Land Use and CEQA Litigation Update

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Notes:

Land Use & CEQA Litigation Update
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Golden Door Properties LLC v. County of San Diego (2018) 27 Cal.App.5th 892

The Fourth District Court of Appeal upheld the trial court's determination that the County of San Diego's "2016 Climate Change Analysis Guidance Recommended Content and Format for Climate Change Analysis Reports in Support of CEQA Document" ("2016 GHG Guidance") was ripe for adjudication, constituted piecemeal environmental review, and contained an improper threshold of significance, in violation of CEQA and a previously-issued writ of mandate.

In 2011, the County updated its general plan. The Environmental Impact Report (EIR) for the update incorporated mitigation measures to address greenhouse gas emissions from county operations. Two such measures are at issue here. First, Mitigation Measure CC-1.2 required the County to prepare a Climate Action Plan (CAP), and to adopt Greenhouse gas (GHG) emission targets and deadlines for achieving the targets. Second, Mitigation Measure CC-1.8 required the County to revise its guidelines for determining GHG significance based on the CAP. The county adopted a CAP, which was set aside when the court granted a petition for writ of mandate filed by the Sierra Club. While that case was on appeal, the County adopted the "2013 Guidelines for Determining Significance for Climate Change" ("2013 Guidelines"). Sierra Club challenged the 2013 Guidelines through a supplemental petition, which the parties stipulated to stay pending the appeal. In 2014, the court of appeal upheld the trial court's decision to set aside the CAP. On remand, the trial court issued a supplemental writ directing the County to set aside both the CAP and the 2013 Guidelines and retained jurisdiction to ensure compliance.

In 2016, while in the process of developing the CAP, the County published the 2016 GHG Guidance. In one section, the County stated that it represented "one potential set of criteria and methodologies, along with supporting evidence that would be appropriate for Climate Change Analysis," while in another section it stated that "[t]he County Efficiency Metric is the recognized and recommended method by which a project may make impact significance determinations." Sierra Club filed a second amended petition in the trial court, and Golden Door Properties, LLC, filed a separate challenge to the 2016 GHG Guidance. The cases were consolidated through a stipulation and the trial court determined that the claims were ripe, that the 2016 GHG Guidance created a threshold of significance, violated Mitigation Measures CC-1.2 and CC-1.8, was not supported by substantial evidence, and violated the previous writ of mandate because it constituted piecemeal review. The County appealed.

First, the court addressed the issue of ripeness. The County argued that the action was not ripe because it was still developing the CAP and because the controversy did not involve a specific set of facts (that is, no project using the 2016 GHG Guidance to perform Climate Change Analysis had been challenged). The court disagreed, finding that the situation here involved a threshold of significance that would "be used routinely to determine environmental effects…" and thus generally applicable. The court distinguished *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158 because that case involved a challenge to policies in a guidance document, under which the Commission might impose certain permit

conditions should any of the landowner/plaintiffs apply for such a permit. The court found that, although the 2016 GHG Guidance acknowledged that other methods for determining significance may apply, the efficiency metric was stated to be "the recognized and recommended method" for determining GHG significance, making it generally applicable and thus justiciable.

The County argued that the 2016 GHG Guidance did not set a threshold of significance, but instead, provided a recommended method for evaluating GHG emissions. The court disagreed and found that, because the 2016 GHG Guidance provided one "recognized and recommended" efficiency metric to measure the significance of a project's GHG emissions, the efficiency metric was a threshold of significance. That the County's 2013 Guidelines were more explicit than the 2016 GHG Guidance did not make the efficiency metric any less of a threshold of significance. The court found that the metric violated CEQA because the County had failed to follow the adoption procedures for such thresholds laid out in CEQA Guidelines section 15064.7, which required formal action by the County after a public review period. The court also found that Mitigation Measure CC-1.8 required the County to adopt the CAP before updating its guidance documents because Measure CC-1.8 required the updated guidance to be based on the CAP.

The court also found that the threshold of significance was not supported by substantial evidence. Specifically, the court held that the County needed to support the efficiency metric with substantial evidence establishing a relationship between the statewide data used to establish the metric and the County's reduction targets. The 2016 GHG Guidance stated that the efficiency metric represented the County's "fair share" of statewide emissions mandates, but did not explain why that was so. Additionally, the efficiency metric was recommended for all projects, but the 2016 GHG Guidance did not explain why the efficiency metric (based on service population) would be appropriate across all project types.

The court also agreed with the petitioners that the County had "piecemealed" its environmental review because the 2016 GHG Guidance preceded the completion of the CAP. The County argued that, because the CAP was on schedule to be released in compliance with the previous writ, the 2016 GHG Guidance did not violate the writ. The court applied the law-of-the-case doctrine and stated that its previous decision held that the CAP and the updated County guidance were a single project for CEQA purposes. For that reason, the CAP and updated guidance must be publicly reviewed and adopted by the County together. Because the CAP had not been adopted when the 2016 GHG Guidance was issued by the County, the 2016 GHG Guidance violated the writ.

McCorkle Eastside Neighborhood Group v. City of St. Helena (2019) 31 Cal.App.5th 80

The First District Court of Appeal affirmed a judgment denying a petition for writ of mandate seeking to overturn the City of St. Helena's approval of an 8-unit multifamily residential project, finding the city's approval authority was limited to design review under the zoning ordinance. Because the city lacked any discretion to address the project's environmental effects, the city properly determined CEQA review was not required, despite also relying on the Class 32 categorical exemption.

Between 2015 and 2016, the City amended its general plan and zoning ordinance to eliminate the requirement to obtain a conditional use permit for multifamily projects in High

Density Residential (HDR) districts. Consequently, multifamily residential projects were a permitted use in HDR districts, with only design review approval required. Real Party applied for design review approval for the project which was located within an HDR district. Real Party also applied for a demolition permit to demolish an existing single family home on the site.

City planning staff concluded: (1) the project was exempt from CEQA under the Class 32 infill exemption (CEQA Guidelines § 15332); and (2) the project met the design review criteria. At the planning commission hearing several neighbors and community members opposed the project, alleging that the site was contaminated, had inadequate drainage, lacked sufficient open space and would result in cumulatively considerable impacts. Opponents of the project also contended that the project design was inconsistent with the design of the neighboring historical homes.

The city attorney advised the members of the planning commission that, under the city's zoning ordinance, the commission was required to approve the project if it met the city's design review criteria. The city attorney added that while he was confident the Class 32 infill exemption applied, CEQA also did not apply because the approval was non-discretionary. The commission approved the project and adopted findings that the project was exempt from CEQA and would not cause any significant environmental effects. Opponents appealed.

At the city council hearing, the city attorney similarly advised the members of the council that the project was exempt from CEQA under the Class 32 infill exemption, and that their review was limited to the project design. The council voted 3-2 to deny the appeal and uphold the planning commission's approval. The council adopted a resolution containing detailed findings to support the design review approval. The council also found that the Class 32 infill exemption applied, but, even if some level of CEQA review was required, the city was limited to reviewing design-related issues and not the use-related environmental impacts the project opponents had raised.

The McCorkle Eastside Neighborhood Group and St. Helena Residents for an Equitable General Plan filed a petition for writ of mandate challenging the city council's approval as a violation of CEQA and local zoning laws. The trial court denied the petition. The groups appealed. The primary issue on appeal was whether the city abused its discretion by approving the project without requiring an EIR. The appellants argued that the Class 32 infill exemption requires the city council to determine that the project would not result in any significant environmental effects relating to traffic, noise, air quality, and water quality. According to the appellants, the city council could not have done so because it reviewed only the project design.

The court disagreed and held that, irrespective of reliance on the Class 32 exemption, the city council correctly determined that the scope of its discretion was limited to design review and, therefore, no environmental review was required. Under the city's design review ordinance, the city council could not disapprove the project for non-design related reasons. The court found that substantial evidence supported the city council's findings that the project met the design review criteria and would not result in design-related impacts.

With regard to the Appellants' design-related concerns, the court rejected the notion that review was required for those concerns alone, at least for the project at issue. Quoting from the

First District's decision in *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 592, the court stated, "[W]e do not believe that our Legislature in enacting CEQA . . . intended to require an EIR where the sole environmental impact is aesthetic merit of a building in a highly developed area." Furthermore, the court added, "[w]hile local laws do not preempt CEQA, 'aesthetic issues like the one raised here are ordinarily the province of local design review, not CEQA.' 'Where a project must undergo design review under local law, that process itself can be found to mitigate purely aesthetic impacts to insignificance . . . .'" (Quoting *Bowman* at p. 594.)

While the court recognized that St. Helena is not as urban as Berkeley (the location of the *Bowman* project), it nonetheless found that "the principles of that case apply to the design review in this case, which cannot be used to impose environmental conditions." The court next rejected the appellants' argument that the mere fact the city had some discretionary authority in the design review process made the project subject to CEQA. According to the court, the rule that a project will be deemed discretionary for purposes of CEQA if it requires both discretionary and ministerial approvals "applies only when the discretionary component of the project gives the agency the authority to mitigate environmental impacts."

Finally, the court found that it was unnecessary for the city to rely on the Class 32 infill exemption because the city lacked any discretion to address the project's non-design related environmental effects. The court also found it unnecessary to address the appellants' argument that the Class 32 exemption did not apply based on the "unusual circumstances" exception. According to the court, "[b]ecause CEQA was limited in scope to design review whether or not the Class 32 exemption applied, any exception to the exemption was irrelevant." (*Id*., p. 95.)

Bottini v. City of San Diego (2018) 27 Cal.App.5th 281

The Fourth District Court of Appeal upheld the trial court's ruling ordering the City of San Diego to set aside its determination that the construction of a single-family home required full environmental review.

