Land Use and CEQA Litigation Update

Wednesday, May 3, 2017 Opening General Session; 1:00 – 3:00 p.m.

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CEQA AND LAND-USE UPDATE: OCTOBER 2016 – MAY 2017

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Aptos Council v. County of Santa Cruz (2017) – Cal.App.5th – [slip op. dated March 30, 2017]

The Sixth District held that Santa Cruz County did not engage in "piece-meal" environmental review in adopting three ordinances amending different parts of its zoning ordinance. The court also held that the negative declaration prepared in connection with the ordinance amending development standards for hotels was adequate because whether the ordinance would alter development patterns was speculative.

Santa Cruz County embarked on an effort to overhaul its zoning ordinance. As part of this effort, in 2010 the county adopted amendments to the ordinance to allow for administrative approval of certain minor exceptions to zoning standards, such as reduced setbacks. In 2013, the county extended and expanded these provisions. Also in 2013, the county streamlined its process for approving exceptions to its sign standards. In 2014, the county revised its standards for hotels. Other zoning code amendments in the works addressed wireless communications facilities, permitted uses within various zoning districts, and revised agricultural standards. The petitioner sued, alleging that the county was engaged in piece-meal environmental review because the amendments had to be analyzed as a single project in one over-arching environmental analysis. The petitioner also alleged that the negative declaration adopted by the county to support the amendments to the hotel standards was inadequate. The trial court denied the petition. The petitioner appealed.

First, the petitioner argued the various amendments to the zoning code were, in fact, a single "project" under CEQA that had to be analyzed in a single program EIR, citing CEQA Guidelines sections 15168 and 15378. The court regarded this claim as raising a question of law that the court reviewed independently. The Court, relying on the Supreme Court's two-part test in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396, held that the three ordinances did not need to be analyzed as a single project. As the court explained, "[t]he key term here is 'consequence.' Thus, the issue is whether changing or reforming certain zoning regulations—for example, altering the density requirements for hotels and reducing the required number of parking spaces per hotel room—are reasonably foreseeable *consequences* of the other regulatory reforms challenged by [the petitioner], such as eliminating the need to obtain a variance for certain signs, or expanding administrative approval of minor exceptions to the entire county. We do not believe they are. . . . [T]he regulatory reforms operate independently of each other and can be implemented separately." (Footnote omitted, emphasis in original.) The court distinguished various cases in which piece-mealing was found because actions were functionally linked with one another. In this case, all the ordinances served the same, general objective: updating and modernizing its zoning ordinance. But the overarching goal was not analogous to development of a single, specific development project. Rather, the ordinances consisted of unrelated reforms in the service of a general goal. The approval of one ordinance did not beget the approval of another. Moreover, performing a single environmental analysis of the county's overarching goal, before even considering any amendments, would be "meaningless" because the county's proposal was not fixed and would evolve over time.

The petitioner argued the county also had an obligation to consider the cumulative effects of the ordinances. The court declined to reach this argument because the petitioner raised it only in its reply brief. Moreover, at the time the county considered the ordinances, "other regulatory reforms that may have cumulative impacts had not yet come to fruition. When future reforms are considered for environmental review, the cumulative impacts of all related reforms, as articulated in the CEQA Guidelines, will be examined."

Second, the petitioner challenged the negative declaration adopted to support the county's approval of amendments to development standards for hotels. The amendments reduced the county's existing hotel density requirement of 1,300 square feet per habitable room to 1,100 square feet per habitable room, eliminated a three-story height limit, and relaxed standards for required parking. The county's initial study/negative declaration concluded these amendments would not have environmental impacts because future hotel projects would still undergo review. The county took the position that there was no way to know the number of additional hotel rooms that might be authorized as a result of the amendments; rather, the impacts of additional rooms would be examined in the context of specific development proposals. The county surveyed owners of vacant land with zoning that authorized hotels, but none had applications on file, or disclosed plans to sell their land or to submit applications in the future.

The petitioner argued the negative declaration was flawed because it failed to account for the impacts of future development authorized by the amendments. The court acknowledged that, where a project may induce growth, the agency is not excused from performing environmental review simply because there is some uncertainty about what shape that future development may take. Rather, the agency must do its best to identify and analyze those impacts that are a reasonably foreseeable consequence of the project. "Thus, the issue is whether increased hotel developments, such as hotels proposed at higher densities than before, are a reasonably foreseeable consequence of the ordinance." The petitioner argued that the county "ignor[ed] its own stated reasons for pursuing the ordinance—to facilitate growth." The record did contain some evidence that the county adopted the ordinance in hopes of stimulating the development of hotels. But such hopes did not mean that hotel development was reasonably foreseeable. Moreover, the impacts of an increase in the number of hotel rooms could not meaningfully be analyzed except in the context of a specific proposal. Nor was there any evidence of imminent development; rather, the county investigated the plans of landowners with suitable zoning, and did not identify any reasonably foreseeable proposals. There was thus no evidence that the amendments would actually result in changed development patterns.

Finally, the court found that the petitioner had failed to carry its burden to show the existence of a "fair argument" of potentially significant impacts that would occur if county adopted the hotel ordinance. The petitioner cited evidence in the record suggesting that the ordinance would encourage development of higher-density hotels. But this evidence amounted to unsupported speculation. The county investigated whether increased development would result from the ordinance and concluded, based on this investigation, that no applications were forthcoming or foreseeable. Thus, "[a]t this point, environmental review of potential future developments would be an impossible task, because it is unclear what form future developments will take. The suggested environmental impacts are simply not reasonably foreseeable at this time, and evaluation of the impacts would be wholly speculative."

Environmental Impact Reports

East Sacramento Partnerships for a Livable City v. City of Sacramento (2016) 5 Cal.App.5th 281

The Third District held an EIR for an infill project was inadequate because it relied on General Plan level-of-service standards to conclude the project's traffic impacts on intersections within the city core would be insignificant.

A developer proposed a 336-unit residential development on an infill site in mid-town Sacramento. The city certified the EIR and approved the project. Neighbors sued. The trial court denied the petition. The neighbors appealed.

The neighbors argued the Draft EIR did not identify all the permits the project would need, citing a development agreement, revised zoning to increase the number of residential units, and a variance for driveways. The Court disagreed, noting that these approvals were described and analyzed in the Final EIR; the city provided notice of these approvals; such evolution of the project as it moved through the entitlement process was the norm; and the neighbors failed to show prejudice with respect to this evolution.

A proposal to develop an additional tunnel to provide expanded access to the site, while discussed, was not part of the project, and did not need to be included in the project description. Instead, the city merely approved studying the feasibility of the tunnel. Although the tunnel would serve the project, the tunnel was not essential, and the project could proceed without it. The city also approved a half-street closure, in order to divert project traffic onto adjacent streets that were less congested; this "modest change" did not constitute unlawful piece-meal review. Neither did a city council motion directing staff to delete a proposed parkway and interchange from the General Plan.

