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LAND USE AND CEQA LITIGATION UPDATE

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[NOTE: ORGANIZATION CORRESPONDS TO CHAPTERS OF *MUNICIPAL LAW HANDBOOK*]

CHAPTER X – LAND USE

Part 2. General Plan

***California Native Plant Society v. City of Rancho Cordova, et al* (C057018 Third Appellate Dist., Div. 1, March 24, 2009) [Also Discussed in Chapter XI – Protecting the Environment - CEQA]**

HOLDING: The Court struck down the approval of a residential/commercial project in a protected species habitat area on the basis of an inconsistency with general plan provisions that required endangered species mitigation to be designed "in coordination with" the wildlife agencies. Although the city had consulted with the wildlife agencies, it had not actually designed the mitigation with the wildlife agencies as required by the general plan.

DISCUSSION: This case involved a challenge to a 530-acre mixed-use project on CEQA (discussed later in this paper) and general plan consistency grounds. The project was planned for an area where rare and endangered species were likely present. The petitioner challenged the city's finding that the project was consistent with various general plan provisions relating to protecting and preserving rare or endangered species and their habitat. While the court rejected most of the petitioner's arguments relating the project's consistency with the city's general plan, it did conclude that the City's finding of consistency as to one aspect of the general plan could not be supported. The court held that the question on appeal was whether the finding of consistency "was reasonable based on the evidence in the record." (Slip Opinion, 55.) The city's general plan required that where mitigation was required to protect against the decline of special-status species, the mitigation "shall be designed by the City in coordination with [USFWS and CDFG]." (Slip Opinion, 52.) While the court found that the city had "consulted" with the wildlife agencies, it concluded that this did not amount to the coordinated design of the mitigation. The court concluded that the mere solicitation and rejection of input from the wildlife agency could not reasonably be deemed to have satisfied this requirement. "Although our standard of review on the interpretation of the general plan is highly deferential, 'deference is not abdication.' (*People v. McDonald* (1984) 37 Cal.3d 351, 377.)" (Slip Opinion, 64.)

PRACTICE TIP: Carefully select the words used in general plan policies and implementing measures, especially when actions by other agencies are required. Choosing the phrase "in coordination with" as opposed to "consult with" may dramatically impact a court's interpretation.

Part 4. Subdivisions

***Friends of Riverside's Hills v. City of Riverside* (2008) 168 Cal.App. 743, (Fourth Appellate Dist., Oct. 24, 2008)**

HOLDING: In addition to complying with the procedural hurdles of CEQA when pursuing a CEQA challenge against a decision involving a subdivision map, petitioners must also comply with the procedural requirements under the Subdivision Map Act, including the service of a summons pursuant to Government Code Section 66499.37.

DISCUSSION: In *Friends*, the petitioner had not challenged the city's original approval of the three subject tract maps at the tentative map stage. Instead, eight years later, the petitioner filed a writ of mandate against the city in connection with its approval of the three final maps. The petitioner alleged the approval of the final maps violated CEQA in two respects. First, the petitioner alleged the city weakened the conditions of approval regarding natural open space in violation of Public Resources Code Section 21080(g), which allows the substitutions of mitigation measures in some situations, but only after the new measure is shown in a public hearing to be at least as effective as the prior measure. Second, the petitioner alleged the City failed to enforce and implement the previously approved mitigation measures regarding natural open space. While the petitioner served a copy of the petition in compliance with CEQA, it did not comply with the requirement contained in Government Code Section 66499.37 to serve a summons within 90 days after the date of the City Council's approval of the final maps.

The trial court dismissed the petition on the grounds that there was no service of summons as required by Section 66499.37. The appellate court affirmed. It held that the 90-day service of summons requirement in Section 66499.37 applies to all legal actions concerning a subdivision, including challenges based on CEQA.

PRACTICE TIP: Always check carefully to verify what documents were served and when, and whether they were properly completed.

***Sixells, LLC v. Cannery Business Park, et al,* 170 Cal.App.4th 648 (Jan. 27, 2009)**

HOLDING: The appellate court invalidated a purchase and sale agreement that required the recordation of a final subdivision map under the Subdivision Map Act ("SMA") because the agreement gave the purchaser the right to waive the map condition.

DISCUSSION: Plaintiff Sixells, LLC entered into a contract with defendant Cannery to buy four acres of undeveloped land. One of Sixells' conditions precedent to closing escrow was that on the closing date, a final map must have been recorded over the four parcels, creating a legal parcel. The condition was for the benefit of Sixells, and could be waived by Sixells. Sixells had the right to terminate the contract if any of the conditions for its benefit had not occurred or been waived by Sixells. Cannery terminated the contract and later sold the property to a third party. Sixells filed complaints against Cannery for breach of contract and against the third party for specific performance and intentional interference with contractual relations. The trial court found in favor of the defendants, ruling that the contract violated the SMA, and was thus void from its inception.

