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LAND USE AND CEQA LITIGATION UPDATE

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[ORGANIZATION CORRESPONDS TO CHAPTERS X and XI OF *MUNICIPAL LAW HANDBOOK*]

CHAPTER X – LAND USE

Part 1: Introduction

§ 10.1.05 State Planning Act.

***PR/JSM Rivara LLC v. Community Redevelopment Agency of the City of Los Angeles* (December 2009) 180 Cal.App.4th 1475**

HOLDING: Adoption of design development guidelines by a community redevelopment agency was not subject to requirements of the State Planning Act.

DISCUSSION: The agency adopted a redevelopment plan that provided in pertinent part: "Subject to applicable State and City laws and regulations regarding Design for Development and within the limits, restrictions, and controls established in this [Redevelopment] Plan, the Agency ... is authorized to establish floor area ratios, heights of buildings, land coverage, setback requirements, design criteria, traffic circulation, traffic access, and other development and design controls...." Pursuant to that authority, the agency later adopted design guidelines that were challenged by private developers of properties in the project area, primarily because the design guidelines down-zoned the maximum allowable densities for the project area's commercial core. The challengers argued that the agency's design guidelines effectively amended the city's zoning code without complying with the Planning and Zoning Law (Government Code section 65000 *et seq.*). The court disagreed, concluding that the Community Redevelopment Law (Health and Safety Code section 33000 *et seq.*), not the Planning and Zoning Law, applies when, as here, the agency acted to further the state policy of eliminating blight rather than a local policy of zoning control. Likewise, the court faulted the challengers for failing to recognize the difference between adopting a redevelopment plan – a legislative act – and adopting design guidelines to implement the plan – an executive/administrative act. In the latter instance, the Government Code provisions concerning amendments to a zoning ordinance – a legislative act – are inapplicable.

The record failed to support the challengers' contention that the design guidelines conflicted with state Density Bonus Law (Government Code section 65915 *et seq.*). The agency submitted evidence explaining that the design guidelines combined mandatory and discretionary density bonus plans, which would not deprive a developer of a state mandated density bonus. Moreover, the city's municipal code expressly allows a redevelopment plan to impose more stringent limitations on height, floor area ratios, and density than otherwise would be the maximums allowable under the city's zoning code.

Part 3: Zoning

§ 10.13.05 Zoning Ordinances

Hoffman Street, LLC v. City of West Hollywood, et al. **(November 2009) 179 Cal.App.4th 754**

HOLDING: A moratorium that temporarily precluded projects involving the demolition of apartment buildings and the construction of new multifamily units was held invalid because the city did not make the findings required by Government Code section 65858(c).

DISCUSSION: The plaintiffs sought to demolish existing apartment buildings and construct condominiums. The city adopted an interim moratorium on new multifamily dwellings in the zoning districts where the plaintiffs' properties were located through an urgency ordinance. The interim ordinance permitted the construction of certain multi-family dwellings that were designed to be affordable or meet certain other specified criteria. The moratorium was extended.

The plaintiffs filed a combined writ of mandate and complaint, alleging a failure to make the findings required by Government Code section 65858(c), a violation of CEQA and the Permit Streamlining Act, and certain 42 USC section 1983 claims.

The court found that the city had failed to adopt the required findings to extend the moratorium. Specifically, the court held that because the moratorium had the effect of denying the approvals needed for the development of a project with a significant component of multifamily housing, the findings in section 65858(c)(1)-(3) were required. It rejected the city's argument that the findings were not required because the development was covered by the exemption contained section 65858(g), which excludes certain projects that eliminate or reduce affordable housing from the definition of "multifamily housing," and thus the need for those findings. Essentially, the exemption is designed to make it easier for cities or counties to impose a moratorium on projects that will reduce affordable housing opportunities. Since the two projects at issue were demolishing existing apartment buildings, the city argued that subsection (g) was applicable, and there was no need to make the findings required in subsection (c). However, the court adopted a narrow reading of subsection (g), and found that if the project has any component other than what is described in subsection (g), the findings in subsection (c) are still required.

The court found that the findings the city did make did not meet the rigorous requirements of section 65858(c)(1)-(3).

The court also held that it was improper for the court to enter judgment in favor of the city on all counts in the complaint after only hearing the first three causes of action.

§ 10.3.45 Special Issues

(I) Telecommunications Act of 1996

***Sprint PCS, LLC v. City of Palos Verdes Estates* (9th Cir. October 2009) 583 F.3d 716**

HOLDING: Neither the California Public Utilities Code nor the Federal Telecommunications Act of 1996 bars cities or counties from denying approvals of proposed cell phone antennas in public rights-of-way based upon aesthetic concerns.

DISCUSSION: The city granted 8 of the 10 permits for wireless telecommunication facilities Sprint had applied for in the city's right-of-way. Two permits were denied based upon aesthetic concerns. While the district court granted summary judgment in favor of Sprint based upon preemption, the Ninth Circuit reversed. It found that the city's denial of the permits based upon aesthetic grounds was not inconsistent with California Public Utilities Code section 7901 or section 7901.1. Section 7901 only allows telecommunication facilities to be installed in such manner and at such points "not to incommode the public use" of the road. The court concluded that based upon the definition of "incommode," the city was justified in taking aesthetics into account in reviewing the application. The court further found that the aesthetics are time, place and manner regulations consistent with section 7901.1.

The court also found that Sprint had not demonstrated that the denial of the two permits would have the effect of prohibiting the provision of wireless service. Sprint had not sufficiently demonstrated that there was a significant gap in service coverage.

Part 8. Exactions: Fees and Dedications

***California Building Industry Association v. San Joaquin Valley Air Pollution Control District* (October 2009) 178 Cal.App.4th 120**

HOLDING: The San Joaquin Valley Air Pollution Control District's indirect source review program was upheld against claims that it imposed invalid development and regulatory fees and that the District exceeded its authority in imposing the fees.

DISCUSSION: In order to address its nonattainment status for NOx and PM10, the District adopted a rule that required new development projects to submit an Air Quality Impact Assessment to the District at or before the time of the project being approved by the approving authority. The Assessment would quantify the emissions attributable to the new development. It would also assess on-site reduction measures. If certain levels of reduction could not be reached, the developer was required to pay a fee to the District for off-site emission reduction projects.

