# Land Use and CEQA Litigation Update

**Friday, October 7, 2016 General Session; 8:00 – 10:15 a.m.**

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**Notes:**

DOWNEYBRAND

# League of California Cities

# CEQA & Land Use Litigation Update

**Cases Reported from**
**May through August 2016**

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**Friday, October 7, 2016**
**8:00 – 10:15 a.m.**
**Long Beach Convention Center**
**Long Beach, California**

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# CEQA & LAND USE LITIGATION UPDATE[1]

## I. PUBLISHED CEQA DECISIONS

Between May and August 2016, California courts of appeal published thirteen decisions under the California Environmental Quality Act (CEQA), granting relief in favor of the petitioner (and against the public agency) in only four cases. Of the four cases decided against public agencies, three of them involved challenges to climate or energy impacts in environmental impact reports.

### A. Scope of CEQA

#### 1. *Delaware Tetra Technologies, Inc. v. County of San Bernardino* (2016) 247 Cal.App.4th 352

- Memorandum of understanding governing groundwater pumping project did not constitute a "project" under CEQA as it did not foreclose alternatives or mitigation measures, it did not commit the agency to a particular course of action, and it ensured the agency retained full discretion to approve, deny, or condition the project.

This case is one of six[2] related actions before the Fourth District Court of Appeal challenging the Cadiz Valley Water Conservation, Recovery, and Storage Project, which proposed to install 34 new wells on Cadiz's land in Eastern San Bernardino County to extract an average of 50,000 acre-feet of groundwater from the underlying aquifer system for 50 years. The project was proposed as a public/private partnership between Cadiz and the Santa Margarita Water District (SMWD) that would deliver the water for municipal and industrial uses in Southern California. This case (and a related but unpublished case) involved the challenge by Delaware Tetra Technologies, Inc. to the County of San Bernardino's 2012 approval of a pre-project Memorandum of Understanding (MOU) among the County, Cadiz, SMWD, and the Fenner Valley Mutual Water Company. The County determined that the MOU did not constitute "approval" of a "project" subject to CEQA. Tetra challenged that determination claiming that the County should have conducted full environmental review prior to approving the MOU.

Because the Cadiz Project is located within San Bernardino County, it is subject to the County's Desert Groundwater Management Ordinance (Ordinance), which requires operators of groundwater wells to either secure a permit from the County or qualify for an "exclusion." SMWD and Cadiz had intended to proceed under the exclusion process based on a comprehensive Groundwater Monitoring, Management, and Mitigation Plan (GMMMP) to be negotiated with the County. In May of 2012, the County approved an MOU for the project in which the parties agreed that a GMMMP would be developed and that the GMMMP would govern the operation and management of the project. At that time, SMWD was in the process of undertaking environmental review as lead agency for the project and had released the draft Environmental Impact Report (EIR), but had not yet certified a final EIR.

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[1] Authored by Downey Brand attorneys Christian Marsh, Donald Sobelman, Kathryn Oehlschlager, Arielle Harris, and Pejman Moshfegh.

[2] The Court of Appeal published two of the six cases, this one and *Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th 326, summarized later in this report.

Relying on the California Supreme Court's opinion in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, Tetra argued that approval of the MOU constituted "approval" of a "project" requiring environmental review. Tetra claimed that the MOU was one of four governmental approvals necessary for the project to proceed, and, therefore, environmental review was required for the earliest commitment to the project. The court disagreed, finding that MOU merely established a process for completing the GMMMP and that the interim County retained *full discretion* to consider the final EIR and then to approve, disapprove, or condition the project.

The court distinguished the facts from those in *Save Tara* (where the City of West Hollywood contractually bound itself to sell land) and *RiverWatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186 (where the water district contractually bound itself to deliver water for 60 years). Unlike those cases, the MOU here would "not foreclose alternatives or mitigation measures" or otherwise "commit the County to a particular course of action that will cause an environmental impact." The court analogized the MOU to the facts presented in *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, where the appeals court concluded that a highly detailed term sheet setting forth the terms of a transaction to develop a football stadium was not a project as it only bound the parties to negotiate in good faith, and did not make any of its terms binding on the parties.

### 2. *California Building Industry Association v. Bay Area Air Quality Management District* (2016) 2 Cal.App.5th 485

- Air District's CEQA thresholds for toxic air contaminants and sensitive receptors held invalid to the extent they sought to mandate that lead agencies apply the thresholds to assess the effects of existing environmental conditions on future users or occupants of a project.

- The thresholds need not be invalidated in their entirety because there are legitimate circumstances where the thresholds could be used consistent with CEQA—e.g., voluntarily for informational purposes or to measure the extent a project might exacerbate existing conditions.

On remand from the California Supreme Court, the First Appellate District issued its second ruling in *California Building Industry Association v. Bay Area Air Quality Management District*. In this case, the California Building Industry Association (CBIA) challenged the Bay Area Air Quality Management District's (BAAQMD's) 2010 "CEQA Air Quality Guidelines"—specifically, the Guidelines' thresholds and methods for assessing the effects of siting new sensitive receptors (residences) near existing sources of toxic air contaminants and other harmful air emissions, such as freeways. In December 2013, the California Supreme Court held that CEQA "does not generally require an agency to consider the effects of existing environmental conditions on a proposed project's future users or residents" (so-called 'CEQA-in-Reverse'). Requiring analysis of the existing environment's effects on a project, the Supreme Court emphasized, would "impermissibly expand the scope of CEQA." The Supreme Court remanded

the case to the First Appellate District to apply its general ruling to the specific aspects of the BAAQMD Guidelines still in dispute.

BAAQMD argued on remand that despite the Supreme Court's ruling, the receptor thresholds adopted by BAAQMD did not need to be set aside "because there are legitimate circumstances in which they could be utilized during the CEQA process." The appeals court agreed, holding that:

- While the Supreme Court's ruling forecloses an agency from requiring private applicants or other agencies to apply the thresholds, "an agency may do so voluntarily on its own project and may use the Receptor Thresholds for guidance";

- Agencies can rely on the receptor thresholds to address the degree to which a project might worsen (or "exacerbate") environmental conditions;

- Agencies can rely on the receptor thresholds to "assess the health risks to students and employees at a proposed school site," a circumstance in which the CEQA statute specifically requires consideration of the environmental effects of locating new receptors at a proposed project site; and

- The thresholds may be used to "evaluate whether a housing project [is] exempt from CEQA review."

BAAQMD further argued that the threshold could be used to "determine whether a particular project is consistent with a general plan." The court declined to rely on this reasoning, as it was too speculative.