The neighbors challenged the EIR's analysis of toxic air contaminants, noting the site's proximity to railroad tracks, a freeway and an old landfill. Citing the California Supreme Court's decision in *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, the Court held that CEQA does not require an EIR to analyze the effects of the existing environment on future residents of the project and concluded that the neighbors failed to cite substantial evidence that the project would exacerbate health risks.

The neighbors also argued the project was inconsistent with various General Plan policies pertaining to transportation, the environment, and noise. Those policies, however, had either been amended such that they no longer applied to the project, or the city had discretion to find the project consistent with the General Plan as a whole despite tensions with certain policies, or the policies cited by the neighbors were couched in terms such that strict compliance was not required.

The neighbors argued the EIR's traffic analysis was inadequate in various respects. The Court disagreed, with one significant exception. Specifically:

- The city properly relied on Public Resources Code section 21159.28 to streamline its analysis of the project's impact on the regional transportation network, including freeways in the region. The record supported the city's conclusion that the project was consistent with SACOG's MTP/SCS program EIR.

- The city had discretion, pursuant to its guidelines, to focus on the project's impacts on intersections, rather than on road segments.

- The re-categorization of a roadway from a "major collector" to a "local collector," and the corresponding shift in the applicable level-of-service standard, did not require recirculation of the Draft EIR because the volume of traffic remained the same.

- A traffic engineer hired by the neighbors claimed the EIR's traffic study omitted certain, key road segments, but as noted the city had discretion to focus on intersections, and in any event the neighbors failed to show prejudice in light of the fact that the traffic study analyzed intersections on these same roadways.

- The city's mitigation measures, which called for monitoring and re-timing the signal at a key intersection and required the developer to pay "fair share" fees for traffic improvements, were adequate.

The neighbors challenged the city's reliance on General Plan traffic policies to establish thresholds to determine the significance of the project's traffic impacts. Those policies differed depending on where in the city the streets were located; those in the downtown/midtown "core" could tolerate greater congestion (LOS E or F) than those located elsewhere. The EIR concluded that traffic impacts would not be significant in light of these policies. The Court held that was not good enough; the EIR had to consider whether traffic impacts would be significant, despite the project's consistency with General Plan traffic standards. The traffic study showed traffic would degrade at certain intersections from LOS E or F, and found that impact to be significant or insignificant, depending on the location of the intersection. But the "EIR contain[ed] no explanation why such increases in traffic in the core area are not significant impacts, other than reliance on the mobility element of the general plan that permits LOS F in the core area during peak times." The EIR's reference to "community values" and to the General Plan did not provide a sufficient explanation for why the threshold differed. Thus, the EIR did not contain substantial evidence to support the finding of no significant impacts with respect to certain intersections in the core area where LOS would degrade to E or F.

Mission Bay Alliance v. Office of Community Investment and Infrastructure (2016) 6 Cal.App.5th 160

The Golden State Warriors proposed to construct an 18,500-seat capacity arena in the Mission Bay South area of San Francisco. The Governor certified the arena under AB 900. The Office of Community Investment and Infrastructure – the successor to the city's redevelopment agency – prepared and certified a subsequent EIR. The subsequent EIR tiered off two prior EIRs prepared in 1990 and 1998 for the Mission Bay South redevelopment plan. These plans called for the transformation of the neighborhood from a disused industrial area into a medical and research complex. In November 2015, OCII approved the project. The Mission Bay Alliance – a coalition seeking to locate the arena elsewhere, rather than amidst the area's burgeoning hospital and research facilities (notably, the newly opened UCSF medical center) – sued. The trial court denied the petition. The alliance appealed.

In a lengthy opinion, the First District affirmed. First, the alliance argued that the city had improperly "scoped out" certain topics as adequately addressed in the prior EIRs. With respect to land use impacts, the alliance argued the record contained a "fair argument" that the project would adversely affect the community character in the vicinity of the arena. The Court held, however, that the "fair argument" standard did not apply; rather, "[s]ubstantial evidence is the proper standard where, as here, an agency determines that a project consistent with a prior program EIR presents no significant, unstudied adverse effect." OCII had a "reasonable basis" to conclude the arena would not interfere with other uses in the area. Similarly, the initial study explained why an area that had been excavated after the 1998 program EIR had been prepared, and subsequently filled with water, did not contain significant biological resources. The initial study, and responses to comments in the Final SEIR, also explained why there would be no new significant impacts with respect to the clean-up of hazardous substances in soil at the site, or to nearby parks.

With respect to transportation, the EIR analyzed traffic and transit impacts under various scenarios. The analysis took into account implementation of a "Transit Service Plan" (TSP) as a component of the project that would be implemented for larger events at the arena. The alliance argued that this approach ran afoul of the First District's decision in *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, which held that an agency violated CEQA when it cited project components that served to reduce impacts, and thereby avoided analysis of the project's impacts and the identification of mitigation measures. In this case, the Court observed: "Arguably, some components of the TSP might be characterized as mitigation measures rather than as part of the project itself. Any mischaracterization is significant, however, only if it precludes or obfuscates required disclosure of the project's environmental impacts and analysis of potential mitigation measures." In this case, the characterization of the TSP as part of the project, rather than as a mitigation measure, did not interfere with the identification of the transportation consequences of the project or the analysis of measures to mitigate those consequences. The SEIR analyzed the project's transportation impacts both with and without implementation of the TSP, and applied the same significance thresholds to both scenarios. Because substantial evidence in the record showed that adequate funding would be available to implement the TSP, OCII was not required to consider other funding sources. Moreover, because the accompanying Transportation Management Plan included specific performance standards, the Warriors might have to provide additional funding if necessary to meet those standards. Mitigation measures requiring the Warriors to "work with" regional transit agencies to provide necessary additional service were similarly adequate, given the city's track record of working with these transit agencies to expand service to accommodate regional transit demand from events at nearby AT&T Park and elsewhere in the city. The record also showed that expanded regional transit service was available from a variety of sources, including the city's ½-cent sales tax, fare-box recovery, and disbursements from the Metropolitan Transportation Commission.

With respect to noise, the SEIR's significance thresholds focused on the extent to which the project would cause an incremental increase on noise levels, above existing, ambient noise. The threshold varied depending on the nature of the noise source (construction, transportation, crowds, and fixed sources) and existing noise levels (the higher the level of ambient noise, the lower the threshold). The Court held this approach was within OCII's discretion. The SEIR also contained sufficient information on the health effects of noise.

The alliance attacked the SEIR's analysis of the project's impact on greenhouse gas emissions (GHG) and climate change. The SEIR concluded this impact would be less than significant because the project was consistent with the city's adopted "GHG Strategy." According to the alliance, that was not enough; the SEIR also had to quantify both the project's GHG emissions, and the GHG emission reductions that would occur as a result of implementing the strategy. The Court disagreed, noting that CEQA Guidelines concerning GHG emissions authorize an agency to "[r]ely on a qualitative analysis or performance based standards." (CEQA Guidelines, § 15064.4, subd. (a).) "Given the nature of greenhouse gas emissions—gases that trap heat in the atmosphere, contributing to global climate change but with little immediate perceptible effect on the locale from which they emanate—a project's compliance with an area-wide greenhouse gas reduction plan may be more useful in determining the significance of those emissions on a global scale than quantification of its incremental addition to greenhouse gas emissions." In *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, the California Supreme Court endorsed this approach as a potential pathway to compliance.