The appellate court affirmed, citing Section 66499.30(b) of the SMA, which prohibits any person from selling real property for which a parcel map is required under the SMA until the final map has been filed for record. The SMA contains an exception for contracts where the sale is expressly conditioned on the approval and filing of a final map. The court found that because Sixells had the ability to waive this condition, the contract did not expressly condition the sale on the approval and filing of a final map. Further, the court found that simply striking the word "waived" from the contract would not solve the problem, as the remaining contract language would still allow for the possibility of the sale of an undivided parcel in violation of the SMA.

PRACTICE TIP: If a transaction requires the recordation of a subdivision map in order for there to be a conveyance of a legal parcel, the requirement should not be subject to being waived.

Part 6. Growth Management

Arcadia Development Company v. City of Morgan Hill **(2008) 169 Cal.App.4th 253 (Sixth Appellate Dist., Dec. 16, 2008)**

HOLDING: The appellate court held that the voters' adoption of a growth control measure that extended the life of an earlier voter adopted measure triggered a new statute of limitations.

DISCUSSION: In 1990, the votes of Morgan Hill enacted a series of growth control measures. The 1990 measures were set to expire in 2010. In 2004, the voters adopted another general plan amendment and extended the growth control ordinance for an additional 10 years. A property owner affected by the density restrictions filed suit, challenging the extension. The trial court found that the challenge to the extension of the ordinance was time barred because the original adoption of the ordinance took place in 1990. The court of appeal reversed, concluding that the decision to extend the measure reopened the statute of limitations.

While there are limited circumstances where reenactment of an ordinance will not restart a statute of limitations (*e.g., De Anza Properties X, Ltd. v. County of Santa Cruz* (9th Cir. 1990) 936 F.2d. 1084, 1086 – reenactment of mobile home rent control ordinance without sunset clause did not give rise to new cause of action for takings claim), the court found that the extension of the growth control measure was a "new burden" on the property, triggering a new inverse condemnation claim.

The court also distinguished *Buena Park Motel Assn. v. City of Buena Park* (2003) 109 Cal.App.4th 302, where the plaintiff challenged two ordinances: (1) the original ordinance restricting motel stays to 30 days, and (2) an ordinance passed three years later that retained the 30-day restriction, but added additional provisions. In that instance, the court ruled that the plaintiff could not challenge the first ordinance at all, because it had missed the 90-day statute of limitations contained in Government Code section 65009, but also could not challenge the portions of the second ordinance that merely quoted the portions of the municipal code adopted by the earlier ordinance that were not being altered. The court in *Arcadia* notes that, unlike the *Buena Park Motel Assn.* case, the property owner was not challenging the 1990 measure, but instead was challenging only the 2004 measures.

Part 14. Challenges to Land Use Decisions

§ 10.14.05 Regulatory and Physical Takings

***Action Apartment Association v. City of Santa Monica*, 41 Cal. 4th 1232 (Sep. 2008)**

HOLDING: The nexus and rough proportionality tests associated with the Nollan/Dolan line of cases have no application to a facial challenge to a land use regulation.

DISCUSSION: In this case, the city adopted an ordinance that modified its multifamily housing regulations. For developers building multifamily ownership housing in multifamily residential districts, the developer was required to construct affordable housing either on-site or at another location.

The plaintiff filed no application to construct multifamily housing, and instead filed a complaint alleging that the new multifamily housing regulations, including the affordable housing production requirement, resulted in an unlawful taking under the federal and state constitutions, that there was no rough proportionality or nexus between the construction of the new or replacement condominium units and the need for more affordable housing.

The court held that the Nollan/Dolan test only applies in the context of judicial review of an individual adjudicative land use decision, and has no application in cases challenging the facial validity of an ordinance requiring developers to construct affordable housing. The court therefore rejected the facial challenge to the ordinance. The petitioner also challenged the ordinance as being, in effect, an amendment to the city's Housing Element that required HCD approval. The court rejected that argument out of hand.

***John Monks v. City of Rancho Palos Verdes* 167 Cal.App.4th 263 (Oct. 1, 2008)**

HOLDING: A moratorium on construction in the vicinity of a landside area constituted a taking. The court held that a permanent ban on home construction cannot be based merely on a fear of personal injury or significant property damage.

