Land Use and CEQA Litigation Update

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Notes:

CEQA AND LAND-USE UPDATE
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CEQA

Statutory Exemptions; Scope of Project

County of Ventura v. City of Moorpark (2018) 24 Cal.App.5th 377

The Second District Court of Appeal held that the statutory CEQA exemption applicable to a beach restoration project also encompassed the agency's approval of a settlement agreement specifying particular haul routes that trucks had to use to and from the site. The court also held that, in certain portions of the agreement, the agency improperly contracted away its police powers, but this defect did not require invalidating the entire agreement.

The State formed the Broad Beach Geologic Hazard Abatement District ("BBGHAD") to restore a 46-acre stretch of beach in Malibu. The project involved placing five "deposits" of sand on the beach at five year intervals. Each 300,000-cubic-yard deposit would generate 44,000 one-way truck trips over the course of three to five months. The City of Moorpark was concerned that the haul trucks would harm the city's residents. Moorpark and BBGHAD entered into a settlement agreement to resolve these concerns. The settlement agreement restricted the haul routes that BBGHAD could use for the project.

The County of Ventura sued. First, Ventura argued that the city/BBGHAD settlement agreement was distinct from the beach restoration project, and was therefore not exempt from CEQA. The court disagreed, finding that the settlement agreement was part of the whole of the action because it was one piece of a single, coordinated endeavor to address erosion. Applying the test for "separate projects" under *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, the court found: (i) both respondents were proponents of the settlement agreement; (ii) the agreement and beach restoration served a single purpose: to abate a geologic hazard; and (iii) even if the beach restoration could be completed without the settlement agreement, the two became inextricably linked when the Coastal Commission incorporated the agreement into the project's coastal development permit. Thus, the court found, the agreement was not a separate project under *Banning Ranch*. The restoration project was exempt from CEQA as an "improvement" (Pub. Resources Code, § 26505) undertaken by a geologic hazard abatement district "necessary to prevent or mitigate an emergency." (Pub. Resources Code, § 26601; see Pub. Resources Code, § 21080, subd. (b)(4).) Because settlement agreement was part of that project, it too was exempt.

Second, Ventura argued the settlement agreement was void because Vehicle Code section 21 preempted Moorpark's ability to control project traffic. Again, the court disagreed. Vehicle Code section 21, subdivision (a), preempts local traffic control ordinances and resolutions. The settlement agreement was a contract, not an ordinance or resolution. As such, section 21 did not apply.

Third, Ventura argued the settlement agreement was an unlawful attempt by Moorpark to exercise its regulatory powers outside of its city limits. But the prohibition against extraterritorial regulation did not apply to Moorpark's contracting power. In addition, the court said, a city has authority to enter into contracts to enable it to carry out its necessary functions. Trucks' use of roads can create a public nuisance, and Moorpark appropriately entered into the settlement agreement in an attempt to abate that nuisance.

Fourth, Ventura argued BBGHAD relinquished its police power when it granted Moorpark the power to dictate sand hauling routes that BBGHAD's contractors had to use, rendering the entire agreement void.

The court held that BBGHAD was allowed under state law to exercise a portion of the state's police power, but it could not contract away its right to exercise its police power in the future. The determination of haul routes was a police power, and therefore the portions of the settlement agreement that surrendered BBGHAD's discretion to alter those routes in the future were void. The settlement agreement had at least two purposes: (i) to determine permissible and prohibited sand hauling routes, and (ii) to describe the duration of and limited discretion to modify the route restrictions. Only the second purpose was unlawful. Because the unlawful portions was severable, the remainder of the agreement could remain in force. Thus, the court declined to find the agreement void in its entirety.

Statutory Exemptions: Ministerial versus Discretionary Permits

California Water Impact Network v. County of San Luis Obispo (2018) 25 Cal.App.5th 666

The Second District Court of Appeal held that well construction permits issued by San Luis Obispo County were ministerial, and therefore did not trigger CEQA.

The county issued permits to four companies to install irrigation wells, mostly for vineyards. The petitioner sued. The county and real parties in interest demurred. The trial court agreed that the permits were ministerial, sustained the demurrer, and entered judgment denying the petition. The petitioner appealed. The Court of Appeal affirmed.

The county's permitting authority over irrigation well construction was based on County Code Chapter 8.40. Under this ordinance, the county "shall" issue a permit if the well complies with county and state standards. The standards incorporated by reference consist of bulletins issued by the Department of Water Resources. The standards address such matters as well seal depths, the licensing of the firm installing the well, the distance from potential sources of contamination, and the like. The Court analogized these standards to building permits, which are presumed to be ministerial. "So long as technical standards and objective measurements are met, [the] County must issue a well permit to licensed contractors." (Slip op. at p. 9.) The code and DWR bulletins focused on objective standards designed to protect groundwater *quality*. Nothing in the code or bulletins addressed the regulation of groundwater quantity. The county could not, for example, adopt a condition limiting the amount of water pumped as a means of preserving groundwater resources. "The purpose of Chapter 8.40 is to prevent contamination or pollution of groundwater during well construction, repair, modification or destruction. Only an impermissible rewriting of the ordinance would allow us to infer a legislative intent to condition well permits on pump limits or subsidence monitoring, which have nothing to do with groundwater pollution. The County has no discretion to impose water usage conditions on permits issued under Chapter 8.40." (*Id*. at pp. 10-11.)

In 2014, the State Legislature adopted the Sustainable Groundwater Management Act (SGMA). (Wat. Code, § 10720 et seq.) The SGMA empowers local agencies local agencies to adopt groundwater management plans aimed at, among other things, protecting groundwater resources from over-pumping. Although the county had begun implementing the SGMA, County Code Chapter 8.40 – the ordinance at issue here – did not address the issue. "Appellant's concerns about groundwater sustainability do not empower the courts to rewrite County Code Chapter 8.40 to hasten appellant's legislative goals. Those goals must be addressed to County's elected officials as they implement SGMA." (*Id*. at p. 12.)

Categorical Exemptions

World Business Academy v. California State Lands Commission (2018) 24 Cal.App.5th 476

The Second District Court of Appeal upheld the State Lands Commission's reliance on CEQA's "existing facilities" categorical exemption to approve extensions of two leases to Pacific Gas and Electric (PG&E) for public land used by the Diablo Canyon nuclear power plant for cooling water facilities.

PG&E operates the Diablo Canyon nuclear power plant. The plant circulates sea water to cool the nuclear units. Facilities used to circulate the sea water – an intake cove, breakwaters, intake structure, and discharge channel – are located on state-owned tidal and submerged lands. In 1969 and 1970, the State Lands Commission issued PG&E long-term leases for the state-owned lands. The leases were scheduled to expire in 2018 and 2019. In 2015, PG&E applied to the Commission to extend the leases by five years, so that the leases would expire at the same time as the permits issued by the federal Nuclear Regulatory Commission. The State Lands Commission approved the lease extensions. In doing so, the Commission found that no CEQA review was required under the Class 1 "existing facilities" categorical exemption. In the lawsuit that followed, petitioners argued that the lease replacement did not qualify for the "existing facilities" exemption, and even if it did, the "unusual circumstances" exception applied. The trial court denied the petition. Petitioners appealed.

At the outset, the court criticized both parties for failing to ensure that a complete copy of the record was transmitted to the Court of Appeal. Instead, the parties transmitted only excerpts of the record as part of the appellant's appendix. Appellant belatedly transmitted the entire administrative record, however, and the court exercised its discretion to consider it.

The court held that the Commission properly relied on the "existing facility" categorical exemption. This exemption covers "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." (CEQA Guidelines, § 15301.) The lease replacement plainly fit within these terms because the nuclear power plant was an existing facility. Appellant argued that the exemption necessarily did not apply to nuclear power plants, citing the legislative and regulatory history underlying the Class 1 exemption. This history, however, had never been presented to the Commission. "Hence, to the extent they rely on legislative and administrative history that was not before the Commission, arguments regarding the scope of the existing facilities exemption may not be raised." (24 Cal.App.5th at p. 494.) In any event, section 15301 included, as an example of an "existing facility," "investor and publicly-owned utilities used to provide electric power" (CEQA Guidelines, § 15301, subd. (b)), and the Diablo Canyon plant plainly fell within this language. The "key consideration" under Class 1 is "whether the project involves negligible or no expansion of an existing use," and nothing in the record suggested that the lease replacement would expand the plant's current operational capacity.