Ultimately, the court ruled that, "[b]ecause the Receptor Thresholds themselves may be used under certain circumstances consistent with CEQA, they . . . need not be set aside in their entirety." Nevertheless, because BAAQMD's Guidelines remained "misleading" in scope, the court instructed the trial court to partially grant the writ and invalidate those portions of the Guidelines "suggesting that lead agencies should apply the Receptor Thresholds to routinely assess the effect of existing environmental conditions on future users or occupants of a project."

Finally, with respect to an award of attorneys' fees, the court noted that CBIA had now "prevailed in part on one of the issues it raised in this proceeding" and that "[p]artially successful plaintiffs may recover attorney fees under Code of Civil Procedure section 1021.5." Therefore, on remand, the trial court would need to "determine CBIA's entitlement to attorney fees on appeal and the amount of any such fees (including fees for proceedings in the Supreme Court), in addition to the fees it awards, if any, for the litigation in the trial court."

## B. Exemptions

### 1. *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809

- The Class 3 categorical exemption for "construction and location of limited numbers of new, small facilities or structures" can be applied to commercial projects that are similar to stores, motels, offices, and restaurants.

- General effects of an operating business, such as noise, parking and traffic, cannot serve as unusual circumstances in and of themselves.

Respondents and real parties in interest Redondo Auto Spa and Chris McKenna (collectively Auto Spa) filed an application with the City of Redondo Beach to build a 4,080 square-foot, full-service car wash and small coffee shop on a property that was zoned for commercial uses. The City issued Auto Spa a conditional use permit (CUP), found that the project was categorically exempt under CEQA Guidelines section 15303(c), and imposed several conditions concerning noise, operating hours, and a vehicle limit of 10,000 cars per month. Appellants, five homeowners of the parcels adjacent to the proposed car wash and coffee shop, filed a petition for writ of mandate challenging the City's CEQA determination and issuance of the CUP. The trial court denied the writ petition, upholding the City's use of an exemption for the project and the issuance of the CUP.

The Second Appellate District began its analysis by clarifying the standard of review. The court explained that where the argument turns only on the interpretation of language within the CEQA Guidelines, the issue is a question of law. Where the agency makes factual determinations as to whether the project fits within an exemption, the court instead determines whether the record contains substantial evidence to support that decision. The core dispute over application of the Class 3 exemption involved three issues: (1) whether the project generally fits within the definition of "commercial buildings" as it is used in Guidelines section 15303; (2) whether the exemption can be applied to a single commercial building in excess of 2,500 square feet; and (3) whether the car wash and coffee shop would be utilizing "hazardous chemicals."

As to the first issue, the appellants characterized the car wash operation as requiring the installation of industrial equipment such as blowers, vacuums, air nozzles, and waste treatment, which appellants believed removed the project from outside the purview of the exemption. Appellants also believed that the car wash use was not comparable to the example uses listed in Section 15303(c), which include stores, motels, offices, restaurants, or similar structures. The court rejected appellants' argument finding that the car wash and coffee shop combination qualified as a commercial use. The court also held that the equipment needed for the car wash was not substantially different from the types of equipment associated with other commercial uses.

As to the issue of square footage limitations, appellants argued that Section 15303(c) could not be applied to a single commercial building that exceeds 2,500 square feet. Citing previous case law, the court rejected that claim stating that the exemption covers projects involving the

construction of one to four buildings in an urbanized area where the total floor area does not exceed 10,000 square feet.

Finally, on the issue of the use of hazardous substances, appellants argued that the car wash would be using hazardous chemicals that would disqualify it from coverage under the exemption, which only covers uses "not involving the use of significant amounts of hazardous substances." The court pointed out that the appellants had presented no evidence suggesting that the soaps and detergents used by the car wash are hazardous or that any significant amount of hazardous substances would otherwise be used. Instead, the evidence showed that the soaps were biodegradable and verified as nonhazardous.

Appellants also claimed the presence of "unusual circumstances" under Guidelines section 15300.2(c). Under the first part of the two-part test announced in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086—whether any unusual circumstance is present—the court found that "there is nothing particularly unusual about the proposed car wash and coffee shop," that the evidence in the record established that there are many other car washes in the surrounding area, and that the site itself was a car wash and snack bar for nearly 40 years. The court also rejected appellants' claims that the "large air blowers and other outdoor activities" made the car wash qualitatively different from the other uses provided in the Class 3 exemption. Similarly, the court stated that the "general effects of an operating business, such as noise, parking and traffic, cannot serve as unusual circumstances in and of themselves."

Next, the court looked at appellants' arguments under the second prong of the test in *Berkeley Hillside,* to see whether appellants had presented "substantial evidence indicating (1) the project will actually have an effect on the environment and (2) that effect will be significant." Appellants raised concerns regarding noise and traffic, claiming that the operation of the car wash would violate the City's interior and exterior noise limits at the abutting property line and that the car wash would adversely impact local traffic and pose public safety concerns. The court rejected both claims. On the issue of noise, the court clarified that the finding of environmental impacts must be based on the project *as approved*, and that here the condition of approval imposed by the City mandated that the project not exceed the City's noise ordinance decibel levels. As to traffic, appellants argued that the car wash and coffee show was "inefficient" and would cause backups "within the project property." The court swiftly rejected appellants' argument, finding that the claim was speculative, contradicted by facts in the record, and that there was no authority that parking or traffic issues within the property qualified as "traffic" under CEQA, which instead addresses the flow of traffic in public spaces.

### C. Negative Declarations

#### 1. *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677

- A layperson's opinion that a project would lead to urban decay does not qualify as "substantial evidence."

- A project's inconsistencies with economic development policies and goals in a general plan do not implicate CEQA; as such, the abuse of discretion standard of review applies when reviewing a project's consistency with such policies and goals.

In this case, the County of San Bernardino approved a 9,100 square foot general retail store in the rural community of Joshua Tree, which was intended for occupancy by national chain Dollar General. In approving the project and granting the applicant a conditional use permit, the County prepared and adopted a mitigated negative declaration (MND). The Joshua Tree Downtown Business Alliance, an association of local business owners and residents, filed a petition for writ of mandate, challenging the County's decision on several grounds: (1) the County failed to adequately consider the project's potential to cause urban decay; (2) an EIR was required because substantial evidence supported a fair argument that the project would cause urban decay; (3) the project was inconsistent with the various policies and goals contained in the Joshua Tree Community Plan (Community Plan), which was a part of the County's general plan; and (4) the County improperly attempted to conceal the intended occupant's identity.