The court upheld the indirect source review program. It determined that the fees imposed were regulatory fees rather than development fees. The program did not impose a development fee because the development project was not conditioned on the payment of the fee. The payment was not exacted in exchange for a permit. The court found that District employed a valid method for calculating the fee, that it established the estimated cost of the program, and that it had shown

that the fee charged reasonably related to the amount of pollution attributed to each new development. It also found that the District acted within its statutory powers in adopting the program.

Part 12. California Coastal Act

§ 10.12.10 Coastal Development Permits

***Gualala Festivals Committee v. California Coastal Commission* (March 2010) 1st App. Dist. Case A1255614**

HOLDING: Fireworks display is "development" that requires a coastal development permit under the California Coastal Act.

DISCUSSION: Pursuant to Public Resources Code section 30600(a), with certain exceptions, any agency or person wishing to perform or undertake any "development" in the coastal zone must obtain a coastal development permit. The court found that, because fireworks cause casings and chemical residue to fall to the ground, the display of fireworks would result in the discharge of solid and chemical waste within the coastal zone and thereby fit within the definition of "development" in Public Resources Code section 30106. The Commission has the authority to grant a "de minimis" exemption to activities that will not adversely affect coastal resources. However, in this instance, the fireworks were found to cause debris to fall in scenic trail areas. The court rejected the argument that the temporary nature of fireworks precluded their display from being classified as "development." The court upheld the Commission's cease and desist order.

Part 14. Challenges to Land Use Decisions

§ 10.14.05 Regulatory and Physical Takings

***Guggenheim v. City of Goleta (*September 2009)(9th Cir.) 582 F.3d 996, petition for rehearing en banc granted (March 2010) 2010 U.S. App. LEXIS 5211 (No Longer Citable)**

HOLDING: In 2-1 decision, the court initially held that owners of a mobile home park had a valid facial challenge to a county mobile home rent control ordinance as a regulatory taking under *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104. However, on March 12, 2010, the Ninth Circuit voted to rehear the case *en banc*, so the 3-judge panel decision may not be cited as precedent by or to any court of the Ninth Circuit.

CHAPTER XI – PROTECTING THE ENVIRONMENT

Part 2. California Environmental Quality Act (CEQA)

§ 11.2.05 Scope of CEQA

***Sunset Sky Ranch Pilots Assn. v. County of Sacramento, et al.* (December 2009) 47 Cal.4th 902**

HOLDING: The county's decision declining to renew a conditional use permit for the continued operation of an airport was not a "project" subject to CEQA.

DISCUSSION: The county declined to renew a conditional use permit for a privately owned airport. The owners and users of the airport sued, claiming that the county could not decline to extend the conditional use permit without first complying with CEQA. The petitioners argued that the denial was, in effect, an activity undertaken by a public agency and was therefore within the definition of Public Resources Code section 21065. They argued that the denial could lead to the operations being moved elsewhere. The court rejected this argument. It held that the consequences of the project denial should not be deemed to be part of the project itself. To require analysis of the consequences of project denial would effectively abrogate the statutory exemption in section 21080(b)(5) for disapproval of projects. The court differentiated the cases involving a public agency's decision to close a public facility (e.g., school closure), which decisions are considered "projects" for CEQA purposes.

***California Unions for Reliable Energy, et al v. Mojave Desert Air Quality Management District, et al.* (October 2009) 178 Cal.App.4th 1225**

HOLDING: The Mojave Desert Air Quality Management District's adoption of a rule concerning the use of road paving to offset increases in airborne dust was not exempt from CEQA under Guideline 15308's exemption of actions taken by regulatory agencies to assure the maintenance, restoration, or protection of the environment, where the regulatory process involves procedures for protection of the environment.

DISCUSSION: The District has been designated as a nonattainment area for PM10. The District includes 5,000 miles of unpaved roads. Since unpaved roads are a source of PM10, the District adopted a rule that identified the paving of unpaved roads as a method of offsetting PM10 emissions from new source review.

The plaintiffs objected to the offset on numerous grounds. They argued that combustion-related PM10 (which contains PM2.5) and road dust PM10 is entirely different, and the District was effectively trading one air pollution problem for another. They further argued that road paving has direct environmental effects on plants and animals, and has indirect growth-inducing effects.

The court agreed with the plaintiffs. It noted that, rather than being positive for the environment, because the rule provided for a one-to-one offset, at best it would have a break even effect.

The court also rejected the District's argument that it was too speculative to determine what environmental effects the rule would have. The court concluded that it was reasonably certain that at least some road paving would occur as a result of the rule, and that it was not speculative to determine the types of impacts that could occur from such paving.

***Bus Riders Union v. Los Angeles County Metropolitan Transportation Agency* (November 2009) 179 Cal.App.4th 101**

HOLDING: The MTA's decision to increase bus and rail fares to cover operating costs and to maintain existing service was statutorily exempt from CEQA 21080.

DISCUSSION: Public Resources Code section 21080 exempts an agency's setting of fares for the purpose of meeting operating expenses and maintaining service. The MTA fare increases were accompanied by a resolution explaining that the additional revenues would be used to meet operating expenses and maintain existing service.

***Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara County Association of Governments* (November 2009) 179 Cal.App.4th 113**

HOLDING: Approval of a retail sales and use tax measure that does not commit the local transportation agency to any one or all of the projects cited in an accompanying expenditure plan for those revenues, is not a "project" under CEQA.

DISCUSSION: Pursuant to provisions in the Public Utilities Code, the local transportation agency for Santa Barbara County has the authority to impose a limited tax for transportation purposes upon voter approval. Statutes required the agency to adopt a "Transportation Investment Plan" ("Plan") that showed the expenditure of the revenues expected to be derived from the tax, as well as any federal, state or local funds expected to be available for transportation improvements. The petitioners challenged the agency's approval of the funding measure as violating CEQA because no environmental review was performed. The ordinance approving the tax measure was expressly conditioned on completing necessary environmental review required by CEQA, prior to the commencement of any project included in the Plan.