In February 2011, the Bottini family purchased Windemere Cottage ("Windemere"). At that time, Windemere's designation as a historical resource was pending before the city's historical resources board. Shortly thereafter, the board declined to grant historical status to Windemere. In November 2011, the city's neighborhood code compliance division determined that Windemere constituted a public nuisance and ordered the Bottinis to demolish the structure. They complied. Then in August 2012, the Bottinis applied for a coastal development permit for the construction of a single-family home on the vacant lot. City staff determined that the project was categorically exempt from CEQA, but on an appeal of the determination, the city council ordered a fuller evaluation of the project using a January 2010 baseline, concluding that the demolition of Windemere was part of the project. The council further concluded that the project was not exempt because the unusual circumstances and historic resources exceptions to the exemption applied. In response to the city council's decision, the Bottinis filed a petition for writ of administrative mandamus seeking to compel the city council to set aside its decision, as well as a complaint alleging constitutional causes of action. The trial court granted the CEQA petition finding that the demolition of Windemere was not a component of the project and therefore the city's determination that the project is not categorically exempt lacked substantial evidentiary

support. It granted summary judgment in favor of the city as to the constitutional claims. The Bottinis and the city cross-appealed.

The court of appeal held that an environmental baseline that presumed the existence of the Windemere cottage, which in reality no longer existed at the time the project was proposed, did not accurately reflect the environmental conditions that would be affected by the project. The court dismissed the city's allegations that the Bottinis "strong-armed" the city into making a public nuisance determination because there was no evidence to support such an allegation. Moreover, the court found that the public nuisance determination confirmed that the demolition permit served a purpose distinct from and not part of the single-family home under review. Thus, the court concluded that the demolition of the cottage could not properly be considered part of the project.

Using the appropriate baseline, the court held that the city erred in concluding that the Class 3 exemption did not apply to the project. The construction of a single-family home on a vacant lot is typically categorically exempt. The court further determined that no exceptions to the exemption applied.

The Bottinis alleged three causes of action for violation of the California Constitution's takings, equal protection, and due process clauses. Regarding the takings claim, the court applied the test set forth in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 124, concluding that the Bottinis did not have a "reasonable investment-backed expectation" because there was no evidence they intended to demolish the cottage when they purchased the property. Even if they had articulated a distinct expectation to do so, there was no basis to conclude that they had a reasonable expectation that they could demolish the cottage to construct a new residence without undertaking any form of environmental review. The court further found that the Bottinis could not sustain a claim for due process because they did not identify any property interest or statutorily conferred benefit of which the city had deprived them. Finally, with respect to equal protection, the court held that the Bottinis did not meet their burden to show that the city's decision was not rationally related to a legitimate government interest.

As of April 10, 2019, the Supreme Court reviewed the matter and "dismissed as improvidently granted." Under the Rules of Court § 8.528(b) and § 8.1115(e)(2), the CEQA portion of this decision is now citable.

Categorical Exemptions

Berkeley Hills Watershed Coalition v. City of Berkeley (2019) 31 Cal.App.5th 880

The First District Court of Appeal upheld the City of Berkeley's determination that three new single-family homes on adjacent parcels in the Berkeley Hills fell within the scope of the Class 3 categorical exemption found in CEQA Guidelines section 15303, and that the "location exception" did not apply. The court also held that the city did not violate a local ordinance requiring a use permit for the addition of a fifth bedroom to existing homes.

In 2016, a group of landowners submitted applications to the City of Berkeley for permits to construct three new single-family homes on three contiguous parcels in the Berkeley Hills. In connection with the permit applications, the property owner hired a consulting firm to prepare a geotechnical and geologic hazard investigation of the proposed residences. The report indicated that a portion of the site is within the Alquist-Priolo Earthquake Fault Zone (APEFZ) and is also located in a potential earthquake-induced landslide area mapped by the California Geologic Survey on their Seismic Hazard Mapping Act map for the area. The city later retained its own consultants to peer review the report and provide additional information regarding slope stability and seismic hazards.

The city ultimately approved the use permits in 2017 after finding the proposed projects were categorically exempt from CEQA under the Class 3 categorical exemption for new construction of small structures. A group of petitioners filed a petition for writ of mandate challenging the city's approval. In contesting the city's CEQA exemption findings, the petitioners argued the "location" exception under Guidelines, section 15300.2, subdivision (a), applied and precluded the city from relying on the exemption. The petitioners also argued the city's approval violated zoning requirements regarding "fifth bedrooms."

The trial court denied the petition for writ of mandate and the petitioners appealed. Although the petitioners conceded that the projects fell within the "Class 3" categorical exemption, which applies to "construction and location of limited numbers of new, small facilities or structures," including "up to three single-family residences" in "urbanized areas," they alleged that the city was precluded from relying on the exemption because the projects met the "location" exception set forth in Guidelines, section 15300.2 (a). That section provides that several categorical exemptions, including Class 3, are "qualified by consideration of where the project is to be located" and do not apply "where the project may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies." The petitioners argued that this exception applied because the projects were located in the APEFZ, which the petitioners alleged was is an environmental resource of hazardous concern. The court disagreed.

At the outset, the court clarified that the same bifurcated standard of review applicable to the unusual circumstances exception (CEQA Guidelines, § 15300.2(c)), also applies to the location exception. According to the court, whether a project is located where there is "an environmental resource of hazardous or critical concern" is a factual inquiry subject to review for substantial evidence. If this standard is met, the court then applies the fair argument standard in determining whether a project "may impact on" the environmental resource due to the project's location.

Applying this standard, the court held that the exception did not apply to the projects. The court first explained that for the location exception to apply, it is the "environmental resource" which must be "designated, precisely mapped, and officially adopted pursuant to law." The petitioners, however, cited statutes that mapped the physical locations of potential earthquakes and landslides. Citing the dictionary definition of "resource," the court concluded that earthquakes and landslides are geologic events, not environmental resources, as contemplated by the location exception. Moreover, while the APEFZ is "officially mapped" in accordance with the Seismic Hazards Mapping Act, that statute was enacted for the purpose of preventing

economic loss and protecting health and safety, not to identify the locations of environmental resources. Similarly, as the Supreme Court affirmed in *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, CEQA is concerned with a project's significant effects on the environment, not the significant effects of the environment on the project. Accordingly, the court held that the location exception was inapplicable based solely on the fact the project was located in a potential earthquake and landslide zone.

The court then considered whether the city's determination that the project site was not located in an environmentally sensitive area was otherwise supported by substantial evidence and found that it was. The geotechnical reports produced during the administrative process were designed to evaluate the potential impact of landslides and fault ruptures on the project. There was no evidence that the project posed a risk of harm to the APEFZ. The court therefore held that the petitioners failed to meet their burden of showing that the projects were located where there is "an environmental resource of hazardous or critical concern."

Because the court found the city's determination supported by substantial evidence, it did not need to reach the second prong of the location exception inquiry—whether substantial evidence supports a "fair argument" that the project "may impact" the mapped resource—but it did anyhow. The court found that the petitioners failed to identify any substantial evidence that would support a fair argument that the project would have an adverse effect on the environment. The petitioners pointed to no evidence in the geologic reports that construction of the proposed residences would exacerbate existing hazardous conditions or harm the environment. Nor did petitioners submit their own geotechnical evidence, or any other evidence, to establish as much.

Turning to the municipal code claim, the court considered whether the city violated a code provision that requires a use permit before adding a fifth bedroom. The petitioners alleged that the city violated this provision because it did not require additional use permits, despite the fact that all of the residences had more than four bedrooms. The court was unpersuaded.

During the administrative proceedings, the city attorney explained that the ordinance applies only to modifications of existing dwellings—not to new construction. The purpose of the ordinance was to gain discretion over creation of "mini-dorms" via the addition of bedrooms to existing buildings, which in some cases could otherwise be done without discretionary review.

The court gave deference to the city's interpretation, finding that the ordinance was intertwined with issues of fact, policy, and discretion regarding zoning requirements and impacts to the local community. And even without such deference, the court concluded the city's interpretation was correct based on the plain meaning of the words used in the ordinance. Use of the word "addition of a fifth bedroom" implies the preexistence of four bedrooms. Because the projects were all new construction, the "fifth bedroom" ordinance did not apply.

San Diegans for Open Government v. City of San Diego (2018) 31 Cal.App.5th 349

The Fourth District Court of Appeal rejected a challenge to an amended lease agreement between the City of San Diego and the operator of an amusement park in Mission Beach. The court upheld the city's determination that the amended lease was categorically exempt from CEQA. The court also held that the amended lease did not violate a city proposition limiting

development in the area, or a city charter provision requiring that certain contracts can only be approved by ordinance.

In 1925, a developer built an amusement park on the San Diego oceanfront, which is now commonly known as Belmont Park. Upon the developer's death, the amusement park was granted to the city for the enjoyment of the people and the city later dedicated the park and surrounding land, collectively referred to as Mission Beach Park, to be used solely for park and recreational purposes.

In 1987, the city entered into a lease agreement with the park operator and approved a development plan to revitalize the park. The 1987 lease authorized the operator to demolish and renovate certain facilities, and to construct several new buildings for restaurants, shops, and other commercial uses. The lease was for a 50-year term and included a right of first refusal to enter into a new agreement in the future.

Following the execution of the 1987 lease, the city's electorate passed Proposition G, which limited the development of Mission Beach Park to certain specified uses. It also included an exemption for projects that had obtained "vested rights" as of the effective date of the measure. In 1988, the city passed an ordinance providing that the 1987 lease and development plan for Belmont Park provided a vested right under Proposition G, and as a result, the use and redevelopment of the park could continue as planned.

In 2015, the city entered into an amended lease with the current operator, Symphony Asset Pool XVI, LLC. The amended lease required Symphony to pay rent, operate, and maintain the property, and also gave Symphony the opportunity to extend the lease beyond the original 50-year term. Under the terms of the agreement, if Symphony completed ongoing and planned improvements, made additional improvements, and paid the city a lump sum payment, the amended lease could be extended an additional 50 years. Prior to approving the amended lease, the city determined that it was categorically exempt from CEQA under the "existing facilities" exemption found in CEQA Guidelines section 15301.

