies' broad interpretation of the statute, and held that challenges to the Clean Water Rule must be heard in the first instance in the district courts. The Supreme Court's decision cleared the way for the pending challenges to the Clean Water Rule to proceed in the federal district courts.

The Responses to the Court's Decision

Parties challenging the 2015 Clean Water Rule have filed cases in multiple federal district courts and courts of appeals. In August 2015, the U.S. District Court for the District of North Dakota issued a preliminary injunction that prevented the Rule from taking effect in 13 states. Cases that had been filed in

the federal courts of appeals were consolidated in the U.S. Court of Appeals for the Sixth Circuit, and that court issued a nationwide stay of the rule in October 2015.

Several weeks after the Supreme Court's decision in *National Association of Manufacturers*, the Sixth Circuit vacated its nationwide stay of the Clean Water Rule and dismissed the case. The District Court for the District of North Dakota's preliminary injunction, which affects 13 states, remains in place. Meanwhile, plaintiffs challenging the Rule in the District Court for the Southern District of Texas recently filed a motion for a nationwide preliminary injunction. Cases challenging the Rule are pending in three other district courts. See *Southeast Legal Foundation v. EPA*, No. 1:15-cv-2488 (N.D. Ga.); *Georgia v. McCarthy*, No. 2:15-cv-79 (S.D. Ga.); *North Dakota v. EPA*, No. 3:15-cv-59 (D.N.D.); *Ohio v. EPA*, No. 2:15-cv-2467 (S.D. Ohio); *Oklahoma v. EPA*, No. 4:15-cv-381 (N.D. Okla.); *Chamber of Commerce of the United States of America v. EPA*, No. 4:15-cv-386 (N.D. Okla.); *Texas v. EPA*, No. 3:15-cv-162 (S.D. Tex.); *American Farm Bureau Federation v. EPA*, No. 3:15-cv-165 (S.D. Tex.).

For their part, the EPA and the Corps will continue to apply pre-2015 regulations and guidance; on February 6, the agencies adopted a rule to delay the applicability of the Clean Water Rule until 2020. That delay rule has since been challenged by environmental groups and a coalition of states. See *South Carolina Coastal Conservation League v. Pruitt*, No. 2:18-cv-330 (D.S.C.); *New York v. EPA*, No. 1:18-cv-1030 (S.D.N.Y.); *Natural Resources Defense Council v. EPA*, No. 1:18-cv-1048 (S.D.N.Y.).

The EPA and the Corps have also announced their intention to rescind and replace the 2015 Clean Water Rule, and the agencies are currently finalizing a proposed rule to rescind the Clean Water Rule.

Until the agencies issue final rules to rescind the Clean Water Rule and replace it with a new definition of "waters of the United States" (and the inevitable litigation challenging those rules is resolved), the long-standing potential for regulatory uncertainty and inconsistency will remain.

***Friends of the Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906 (9th Cir. 2018)**

Ninth Circuit Rejects Challenge to Newhall Ranch Section 404 Alternatives Analysis

In the latest decision in the long-running legal saga over the proposed Newhall Ranch development in Los Angeles County, the U.S. Court of Appeals for the Ninth Circuit upheld the Army Corps of Engineers' EIS and Section 404 permit, giving substantial deference to the Corps' decisionmaking.

Background

Newhall Ranch is a proposed large-scale master-planned community in Los Angeles County. The County approved a specific plan for the project that provided for more than 21,000 residential units and 4.4 million square feet of commercial, office, and retail uses. In connection with the project, Newhall Land and Farming Company applied to the Army Corps of Engineers for a permit under Section 404 of the Clean Water Act to discharge dredge or fill material into navigable waters. The Corps, along with the California Department of Fish and Wildlife, prepared a combined EIS/EIR. The EIS/EIR considered eight project alternatives, including Newhall's preferred alternative, a no-build alternative and six other alternatives.

The Corps issued a Record of Decision that adopted one of the studied alternatives ("Modified Alternative 3") as the least environmentally damaging practicable alternative. Modified Alternative 3 involved developing less acreage than Newhall's preferred alternative, at a higher cost per developable acre. The Corps also determined that wastewater and stormwater discharges from the project would not affect endangered steelhead in the Santa Clara River downstream from the project. Based on this "no effect" determination, the Corps did not consult with the National Marine Fisheries Service on impacts to endangered steelhead.

The plaintiffs claimed that the Corps' decisions violated the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act. First, the plaintiffs challenged the Corps' selection of Modified Alternative 3 as the least environmentally damaging practicable alternative. Second, the plaintiffs challenged the Corps' failure to consult with NMFS. Third, the plaintiffs argued that the EIS did not adequately analyze cumulative impacts on steelhead.

Standing

The court first considered whether the plaintiffs had standing. To have standing to bring claims of procedural violations, a plaintiff must demonstrate that (1) the agency violated procedural rules, (2) those rules protect the plaintiff's concrete interests, and (3) it is reasonably probable that the challenged action will threaten the plaintiff's concrete interests. Newhall argued that the plaintiffs could not satisfy the third prong of this test because their interests were limited to recreation and natural resources within the project area, where there were no steelhead.

Rejecting this argument, the court explained that the plaintiffs only needed to show that they would be harmed by the challenged agency action, not that the alleged procedural deficiency would threaten their interests. Thus, the court concluded, the plaintiffs had standing because they were harmed by the Corps' issuance of the Section 404 permit; it did not matter whether the plaintiffs had an interest in steelhead. The court also held that the plaintiffs showed causation and redressability because there was a reasonable probability that additional analysis could have influenced the Corps' decision.

Selection of Least Environmentally Damaging Practicable Alternative

Prior to issuing a Section 404 permit, the Corps must analyze project alternatives and select the least environmentally damaging practicable alternative in light of the overall project purpose. The plaintiffs raised several arguments challenging the Corps' selection of Modified Alternative 3 under this standard.

First, the plaintiffs argued that the Corps used an overly specific project purpose that narrowed the range of available alternatives. The court disagreed. In its environmental analysis, the Corps defined the project purpose as the development of a master planned community that would achieve the basic objectives of the Newhall Ranch Specific Plan and would provide approximately the same range and size of land uses described in the Specific Plan. The court explained that regulations required the Corps to consider, and normally to accept, local land use plans and decisions when determining the overall project purpose. Further, the court held, it was reasonable for the Corps to have rejected alternatives because (1) reductions in available developable areas would prevent the alternatives from meeting elements of the specific plan and (2) cost increases would make the alternatives impracticable.