DISCUSSION: In 1978, the city adopted a moratorium on the construction of new homes in the vicinity of a landslide. The area was zoned for single-family dwellings. The city established an administrative process that property owners could go through to be exempted from the moratorium. The plaintiffs owned lots in the area and filed a joint application for an exemption. While the application was pending, the city toughened the criteria for obtaining an exemption. The property owner was required to demonstrate at least a 1.5 safety factor for the entire zone in which the property was located. This made it impossible for the plaintiffs to build. The court held that, under *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1027, the application of the moratorium resulted in a permanent taking. The court found that the city's allowance of the right to build a temporary nonresidential structure not exceeding 320 sq. ft., which did not increase water usage, did not ameliorate the taking.

CHAPTER XI – PROTECTING THE ENVIRONMENT

Part 2. California Environmental Quality Act (CEQA)

§ 11.2.05 Scope of CEQA

***Save Tara v. City of West Hollywood*, 45 Cal. 4th 116 (Oct. 31, 2008)**

HOLDING: The city was ordered to void two agreements it had entered into with a developer of an affordable housing project prior to completing the EIR for the affordable housing project, even though the agreements were expressly conditioned on subsequent compliance with CEQA.

DISCUSSION: This case involved the question whether, and under what circumstances, CEQA requires preparation of an EIR prior to a city approving an agreement that allows for private redevelopment, conditioned on future compliance with CEQA.

The California Supreme Court held that under certain circumstances, CEQA requires that an EIR be prepared before a city approves an agreement for private development or redevelopment, even if the agreement is conditioned on compliance with CEQA. However, the court provided no bright-line test. If an agreement, "viewed in light of all the surrounding circumstances, commits the city as a practical matter to the project," an EIR (or other CEQA compliance) is necessary *before* the city approves the agreement.

In this case, before completing an EIR for the project, the city took certain steps to facilitate an affordable housing project that the California Supreme Court felt constituted a "project approval." The city council approved an option to purchase the property in favor of a nonprofit developer. The agreement was necessary to allow the developer to proceed with its HUD grant application, which outlined a proposal to redevelop the site with a 35-unit low income housing project for seniors. In a letter to HUD, the city manager stated that the city had approved the sale of the property at a negligible cost and that the city "will commit additional funding" toward development. HUD granted the application, and the city council approved a "Conditional Agreement for Conveyance and Development of Property" to facilitate the development. The agreement was conditioned on all requirements of CEQA being satisfied. Save Tara filed a complaint and a petition for writ of mandate claiming that the City violated CEQA by failing to prepare an EIR before it approved the redevelopment agreement. The trial court denied the mandate petition. The court of appeal reversed. The California Supreme Court affirmed in part and reversed in part.

The Supreme Court relied on CEQA Guidelines to interpret Public Resources Code section 21100, subdivision (a), which states that an EIR be prepared on any project that a public agency *proposes to carry out or approve* that may have a significant effect on the environment. The court highlighted that an EIR should be prepared late enough in the process to contain meaningful information, but early enough so that an agency can use it in its decision-making process.

The court adopted a position somewhere in between the positions asserted by the parties. "We adopt an intermediate position: A CEQA compliance condition can be a legitimate ingredient in

a preliminary public-private agreement for exploration of a proposed project, but if the agreement, viewed in light of the surrounding circumstances, commits the public agency as a practical matter to the project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review." (45 Cal.App.4th at 116.)

Applying this principle to the city's case, the court concluded that the city should not have approved the conditional agreement without first preparing an EIR because: 1) the agreement's stated purpose was to "cause the reuse and redevelopment" of the property; 2) the first half of a $1 million loan the city was going to make was not conditioned on compliance with CEQA; 3) the conditional language that the "requirements of CEQA" be "satisfied" did not seem to allow the city to reject the project even if the EIR was legally adequate; 4) the city had told HUD that the city had "approved the sale of the property;" 5) public statements were made by public officials indicating that the property would be redeveloped; 6) alternative uses had been ruled out; and 7) the city began the process of relocating tenants, which was to be completed before an EIR was required to be prepared.

PRACTICE TIP: Warn your city staff and elected officials that the comments they make suggesting a commitment to the project can be used against the city. Let's hope for a legislative solution.

***Riverwatch, et al. v. Olivenhain Municipal Water District,* 170 Cal.App.4th 1186 (Jan. 30, 2009)**

HOLDING: The appellate court struck down an agreement entered into by a water district to supply water to a project because the agreement had been entered into prior to the preparation of the EIR.

DISCUSSION: This case arises out of a proposal to construct and operate a landfill and recycling center at the Gregory Canyon site in northern San Diego County.

In a previous lawsuit, the EIR for the landfill had been set aside due to its failure to adequately analyze the water supply necessary to operate the landfill. The court had determined that the water rights relied upon were non-existent or undocumented. The court concluded that there was too much reliance on the pumping of groundwater, which had not yet been permitted. An update to the EIR had attempted to correct this problem by discussing the potential to transport the necessary water to the site by truck. However, it noted that the trucking of the water would have other environmental impacts. The project approvals were set aside.