The court also rejected appellant's contention that the "unusual circumstances" exception precluded the Commission's reliance on the exemption. That exception applies "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (CEQA Guidelines, § 15300.2, subd. (c).) Under *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, the party challenging the exemption based on the "unusual

circumstances" exception must show: (1) that the project has some feature that distinguishes it from others in the exempt class, such as its size or location, and (2) that there is a reasonable possibility of a significant effect on the environment due to that unusual circumstance. The court found it unnecessary to determine whether the lease replacement presented unusual circumstances (the first part of the test) because, even assuming the existence of "unusual circumstances," appellant failed to establish that there was a fair argument that any environmental impacts may occur. In making this determination, the court emphasized that the project was simply a lease replacement, and the environmental impacts alleged by appellant were not a change from conditions as they had previously existed under the current leases. Appellant argued that the Commission applied the wrong "baseline" to its analysis by failing to consider the impacts of seven additional years of operations, and new evidence concerning seismic risks, increased cancer rates, worsening marine conditions, the deteriorating condition of the plant and related safety impacts, and other impacts. But "all of the purported environmental effects to which appellant points are incident to and part of the plant's current baseline operations." (24 Cal.App.5th at p. 501.) "These preexisting effects are part of the baseline, and appellant has not pointed to any substantial evidence indicating that they will become worse due to the lease replacement." (*Id*. at p. 504.)

Finally, the court held that the Commission did not abuse its discretion in finding that the lease extensions were consistent with the public trust. The Commission's conclusion was backed up by a staff report discussing public trust issues. "The Commission considered the facts before it, citing record evidence while balancing the public trust rights to navigation, fisheries, and environmental protection against the public need for efficient electrical production. This review was not arbitrary, capricious, or procedurally irregular." (*Id*. at pp. 509-510.)

Negative Declarations

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

The First District Court of Appeal upheld the City of Santa Rosa's adoption of a negative declaration for a youth treatment center, finding that noise analysis offered by non-expert attorneys was not substantial evidence in support of a fair argument of a potentially significant noise impact from outdoor recreation activities and the parking lot at the center.

In 2014, Santa Rosa approved plans to convert the shuttered Warrack Hospital to the SAY Organization's new Dream Center. SAY is a non-profit organization that provides housing, counseling, and job services to youth and families in Sonoma County. The facility would offer temporary housing, job skills training, health services, and enrichment activities. The property is in a developed area, surrounded by residential housing, offices, and a hospital. SAY applied for a conditional use permit, rezoning, and design review to implement the project. The city's initial study/negative declaration concluded there would be no significant impacts. The city approved the project. Two neighbors sued. The trial court denied the petition. The neighbors appealed.

The First District evaluated whether substantial evidence supported a fair argument that noise impacts from the project's parking lot and outdoor recreation area could be significant, thus requiring an EIR. The neighbors urged the court to reject the city's noise study, and rely instead on their independently calculated findings purporting to show the project's noise levels would be significant. The neighbors' attorneys extrapolated their own analysis from a previous study conducted by noise experts for the city, for another project, at a different site. The neighbors also argued that the city's noise ordinance set the

maximum allowable noise levels, and any noise that would exceed those thresholds was a significant impact.

The court rejected all of petitioners' arguments. First, the court rejected petitioners' interpretation of the city's noise ordinance, finding that its "base" noise values set the standard or normally acceptable levels, not maximum allowable levels, and thus, were not significance thresholds for CEQA's purposes. Furthermore, the ordinance was not as inflexible and quantitative as petitioners alleged, but rather, allowed for experts to consider factors such as the noises' level, intensity, nature, and duration when determining if impacts would be significant. Under this analysis, petitioners failed to identify any evidence in the record that noise impacts would exceed the allowable threshold.

Second, the court rejected petitioners' contention that their noise calculations based on another study for a different project were substantial evidence that this project could result in noise impacts. According to the court, a project opponent cannot simply import the values of one study onto those of another, particularly in the absence of qualified expert opinion. Petitioners' convoluted methodology and ultimate conclusions were based on speculation, rested on supposition and hypothesis, and were not confirmed by experts. The analysis also ignored key facts, such as limitations on parking lot use and hours of operation.

The court also noted that petitioners' conclusions, which they drew from the noise study prepared for the other project, were not presented to the city during the approval process, and did not appear in any part of the administrative record; rather, the other study was simply attached to the opponents' comments submitted to the city council as part of an administrative appeal. Only during appellate briefing did petitioners present the calculations they extrapolated from the other study. For that reason alone, the court stated it was justified in rejecting petitioners' calculations.

Given the court's conclusion that the offered evidence lacked the requisite foundation and credibility, petitioners failed to demonstrate, even under the comparatively low fair-argument standard, that further environmental review was required.

* * *

Protect Niles v. City of Fremont (2018) – Cal.App.5th – [2018 WL 3769850]

The First District Court of Appeal held that the record contained a "fair argument" that a mixed-use project in an historic district might have significant aesthetic impacts on the historic character of the community due to the project's size and scale. The court also cited residents' concerns regarding traffic hazards and congestion, and concluded that the city erred in adopting a mitigated negative declaration, and had to prepare an EIR.

The City of Fremont adopted a zoning overlay district to protect the historic character of the community of Niles, a small commercial strip dating to the 19th century. A developer proposed a mixed-use project with 98 residential units on a vacant six-acre property at the gateway to this district. Neighbors complained that the buildings were too tall, and the project was too dense, so that it was incompatible with the area and would increase traffic congestion. The city's architectural review board recommended denying the project. The planning commission recommended approval, and the city council adopted a mitigated negative declaration and approved the project. Neighbors sued. The trial court found that the

record contained a "fair argument" on aesthetics and traffic, and granted the writ. The developer appealed.

In May 2018, the city published a draft EIR for the project. The neighbors moved to dismiss the appeal as moot because the city had decided to comply with the trial court's writ. The appellate court declined to dismiss the appeal. The city was not a party to the appeal. The developer's submittal of a revised application did not mean the original project was abandoned. Moreover, the appeal was not moot; "[w]ere [the developer] to prevail in this appeal, the [c]ity's 2015 Project approval would be restored regardless of the status of the revised application and EIR." (Footnote omitted.)

Turning to the merits, the court concluded that the project's visual impact on its setting – in this case, an historic commercial "main street" recognized as sensitive by the city – was a proper subject of review, over and above the analysis of the project's impact on historic resources. According to the court, the record "clearly" contained a fair argument that the project would have a significant aesthetic impact on the historic district. The city's initial study found that the project was aesthetically compatible with the district because it reflected the architectural style of the industrial buildings that previously occupied the site, and the city's design guidelines recognized that architecture within the district was varied. Members of the architecture review board and of the public, however, stated that the project was too tall and dense, and inconsistent with Niles' village-like character. These complaints continued even after the developer modified the project. "In short, opinion differed sharply as to the [p]roject's aesthetic compatibility with the historic district." The court recognized "that aesthetic judgments are inherently subjective." In this case, however, "the comments about incompatibility 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 [district] neighborhood and commercial core." Commenters included members of the city's historic architectural review board, who recommended denial. Although the project evolved, the essential elements of its design, massing and density did not.

The court rejected the developer's various arguments that the project's aesthetic impact was not significant. First, although the site was currently vacant and scruffy, that did not automatically mean that development of the site would be an upgrade. Second, the site, though on the edge of the historic district, was nevertheless located at a recognized gateway to Niles, and was within the district's boundaries. Third, the architectural review board's recommendation to deny the project was not a bare conclusion, but was supported by record evidence of the board members' underlying aesthetic judgments about the effect of the project. Thus, the board's "collective opinions about the compatibility of the [p]roject with the Niles [district] are substantial evidence in this record of the [p]roject's potentially significant aesthetic impacts. [Footnote omitted.]"