Shortly thereafter, a local group filed a lawsuit challenging the amended lease on three grounds: (1) that the amended lease violated Proposition G by authorizing new uses in excess of the vested rights conferred under the 1987 lease; (2) that the city improperly determined that the amended lease was categorically exempt from CEQA; and (3) that the approval of the amended lease violated the city charter, which at the time required certain agreements lasting more than five years to be adopted by ordinance after notice and a public hearing. The trial court ruled in favor of the city and the petitioner appealed.

The Court of Appeal first considered whether the amended lease violated Proposition G. The petitioner argued that it did because the scope of work allowed under the amended lease exceeded the vested rights determined by the city in 1988, and because the extension of the lease beyond the original 50-year term exceeded the vested rights obtained in 1988. The court rejected both arguments. First, the court found that the original lease included a long list of allowable uses and all of the uses allowed under the amended lease were encompassed within the broad language of the original agreement. Second, the court held that the extension beyond the original 50-year term did not violate Proposition G because the 1987 lease contemplated such an

extension by including a right of first refusal to enter into a new agreement. Furthermore, neither Proposition G nor the city's 1988 ordinance finding a vested right contained any time limit on the rights vested.

Turning to the petitioner's CEQA claim, the court considered whether the city properly determined that the amended lease was categorically exempt from CEQA under Guidelines section 15301 (Class 1 exemption). Section 15301, known as the "existing facilities" 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." The petitioner argued that the amended lease did not fit within this exemption because it contemplated a wide range of improvements, including construction of a new restaurant and bar, food court venues, and a new arcade, which according to the petitioner, involved more than a negligible expansion of the existing use. The court disagreed.

The court found that all of the construction activities cited by the petitioner had already been completed at the time the amended lease was executed, and thus were existing facilities. The court noted that while the amended lease did contemplate additional improvements to a pool facility in the future, the petitioner did not argue those activities were outside the scope of the exemption. At any rate, the court added, those activities involved only the refurbishment of existing facilities and not new construction, and therefore, they too fell squarely within the exemption.

Petitioner also argued that even if the amended lease did fit within the existing facilities exemption, the unusual circumstances exception in CEQA Guidelines section 15003.2 (c) applied and precluded the city from relying on the exemption. Under that section, a categorical exemption "shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."

Petitioner alleged the existence of the voter-passed Proposition G constituted an unusual circumstance within the meaning of section 15003.2 because the voters had used the initiative power to declare a distinct interest in minimizing the environmental impacts of development in Mission Beach. The petitioner also argued that there was a fair argument that the project would result in significant traffic and noise impacts. To support this claim, the petitioner cited a statement by a Symphony representative that the project would generate an additional $100 million in revenue over the term of the lease, which the petitioner argued could only occur with significantly more visitors and, therefore, significantly more traffic and noise. The court rejected these arguments, finding that the types of impacts alleged by the petitioner were speculative, and in any event, the petitioner failed to establish that the alleged traffic and noise impacts would be due to the alleged unusual circumstance (i.e., the existence of Proposition G).

The final issue in the case was whether the approval of the amended lease violated a provision in the city's charter requiring that certain agreements lasting more than five years could only be approved by ordinance following publication in a local newspaper and a public hearing. Petitioner argued that the charter provision applies to any contract lasting more than five years, while the city countered that the provision only applies to agreements that require the city to expend funds. After finding that the charter language was ambiguous and could support either

interpretation, the court explained that the city's interpretation of its own charter is entitled to deference. The city's longstanding interpretation of the provision was that it applied solely to agreements requiring the city to expend funds. Because it found this interpretation to be reasonable and consistent with the legislative history, the court deferred to the city and ruled that the charter provision did not apply to the amended lease.

Mitigated Negative Declarations

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

The Fourth District Court of Appeal upheld the trial court's conclusion that the City of Riverside properly adopted a negative declaration and was not required to prepare an EIR for a six-unit Planned Residential Development in the city's Residential Conservation Zone. The court also found that the city did not abuse its discretion by approving the project with six homes on six lots.

In 2015, Real Parties in Interest (the Lofgrens) applied to develop approximately twelve acres of property they owned in the city's Residential Conservation Zone (RCZ). The RCZ places special requirements on proposed residential development in order to protect the natural landscape in the zone. These requirements include submitting information on the natural slope of lots in the parcel to determine the minimum lot size (the greater the average slope, the larger the minimum lot size), and, ordinarily, a maximum density of 0.5 dwelling units per acre. Projects that qualify as Planned Residential Developments (PRDs) allow smaller minimum lot sizes and higher density. PRDs must be designed to protect and retain the natural topographic features of the site and may cluster homes in less steep areas of the site to protect such features and preserve open space. The Lofgrens also sought a density bonus to allow 0.63 dwelling units per acre by preserving 4.85 acres of the site as managed open space and selecting from a list of "superior design" elements.

As the project moved through the city's administrative process, the acreage information fluctuated on the maps submitted by Real Party (between just over 12 acres and just over 11 and a half acres) and the design of the site changed. After preparing an initial study, the city issued a negative declaration for the project. Petitioner Friends of Riverside's Hills (Friends) commented several times during the administrative process concerning the acreage (and thus the number of allowable lots) and density. Twice, the city and/or the Lofgrens amended the project to address Friends' concerns. Friends also argued that: the city had failed to require the Lofgrens to have a recognized conservation group oversee the open space preservation because an early version of the conditions of approval designated a homeowners' association, the project would require excessive grading, the natural slope information submitted by the Lofgrens was inconsistent, and the project violated CEQA because it was inconsistent with the city's zoning and grading ordinances. Ultimately, the city approved the project with the density bonus to allow six single-family homes on six lots ranging from just over a half-acre to just over an acre in size and with average natural slopes ranging from 21 to 29.5 percent.

Friends sought a writ of mandate to set aside the city's approval and require an EIR. Friends argued several theories to support their position, including, first, that the project did not

comply with the RCZ because it failed to cluster the proposed lots on the less steep portions of the site and preserve the natural features. Second, Friends argued that the project would require excessive grading. Third, they contended that the Lofgrens were required to seek a variance for lots smaller than two acres. Finally, Friends argued that the city abused its discretion by failing to support its determination regarding the natural slope of the proposed lots and by deferring selection of the "superior design" elements to the grading permit stage of development. The trial court found that there was no evidence that the project violated any of the land use provisions identified by Friends and denied the petition. Friends appealed.

On appeal, the court found that the RCZ was adopted by the city for environmental protection purposes, so violating those provisions could create a significant impact on the environment. But, the court found that there was no evidence in the record of any of the land use impacts alleged by Friends. First, Friends claimed that the project might violate the RCZ in the future, if it did not buildout as proposed in the PRD. The court found this to be speculation because the Lofgrens had not yet submitted final plans for the location of the homes. The court also found that while the RCZ required site design to be sensitive towards the natural topographic and habitat features of the site, clustering homes in less sensitive and steep portions of the site was one way that the applicant could choose to demonstrate the required sensitivity. There was no requirement to build in the least steep area of the site.

The court also pointed out that Friends were not challenging the actual conditions of approval, but arguing that the Lofgrens might not comply with them in the future, and that could have environmental impacts. The court stated that such an argument was true in nearly all cases, and that, if the project did not comply with the permit conditions, Friends could seek supplemental environmental review at that time. Further, the conditions required the project to be built in substantial conformance with the proposed PRD. Next, the court dismissed the variance argument, finding that the minimum two-acre lot size only applied where a proposed development was not a PRD. Lastly, the court rejected the abuse of discretion claims, finding that there was substantial evidence in the record of the average natural slope of the lots to support the city's determination that the site could support six lots. The court also found that RCZ did not require an applicant to select the "superior design" elements prior to permit approval, but, in any case, the Lofgrens had selected their preferred "superior design" elements.

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

The Third District Court of Appeal upheld a trial court ruling requiring an EIR for the potentially significant aesthetic impacts of a Dollar Store proposed in a "quaint Gold Rush-era hamlet."

In 2015, the Georgetown Preservation Society (Society) filed a petition for writ of mandate challenging the County's adoption of a mitigated negative declaration and approval of design review for a proposed Dollar General store in rural El Dorado County. The project included a 9,100-square-foot retail store with 12,400 square feet of parking on three vacant lots along Georgetown's Main Street. Local residents opposed the project, submitting comments that the project's size and overall appearance were inconsistent with the "look and feel" of historic downtown Georgetown. The trial court found that the comments supported a fair argument that

the project may have a significant aesthetic effect on the environment and directed the County to prepare an EIR. The County and Real Parties (appellants) appealed.

Appellants argued that, in approving the project, the County had reviewed the project for consistency with its Historic Design Guide and found the project substantially complied with all applicable design standards. The appellants contended the County's finding of compliance with its design guidelines should be entitled to deference and should be reviewed under the substantial evidence standard. The court rejected this argument, drawing a distinction between Planning and Zoning Law findings and the CEQA fair argument standard. The court explained that, although Planning and Zoning law findings are reviewed for substantial evidence, design review is not a substitute for CEQA review and the fair argument standard still applies, even apparently to arguments based on consistency with agency plans and policies. According to the court, although an agency's design review forms part of the body of evidence to consider when determining whether the fair argument standard has been met, the application of design guidelines does not insulate the project from CEQA review at the initial study phase under the fair argument standard. Moreover, the court explained, while design review may provide substantial evidence that aesthetic impacts are less than significant, if contrary evidence meets the fair argument standard, an EIR is required.

Applying the fair argument standard to the project at issue, the court stated it had "little difficulty finding the fair argument standard was met . . . ." The court noted that multiple commentators objected to the size and overall appearance of the project, including some people claiming backgrounds in design and planning. As a result, the court stated, it could not seriously be disputed that the low threshold needed to trigger an EIR was met. The court also rejected appellants' arguments that here the County's design review criteria recommending specific architectural styles and features constituted a technical subject beyond the credible reach of lay commenters. The court noted that several decisions have found lay commentary on nontechnical matters to be admissible and probative, and may satisfy the fair argument standard. According to the court, while the commenters may have lacked the background to apply the County's design standards, a rational lay person familiar with the area could conclude a 9,100-square-foot chain store may impact the historic district's aesthetic.