In an attempt to cure the deficiency of an uncertain water supply, the developer of the project entered into an agreement with the local water district for the purchase of 244,000 gallons of recycled water per day for use at the landfill. The term of the agreement was 60 years. It was anticipated that 89 truck trips per day would be required to transport the water. The agreement provided that the developer would be responsible for installing the necessary improvements and equipment on the District's property, so that the trucks could access the reclaimed water. The agreement also stated that the developer:

> Shall be solely responsible to comply with all [CEQA] and [NEPA] requirements necessary for [the developer's] receipt, use and transportation under this Agreement. [Developer] shall also be solely responsible for any and all permits required under any state, federal or local law for its receipt, use and transportation of recycled water under this Agreement.

In a subsequent exchange of letters, the parties agreed that this provision made completion of CEQA a condition of the agreement. No CEQA analysis was completed for the approval of the agreement itself.

The County's Department of Environmental Health, the lead agency for the EIR that had been invalidated, subsequently issued a notice of availability of a revised draft EIR, which attempted to address the issues that had caused the original EIR to be invalidated. The revised draft EIR analyzed the impacts of the proposed use of the off-site recycled water, and it described the trucking process.

While this revised draft EIR was being circulated for public review, Riverwatch issued a new CEQA challenge, this time attacking the water district for having entered into the water purchase agreement without completing CEQA analysis. While the San Diego Superior Court ruled in favor of the water district under the theory that the agreement was conditioned upon compliance with CEQA, the court of appeal found in favor of Riverwatch.

The court first concluded that the activities covered by the agreement were part of the landfill project, and further found that the water district was a "responsible agency" under CEQA with regard to that project. It then concluded that the approval of the water sales agreement constituted an approval of the project, and since the agreement was approved and executed prior to the certification of the revised EIR, the court struck down the agreement. The water district and the developer tried unsuccessfully to argue that, because of the conditions in the agreement that the developer was solely responsible for complying with CEQA and for obtaining the necessary permits, the district approval of the agreement did not constitute an approval of the project. Relying on the California Supreme Court's decision in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, the court rejected the argument. It concluded that because the agreement set forth the specific details regarding the 60-year obligation to deliver water to the developer, the approval and signing of the agreement satisfied the requirement of a commitment to a definite course of action. Regarding the "CEQA condition," the court noted that the condition did not, under any reasonable construction, provide the water district with complete discretion under CEQA to consider the final EIR and then approve or disapprove its part of the project. The parties' subsequent exchange of letters regarding the interpretation of the provision did not advance the argument. The letters did not demonstrate that the district would have unfettered discretion under CEQA to approve or disapprove the project. The court further noted that, even if the agreement had contained a condition under which the district had retained its CEQA responsibilities, the facts of the matter would still lead the court to conclude that the district had approved its portion of the larger project. The district had a duty, as a responsible agency, to consider the revised final EIR before it took action on the agreement.

***Great Oaks Water Co. v. Santa Clara Valley Water Dist,* 170 Cal.App.4th 956 (Jan 28, 2009)**

HOLDING: A resolution raising ground water rates was found to be exempt from CEQA.

DISCUSSION: This case deals with the statutory exemption from CEQA for rate setting contained in Public Resources Code section 21080(b)(8) and CEQA Guideline 15273(c). The Santa Clara Valley Water District replied upon this exemption in adopting a resolution that raised its groundwater-charge rates. Great Oaks Water Co. challenged the reliance on the exemption, and also claimed that the findings made to support the exemption were not supported by substantial evidence.

The case has a good discussion of the standard of review for challenges to the reliance on a statutory exemption from CEQA (as opposed to a categorical exemption). While the court notes that the statutory interpretation of the scope of a CEQA exemption is a question of law, the substantial evidence test applies to the agency's factual determination that a project falls within an exemption. The court states:

> Applying the substantial evidence test in the context of a court reviewing an agency's statutory-exemption decision (where the exemption itself does not depend on whether the activity will have a significant environmental effect) means determining whether the record contains relevant information that a reasonable mind might accept as sufficient to support the conclusion reached. Although the agency bears the burden to demonstrate with substantial evidence that its actions fell within the exemption, all conflicts in the evidence are resolved in its favor and all legitimate and reasonable inferences are indulged in to uphold the finding, if possible.

The case turned on the requirement in the exemption that "[t]he public agency shall incorporate written findings in the record of any proceeding in which an exemption under this paragraph is claimed setting forth with specificity the basis for the claim of exemption." (Pub. Res. Code § 21080(b)(8).) The resolution approving the rate increase explained the purpose of the increase as "meeting operating expenses, purchasing or leasing supplies, equipment or materials, and meeting financial reserve needs; and obtaining funds for capital projects necessary to maintain the service area." These findings tracked the statutory language in the exemption.