The court's holding ultimately relied on CEQA Guideline section 15378(b)(4) (exemption for creation of government funding mechanism or other government fiscal activities) to uphold the Plan's adoption. The court discussed *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 and distinguished the agency's action on the Plan from the actions of West Hollywood. The agency did not, by adopting the ordinance calling for a vote on the tax, significantly further the Plan's projects in a manner that foreclosed alternatives or mitigation measures that would ordinarily be part of CEQA review. The Plan gave only a brief description of projects without details or specifications, and each of the projects therein required matching funds from federal and state sources to have sufficient money to construct the transportation improvements. Unlike the actions of West Hollywood in *Save Tara*, SBCAG's approval of the Plan merely complied with a statutory requirement prior to the call of an election.

The agency had also argued the CEQA challenge was moot because, three months after approval of the tax measure, an EIR was completed for the county's Regional Transportation Plan that purportedly analyzed all of the projects in the Plan. The court disagreed, noting that "after the

fact" or subsequent environmental analysis should not be allowed because it would likely become a *post hoc* rationalization to support action already taken. Also, the petitioners filed a challenge against the sufficiency of that EIR. Thus, court considered the merits of Petitioners' appeal.

Parchester Village Neighborhood Council et al. v. City of Richmond **(February 2010) 182 Cal.App.4th 305**

HOLDING: The approval of a municipal services agreement ("MSA") wherein a city agreed to provide certain municipal services in exchange for agreed upon payments and to support an Indian Tribe's effort to acquire land outside the city for a casino did not constitute a "project" under CEQA.

DISCUSSION: The Scotts Valley Band of Pomo Indians ("Tribe") submitted an application requesting that the Secretary of the Interior acquire approximately 30 acres of land in west Contra Costa County in trust for the benefit of the Tribe. The proposed site is adjacent to the City of Richmond ("City"). The Tribe plans to develop a casino on the site. Representatives of the Tribe met with the City to begin discussions about entering into a MSA. The City staff determined that the casino would have a tremendous impact on the surrounding residents and businesses. Because the City would have no say over the decisions concerning the casino, the City staff recommended that the City proceed with the MSA to secure some funding to mitigate the casino's impacts. The City and the Tribe executed the MSA, which included multi-million dollar nonrecurring and annual contributions by the Tribe to the City for a variety of public services, including police, fire, and public works. The City intended to use the funds for police, fire, and public works personnel and for equipment. The City disavowed any commitment to make physical changes to the environment as a result of the MSA. The plaintiffs challenged the MSA, contending that the City was required to conduct an environmental review under CEQA before the City could approve the MSA.

The court first reviewed whether or not the Tribe's casino development or the City's stated support for the development was a "project" of the City under CEQA. CEQA states that a "project" includes an activity "directly undertaken by any public agency." (Pub. Res. Code § 21065.) The casino was not something that the city was carrying out or approving. Therefore, since "the City has no legal authority over the property upon which the casino will be situated" the court concluded the casino development did not constitute a "project."

The plaintiffs attempted to argue that City's expression of support for the development transformed it into a "project." However the court found this argument unpersuasive for two reasons. First, an agency does not commit itself to a project by being its proponent or advocate. Second, the proposed casino is to be built on a site outside of the City's boundaries.

The court also held that the MSA's support of the Tribe's application to the Bureau of Indian Affairs did not constitute a project. Additionally, the court found CEQA did not apply to the MSA because the City did not commit itself to making any physical changes to the environment Rather, the MSA was similar to a memorandum of understanding which provides a mechanism for funding proposed projects that may or may not be implemented. Additionally, the MSA acknowledged that CEQA review might be required if the City ultimately were to provide

infrastructure related to the casino projects. The court applied this same reasoning to hold that other sections of the MSA did not trigger CEQA review.

Las Lomas Land Company, LLC v. City of Los Angeles **(September 2009) 177 Cal.App.4th 837**

HOLDING: Lead agency is not obligated to complete an EIR before rejecting a project, and no CEQA or constitutional claims arise from the failure to complete an EIR before such a rejection.

DISCUSSION: The 555-acre project at issue included 5800 residential units, 2.3 million sq. ft. of office space, 0.5 million sq. ft. of retail and community facilities, a hotel, and open space. The project land use approvals included annexation, a specific plan, zoning, and land use entitlements. After spending several years preparing an EIR (but not finishing the process), the city council decided to simply reject the project. The developer sued, claiming that the city council could not make the policy decision to not proceed with the project without the EIR, and further alleged that its due process and equal protection rights had been violated by the denial. It claimed $100 million in damages.

Based upon Public Resources Code section 21080(b)(5), the court held that "if an agency at any time decides not to proceed with a project, CEQA is inapplicable from that time forward." (177 Cal.App.4th at 850.) The court distinguished the decision in *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, on the basis that in *Sunset Drive*, the city had not rejected the project.

The court also held that procedural due process claims could not be asserted by the developer since it had no protected property interest in the entitlement process. The fact that the developer owned the property did not elevate its interest in the entitlement process to a protected interest. "An ownership interest alone does not cloak the prospect of developing the property with the project of procedural due process." (177 Cal.App.4th at 853.) The court refused to follow the decision in *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, to the extent it relied upon there being a due process right in the outcome of an entitlement proceeding.

The court rejected the substantive due process claim because the facts alleged did not constitute an "outrageous or egregious" abuse of power. The court concluded that the allegations that a councilmember had vigorously opposed the project, had made misleading public statements about it, and had managed to convince the council to "cease all work" on the project, if true, did not amount to an "abuse of power of constitutional dimension." (177 Cal.App.4th at 857.)

The court also rejected the equal protection claims. The court noted that the project involved complex urban planning and land use issues involving numerous public policy considerations and the exercise of discretion based upon subjective, individualized determination. Given these factors, the court concluded that the developer could not prove the absence of a rational basis for the denial.

Stephen Wollmer, et al v. City of Berkeley, et al (November 2009) **179 Cal.App.4th 933**

HOLDING: When approving a mixed-use density bonus project that granted more density bonus units than the minimum required under state law, a city neither abused its discretion when

it approved use permits and variances for the project, nor demonstrated a "change in policy" amounting to a "de facto amendment" to the municipal code that would require CEQA review.