Finally, the court rejected an argument by the County that some of the evidence cited from lay persons was not credible. According to the court, the County's decision-makers were obligated to state, in the record and with particularity, which proffered evidence lacked credibility and why. While the appellants asserted that much of the cited testimony lacked basis in facts, the court held that the County could not discount such evidence in litigation after failing to do so in the administrative record. The court added that even if the County had made such determinations here, doing so would have been an abuse of discretion because the court found the testimony constituted substantial evidence supporting a fair argument.

Environmental Impact Reports

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

On December 24, 2018, the California Supreme Court issued its highly-anticipated decision in *Sierra Club v. County of Fresno,* invalidating portions of an EIR's air quality analysis prepared for a 55 and over Specific Plan project. The Court found that: (1) when reviewing whether an EIR's discussion of environmental effects "is sufficient to satisfy CEQA," courts must be satisfied that the EIR "includes sufficient detail to enable those who did not participate in its preparation to understand and consider meaningfully the issues the proposed project raises"; (2) an EIR must show a "reasonable effort to substantively connect a project's air quality impacts to likely health consequences"; (3) a lead agency "may leave open the possibility of employing better mitigation efforts consistent with improvements in technology without being deemed to have impermissibly deferred mitigation measures"; and (4) a lead agency "may adopt mitigation measures that do not reduce the project's adverse impacts to less than significant levels, so long as the agency can demonstrate in good faith that the measures will at least be partially effective at mitigating the project's impacts."

The controversy arose over an EIR prepared by the County of Fresno for the Friant Ranch project, a proposed master-planned community near the unincorporated community of Friant in north-central Fresno County. The project included a Specific Plan and Community Plan Update. The Specific Plan provided the framework for the development of approximately 2,500 single and multi-family residential units that are age restricted to "active adults" age 55 and older, other residential units that are not age restricted, a commercial village center, a recreation center, trails, open space, a neighborhood electric vehicle network, and parks and parkways. The project also included 250,000 square feet of commercial space on 482 acres and the dedication of 460 acres to open space. The Community Plan Update expanded a preexisting Community Plan's boundaries to include the Specific Plan area and added new policies that were consistent with the Specific Plan and the County's General Plan.

The EIR generally discussed the health effects of air pollutants such as Reactive Organic Gases (ROG), oxides of nitrogen (NOx), and particulate matter (PM), but without predicting specific health-related impacts resulting from the project's emissions. The EIR found that the project's long-term operational air quality effects were significant and unavoidable, even with implementation of all feasible mitigation measures. The EIR recommended a mitigation measure that included a "substitution clause," allowing the County, over the course of project build-out, to allow the use of new control technologies equally or more effective than those listed in the adopted measure. The County chose to approve an alternative that was identified as the "environmentally superior alternative" in the EIR, rather than the initial proposal.

The Sierra Club filed a petition challenging the County's certification of the EIR and approval of the project. The trail court denied the petition in full. Sierra Club appealed. The Court of Appeal reversed the trial court's judgment on three grounds. First, the court held that the EIR was inadequate because it failed to include an analysis that correlated the project's emission of air pollutants to its impact on human health. Second, it found that the mitigation measures for the project's long-term air quality impacts violated CEQA because they were vague, unenforceable, and lacked specific performance criteria. Third, the court held that the

EIR's statement that the air quality mitigation provisions would substantially reduce air quality impacts was unexplained and unsupported.

Real Party in Interest petitioned the Supreme Court for review and review was granted. The Court issued a unanimous opinion, affirming in part, and reversing in part, the Court of Appeal's decision.

First, addressing the standard of review, the Court held that in certain circumstances claims alleging that an EIR's discussion of environmental impacts is inadequate may be reviewed de novo under the "procedural" prong of CEQA's standard of review. (Pub. Resources Code, § 21168.5.) The Court explained that, over time, "a procedural issues/factual issues dichotomy" has been created with a substantially different standard of review applied to each type of error. While courts determine de novo whether an agency has employed the correct procedures, the agency's substantive factual conclusions are accorded greater deference and will be upheld if they are supported by substantial evidence.

The Court explained that the issue of whether an EIR's discussion of environmental impacts is adequate, such that it facilitates "informed agency decision-making and informed public participation," does not "fit neatly within the procedural/factual paradigm." Relying heavily on *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, the Court held that, although there are instances where the agency's discussion of significant project impacts may implicate a factual question that makes substantial evidence review appropriate, "whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question." The Court explained that "a conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence." The Court held that in these instances, claims that an EIR's discussion of environmental impacts is inadequate or insufficient may be reviewed de novo. Although agencies have considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR, the Court concluded that a reviewing court must determine whether the EIR includes enough detail "to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." The Court determined that this inquiry presents a mixed question of law and fact, and as such, "it is generally subject to independent review."

Second, the Court considered whether the EIR's air quality analysis complied with CEQA. The challenged EIR quantified the amount of air pollutants the project was expected to produce and also provided a general description of each pollutant and how it affects human health. The EIR explained that a more detailed analysis of health impacts was not possible at the early planning phase and that a "Health Risk Assessment" is typically prepared later in the planning process. Nevertheless, the Court of Appeal found that the EIR was inadequate because it failed to correlate the increase in emissions with adverse impacts on human health. The Supreme Court agreed, with qualifications.

The Court found an EIR must reflect "a reasonable effort to substantively connect a project's air quality impacts to likely health consequences." Specifically, an EIR must show "a reasonable effort to discuss relevant specifics regarding the connection between" (1) the "general

health effects associated with a particular pollutant" and (2) the "estimated amount of that pollutant the project will likely produce." Thus, an EIR must "provide an adequate analysis to inform the public how its bare [emissions] numbers translate to create potential adverse [health] impacts or it must adequately explain what the agency does know and why, given existing scientific constraints, it cannot translate potential health impacts further."

Here, the EIR quantified how many tons per year the project would generate of ROG and NOx (both of which are ozone precursors). Although the EIR explained that ozone can cause health impacts at exposures for 0.10 to 0.40 parts per million, the Court found this information meaningless because the EIR did not estimate how much ozone the project would generate. Nor did the EIR disclose the specific levels of exposure to PM, carbon monoxide, and sulfur dioxide that would trigger adverse health impacts. In short, the Court found the EIR made "it impossible for the public to translate the bare numbers provided into adverse health impacts or to understand why such translation is not possible at this time (and what limited translation is, in fact, possible)." Outlining the unhealthy symptoms associated with exposure to various pollutants, as the EIR did, was insufficient.

The Court was unpersuaded by Real Party's explanation, supported by amici curiae briefs submitted by air districts, as to why the connection between emissions and human health that the plaintiffs sought could not be provided in the EIR given the state of environmental science modeling. Even if that was true, the Court explained, the EIR itself must explain why it is not scientifically possible to do more than was already done in the EIR to connect air quality effects with potential human health impacts.

The Court also noted that, on remand, one possible topic to address would be the impact the project would have on the number of days of nonattainment of air quality standards per year. The Court stopped short of stating such a discussion is required. Instead, the Court noted that the County, as lead agency, has discretion in choosing the type of analysis to provide.

Third, the Court turned to the adequacy of mitigation measure 3.3.2 which included a suite of measures designed to reduce the project's significant air quality impacts by providing shade trees; utilizing efficient "PremAir" or similar model heating, ventilation, and air conditioning systems; building bike lockers and racks; creating bicycle storage spaces in units; and developing transportation related mitigation that would include trail maps and commute alternatives. The measure included a substitution clause allowing the County to "substitute different air pollution control measures for individual projects, that are equally effective or superior to those propose[d] [in the EIR], as new technology and/or other feasible measures become available [during] build-out within the [project]." The EIR stated that the measures would "substantially reduce" operational air quality impacts related to human activity within the entire project area, but not to a less-than-significant level.

The Court found the EIR's mitigation and analysis of health effects to be lacking in adequate explanation or factual support. According to the Court, the EIR "must accurately reflect the net health effect of proposed air quality mitigation measures." Here, the EIR included no facts or analysis to support the inference that the mitigation measures will have a quantifiable "substantial" impact on reducing the adverse effects.

The Court also considered whether the air quality measure impermissibly deferred formulation of mitigation because it allowed the County to substitute equally or more effective measures in the future as the project builds out. The Court held that this substitution clause did not constitute impermissible deferral of mitigation because it allows for "additional and presumably better mitigation measures when they become available," consistent with CEQA's goal of promoting environmental protection. The Court noted that mitigation measures need not include precise quantitative performance standards, but they must be at least partially effective, even if they cannot mitigate significant impacts to less than significant. Thus, the measure was adequate even though the County had discretion to determine what specific measures would be implemented.

Lastly, the Court reasoned that "the inclusion of mitigation measures that partially reduce significant impacts does not violate CEQA." Rather, if all feasible mitigation measures have been incorporated into an EIR and significant effects still exist, an agency may still approve the project if it finds the unmitigated significant effects are outweighed by the project's benefits.

SOMCAN v. City and County of San Francisco (Feb. 13, 2019) ___ Cal. App. 5th ___ (Case No. A151521)

In the first appellate decision to apply the CEQA standard of review that was recently articulated by the California Supreme Court in *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502 - the First District Court of Appeal held that an EIR prepared for a mixed-use development project was legally adequate.

The City and County of San Francisco certified an EIR and approved the development of a mixed-use project that included office, retail, cultural, educational, and open-space uses for a four-acre property in downtown San Francisco. The EIR described two "options" for the project, an "Office Scheme" and a "Residential Scheme."

In finding the EIR adequate despite a variety of claims, the court applied the three "basic principles" articulated by the Supreme Court regarding the standard of review for adequacy of an EIR: (1) An agency has considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR; (2) However, a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, i.e., whether the EIR comports with its intended function of including detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project; and (3) The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency's factual conclusions.