The lower court held that the County had adequately considered urban decay, but that lay opinions offered by a local business owner constituted substantial evidence of a "fair argument" that the project might cause significant urban decay. Consequently, the trial court directed the County to set aside its approval and prepare an EIR. On appeal, the Fourth Appellate District agreed that the County had adequately considered the issue of urban decay, but broke with the trial court on the impact of the lay opinion evidence.

One commenter during the MND process—a local business owner who was a former assistant attorney general in the Oregon Department of Justice—had commented extensively on the project's potential to cause urban decay. The Fourth Appellate District held that, although members of the public may provide opinion evidence where special expertise is not required, analysis of urban decay requires relevant expert opinion such as from an economist. Because the commenter—as a business owner and lawyer—lacked expertise in any relevant area, she was not qualified to opine on urban decay and her comments did not constitute substantial evidence. Moreover, the commenter "did not offer any particular factual basis" for her opinions. For example, she did not claim that any business in Joshua Tree had suffered due to competition from a national chain and she had not undertaken any surveys or studies. As such, "whether viewed as lay or expert opinions, her conclusions were speculative."

The appeals court also denied the Alliance's claim that the project was inconsistent with various policies and goals in the Community Plan. Rejecting the Alliance's argument that general plan consistency is reviewed under CEQA's "fair argument" standard, the appeals court applied the "abuse of discretion" standard of review that normally applies to general plan claims and found that the County could reasonably have concluded that the project was not inconsistent with the Community Plan's policies and goals.

### 2. *Friends of the Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457

- Where trial court grants petition for writ of mandate and requires lead agency to vacate approvals of an MND and prepare an EIR, appeal is not rendered moot just because an EIR for the project was certified if the lead agency has neither vacated the prior approvals nor evaluated the project in light of the EIR.

- Where a resource is neither deemed nor presumed to be a historical resource for purposes of CEQA, a lead agency's determination as to whether the resource is an historical resource is subject to "substantial evidence," not "fair argument" review even in the context of an MND.

In 2013, the City of San Jose proposed to demolish the Willow Glen Railroad Trestle—a wooden railroad bridge built in 1922 to service industry—and replace it with a pedestrian bridge that would be part of the City's trail system. The City issued an initial study and MND for the project that found no impact on historical resources. This finding relied on two documents obtained by the City in 2004, when it proposed a trail project that did not threaten the Trestle's existence: (1) a one-page letter from a State Historic Preservation Officer stating that the proposed project would not affect any "historic properties"; and (2) a one-page evaluation by a consulting architectural historian who opined that the Trestle's design was based on standard plans for wood trestle bridges, the trestles and superstructure were likely replaced during the previous 30 to 40 years, and the Trestle was "a typical example of a common type and has no known association with important events or persons in local history."

During the comment period on the MND, the City received numerous comments, including from a local historian, a historical architect, and an environmental architect. These comments described the uniqueness and historic importance of the Trestle, asserted that the Trestle qualified for listing in the state Register of Historical Resources and that the 2004 documentation was outdated and contradicted by more recent reports and documents. In January 2014, the City Council adopted the MND, finding that "the existing wood railroad trestle bridge is not a historic resource" because "the design is based on standard plans for wood trestle bridges and has no known association with important persons; the bridge materials were likely replace[d] during the last 30 or 40 years; the trestle is not unique and is unlikely to yield new, historically important information; and the trestle did not contribute to broad patterns of California's history and cultural heritage."

Petitioner Friends of the Willow Glen Trestle filed a petition for writ of mandate in Santa Clara County Superior Court, asserting that there was substantial evidence to support a "fair argument" that the Trestle was a historical resource, and therefore an EIR was required. In August 2014, the trial court determined that the fair argument standard applied and that the evidence presented by petitioner met that standard. As a result, the court granted the petition and ordered the City to set aside the approvals for the project and MND and to prepare an EIR. The City appealed.

On appeal, the City first argued that the case was moot because the City had already certified an EIR for the project. The appeals court disagreed. Even though an EIR had been certified, the City had neither vacated the original project approvals nor reconsidered the project in light of the

EIR's analysis. Because the City would not be required to take those actions if it succeeded on appeal, the appeal was not moot.

The appeals court then addressed the issue of whether the fair argument or substantial evidence standard applies to a lead agency's determination that a resource is an "historical resource" under CEQA section 21084.1. The court first rejected the City's claim that it was bound to adopt the Fifth Appellate District's holding in *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039—which held that the substantial evidence standard applies to this determination—simply because the California Supreme Court "allegedly approved of the holding on this issue" in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086. Although *Berkeley Hillside* referenced *Valley Advocates* as support for the Supreme Court's interpretation of CEQA's categorical exemptions, it did not consider *Valley Advocates'* holding. As such, the Sixth Appellate District felt the need to resolve the issue itself in this case.

The court began by examining the language of Section 21084.1, which provides that: (1) a resource listed in (or determined to be eligible for listing in) the California Register of Historical Resources is deemed to be a historical resource; and (2) a resource included in a local register of historical resources, or deemed significant pursuant to statutory criteria, is presumed to be historically or culturally significant, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant. Section 21084.1 further provides that the fact that a resource is neither deemed nor presumed to be a historical resource under these criteria—as was the case with the Trestle at issue here—"shall not preclude a lead agency from determining whether the resource may be an historical resource" for CEQA purposes.

The appeals court found the treatment of "presumed" historical resources in Section 21084.1 to be instructive. The fact that historical resources are only "presumed" historical based on a "preponderance of the evidence" supports the conclusion that such finding "would not be reviewed under the fair argument standard":

> It would make no sense for the statute to permit the lead agency to make a finding based on a preponderance of the evidence that a resource is not a historical resource if the fair argument review standard would generally result in the invalidation of that finding…. If the lead agency's standard for its decision is 'preponderance of the evidence,' the standard of judicial review logically must be whether substantial evidence supports the lead agency's decision, not whether a fair argument can be made to the contrary.

The appeals court noted that this interpretation was consistent with both CEQA Guidelines section 15064.5(a)(3)—which requires the lead agency's determination regarding a historical resource to be "supported by substantial evidence in light of the whole record"—and with the Fifth Appellate District's decision in *Valley Advocates*. On remand, the trial court was ordered to: (1) vacate its judgment granting the petition; and (2) determine whether the City's adoption of the MND was supported by substantial evidence that the Trestle is not a historical resource.

## D. Environmental Impact Reports

### 1. *Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th 326

- The public agency that is part of a public/private partnership that will be carrying out a project may serve as lead agency for the purposes of environmental review for that project, even when beyond its jurisdiction.