The court also found that the record contained a fair argument concerning traffic safety. The project's traffic study concluded a left-turn pocket lane was warranted at the project entrance. Staff did not recommend the pocket, however, because left-turn pocket lanes generally were not located elsewhere along the street, and because omitting a pocket would make vehicles slow down. Testimony from residents, however, stated that drivers did not adhere to the posted speed limit, and site lines might not be adequate if multiple drivers queued up to turn left into the project site. "These *fact-based* comments" (original italics) were substantial evidence supporting a fair argument that a newly constructed intersection at the project entrance would create traffic hazards.

The record also contained a fair argument that the project would contribute to existing traffic congestion. Residents testified that traffic at the nearby Niles Boulevard / Mission Boulevard

intersection was already terrible, and that during the morning commute traffic already backed up from this intersection to the project site. The city's own traffic study found that traffic at this intersection was Level of Service ("LOS") E – an unacceptable level of congestion – and that project-related traffic would cause congestion there to worsen to LOS F. The developer argued that, under the city's thresholds of significance, a shift from LOS E to LOS F was not a significant impact. The court held, however, that the city's significance threshold could not be applied to foreclose consideration of substantial evidence that the impact might be significant. "The fact-based comments of residents and city staff and officials supported a fair argument that unusual circumstances in Niles might render the thresholds inadequate to capture the impacts of congestion on Niles Boulevard extending from the Niles/Mission intersection well into the Niles [historic overlay district] commercial core. Residents aptly described Niles as 'geographically cut off from the rest of Fremont,' which might cause congestion effects atypical of the [c]ity. Also, Niles Boulevard serves as the main street of the commercial core of the Niles [district], such that congestion arguably adversely affects the character of the historical district, another unusual impact."

Environmental Impact Reports

Rodeo Citizens Assn. v. County of Contra Costa (2018) 22 Cal.App.5th 214

The First District Court of Appeal rejected a challenge to an EIR prepared for a project to add gas recovery facilities to an existing oil refinery. The court, applying the "substantial evidence" test, found that the EIR's description of the project was not misleading, and concluded that the EIR did not need to speculate about the impacts from downstream use of recovered gas on greenhouse gas ("GHG") emissions, and contained sufficient information on the hazards of transporting the gas by rail.

Phillips 66 Company ("Phillips") owns two refineries, one near Santa Maria, the other near Rodeo. The Santa Maria refinery processes heavy crude oil. The semi-refined crude is then sent via pipeline to the Rodeo facility, where it is further refined into finished petroleum products. The Rodeo facility also refines crude oil from both domestic and foreign sources delivered by ship to an adjacent marine terminal. The Rodeo refinery is able to process both heavy and light crude oil. The final products are shipped by rail from the refinery to Phillips' customers.

In June 2012, Phillips applied to Contra Costa County for a permit to modify the existing Rodeo facility to enable Phillips to recover butane and propane and ship it by rail for sale. In June 2013, the county released a Draft EIR for the project. A Final EIR was released in November 2013. Based on comments from the Bay Area Air Quality Management District, the county prepared a Recirculated EIR (REIR) addressing air and health issues. In early 2015, the county published a Final REIR and approved the project. Rodeo Citizens Association ("Citizens") and two other groups sued. The trial court found certain deficiencies in the air quality section of the EIR, and issued a writ of mandate requiring the county to reconsider that section, but rejected the remainder of petitioners' arguments. Citizens appealed.

Citizens argued the EIR's project description incorrectly defined the project to include only the recovery and sale of propane and butane from refinery fuel gas. According to Citizens, the real purpose of the project was to allow Phillips to process increased amounts of non-traditional crudes, including imported tar sands and Bakken crudes; these non-traditional crudes contain higher levels of dangerous chemicals and emit more harmful air pollution during the refining process. Citizens contended the EIR's project description violated CEQA for not disclosing the true scope of the project, which, in turn, caused the EIR to understate the project's impacts. The court found, however, that substantial evidence supported the

REIR's project description. In particular, the Final EIR included a master response directly addressing the "project description." This response presented substantial evidence that the project was designed to extract propane and butane from its existing fuel gas stream, and did not depend on securing new sources of crude oil feedstock. Citizens "only weakly" contested the accuracy of the master response and failed to demonstrate the county lacked substantial evidence for the project description.

Turning to the EIR's GHG analysis, Citizens claimed that the analysis violated CEQA because it failed to consider GHG emissions resulting from the combustion of propane and butane by downstream users. The EIR addressed the issue of downstream users, but concluded that due to the lack of data and changing market conditions, there was no way to determine how the propane and butane would be used. In many instances, a switch to propane actually reduces GHG emissions as compared with gasoline and diesel. Indeed, California has adopted a program to encourage companies to switch from gasoline/diesel to propane. Ultimately, the EIR concluded that it would be too speculative to reach a conclusion regarding the significance of the project's GHG impacts resulting from downstream users. The court held that substantial evidence, including comments from the air district, supported this conclusion.

Regarding the project's public and environmental health hazards impacts, Citizens argued that the EIR failed to assess the impacts of the project on a child care center located approximately 500 feet from the rail lines on which the propane and butane would be transported from the refinery. This argument was "arguably barred" by the exhaustion doctrine, because Citizens failed to raise it prior to the county's approval of the project. In any event, although the EIR did not specifically address how the transport of the project's hazardous materials might impact the child care center, the EIR disclosed that the risk zone for rail transport under the project was 262 feet from the tracks. At around 500 feet away, the child care center was safely beyond this distance.

Finally, Citizens contended the EIR's cumulative hazards analysis was inadequate because it failed to consider the cumulative risk of rail accidents. The Final EIR's response to comments on this issue explained that most of the projects cited by the commenters were located a substantial distance from the refinery and did not involve the transport of liquid propane gas by rail. Citizens argued this response was inadequate. The court found, however, that the county's explanation for why a cumulative analysis for transportation hazards was not included was not unreasonable, which is all that CEQA requires.

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San Franciscans for Livable Neighborhoods v. City and County of San Francisco (2018) – Cal.App.5th – [2018 WL 4024685]

The First District Court of Appeal rejected a broad challenge to an EIR prepared for the City and County of San Francisco's Housing Element. The court ruled that the EIR used an appropriate baseline, provided sufficient support for the city's conclusions regarding various impacts, and analyzed a reasonable range of alternatives.

In 2011, the City and County of San Francisco certified an EIR and approved a combined 2004 and 2009 Housing Element. The document covered both 2004 and 2009 because the city's earlier 2004 Housing Element had been set aside on CEQA grounds, and by the time an EIR was prepared, the next Housing Element cycle was underway. A coalition of neighborhood groups ("Neighbors") sued, lost, and appealed.

Neighbors argued the EIR used a phony baseline against which to measure the impacts of the Housing Element. The court acknowledged that, as a general matter, the baseline consists of physical conditions at the time the agency commences the environmental review process. In this case, Neighbors argued the city violated CEQA by assessing traffic and water impacts measured against conditions expected to exist in the year 2025 based on population projections from the Association of Bay Area Governments. As the court noted, the EIR contained information on existing traffic levels and water use, as well as 2025 projections. The Housing Element did not approve any additional units; instead, it established a policy framework that would likely result in greater density. The city acted within its discretion in adopting a baseline calculation that forecast traffic and water impacts in 2025, rather than comparing the existing conditions with and without the Housing Element. The Housing Element was not designed to induce growth that would not otherwise occur, but was instead designed to establish policies that would guide growth that would occur with or without the Housing Element. Neighbors argued that the Housing Element would lead to increased growth. That was an argument, not about baseline conditions, but about causation, premised on the notion that policies to increase density would operate in isolation from the causes of population growth. In fact, the Housing Element was designed not to produce growth, but to accommodate it.