The court rejected petitioners' claim that the EIR's project description was unstable because the draft EIR presented two alternative schemes. The court found the project description contained the required information and was not confusing or misleading despite presenting two different use options. According to the court, the EIR described only one proposed project—a mixed use development with two options for different allocations of residential and office units—and the analysis was not curtailed, misleading, or inconsistent. The court also rejected petitioners' argument that the final EIR adopted a "revised" project that was a variant of another

alternative identified in the draft EIR—emphasizing that the CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project, but is instead intended to allow consideration of other options that may be less harmful to the environment.

The court upheld the EIR's cumulative impacts analysis, finding no evidence in the record to support petitioners' claim that the EIR's list of projects was inadequate because it was developed in 2012 (during the "Great Recession") and did not reflect the recent increase in development. Accordingly, the court held that the petitioners had not met their burden of proving the EIR's cumulative impacts analysis was not supported by substantial evidence. Notably, the court cited *Sierra Club v. County of Fresno* for the proposition that agencies have discretion in selecting the methodology to be used in evaluating environmental impacts, subject to review under the substantial evidence standard.

In upholding the EIR's traffic analysis, the court deferred to the city's determination of the geographic boundaries to use for the chosen intersections. The court noted that the city explained its reasoning for selecting certain intersections and excluding others, and the analysis was supported by substantial evidence. The city also was not required to include the Safer Market Street Plan in the EIR that was not reasonably foreseeable when the city initiated EIR preparation. Finally, the court found that the EIR addressed the mitigation measures petitioners alleged were missing and did not need to analyze additional alternatives because the alternatives were not feasible, would not meet the project objectives, or would not reduce environmental impacts.

The court also rejected petitioners' argument that the developer was required to provide an alternative project configuration under the city's comfort criterion for wind speeds because exceedance of the criterion alone did not establish a significant impact under CEQA. The court also rejected petitioners' assertion that the project failed to provide adequate onsite open space where the EIR provided that the project includes more space than the local code required and would result in a less-than-significant impact related to use of existing parks and open spaces.

The court also determined the EIR clearly set forth specific information about the shade and shadow impacts and analyzed why they would not produce a significant environmental effect. The court rejected petitioners' argument that sunlight is a "special and rare resource" warranting "special emphasis" under section 15125 of the CEQA Guidelines, citing petitioners' failure to cite any authority. The city also made a good faith effort to discuss inconsistencies with the applicable general plans—noting that CEQA does not mandate perfection.

Finally, the court upheld the city's statement of overriding considerations against petitioners' claim that the city improperly considered the benefits of the project before considering feasible mitigation measures or alternatives. The court emphasized that the project was modified to substantially conform to the identified environmentally superior alternative, which would not have occurred if there had been no consideration of mitigation measures or alternatives.

Subsequent Environmental Review/Addenda

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

The Fourth District Court of Appeal found that the addendum process under CEQA Guidelines section 15164 fills a procedural gap in the statute and is not invalid. The court also ruled that Public Resources Code section 21081 findings are not required again with an addendum.

The City of San Diego certified an EIR and approved a project in 2012 to restore pedestrian and park uses to portions of Balboa Park. Save Our Heritage Organisation (SOHO) filed a petition for writ of mandamus challenging the project. The superior court granted the petition and directed the City to rescind the project approval. The Real Party in Interest and SOHO each appealed the judgment, and the court of appeal reversed the trial court's judgment and upheld the EIR. The Real Party in Interest filed a motion seeking an award of attorney fees, which the trial court denied and the appellate court affirmed.

While the appeals were pending, several physical changes occurred to the project's environmental setting. In 2016, the City adopted an addendum to the EIR to address modifications to the project. The addendum concluded that: (1) There were no substantial changes to the project requiring major revisions to the EIR because of new or substantially increased significant environmental effects; (2) There were no substantial changes in circumstances requiring major revisions to the EIR because of new or substantially increased significant environmental effects; and (3) There was no new, previously unknown or unknowable, information of substantial importance showing: (a) the project would have significant effects not discussed in the EIR; (b) the project would have substantially more severe significant effects than shown in the EIR; (c) previously infeasible mitigation measures and project alternatives were now feasible and would substantially reduce significant environment effects; or (d) considerably different mitigation measures than analyzed in the EIR would substantially reduce significant environmental effects. The City incorporated these findings into its resolution adopting the addendum.

The court found that SOHO did not meet its burden of proof to show that CEQA Guidelines section 15164, which allows for preparation of addenda, is invalid. The court explained the difference between quasi-legislative rules (those in which the Legislature has delegated a portion of its lawmaking power) and interpretive rules (those in which an agency interprets a statute's meaning and effect). Although the California Supreme Court has not ruled on which category applies to the CEQA Guidelines, the court explained that such a distinction was not necessary to make here because, either way, SOHO did not establish that section 15164 is invalid.

The court determined that Guidelines section 15164 is both (1) consistent and not in conflict with CEQA; and (2) reasonably necessary to effectuate the purpose of CEQA.

The court explained that the Resources Agency promulgated Guideline 15164 to implement Public Resources Code section 21166, which describes the circumstances under which an agency must conduct subsequent or supplemental review. That section, explained the

court, creates a presumption against further environmental review once an EIR has been finalized. And, although section 21166 does not expressly authorize an "addendum," the court explained that Guidelines section 15164 fills in the gap for CEQA projects where there is a previously certified EIR that should be revised, but the conditions that warrant preparation of a subsequent EIR under section 21166 are not met. Furthermore, the court said, Guidelines section 15164 is consistent with and furthers the objectives of section 21166 because it requires an agency to substantiate its reasons for determining why project revisions do not necessitate further environmental review.

The court also explained that the absence of a public review process for an addendum does not render Guidelines section 15164 inconsistent with CEQA. Instead, the absence of public review reflects the finality of adopted EIRs, and the proscription against further environmental review except in specified circumstances in section 21166. In addition, the court pointed to the analogous requirement that a Final EIR must be recirculated before certification only where revisions add significant new information. Finally, the court emphasized that the Resources Agency first promulgated Guidelines section 15164 in 1983, and the Legislature has not modified CEQA since then to eliminate the addendum process.

SOHO argued that the City was required to make new findings under section 21081, but the court disagreed. Section 21081 provides that a public agency shall not approve or carry out a project for which an EIR has been certified unless the agency makes specific findings with respect to identified significant effects. The court explained that neither the Code nor the Guidelines suggests new findings are required when an addendum is prepared. And, the court explained, the only purpose of findings is to address new significant effects, but an addendum is only proper where no new significant environmental impacts are discovered. Where there are no new significant impacts, there is no need for findings. Therefore, the court held, findings are not required for an addendum.

Other Issues/Res Judicata

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

The Fourth District Court of Appeal upheld a lower court's ruling sustaining the city's demurrer without leave to amend, finding that the petitioners' claims under CEQA and the Water Code were barred by the doctrine of res judicata.

The action involved a proposed development pending in various permutations for decades in the Highland Hills area of San Bernardino. In 1982, the city approved a specific plan and EIR for the project. The EIR was promptly challenged by a homeowners association, one of the same petitioners in this case. The parties resolved the suit through a settlement agreement. A later addendum to the agreement stipulated that if future project modifications met specified criteria (i.e., did not increase the level of development or result in greater impacts), then those changes would be considered "minor modifications." Minor modifications would not be subject to additional CEQA review. The project was not built at that time.

In 2014, the original developers' successors in interest wanted to proceed with the project. The city approved the project, agreeing that proposed modifications were minor, and did

not require further environmental review. The HOA sued (the related action). Respondents requested and received a court order confirming that the modifications complied with the terms of the settlement agreement, were minor in nature, and that no further CEQA review was required.

This suit was then brought by the original petitioner, the HOA, and joined by two environmental groups (CREED-21 and Inland Oversight Committee). Petitioners asserted that the project as modified violated CEQA and the Water Code. Respondents successfully moved for a demurrer without leave to amend. This appeal followed.

The court ruled that the petitioners' claims were barred by res judicata, because the issue of whether further environmental review was required was resolved in the related action. Under the doctrine of res judicata, a valid, final judgment on the merits is a bar to subsequent action by parties or their privies in the same cause of action. In California, whether causes of action in two suits are the same for the purpose of res judicata depends on whether they involve the same primary right. In the CEQA context, the same primary right is at issue if the actions involve the same general subject matter, provided that they are not distinct episodes of noncompliance.

The allegations of noncompliance with the settlement agreement were the same in both this suit and the prior related matter. In both, the petitioners contended that the city violated CEQA by not conducting further environmental review. As the court held in the related matter, the updated proposal is a minor modification, and no further environmental review is required. That decision was final.

The court rejected the contention by the environmental group petitioners that they were not in privity with the HOA. Privity is found if the party's interests are so similar that the party in the prior action was the current party's virtual representative. The court found that standard applied here, because the environmental groups and the HOA both opposed the project and sought to invalidate its approvals. Even accepting the contention that the environmental groups were acting in public interest, and that the HOA acted in its own private interest, the petitioners failed to articulate how those interests were not aligned. The HOA did not, for example, assert any particular private harm that was not shared with the public at large. This holding is consistent with other persuasive authority finding privity between individuals asserting private interests and nonprofit organizations asserting public interests, both on similar grounds.

The court also found that the petitioners' Water Code claims (alleging that a water supply analysis was required) were similarly barred by res judicata. As with the CEQA claims, the Water Code allegations rested on the petitioners' key assertion—that the project was not a minor modification of the original project, and that further environmental review was required. That claim was litigated and decided; as such, a water supply analysis could not be required. The court further briefly noted that petitioner's claims would also be barred under the doctrine of collateral estoppel.