The Court ruled that the SEIR was not required to study the impact of wind at on-site, publicly-accessible open space. The SEIR's inclusion of this information for disclosure purposes did not mean the impact was cognizable under CEQA.

OCII had discretion to determine the appropriate significance threshold to assess cancer risks associated with toxic air contaminant emissions. The record included guidance indicating various thresholds that had been deemed acceptable, and the threshold used in the SEIR was consistent with this guidance.

On non-CEQA claims, the alliance argued the project exceeded allowable square footage limits for retail uses. The Court disagreed, insofar as the claim rested on a misinterpretation of the meaning of "retail" under the operative redevelopment plan. The Court also upheld approval of a "place of entertainment" permit under the city's police code, finding that substantial evidence supported the arena's compliance with the code's requirements.

Residents Against Specific Plan 380 v. County of Riverside (2017) – Cal.App.5th – [slip op. dated February 14, 2017, ordered published March 15, 2017]

The Fourth District upheld an EIR prepared for a master plan community, holding that revisions to the project that occurred after the county certified the EIR did not require recirculation or invalidate the approvals or notice of determination.

The project consisted of a master-planned community with seven planning areas containing medium-density residential housing, mixed uses, commercial retail, and dedicated open space on 200 acres of undeveloped land in Riverside County. Planning area 6, the mixed use area, was analyzed as potentially providing for the development of a Continuing Care Retirement Community ("CCRC") for seniors. The county prepared and, in December 2012, certified an EIR and voted tentatively to approve the project. In November 2013, the project returned to the county with certain modifications, and the county approved it. The petitioners sued. The trial court denied the petition. The petitioners appealed.

First, the petitioners argued the county approved the project in December 2012, when the county certified the EIR and voted to approve the project. The petitioners claimed the county erred because the developer and the county thereafter substantially modified the plan. The court rejected this claim. The record made clear that the county's approval in December 2012 was only *tentative*. The modifications brought back to the Board of Supervisors in November 2013 were designed to address directions provided by Board members at the December 2012 hearing. The final vote, and actual approval, occurred in November 2013, not December 2012. That was also when the county adopted CEQA findings, an override, and an MMRP.

Second, the court concluded that the notice of determination posted by county substantially complied with the informational requirements of CEQA, despite conceded errors in the notice's description of the project, stating: "We conclude the notice's description of the project is close enough to the project as approved that it provided the public with the information it needed to weigh the environmental consequences of the [c]ounty's determination, seek additional information if necessary, and intelligently decide whether to bring a legal challenge to the approval within the 30-day limitations period." In any event, the petitioners could not show prejudice because they filed their petition well before the statute of limitations had run.

Third, the petitioners argued that the county had to recirculate the draft EIR following the changes to the project that occurred after the December 2012 Board hearing. The court disagreed. The differences between the plan described in the final EIR and as approved focused on the allocation and arrangement of uses within the project site, not the kinds of uses permitted or the overall extent or density of the proposed development. The footprint of the project remained the same. Because the overall number of residential units and square footage of commercial development did not increase, substantial evidence supported the county's conclusion that the generation of traffic trips would be no greater than disclosed in the EIR. Similarly, moving uses within the project would cause no greater impacts on adjacent biological resources. The record did not support the petitioners' claim that relocated residential and mixed uses within the site would result in new, significant noise or land-use impacts. For these reasons, substantial evidence supported the county's decision not to recirculate the draft EIR.

Fourth, the petitioners argued the EIR did not provide an adequate analysis of the air quality, noise, and traffic impacts that would occur as a result of development in the mixed use planning area. The analysis focused on development of a CCRC. According to the petitioners, the EIR's approach erred because, although a CCRC was one permitted use of this area, the plan did not *require* the area be used for building a CCRC. Thus, the developers could pursue other permitted commercial or residential land uses, and those uses might generate substantially more traffic than a CCRC and, as a consequence, have greater air quality and noise impacts as well. The court rejected this claim, stating that the county's decision to focus on the impacts of the CCRC was based on substantial evidence. If the developer decides not to build a CCRC and seeks to pursue other permitted options, it could do so only if the proposed uses were found to be compatible with adjacent uses, and if the county found that no additional impacts would occur. For this reason, the county "could reasonably conclude in view of those requirements that it was not necessary to undertake an environmental analysis of what are merely possible development schemes. . . . The agency merely decided to limit the analysis to the proposed and likely development while imposing restrictions that would limit the scope of potential changes to the development plan."

Finally, the court ruled that the EIR adequately considered the specific suggestions for mitigating the project's air quality and noise impacts. The South Coast Air Quality Management District proposed revising air quality mitigation to require the use of cleaner construction equipment. The EIR responded that this proposal was infeasible because lower-emission equipment might not be available when needed. The City of Temecula proposed that the project comply with the 2010 Energy Code, rather than the 2008 code cited in adopted mitigation; the EIR's response noted, however, that the project had to comply with whatever code was in place at the time of construction. Similarly, although Temecula proposed that the project incorporate specific requirements of the Green Building Standards Code, the county acted within its discretion in committing to an overall performance standard, rather than a prescriptive list of requirements. The petitioner proposed various measures to reduce the project's significant traffic noise impacts, but the county was not required to respond because these proposals were made at the December 2012 hearing, more than a year after the comment period had closed. Moreover, the county was justified in declining to adopt these noise mitigation measures because they required electric construction equipment that may not be available or duplicated existing requirements.

Banning Ranch Conservancy v. City of Newport Beach (2017) – Cal.5th – [slip op. dated March 30, 2017]

The California Supreme Court ruled that the EIR prepared for a project located in the coastal zone was deficient because it did not flag areas on the property that would likely be found by the Coastal Commission to constitute "environmentally sensitive habitat areas" (ESHA) under the Coastal Act, and therefore did not consider mitigation measures and alternatives designed to reduce impacts on those areas.

Newport Banning Ranch (NBR) proposed the Banning Ranch project on a 400-acre property located in the coastal zone. The project proposed to develop 1,375 residential units, 75,000 square feet of retail uses, and a 75-room hotel; roughly three quarters of the site would be preserved as open space, and historic oil operations would be consolidated and remediated. The site was in the coastal zone, and therefore required a Coastal Development Permit (CDP) from the Coastal Commission. The EIR prepared by the City of Newport Beach acknowledged the Coastal Commission's jurisdiction, but did not map ESHA on the property; instead, the EIR stated that the Commission would make the determination regarding where ESHA was located in considering NBR's CDP application. The City certified the EIR and approved the project. Banning Ranch Conservancy sued, alleging (1) the EIR was inadequate, and (2) the city had failed to adhere to a policy in its General Plan. The trial court rejected the Conservancy's CEQA claim, but agreed that the city had not complied with its General Plan policy. The Fourth District rejected both the CEQA and General Plan consistency claims. The Supreme Court granted the conservancy's petition for review.