Neighbors argued that the city did not provide sufficient justification for its decision to use a "future baseline," rather than current conditions. The Supreme Court's decision in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439 suggests that, while a future baseline may be permissible, the EIR should explain why a current-conditions baseline analysis would be misleading. In this case, there was sufficient justification for using a 2025 baseline to measure the Housing Element's impacts. As the court stated, "[i]t would be absurd to ask the City to hypothesize the impacts of a long-term housing plan taking hold immediately. 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. [Citation.]" (Slip op. at p. 17.) Elsewhere, the EIR analyzed the visual and land-use impacts – consisting of the potential for greater density in various city neighborhoods – against the existing character of those neighborhoods. This baseline was not hypothetical, but was based on observation of existing conditions.

Neighbors challenged the EIR's analysis of particular impacts. The court rejected those challenges. To wit:

- With respect to land use and aesthetics, the EIR acknowledged that the denser development could be out of scale or otherwise incompatible with existing neighborhoods. Various policies, however, required compliance with zoning standards, design guidelines, and other policies promoting consistency with the prevailing character of a neighborhood. The Housing Element did not change or trump those requirements.

- At the time the EIR was prepared, three major projects – Treasure Island, Parcmerced and Hunters Point – were undergoing review. Neighbors argued the Housing Element EIR ignored the traffic from these projects. In fact, the EIR's 2025 analysis of cumulative conditions included projected traffic from those projects.

- Neighbors argued the EIR failed to disclose uncertainty regarding the sufficiency of the city's long-term water supplies. The court held, however, that the Housing Element would not increase the demand for water. "The Housing Element serves as the policy basis for approving project with increased residential density as a growth-accommodating rather than growth-

inducing measure." (Slip op. at p. 26.) Denser development would, on the whole, demand less water on a per-capita basis, and new development would have to comply with various requirements designed to reduce this demand. City plans were in place to develop additional sources of supply. The EIR's reliance on the city's water supply assessment, which used a horizon year of 2030, was reasonable. The EIR acknowledged that, after 2030, supplies might not be sufficient, but cited plans to further reduce demand via rationing or conservation if necessary.

- Neighbors argued a memorandum from the city's public utility commission ("PUC") triggered the duty to recirculate the EIR. The PUC memorandum, issued after publication of the final EIR, disclosed that short-term shortfalls in water could arise due to decreased availability of certain supplies relied upon by the city. Elsewhere, however, the PUC stated that demand was also lower than projected, and that if shortfalls developed, modest rationing could plug any gaps without ill effects.

- The EIR concluded that the Housing Element, by encouraging greater density along transit corridors, was consistent with regional policies aimed at directing development to these areas. Neighbors' disagreement with this analysis did not mean the EIR was inadequate.

Neighbors argued the EIR failed to adequately consider a reasonable range of alternatives. Those alternatives included (A) continued reliance on the city's Housing Element policies dating to 1990 (no project), (B) Housing Element policies adopted in 2004 that were not stricken in response to the earlier CEQA lawsuit (another variant on no project), and (C) the "2009 Housing Element Intensified." Each alternative was compared to both the 2004 and 2009 Housing Elements. Neighbors argued the only authentic alternative was the "2009 Housing Element Intensified" alternative, which did not really reduce impacts. According to the court, however, Neighbors did not carry its burden to show that the selected alternatives did not amount to a reasonable range, or that the city improperly excluded an alternative despite its environmental benefits. The only significant impact identified by the EIR concerned the city's transit capacity. The EIR analyzed whether the various alternatives would avoid this impact, or create other impacts. That is exactly what an alternatives analysis is supposed to do. The Final EIR addressed alternatives proposed by the Neighbors – a "RHNA-Focused Reduced Density" alternative focusing solely on meeting the City's obligations to provide affordable housing, and a "No Additional Rezoning" alternative – and explained why they did not add meaningfully to the analysis, did not reduce impacts, or were infeasible. The RHNA-Focused Reduced Density alternative addressed affordable housing, which the city consistently treated as a social issue, rather than an environmental one. And the "No Additional Rezoning" alternative was infeasible because the city had to rezone somewhere in order to accommodate anticipated growth. Impacts on transit were inevitable given the growth that was expected to occur.

Finally, Neighbors argued the city failed to consider additional mitigation measures to address transit impacts – to wit, reducing density along transit corridors or imposing transit impact fees. The city responded to these proposals by noting that the first proposal was already encompassed by Alternative A, and the city already imposed an impact fee, and further funding for transit expansion was uncertain.

Supplemental Review

Citizens Coalition Los Angeles v. City of Los Angeles (2018) – Cal.App.5th – [2018 WL 4026019]

The Second District Court of Appeal upheld the City of Los Angles' reliance on an addendum to a previously certified EIR for a Target superstore. The court rejected claims that the city had to consider the impacts of other potential superstores that might be proposed based on the same zoning district established to accommodate the Target. The court also held that, although the city's decision constituted "spot zoning," such zoning was not impermissible.

Target applied to the City of Los Angeles for entitlements to build a "superstore" Target retail store. The city certified an EIR and approved the entitlements, which included eight variances. In the lawsuits that followed, a trial court upheld the EIR, but found that substantial evidence did not support the city's findings as to six of the variances. Both sides appealed. Meanwhile, the city amended its "Station Neighborhood Area Plan" ("SNAP") to accommodate the Target. The Court of Appeal then dismissed the pending appeal as moot. (*La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles* (2016) 2 Cal.App.5th 586.)

To support its approval of the SNAP, the city prepared an addendum to its original EIR, concluding that the Target would result in no greater impacts than those that had previously been disclosed. Citizens' Coalition etc. ("Coalition") sued again, accusing the city of violating CEQA and adopting impermissible spot zoning. The trial court granted the writ on CEQA grounds, and did not rule on the spot zoning claim. The city and Target appealed.

The CEQA dispute focused on whether the city erred in performing supplemental review under Public Resources Code section 21166. In the Coalition's view, by amending the SNAP, the city created a new, floating sub-zone congenial to superstores, separate and apart from the proposed Target superstore; as such, the city had to study the amendments as a stand-alone project. The city and Target, by contrast, argued that the SNAP amendments were designed solely to enable the Target superstore to go forward; in this view, because they involved a project for which the city had already certified an EIR, supplemental review was appropriate. "Accordingly, we approach the CEQA question by asking three questions: (1) what does the Ordinance do?; (2) which provisions of CEQA apply to the Ordinance—the provisions governing 'projects' for which there is no prior CEQA analysis or the provision (namely, section 21166) that applies when there has already been a prior CEQA analysis?; and (3) did the City Council comply with the applicable provision(s)?" (Slip op. at p. 10.)

First, the ordinance created a new "sub-area F" within the SNAP, and placed the parcel where the superstore was located into that subarea. The ordinance also identified the criteria that would have to be met (parcel size, proximity to transit, etc.) that any parcel would have to meet in order to be placed into subarea F. Only the Target superstore parcel met these criteria. Two other parcels potentially qualified, but the other parcels did not meet the requirement that the parcel contain at least 100,000 square feet of commercial space. For this reason, the ordinance did not create a free-floating zone that could be applied anywhere within the SNAP.

Second, the city had already certified an EIR for the Target superstore. The challenged action, however, consisted not of approval of the superstore, but of amending the SNAP to create a new subzone, and then placing the superstore parcel in that subzone. The projects – superstore and SNAP amendment – were clearly related to one another, but operated at different levels of generality; the superstore (for

which the city certified an EIR) was a specific development proposal, and the SNAP amendment represented a shift in land-use policy. According to the court, this shift in "level of generality" did not mean that section 21166 was inapplicable. The issue instead was whether the information in the prior environmental document for the superstore remained relevant to the agency's decision to amend the SNAP. In proposing to amend the SNAP, the issue for the city was to understand the impacts that would occur by placing a large superstore in subarea F. That is what the superstore EIR focused upon. The superstore EIR therefore retained relevance to the city's analysis. Although the Coalition argued the superstore EIR was flawed, that did not mean the EIR lacked relevance. Moreover, the trial court had found the superstore EIR to be adequate, and by the time the city prepared the addendum and approved the SNAP amendment, the trial court's decision was final. For these reasons, the city did not violate CEQA in deciding to proceed under section 21166.