Great Oaks argued that the requirement to set forth the basis "with specificity" meant that the district had to do more than just recite the statutory language. The court disagreed, noting that the language contained "the ultimate factual bases" for the exemption. However, it noted that the district had only "minimally satisfied the requirement" and that they could have been more detailed. It notes that its conclusion was based in part on the fact that the context of the case was traditional mandamus arising from a legislative act of rate setting. The court then found that substantial evidence supported the findings.

§ 11.2.15 Negative Declaration

***California Native Plant Society v. County of El Dorado,* 170 Cal.App.4th 1026 (Jan. 29, 2009)**

HOLDING: Fee-based habitat mitigation programs must be adopted with adequate CEQA review in order to be subsequently relied upon to mitigate an impact to a level of insignificance.

DISCUSSION: The county approved a mitigated negative declaration ("MND") in connection with the approval of a congregate care facility. Petitioners claimed that an EIR was required because the project would adversely impact two rare plant species. The county argued that the MND was appropriate because a county ordinance had established a program under which developers in a defined geographic area would pay a rare-plant impact fee to be used for the creation of professionally managed rare plant habitats ("Program"), and the approval of the congregate care facility had been conditioned upon payment by developer into that fund. The Program was the product of collaborations among the county, US Fish &Wildlife Service, Department of Fish & Game, Bureau of Land Management, the Bureau of Reclamation, and several conservancy groups, and had been adopted expressly to reduce the risk and uncertainty of case-by-case individual mitigation. The trial court found for the county, holding that this payment mitigated any plant impacts to a level of insignificance.

The appellate court reversed, finding that the payment of the impact fee did not adequately mitigate the environmental impacts to the plants, and that there was substantial evidence in the record to support a fair argument that impacts would occur. Thus, the developer was not entitled to the MND. The court found that, although payment into a fee program CAN be deemed to presumptively establish full mitigation in some cases, here it did not because **the fee program had not itself been evaluated under CEQA**, either as a tiered review at the programmatic level or on an individual project level. (The ordinance establishing the Program had been found to be categorically exempt from CEQA.) Thus, payment did not eliminate the need to address, in an EIR, the impacts of this particular project on plants.

For cases upholding payment into fee programs as full mitigation, see *Save Our Peninsula Committee v. Monterey County* (2001) 87 Cal.App.4th 99, 140; *Russ Building Partnership v. City of S.F.* (1988) 44 Cal.3d 839, 844-46; *City of Marina v. Board of Trustees* (2006) 39 Cal.4th 341, 363-66; *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188 [fair share contributions to fee-based mitigation programs must be based on a reasonable plan of actual mitigation that the agency commits itself to implement; specific improvements need to be made and specific amounts of fees must be paid].

§ 11.2.20 Environmental Impact Report

***Sheryl Gray, et al v. County of Madera, et al.* 167 Cal.App.4th 1099 (Oct. 24, 2008)**

HOLDING: The EIR for a mining project was held inadequate based on deficiencies in its water supply, traffic and noise analysis.

DISCUSSION: This case involved a Conditional Use Permit ("CUP"), a Mining Permit, a zone change, and a cancellation of a Williamson Act contract for an aggregate reserve mining operation. The operation was to include an excavation pit, an aggregate processing facility, a hot mix asphalt plan, stockpile areas, and other related facilities. The permit allowed 900,000 tons of aggregate to be mined per year. The appellate court found that the EIR prepared for the project was inadequate.

The EIR concluded that the project could cause water levels and pumping rates in adjacent private wells to decline during the life of the quarry. The EIR imposed monitoring of water levels and further required that the operator replace water for non-consumptive use from the quarry operator's wells. Consumptive use water would be supplied either by the private well owner or by supplying bottled water. The case has an extensive discussion of the analysis of how quarry operations can impact the operations of wells on adjoining property and how that could be mitigated. Ultimately, the court found that the mitigation was not sufficient. The project proponent argued that the County Board of Supervisors' conclusions regarding the measures should be given deference. The court concluded that the measures "defied common sense:"

> Law is not required to abandon common sense. Here, our common sense informs us that the mitigation measure will not effectively replace the water that could be lost by the neighboring landowners. It is true that the mitigation measure will provide a replacement for the lost amount of water. However, neither [of the measures] will provide neighboring residents with the ability to use water in substantially the same manner that they were accustomed to doing if the project had not existed and caused a decline in the water levels of their wells.