DISCUSSION: The City of Berkeley approved a five-story mixed-use development with ground floor retail (including a grocery store) and 148-residential unit project, comprised of 22 low-income household units, on approximately one acre. The project as approved included: an award of 32 "mandatory" density bonus units under state law (Government Code section 65915, as it existed in 2005, at the time of use permit approval); an additional discretionary authorization of 25 "extra" density bonus units per subdivision (n) of section 65915 and Berkeley Municipal Code; and provision for zoning variances from height and FAR limitations, and front yard setback requirements along abutting residential areas. Berkeley approved the project based upon a mitigated negative declaration. The mitigation included full payment by developer for a new traffic signal, a traffic diverter, and landscaped traffic barrier. Residential tenants on adjoining property and an unincorporated association challenged Berkeley's approval of the project as violating section 65915, CEQA, and Berkeley Municipal Code.

The petitioners' argument under section 65915 centered on the 25 "extra" units and claimed that they should be considered part of the "base units" when determining maximum number of allowable density bonus units. The court rejected contention that state Density Bonus Law places a cap, rather than imposes a minimum, on local jurisdictions when approving affordable residential projects. Likewise, the court rejected Petitioners' contention that Berkeley had to adopt a new ordinance and should not have acted on an "*ad hoc*" basis when granting the 25 "extra" units. Subdivision (n) in section 65915 (as it existed at time of project approval) expressly allows cities to grant more than the state-mandated minimum. As such, no "*de facto*" amendment of the municipal code occurred when additional density bonus units were authorized, and no "project" under CEQA resulted merely by the city's action in interpreting and applying subdivision (n).

Post Script: Subdivision (n) of section 65915 has since been amended to clarify, "[i]f permitted by local ordinance...." (Stats. 2008, Ch. 454 (AB 2280).)

§ 11.2.20 Environmental Impact Report (EIR)

(A) When Required

Inyo Citizens for Better Planning v. Inyo County Board of Supervisors **(November 2009) 180 Cal.App.4th 1, 102 Cal.Rptr.3d 522**

HOLDING: The county's general plan amendment that changed the definition of "net acreage" that could be subdivided to add back in acreage subject to utility easements (as opposed to right-of-way) required the preparation of an EIR rather than a negative declaration.

DISCUSSION: The county's general plan defined "net acreage" that was subject to subdivision and development to exclude not only right-of-way for roads, but also "land devoted to utilities." The county staff concluded that land subject to utility easements should not be deducted from the net acreage because the land is still useable. The staff prepared a negative declaration as the CEQA clearance for the amendment. The amendment would allow the subdivision of properties that could not otherwise be subdivided. Many citizens opposed the amendment.

The court found that substantial evidence existed suggesting that the amendment may have a significant impact, and thus required the preparation of the EIR. The area water association submitted a letter indicating that the area affected by the general plan amendment was already experiencing problems with water flow that would be aggravated by increased development.

Save The Plastic Bag Coalition v. City of Manhattan Beach **(January 2010) 181 Cal.App.4th 521**

HOLDING: A group of plastic bag manufacturers/distributors has standing to file a CEQA writ of mandate to challenge a plastic bag ban under the public right/duty exception to the beneficial interest requirement. Additionally, an EIR must be prepared for a ban on the use of plastic bags where the record contains substantial evidence that supports a fair argument that the ban may have a significant environmental impact by increasing the demand for paper bags.

DISCUSSION: The city adopted an ordinance that prohibited certain retailers from distributing plastic carry-out bags to customers at point of sale. The city's goal in enacting the ordinance was to protect the adjacent marine environment and marine life. On the basis of the city's initial study, the city found that the plastic bag ban would not have any significant impacts upon the environment (although it would likely lead to an increase in paper bags) and thus the city only prepared a negative declaration. Shortly after the ordinance was adopted, an unincorporated association of plastic bag manufacturers, distributors and others, including three companies that supply plastic bags to city businesses, filed a mandate petition and a declaratory relief request. The trial court affirmed that an EIR was required.

The appellate court described in detail five reports in the administrative record. Four of the five reports addressed the potential negative implications from a plastic bag ban, while only one report highlighted the benefits of such a ban.

In considering the issue of the plaintiff's standing, the court first noted that the coalition had alleged that it was formed to respond to misinformation, myths, and exaggerations that have been disseminated about the environmental impacts of plastic bag use. The court also made reference to cases that have held that standing requirements are to be "liberally construed" under CEQA. While there is a general requirement for a "beneficially interested" petitioner, the California Supreme Court has recognized the "public right/public duty" exception to that rule where the question is one of "public right and the object of the mandamus is to procure the enforcement of a public duty…." The court held that the plaintiff asserted an interest that is not "purely commercial and competitive" and that "maintaining a quality environment is a matter of statewide concern."

The court then addressed whether or not an EIR was required. Noting that the threshold requirement for preparing an EIR is low, the court stated that a public agency should not file a negative declaration if there is substantial evidence supporting a fair argument the project may have a significant effect on the environment. Additionally, the court found that if any aspect of a project may result in a significant environmental impact, an EIR is required, even if the overall effect of the project is beneficial. The court found that it could be fairly argued, based on substantial evidence in light of the whole record that the plastic bag distribution ban may have a significant effect on the environment. Four of the reports in the record supported that

conclusion, and the city's initial study did not contain information from the city's actual experience to support an argument that the city is so small and public concern for the environment is so high that there will be little or no increased use of paper bags. As a result, the court confirmed that an EIR was required.

(C) Baseline

***Communities for a Better Environment v. South Coast Air Quality Management District et al.* (March 2010) Supreme Court of California, Case No. S161190, 2010 Cal.LEXIS 1894**

HOLDING: The lead agency must use the existing physical conditions for calculating the baseline for an initial study of a project's environmental impact under CEQA, rather than using the maximum permitted operation under existing permits.

DISCUSSION: ConocoPhillips ("Conoco") operates a petroleum refinery in Los Angeles. Due to new regulations on sulfur content in fuels, Conoco developed plans for an Ultra Low Sulfur Diesel Fuel Project ("Diesel Project"), that involved replacing or modifying reactors, installing new pipelines and pumps, and increasing operation of the existing cogeneration plant and four boilers. The cogeneration plant and boilers were subject to prior permits that have a maximum rate of heat production for each piece of equipment. Conoco applied to the South Coast Air Quality Management District for a permit to construct the modifications. The District conducted an initial study and found that the activities would create an additional 237 to 456 pounds per day of NOx emissions (of which 201 to 420 would come from the steam generating equipment). However, the District did not consider these increases to be part of the Diesel Project, because they did not exceed the maximum rate of heat production allowed under existing permits. Therefore, the District did not complete an EIR and relied on a negative declaration.