The Supreme Court characterized the "principle issue" as "whether the Banning Ranch EIR was required to identify potential ESHA and analyze the impacts of the project on those areas." The Court held that CEQA imposed such an obligation on the city, and that the city's failure to do so was "a procedural question subject to de novo review." CEQA directs the lead agency to integrate its environmental review with the permitting and review processes being

carried out by other agencies. In this case, the city acknowledged the Coastal Commission's permitting authority, but did not adequately integrate its CEQA review with the requirements of the Coastal Act, despite comments from Coastal Commission staff and others asking that the city take into account the potential presence of ESHA on the property. This, in turn, meant that the EIR did not consider alternatives or mitigation measures designed to avoid or lessen impacts on ESHA. "[T]he regulatory limitations imposed by the Coastal Act's ESHA provisions should have been central to the Banning Ranch EIR's analysis of feasible alternatives." The EIR did not identify which areas might qualify as ESHA, or flag specific areas that had been delineated as ESHA in prior Commission proceedings. "As a result, the EIR did not meaningfully address feasible alternatives or mitigation measures. Given the ample evidence that ESHA are present on Banning Ranch, the decision to forego discussion of these topics cannot be considered reasonable." (Footnote omitted.)

The Court acknowledged that the Coastal Commission would ultimately make the determination whether ESHA was present. That fact, however, did not relieve the city of the obligation to include in the EIR a prediction of where the Commission would find ESHA to be located: "[A] lead agency is not required to make a 'legal' ESHA determination in an EIR. Rather, it must discuss potential ESHA and their ramifications for mitigation measures and alternatives when there is credible evidence that ESHA might be present on a project site. A reviewing court considers only the sufficiency of the discussion." (Footnote omitted.)

The city argued that identifying potential ESHA would be speculative, because only the Commission could make that determination. The Court disagreed. Two small areas on the property had already been designated ESHA in a prior proceeding. A biologist had mapped potential ESHA on the property, and Coastal Commission staff had offered to assist, but the city declined. Thus, the city "did not use its best efforts to investigate and disclose what it discovered about ESHA on Banning Ranch." The city could not deflect this obligation by pointing to the permitting jurisdiction of the Coastal Commission.

That did not mean the city had to accept the ESHA designations and related measures proposed by Commission staff. An agency could disagree with conflicting views, even those advanced by other agencies. But "an EIR must lay out any competing views put forward by the lead agency and other interested agencies. [¶] . . . [B]oth the commissioners and interested members of the public are entitled to understand the disagreements between commission staff and the [c]ity on the subject of ESHA. . . . Rather than sweep disagreements under the rug, the [c]ity must fairly present them in its EIR. It is then free to explain why it declined to accept commission staff suggestions." Although EIR appendices and other documents in the record addressed these issues, this "fragmented presentation" was inadequate, and did not reflect a good-faith effort at full disclosure. The EIR's detailed analysis of biological resources did not suffice, given the project's location in the coastal zone.

By certifying an inadequate EIR, the city abused its discretion. This error was prejudicial because it resulted in inadequate evaluation of project alternatives and mitigation measures, and deprived the Coastal Commission of information relevant to its permitting decision.

The Court reversed the Court of Appeal's judgment. The Court did not address, and "express[ed] no view," on the General Plan consistency claim.

Supplemental Review

San Diegans for Open Government v. City of San Diego (2016) 6 Cal.App.5th 995

The Fourth District ruled that CEQA did not require the city to provide an appeal to the city council of the planning department's "substantial conformance review" of modifications to an approved planned development permit.

In 1997, the city certified a program EIR and approved a high-density, mixed-use retail, commercial, and industrial business park on 242 acres. In 2000 and 2002, the city prepared, respectively, an addendum and mitigated negative declaration, and amended the plan to include 1,568 residential units. In 2012, the city approved a planned development permit for several hundred units, subject to carrying out adopted mitigation measures. In November 2013, the developer applied to the city to modify the approved design; the changes included a slight increase in building heights, a shift in the mix of units, and a reduction in parking. Various city departments performed "substantial conformance review" (SCR) to determine whether the developer's proposal was consistent with the city's approved plans. In January 2014, the planning department approved the project revisions, subject to appeal to the planning commission. The petitioner appealed the decision, arguing that the modifications were not minor, and that the SCR process was inappropriate. Following a hearing, the commission denied the appeal and upheld the approval. The petitioner appealed the commission's decision to the city council. The city refused to process the appeal based on its view that the commission's action was not appealable. The petitioner sued. The trial court denied the petition. The petitioner appealed.

According to the Court, "[t]he sole issue on appeal is whether plaintiffs are entitled to an administrative appeal of the SCR decision to the City Council." The petitioner argued that Public Resources Code section 21151, subdivision (c), required such an appeal. That statute states: "If a nonelected decisionmaking body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to this division, that certification, approval, or determination may be appealed to the agency's elected decisionmaking body, if any." According to the petitioner, because planning staff and the commission were not elected, the city had to allow an appeal to the council. The Court disagreed. Staff and the commission did not certify an EIR or approve a negative declaration or mitigated negative declaration. Nor did they determine that the project is not subject to CEQA. The city council had already determined that the entire master plan was subject to CEQA. The SCR decision did not alter that determination. Rather, the SCR process confirmed that the project remained subject to the city's previously-adopted mitigation measures. The fact that the SCR decision involved discretion did not, in of itself, trigger a right to a city council appeal. The municipal code, which contained a right of appeal paralleling the language of section 21151, subdivision (c), did not alter that conclusion.

Committee for Re-Evaluation of the T-Line Loop v. San Francisco Municipal Transportation Agency (2016) 6 Cal.App.5th 1237

The First District Court of Appeal upheld the decision of the San Francisco Municipal Transportation Agency ("Muni") to approve a contract to complete construction of the "T-Line Loop" – an extension of the City's light-rail system through the Dogpatch neighborhood on the

City's southeast waterfront. The Court held that substantial evidence supported Muni's conclusion that supplemental environmental review was not required.

In 1998, Muni issued an EIR/EIS covering expansion of the City's light-rail system. The analyzed improvements included construction of an "Initial Operating Segment" – an extension of light rail down Third Street, connecting Mission Bay and Dogpatch with the City's downtown transit system. By 2003, Muni had constructed much of this segment, including portions of a loop track at the end of this extension. Muni did not complete all components of the Third Street Loop, however, due to budget constraints. Operations commenced in 2007. In 2013, Muni received a Federal grant to complete the Loop. Muni asked the City's Planning Department to determine whether the 1998 EIR still "covered" the Loop, particularly in light of increased development in Mission Bay, and the proposal to construct an arena for the Golden State Warriors on Third Street. The Planning Department concluded that supplemental review was not required because the 1998 EIR had anticipated such growth. In 2014, Muni approved a contract to construct the remaining improvements to complete the Loop. The committee sued. The trial court denied the petition. The committee appealed.