Next, the plaintiffs argued that Modified Alternative 3 was not the least environmentally damaging practicable alternative because additional measures to minimize environmental impacts were theoretically possible. The court observed that regulations required the Corps to consider costs when determining that an alternative is not practicable. The court concluded that it was reasonable for the Corps to have determined that Modified Alternative 3 was at the outer limit of cost practicability for the project, and that further avoidance measures would not be practicable even if theoretically possible.

Finally, the plaintiffs challenged three aspects of the Corps' cost methodology: (1) consideration of costs on a per-acre basis rather than per-residential unit or per-commercial floor space, (2) not considering the project's revenues, and (3) including land acquisition costs. The court held that the Corps' cost methodology was reasonable and entitled to deference. First, the court determined that it was reasonable for the Corps to evaluate costs per acre given the uncertainty of the type and density of units that would ultimately be developed. Second, the court found that although not required to do so, the Corps had considered revenues in its analysis by evaluating each alternative's developable acreage, which was the

source of revenue for the project. Third, the court held that it was reasonable for the Corps to include land acquisition costs in the costs of each alternative.

ESA and NEPA

Section 7 of the ESA requires a federal agency to consult with NMFS or the Fish and Wildlife Service if its action may affect endangered or threatened species or their critical habitat. The Santa Clara River downstream from the Newhall Ranch site is critical habitat for the Southern California steelhead, an endangered species. The Corps determined that wastewater and stormwater discharges from the project were not likely to adversely affect steelhead, because the concentration of dissolved copper in the project's discharges would be less than the existing dissolved copper concentration in the Santa Clara River and would be less than the dissolved copper limit for the Santa Clara River set by EPA's water quality standards.

The plaintiffs challenged the Corps' "no effect" determination under both the ESA and NEPA. The plaintiffs alleged that the Corps should have consulted with NMFS on impacts to endangered steelhead, and that the EIS did not adequately analyze the cumulative effects of dissolved copper on steelhead. In particular, the plaintiffs argued that a technical memorandum published by NMFS established that dissolved copper concentrations during storm events would cause sublethal impacts to juvenile steelhead smolt.

The court rejected the plaintiffs' arguments, noting that the agency's scientific judgment is entitled to substantial deference. The court concluded that the Corps had reasonably determined that the NMFS technical memorandum did not contain the best available scientific information regarding the project's impacts on steelhead. In addition, the court held that it was reasonable for the Corps to rely on EPA's water quality standard as a threshold for assessing whether the project would adversely affect endangered species.

CHAPTER 8

Endangered Species Protections

Central Coast Forest Association v. Fish & Game Commission, 18 Cal. App. 5th 1191 (2018)

Court of Appeal Defers to the California Fish & Game Commission, Rejects Relisting Petition Under the California Endangered Species Act

This case was decided on remand from the California Supreme Court. In *Central Coast Forest Ass'n. v. Fish & Game Comm'n*, 2 Cal. 5th 594 (2017), the Supreme Court held that a delisting petition may properly be used to challenge the basis for a prior listing decision under the California Endangered Species Act. Such review of a species must be based on the best scientific information that is available, which – according to the Court – supported the notion that scientific determinations are subject to change over time, that new evidence and information may be presented to revisit those prior determinations, and that “the Commission’s decisions ought to evolve along with scientific understanding.”

The court of appeal rejected the plaintiffs’ challenge to the Fish & Game Commission’s denial of their delisting petition for coho salmon. Based on the evidence in the administrative record and deferring to the findings of the Commission, the court found conclusive evidence that native coho salmon were present in the streams in question prior to the beginning of hatchery activity in 1906, and that fish with the same genetic makeup still inhabit these streams today. Accordingly, it was appropriate for the Commission to find that the coho salmon were “native” species within the meaning of CESA. The court additionally determined that a particular population of a species – here, coho salmon in streams south of San Francisco – need not constitute “an important component” the species’ overall evolutionary legacy before the population may be listed as endangered.

Native Ecosystems Council v. Marten, 883 F.3d 783 (2018)

Ninth Circuit Rejects ESA Challenge to Logging Plan in Montana

In *Native Ecosystems Council v. Marten*, the Ninth Circuit ruled that the U.S. Fish & Wildlife Service complied with the Endangered Species Act when it issued a Biological Opinion that determined that a proposed logging project in Montana would not jeopardize the Canada lynx. The plaintiffs claimed that the “no jeopardy” determination was not based on the best available science as required under the ESA, since that determination did not properly take into account a recent scientific paper published on the lynx. In rejecting this claim, the court deferred to the agency’s determination that the scientific paper did not alter its “no jeopardy” analysis. The court stated: “The determination of what constitutes the ‘best scientific data available’ belongs to the agency’s ‘special expertise.... When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.”

The decision highlights the reluctance of the courts to second-guess scientific determinations by the FWS when implementing the ESA.

National Wildlife Federation v. National Marine Fisheries Service, 886 F.3d 803 (9th Cir. 2018)

Federal Agencies Must Modify Operations at Columbia River Hydroelectric System to Protect Salmonid Species

The Federal Court of Appeals for the Ninth Circuit recently affirmed a district court order requiring that the National Marine Fisheries Service, the Corps of Engineers, and the Bureau of Reclamation conduct spill operations and monitoring at dams and related facilities in the Federal Columbia River Power System in order to protect migrating salmon and steelhead. The district court issued the order after finding the continued low abundance of the species made them vulnerable to extinction from shock events such as climate change.

This appeal is the latest development in a long-running dispute regarding salmonids in the Columbia River listed as endangered or threatened species under the Endangered Species Act. The fish migrate up and down the Columbia and Snake Rivers every year, encountering the Columbia River dams. Turbines in the dams cause a high rate of mortality for the salmonid species that pass through or near them.

A 2014 Marine Fisheries Service biological opinion concluded that ongoing operation of the dams would jeopardize ESA-listed species and adversely modify their critical habitat. It proposed an alternative that included multiple actions over a 10-year period designed to (i) modify systems operations and structures at the dams to improve fish passage and migration conditions, and (ii) allow some spill from the dams to enhance the likelihood of survival for migrating juveniles. Two years later, the Oregon District Court found that the biological opinion violated the ESA because it had not adequately considered climate change. The federal agencies responded by preparing a new biological opinion for dam operations.

Meanwhile the State of Oregon and a coalition of environmental organizations filed a lawsuit and obtained an injunction ordering the Corps to increase spring spill over the dams as well as to operate juvenile bypass facilities and tag detection systems. The federal agencies appealed.

The Court of Appeals upheld the district court's injunction, ruling that the court was not required to find irreparable harm due to an "extinction-level threat" to the protected species before it could issue an injunction. Rather, the court's finding a "definitive threat of future harm, beyond speculation," was sufficient.