With regard to the concept of supplying bottled water as an alternative, the Court found that the County's conclusion regarding an effective mitigation measure "defies common sense." The Court concluded that the mitigation measures do not allow the affected neighboring landowners to use water in a substantially similar manner as their current water use, and would further expose them to regulatory oversight in their use of non-potable water.

Regarding the traffic analysis, the court struck down one of the traffic mitigation measures. The measure required that the operator contribute an equitable share of the cost of construction of future roadway improvements if requested by Caltrans or the County and lay a long-term maintenance fee based on annual aggregate tonnage. A formula was provided for calculating the equitable share of the improvements, but not for the maintenance fee. The court found the measure invalid. Caltrans had submitted letters for the record, but they did not identify what

improvements would be made or when they would be constructed. The court held that there was no evidence that they would be scheduled to avoid the impacts associated with the project. The court further held that there was no evidence that the County had a mitigation plan in place for either the improvement or the maintenance of the affected roadways. This is an important case to look at if you have "fair share" conditions to mitigate traffic impacts.

Regarding noise impacts, the court found that the County erred in assuming a rule of thumb that a project would not have a significant noise impact if it did not increase the noise levels by at least 3 dB. The court found that the background noise levels were critical to determining impacts.

The cumulative impact discussion may be of interest to lead agencies defending their list of cumulative projects. The court accepted that the DEIR had identified a "cut off date" for purposes of considering projects, and concludes that "probable future projects" can be interpreted to cover "any future project where the applicant has devoted significant time and financial resources to prepare for any regulatory review."

It also invalidated a portion of the cumulative impact analysis that was based upon the County General Plan because it did not specify where those documents can be publically viewed.

California Native Plant Society v. City of Rancho Cordova, et al **(C057018 Third Appellate Dist., Div. 1, March 24, 2009)**

HOLDING: The EIR for a large mixed use project that involved loss of habitat for endangered species was upheld against numerous attacks on the habitat mitigation program. This is a great case for lead agencies on the issues of exhaustion of administrative remedies and deferred mitigation.

DISCUSSION: This is an EIR CEQA challenge/general plan consistency case. The general plan issues were discussed earlier in this paper. With regard to CEQA, this case is important as it relates to the following topics: exhaustion of administrative remedies, deferral of mitigation and defending mitigation measures after they have been disapproved by trustee agencies. The petitioner filed a mandate action to challenge a 530-acre commercial/residential project. The site was in the "vernal pool" region. The vernal pools are inundated with water for various portions of the year, depending on their depth. The project area also had a drainage course running through it. The site provided habitat for vernal pool fair shrimp and vernal pool tadpole shrimp. These shrimp species are protected under the federal Endangered Species Act.

According to the EIR, the project would cause the direct loss of habitat for both types of shrimp. This was identified as a significant impact. To mitigate this impact, the EIR required preparation and implementation of a habitat mitigation and monitoring plan to compensate for the loss of habitat. Under the plan, the developer would be required to preserve two acres of existing habitat or create one new acre of habitat for each acre of lost habitat. The plan was required to include target areas for creation or preservation of habitat. It was also required to set performance standards for success to ensure that the compensation ratios are met.

The project was also identified as having indirect impacts on the shrimp habitat by altering the hydrology in the area. The same ratio of creation/preservation requirements for direct loss of habitat was imposed for the indirect loses.

The project was also going to cause jurisdictional waters of the U.S. to be filled. To mitigate this significant impact, the applicant was required to develop a plan for the creation of jurisdictional waters on at least a 1:1 ratio.

In response to comments on the above mitigation plans, the city added an additional mitigation measure requiring the submission of a wetland "avoidance/mitigation plan" which was required to show the location of the proposed vernal pools and seasonal wetlands. It required a monitoring plan to ensure that the replacement sites were functioning as intended, and a maintenance plan to ensure that the created sites were maintained as wetland habitat in perpetuity.

Exhaustion of Administrative Remedies

The petitioner had specifically commented on the mitigation plans, but its comments were limited to the negative environmental impacts of creating artificial vernal pools within an existing vernal pool ecosystem, and the argument that the requirement to prepare and implement mitigation plans in the future was deferred mitigation, in part because the proposed mitigation sites were not identified.

The opinion contains a very thorough discussion of exhaustion doctrine. The court ultimately rejected four of petitioners six arguments relating to the mitigation programs. The only two arguments that the petitioner had adequately preserved with its comments noted above were (1) whether the mitigation of the impacts was being improperly deferred; and (2) whether the finding that the measures would actually work to reduce the impacts to less than significance was supported by substantial evidence.

The trial court noted, and the appellate court agreed, that the comments submitted during the administrative process had not "alerted" the city that there were deficiencies in the project description or in the description of the background environment. Nor was the city alerted to the notion that the project was being piecemealed or that the EIR needed to be recirculated.