Atwell v. City of Rohnert Park (2018) 27 Cal. App. 5th 692

The First District Court of Appeal found petitioners' CEQA and Planning and Zoning Law claims barred by res judicata. In 2010, the City of Rohnert Park (City) prepared a General Plan and EIR for a Walmart store to add space for a 24-hour grocery store/supermarket (Project) in the northwest corner of the City. Following a public hearing, the planning commission declined to certify the EIR because the Project did not comply with the General Plan and was inconsistent with Policy LU-7 (to encourage new neighborhood commercial facilities and supermarkets to maximize residential accessibility). Walmart appealed the commission's decision and after a subsequent public hearing discussing Policy LU-7, the City Council approved the Project with recommended conditions.

Sierra Club and Sonoma County Conservation Action (SCCA) filed a petition for writ of mandate challenging the City's approval of the EIR and the Project. Nancy Atwell, Elizabeth Craven, Matthew Weinstein (appellants), were not named parties in the action. Petitioners raised, but did not pursue, the claim that the Project was in conflict with Policy LU-7. The trial court granted the petition and ordered the Project approvals be remanded for additional environmental review.

After vacating the Project approvals, the City prepared a revised EIR but did not alter the original EIR's analysis of consistency with the General Plan. In 2014, after another public hearing, the planning commission certified the revised EIR and reapproved the Project.

In 2015, appellants filed a petition for writ challenging the Council's re-approval of the Project as inconsistent with its General Plan and Policy LU-7. The City asserted appellants' claims were barred by res judicata and filed a motion for judgment on the pleadings. When a complaint fails to allege facts sufficient to state a cause of action, judgment on the pleadings in favor of the defendant is appropriate. Judgment was entered in favor of the City after appellants did not contest the trial court's tentative order which granted the City's motion and concluded the petition was barred by the doctrine of res judicata and statute of limitations. Petitioners appealed.

On appeal, the court affirmed the trial court's decision, holding that appellants' claims were barred by res judicata because consistency with the General Plan was challenged by the Sierra Club and SSCA and resulted in a final judgment. Appellants asserted their petition raised a distinct issue because the Project's consistency with the General Plan was not actually litigated by the Sierra Club action since the petition was based on the City Council's 2015 resolutions, which were approved after the Sierra Club action. The court explained, so long as the later-raised issues constitute the same cause of action involved in the prior proceeding, res judicata bars issues that *could have been* litigated.

Under the doctrine of res judicata, a valid, final judgment on the merits is a bar to subsequent action by parties or their privies for the same cause of action. In California, whether causes of action in two suits are the same for the purpose of res judicata depends on whether they are based on the same primary right. The court explained the same primary right is at stake if two actions involved the same injury to the petitioner and the same wrong by the defendant regardless of what different theories are pled in a second suit and/or new forms of recovery

sought. The court explained that new challenges to a revised EIR can be barred when the material facts have not changed and the two proceedings involve the same primary right and the same cause of action.

The court notes there was no dispute that the Project proposal remained unchanged and that both the 2010 and 2015 resolutions found the Project would be consistent with the General Plan and Zoning Ordinance. The court also found the revised EIR addressed the traffic and noise impacts that the trial court found to be deficient in the original EIR. The changes made to the revised EIR were unrelated to the concerns regarding Policy LU-7 brought by appellants. All of the Policy LU-7 arguments brought by appellants were identical to those raised before the Council in 2010 and were evaluated in the original EIR. The court therefore found appellants' petition was not based on changed material facts and raised the same claims as those raised by the Sierra Club action.

Appellants' claims were also found barred by res judicata based on privity. The court found privity between the parties because the Sierra Club and appellants opposed the project and sought to invalidate its approvals on behalf of citizens, taxpayers, property owners, and electors of the City. Despite appellants' claim of personal harm, the court held Sierra Club brought their petition on behalf of its members who are part of the community; thus, the relationship to the subject matter of the litigation is identical. Appellants failed to assert that petitioners' litigation did not adequately represent their interest.

Ione Valley Land, Air, and Water Defense Alliance, LLC, v. County Of Amador, et al. (2019) 33 Cal.App.5th 165

The Third District Court of Appeal found petitioner's new arguments challenging a partially recirculated and certified EIR barred by res judicata. In 2012, the County of Amador (County) approved the Newman Ridge Project (Project) and certified an EIR. The Project involved an aggregate quarry and related facilities owned by Newman Minerals (Applicants). The Project consisted of two parts: the Newman Ridge Quarry and the Edwin Center. After the EIR was certified, Petitioner (LAWDA) filed a petition for writ of mandate under CEQA. LAWDA raised a multitude of issues, including air quality, traffic and responses to comments.

The trial court granted the petition in part, finding the 2012 EIR's analysis of traffic deficient. All other claims were denied. The trial court ordered the County to decertify the EIR, and revise and recirculate the traffic analysis. After recirculation the County certified the revised EIR, approved the Project and sought a return on the writ.

The trial court granted the motion to discharge the writ. LAWDA filed a new petition for writ of mandate. The trial court denied the petition, which LAWDA appealed.

Previously, in April 2015 and prior to discharge of the first writ, LAWDA filed a second petition challenging the partially recirculated EIR on grounds other than traffic. The trial court sustained a demurrer with leave to amend, claiming the contentions were already litigated and resolved. No record of the hearing was available to the court of appeal.

The court of appeal agreed with the County and Applicants contention that LAWDA was barred from raising nearly all the claims contained in the second petition. The trial court's writ required the County to revisit only the traffic impacts from the 2012 EIR. The court of appeal held all of LAWDA's objections to the partially recirculated EIR and Project approval were barred by res judicata, except for the issues regarding traffic.

The court of appeal rejected LAWDA's claim that decertification of the EIR enabled petitioner to pursue new arguments, reasoning that the decertification did not alter the sufficiency of the remainder of the EIR that had already been litigated and resolved. The court held that because LAWDA failed to include the counter-argument to the application of res judicata in their opening brief, they forfeited the argument. They noted that " 'the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' " (*Ibid*., quoting *Neighbors v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.).

LAWDA also argued that the County's responses to Caltrans' comments were deficient and the partially recirculated EIR did not account for the Mule Creek State Prison expansion or the City of Galt's concerns. The court of appeal found LAWDA's assertions lacking merit, the response to Caltrans' concerns was adequate. The court also found the revised EIR's consideration of the Mule Creek State Prison expansion sufficient, as was the response to concerns raised by Galt. The court affirmed the trial court's decision.

II. LAND-USE CASES

Planning and Zoning Law

Save Lafayette Trees v. City of Lafayette (2019) 32 Cal.App.5th 148

In a prior published opinion filed on October 23, 2018 (28 Cal. App. 5th 622), the First District Court of Appeal upheld an order sustaining without leave to amend a demurrer to petitioners' Planning and Zoning Law claims as time barred under Government Code section 65009(c)(1)(E), and reversing the order sustaining the demurrer as to the first (CEQA) cause of action, finding that the CEQA cause of action was timely filed. Thereafter, both Real Party (PG&E) and Petitioner filed petitions for rehearing. The Court of Appeal granted PG&E's petition to allow reconsideration of the conclusion regarding the CEQA claim, ultimately finding no reason to alter the original conclusions and reissued the opinion with limited modification.

In March 2017, the City approved an agreement with PG&E conditionally authorizing the removal of up to 272 trees from PG&E's local natural gas pipeline rights-of-way. City staff and PG&E disagreed regarding whether or not PG&E was subject to permitting requirements in the city's tree protection ordinance. Rather than requiring PG&E to obtain a tree removal permit, PG&E and city staff agreed to process the project under a provision of the City's municipal code allowing the removal of protected trees "to protect the health, safety and general welfare of the community." Petitioners Save Lafayette Trees, et al., filed a lawsuit challenging the city's approval of the tree removal agreement. The petition alleged that the city failed to comply with the Planning and Zoning Law and CEQA. The petition also alleged that the city violated petitioners' due process rights by failing to provide sufficient notice of the city council meeting

at which the agreement was approved. The petition was filed on June 26, 2017, 90 days after the city's approval of the agreement, and served the following day.

PG&E filed a demurrer to the petition, which the city joined, contending that the challenge was time barred under Government Code section 65009, subdivision (c)(1)(E), which requires that an action challenging a decision under the Planning and Zoning law be filed *and served* within 90 days. The trial court sustained the demurrer without leave to amend and dismissed the petition. Petitioners appealed.

On appeal, the appellate court affirmed in part and reversed in part. First, the court agreed with the trial court that the petitioners' Planning and Zoning Law claims were time barred under Government Code section 65009(c)(1)(E). The court explained that the 90-day limit in that section applies broadly to any action challenging a decision by a legislative body regarding a permit provided for by a local zoning ordinance. In this case, the court concluded the city's tree ordinance is a zoning ordinance, codified in the "Planning and Land Use" title of the city's municipal code. Although the city entered an agreement for the removal of trees rather than issuing a "permit," the court concluded there was no meaningful difference between the two in this instance, thus, section 65009(c)(1)(E) applied.

The court rejected petitioners' arguments that section 65009(c)(1)(E) did not apply. Petitioners' alleged section 65009 only pertained to decisions involving housing. The court was unpersuaded, finding authority applying the statute to challenges involving a broad range of planning and zoning decisions. The court similarly rejected an argument that section 65009 did not apply because the city council was not acting in one of the statutorily enumerated roles when it approved the agreement (i.e., a board of zoning adjustment, zoning administrator or board of appeal). The court explained that it is the underlying decision being reviewed, not the reviewing body, that determines the applicability of section 65009. The court also rejected petitioners' argument that its action was subject to the longer, 180-day statute of limitations provided by the city's municipal code for actions challenging a decision of the city council. The court agreed with the trial court that the municipal code section directly conflicted with Government Code section 65009 and was therefore preempted. Petitioners' due process claim, alleging that strict compliance with the statute should be excused because the city failed to provide sufficient notice of the city council meeting, was also rejected. The city satisfied the public notice requirements of the Brown Act. Petitioners failed to allege sufficient facts to support its contention its members were entitled to personal notice.