Reviewing the district court's factual findings, the appellate court agreed they were sufficient to show irreparable harm. The court had found that the salmonids were in a "precarious" state and would remain there without conservation efforts beyond those in the 2014 biological opinion. Sustained low abundance of the species made them vulnerable to extinction, and the federal agencies should have analyzed how "climate change increases the chances of 'shock events' that would be catastrophic for the listed species' survival."

Center for Biological Diversity v. Zinke, 900 F.3d 1053 (9th Cir. 2018)

Ninth Circuit Decision Overturns FWS Determination Not to List Species

In *Center for Biological Diversity v. Zinke*, the court overturned the determination by the U.S. Fish & Wildlife Service not to list the arctic grayling, a cold-water fish that currently exists only in Montana and that has lost most of its historic range, as an endangered or threatened species under the Endangered Species Act.

The court decided the first issue in favor of FWS. In deciding whether or not to list a species, the Act requires an evaluation of the whether the species faces the danger of extinction "throughout all or a significant portion of its range." See 16 U.S.C. §§ 1532(6), (20) (definitions of "endangered" and

“threatened”). In 2014, FWS adopted a policy to define the term “range,” which is not defined in the Act. See 79 Fed. Reg. 37578 (July 1, 2014). According to this definition, lost historical range is relevant to the overall analysis of the species and its status, but does not constitute a significant portion of a species’ range. The court rejected the plaintiffs’ challenge to use of the 2014 policy in this case, finding that the term “range” in the statutory text was ambiguous, and that FWS’ interpretation was reasonable and thus entitled to deference.

However, the court found that FWS erred in its decision not to list the species because it failed to use the best scientific data that was available. Specifically, the court questioned FWS’ finding that the fish population was increasing, as that finding neglected a 2014 study by FWS’ own scientists that determined that the population actually was in decline. The court stated: “Although FWS has broad discretion to choose which expert opinions to rely on when making a listing decision, it cannot ignore available biological data.”

The court similarly questioned FWS’ finding that the fish population possessed the ability to migrate to cold water refugia to survive during the summer months, in face of the increasing threats posed by lower stream flows and higher stream temperatures. This finding was based on a study that FWS previously had considered in determining that the ability of the fish to migrate to cold water refugia was not sufficient to nullify the threats posed during the summer months. The court faulted FWS for failing to explain this inconsistency and the agency’s change of position on this issue.

Lastly, the court admonished FWS for using scientific uncertainty as a reason to avoid making any determinations about the threat to the species posed by climate change. The court found that the agency failed to explain *how* this uncertainty justifies its conclusion. The court therefore overturned FWS’ decision not to list the species and remanded the matter to FWS to reassess its decision.

Weyerhaeuser Co. v. Fish and Wildlife Service, 139 S. Ct. 361 (2018)

Supreme Court Limits Authority to Designate Critical Habitat Under Endangered Species Act

In a unanimous decision with immediate repercussions for the administration of the Endangered Species Act (ESA), the U.S. Supreme Court held that an area is eligible for designation as critical habitat under the ESA only if it is also “habitat” for the species within the meaning of the statute. And federal courts can review the decision not to exclude areas from critical habitat based on economic impacts and other factors. This decision nonetheless leaves significant merits claims as well as a question of statutory interpretation to the appeals court on remand.

Critical Habitat Designation Under the ESA

The U.S. Fish and Wildlife Service (Service), upon listing a species as endangered, must also designate its “critical habitat.” 16 U.S.C. § 1533(a)(3)(A)(i). The ESA defines critical habitat to include: (1) areas occupied by the species that contain “physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection,” and (2) areas not occupied by the species but determined by the Service to be “essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A).

As part of its proposed critical habitat designation, the Service must also consider the costs of that designation. 15 U.S.C. § 1533(b)(2). Unless it would result in the extinction of the species, the Service is authorized to exclude from critical habitat an area where the benefits of excluding that area outweigh the benefits of designation. *Id.*

The Dusky Gopher Frog and the Instant Litigation

The dusky gopher frog once lived in longleaf pine forests throughout Alabama, Louisiana and Mississippi. Due in large part to the loss of these forests, the frog's wild population dwindled by 2001 to a group of 100 individuals at a single pond in southern Mississippi. That year, the Service listed the frog as endangered.

In 2012, the Service designated nearly 6,500 acres in Louisiana and Mississippi as dusky gopher frog critical habitat. This included all four areas known by the Service to host dusky gopher frog populations. The Service found these areas possessed three features "essential to the conservation" of the frog: ephemeral ponds for breeding; upland open-canopy forest with holes and burrows to live in; and open-canopy forest connecting the two.

The critical habitat designation also included 1,544 acres of closed-canopy timber plantation (dubbed "Unit 1") not occupied by the frog in several decades. According to the Service, Unit 1 was essential for the conservation of the species and met the definition of unoccupied critical habitat by virtue of its high-quality ephemeral breeding ponds and proximity to existing frog populations. And although much of Unit 1 lacked the type of open-canopy forest required by the frog, the Service found that such forest habitat could be restored there "with reasonable effort."

As required by the ESA, the Service commissioned a report on the probable economic impact of its proposed critical habitat designation, which concluded that designating Unit 1 could cost private landowners up to \$33.9 million in lost development value. The Service nonetheless determined the conservation benefits of designating Unit 1 outweighed the benefits of excluding Unit 1 from critical habitat.

Private property owners within Unit 1 challenged the critical habitat designation, which both the U.S. District Court for the Eastern District of Louisiana and the U.S. Court of Appeals for the Fifth Circuit upheld. The Supreme Court granted certiorari to consider: (1) whether "critical habitat" must also be habitat, and (2) whether a federal court may review an agency decision not to exclude a certain area from critical habitat because of the economic impact of such a designation. The Court's 8-0 decision resolves these issues in the affirmative.

Critical Habitat Must Be Habitat

First, the Court ruled that only habitat of an endangered species is eligible for designation as critical habitat: "According to the ordinary understanding of how adjectives work, 'critical habitat' must also be 'habitat.' Adjectives modify nouns—they pick out a subset of a category that possesses a certain quality. It follows that 'critical habitat' is the subset of 'habitat' that is 'critical' to the conservation of an endangered species." Slip. Op. at 8. The term "habitat," however, is not defined in the ESA or regulations.

The Court remanded the case for consideration of two disputed issues: (1) whether an endangered species' habitat can include areas that would require some modifications to support the species, and (2) whether the dusky gopher frog could survive in Unit 1 without any modifications to the existing features.