This case is one of six related actions before the Fourth Appellate District challenging the Cadiz Valley Water Conservation, Recovery, and Storage Project, which proposed to install new wells and pump groundwater from an underground aquifer located in eastern San Bernardino County through pumps located on private property owned by Cadiz Inc.[3] This case involves a challenge by the Center for Biological Diversity, San Bernardino Valley Audubon Society, and Sierra Club, San Gorgonio Chapter, and the National Parks Conservation Association (collectively Petitioners) against SMWD, the SMWD Board of Directors, and the County of San Bernardino. The Petitioners challenged SMWD's certification of the final EIR and approval of the project.

The project involves the construction of approximately 34 new wells on Cadiz's land in San Bernardino County to extract an average of 50,000 acre-feet[4] of groundwater annually for 50 years. The project was proposed to be managed and operated by Fenner Valley Mutual Water District, a private, nonprofit entity formed by Cadiz and was subject to the County's Desert Groundwater Management Ordinance (Ordinance). In June 2011, the County and SMWD executed a memorandum of understanding that provided that SMWD would act as the lead agency, and the County would act as a responsible agency (the 2011 Memorandum). In December 2011, SMWD released the draft EIR for public review and comment, and on July 31, 2012, SMWD certified the final EIR. Prior to certification of the EIR, the County, SMWD, Cadiz, and Fenner entered into a separate memorandum of understanding (2012 MOU) setting forth the terms of the parties' agreement concerning the application of the County's Ordinance to the project, and the use of the exclusion process under that Ordinance. Under the terms of the 2012 MOU, the project was required to obtain approval by the County of a Groundwater Monitoring, Management, and Mitigation Plan to satisfy the terms of the Ordinance. The County would consider whether to approve GMMMP after SMWD's certification of the EIR and approval of the project. At the time that Petitioners initiated this lawsuit, that approval had not yet been granted.

Petitioners' core contention was that the County—and not SMWD—should have acted as the lead agency for the project, and that the improper designation of SMWD as lead agency "so tainted the entire environmental review process" that a new EIR had to be prepared by the County. The trial court had agreed that the County should have acted as the lead agency, but ultimately found that no prejudice resulted from the designation of SMWD as lead agency. The

[3] The companion case, *Delaware Tetra Technologies, Inc. v. County of San Bernardino* (2016) 247 Cal.App.4th 352, is summarized in Section I.A.1, above.

[4] One acre-foot equals about 326,000 gallons, or enough water to cover an acre of land, about the size of a football field, one foot deep.

appeals court, however, concluded that there was no error in designating SMWD as lead agency, and thus no need to evaluate whether prejudice occurred.

Public Resources Code section 21067 defines the lead agency as "the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment." Section 15051 of the CEQA Guidelines further elaborates this requirement by setting forth the criteria for determining what agency should act as the lead agency, including: (a) if a public project, the agency that will carry out the project; (b) if a private project, the agency with the "greatest responsibility for supervising or approving the project as a whole"; or (c) if two agencies have an "equal claim," the agency that acts "first" on the project. And where these provisions leave two or more public agencies "with a substantial claim to be the lead agency," the agencies may designate one as the lead agency by agreement (Section 15051(d) of the CEQA Guidelines). The June 2011 MOU did just that.

The court concluded that SMWD was correctly designated as the lead agency under Section 15051(a), (b), and (d). The court's holding clarified for the first time that where a project will be carried out jointly between a public agency and a nongovernmental person or entity, the agency that will serve as the lead agency for purposes of the environmental review for the project may be: (1) the public agency that is a part of the public/private partnership; or (2) the public agency with the greatest responsibility for supervising or approving the project as a whole. The court went on to hold that SMWD was correctly designated as the lead agency under either prong. The court listed in considerable detail all of SMWD's responsibilities over the project, noting that whereas the County has primary authority over the pumping of groundwater, that SMWD has far more authority over the project as a whole (which included conveyance and deliveries as well). Finally, the court clarified that Section 15051(d), which authorizes two or more agencies to enter into an agreement designating one as the lead agency so long as each agency has a "substantial claim," *does not* require that each agency have an "equal claim" to lead agency status (as is the case under Section 15051(c)).

Petitioners' second argument was that the EIR's project description was inaccurate and misleading because it stated that the "fundamental purpose of the project is to save substantial quantities of groundwater that are presently wasted and lost to evaporation by natural processes." Petitioners argued that the project could not satisfy this purpose because it would not "save" water from evaporation in an amount equal to the water being pumped from the aquifer. The court disagreed, concluding that the project was consistent with the EIR's purpose and objectives because it would conserve water that would otherwise be lost to evaporation and improve water supplies throughout Southern California.

Petitioners' third argument was that the EIR's description regarding the total duration of the project was unstable, not finite, and misleading, because as Petitioners contended the project could exceed its initial 50-year term. The court rejected Petitioners' argument, finding that the EIR set a definite length of time during which pumping may occur, and that any additional time permitted for pumping *would not* alter the total amount of water that may be withdrawn from the aquifer. Further, the EIR provided that any extensions of the project term would require further, separate environmental review. Finally, the court held that "the possibility of an extension of the term of the Project" is "far too speculative to require environmental analysis at this point."

Finally, Petitioners claimed that the project would pump more water from the aquifer than is contemplated by and evaluated in the EIR. The court also rejected this argument, finding that the EIR and its supporting documents do not permit withdrawal of water in excess of the amounts specified in the EIR.

### 2. *Spring Valley Lake Association v. City of Victorville* (2016) 248 Cal.App.4th 91

- Where a greenhouse gas (GHG) impacts analysis asserts that those impacts are below the threshold of significance due to the project's exceeding of California's Title 24 Building Energy Efficiency Standards, record must include substantial evidence demonstrating the project's exceedance of those standards.

- Where a general plan requires that all new commercial development generate electricity on-site to the maximum extent feasible, a bald claim that on-site electricity generation is infeasible due only to cost considerations does not constitute substantial evidence supporting a finding of general plan consistency.

- Under the Subdivision Map Act, the legislative body of a city or county is required to make an affirmative finding for each of the items enumerated under Government Code section 66474(a)-(g) before approving a tentative map (or a parcel map for which a tentative map was not required).

A local association challenged the construction of an approximately 215,000 square foot commercial retail development in the City of Victorville, which included an approximately 185,000 square foot Wal-Mart store. The challenge included claims under CEQA, state Planning and Zoning Law provisions concerning general plan consistency, and the Subdivision Map Act.