In analyzing the facts, the California Supreme Court noted the general rule that if an initial study produces substantial evidence supporting a fair argument that the project may have significant adverse effects, then the lead agency must prepare an EIR.

The Court went on to discuss how to define the baseline for determining a project's impact. According to section 15125 of the CEQA Guidelines, an EIR must include a description of the physical environmental conditions in the project vicinity and that this environmental setting "will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." Additionally, the Court cited to a long line of authority holding that projects are supposed to look to actual environmental conditions rather than to allowable conditions defined by a plan or regulatory framework. The environmental review must look at the "real conditions on the ground" rather than what "could or should" have been allowed. As a result, the Court looked to what was a "realistic description" of the existing conditions. Because the boiler operations were not at maximum levels, and never actually operated at this level, the maximum permitted levels were an "illusory" basis for the District's findings.

The District and Conoco cited to several appellate court decisions supporting the use of maximum operational levels allowed under a permit. However, those decisions characterized the project at issue as a modification of a previously analyzed project or as a continuation of an operation without significant expansion. Unlike those cases, here, the Diesel Project involved an

addition of a new refining process, which required new equipment and significantly increased operation of other equipment.

The District and Conoco also argued that a baseline below the maximum permissible levels in the permits would defeat the company's vested rights and contravene CEQA's statute of limitations. However, the Court ruled that the CEQA analysis doesn't result in an order that Conoco reduces or limits its use of an individual boiler. Disapproval of the project would not prevent Conoco from operating its existing boilers at levels allowed under the permits. The statute of limitations argument failed because this case involved a review of the approval of the Diesel Project, not the approval of the boiler permits.

Finally, the Court addressed whether or not the Project would have significant adverse effects. Because the negative declaration estimated an increase of between 201 and 420 additional pounds per day of NOx emissions and District established a significance threshold for NOx of 55 pounds per day, these estimates constitute substantial evidence supporting a fair argument for a significant adverse impact.

(D) Contents

***Tracy First v. City of Tracy*, 3rd App. Dist., Case No. C059227 (September 2009) 177 Cal.App.4th 912**

HOLDING: A city council may certify an EIR that was amended and recirculated after the planning commission reviewed it, without first sending it back to the planning commission for an additional review, provided the project itself is not amended. The court also upheld the EIR's alternative and energy consumption analyses, and held that a lead agency does not have a duty to mitigate extraterritorial traffic impacts if the jurisdiction with control of the affected roadway or intersection has no project, program or financing plan in place to fund the improvements.

DISCUSSION: The city was considering general plan and specific plan amendments that would change a particular property's designation from industrial to commercial. Thereafter, an application was submitted to construct a WinCo Foods store on the property. An EIR was prepared that addressed the general and specific plan amendments, as well as the construction of the WinCo Foods store. After a hearing and public comment, the planning commission recommended that the city council certify the EIR and approve the general and specific plan amendments. In response to public comments, the city council decided to amend the EIR. The city recirculated the amended EIR even though the city did not believe that recirculation was mandated under Public Resources Code section 21092.1. The amendments involved the EIR sections regarding land use and economics, traffic impacts, air quality impacts and energy conservation. The planning commission did not review the amended EIR. Following the certification of the amended EIR by the city council, Tracy First filed a petition for writ of mandate arguing that the city did not proceed as required by law. Both the trial court and the court of appeal rejected the argument.

Pursuant to the CEQA Guidelines, the planning commission was required to review the EIR "in draft or final form." (CEQA Guideline § 15025(c).) Although there are circumstances that require remand to the planning commission if substantial changes are made to the project itself,

CEQA contains no such requirement when portions of the EIR are amended. Because the amendments at issue did not change the project, the court held that remand to the planning commission was unnecessary.

In perhaps the most significant portion of the case, the court limits the application of *City of Marina v. Board of Trustees of California University* (2006) 39 Cal.4th 341, with regard to the duty to mitigate extraterritorial traffic impacts. In *Tracy,* the EIR identified that certain improvements to a county intersection would mitigate the project's impacts. The EIR concluded that the county would be responsible for the construction of the improvements, and that it had no identified plan or project to construct them. Nor was there any financing plan in place to fund the improvements. The EIR concluded that the mitigation could not be implemented and the impact would remain significant and unavoidable. The court upheld the conclusion. It noted that the *City of Marina* case dealt with a situation where a mitigation plan was already in place and there was a statutory obligation to implement the plan.

The court rejected Tracy First's argument that the developer should pay a mitigation fee and that the agency must prepare a plan for the construction of the improvement. The court states: "For this to be true, it would require the [c]ity to impose on the county a plan to improve the intersections. Without jurisdiction and without a county plan in place, the [c]ity cannot insure that mitigation measures will be implemented, even if funding is required by the EIR." (*Id.* at 938.)

The court also rejected the petitioner's challenge to the alternative analysis. The petitioner argued that the EIR should have included a reduced size alternative to lessen traffic and air quality impacts. The court rejected the argument, holding that there was no evidence in the record that a reduced sized alternative would have less traffic or fewer emissions. It was unwilling to presume that a smaller size project would have reduced impacts.

The court has an extensive discussion of the EIR's treatment of energy impacts. The petitioner claimed the analysis was flawed because: (1) the energy consumption on one of the parcels was omitted; (2) the analysis relied on state energy efficiency standards to conclude there was no significant impact; and (3) the analysis omitted an Appendix F analysis. In a very detailed analysis, the court rejected each of these arguments.

***California Native Plant Society, et al v. City of Santa Cruz, et al* (September 2009) 177 Cal.App.4th 957**

HOLDING: The court rejected a challenge to an EIR based upon the claim that the lead agency should have selected an alternative project location that did not affect sensitive plant habitat.

DISCUSSION: The challenged project was a master plan for a 67+ acre scenic natural area owned by the city. The plan included 2 miles of trails, which included 0.6 miles of ADA compliant trails and 1.4 miles of pedestrian only trails. A portion of the trails would pass through the Santa Cruz tarplant historic habitat. Among the alternatives was one that reduced the impact on the habitat by eliminating certain portions of the trails and reducing others to narrow widths that would not meet ADA requirements.