Third, the court considered whether the city's addendum complied with section 21166. "[The] inquiry into whether a prior CEQA review of a project is sufficient in scope vis-à-vis subsequent changes to that project is … functionally indistinguishable from the question whether a current CEQA review of a project is sufficient in scope vis-à-vis possible future actions flowing from that project. In both instances, the fundamental question is the same: Does the existing CEQA document encapsulate all of the environmentally significant impacts of the project? In the latter instance, further CEQA analysis is required only (1) if the 'future expansion or other action ... is a reasonably foreseeable consequence of the initial project,' and (2) if that 'future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.' (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396 ([*Laurel Heights I*]).) We hold that the same test should be applied in both instances, including under section 21166." (Slip op. at pp. 22-23.)

With respect to the first prong of the *Laurel Heights I* test, the court offered the following categories for when the courts have found a future action or consequence to be "reasonably foreseeable": (1) when the agency has already committed to take the other action; (2) when the project under review presupposes the occurrence of the other action; (3) when the other action is itself under concurrent environmental review [note – this category appears to borrow on case law concerning the scope of projects included in cumulative impact analysis]; (4) when "the agency subjectively 'intends' or 'anticipates' the consequence, and the project under review is meant to be the 'first step' towards the consequence" (slip op. at p. 27, citations omitted); and (5) when "the project under review creates an incentive that is all but certain to result in the consequence" (*ibid*., citations omitted). A future action or consequence must be considered if it falls into any of these categories and "is sufficiently certain to come to pass." (*Id*. at p. 28.)

"Conversely, a consequence is not reasonably foreseeable when it is entirely independent of the project under consideration. [Citations.] [¶] A consequence is not reasonably foreseeable simply because the project under consideration makes that consequence a *possibility*—even when the public agency is subjectively aware of that possibility (that is, even when it is 'a gleam in [the] planner's eye'). [Citations.]" (Slip op. at pp. 28-29.) Showing that the consequence is possible, or even probable, is not enough to make it reasonably foreseeable. Under these circumstances, the agency can delay its review "until the consequence is sufficiently certain. [Citation.]" (Slip op. at p. 31.)

In this light, the issue was whether substantial evidence supported the city's finding that no large-scale commercial developments beyond the Target superstore were a reasonably foreseeable consequence of the SNAP amendment's creation of subarea F. According to the court, substantial evidence supported

the city's finding that the construction of the Target superstore was the sole reasonably foreseeable consequence of creating subarea F. Two other parcels in the SNAP met the size and proximity-to-transit criteria. No one had proposed a superstore on either of them. Nothing suggested that such development was anticipated. The code amendment did not create an incentive to make such further large-scale development inevitable. The SNAP amendment constituted a changed circumstance, in that it altered the mechanism for allowing the superstore to go forward, but this change did not require major revisions in the certified EIR.

The Coalition argued that the city had to anticipate and analyze the impacts of further superstore development authorized by the SNAP amendment on the theory that, "if you zone it, they will build." The court disagreed because substantial evidence supported the city's conclusion that any incentives created by subarea F would not make such development "all but certain." (Slip op. at p. 35.)

The court also rejected the Coalition's "spot zoning" claim. In this case, the city's action placed the superstore parcel, but not other parcels, into the less restrictively zoned SNAP subarea F. The creation of a "spot zone" is "invalid only when it is not in the public interest — that is, when it is 'arbitrary,' 'irrational,' and 'unreasonable.' [Citations.]" (Slip op. at p. 36.) Here, the Coalition did not carry its burden to show that the city's decision was irrational. The subarea F zoning was actually a "mixed bag," in that it allowed greater building heights, but also imposed numerous restrictions. Moreover, the city council had a rational basis for establishing such a district. Staff provided a comprehensive inventory of the ways in which the retail complex would benefit the neighborhood. In approving the rezone, the city council was not required to make an express finding that the ordinance was in the public interest; rather, the council merely had to have an evidentiary basis supporting such a conclusion. As to the Coalition's other claims:

- The city council's alleged motive in approving the rezone – characterized by the Coalition as a nefarious scheme to allow Target to proceed with construction while litigation was pending – was irrelevant.

- The city's approval of the zoning for Target did not commit the city to approve other large-scale commercial projects. The council retained the ability to assess whether other future large-scale commercial developments were in the public interest, and nothing in the SNAP amendment diminished that discretion.

- The Coalition argued that the ordinance was incompatible with the SNAP because the ordinance amended the plan. "The plain import of this argument is that a SNAP may never be amended. That is clearly not the law. [Citations.]" (Slip op. at p. 40.)

OTHER LAND-USE CASES

<u>Planning and Zoning Law; Initiatives and Referenda</u>

City of Morgan Hill v. Bushey (2018) – Cal.5th – [slip op. dated August 23, 2018]

The California Supreme Court held that the referendum power can be used to disapprove a rezone, even where that rezone was designed to make the zoning ordinance consistent with a General Plan amendment, at least where the municipality has other options for ensuring consistency.

In 2014, the City of Morgan Hill amended its General Plan to change the land-use designation for a vacant lot from "industrial" to "commercial." The zoning district – "light industrial" – remained the same. In 2015, the city council amended the zoning ordinance to change the lot's zoning to "general commercial." Both the General Plan amendment and the rezone were designed to facilitate a proposed project centered on a hotel. A referendum petition challenging this rezone qualified for the ballot. The city council placed the referendum on the ballot, and filed a lawsuit against election officials seeking an order directing the officials to remove it. The trial court ordered the referendum removed from the ballot. The Court of Appeal reversed. The Supreme Court granted review "to determine whether the people can bring a referendum to challenge an amendment to a property's zoning where a prior general plan amendment rendered the property's zoning inconsistent with the general plan and the challenged zoning amendment seeks to make the property's zoning consistent with the amended general plan."

Voters may amend a city's or a county's general plan or zoning ordinance by initiative. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763.) Under Government Code section 65860, subdivision (a), a local agency cannot enact a zoning ordinance that is inconsistent with the agency's general plan. In *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, the Supreme Court held that this same prohibition applies to voters enacting zoning by initiative. Nevertheless, under Government Code section 65860, subdivision (c), if a zoning ordinance becomes inconsistent with the General Plan as a result of a plan amendment, the zoning – if valid when enacted – need not be amended right away; rather, the local agency can amend the zoning ordinance to achieve consistency "within a reasonable time so that it is consistent with the general plan as amended."

Here, the filing of a sufficient number of signatures on the referendum, and the subsequent failure of the measure at the polls, suspended and then annulled the new zoning, so that it never took effect. The former "light industrial" zoning therefore remained in place. That was permissible, even though the former zoning was inconsistent with the General Plan as amended. Thus, the court held, the voters may "challenge by referendum a zoning ordinance amendment that changes a property's zoning designation to comply with a general plan amendment, at least where other consistent zoning options are available, or the local municipality has the power to make the zoning change and general plan consistent through other means." (Slip op. at p. 9.) Although the referendum has the potential to invalidate the municipality's first attempt to rezone, the municipality may have other options – such as adopting another zoning district that is also consistent with the amended General Plan – and the Planning and Zoning Law does not impose an express time limit on how soon after amending its General Plan the municipality must adopt conforming zoning. Thus, according to the court, the Legislature did not intend the Planning and Zoning Law's General Plan consistency requirement to usurp the voters' reserve power of referendum.

The city argued that a successful referendum was tantamount to adopting the former zoning, which could not be squared with the requirement that the zoning be consistent with the General Plan. The court disagreed, noting that if a referendum qualifies for the ballot, then the amendment to the zoning code never takes effect, and the former zoning remains in place unless and until the voters approve the new zoning. Nothing in the statute suggested that the Legislature assigned the obligation to amend the zoning ordinance solely to the municipality's elected officials.