The opinion noted the trial court's conclusion that the "claimed deficiencies are more than merely alternative legal theories arising from the allegation that the off-site mitigation was being deferred improperly or would not actually reduce the impact of the project on vernal pools to 'less that significant'; they are also separate factual issues that, if accepted and acted upon, would have required restructuring and rewriting sections of the EIR entirely distinct from those addressing the mitigation measures at issue here." (Slip Opinion, 18.)

The court of appeal noted that the petitioner's comments did not "call into question" the various EIR components subsequently under attack (*e.g.,* the project description, the environmental background). Nor did the comments "fairly apprise" the city of the later alleged inadequacies in the EIR.

The court then adopted a very restrictive reading of *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745 (*"SORE"*). The court concluded that, because the opinion in *SORE* did not identify what objections the challengers had raised in that case, it ***is of little assistance*** here,

> . . . as we cannot determine exactly what comments the court found were sufficient to exhaust administrative remedies on the adequacy of the EIR's alternative site analysis and thus cannot extrapolate from the facts of that case a legal principle that we can apply to the facts at this case. Without that detail, *SORE* at best stands for the proposition that complaints [that] a project will be deleterious to the surrounding community may be sufficient to exhaust administrative remedies on the EIR's failure to adequately examine alternative sites. (Slip Opinion, 20.)

The petitioner was again barred by the exhaustion doctrine from attacking the EIR's water supply analysis. The EIR had incorporated by reference and relied upon the long term water supply analysis that had subsequently been invalidated by the California Supreme Court in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412. While the petitioner had not raised an objection to the water supply analysis in the instant proceeding, it argued that by incorporating the Vineyard EIR, the city had essentially also incorporated every objection that had been raised in that earlier proceeding. The court disagreed:

> The suggestion that an agency must treat as a comment on a current EIR any comment received on an earlier EIR that the current EIR relies on or incorporates by reference has no support in the law, as far as we can determine, presumably because an agency is entitled to know exactly what objections members of the public have to the current EIR.
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> . . .
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> An objector cannot simply sit back and wait for the earlier EIR to be invalidated, then belatedly assert after the administrative proceeding is complete (as happened here) that the current EIR is defective because it relied on the earlier EIR that has now been invalidated. (Slip Opinion, 41-41.)

Improper Deferral of Mitigation

Even though the mitigation plans would be created and implemented in the future, the court concluded that the city had not improperly deferred the formulation of the mitigation for the loss of habitat. The court discussed the key deferred mitigation cases — *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296 and *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011 (*"SOCA"*) — and concluded that the habitat plans at issue fell within the parameters of what the same court previously ruled was permissible in the *SOCA* case. After

noting that the *Sundstrom* decision was decided by a different appellate district, the court summarized the holding in its *SOCA* decision as follows:

> SOCA stands for the proposition that when a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measures in the EIR, as long as it commits to mitigating the significant impacts of the project. Moreover, under SOCA, the details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study. (Slip Opinion, 27.)

The court found that the required habitat plans satisfied these requirements. The city had not deferred the significance determination, but instead had expressly found the impact significant, and then had identified specific measures to mitigate the impact, namely, preservation or creation of replacement habitat at specific ratios. The court specifically found that nothing in the deferred mitigation line of cases required that the city identify the proposed mitigation site. The court noted that the petitioner and the lower court were confusing the deferred mitigation concepts with the issue of whether the measures were feasible:

> Similarly, concerns about whether it is "realistically foreseeable that [a mitigation] measure will actually be carried out as outlined" do not raise an issue of improper deferral. If the agency has identified one or more mitigation measures and has committed to mitigating the impact those measures address, then the principles forbidding deferral of mitigation are not implicated. (Slip Opinion, 29.)

Sufficiency of Evidence Supporting Mitigation Measure Where Trustee Agencies Disapprove of the Measure

The petitioner argued that because the wildlife agencies, the USEPA, and the US Army Corps of Engineers all had concluded that the mitigation plans would actually be detrimental to the shrimp and their habitat, the city's finding that the measures would reduce the impact to less than significant could not stand. The court disagreed. "Pointing to evidence of a disagreement with other agencies is not enough to carry the burden of showing a lack of substantial evidence to support the City's finding."

§ 11.2.40 Legal Challenges

***Center for Biological Diversity v. FPL Group* 166 Cal.App.4th 1349 (Sep. 18, 2008)**

HOLDING: Private parties can sue for violation of the public trust doctrine based upon injury to wildlife.