An Agency Decision Not to Exclude Area From Critical Habitat Is Reviewable

The Service argued that a decision not to exclude an area from critical habitat is wholly discretionary and therefore unreviewable. The Court disagreed, finding the decision reviewable for abuse of discretion.

The Court emphasized the strong presumption in favor of judicial review of administrative action and concluded that the ESA provisions regarding decisions not to exclude an area from critical habitat were not drawn so narrowly as to deny the court a meaningful standard to apply. Rather, this claim—that the agency did not appropriately consider all of the relevant factors that the ESA sets forth in guiding the

Service’s critical habitat exclusion decisions—is of the sort that federal courts “routinely assess” for abuse of agency discretion. Slip Op. at 14.

Because the Fifth Circuit found this issue unreviewable, it did not decide whether the Service’s assessment of the costs and benefits of critical habitat designation was flawed in a way that rendered the decision to exclude Unit 1 arbitrary, capricious or an abuse of discretion. The Supreme Court remanded for consideration of this question.

Conclusion

The Supreme Court’s ruling is a significant victory for property owners and developers, including companies in the timber products and energy industries. The decision limits the areas that can be designated as critical habitat by requiring the Service to first find that an area is “habitat.” In practice, the extent of this limitation will depend on how courts interpret the term “habitat”—the major question for the Fifth Circuit on remand is whether a species’ habitat can include areas that require modification to be habitable. The Court’s decision is also an invitation for the Service to promulgate a new regulation to define the term “habitat.”

The ruling also opens the door for private parties to challenge the Service’s cost-benefit analyses underlying critical habitat designations. While this will likely lead to more litigation over critical habitat designations, review for abuse of discretion is highly deferential to an agency’s decision.

The Supreme Court’s decision comes on the heels of several recent agency-level attempts to limit the scope and regulatory burden of the ESA. In April, the Service issued a guidance memorandum that narrowed the circumstances under which the Service would consider an incidental take permit for habitat modification appropriate. And in July, the Service proposed significant revisions to its ESA regulations that would, among other things, limit the Service’s ability to designate unoccupied areas as critical habitat.

CHAPTER 9

Design Review, Historic Preservation, Williamson Act, Coastal Development, Stormwater, Prevailing Wage and Public Bidding

Greenfield v. Mandalay Shores Community Association, 21 Cal. App. 5th 896 (2018)

Ban on Short-Term Home Rentals Is a “Development” Subject to the Coastal Act

Underlining the broad and expansive definition of “development” under the California Coastal Act, the Second Appellate District ruled that a coastal homeowners association’s ban on short-term rentals is considered “development” subject to the requirements of the Coastal Act.

The Mandalay Shores Community Association is the homeowners’ association for 1,400 residences in a beach community within the City of Oxnard coastal zone. Increasingly concerned about the parking, noise and trash problems caused by short term rentals, the Association adopted a resolution barring home rentals for fewer than 30 consecutive days. Owners who violated the ban would be fined by the Association: \$1,000 for the first offense, \$2,500 for the second, and \$5,000 for each subsequent offense.

A Coastal Commission enforcement supervisor advised the Association that its ban on short term rentals constituted a “development” under the Coastal Act which required a coastal development permit. The plaintiffs, owners of a home in Mandalay Shores, then sued the Association to prevent enforcement of the ban, asserting it violated the Coastal Act.

The trial court denied the plaintiffs’ motion for a preliminary injunction, ruling that the Association’s ban on short term rentals was not a “development” under the Coastal Act.

The court of appeal reversed the trial court judgment, ruling that it had not correctly construed the Coastal Act. The court stated that, because a key goal of the Coastal Act is to maximize public access, “development” is broadly defined to include changes in density or intensity of use of land, and not just alterations of land or water. For example, the court explained, locking a gate that is usually open for public beach access over private land, or posting a “no trespassing” sign on a parcel used for beach access, are both “developments” because they have a significant adverse impact on public use of coastal resources.

Similarly, the court reasoned, preventing non-residents from vacationing—as they had for decades—at Mandalay Shores through the short-term rental of beach homes created a “monetary barrier to the beach.” The Association’s ban was therefore a “development” subject to the provisions of the Coastal Act. The question of whether short-term rentals should be regulated or banned would need to be decided by the Coastal Commission and the City of Oxnard, not a private homeowner’s association.

The appellate court ordered the trial court to grant the plaintiffs’ motion for a preliminary injunction, thereby preventing continued enforcement of the Association’s ban on short-term rentals.

San Diego Unified Port Dist. v. Cal. Coastal Commission, 27 Cal. App. 5th 1111 (2018)

Port Master Plan Conflicted with Coastal Act Goals

A core principle of the California Coastal Act is to maximize public access to the coast, including recreational opportunities in the coastal zone. The Court of Appeal determined that the Coastal Commission acted within its authority in rejecting an amendment to a port master plan as inconsistent with this principle.

The Port District applied to the California Coastal Commission for certification of an amendment of the District's port master plan to authorize specified hotel development, including construction of a 175-room hotel. The Commission denied the amendment finding it inconsistent with the public access and recreation policies of the Coastal Act because it did not adequately protect and encourage lower-cost visitor and public recreational opportunities. The District sought, and the trial court issued a writ of mandate invalidating the decision. The trial court found the Commission, in excess of its jurisdiction, had essentially conditioned its certification on the provision of lower-cost overnight accommodations, which "infring[ed] on the wide discretion afforded the District to determine the contents of land use plans and how to implement those plans."

The Fourth Appellate District reversed the trial court's rulings.

The appellate court rejected the District's contention that it fell within a specifically defined category of local government entity over which the Commission's authority was limited. The court declined to "rewrite the law" to extend certain restrictions on the Commission's jurisdiction to port district master plans, which are governed by Chapter 8 of the Coastal Act.

The court then addressed (*de novo*) whether the Commission's decision was within its authority under the Coastal Act. The District argued that "precise policy" originates with a legislative body such as the District, meaning the District is charged with creating policies to implement the Coastal Act whereas the Commission merely verifies a plan's consistency. The court disagreed, acknowledging the breadth of the mandate in reviewing planned development and other uses within the coastal zone. This mandate includes promulgating statewide rules and statewide policies, not merely acting as a "rubber stamp agency" with respect to local planning. The Commission exercises its independent judgment on the issue of a local entity's compliance with coastal policy, and its "broad supervisory role" is particularly important when dealing with a port master plan.

The court acknowledged that the Commission may not conditionally approve a master plan under the Coastal Act, i.e., grant certification subject to a specified modification. But this is not what the Commission did in this case – it denied certification on grounds that the proposed amendment did not further the Act's public access policies. While the Commission suggested how the District might meet the Act's policy that "lower cost visitor... facilities shall be... provided," it expressly acknowledged it was not permitted to make such modifications to the plan.