The petitioners challenged the range of alternatives evaluated in the EIR and the city's findings that the alternatives were infeasible. They argued that the alternative analysis was skewed by the project objective of providing for a multiuse connecting trail that was ADA compliant. They contended that if having an ADA compliant connecting trail was such an important policy of the master plan, then each of the alternatives should have included it. The court rejected this argument, noting that providing for an ADA connecting trail was only one of 10 project objectives. The court found that while none of the alternatives had a full east-west connecting trail that was ADA compliant, they did have alternative alignments and varying levels of accessibility. The court held that there is no legal requirement that the alternatives analyzed in an EIR must satisfy every key objective of a project. "Ranking the relative importance of the various objectives in the overall context of the project was a policy decision for the City Council." (117 Cal.App.4th at 992.)

The court also rejected the petitioners' argument that the EIR should have considered an off-site east-west trail. It noted that the trail was merely one component of the project, and alternatives are supposed to be related to the project as a whole, not just one of its components. It also noted that prior environmental documents had reviewed off-site trails. The EIR presented sufficient information to explain the choice of alternatives and the reasons for excluding the off-site alternative.

In challenging the city's findings that the alternatives were infeasible, the petitioners argued that the feasibility findings presented an issue of law. The court rejected the argument, noting that where findings are free of legal error, they are entitled to great deference.

The court noted the important distinction between potentially feasible alternatives in the EIR versus what the council ultimately finds as feasible at the project approval stage. "While it is up to the EIR preparer to identify alternatives as potentially feasible, the decision-making body 'may or may not reject those alternatives as being infeasible' when it comes to project approval …. Rejection by the decision-makers does not undermine the validity of the EIR's alternative analysis." (*Id.* at 999.)

In rejecting alternatives, the decision-makers can reject alternatives based upon a reasonable balancing of relevant economic, environmental, social, technological and similar policy factors.

***Planning and Conservation League v. Castaic Lake Water Agency* (December 2009) 180 Cal.App.4th 210**

HOLDING: The court rejected challenges to the EIR certified by Castaic Lake Water Agency concerning a water transfer from certain water agencies to Castaic.

DISCUSSION: The court rejected the claim that by carving out and studying the impact of the water transfers to Castaic, Castaic had usurped the power of the Department of Water Resources (DWR) in assessing the impacts of the broader impacts of the Monterey Agreement. The court concluded that the Kern-Castaic transfer has "significant independent or local utility" and was not encompassed by the Monterey Agreement. The court rejected the argument that the EIR did not sufficiently describe the interrelationship between the transfers and the DWR's assessment of the Monterey Agreement. The court also rejected the argument that the "no project" alternative

had to consider not only the no Kern-Castaic transfer, but also the Pre-Monterey Agreement status as well. Finally, the court rejected the claim that the EIR relied upon outdated hydrology models. The fact that a new computer model was developed after the studies were complete does not mean that they have to redo the studies.

(E) Adequacy

Lake Almanor Associates, L.P. v. Huffman-Broadway Group, Inc. **(October 2009) 178 Cal.App.4th 1194**

HOLDING: An EIR consultant is not liable to the developer for damages due to the failure to prepare an EIR in a timely fashion.

DISCUSSION: The county entered a contract with an EIR consultant to prepare an EIR for the plaintiff's 1,400 acre mixed use development. The plaintiff was required to reimburse the county for the costs of the EIR. The consultant failed to produce the promised EIR on schedule. Many months after the missed production deadline, the county sent a notice of termination of the contract. The consultant sought additional time and subsequently submitted a preliminary working draft of an EIR, which was rejected as unacceptable by the county. The county sent a second notice of termination. In the meantime, the developer lost a sale of the property to a third party and sued the consultant for $50 million in damages for breach of contract (as a third party beneficiary), negligence, and negligent interference with prospective economic advantage.

The court held that the developer's claim failed to state a cause of action. The court found that the developer was not a third party beneficiary under the contract. The court also rejected the tort claims on the basis that the consultant owed no duty to the developer.

(I) Certification of Final EIR

Schellinger Brothers v. City of Sebastopol **(December 2009) 179 Cal.App.4th 1245**

HOLDING: The court cannot issue a writ of administrative mandamus to compel a city council to certify an EIR where the council has determined that the pending EIR needs to be revised and recirculated to address new issues.

DISCUSSION: The petitioner was attempting to develop 10 acres with single-family residential units and a neighborhood commercial center. The EIR processing spanned from 2001, when the original development application was deemed complete, until 2007, when the petitioner apparently lost patience with the process when the city council indicated that the EIR should be revised and recirculated for a second time. In the intervening years, the petitioner had modified the project on several occasions (generally reducing the number of units and the square footage of the commercial area) and also went through a year-long mediation process involving the opponents, the city, and a retired judge. The intervening years also included bizarre occurrences, such as the transplanting of endangered species on the property, presumably by project opponents. That led to a criminal investigation by the Department of Fish and Game.

When it appeared that even the "mediated project proposal" was not going to receive a favorable vote, the plaintiff demanded a vote on its earlier proposal. At a subsequent hearing, the city

council indicated that the EIR should be recirculated with additional environmental analysis. The plaintiff refused to fund further environmental review, and instead filed an action to compel the certification of the EIR and a vote on the project pursuant to CCP section 1094.5.

The court found that the claims had no merit. Neither Public Resources Code section 21151.5 nor Government Code section 65589.5 authorized the court to compel the certification of the EIR. The court held that the one-year period referenced in Public Resources Code section 21151.1 is not fixed "in cement." (179 Cal.App.4th at 1261.) The court ruled that Government Code section 65589.5 had no application because the project had neither been rejected nor conditionally approved.

The court distinguished *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, where the court held that a lead agency could be ordered to complete the review process if it refuses to do so. Here, the city was not refusing to complete the process. The petitioner was attempting to force the city to certify the EIR. CEQA precludes a court order dictating how a lead agency should exercise its discretion.

The court also noted that the petitioner had been a willing participant in the processes that had led to the delay. It had modified its project and agreed to participate in the mediation. Much of the delay rested with the petitioner. The court found the petitioner's conduct gave rise to the defense of laches.