DISCUSSION: The court of appeals held that wildlife was subject to the public trust doctrine, and that any member of the public has standing to raise a claim of harm to the public trust. However, the court held that the appropriate enforcement action would be one by the member of

the public against the responsible public agency, seeking to compel the entity, as the trustee under the public trust doctrine, to take action to protect the trust. Because the time periods to bring such an action had passed in this case, the court found that the plaintiffs could not sue for birds being injured by wind turbines.

Part 3. Water Supplies and Supply Planning

***O.W.L. Foundation v. City of Rohnert Park*, 168 Cal.App.4th 568 (Nov. 19, 2008)**

HOLDING: The court of appeal upheld the water supply assessment ("WSA") prepared pursuant to Water Code Section 10910(f)(5) and rejected the challenger's claim that the WSA's scope of analysis was inadequate because it used a study area smaller than the whole basin and failed to analyze future pumping throughout entire basin.

DISCUSSION: The WSA at issue in the case was prepared for six development projects. The city council approved the WSA by resolution. O.W.L. Foundation and others challenged the city's action by writ of mandate. The trial court struck down the WSA, holding that Water Code Section 10910(f)(5) "appears to require a real analysis of the amount of water available, which seem to require a determination of the amount of water being used and expected to be used by everyone who uses the same water supply." (*Id*. at 580.)

The court of appeal reversed. The court noted that while Water Code Section 10910 requires a determination of "sufficiency," this could not be read as requiring the preparation of a basin-wide study of all current and future pumping. "[T]here is nothing intrinsic in the word 'sufficiency' that dictates the preparation of a basin-wide study of existing and future pumping." (*Id*. at 589.) The court also reviewed the legislative history of Section 10910 and noted the fact that the legislature had initially considered the inclusion of language that would have required a WSA to address the other groundwater users in the basin, but that language was ultimately rejected. (*Id*. at 590.)

The court also recognized that the type of analysis that the petitioners proposed was simply not practical. The court noted that it would require a "herculean effort" in the limited 90-day time frame for completion of an analysis of demand and supply in this basin:

> A WSA serves the limited function of providing information about ground-water sufficiency for a *specific, proposed development project*. (§ 10910(f)(5).) It is not a general planning document for the management of groundwater supplies in a basin. … A broad inquiry into basin-wide conditions and uses may be a proper subject for such water management mechanisms, but it is not appropriate to impose that obligation upon water suppliers seeking to comply with section 10910, subdivision (f) and analyze groundwater sufficiency for a particular proposed project. (Id. at 592.)

Part 5. Air Quality

***Association of Irritated Residents v. San Joaquin Valley Unified Air Pollution Control Dist.*, 168 Cal.App.4th 535 (Nov. 19, 2008)**

HOLDING: The court of appeal struck down the adoption of an air quality rule because the air district had not completed a health assessment of the impacts of the regulation.

DISCUSSION: This case struck down San Joaquin Valley Unified Air Pollution Control District's adoption of an air quality rule because the district had not properly studied its impacts on public health. The rule (Rule 4570) established a permitting process and regulations for large confined animal facilities. The Court found that the District did not satisfy the requirement of Health & Safety Code Section 40724.6 to complete a health assessment prior to adopting a rule or regulation.

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Kathy has handled numerous land use cases before various courts of appeal. Her published cases include: *Torres v. City of Yorba Linda* (1993) 13 Cal.App.4th 1035; *Burchett v. City of Newport Beach* (1995) 33 Cal.App.4th 1472; *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152; *City of Vernon, et al. v. Board of Harbor Commissioners, et al* (1998) 63 Cal.App.4th 677; *Cantrell v. City of Long Beach, et al.* (9th Cir. 2001) 241 F.3d 674; *California Earth Corps California State Lands Commission* (2005) 128 Cal.App.4th 756. Her unpublished decisions include: *Stop Taking Our Parks et al. v. City of Long Beach* (Second Dist., Case No. B156347); *Citizens of Orange Park Acres Coalition v. City of Orange, et al.* (Fourth Dist. Case No. G024841); *Huell Howser v. City of Long Beach* (Second Dist. Case No. B123336); *Sierra Club v. City of Palm Springs, et al.* (Fourth Dist. Case No. E023399); *Huell Howser v. City of Long Beach* (9th Circuit Case No. 98-55351); *Friends of Coachella Valley v. County of Riverside* (Fourth Dist. Case No. B017901) [tentative opinion]; *Ignacio Barajas, et al. v. City of Santa Ana and Orange County Register* (Fourth Dist. Case No. G011307); and *Raphael Babay, et al. v. City of Lynwood, et al.* (Second Dist. Case No. B046883).

Kathy also had the pleasure of arguing before the California Supreme Court on behalf of the League of California Cities in *City of Long Beach v Department of Industrial Relations, et al.*, (Case No. S118450), 34 Cal. 4th 942 (2004), involving charter city and prevailing wages issues.