The city argued the voters should have challenged the council's 2014 approval of the General Plan amendment. The court was unmoved. A General Plan is, by definition, general, and the voters may have reason to challenge the particulars of development authorized under the rezone, even if the voters do

not challenge the General Plan amendment. The court therefore overruled the Court of Appeal's earlier decision in *deBottari v. City of Norco* (1985) 171 Cal.App.3d 1204.

The city argued that giving effect to the referendum would present "awkward questions about what constitutes a 'reasonable time' for a zoning ordinance to remain out of compliance with a general plan." The court acknowledged this uncertainty, but held that such uncertainty did not mean that the general plan consistency requirement trumped the reserved right of referendum. The appropriate time frame might vary from one context to another, but in this particular case it had not been exceeded.

The city claimed that this particular referendum posed insurmountable problems because no other zoning designation was available that was consistent with the amended General Plan; all such districts allowed hotels, and opposition to a hotel was what animated the referendum's sponsors. The court concluded, however, that the record was incomplete on this issue, and remanded the matter to the trial court for further proceedings.

Comment: According to the Supreme Court, the city could address the inconsistency problem by adopting a different zoning district, by amending the General Plan or zoning ordinance, or by other means. Given these options, a municipality may be hard pressed to show that the defeat of a rezone by referendum would necessarily result in an irreconcilable inconsistency with the municipality's General Plan. In such a situation, a municipality would appear to always have options for achieving consistency.

* * *

Center for Community Action and Environmental Justice v. City of Moreno Valley (2018) – Cal.App.5th – [2018 WL 4025516]

The Fourth District Court of Appeal has held that, although a municipality's approval of a development agreement is subject to referendum, such an agreement cannot be adopted by initiative.

A developer proposed a project dubbed the "World Logistics Center" ("WLC"). In 2015, the City of Moreno Valley certified an EIR and approved a development agreement for the project. The city's decision was greeted with a hailstorm of CEQA lawsuits. A coalition filed an initiative petition that would repeal the city-approved development agreement, and adopt a new one. The initiative received sufficient signatures to qualify for the ballot. The city council approved the initiative, effectively mooting the CEQA challenge. Lawsuits challenging the initiative followed. The trial court denied the petitions.

On appeal, the issue was whether the Legislature, in adopting the development agreement statute, intended to delegate approval of development agreements exclusively to local legislative bodies, such that development agreements are not subject to the initiative power. The appellate court regarded this issue as raising a purely legal question, to be resolved based on the statute and the Legislature's intent.

Government Code section 65867.5, subdivision (a), states: "A development agreement is a legislative act that shall be approved by ordinance and is subject to referendum." According to the court, the Legislature, in specifically stating that a development agreement is subject to referendum, omitted any reference to initiative. That omission was sufficient to divine the Legislature's intent to exclude development agreements from the initiative process.

The city and developer argued that the statute's reference to referenda was merely to emphasize its availability, and not to suggest that the initiative power was *unavailable*, noting that the initiative power is generally regarded as broader than the power of referendum. The court was unpersuaded; in its view, the express reference to "referendum" meant that the initiative power did not apply. In addition, Government Code section 65876.5 referred to the local "legislative body," further suggesting that the Legislature intended to deny the voters the initiative power with respect to development agreements.

The court also held that the development agreement statute addressed a matter of statewide concern, rather than a "municipal affair," suggesting that, under *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, the Legislature intended to delegate authority to approve development agreements solely to the municipality's governing body, and not to the voters. "The development agreement statute was enacted to address a statewide impediment to land use development; namely, '[t]he lack of certainty in the approval of development projects' that resulted from the late vesting rule" established by *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785.

The court rejected the city's attempt to analogize the development agreement statute with the Planning and Zoning Law, which (under *DeVita v. County of Napa* (1995) 9 Cal.4th 763) is subject to the initiative power. The court rejected this attempt even though the development agreement statute appears within the Planning and Zoning Law, and even though the development agreement statute does not apply to charter cities. As the court summarized, "[i]t is sufficient to conclude that development agreements implicate statewide concerns and that the statutory language regarding charter cities does not conclusively establish otherwise." (Slip op. at p. 20.)

The court agreed that, as a negotiated contract between a developer and a municipality, a development agreement was incompatible with the initiative process, in which the measure is proposed by the voters and, if approved, cannot be changed. By contrast, "the initiative process is consistent with planning and zoning changes, which do not require negotiation, and those changes generally are subject to initiative. The governing body takes action after public hearings, or the public takes action through the initiative. Although stakeholders like developers may participate, the purpose is not to reach a binding agreement with them, and there is thus no implied need for negotiation." (Slip op. at p. 24 [citations omitted].) Nor could the initiative process be squared with the requirement that a municipality perform ongoing monitoring and enforcement. Moreover, the court observed, "[i]f development agreements could be adopted by initiative, developers could obtain vested rights, without fulfilling the corresponding commitments envisioned by the statute." (Slip op. at pp. 25-26 [footnote omitted].)

Finally, the court cited legislative history dating to 1979, in which stakeholders endorsed including the reference to referenda, but made no mention to initiatives. In 2017, the Legislature adopted a measure prohibiting the adoption of development agreements via initiative. Governor Brown vetoed the measure. The city and developer characterized this bill as a failed attempt to change existing law. The legislative history of 2017's failed bill, however, stated that it was intended to "clarify" existing law, and observed that negotiated agreements (like development agreements) are "unsuitable for the initiative process." (Slip op. at p. 30.) "Thus, read in context and in light of the statutory scheme, the only reasonable interpretation of 'clarify' is that that the amendment barring approval by initiative was a clarification of the law, not a change to it." (*Ibid*.)

As the court summed up, "[w]e are sensitive to our duty to guard the right of initiative, and to resolve doubts in its favor. However, we are also required to ascertain the intent of the Legislature. There is

clear evidence that the Legislature intended to exclusively delegate approval of development agreements to governing bodies and to preclude the right of initiative." (Slip op. at p. 31.)

Spot Zoning

Citizens Coalition Los Angeles v. City of Los Angeles (2018) – Cal.App.5th – [slip op. dated August 23, 2018]

See summary above under "CEQA – Supplemental Review."

Fair Employment and Housing Act – Preemption

City and County of San Francisco v. Post (2018) 22 Cal.App.5th 121

The First District Court of Appeal held that the Fair Employment and Housing Act ("FEHA") did not preempt a city ordinance that prohibited landlords from refusing to rent to persons who receive Section 8 vouchers.

In 1998, the City and County of San Francisco adopted an ordinance prohibiting discrimination against tenants based on the source of income used to pay rent. The aim was to prevent discrimination against tenants who rely on Section 8 housing vouchers or other government housing subsidies. The Section 8 program provides these vouchers to qualifying low-income renters. The tenant provides the voucher to the landlord, and the landlord collects the money from the local agency implementing the Section 8 program.

In 1999, the State Legislature enacted FEHA, which included a similar prohibition against discrimination based on sources of income. But FEHA's definition of "sources of income" is narrower than that of the ordinance; it does not include government subsidies, does not prohibit a landlord from declining to rent to those receiving Section 8 vouchers, and thus allows a landlord to opt out of the Section 8 program.

A landlord in the city listed available units. The listing stated the landlord would not accept Section 8 tenants. The city initiated an enforcement action, stating that the listing violated the city ordinance. The landlord argued that FEHA preempted the city ordinance. The trial court disagreed. The landlord appealed.

The landlord argued that FEHA's source-of-income housing discrimination provision preempted the city's ordinance, citing Government Code section 12993, subdivision (c), in which the Legislature declared its intent to "occupy the field of regulation of discrimination in employment and housing" addressed by the legislation. The court read this language to preempt local ordinances only to the extent they addressed matters addressing discrimination that were encompassed by FEHA itself. Under this reading, FEHA's prohibition against discrimination based on the tenant's source of income does not address all such discrimination, but only discrimination based on sources of income *paid to the tenant* that is then used to pay rent. Section 8 subsidies are paid, not to the tenant, but directly to the landlord. By its terms, therefore, the sources of income addressed by FEHA do not include payments to someone other than the tenant. The preemption argument was also inconsistent with the general principle that, in the realm of land use, local agencies have broad police powers to address such matters as affordable housing; a local ordinance prohibiting discrimination against participants in the Section 8 program "fits

well within the sphere of land use regulation in which local ordinances are presumptively valid." (22 Cal.App.5th at p. 134, footnote omitted.)