§ 11.2.25 Additional Types of EIRs and Negative Declarations

(B) Subsequent EIRs and Negative Declarations

Melom v. City of Madera (Zelman Retail Partners Inc.) **(March 2010) 5th App. Dist., Case No. F055024**

HOLDING: A subsequent EIR was not required for reapportionment of retail project allocating greater square footage to supercenter.

DISCUSSION: The City of Madera certified an EIR for a proposed retail center. Less than a year later, the developer submitted a "refined" site plan in which the total square footage of the Project remained unchanged, but the largest retail space grew from 138,000 to 198,484 square feet, to accommodate a "Super Target." The City approved the project and prepared an addendum to the EIR, concluding that there had been no "substantial changes" to the Project. The plaintiff sued, alleging that the City violated CEQA by approving the project without preparing a subsequent EIR for the project after the square footage had been reapportioned. The plaintiff argued that because the City approved a project that included a so-called supercenter, the City was required to prepare an EIR to address potential urban decay. The trial court denied the petition for a writ of mandate directing the City to set aside its approval.

The court of appeal began its analysis by stating the general rule for preparation of a subsequent or supplemental EIR. According to Public Resources section 21166, when an EIR has been prepared for a project pursuant to CEQA, no subsequent or supplemental EIR is required unless there are substantial changes to the project or new information comes forward. This provides a balance against the burdens created by the environmental review process and gives a reasonable

measure of finality to the results achieved. (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1018.) Contrary to the case cited by the plaintiff, the addition of a so-called "supercenter" to a project does not *automatically* require an analysis of potential urban decay effects. Rather, case law points out that an environmental analysis of urban decay is required if there is either a misdescription of the size of the project or expert evidence that a project might lead to urban decay. Here, no evidence was provided of either proposition.

§ 11.2.30 Project Approval

***Friends of Glendora et al. v. City of Glendora et al.* (March 2010) 182 Cal.App.4th 573**

HOLDING: An appeal fee may be properly imposed by a city on a resident who appealed a construction project approved without an EIR.

DISCUSSION: The plaintiffs filed a complaint for declaratory and injunctive relief and a petition for writ of mandate against the City of Glendora. The complaint alleged two causes of action: (1) the City should have prepared an EIR for a project; and (2) that the City violated CEQA when it assessed a $2,000 fee for filing a CEQA-based appeal of the planning commission's approval of the project. The trial court sustained the City's demurrer on the second cause of action and entered judgment against the plaintiffs on the first cause of action.

The court of appeal first looked to *Sea & Sage Audubon Society, Inc. v. Planning Com* (1983) 34 Cal.3d 412. In that case, the plaintiffs opposed a planned community development project. After the city's planning commission voted to certify the EIR as complete, the plaintiffs mailed a brief letter, stating that they were appealing the commission's certification. However, the plaintiffs did not pay the required administrative appeal fee. Relying on Government Code sections 66452.5 and 66451.2, the California Supreme Court found that a city may impose a reasonable fee in this situation. (*Sea & Sage Audubon*, *supra*, 34 Cal.3d at p. 419.) Because the plaintiffs failed to point to any suggestion that the Legislature intended to foreclose a reasonable appeal fee, the California Supreme Court allowed for a fee.

The plaintiffs in this case contended that *Sea & Sage* did not apply because this was an appeal of a negative declaration (rather than an EIR), which is governed by Public Resources Code section 21151. Additionally, the plaintiffs cited to Public Resources Code section 21089, which allows a city to charge a fee to the proponent of a project for the preparation of a negative declaration. According to the plaintiffs, there was no similar statute allowing for a fee for an appeal.

The court of appeal found that such a fee did not require a specific statutory authorization under CEQA. Just as in *Sea & Sage*, the plaintiffs failed to present evidence to suggest that the Legislature intended to foreclose a city from charging an appeal fee to an individual who wishes to challenge the negative declaration. Thus, the trial court did not abuse its discretion in sustaining the demurrer.

§ 11.2.40 Legal Challenge

(A) Statue of Limitations

Committee for Green Foothills v. Santa Clara County Board of Supervisors **(February 2010) 48 Cal.4th 32**

HOLDING: The California Supreme Court unanimously held, with respect to statutes of limitations in CEQA matters, that a suit must be brought within 30 days of a valid Notice of Determination ("NOD"), regardless of the nature of the CEQA violation asserted.

DISCUSSION: In 2000, Stanford University applied for a community plan and general use permit to construct additional buildings on its campus. An EIR prepared for the overall project acknowledged possible environmental impacts, including that the project would considerably affect public access to recreational facilities. The EIR was certified and the permit was approved; however, one express condition of the permit required the University to develop, in conjunction with the County, two trails in the Santa Clara County trails plan. The County eventually approved an agreement that enforced the trails condition of the permit. The agreement was considered a subsequent implementing activity and not an independent project. With respect to one of the trails, the County prepared a Supplemental EIR. With regard to the other trail, the County determined that no additional CEQA review was necessary because the agreement did not constitute County approval of construction, operation or maintenance of specific trail improvements. Rather, the agreement specified that before improvements would be made to this trail, other agencies would consider the plans of improvement and determine what type and level of environmental review would be needed as required by CEQA. The County thereafter filed and posted a NOD and later an amended NOD specifying the County's actions as to the trail alignments.

The petitioner filed a challenge to the action 171 days after the County had filed and posted the NOD. The petitioner alleged that the County was in violation of CEQA because it approved one of the trails without conducting the requisite environmental review. While the County argued that the action should be barred by the 30-day statute of limitations specified in CEQA code section 21167(b), (c), or (e), the petitioner alleged that it should be afforded section 21167(a)'s 180-day statute of limitations that applies where a project is approved without a determination of its potential environmental impact.

After considering the statutory language of section 21167 and other evidence of legislative intent, the California Supreme Court provided a bright-line rule for statute of limitations in CEQA matters. The key for determining statute of limitations, the Court explained, is "not what type of violation the plaintiff has alleged, but whether the action complained of was disclosed in a public notice." Where public notice is given, swift action by the public can be expected. Where statutory notice is not provided, the public is deemed to have constructive notice only upon the commencement of the project. In that instance, a longer limitations period is applicable. As a consequence, the proper filing of a NOD triggers the 30-day period, regardless of the nature of the CEQA challenge.