With regard to the petitioners' CEQA claim, the court of appeal reversed the trial court, finding the 180-day statute of limitations applied pursuant to Public Resources Code section 21167, subdivision (a). Under that section, a complaint or petition shall be served not later than 10 business days from the date the action was filed. After finding these sections could not be reconciled with the 90-day limit in Government Code section 65009, the court found the more specific Public Resources Code provisions govern. The CEQA petition was therefore timely filed and served.

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1305 Ingraham, LLC v. City of Los Angeles (2019) 32 Cal.App.5th 1253

The Second District Court of Appeal ruled that appellant's planning and zoning law claims were barred by the 90-day statute of limitations found in Government Code section 65009, rejecting appellant's arguments that: (1) the planning commission's failure to act was not a "decision" triggering the 90-day limitations period; and (2) the planning director's decision was not reviewable under Government Code section 65009.

Appellant timely challenged the planning director's approval of affordable housing incentives and site plan review for a multi-story mixed use project. The planning commission failed to consider the appeal. No hearing was held. Nevertheless, the city approved the project and a notice of determination was filed. Nine months later, appellant filed a petition for writ of mandate and complaint for declaratory relief. The trial court held that appellant's claims were time-barred by the 90-day statute of limitations. The court of appeal affirmed.

Relying on relevant provisions of the Los Angeles Municipal Code (LAMC), which states that prior to deciding an appeal, the planning commission shall hold a hearing, appellant asserted that a hearing was a prerequisite to any decision. The court disagreed relying on a later LAMC code provision, which by its plain terms stated that the planning director's decision becomes final where the planning commission fails to timely act. The court further found that interpreting Government Code section 65009 to allow a decision to become final despite a procedural irregularity did not violate procedural rights of appellants, but instead advanced the purposes of site plan review set forth in the LAMC. The court rejected appellant's argument that the term "legislative body" contemplates more than the findings of the planning director, a single person. The court held that it is the subject matter of the decision being reviewed that controls application of Government Code section 65009—not the legislative body charged with making the decision.

California Coastal Act

Fudge v. City of Laguna Beach (2019) 32 Cal. App. 5th 193

The Fourth District Court of Appeal finds the California Coastal Act takes precedence over CEQA for de novo review of appeals involving the issuance of a coastal development permit (CDP).

In April 2016, Hany Dimitry bought a house located in the city of Laguna Beach (City) between Pacific Coast Highway and the ocean. Dimitry wanted to demolish the home and replace it with a new three-story single family residence. Mark Fudge (Fudge) opposed the project, contending that the existing house had historical value as a "relatively unaltered" example of Spanish Colonial Revival Design and that the new house would obstruct "view corridors."

In January 2017, the City's Design Review Board (Board) denied Dimitry's application for a coastal development permit (CDP), citing the home's historical importance. A few months later, the City Council overturned the Board's decision, approved a CDP for demolition, but took no action on the proposed new house. Under the California Coastal Act (Coastal Act), local

agencies with certified local coastal programs (LCPs) are authorized to approve CDPs in the first instance, but their decisions may be appealed to the California Coastal Commission (Commission).

In June 2017, Fudge filed an appeal of the CDP to the Commission. The next month, while the Commission's de novo hearing was pending, Fudge filed a petition for writ of mandate under CEQA seeking to vacate the CDP.

In August 2017, the Commission accepted Fudge's appeal on the CDP. The court noted the Commission must accept the appeal unless it fails to raise "substantial issues." (Pub. Resources Code, § 30625 (b)(1).) Once the Commission accepts an appeal, it has de novo authority over the CDP, nullifying the local agency's approval. (§ 30621 (a).) In response to a demurrer, the trial court dismissed Fudge's CEQA lawsuit, finding the dispute moot in light of the Commission's acceptance of Fudge's CDP appeal, and concluded the CDP was now *entirely* in the Commission's hands. While the appeal was pending, the Commission approved Dimitry's request to demolish the house, permits were issued, and the house was demolished.

Fudge appealed the dismissal, arguing his appeal of the CDP to the Commission would not be heard "in the same manner" as the original granting of the CDP by the City because the City was required to make its decision under CEQA, while the Commission would make its decision under the Coastal Act. While local agencies must comply fully with CEQA, the Commission is subject to compliance with its certified regulatory program.

The court explained that when a state agency's regulatory program has been certified by the Secretary of Resources, the information provided under the regulatory program may be submitted "in lieu of" the usual environmental impact report (EIR). The court of appeal found the Legislature provided for de novo review of appeals to the Commission. The court stated when there is a conflict between the Coastal Act and CEQA, the Legislature "impliedly emphasized the importance of the Commission's de novo review in section 21174, which says the Coastal Act takes precedence over CEQA." The court noted the reasoning behind the Legislature's choice was to avoid allowing a project opponent "two bites at the apple," and to avoid undermining the Commission's ability to implement uniform policies governing coastal development.

The court of appeal affirmed the trial court's decision dismissing, as moot, petitioner's CEQA challenge to the CDP authorizing demolition of a house. The court also found, because the City's action was nullified by the Commission's acceptance of review, judicial review against the City was unavailable. Thus, the superior court properly denied Fudge's request for attorneys' fees. The court declined to contemplate the merits of any §30801 writ that Fudge may bring against the Commission's decision to give Dimitry the CDP.

Venice Coalition to Preserve Unique Community Character v. City of Los Angeles (2019) 31 Cal. App. 5th 42

The Second District Court of Appeal upheld the trial court's decision to grant a motion for summary judgment filed by the City of Los Angeles, finding that when land use decisions are ministerial, no due process protections are triggered.

In February 2016, appellants Venice Coalition to Preserve Unique Community Character and Celia R. Williams (Venice Coalition) filed a complaint for declaratory and injunctive relief against the City. Appellants alleged the process by which the City approved various development projects in Venice violated the California Constitution, the Coastal Act, the Venice Land Use Plan (LUP), and the California Code of Civil Procedure. The trial court granted the City's motion for summary judgment, which the Venice Coalition appealed.

In 2003, the City Planning Commission approved an amendment to the Venice Specific Plan which implemented the policies of the Venice Land Use Plan (LUP), allowing certain small-scale development projects to be issued a "Venice Sign-Off" (VSO) by the Director of Planning and exempting them from further review and decision.

First, Venice Coalition claimed the City's approval of VSO's violated community members' due process rights because of the lack of public notice and hearing. Finding petitioners' argument unpersuasive, the court explained that ministerial actions, as here, involve nondiscretionary decisions based on objective standards. As such, due process is typically not triggered because the decision is "essentially automatic" and based on fixed standards. The court therefore upheld the trial court's finding that the VSO process is ministerial since the Director of Planning does not exercise independent judgment, but rather utilizes nondiscretionary checklist forms.

Second, the court rejected Venice Coalition's claim that the City failed to ensure all VSO projects complied with the requirements of the LUP. Agreeing with the City, the court reasoned that when VSO projects are found consistent with the specific plan standards, they are also deemed consistent with LUP requirements. The court also noted that any challenge to the VSO process was required to be brought within the 90-day statute of limitations period per Government Code section 65009(c)(1)(A). Petitioner's claim was therefore barred by the statute of limitations. The court also noted that the City ultimately evaluates specific plan projects for compliance with the LUP when obtaining a CDP.

The Venice Coalition did not challenge the grant of summary judgment in favor of the City for the third cause of action, which alleged that the City acted in excess of its authority by issuing exemptions from the Coastal Act's requirement that development projects obtain CDPs.

Lastly, the Venice Coalition's fourth cause of action alleged the exemptions granted by the City were unauthorized under the Coastal Act because §30610 only allows for "improvements" to existing structures and not additions. Specifically, they claimed any improvements that increased existing height or floor area were limited to 10 percent. The court explained petitioner's interpretation was incorrect and the 10 percent improvement language only applies to projects within a certain proximity to the ocean. The Coastal Act contemplates improvement to existing structures, including additions. Additions falling outside the 10 percent proximity limitation can be deemed exempt from the requirement to obtain a CDP.

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City Charter

Westsiders Opposed to Overdevelopment v. City of Los Angeles (2018) 27 Cal.App.5th 1079

The Second District Court of Appeal upheld the City of Los Angeles' interpretation of its charter, allowing a General Plan amendment for a transit-oriented development project.

In 2013, Real Parties in Interest Dana Martin, Jr., Philena Properties, L.P., and Philena Property Management, LLC (Philena) applied to develop a mixed-use, transit oriented development project on the site of a former car dealership in West Los Angeles. The project site is located on the corner of Bundy Drive and West Olympic Boulevard, less than 500 feet from a light rail station. As part of its application, Philena requested that the city change the site's general plan designation from light industrial to general commercial. The city prepared and certified an EIR and approved the project. Westsiders Opposed to Overdevelopment (Westsiders) sued, challenging the amendment as a violation of City Charter provisions for general plan amendments. The trial court denied the petition for writ of mandate, finding the city did not exceed its authority under the charter or abuse its discretion in approving the general plan amendment. Westsiders appealed.

As relevant here, Los Angeles City Charter section 555 governs general plan amendments. Section 555 (a), allows the general plan to be amended "by geographic area, provided that the . . . area involved has significant social, economic or physical identity." Subdivision (b) states, in pertinent part, that "[t]he Council, the City Planning Commission or the Director of Planning may propose amendments to the General Plan." Westsiders argued that both of these provisions prevented the City from approving the general plan amendment in this case. Specifically, Westsiders alleged that the general plan could not be amended for a single project or parcel because it is not a large enough "geographic area" with "significant social, economic or physical identity" as required by section 555(a). Westsiders also argued that, by requesting the general plan amendment, Philena effectively "initiated" the amendment in violation of section 555(b).

Because the general plan amendment was for a single project, the court found judicial review under Code of Civil Procedure section 1094.5 (administrative mandamus) governed. In discussing the appropriate standard of review, the court also recognized that charter cities are presumed to have power over municipal affairs, and that any limitation or restriction on that power in the charter must be clear and explicit. The court added that, while construing the charter was a legal issue subject to de novo review, the city's interpretation of its own charter is entitled to great weight unless it is clearly erroneous, and must be upheld if it has a reasonable basis.