The Court considered the standard of review applicable to review of Muni's threshold decision to rely on the rules governing supplemental environmental review under Public Resources Code section 21166, rather than treating the proposed contract as a new, stand-alone project. Citing *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, the Court held that the petitioner had the burden of proof to show that Muni's decision to rely on section 21166 was not supported by substantial evidence.

The committee argued the 1998 EIR did not analyze the impacts of the 2014 construction contract and, therefore, the "fair argument" standard of review applied. The Court disagreed. The 1998 EIR had identified the Loop as part of the "Initial Operating Segment." These passages, and other documents in the record, showed that the "Loop" approved in 2014 was the same "Loop" described and analyzed in the 1998 EIR. Case law applying the "fair argument" standard of review involved instances in which the prior EIR either did not address the latter activity, or was a "program EIR" prepared under Public Resources Code section 21094 for which latter, site-specific review was contemplated. The 1998 EIR, by contrast, was a project-specific EIR, and specifically considered the impacts of the Loop as part of the project.

The committee argued that, even if the 1998 FEIR mentioned the Loop, its analysis was insufficiently detailed to pass CEQA muster. The Court rejected this argument as a belated attack on the 1998 EIR.

Substantial evidence supported Muni's decision not to prepare a further EIR. Muni had twice asked the Planning Department whether there were substantial changes to the project, or to the circumstances surrounding the project, necessitating further analysis. Both times, the Planning Department confirmed that the project had not changed, and that although surrounding growth had occurred or been proposed, the underlying EIR had already assumed substantial growth would occur in the area. A separate analysis prepared by the Federal Transit Administration ("FTA") under NEPA provided further support that no new or more severe impacts would occur.

Finally, the committee argued that the City failed to follow required procedures in making its determination that no further CEQA review was required. The Court was unmoved. CEQA does not establish a particular procedure that must be followed to make a determination

under section 21166. In particular, no initial study or public hearing is required. Moreover, the FTA had circulated its NEPA analysis, and a Board of Supervisors subcommittee had held a hearing; the committee had participated in both proceedings.

LAND-USE OPINIONS

School District Preemption of Local Zoning

San Jose Unified School Dist. v. Santa Clara Office of Education (2017) 7 Cal.App.5th 967

The Sixth District Court of Appeal held that Government Code section 53094 does not authorize a county Board of Education to override local zoning with respect to the use of property for a proposed charter school.

Rocketship Education proposed to locate a charter school on property owned by the city of San Jose. The city's General Plan designated the site for parks, habitat, or other open space uses. The city's zoning ordinance zoned the site for "light industrial" uses. Neither designation allows schools. At Rocketship's request, the county Board of Education adopted a resolution pursuant to Government Code section 53094 exempting the property from the city's General Plan and zoning ordinance. The school district and an adjacent property own sued. The trial court granted the petition, ruling that only the school district – not the county Board of Education – had authority to adopt such a resolution. The county Board of Education appealed.

Government Code section 53094 states in part: "[The governing board of a school district . . . by a vote of two-thirds of its members, may render a city or county zoning ordinance inapplicable to a proposed use of property by the school district." The issue was whether "governing board of a school district" referred to all agencies involved in public education, or more narrowly to local school districts. The statute did not define these terms. Section 53094 was adopted in order to immunize school districts from local interference, given the State-wide interest in ensuring uniformity in school construction standards. Here, the statute was being invoked by the county Board of Education in support of a charter school. Even for charter schools, however, Education Code section 47614 provides that school districts – not county Boards of Education – are responsible for ensuring that adequate facilities are available for county authorized charter schools. Evidence that some school boards may have invoked section 53094 was too equivocal to persuade the Court to adopt another construction of the statute.

Local Regulation of Billboards on State Highways

D'Egidio v. City of Santa Clarita (2016) 4 Cal.App.5th 515

The Second District Court of Appeal ruled that the Outdoor Advertising Act does not preempt local regulation of billboards, and that cities and counties therefore have discretion to adopt billboard regulations that are more stringent than the Act.

A property owner erected a billboard next to the freeway to advertise homes the owner was developing on the property. At the time, the site was unincorporated. The county's sign ordinance allowed such signs, but only for on-site home sales, and not for off-site goods and services. D'Egidio bought the property and, in 1987, leased out the sign for advertising of off-site goods and services. The city annexed the site in 1990. The city adopted the county's sign

ordinance, and amended the ordinance from time to time thereafter; ultimately, the city's ordinance prohibited such signs unless they were grandfathered under the county's ordinance; nonconforming signs had to be removed within five years. In 2014, the city sent the owners a letter directing them to remove the sign by 2019. D'Egidio sued. The city filed a cross-complaint. The trial court granted the city's motion for summary judgment. D'Egidio appealed.

The primary issue on appeal was whether the Outdoor Advertising Act (Bus. & Prof. Code, § 5200 et seq.) preempted the city's authority to adopt and enforce its code. Section 5270 states that the Act is "exclusive of all other regulations for the placing of advertising displays within the view of the public highways of this state in unincorporated areas." Although section 5270 on its face seems to supplant local control, other sections in the Act provide that cities and counties have discretion to adopt regulations that go beyond the Act. The Court concluded that the Legislature intended that local agencies would retain the authority to adopt regulations that were more restrictive than the regulations under the Act. The Act's legislative history supported this conclusion. Nor was there sufficient reason under the statute to differentiate between incorporated or unincorporated areas. Thus, cities and counties have discretion to adopt and enforce regulations as or more restrictive than those in the Act.

D'Egidio argued its billboard was legal. The Court disagreed. The sign became unlawful in 1987, when D'Egidio leased it out for off-site advertisers. The sign ceased to be lawfully erected at that time.

D'Egidio argued that, under section 5216.1, there was a "rebuttable presumption" that the sign was lawful because it had been in place for more than five years, and the owner had not received notice of the illegality of the sign. Here, the sign had been in place, and used for off-site advertising, for more than 20 years before D'Egidio received such a notice. The Court rejected this argument. The "rebuttable presumption" had the effect of placing the burden of proof on the city to show the sign was not lawfully erected. The city met that burden. The city was not barred by estoppel or laches from obtaining summary judgment. The trial court did not err in awarding the city its attorneys' fees in an action to abate a nuisance.

Planning and Zoning Law – General Plan Consistency

Orange Citizens for Parks and Recreation v. Superior Court (2016) 2 Cal.5th 141

The Supreme Court ruled a city abused its discretion in finding a project to be consistent with its general plan, where the face of the plan showed a different land-use designation for the subject property. The Court rejected attempts to point to a decades old "recommendation" to amend the plan, where that recommendation, although seemingly approved by the council at the time, never found its way into the plan itself.