The Court further explained that if the 30-day statute of limitations could be defeated by a plaintiff merely alleging that a "*sufficient* determination about potential environmental impacts" had not been made, "the certainty normally afforded by the filing of an NOD would be lost. Developers would have to wait a full 180 days before embarking on a project to avoid potential interruption by litigation. Such delay and uncertainty are precisely what the Legislature sought to avoid when it enacted [CEQA's] unusually short limitation periods. . . ." The Court reaffirmed its bright-line rule that public notice, not the substance, of the determination is relevant and thus held that the 30-day limitations period applies even where a NOD indicates that no additional CEQA review is necessary to address subsequent activities studied in a previous EIR.

Stockton Citizens for Sensible Planning v. City of Stockton **(April 2010), California Supreme Court Case No. S159690**

HOLDING: Flaws in the decision-making process underlying a facially valid Notice of Exemption ("NOE") do not prevent the NOE from triggering the 35-day period for filing a lawsuit.

DISCUSSION: In this case, the city's director of community development purported to approve the construction of a Super Wal-Mart on the basis of a previously approved (and CEQA reviewed) master development plan. Under the master development plan, the design review board and the director were required to approve specific projects if they were consistent with the master development plan. Such approvals were subject to appeal to the city council. Based upon the city's interpretation of the master development plan, the director treated the approval of the Wal-Mart Supercenter as a ministerial action, since he only was determining consistency with the master development plan. After he approved the construction, the City filed a NOE with the county clerk.

The plaintiffs filed their CEQA challenge nearly six months later. In attempting to avoid the application of the 35-day statute of limitations, the plaintiffs argued that because the director's approval was invalid and ineffective for various reasons, and because the NOE was defective in form and content, the city was not entitled to rely upon the 35-day statute of limitations.

While both the trial court and the appellate court agreed with the plaintiffs, the California Supreme Court did not. Provided the NOE is facially valid, flaws in the underlying decision-making process did not invalidate the effect of the NOE. The Court rejected the argument that the director's actions did not constitute "an approval." The Court also held that the NOE was not defective for failing to identify the retail use as a Wal-Mart. The Court found that although the NOE could have been clearer and more informative, it was sufficient to meet the requirements of CEQA Guideline 15062(d).

(D) Procedural Requirements

County of Sacramento v. Superior Court (Forster-Gill, Inc.) **(December 2009), 180 Cal.App.4th 943, 103 Cal.Rptr.3d 449**

HOLDING: In a CEQA challenge, the request for a hearing under Public Resources Code section 21167.4 must be in writing.

DISCUSSION: A CEQA petitioner had telephoned the court and reserved a hearing date on its CEQA claim before the 90-day period expired, but had not filed and served a notice of the hearing within that deadline. After the deadline, the parties had submitted a stipulation extending the time period to prepare the administrative record, and had noted in the stipulation that the petitioner had "previously reserved" a hearing date, but that the date was premature and should be moved back three months. The trial court denied a motion to dismiss the petition on the basis that section 21167.4 does not expressly state that the request must be in writing. The county and the real parties in interest filed an appellate writ. The writ was granted. The appellate court noted that, while the statute requiring that the request for the hearing be made does not specify that the request must be in writing, subsection (b) of section 21167.4 requires that the petitioner must serve a notice of the request at the time the petitioner requests the hearing. That language "plainly contemplates a written request." The court explained that holding in *McCormick v. Board of Supervisors* (1988) 198 Cal.App.3d 352, that a petitioner need only take affirmative steps sufficient to place the matter on the court's calendar is no longer good law because it predated the adoption of subsection (b) of section 21167.4.

With regard to the stipulation the parties had entered relating to the hearing date after the 90 days had passed, the court held that "a stipulation regarding a hearing date (or briefing schedule for that matter) does not 'supplant' the statutory requirement that the petitioner request a hearing date and serve notice of that request at the time the request is filed." (180 Cal.App.4th at 952). "Whether the parties stipulated to alter the presumptive time periods in subdivision (c) has nothing to do with whether [the petitioner] complied with the requirements of subdivision (a) and (b) of section 21167.4." (*Id.*)

The petitioner argued that it was inequitable to allow the dismissal given that the county and real parties in interest had signed stipulations relating to the record preparation and the proposed hearing date. The court noted that there was no evidence to suggest that the petitioner was lulled into a false sense of security about the need to comply with subsection (a) of section 21167.4.

11.2.45 National Environmental Policy Act (NEPA)

***South Fork Band Council of Western Shoshone of Nevada, et al. v. United States Department of the Interior, et al.* (9th Cir.) (December 2009) 2009 U.S. App. LEXIS 26329**

HOLDING: Ninth Circuit held that district court should have issued a preliminary injunction in favor of the Tribes challenging an EIS for a mining expansion project, where the Tribes had demonstrated that ore transportation and mine dewatering would have environmental impacts not assessed in the EIS and where the EIS did not properly analyze PM2.5.

DISCUSSION: Various Tribes challenged the Bureau of Land Management's (BLM) action in approving a final EIS for a gold mining expansion project that would extend an existing mining operation of a new 850-acre mining pit area. The Tribes considered the expansion area to be a sacred site that could be damaged by the environmental effects of the expansion.

The Tribes asserted claims under the Federal Land Policy Management Act and the Religious Freedom Restoration Act. They claimed the mine expansion would create a substantial burden on the exercise of their religion. Based upon the extensive consultation that had occurred with

the Tribes over a two-year period, the Ninth Circuit concluded the preliminary injunction was properly denied as to these claims.

As to the NEPA claims, the Ninth Circuit concluded that the district court had erred in denying the preliminary injunction. It focused on three flaws in the EIS.

First, the EIS did not evaluate the impacts of transporting ore 70 miles to an off-site facility for processing. There would be two shipments a day for 10 years. The BLM said that, because this was simply a continuation of the existing levels of ore transport, the EIS did not have to evaluate it. The Ninth District disagreed. "[T]he mine expansion will create ten additional years of such transportation, that is, ten years of environmental impacts that would not be present in the no-action scenario." (*Id.* at 725-726.)

The Ninth Circuit also held that the EIS did not sufficiently mitigate the impacts of mine dewatering on springs and groundwater in the area. Finally, the Ninth Circuit also found that the EIS focused only on PM10 and not on PM2.5. It ruled that the BLM should perform a separate modeling of PM2.5.