The city's ordinance overlaps with the "source of income" provisions in FEHA, in that both the city ordinance and FEHA prohibited discrimination based on the source of a tenant's lawful income, to the extent that income is paid directly to the tenant. But the provision in the city ordinance at issue reached discrimination based on the tenant's participation in Section 8. FEHA addresses certain categories of discrimination, but not the particular category addressed by the city ordinance. Within this realm, there is no overlap, and no preemption.

Appellants argued that, even if FEHA did not expressly preempt the city ordinance, such preemption is nevertheless implied. In their view, FEHA embodies a policy choice to allow landlords to opt out of Section 8. The city ordinance deprives landlords of that choice. The court was unpersuaded because, while FEHA does not prohibit landlords from opting out of Section 8, it also does not guarantee that landlords can opt out. Rather than ensuring that landlords could choose whether to participate in Section 8, FEHA simply does not address the issue, leaving it to local agencies to decide whether to adopt an ordinance like the city's.

Ellis Act – Preemption

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

The First District Court of Appeal held that a local ordinance imposing a ten-year waiting period on alterations to non-conforming residential units removed from the rental market imposed a substantive restriction on landlords that could not be squared with the Ellis Act.

The Ellis Act allows property owners who seek to exit the rental business to evict residential tenants, and prohibits local agencies 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. Code, § 7060, subd. (a).) The City and County of San Francisco adopted an ordinance modifying the city's Planning Code. Previously, the Planning Code prohibited enlarging or altering non-conforming residential units. The amendments allowed altering or enlarging such non-conforming units in zoning districts where residential uses are principally permitted. A waiting period of ten years applied for changes to units if the landlord had evicted a tenant to withdraw the residential unit from the rental market under the Ellis Act. The amendments were designed to encourage improvements to non-conforming units – a source of relatively affordable housing – while discouraging landlords from removing these units from the rental market. The Small Property Owners of San Francisco Institute ("SPOSFI") sued. The trial court denied the petition. SPOSFI appealed.

SPOSFI argued that the ordinance was preempted by the Ellis Act because the ordinance imposed a ten-year waiting period on altering nonconforming units where a tenant was evicted by a landlord exercising its rights, guaranteed by the Ellis Act, to exit the rental market. The court agreed. The Ellis Act completely occupies the field of substantive eviction controls over landlords' desiring to exit the residential market. The ordinance was facially inconsistent with the Ellis Act. "By imposing a 10-year waiting period on alterations to non-conforming units where property owners have exercised their Ellis Act rights, the ordinance penalizes property owners who leave the rental market. The ordinance does not regulate the particulars of the remodeling of a nonconforming unit, but rather prohibits any such

changes for a period of 10 years after the property owner exits the rental business. By imposing such a prohibition on property owners who have left the rental market, the ordinance challenged here improperly enters the field of substantive eviction controls over such property owners. [Citation.]" (22 Cal.App.5th at pp. 87-88.) "[I]n every case where a property owner exercises the Ellis Act right to withdraw a nonconforming rental unit from the residential market, the property owner is met with a locally-imposed legal barrier: a 10-year waiting period before the unit can be remodeled. In this respect, the ordinance impedes property owners from exercising their Ellis Act rights to withdraw residential units from the rental market. It does not matter that the waiting period occurs after the Ellis Act eviction, rather than before it." (*Id*. at p. 88.) The ordinance's ten-year waiting period did not regulate the manner in which the landlord altered or remodeled the unit, and thus did not involve the city's acknowledged right to regulate local land-use. Rather, the waiting period focused on the removal of the unit from the rental market. "Rather than regulating the particulars of a property owner's proposed alteration of a nonconforming unit, the ordinance here prohibits a property owner who has withdrawn a nonconforming unit from the market from altering it for 10 years, and in doing so penalizes property owners who are protected by the Ellis Act." (*Ibid*.)

The city argued that the ordinance was aimed at protecting tenants, but whether such protection would be afforded was speculative. Moreover, the court saw no benefit to tenants from requiring a unit to remain unimproved and off the market for ten years.

The city argued the ordinance did not impose a prohibitive price on exiting the rental business. Under the Ellis Act, however, a local agency cannot impose significant restrictions on the landlord's use of the property, if those restrictions are tied to the exercise of Ellis Act rights. The city argued that the burden was reasonable because it paralleled the Ellis Act's provision allowing local agencies to require property owners who offer a unit for rent within ten years of its removal from the rental market to offer the unit to the displaced tenant. "But the ordinance does more than that. It does not simply require that a unit that is returned to the market be offered to the displaced tenant: it imposes a waiting period on the alteration of nonconforming units where an Ellis Act eviction has taken place, no matter the use to which the unit is put." (*Id*. at p. 90.) "We conclude that because it imposes a 10-year waiting period for alterations of properties that have been withdrawn from rental use under the Ellis Act, Planning Code section 181, subdivision (c)(3) conflicts with, and is preempted by, the Ellis Act." (*Ibid*.) The court reversed with instructions to the trial court to enjoin the city from enforcing this provision.

ISSUES THAT ARISE IN CEQA AND LAND-USE LITIGATION

Recovery of Costs for Preparation of Record

LandWatch San Luis Obispo Co. v. Cambria Comm. Serv. Dist. (2018) 25 Cal.App.5th 638

The Second District Court of Appeal ruled that the trial court acted within its discretion in awarding record-related costs to the respondent agency, even though the petitioner had elected to prepare the record, where the petitioner failed to prepare the record in a timely fashion.

In January 2014, the Cambria Community Services District ("District") approved an emergency water supply project. The District did not perform CEQA review. LandWatch sued and elected to prepare the record. LandWatch also sent the District a letter under the Public Records Act asking for the documents comprising the record. The District sent LandWatch the documents. A month later, the District informed LandWatch that additional documents had been identified, and that the District would provide them

upon payment. Three months passed before LandWatch asked for them, at which point the District provided the additional documents. By now, it was April 2015. In August 2015, LandWatch produced a draft index to the record. The District responded by noting that the index was both over- and under-inclusive. That same date, the District produced its own index and certified the record it had prepared. LandWatch filed a motion to include additional documents post-dating the January 2014 approval date. The trial court ordered the District to certify an appendix consisting of the additional documents. Weeks passed; LandWatch did not prepare the appendix. The District wrote that it would prepare the appendix itself. Only then did LandWatch prepare its own, competing appendix, which it lodged in February 2016, a month before the trial. The court accepted the District's appendix, and rejected the one prepared by LandWatch. Following trial, the court denied the petition. The District filed a memorandum of costs seeking $39K, including $4K for preparing the certified record, and $27K for preparing the appendix. LandWatch moved to tax costs. The trial court awarded the District $21K ($4K for preparing the certified record; $14K for preparing the appendix – half of the District's requested amount; and $3K for other items). LandWatch appealed.

LandWatch argued that, because it had elected to prepare the record, the District ought not to recover any record-related costs. The court noted, however, that in electing to prepare the record, LandWatch was required to do so within 60 days. LandWatch missed this deadline. LandWatch argued the District was to blame for the delays. The court disagreed. The trial court, as trier of fact, had concluded otherwise. "Here the trial court expressly found that the District acted properly in preparing the record. Implicit in the finding is that LandWatch unreasonably delayed. LandWatch's right to prepare the record is subject to a 60-day limitation. Having unreasonably delayed, it forfeited that right." (Slip op. at p. 6.) "… [U]nder the appropriate circumstances the trial court has discretion to award the agency costs for preparing the record notwithstanding the petitioner's election under section 21167.6, subdivision (b)(2). [¶] That is what the trial court did here and it was well within its discretion. The District has the right to a timely record." (*Id*. at p. 7.)