In 1973, the city adopted the "Orange Park Acres Specific Plan." The city council's approving resolution endorsed "recommendations" of the planning commission. One of the commission's recommendations was to designate the property at issue as "low-density residential," rather than as open space. The published text and maps in the plan continued to show the area as "open space." In 2007, Milan (the property owner) submitted a plan to develop the property for low-density residential sues. Milan's application requested a General Plan amendment and rezone. The EIR showed the property's existing General Plan designation as "open space." In 2009, Milan's attorney exhumed the planning commission's 1973 resolution recommending rezoning the property for residential uses. In 2010, the city adopted a new

General Plan; that plan referred readers to various adopted specific plans, including the specific plan for Orange Park Ares. The 2010 General Plan included a land-use map showing the property as "open space." In 2011, the city certified the EIR for Milan's project and adopted a general plan amendment changing the land-use designation to match up with the commission's 1973 recommendation (low-density residential). A referendum petition was launched. While signatures were being gathered, the city and Milan took the position that the outcome of the vote was irrelevant, because the Orange Park Acres plan already designated the site for residential uses, and the amendments adopted by the council in 2011 were unnecessary. Both sides sued; Milan and the city claims that the project could go forward regardless of how the vote turned out; and the citizens claimed that the project was inconsistent with the General Plan's open-space designation. The trial court ruled in favor of Milan and ordered the referendum off the ballot. The citizens filed a writ, and the Court of Appeal granted the citizens' request to stay the trial court's order. The referendum appeared on the ballot in November 2012; 56% of the voters rejected the general plan amendment. In 2013, the Court of Appeal ruled that, in light of ambiguities regarding the designation of the property, deference to the city's construction of the plan was appropriate, and the general plan amendment subject to the referendum was unnecessary for the project to be approved by the council. The Supreme Court granted review.

Milan argued the residential designation was established in 1973, and had never been disturbed. Under this theory, the voters' rejection of the 2011 general plan amendment merely preserved the status quo of the property as zoned for open space and residential development. The citizens' disagreed, noting that throughout the city's consideration of the project, the publicly available version of the general plan showed the property as "open space"; thus, the voters' rejection of the 2011 general plan amendment meant that the property remained open space.

The Court acknowledged that its review of the city's general plan consistency determination was entitled to deference. Here, the city found that the project was consistent with the plan. That finding, however, was contingent on the city's 2011 amendment of the plan, and that amendment was rejected by the vote on the referendum.

The plan in place at the time included "an unambiguous designation of the [p]roperty as open space." "With such a specific land use designation for the [p]roperty, and without any competing designations, policies, or extant amendments to the contrary, no reasonable person could conclude that the [p]roperty could be developed without a general plan amendment changing its land use designation." The city's finding, based on the planning commission's 1973 recommendation that never found its way into the plan itself, was an abuse of discretion. "The 1973 planning commission amendment authorizing residential development never became integrated into the publicly available [Orange Park Acres Specific] Plan, let alone the 2010 General Plan. [Citations.] Any reasonable person examining the documents publicly available in 2010 would have concluded that the OPA Plan was consistent with the General Plan map designating the Property as open space." Moreover, the general plan, as adopted by the city in 2010, did not purport to refer to other documents, such as the OPA plan, to determine permitted uses; for this reason, the designation lurking hidden in the OPA plan was irrelevant. The Court therefore reversed the Court of Appeal's decision.

Constitutionality of Land-Use Initiative; Brown Act

Hernandez v. Town of Apple Valley (2017) 7 Cal.App.5th 194

The Fourth District ruled the Town of Apple Valley violated the Brown Act by approving a memorandum of understanding in which Walmart committed to pick up the cost of a special election, because neither the agenda nor its accompanying packet mentioned the MOU. The Court also ruled that the land-use initiative at issue did not violate California Constitution article II, section 12, because the initiative assigned powers and duties not to "Walmart," but to the property's "owner" and the project's "developer."

In 2013, the town adopted resolutions (1) calling for a special election allowing the voters to approve a proposed specific plan, (2) providing for ballot arguments on the measure, and (3) approving a memorandum of understanding ("MOU") accepting a gift from Walmart to cover the cost of the special election. The proposed specific plan authorized a 30-acre commercial development, to be anchored by a Wal-Mart supercenter. The council agenda identified the action as ""Walmart Initiative Measure," but did not list the proposed resolutions or specific plan. The phrase "Walmart Initiative Measure" also referred to an earlier initiative measure approved by the town council in 2011 that had subsequently been ruled void. Hernandez sent a letter stating the town had violated the Brown Act and demanding a cure. The town declined. Hernandez sued. The trial court granted Hernandez' motion for summary judgment. The town and Walmart appealed.

The Court of Appeal ruled the town had violated the Brown Act because neither the agenda nor the attached agenda packet said anything about the MOU. This MOU allowed the town to accept a gift from Walmart in order to pay for the special election. Walmart had proposed to make this gift after the town had posted the agenda, so the hearing itself was the first time anyone knew about the proposal. The agenda item listed only the "Walmart Initiative Measure" and the direction to be given to staff would be discussed at the meeting. The agenda packet included a summary of the resolutions and the initiative. None of these documents identified the MOU as an "item of business" the town council would consider. According to the Court, "[t]his is troublesome as it is conceivable this was a major factor in the decision to send the matter to the electorate." The town therefore violated the Brown Act.

Because the item was likely to return to the town council after the town cured its Brown Act violation, the Court went on to consider whether the initiative violated article II, section 12, of the California Constitution. That section states: "No amendment to the Constitution, and no statute proposed by the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect." Hernandez argued that, although the initiative did not name Walmart, the initiative violated this provision because Walmart was the universally acknowledged beneficiary of the initiative, and the various functions, powers and duties established by the specific plan could be carried out only by Walmart. Rather than naming "Walmart," the initiative used such terms as "developer" and "owner." The "developer" and "owner" referred to whomever had the power to develop the property and the duty to obtain the proper permits and approvals. The initiative did not assign these powers to Walmart. After all, Walmart could sell the property. As the Court explained, "[i]f we were to extend article II, section 12 as requested by Hernandez … , any land-use initiative would be invalidated as one only would need to establish the company who intended to

develop the property or owned the property, even though the [i]nitiative itself makes no reference to the entity. We do not find anything in the legislative history or the language of the statute that article II, section 12 was intended to be this broadly interpreted. As such, we find that the Initiative does not violate article II, section 12."

Coastal Act; Affordable Housing; Density Bonuses

Kalnel Gardens, LLC v. City of Los Angeles (2016) 3 Cal.App.5th 927

The Second District held that a city had discretion to deny a project in the coastal zone as inconsistent with Coastal Act policies, notwithstanding the fact that the project qualified for density bonuses and waivers of height and set-back restrictions due to the inclusion of affordable housing. Thus, the Court held that the Housing Accountability Act (HAA), the Mello Act and the Density Bonus Act did not override the agency's discretion to deny a project under the Coastal Act.