The San Bernardino County Superior Court granted the petition in part, holding that (1) the EIR failed to adequately analyze both the project's impacts on GHG emissions and its consistency with the general plan's on-site electricity generation requirement, and (2) there was insufficient evidence to support a finding that the project's parcel map and zone change were consistent with the general plan's on-site electricity generation requirement. The lower court rejected the project opponent's other claims: that the City violated CEQA by failing to recirculate the EIR after revising the EIR's analysis of numerous project impacts; and that the City violated the Subdivision Map Act by not making all of the findings specified in Government Code section 66474. The project opponent and Wal-Mart Stores, Inc. (real party in interest) cross-appealed.

Wal-Mart sought reversal of the lower court judgment that found the EIR's GHG emissions impacts analysis inadequate, claiming there was substantial evidence in the record to demonstrate compliance with a general plan policy incorporating state energy efficiency standards. The EIR's GHG impacts analysis had relied on compliance with this policy to demonstrate that the project's GHG impacts were below the threshold of significance. However, the court rejected Wal-Mart's argument, finding several inconsistencies in the record regarding the project's actual capacity to meet the energy efficiency standards.

The EIR's air quality analysis discussed the project's GHG emissions impacts, consistent with CEQA Guidelines section 15064.5(b), and concluded that the project (1) did not substantially increase GHG emissions over baseline, (2) would support and not hinder the state's GHG reduction goals, and (3) that although there were no local or regional GHG reduction mitigation or reduction plans, the project's design features would likely comply with any future adopted plans. Notably, each of the City's conclusions was partially dependent on the project's compliance with a general plan policy that requires all new commercial construction in the City to attain a 15 percent efficiency increase over 2008 Title 24 (Cal. Code Regs.) Building Energy Efficiency Standards. The court found that the City's conclusions in this regard were not supported by the record. In two separate places, the EIR stated that the project would achieve only a minimum of 10 percent increased efficiency over the Title 24 Standards. In another, it stated the project would achieve a minimum of 14 percent increased efficiency. Finally, in response to a comment, the City acknowledged that the project was "currently not in conformity" with the general plan policy and that "several of the project's current energy efficient measures *likely* meet the 15% requirement" (emphasis added). The appeals court held that, at most, the record showed that the project may comply with the policy, not that it will comply, and therefore the City's determination that the project will have no significant GHG emissions impacts was not supported by substantial evidence.

The appeals court also affirmed the trial court's ruling that there was no substantial evidence to support the City's finding of consistency with another general plan requirement—that all new commercial or industrial development generate electricity on-site to the maximum extent feasible. The EIR explained that the project was being developed as "solar ready," but concluded that it was infeasible for the City to require rooftop solar panel installation due to uncertainties concerning the availability of tax credits and other financial incentives. The court of appeal held this was insufficient, noting that the EIR also stated that "there are many factors to be considered in determining the feasibility of solar power generation," but failed to state what those factors might be or to discuss their application to this project. The EIR also did not include any discussion of the feasibility of other types of on-site electricity generation, such as wind power. For these reasons, the City could not demonstrate general plan consistency and therefore failed to comply with both CEQA and the Planning and Zoning Law requiring consistency (CEQA Guidelines section 15125(d); Govt. Code sections 65860(a), 66473.5).

Lastly, the appeals court partially reversed the trial court's ruling on recirculation of the EIR, holding that certain revisions to the EIR constituted "significant new information" within the meaning of Section 21092.1 of CEQA. The appeals court held that revisions to the air quality impacts analysis added analysis of the project's consistency with several general plan policies and implementation measures and—without recirculation—deprived the public of a meaningful opportunity to comment on that information. Similarly, recirculation was required for revisions to the hydrology and water quality impacts analysis that included a "complete redesign" of the project's stormwater management plan and essentially replaced 26 pages of the EIR's text with 350 pages of technical reports.

The appeals court also held that the City violated the Subdivision Map Act by failing to make all of the findings specified in Government Code section 66474 when it approved the parcel map for the project. On its face, Section 66474 requires only that a city *deny* approval of a parcel map

(or a tentative map) *if it makes* any one of seven findings enumerated at subsections (a)-(g), concerning consistency with general and specific plans, site suitability, conflicts with public access easements, and impacts on the environment, wildlife, or public health. The statute does not explicitly address whether a city must *affirmatively* make those findings before *approving* a map. However, the court concluded that affirmative findings are, in fact, required for each of Section 66474's enumerated subsections. In reaching this conclusion, the court relied on the requirements of a related Government Code section 66473.5 (which requires affirmative findings as to general and specific plan consistency), a 1975 Attorney General opinion stating that both sections require affirmative findings (58 Ops. Cal. Atty. Gen. 21, 28 (1975)), and case law and secondary source authority supporting the Attorney General's interpretation.

### 3. *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256

- Adoption of an addendum to address an approved EIR's inadequate analysis of energy impacts fails to comply with CEQA.

- EIR's analysis of energy use failed to include a separate section analyzing energy impacts and did not include a calculation of the energy use attributable to vehicle trips, operations, or construction, which is necessary to an adequate impacts analysis.

In 2011, Costco applied for a use permit and site rezone to allow construction of a 148,000-square-foot retail facility—including a warehouse store, over 600 parking stalls, and a 16-pump gas station—in the City of Ukiah. In December 2013 and January 2014, the City adopted the necessary rezoning legislation, certified the EIR, and adopted a statement of overriding considerations. Ukiah Citizens for Safety First, a local citizens group, filed suit to challenge the EIR in the Mendocino County Superior Court. Shortly after the suit was filed, the Third Appellate District issued its opinion in *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173 (CCEC). The City concluded that the *CCEC* decision required "a more detailed discussion of energy use than was previously understood at the time the EIR was certified," and thereafter prepared an addendum and lodged the addendum with the trial court, in an effort to satisfy the more exacting standard articulated in *CCEC*.

Petitioner argued at trial that the EIR did not properly identify and analyze the project's potentially significant energy impacts, and that the addendum prepared by the City – following certification of the EIR and approval of the project—was not properly a part of the administrative record concerning the EIR's adequacy. The trial court, however, considered the addendum, found the energy impacts analysis to be adequate, and denied the petition in its entirety. Petitioner appealed.