The court reaffirmed that the Commission is empowered to exercise independent judgment in determining not only whether a master plan amendment conforms with the Act's policies, but also whether the plan "*carries out* those policies" (emphasis in original). The Commission has a statutory mandate to consider "the manner of public access" on a case-by-case basis and may take into account social and economic needs. The court concluded that the Commission exercised this mandate in deciding that the plan amendment did not adequately protect lower-cost visitor and public recreational opportunities, including overnight accommodations.

***Beach and Bluff Conservancy v. City of Solana Beach*, 28 Cal. App. 5th 244 (2018)**

Administrative Mandate Is the Exclusive Method For Challenging An Lcp Under The Coastal Act

An appellate court has held that the sole means of challenging a certified local coastal program (LCP) based on violation of the California Coastal Act is a petition for writ of administrative mandate under Code of Civil Procedure section 1094.5.

Under the Coastal Act, local governments must develop an LCP consisting of a land use plan (LUP) and a Local Implementation Plan and submit the plans to the Coastal Commission for certification of consistency with the Act. In this case, the City submitted an amended LUP to the Commission for certification and, after a series of proposed modifications accepted by the City, the Commission certified the LUP.

Petitioner filed an action for declaratory relief and traditional mandate under Code of Civil Procedure 1085, asserting a facial challenge to policies in the amended LUP on the grounds that they conflicted with the Coastal Act and/or violated the takings clause of the Fifth Amendment.

The appellate court concluded that petitioner's sole remedy for claims based on the Coastal Act was a petition for writ of administrative mandamus against the Coastal Commission. The court relied on Public Resources Code § 30801, which states that any challenge to a decision or action by the Coastal Commission must be by writ of mandamus under Code of Civil Procedure § 1094.5 filed within 60 days after the final decision of the Commission.

The court reasoned that any post-approval facial challenge to a local land use policy is "essentially a challenge to the Commission's quasi-judicial certification decision." That the *City* was acting legislatively when it enacted the LUP did not change the fact that a mandamus proceeding against the *Commission* (with the City named as a necessary party) was petitioner's exclusive method of challenging policies based on inconsistency with the Coastal Act. The court pointed to the established principle that where a statute creates rights and obligations not previously existing under common law, it may also define the exclusive procedure for judicial review based on those rights and obligations. Because the Coastal Act created new rights and obligations regarding the development and management of coastal property, the exclusive method of challenging decisions of the Commission under the Coastal Act was administrative mandamus, notwithstanding common law remedies that might otherwise have been available.

Turning to petitioner's constitutional challenge, the court observed that the Commission's review of an LUP is statutorily limited to a determination of consistency with the Coastal Act, and hence section 30801 arguably did not apply to a constitutional challenge to a Commission-certified LUP. The court found it unnecessary to decide this, however, finding that petitioner's constitutional claims were not ripe for adjudication because the Commission and City had not adopted a final, definitive, position regarding how policies would be applied to the petitioner's property. Only then, the court said, could it be determined whether a constitutional violation had occurred. The court added that nothing in its decision precluded any property owner affected by the LUP from later challenging the application any of its policies to the owner's specific property.

CHAPTER 11

Regulatory Takings

Colony Cove Props., LLC v. City of Carson, 888 F.3d 445 (9th Cir. 2018)

Ninth Circuit Holds that Rent Control Board's Denial of a Mobile Home Owner's Request for Rent Increase Is Not an Unconstitutional Taking

The Ninth Circuit held that the City of Carson's mobile home rent control board's decision not to factor in debt service increases in its adjustment of a rental rate for a mobile home park did not result in a regulatory taking of the mobile home park owner's property.

The plaintiff purchased a \$23 million rent-controlled mobile home park in the City of Carson, \$18 million of which was financed through a loan. When the plaintiff acquired the property, the City Rent Review Board's application review guidelines required the Board to consider certain expenses submitted by property owners against the property's income to determine what rents would give the owner a fair return on their investment. At the time the plaintiff purchased the property, these expenses included debt service, which are interest payments made on a loan to purchase the rent-controlled property. Subsequently, the City revised its guidelines for considering rent increases and the City's new rent control formula no longer factored in debt service expenses.

The plaintiff twice petitioned the city's Rent Review Board for a several hundred-dollar rent adjustment, per space. Applying the new guidelines, the City only granted a rent increase of \$36.74. The plaintiff sued the City, contending the Board's decision was an unconstitutional taking. The jury awarded the plaintiff over \$3 million in damages and the City appealed the decision.

The Ninth Circuit engaged in a regulatory takings analysis, governed by the factors set out in *Penn Central v. Transportation Co. v. City of New York*, 438 U.S. 104 (1978), which instructs courts to evaluate: 1) the regulation's economic impact; 2) the extent to which the regulation interferes with distinct investment-backed expectations; and 3) the character of the government action.

First, citing prior cases finding that a diminution in property value in excess of 75% did not amount to a taking, the court found that the denial of the plaintiff's requested rent increase was not a legally sufficient economic impact. The plaintiff's diminution in value "would only be 24.8% ... far too small to establish a regulatory taking."

Second, the plaintiff argued the change interfered with an investment-backed expectation because the City's implementation guidelines at the time plaintiff purchased the property included a debt service calculation in the rent increase. The court rejected this argument as the guidelines explicitly stated the current analysis would not create an entitlement to a specific rent increase. The court further concluded that the owner's reliance on the City continuing its past practice of calculating debt service in future rent increases did not create a reasonable investment-backed expectation.

Lastly, the court reasoned that the City's rent control program should be characterized as a public program, rather than a physical invasion, as the rent control program is intended to protect homeowners from rent increases. The court found that the "[t]his central purpose of rent control programs counsels against finding a *Penn Central* taking."

The Ninth Circuit therefore found that no reasonable finder of fact could conclude the plaintiff successfully presented a regulatory taking claim and reversed the district court's judgment.

CHAPTER 12

Exactions: Dedications and Development Fees

1901 First Street Owner v. Tustin Unified School District, 21 Cal. App. 5th 1186 (2018)

School Fees for Apartment Buildings Not Limited to Square Footage of Individual Units

School impact fees for an apartment complex must be calculated based on the square footage of both the individual units and other space within the interior of the buildings, such as hallways and elevator shafts.