The city planning department approved a 15-unit project in the Venice area in the coastal zone. The project included low-income units, and thus qualified for more density and greater heights than authorized under applicable zoning. Neighbors appealed to the city's planning commission, claiming the project was too tall and intense for its surroundings. The commission denied the permit based on its finding that the project was inconsistent with Coastal Act policies due to its size, height, bulk and scale. The city council affirmed the commission's denial. Kalnel – the developer – sued. The trial court rejected the lawsuit based on its view that Coastal Act policies trumped the HAA, the Mello Act and the Density Bonus Act – the three laws that authorized the bonus units. Kalnel appealed.

The Court of Appeal affirmed. First, as to the claim under the Housing Accountability Act, Government Code section 65589.5, subdivision (m), states that appellate review under the HAA must be sought by filing a writ petition within 20 days of the trial court's order (with the potential for extensions granted by the trial court for good cause). Here, the trial court ruled the city had violated the HAA, but denied relief under the Coastal Act. Kalnel did not file a writ petition seeking appellate review of that order. The Court of Appeal therefore had no jurisdiction to consider Kalnel's HAA claim.

Second, as to Kalnel's claim under the Density Bonus Act, Government Code section 65915, subdivision (m), states that the statute "does not supersede or in any way alter or lessen the effect or application of the [Coastal Act]." Given this clear language, the Coastal Act took precedence. Thus, section 65915 required local agencies to grant density bonuses to qualifying projects, *unless* doing so would violate the Coastal Act.

Third, the interrelationship between the Coastal Act and the Mello Act (Gov. Code, § 65590) was less clear cut. The Mello Act states that it applies in the coastal zone. (Gov. Code, § 65590, subd. (a).) Kalnel argued that this meant an agency had to grant a qualifying project a density bonus, even if doing so would violate the Coastal Act. The Court disagreed, reasoning that under Public Resources Code sections 30007.5 and 30009, the Legislature has directed that the Coastal Act should be construed in the manner that is most protective of coastal resources. The Court then explained: "Which interpretation is most protective of coastal resources? One that requires Mello Act housing even if it blocks coastal access, intrudes into environmentally sensitive areas, or is visually incompatible with existing uses, or one that requires application of the Mello Act's affordable housing requirements within the coastal zone so long as those housing

projects abide by the Coastal Act's overall protective provisions? Remembering the Legislature's statements that protecting coastal resources is a paramount concern because those resources are of vital and enduring interest, it seems clear that the latter interpretation must prevail." Thus, the project was still subject to the Coastal Act, and the city had discretion to disapprove the project based on its inconsistency with Coastal Act policies, even though the project's affordable housing satisfied the Mello Act.

The city did not need to adopt a finding under Public Resources Code section 30604, because that section requires such a finding only where the agency reduces a project's density, not where, as here, the agency disapproves a project in its entirety. Moreover, the record showed the commission's concern focused on visual compatibility, not density.

Finally, Kalnel argued the city abused its discretion because the project was consistent with the Venice Land Use Plan, and that plan stated the city had to issue a permit under those circumstances. The Court rejected Kalnel's premise because in this instance the city did not find that the project was consistent with the plan. The plan included policies requiring that development preserve the character of existing neighborhoods. Other policies acknowledged the density bonuses and waivers available under the Density Bonus Act and the Mellow Act, and called upon the city to take steps to accommodate increased density, if feasible and consistent with Coastal Act policies. Here, however, the city denied the project due to its visual impacts on the neighborhood. Kalnel was free to submit a revised application with the same density, provided the resubmitted project addressed the aesthetic concerns that were the basis for the city's denial.

CALIFORNIA SUPREME COURT

Depublication Ordered

Bay Area Clean Environment, Inc. v. Santa Clara County (2016) 2 Cal.App.5th 1197

The Sixth District found that the county complied with SMARA and CEQA in approving a reclamation plan for an existing quarry. Petition for review denied. Ordered depublished December 14, 2016.

Coastal Hills Rural Preservation v. County of Sonoma (2016) 2 Cal.App.5th 1234

The First District held that the "substantial evidence" test applied to its review of a subsequent mitigated negative declaration that supplemented a previously adopted mitigated negative declaration. On November 22, 2016, the Supreme Court issued the following memorandum opinion:

> The petition for review is granted. The matter is transferred to the Court of Appeal, First Appellate District, Division One, for reconsideration in light of *Friends of the College of San Mateo Gardens v. San Mateo County Community College District et al.* (2016) 1 Cal.5th 937, 957-959, footnote 6 [] and [CEQA Guidelines] section 15384. The request for an order directing depublication of the opinion in the above entitled appeal is granted.

Opinions Issued

Orange Citizens for Parks and Recreation v. Superior Court (2016) 2 Cal.5th 141

See summary above.

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Banning Ranch Conservancy v. City of Newport Beach (2017) – Cal.5th – [slip op. dated March 30, 2017]

See summary above.

Petition for Review Granted

Union of Medical Marijuana Patients, Inc. v. City of San Diego (No. S238563). Review granted on January 11, 2017. Court of Appeal opinion at 4 Cal.App.5th 103.

(1) Is the enactment of a zoning ordinance categorically a "project" within the meaning of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)?

(2) Is the enactment of a zoning ordinance allowing the operation of medical marijuana cooperatives in certain areas the type of activity that may cause a reasonably foreseeable indirect physical change to the environment?

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United Auburn Indian Community of Auburn Rancheria v. Brown (No. S238544). Review granted on January 25, 2017. Court of Appeal opinion at 4 Cal.App.5th 36.

May the Governor concur in a decision by the Secretary of the Interior to take off-reservation land in trust for purposes of tribal gaming without legislative authorization or ratification, or does such an action violate the separation of powers provisions of the state Constitution?

_____

T-Mobile West LLC v. City and County of San Francisco (No. S238001). Review granted on December 21, 2016. Court of Appeal opinion at 3 Cal.App.5th 334.

(1) Is a local ordinance regulating wireless telephone equipment on aesthetic grounds preempted by Public Utilities Code section 7901, which grants telephone companies a franchise to place their equipment in the public right of way provided they do not "incommode the public use of the road or highway or interrupt the navigation of the waters"?

(2) Is such an ordinance, which applies only to wireless equipment and not to the equipment of other utilities, prohibited by Public Utilities Code section 7901.1, which permits municipalities to "exercise reasonable control as to the time, place and manner in which roads, highways, and waterways are accessed" but requires that such control "be applied to all entities in an equivalent manner"?

Petition for Review Granted – Previously Reported But Still Pending

Cleveland National Forest Foundation v. San Diego Assn. of Governments (No. S223603). Review granted on March 11, 2015. Oral argument letter sent December 28, 2016; argument not yet scheduled. Court of Appeal opinion at 231 Cal.App.4th 1056.

Must the environmental impact report for a regional transportation plan include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S-3-05, so as to comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)?

Friends of the Eel River v. North Coast Railroad Authority (No. S222472). Review granted December 10, 2014. Oral argument letter sent February 8, 2017; argument not yet scheduled. Court of Appeal opinion at 230 Cal.App.4th 85.