Affirming the trial court's decision, the court concluded that the plain meaning of the terms "geographic area" and "significant social, economic or physical identity" did not contain any clear and explicit limitation on the size or number of parcels involved when amending the general plan. Further, the court found that the city's determination that the site had significant economic and physical identity because it was one of the largest underutilized sites with close proximity to transit in West Los Angeles, and that the project would be the first major transit-oriented development, satisfied the charter requirements. The court rejected Westsiders'

argument that, in considering whether a geographic area has "significant social, economic or physical identity," the city may not consider the proposed project and future uses of the site.

Next, with regard to Westsiders' claim based on section 555 (b), the court also rejected their argument that, by filling out a land use application requesting that the city amend the general plan, Philena had illegally "initiated" the amendment. Similar to its analysis of subdivision (a), the court found that section 555 (b) contained no clear and explicit limitation on who could *request* that the city amend the charter. According to the court, the city followed the procedures required by the charter because, after Philena made its request, it was the planning director who formally initiated the amendment process.

The court also rejected Westsiders' claim that the city was required to make specific findings regarding the project site, including that the site constituted a "geographic area" or that the lot has "significant economic or physical identity." Because amending the general plan is a legislative act, the city was not required to make explicit findings to support its decision. Moreover, the court added, the city did make findings, it just did not use the exact language of the charter. The city's analysis showed the site had significant economic and physical characteristics and met the requirements of Charter section 555.

Westsiders' argument that the city impermissibly "spot-zoned" the project site through the general plan amendment was also rejected because Westsiders failed to raise this argument in the trial court and was thus barred from raising it on appeal.

Public Trust Doctrine

Environmental Law Foundation et al. v. State Water Resources Control Board (2018) 26 Cal.App.5th 844

The Third District Court of Appeal upheld a decision by the trial court on summary judgement finding public agencies have a duty under the Public Trust Doctrine to consider the adverse impacts of groundwater pumping on public trust resources (i.e. rivers, lakes), and compliance with the Sustainable Groundwater Management Act (SGMA) does not operate as a substitution for such consideration.

The case centered on the Siskiyou County's duty to consider the public trust doctrine in permitting groundwater wells that could adversely affect flows in the Scott River. Seeking declaratory relief, the Environmental Law Foundation (ELF) claimed the County had a duty under the public trust doctrine to consider whether groundwater extractions in the Scott River system could affect uses of the river protected by the doctrine. The County filed a cross-complaint and request for its own declaratory relief. To expedite the appeal, the parties stipulated to various undisputed material facts, including that the Scott River is a navigable waterway for the purposes of the public trust doctrine, that extraction of groundwater interconnected with the Scott River system has an effect on surface flows, and that the County's permitting and groundwater management programs regulate extraction of the interconnected groundwater.

The parties also agreed that the trial court had decided several questions of law relevant to the appeal: the public trust doctrine applied where the extraction of groundwater affects public

trust resources and uses in the Scott River; the County, in regulating the extraction of groundwater in the Scott River system, has a public trust duty to consider whether permitted wells will affect public trust resources and uses in the Scott River; the SGMA did not conflict with the County's duty under the public trust; and the Board has both the authority and a duty under the public trust doctrine to regulate groundwater extractions that affect public trust uses in the Scott River. Both the trial court and the court of appeal concluded that the question of what the Board could or should do to regulate such groundwater was a question for another day.

The Third District Court of Appeal upheld the trial court's decision that the public trust doctrine applied to the extraction of groundwater to the extent such extraction may adversely impact the river. The court also upheld the trial court's determination that the SWRCB had the authority and duty to "take some action" regarding groundwater extractions that affect uses of the Scott River protected by the public trust doctrine. Lastly, the court found the SGMA neither supplanted nor "fulfilled" the State's duty to consider the public trust doctrine where groundwater extraction could affect protected uses.

On appeal, the County argued that the public trust doctrine does not apply to the extraction of groundwater and, as such, it did not have to consider the doctrine in issuing well permits. Relying heavily on the seminal case *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, the court rejected the County's arguments in full. Following the reasoning in *National Audubon*, the court found the key question is the impact of an activity on public trust resources. In *National Audubon*, the Supreme Court found that diversion of water from streams unprotected by the public trust doctrine, nevertheless triggered the doctrine when the diversions impacted protected uses in Mono Lake. The court of appeal therefore found unpersuasive the County's argument that, because the groundwater being extracted was not itself "navigable," it was not protected by the public trust doctrine.

The court of appeal similarly rejected the County's arguments that the State's constitutional mandate requiring the "reasonable use" of water, along with the SWRCB's statutory permitting obligations under the Water Code, subsumes any duty to consider the public trust doctrine. The court, in its discussion of the SGMA, also rejected the County's argument that the Legislature intended to occupy the field of groundwater regulation and therefore "fulfilled" the State's obligations under the public trust doctrine, reasoning that statutes do not supplant the common law unless there is no rational basis for harmonizing potential conflicts between the two. The court agreed with ELF's argument that the SGMA is not as comprehensive a body of law as the appropriative rights system at issue in *National Audubon*, noting the Legislature expressly stated that the SGMA supplements - but does not alter nor supplant - the common law.

Importantly to counties (and cities), the court rejected the County's fallback argument that, even if the State had a duty under the public trust doctrine, that duty did not fall to the County to fulfill. The court found the general use of the term "State" to include counties as subdivisions of the State which have a shared obligation under the public trust doctrine to protect resources subject to the Public Trust Doctrine. The Legislature, moreover, when enacting the SGMA, did not make itself the sole keeper of the public trust.

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Other/Grading Permit

York et al., v. City of Los Angeles (2019) ___Cal.App.5th___ (Case No. B278254)

The Second District Court of Appeal upheld a trial court decision denying Petitioner/Appellants' request for leave to amend their complaint alleging: (1) the City's action denying relief from a City zoning ordinance was arbitrary and capricious; (2) the City had taken Appellants' property by depriving them of substantially all economic value, that equated to inverse condemnation; and (3) the City had arbitrarily and unlawfully imposed restrictions on Appellants' use of their property and treated Appellants differently than other similarly-situated homeowners.

In November 2011, Kenneth and Annette York (Appellants) sought approval from the City of Los Angeles (City) to build a large house which would require 80,000 cubic yards of grading. The City granted permission to build the home and accessory structures but denied the grading request.

The City's Baseline Hillside Ordinance (BHO) sets out the maximum amount of grading allowable on a property in a designated hillside area. In order to grant a deviation from the by-right grading limitations, a zoning administrator must hold a public hearing and make findings. After conducting a public hearing in 2013, the Zoning Administrator issued a written determination approving the home and accessory buildings but denying the request for grading. The Appellants appealed the Zoning Administrator's decision to the Area Planning Commission (Commission). In 2014, the Commission held a public hearing and voted to deny the appeal.

In January 2015, Appellants filed a complaint and petition for writ of mandate. The trial court denied Appellants' mandate petition, and concluded that the City's decision was supported by substantial evidence. The trial court granted the City's request for judicial notice and the motion for judgment on the pleadings, reasoning that "the matter [is] not ripe as plaintiffs have not proposed plans of reduced scope that would nonetheless allow the proposed project. Plaintiffs, for instance, could propose plans that would export all or some of the excavated soil from the site or propose its deposit elsewhere on the site."

The court of appeal upheld the trial court's denial of the petition for writ of mandate. The court noted that abuse of discretion does not require reversal unless the appellant shows the ruling was prejudicial. The zoning administrator told the Commission that while he had misunderstood the scope of his discretion he would have made the same decision in any case. The court also held that if Appellants believe that building a residence on the property requires grading, it is their burden to make that showing—not the City's burden to demonstrate to the contrary. The court also noted that evidence that some of the project's features benefitted the community did not require the conclusion that the project was beneficial as a whole.

The court also upheld the trial court's judgment granting judicial notice and the motion for judgment on the pleadings. In addressing the Appellants' second and third causes of action, the court discussed regulatory takings. The court noted if a governmental agency has not decisively acted to ban all development on a parcel, an owner's ability to use his or her property cannot be said with assurance to have been irretrievably lost and therefore is not a taking. The court held the Appellants' due process and equal protection claims were not ripe since it is

unknown how the City will apply the BHO to Appellants' property as no final decision had been made regarding Appellants' allowable scope of development. The court of appeal held no amendments could overcome the defects within Appellants' complaint.

III. CEQA GUIDELINES

On December 28, 2018, the Office of Administrative Law approved various amendments to the CEQA Guidelines proposed by the Natural Resources Agency. The final amendments, Statement of Reasons and supporting materials are available at: http://resources.ca.gov/ceqa/

This is the first comprehensive update to the Guidelines since the late 1990s. The proposed package contains changes or additions involving nearly thirty different sections, addressing nearly every step of the environmental review process. In addition to the regular updates required by Public Resources Code section 21083, this package also includes new provisions required by recent legislation, including SB 743, which required the Governor's Office of Planning and Research to develop new methodology for addressing transportation impacts. Among these provisions is new Guideline section 15064.3, which proposes "vehicle miles traveled" as the most appropriate measure of a project's transportation impacts in light of the goals of Senate Bill 743. Once that section is adopted, automobile delay (often called "level of service") will no longer be considered an environmental impact under CEQA, particularly in the context of land use projects.

Other examples of the amendments include:

- Updated exemptions for residential and mixed-use developments near transit and redeveloping vacant buildings;
- Clarifications for the use of existing environmental documents to cover later projects;
- New provisions to address energy efficiency and the availability of water supplies;
- Simplified requirements for responding to comments; and
- Modified provisions to reflect recent CEQA cases addressing baseline, mitigation requirements and greenhouse gas emissions.

The updated CEQA Guidelines apply prospectively. Additionally, while a public agency could immediately apply the proposed new Guidelines section regarding the evaluation of transportation impacts (Guidelines section 15064.3), statewide application of that new section would not be required until January 1, 2020.