School impact fees under Government Code section 65995 are based on “assessable space,” defined as “all of the square footage within the perimeter of a residential structure, not including any carport, covered or uncovered walkway, garage, overhang, patio, enclosed patio, detached accessory structure, or similar area.” (§ 65995(b)(1).) This square footage is to be “calculated by the building department of the city or county issuing the building permit, in accordance with the standard practice of that city or county in calculating structural perimeters.” (*Id.*)

The City of Tustin calculated the square footage of an apartment building owned by 1901 First Street using a “net rentable” method — the City’s standard practice at that time — which included the square footage of the individual apartment units but excluded everything else in the building. The school district objected to this method, contending that the statute required all space within the perimeter of the building to be included. The City then revised its square footage calculation based on the perimeter of the building, which resulted in an increase in the fee of over \$238,000. First Street sued to recover the difference.

First Street’s principal argument was that, in the case of apartment buildings, the area of a “residential structure” was limited to the apartments themselves, pointing to the exclusions in section 65995(b)(1) for “any carport, covered or uncovered walkway, garage, overhang, patio, enclosed patio, detached accessory structure, or similar area.” The court found that none of these exclusions applied to areas within the interior of apartment structures, such as lounge areas, recreation rooms, indoor pools, elevator shafts, mechanical rooms and the like. The only potentially applicable exclusion, the court said, was for walkways. It concluded, however, that the statute used the term walkway “in the sense of an external walking path” not in the sense of an internal hallway, reasoning that the other items in the list—such as carports, garages and patios—were typically located at or near the periphery of a residential structure, and that the Legislature had specified these exceptions to make it clear that these peripheral areas were not intended to be included as assessable space.

First Street also argued that the City’s standard practice of calculating net rentable space should govern, relying on the provision in section 65995(b)(1) that “the square footage within the perimeter of a residential structure shall be calculated by the building department of the city . . . *in accordance with the standard practice of that city . . . in calculating structural perimeters.*” (Emphasis added.) The court disagreed, concluding that the “standard practice” referred to in the statute was specifically the standard practice of calculating the square footage “within the perimeter of a residential structure,” which had to comply with section 65995(b)(1).

First Street’s final argument was that the City’s decision to change its method of calculating assessable space violated First Street’s vested rights to proceed in accordance with the rules, regulations and ordinances in effect at the time of the approval of its vesting tentative map. The court rejected this argument based on Government Code section 66498.6(b), which states that approval of a vesting tentative map “does not grant local agencies the option to disregard any state or federal laws, regulations,

or policies.” The City’s standard practice, the court stated, was not in compliance with state law, hence the City could adopt a new rule implementing the statutory mandate without violating any vested rights.

***SummerHill Winchester LLC v. Campbell Union School District*, 30 Cal. App. 5th 545 (2018)**

School District’s Fee Study Did Not Contain the Information Necessary to Lawfully Impose Development Fees

The Sixth District Court of Appeal invalidated a school district’s Level 1 development fee because the underlying fee study did not properly calculate anticipated growth and included the cost of hypothetical new schools that the district had no plans to build.

The Campbell Union School District adopted a Level 1 development fee based on a fee study that concluded the District had no capacity to accommodate new students and calculated an average cost of \$22,039 to house each additional student in new school facilities. This figure was based on the projected cost of building a new, 600-student elementary school and a 1,000-student middle school.

Petitioner paid the development fees under protest and sued to recover them, contending that the fee study had failed to calculate anticipated growth from new development or to identify any new facilities that were necessary to accommodate such growth. The court of appeal agreed on both counts and ordered a full refund of the fees.

The court found that although the fee study determined the District was already over capacity (and hence would be impacted by any new students from development), the study had failed to calculate the “total amount of new housing projected to be built within the District.” Instead, the study simply stated that the amount of new development “would be in excess of 133 residential units.” This was inadequate, the court said, because it did not provide the information needed “to determine *whether* new school facilities are needed due to anticipated development.” While the Board did not need to identify “specific facilities that would be built,” it did need “to decide whether or not new school facilities were needed and, if so, what type of facilities were needed.”

The court also decided that the Board had improperly assessed the fee based on the cost of new school facilities that were not shown to be necessary to accommodate students from new development. While the fee study based its calculations on the cost of building new elementary and middle schools, there was insufficient evidence either that such schools would be needed to accommodate students from new development or that the District actually planned to build such schools.

The District argued that because its enrollment already exceeded its capacity, every additional student generated by new development would necessarily result in a financial impact on the District. The court accepted the validity of this statement but found it did not satisfy the statutory requirement that the “Board demonstrate a *reasonable relationship* between the amount of the fee and the impact of development *on the need for new or reconstructed school facilities*.” (Emphasis added.) The court concluded that the “fee study’s use of hypothetical new schools that [the District] was not going to build as the financial premise for calculating the fee was not a reasonable alternative methodology that could legally support the fee imposed by the Board.”

CHAPTER 13

Initiative and Referendum

Save Lafayette v. City of Lafayette, 20 Cal. App. 5th 657 (2018)

Court Gives Green Light to Referendum of Ordinance Adopted to Conform Zoning With General Plan

A referendum requiring either the rejection of an enacted zoning ordinance or submission to the voters that would leave in place zoning inconsistent with a general plan does not violate Gov't Code Section 65860.

The City of Lafayette amended its general plan to designate a parcel residential in anticipation of a residential development project. After the general plan amendment became effective, the city enacted a zoning ordinance to conform the parcel's zoning with the general plan. The plaintiffs, Save Lafayette, subsequently collected signatures and properly filed a referendum requesting the city to either prevent the enacted zoning ordinance from taking effect or submit it to a vote.

The city declined either option, asserting that preventing the ordinance from taking effect or submitting it to voters would violate Gov't Code Section 65860, resulting in zoning inconsistent with the city's general plan. The city defended its decision by relying on *deBottari v. City Council*, a key case decided in 1985 in which the court held that the City of Norco correctly refused to certify a referendum that would have rejected a zoning ordinance that was amended to be consistent with the general plan.

The court disagreed with this characterization. Relying on the recently-decided *City of Morgan Hill v. Bushey*, the court held that the referendum would not violate Section 65860 because it did not seek to enact new zoning inconsistent with the general plan. At most, the referendum would preserve the existing zoning designation on the parcel, which had become inconsistent because of the recent amendment to the general plan.

The court acknowledged that if instead an initiative was proposed to change the zoning to a designation inconsistent with the general plan, that this would violate Section 65860. This was not the case here; the referendum could lead to the rejection of the new zoning ordinance, but it did not propose to enact zoning inconsistent with the general plan. While the referendum amounted to a challenge to the city's choice of zoning, it did not further constrain the city's ability to enact another suitable zoning designation.

The California Supreme Court recently granted review of *Bushey* to address the split in authority among the courts of appeal. The case summary on the court's web site describes the issue presented as follows: "Can the electorate use the referendum process to challenge a municipality's zoning designation for an area, which was changed to conform to the municipality's amended general plan, when the result of the referendum – if successful – would leave intact the existing zoning designation that does not conform to the amended general plan?"