(1) Does the Interstate Commerce Commission Termination Act [ICCTA] (49 U.S.C. § 10101 et seq.) preempt the application of the California Environmental Quality Act [CEQA] (Pub. Res. Code, § 21050 et seq.) to a state agency's proprietary acts with respect to a state-owned and funded rail line or is CEQA not preempted in such circumstances under the market participant doctrine (see *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314)?

(2) Does the ICCTA preempt a state agency's voluntary commitments to comply with CEQA as a condition of receiving state funds for a state-owned rail line and/or leasing state-owned property?

Sierra Club v. County of Fresno (No. S219783). Review granted October 1, 2014. No oral argument letter sent. Court of Appeal opinion at 226 Cal.App.4th 704.

This case presents issues concerning the standard and scope of judicial review under the California Environmental Quality Act. (CEQA; Pub. Resources Code, § 21000 et seq.)

A BROADER LOOK AT THE SUPREME COURT

Make-up of the California Supreme Court

Name of Justice	Year Appointed	Appointing Governor	Year Retired	Replaced By
Kennard	1989	Deukmejian	2014	Kruger
Baxter	1991	Wilson	2014	Cuéllar
George (C.J.)	1991	Wilson	2011	Cantil-Sakauye
Werdegar	1994	Wilson	August 2017	???
Chin	1996	Wilson		
Brown	1996	Wilson	2005	Corrigan
Moreno	2001	Davis	2011	Liu
Corrigan	2006	Schwarzenegger		
Cantil-Sakauye (C.J.)	2011	Schwarzenegger		
Liu	2011	Brown		
Cuéllar	2015	Brown		
Kruger	2015	Brown		

- At present, four Justices appointed by Republican Governors, three Justices appointed by Democratic Governors.
- When Justice Werdegar steps down in August 2017, Governor Brown will have an opportunity to appoint a fourth justice.
- Era of dominance by Justices appointed by Republican Governors coming to a close.

CEQA / Land-Use Opinions Issued by Supreme Court (2006 – 2017)

[green shading denotes decisions issued by the Court as currently constituted]

Opinion	Topic	Who "won"?	Author	Concur	Dissent
City of Marina v. Board of Trustees of California State University (2006) 39 Cal.4th 341	Duty to mitigate under CEQA	Petitioner	Werdegar	Chin	
Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova (2007) 40 Cal.4th 412	Water supply analysis in EIR for large development project	Petitioner	Werdegar		Baxter
Muzzy Ranch Co. v. Solano County Airport Land Use Commission (2007) 41 Cal.4th 372	Definition of "project"; common-sense exemption	Respondent*	Werdegar		
Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection (2008) 43 Ca1.4th 936	Geographic scope of analysis; responses to comments	Respondent	Werdegar		
In re: Bay Delta etc. (2008) 43 Cal.4th 1143	Program EIR	Respondent	Kennard		
Environmental Protection and Information Center v. California Dep't of Forestry and Fire Protection (2008) 44 Cal.4th 459	Forest Practices Act; CEQA findings; take permits	Forest Practices Act: Petitioner; CEQA: Respondent	Moreno		
Save Tara v. City of West Hollywood (2008) 45 Cal.4th 116	Definition of "project"	Petitioner	Werdegar		

Sunset Sky Ranch	Project denial	Respondent	Corrigan		

Pilots Assn. v. County of Sacramento (2009) 47 Cal.4th 902					
Committee for Green Foothills v. Santa Clara County Board of Supervisors (2010) 48 Cal.4th 32	Notice of determination – statute of limitations	Respondent	Corrigan		
Communities for a Better Environment v. South Coast Air Quality Management Dist. (2010) 48 Cal.4th 310	Negative declaration; baseline	Petitioner	Werdegar		
Stockton Citizens for Sensible Planning v. City of Stockton (2010) 48 Cal.4th 481	Notice of exemption – statute of limitations	Respondent	Baxter		
Save the Plastic Bag Coalition v. City of Manhattan Beach (2011) 52 Cal.4th 155	Negative declaration; standing	Respondent (negative declaration); petitioner (standing)	Corrigan		
Tomlinson v. County of Alameda (2012) 54 Cal.4th 281	Exhaustion of remedies	Respondent	Kennard		
Neighbors for Smart Rail v. Exposition Metro Line Construction Authority (2013) 57 Cal.4th 439	EIR; baseline	Respondent*	Werdegar	Baxter Cantil-Sakauye Chin	Liu
Tuolumne Jobs & Small Business Alliance v. Superior Court (2014) 59 Cal.4th 1029	CEQA and land-use initiatives	Respondent	Corrigan		
Berkeley Hillside Preservation v. City of Berkeley (2015) 60	Exceptions to categorical exemptions	Respondent	Chin		Liu Werdegar

Cal.4th 1086					
City of San Diego v. Board of Trustees of the California State University (2015) 61 Cal.4th 945	Duty to mitigate under CEQA	Petitioner	Werdegar		
Center for Biological Diversity v. Department of Fish and Wildlife (2015) 62 Cal.4th 204 (*Newhall Ranch*)	GHG emissions under CEQA; "take" of fully protected species	Petitioner	Werdegar		Corrigan Chin
California Building Industry Assn. v. Bay Area Air Quality Management Dist. (2015) 62 Cal.4th 369	"Reverse CEQA"	Petitioner*	Cuéllar		
Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist. (2016) 1 Cal.5th 937	Supplemental review	Respondent*	Kruger		
Orange Citizens for Parks and Recreation v. Superior Court (2016) 2 Cal.5th 141	General Plan consistency and referenda	Petitioner	Liu		
Banning Ranch Conservancy v. City of Newport Beach (2017) – Cal.5th – [slip op. dated March 30, 2017]	EIR adequacy	Petitioner	Corrigan		

* For those cases marked with an asterisk, the prevailing party is the party that achieved its basic objective – that is, either affirmance or reversal of the Court of Appeal's opinion. The manner in which the Supreme Court reached its decision, however, has less clear implications, and does not obviously favor either petitioners or respondents.

Some Observations

- Debate over CEQA cases often focuses on input/accountability versus predictability/efficiency. Query whether the current Court may have a different perspective than its predecessor Courts with respect to this debate.

- After several fractured CEQA decisions (*Neighbors for Smart Rail, Berkeley Hillside, Newhall Ranch*), recent cases have been unanimous. But the manner in which some cases have been written may suggest a negotiated compromise in order to achieve unanimity (*CBIA v. BAAQMD, San Mateo Gardens*). Other issues may have been ducked in order to achieve unanimity (*Banning Ranch*). As a result, most of the Court's recent decisions (whether unanimous or not) have raised as many questions as they have resolved.

- Justice Werdegar has served as an important and respected voice on the Court, and has authored a number of significant decisions (*Vineyard, City of Marina, Muzzy Ranch, Save Tara, CBE v. SCAQMD, Neighbors for Smart Rail, Newhall Ranch*) that are often nuanced and do not constitute clear "wins" for either side. Query whether her replacement will cause a meaningful shift in the center of gravity on the Court.