The First Appellate District reversed, holding that the EIR did not adequately analyze the potential energy impacts of the project. The court noted the requirements contained in Public Resources Code section 21100(b)(3) (an EIR must include a statement concerning mitigation measures "to reduce the wasteful, inefficient, and unnecessary consumption of energy") and in Section 15126.4 and Appendix F of the CEQA Guidelines (requiring EIR to consider "potentially significant energy implications of a project"). Here, the EIR did not contain a separate section analyzing energy impacts, but instead mentioned them throughout the EIR.

Notably, the EIR did not include a calculation of the energy use attributable to vehicle trips generated by the project nor of the operational and construction energy use of the project, which the *CCEC* opinion found necessary to an adequate energy impacts analysis. The court concluded that the EIR held deficient in *CCEC* was "in all material respects the same" as the EIR for the Costco project.

The addendum prepared by the City to address the *CCEC* decision did not solve the problem. First, the addendum was prepared after the EIR was certified by the City. As such, the addendum was not a part of the administrative record concerning that certification and could not be considered by the court in evaluating the adequacy of the EIR. Second, subsequent approval of the addendum—even if it contained the necessary analysis of energy impacts—"does not cure the prior approval of an inadequate EIR." Guidelines section 15164, which authorizes preparation of an addendum in certain circumstances, "assumes that the EIR previously certified was properly certified. The section does not authorize the retroactive correction of an inadequate EIR based upon the consideration of which the project was approved, by providing the additional necessary information about the environmental effects of the project after the project has been approved."

#### 4. *Bay Area Citizens v. Association of Bay Area Governments* (2016) 248 Cal.App.4th 966

- Establishes the authority of CARB and MPOs to mandate GHG reduction measures at the regional level, independent of any statewide GHG reduction mandates.

In this case, the First Appellate District rejected a challenge to the regional GHG reduction mandates of "Plan Bay Area," the sustainable communities strategy developed by the Metropolitan Transportation Commission (MTC) and Association of Bay Area Governments (ABAG) to comply with the requirements of SB 375. In particular, the court rejected petitioner's argument that the EIR for the Plan should have taken into account reductions in GHGs that will occur under statewide GHG reduction mandates.

Prior to SB 375 becoming effective in 2009, California promulgated a number of mandates for the reduction of GHG emissions, including regulations issued pursuant to AB 1493 (the "Pavley" legislation, setting statewide emissions reduction targets for passenger vehicles and light-duty trucks), AB 32 (requiring reduction of GHG emissions to 1990 levels by 2020), and Executive Order S-01-07 (the Low Carbon Fuel Standard, requiring reduction of the carbon density of transportation fuel by at least 10 percent by 2020).

SB 375 requires that each metropolitan planning organization (MPO) adopt, as part of its regional transportation plan, a "sustainable communities strategy" that sets forth plans to meet regional GHG reduction targets set by the California Air Resources Board (CARB). In 2010, CARB established the requisite GHG reduction targets for the Bay Area region. MTC and ABAG, acting collectively as the MPO for the Bay Area, then developed a sustainable communities strategy for the region called "Plan Bay Area." In 2013, following CEQA review, MTC and ABAG adopted the Plan. In 2014, CARB accepted the determination by MTC and ABAG that the Plan would meet the GHG reduction targets set by CARB under SB 375.

Petitioner Bay Area Citizens, a group represented by the Pacific Legal Foundation, filed a CEQA challenge to the adoption of Plan Bay Area in Alameda County Superior Court, arguing that the EIR failed to comply with CEQA in five ways: (1) not adequately identifying the Plan's basic objectives; (2) not adequately assessing a "no project" alternative; (3) relying on an outdated baseline; (4) not including a reasonable, feasible alternative; and (5) not responding to petitioner's alternative proposed plan. All five claims relied on the same premise: that the EIR should have taken into account existing statewide GHG reduction mandates that would result in CARB's GHG reduction targets under SB 375 being met without the need for the Plan's "draconian, high-density land-use regime." Petitioner argued that this alleged omission resulted in the EIR failing to satisfy CEQA's "core purpose of informed public decision-making." The trial court rejected this argument and upheld the EIR.

The First Appellate District affirmed, holding that "[t]he only legally tenable interpretation of SB 375 is that it requires [CARB] to set targets for, and [MTC and ABAG] to strive to meet these targets by, emissions reductions resulting from regionally developed land use and transportation strategies, and that it requires these reductions be in addition to those expected from the statewide mandates." The appeals court based this holding on the language of SB 375, the accompanying legislative declarations and findings, and the interpretation of SB 375 by CARB, which is the administrative agency charged with implementing the statute.

The appeals court also rejected Petitioner's arguments on two independent grounds. First, even if the Legislature did not intend for MPOs to develop regional GHG reduction goals that are in addition to existing statewide mandates, CARB—as the agency charged with implementing and meeting the goals of SB 375—had the discretion to require MTC and ABAG to do so. Second, because the lawsuit essentially argued that MTC and ABAG violated CEQA by "adopting a plan that did more than the minimum necessary to meet their SB 375 targets," it amounted to a "substantive attack on the wisdom of Plan Bay Area itself." However, "an objection to the substantive choice a lead agency makes in approving a project is not a legitimate basis for a CEQA lawsuit."

### 5. *Bay Area Clean Environment, Inc. v. Santa Clara County* (2016) __ Cal.App.5th __

- County did not engage in improper "segmentation" by not analyzing impacts of potential future mining project, where application for that project had been withdrawn and current project was not the first phase in a "larger development."

- Conclusion by Department of Conservation that a reclamation plan complies with SMARA constitutes substantial evidence supporting County's conclusion that project complies with SMARA.

- Neither certification findings nor statement of overriding considerations need address impacts determined to be less than significant.

In *Bay Area Clean Environment, Inc. v. Santa Clara County*, the Sixth Appellate District rejected a challenge to the County's 2012 approval of an amendment to a Reclamation Plan ("Plan") for a

century-old 3,510-acre limestone and aggregate surface mine. The County prepared an EIR for the Plan, which was designed to reclaim all of the property impacted by the mining operation over a 20-year period. In its challenge, Petitioner Bay Area Clean Environment, Inc. ("Bay Area") claimed that that the County had failed to comply with both the Surface Mining and Reclamation Act ("SMARA") and CEQA. The trial court upheld the County's approvals and the Sixth Appellate District affirmed.