The court's review should settle whether a referendum that seeks to overturn a new zoning ordinance violates Section 65860 if it leaves in place zoning inconsistent with a general plan.

City of Morgan Hill v. Bushey (River Park Hospitality, Inc.; Morgan Hill Hotel Coalition), 5 Cal. 5th 1068 (2018)

Zoning Ordinance Adopted To Make Zoning Consistent With General Plan May Be Rejected By Referendum

The California Supreme Court has resolved a split among the courts of appeal, concluding that citizens may bring a referendum to challenge a zoning ordinance even if the referendum would temporarily leave in place zoning inconsistent with the general plan.

Government Code Section 65860 requires a city's zoning ordinance to be consistent with the general plan. When a zoning ordinance becomes inconsistent due to a general plan amendment, the city must enact a consistent zoning ordinance within a "reasonable time." Gov't Code Section 65860(c).

Here, voters in the City of Morgan Hill rejected by referendum a zoning ordinance the city council enacted to bring zoning into consistency with its recently amended general plan. The city claimed that by rejecting the zoning ordinance, the voters essentially enacted inconsistent zoning in violation of Section 65860.

The court disagreed. It held that unlike an initiative or ordinance that enacts inconsistent zoning, a referendum that leaves inconsistent zoning in place simply does so for a limited period of time — "until the local government can make the zoning ordinance and general plan consistent in a manner acceptable to a majority of voters." So long as there are other consistent zoning designations available, or the local government has other ways to make the zoning consistent and general plan consistent, then such a referendum is valid.

Furthermore, the court interpreted the "reasonable time" provision of Section 65860(c) as providing localities some undefined time to act, and determined that the time taken for a single referendum rejecting a zoning ordinance did not violate this limitation.

Because the trial court had not addressed whether there were other viable zoning designations or other options for the city to resolve the inconsistency between the existing zoning ordinance and the general plan, the court remanded the case for further consideration of these issues.

Center for Community Action and Environmental Justice v. City of Moreno Valley (HF Properties), 26 Cal. App. 5th 689 (2018)

Development Agreements Cannot be Adopted by Initiative

A development agreement cannot be adopted by initiative, the California court of appeal ruled in *Center for Community Action and Environmental Justice v. City of Moreno Valley*.

The Development Agreement Statute

The Development Agreement Statute (Government Code sections 65864–65869.5) allows a municipal government and a property owner to enter into a contract that vests development rights by freezing the land use regulations applicable to a property. The statute includes procedural and substantive requirements for development agreements, including that "[a] development agreement is a legislative act that shall be approved by ordinance and is subject to referendum." (Government Code section 65867.5(a).)

Background

The project at issue in this case was a proposed logistics center in Moreno Valley. In 2015, the Moreno Valley City Council approved project entitlements, including a development agreement. Opponents then filed a CEQA lawsuit to challenge the environmental impact report for the project. A group backed by the developer responded by filing a petition for an initiative that would repeal the development agreement ordinance and approve a new development agreement. The initiative development agreement was substantially the same as the agreement the City Council approved for the project. The City Council adopted the initiative, rather than submitting it to the voters. Because voter-sponsored initiatives are not subject to CEQA, no environmental review was completed before the City Council adopted the initiative. Opponents then filed this lawsuit, asserting that a development agreement cannot be adopted by initiative.

The Court's Decision

Based on the statutory language, statutory scheme, and legislative history, the court determined that the Development Agreement Statute did not permit adoption of a development agreement by initiative.

First, the court found it meaningful that the Development Agreement Statute specifies that adoption of a development agreement is a “legislative act . . . subject to referendum” but omitted any reference to initiative. This omission, according to the court, indicated an intent by the Legislature to preclude adoption by initiative. The court also found the Development Agreement Statute’s reference to a “legislative body” as providing support for the Legislature’s intent to exclusively delegate power to adopt a development agreement to local governments.

Second, the court determined that the statutory scheme was of statewide concern, which supported inferring a legislative intent to exclude initiatives. In addition, the court explained that the initiative process was inconsistent with the concept of a development agreement as a negotiated contract, because an initiative does not provide any opportunity for the local government to negotiate its terms. The court also observed that adoption by initiative could result in development agreements that did not include all provisions required by the Development Agreement Statute.

Third, the court noted that the legislative history was consistent with an intent to prevent adoption of development agreements by initiative. The court cited an amendment to the text of the bill that stated that development agreements would be subject to referendum. Singling out referenda, the court stated, indicated an intent to exclude initiatives. The court also noted that numerous documents in the legislative history referred to referenda, but were silent as to initiatives.

The court also analyzed the meaning of a bill that passed the Legislature in 2017 but was vetoed by the governor, which would have amended the Development Agreement Statute to prohibit adoption by initiative. The court concluded that this bill did not necessarily mean that the current statute would allow adoption by initiative, because the failed bill stated that it would “clarify” the law.

Implications

In holding that a development agreement may not be adopted by initiative, the court’s decision affirms that a development agreement is a contract that must be negotiated by a local government and a property owner. The court’s holding in this case is straightforward, but has important implications for developers. Adoption of a voter-sponsored initiative by the local legislative body has been an important tool in the developer’s toolkit because CEQA does not apply to such an action. Going forward, local legislative bodies can still adopt voter-sponsored initiatives to amend a general plan, zoning ordinance, or other land use regulations, but not development agreements to vest those regulations.

CHAPTER 16

Sustainable Development

Rodeo Citizens Ass'n. v. County of Contra Costa, 22 Cal. App. 5th 214 (2018)

Court Rejects Challenge to Refinery EIR's Project Description, GHG Emissions Analysis and Hazards Assessment

The county certified an EIR and approved a land use permit for a propane recovery project at an existing oil refinery. The project would modify some existing equipment and add other equipment to allow the refinery to recover butane and propane as a byproduct of the refining process, and ship it by rail for commercial sale.

The trial court found the EIR's air impact analysis inadequate but rejected the petitioner's other claims. Unsatisfied with that result, the petitioner appealed, but the court of appeal also ruled against the petitioner on those claims.

The project description was accurate and adequate. The petitioner contested the EIR's project description, arguing the project would involve more frequent processing of "nontraditional" crude feedstocks – such as imported tar sands and Bakken crudes -- which would contain higher levels of propane and butane, together with higher levels of dangerous chemicals that would increase emissions of air pollution. The court, however, found no support for the claim, concluding the evidence showed that the project was proposed and designed as an adjunct to existing operations, not to change the types or amount of crude oil that can be processed at the refinery. The project would allow recovery of butane and propane produced by ongoing refinery operations, but it would not increase the amount of butane and propane that are produced, and would not change any of the other process units at the refinery.