LandWatch argued the District ought not to recover costs associated with the appendix of post-approval documents because the District had resisted LandWatch's efforts to augment the record with them. The court was unmoved. The trial court had ordered the preparation of the appendix at LandWatch's insistence. "For LandWatch to now assert that the appendix is not part of the record to escape the costs it created is fanciful, if not perverse." (*Id*. at pp. 7-8.)

The trial court had awarded the District all of its costs for preparing the record, and half of its costs for preparing the appendix. LandWatch argued the 50% award for preparing the appendix was arbitrary, and fell short of the trial court's obligation to determine whether record-related costs were reasonable. The Court of Appeal disagreed, concluding that if anything a 50% award was too low.

LandWatch argued the trial court erred in awarding the District's court-call, copying and transcription costs. The appellate court noted that the trial court had already reduced the costs as requested by LandWatch, or had ample basis for finding the costs to be reasonable.

Attorneys Fees

La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles (2018) 22 Cal.App.5th 1149

The Second District Court of Appeals affirmed a trial court's award of attorneys fees under a "catalyst" theory, where the city responded to losing the first round of litigation by amending its zoning ordinance to allow the disputed project to proceed.

The underlying dispute concerned the City of Los Angeles' approval of a Target superstore in an area controlled by the subarea of a specific plan. In approving the project, the city granted eight variances to Target. Petitioners prevailed on their claim that the findings adopted to grant six of the eight variances were not supported by substantial evidence. The court denied petitioners' CEQA claims. Petitioners and Target both appealed. While the appeal was pending, the city approved a new planning subarea encompassing the project site. The Court of Appeal dismissed the appeal as moot. (*La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles* (2016) 2 Cal.App.5th 586 (*Mirada I*).) Petitioners filed a second lawsuit attacking the city's approval of the new planning subarea. The trial court granted the petition. The city and Target appealed. The second appeal remains pending.

Meanwhile, after the Court of Appeal dismissed the appeal in *Mirada I*, petitioners filed a motion for an award of attorneys' fees under Code of Civil Procedure section 1021.5. The trial court awarded roughly $973K. The city and Target appealed the fee award.

The city and Target argued that petitioners were not successful parties, and that no significant benefit had been conferred on a large class of persons. That was because Target successfully advocated for a change in the zoning ordinance, which allowed the store to proceed without variances, and the validity of the city's approval under the amended ordinance had yet to be determined. The city and Target also argued that, even if fees were permissible, the amount was too large.

The court disagreed. First, under the "catalyst theory," the petitioner can show that it was a successful party if it can demonstrate that its litigation caused the defendant to alter its behavior. The petitioner does not have to show that it achieved a specific outcome. Here, petitioners were "successful" in two ways. First, they vindicated their interest when the variances were set aside and further development was enjoined. Second, the suit prompted the "legislative fix" of creating a changed zoning subarea specifically tailored for the project.

Second, petitioners conferred a "significant benefit" to the entire city. That benefit consisted of forcing the city to comply with the municipal code concerning variances. This benefit transcended the Target project.

The city and Target argued that, because the appeal concerning the new zoning subarea was still pending, the rights at issue were still unsettled. The court disagreed. Where a party has obtained a final judgment in its favor on the merits, under the law in existence at the time, and where what remains to be finally adjudicated is the validity of a project under the law as subsequently amended, a petitioner is entitled to fees. The focus of the court's inquiry is the litigation objectives of the prevailing plaintiff, not on the defendant's goals. Here, petitioners accomplished their stated purpose of judicial review of the city's variance process. They did not need to show that they entirely stopped the project. Nor does section 1021.5 require a showing that the entire dispute is settled. Petitioners obtained a final judgment in their favor on the merits, under the law in existence at the time. A court can only resolve disputes

based on existing law, not the law as it might be amended in the future. The court declined to contemplate whether petitioners would be entitled to fees under the new zoning of the subarea, since the new zoning was not at issue in the *Mirada I* litigation.

In the unpublished portion of the decision, the court held that the trial court did not abuse its discretion in determining the amount of the fee award.

REGULATORY DEVELOPMENTS

Update to State CEQA Guidelines

On November 27, 2017, the Governor's Office of Planning and Research transmitted a set of proposed amendments to the CEQA Guidelines to the Natural Resources Agency. The proposed amendments proposed dozens of changes, and represented the first comprehensive update to the Guidelines in roughly 20 years.

In January 2018, the Natural Resources Agency published a "Notice of Proposed Rulemaking." In March 2018, the Agency held hearings on the proposed rulemaking. On July 2, 2018, the Agency issued a "15-day notice" setting forth proposed changes to the amendments. The comment period on the proposed changes ended on July 20, 2018. The Agency is expected to respond to comments received by July 20, and to proceed with the rulemaking. The process will likely conclude before the end of 2018. The updated CEQA Guidelines will apply prospectively only, and would not affect projects that have already commenced environmental review. Additionally, while a public agency could immediately apply the proposed new Guidelines section regarding the evaluation of transportation impacts (proposed Guidelines section 15064.3), statewide application of that new section would not be required until January 1, 2020.

The proposed changes set forth in the 15-day notice involve the following sections of the State CEQA Guidelines:

15004 – timing of CEQA review
15063 – initial studies
15064 – thresholds of significance
15064.3 – transportation impacts and vehicle miles traveled
15064.4 – analysis of greenhouse gas emissions
15125 – description of environmental setting in an EIR; "baseline"
15126.2 – analysis of significant impacts, including wasteful or unnecessary use of energy
15126.4 – mitigation measures, including deferral of mitigation
15182 – exemption for certain residential, mixed use or transit-oriented projects
15234 – addressing how an agency may respond to a successful court challenge
15301 – Class 1 categorical exemption – also applies to transit improvements
Appendix G – checklist revisions to address tribal resources, aesthetics in urban area
Appendix N – checklist for urban projects, revisions paralleling those in Appendix G

The rulemaking file is posted on the Agency's web site at:

http://resources.ca.gov/ceqa/

Technical Advisory re: CEQA Exemptions

In June 2018, the Governor's Office of Planning and Research issued a Technical Advisory entitled: "CEQA Exemptions Outside of the CEQA Statute." The advisory provides an inventory of statutory exemptions that are not located within the CEQA statute itself. (Pub. Resources Code, § 21000 et seq.) The advisory includes an appendix with the statutory language of these exemptions. The advisory is located at:

http://opr.ca.gov/docs/20180606-Tech_Advisory_CEQA_Exemptions.pdf

CEQA AND LAND-USE CASES PENDING IN THE SUPREME COURT

There are four CEQA and land-use cases pending at the California Supreme Court. The cases, listed newest to oldest, and the Supreme Court's summaries are as follows:

United Auburn Indian Community of Auburn Rancheria v. Brown, S238544. (C075126; 4 Cal.App.5th 36; Sacramento County Superior Court.) Petition for review after the Court of Appeal affirmed the judgment in action for writ of administrative mandate. This case presents the following issue: 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? Briefing completed December 2017; oral argument not scheduled.

Union of Medical Marijuana Patients, Inc. v. City of San Diego, S238563. (D068185; 4 Cal.App.5th 103; San Diego County Superior Court.) Petition for review after the Court of Appeal affirmed the judgment in an action for administrative mandate. This case presents the following issues: (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? Briefing completed December 2017; oral argument not scheduled.

T-Mobile West LLC v. City and County of San Francisco, S238001. (A144252; 3 Cal.App.5th 334, mod. 3 Cal.App.5th 999c; San Francisco County Superior Court.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. This case presents the following issues: (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"? Briefing completed June 2017; oral argument not scheduled.

Sierra Club v. County of Fresno, S219783. (F066798, 226 Cal.App.4th 704; Fresno County Superior Court.) Petition for review after the Court of Appeal reversed the judgment of the trial

court in an action for writ of administrative mandate. 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.) Briefing completed July 2015; oral argument letter sent October 2017; oral argument not scheduled.

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