As to CEQA, Bay Area argued that the EIR was inadequate because it failed to address the cumulative impact of a new South Quarry pit that had previously been proposed to replace the reclaimed pit. According to Bay Area, the project proponent had intentionally omitted the new pit from the environmental document in order to achieve quick approval of the Plan. Bay Area said this was improper "segmentation" or "piecemeailing" of environmental review. The court rejected this argument, finding that the application for the new pit, previously submitted by the project proponent, had been withdrawn before the EIR process began. Further, the new pit—if subsequently built—"would not change the scope of the nature of the reclamation of the North Quarry pit or the reclamation's environmental effects." Consequently, the court emphasized, the Plan was a "stand-alone project and does not require approval of a future project, such as the South Quarry pit for reclamation for the North Quarry to occur." Distinguishing *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325—an early case holding that separate treatment of phased development was improper piecemealing—the court here emphasized that the Plan was not a "first phase in a larger development."

Bay Area also claimed that the County's certification findings and statement of overriding consideration were insufficient to support approval of the Plan and EIR in that they did not adequately address impacts on the California red-legged frog. The EIR, however, had concluded that direct impacts to the frog were less than significant because no frogs had been identified in the project area. Because the impact was found to be less than significant, the court concluded that no additional findings were required. Further, the EIR concluded that indirect impacts to aquatic life—not necessary the frog—were significant and unavoidable. According to Bay Area, the statement of overriding considerations should have expressly addressed the red-legged frog. The court rejected this argument. In upholding long-standing CEQA precedent, the court held that because direct impacts to the frog were determined to be less than significant, the statement of overriding considerations was not required to discuss it.

Finally with regard to CEQA, Bay Area argued that the trial court erred in augmenting the record to include an email exchange between an expert biologist and the California Department of Fish & Wildlife. In a 2007 report, the consultant had documented a frog in a pond at the site, but in the 2009 email the consultant clarified that the earlier entry was a mistake. The court found that the document was properly part of the administrative record under Public Resources Code section 21167.6(e)(10), which includes "any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits . . ." The court noted that the email was sent before the EIR was certified by the same firm that prepared the biological assessment for the Plan EIR. The EIR, in turn, relied on the biological assessment for its conclusion that no protected frogs were present in the project area. Consequently, the consultant's email was properly part of the administrative record of the proceedings.

Separately, the court addressed Bay Area's several challenges to the Plan under SMARA. First, the court rejected a claim by Bay Area that the Plan failed to satisfy SMARA water quality standards because placement of overburden during reclamation would increases selenium in a nearby creek. Under the plain language of the SMARA regulations, 14 C.C.R. § 3706(b), it was within the County's discretion to allow temporary water quality impacts if necessary to implement the Plan. Second, the court rejected a claim by Bay Area that the Plan violated SMARA's provisions governing wildlife habitat by failing to specifically mention and provide for the red-legged frog. While SMARA requires that a reclamation plan return the disturbed area to prior (or better) habitat conditions except under certain conditions, the biological assessment attached to the Plan analyzed the frog and its habitat and provided measures for avoiding and minimizing impacts. Third, Bay Area had argued that statements by the Office of Mining Reclamation that the Plan complied with SMARA did not constitute substantial evidence to support the County's determination of SMARA compliance. The court rejected this claim as well, finding that the County properly relied on the Department of Conservation's determination of compliance, which was based in part on the statements of the Office of Mining Reclamation.

## E. Subsequent Review

### 1. *Coastal Hills Rural Preservation v. County of Sonoma* (2016) __ Cal.App.5th __

- Even though project originally proceeded under an MND, subsequent project changes are properly reviewed under CEQA section 21166 and Guidelines section 15162 and the substantial evidence standard of review (rather than fair argument).

- The updated project changes fell within the scope of the earlier-approved project and did not have significant impacts with respect to fire or wildlife hazards, and thus did not require a subsequent EIR.

- Undisputed evidence established that the facility operated as a nonprofit, and therefore qualified for the County's general plan and zoning ordinance designations for rural development and noncommercial clubs and lodges.

This case centered on the applicable standards and appropriateness of proceeding on a Subsequent Mitigated Negative Declaration (SMND), rather than an EIR, where changes had been incorporated in a religious facility approved earlier based on an MND. In 2004, the Tibetan Nyingma Meditation Center (TNMC) purchased a resort located in an area of Sonoma County designated as Resources and Rural Development in the County's general plan. TNMC renamed the resort the Ratna Ling Retreat Center and submitted an application for a master use permit (MUP) to construct 19 additional cabins, a library, a healing center, a therapeutic pool, and a new 18,750 square foot printing press facility for the printing of sacred Buddhist texts in the Tibetan language. The application also proposed expansion of the existing lodge into a meditation hall with a kitchen and dining facilities, and a maximum occupancy of 60 persons. The County adopted an MND (2004 MND) and approved the MUP, subject to 58 conditions of approval. Those conditions designated the printing press operation a noncommercial "ancillary use" and set the maximum occupancy for that operation at 27 persons, with hours of operation 7:00 a.m.

to 10:00 p.m., seven days a week. The accompanying staff report indicated that the printing press operation was intended to be based on the use of one printing press.

In 2006, TNMC installed five additional printing presses at the Ratna Ling facility. Then, in 2008, Ratna Ling received a temporary zoning permit for four steel-frame storage tents to house a "Sacred Text Treasury." Combined, the four tents covered 39,270 square feet—over twice the size of the 18,750 square foot printing press facility. Also in 2008, the County adopted an MND (2008 MND) and approved a use permit allowing construction of a reservoir for Ratna Ling's water system and to modify the size and location of the healing center.

In 2010, a citizens group filed a complaint with the County (2010 Complaint), alleging that Ratna Ling was operating in violation of the conditions of the 2004 MUP—in particular, that the printing press operation was no longer an ancillary function, given that (1) the combined square footage of the printing press operation and the four temporary storage tents was equal to the square footage of Ratna Ling's retreat-related facilities, (2) the six printing presses were operating around-the-clock, with up to 40 workers present each day, and (3) truck traffic related to the operation had increased by 12 to 16 times over Ratna Ling's 2004 estimate. TNMC responded that the sacred text production was "a central religious practice and provides essential support to the primary purpose" of Ratna Ling as a Buddhist retreat.

In 2011, Ratna Ling submitted an application for an MUP that would (among other things) secure permanent status for the four temporary storage tents, allow for a storage use not to exceed the combined square footage of those tents, and raise the occupancy limit to 98 persons (2011 Project). In 2012, the County Board of Zoning Adjustments approved the permit and adopted an MND for the project (2012 MND). These approvals were appealed to the County Board of Supervisors by a project opponent. In 2013, Ratna Ling submitted an updated proposal for the 2011 Project, and Coastal Hills Rural Preservation (CHRP) subsequently refiled its 2010 Complaint. In 2014, the County released a 46-page subsequent MND (SMND) to the 2004 and 2008 MNDs, which superseded the 2012 MND.