An analysis of downstream GHG emissions would require undue speculation. The petitioner further argued the EIR was deficient because it did not analyze greenhouse gas emissions from combustion of the propane and butane that would be sold to downstream users. The EIR explained, however, that propane and butane have many non-fuel uses that generate negligible greenhouse gas emissions, and can also be used to replace fuels with higher emissions. Given the uncertainty regarding end uses, coupled with the highly changeable nature of the propane and butane market, any attempt to quantify downstream GHG emissions would be speculative, so a downstream emissions analysis was not required.

Public and environmental hazard impacts were adequately analyzed. Petitioner also challenged the EIR's findings that the project would not have a significant impact on the public or the environment from the handling and transportation of hazardous materials, including a claim that the EIR failed to analyze the project's contribution to the cumulative risk of rail-related accidents. The EIR concluded that because the project would add tank cars to existing trains, and not add new train trips, the cumulative risk of train accidents would not increase. The court found this explanation "not unreasonable." It also rejected petitioner's other arguments regarding hazard impacts, finding that the EIR's exceptionally detailed risk analysis was plainly sufficient.

CHAPTER 19

Land Use Litigation

Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Association, 19 Cal. App. 5th 399 (2018)

Homeowners Association Land Use Approval Process Is Protected Activity Under Anti-SLAPP Statute

The California Court of Appeal for the Fourth District has determined that the actions of a homeowners association undertaken in accordance with its land use approval process are protected activities in furtherance of free speech under California's anti-SLAPP statute.

Background. Two developers proposed a joint project to build residential housing units for senior citizens on property near Rancho Santa Fe, California. Because the project would exceed local density restrictions, the developers sought approvals from both the County of San Diego and the Rancho Santa Fe Association. Initially, the association expressed support for the development. But that changed following an association meeting at which community members expressed opposition to the project. Following the meeting, the association sent communications to the county recommending the county follow current zoning requirements until the association determined whether it would approve the project.

After the developers failed to secure the necessary approvals, they filed suit against the association asserting nine causes of action alleging violations of the Common Interest Development Open Meeting Act, breach of fiduciary duties, fraud, and interference with business relations. While the complaint separated these theories into separate causes of action, the crucial allegations common to each were that the association initially expressed to the developers that it supported the project; the association refused the developers' request to reschedule an "informational public meeting" to discuss the project; the meeting agenda did not adequately describe the meeting; and the association improperly influenced the county to reject the project.

In response, the association filed a special motion to strike all nine causes of action under California's anti-SLAPP statute, Code of Civil Procedure § 425.16. The trial court granted the association's motion as to eight causes of action, but denied the motion as to the cause of action for violations of the Open Meeting Act. The trial court ruled that the association's alleged activities were not protected under sections 425.16(e)(1) or (2) of the Act as activities occurring during an "official proceeding."

The Court of Appeal's Decision. The court of appeal held that the trial court erred in finding the association's alleged violations of the Open Meeting Act were not based on protected conduct in furtherance of free speech, and upheld the trial court's rulings striking the developers' other claims.

Application of the anti-SLAPP statute requires a two-step analysis. First the defendant must demonstrate that the cause of action arises from protected activity. If the defendant does so, the burden then shifts to the plaintiff to demonstrate that it is likely to prevail on its claims.

Regarding the Open Meeting Act cause of action, asserted by only one of the developers, the court concluded that it was unclear whether the association's activities should qualify as "official" governmental actions under the statute. The court held, however, that the anti-SLAPP statute applied because the activities complained of—communicating with project applicants, setting agendas, and sending emails and letters—were all within the quasi-governmental responsibilities of the association. As a result, the association's actions fell within the broader protections of section 425.16(e)(4) as "conduct in furtherance of the exercise the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." Under the second prong, the court held that the developer could not demonstrate a probability of success on the merits because it was not a member of the association and therefore lacked standing to seek relief under the Open Meeting Act.

For the remaining causes of action based on the association's alleged breach of fiduciary duties, fraud, and interference with business relations, the court held that the crux of these causes of action was the same as the set of allegations giving rise to the Open Meeting Act cause of action. Thus, these causes of action also arose from protected activities. And because the developers did not show they could prevail on the merits of those claims, the trial court did not err by striking them.

Conclusion. While the court acknowledged that the case presented a "close question as to the applicability" of the anti-SLAPP statute, it broadly held that the association's activities concerning property entitlements "are matters of public interest" and therefore are protected activities in furtherance of free speech. The court did not suggest any limitations or provide any guidance as to how broad a segment of the public must be affected for the challenged activities to be considered as in the public interest.

Citizens for Amending Proposition L v. City of Pomona, 28 Cal. App. 5th 1159 (2018)

City's Agreement to Extend Life of Billboards Violated Initiative Measure Prohibiting New Billboards

The Second District Court of Appeal held that the purported amendment of an agreement to extend the period in which billboards were permitted within the City constituted a new agreement and hence violated the terms of a ballot initiative prohibiting new billboards.

The City of Pomona entered into an agreement with Regency Outdoor Advertising allowing billboards alongside several Pomona freeways, but requiring their removal upon the agreement's expiration. Thereafter, Proposition L was passed prohibiting construction of new billboards within city limits. The City/Regency agreement expired in June 2014. One month later, the city council adopted an ordinance purporting to amend the agreement by extending it for an additional 12-year term. Plaintiffs sued, contending that the "amendment" was in fact a new agreement allowing new billboards in violation of Proposition L.

Preliminarily, the court rejected the City's argument that the plaintiffs lacked standing. It noted that both plaintiffs — one of whom was a competitor of Regency — were residents of the City and hence could assert public interest standing in having City laws enforced. The court also disagreed with the City's claim that Regency was an indispensable party and that the failure to include Regency within the applicable limitations period required dismissal of the suit. The agreement required Regency to pay the City \$1 million as consideration for the new agreement. Accordingly, the court reasoned, the interests of the City and Regency were aligned both legally and financially and Regency's interests were thus adequately protected by the City's assertion of its own interests in upholding the contract.

On the merits, the court found that the purported amendment of the City/Regency agreement was a nullity because the agreement had already expired at the time the amendment was approved by the city council. As a new agreement, it was subject to the rules, regulations, and official policies in force in the City at the time of its adoption, including Proposition L. The new agreement violated Proposition L because the original agreement had required removal of the billboards upon its expiration, and thus the new agreement effectively permitted billboards that would otherwise not have existed, contravening both the letter and spirit of the ballot measure.