The County Board adopted the SMND, denied the project's opponent's appeal, and approved the 2011 Project subject to 96 conditions of approval. CHRP then filed a petition for writ of mandate and complaint in Sonoma County Superior Court, challenging the actions of the Board. In April 2015, the trial court denied the writ, and CHRP appealed. The court of appeal affirmed, rejecting CHRP's claims.

First, CHRP argued that the 2011 Project was a new project under CEQA, as opposed to a modification of Ratna Ling's prior MUPs, and therefore the fair argument test should apply regarding the County's decision to proceed with the SMND rather than an EIR. The court rejected this claim, holding that the County appropriately viewed the 2011 Project as falling within the scope of CEQA section 21166 and Guidelines section 15162, as (1) the printing press operation was evaluated in the 2004 MND and authorized by the MUP issued at that time, and (2) although the storage tents were not evaluated in the 2004 or 2008 MNDs, it was "undisputed that these structures are integral to Ratna Ling's existing printing press operation." As such, the 2011 Project was not a new project for CEQA purposes, and the County's decision not to require

an EIR would be reviewed under the substantial evidence standard.[5] The appeals court then rejected CHRP's claim that the record did not include substantial evidence demonstrating that the 2011 Project would not have a significant impact with respect to wildland fires or wildlife hazards. The court also ruled against CHRP with respect to the County's inclusion of the storage tents as part of the baseline conditions for the impacts analysis, finding that the tents were, in fact, part of the existing physical conditions at the site, and, in any event, the County fully evaluated the impacts of the tents. Finally, the court held that the County did not improperly defer study of fire impacts until after the adoption of the SMND by incorporating a condition requiring that the applicant coordinate with the Fire Marshal to review existing fire-fighting infrastructure and install any additional onsite infrastructure that the Fire Marshal deemed appropriate.

Second, CHRP argued that the 2011 Project involved "rampant commercial activity" associated with the production, storage, and sale of printed materials, and therefore was inconsistent with the General Plan's Resources and Rural Development (RRD) designation covering the Ratna Ling property, which permits "visitor serving uses," and the related zoning ordinance, which includes "noncommercial clubs and lodges" as an allowable use, along with "accessory" buildings and uses that are appurtenant to the operation of allowable uses. The appeals court rejected this claim, finding no evidence in the record that Ratna Ling's printing activities were undertaken for profit. Rather, the undisputed evidence showed that 98 percent of its total printing output was given away for free, only 11 percent of its total revenue came from printing operations, and proceeds from those operations were used to support the production of more religious texts. The court held that these operations were not inconsistent with Ratna Ling's primary function as a religious retreat "merely because some of its output enters the stream of commerce." The court also rejected CHRP's claim that the printing operations should be deemed "industrial" uses inconsistent with the RRD designation. Though the printing operations intensified over time, the County did not abuse its discretion in categorizing those operations as ancillary to the retreat center use. Finally, the court found that the Board "fully considered the County's land use policies and the extent to which the 2011 Project conforms to those policies" and, given the deferential standard of review, the court would not reweigh conflicting evidence or substitute its judgment for that of the Board.

Third, the court found that (1) CHRP failed to exhaust its administrative remedies with respect to its argument that adoption of the SMND violated California Constitution provisions relating to the establishment of religion, and (2) CHRP failed to exhaust its administrative remedies with respect to its claim that the County engaged in impermissible spot zoning when it approved the 2011 Project. Even if it had exhausted this claim, nothing in the record or the relevant zoning regulations suggested that the County had violated Government Code section 65852 by authorizing a use at Ratna Ling that was prohibited at all other parcels in the same zone.

[5] This ruling comprises issues that are currently pending before the California Supreme Court in *Friends of the College of San Mateo Gardens v. San Mateo County Community College District*—the standards of review governing project modifications and whether CEQA Guidelines section 15162 appropriately extends to projects initially approved by a negative declaration (see case summary at Section III.A.1, below).

## F. Litigation Procedures

### 1. *Center for Biological Diversity v. California Department of Fish & Wildlife* (2016) 1 Cal.App.5th 452

- Absent specific legislation granting original jurisdiction, appeals courts in California do not have the power to issue and supervise writs of mandate in CEQA cases—that power is reserved to trail courts on remand.

The California Supreme Court in *Center for Biological Diversity v. California Department of Fish & Wildlife* (2015) 62 Cal.4th 204, invalidated the greenhouse gas analysis and mitigation for the fully-protected unarmored stickleback on review of an EIR prepared for the Newhall Ranch development in northern Los Angeles County. In its ruling, the Supreme Court remanded the case to the lower appeals court to determine two issues left undecided—the project's impacts on tribal cultural resources and the endangered steelhead trout.

On July 11, 2016, the Second Appellate District issued its ruling after remand from the Supreme Court. In unpublished sections of its opinion, the court provided further direction to the trial court and lead agency on the greenhouse gas analysis and species issues, and reiterated its earlier ruling—that the EIR's evaluation of tribal cultural resources and steelhead trout was supported by substantial evidence. In the only published portion of the opinion, the court grappled with a procedural issue that only a CEQA aficionado could love—whether the appeals court itself can retain jurisdiction to supervise directly the agency's compliance with its ruling. Appeals court jurisdiction in CEQA cases has witnessed some interesting turns in recent years, as the Legislature has added targeted streamlining provisions and original jurisdiction in the appellate courts in some instances. (*See, e.g.*, Pub. Resources Code, §§ 21168.6 (CPUC challenges), 21185 (environmental leadership projects).) The court here, however, found that it did not have the authority to step into the shoes of the trial court.

After remand from the Supreme Court—and to avoid facing delays in further proceedings before the trial court—the developer and Department urged that the Supreme Court's opinion and certain remedy and timing provisions under CEQA together permitted the appeals court to retain jurisdiction to "supervise the completion of the environmental review process." The Petitioner Center for Biological Diversity (CBD) protested, arguing that appeals courts have no jurisdiction to retain supervision, and that the only available procedure is to remit the case to the trial court for further proceedings. The appeals court agreed with CBD, finding that unlike specific provisions that grant original jurisdiction to the appeals courts—e.g., Section 21168.6 for actions against the Public Utilities Commission—nowhere does CEQA or the Code of Civil Procedure offer such a procedural device.

While appeals courts may not have the power to issue and supervise writs of mandate directly, the court's opinion did recite the significant flexibility that trial courts have to fashion alternative remedies in CEQA cases. This discussion may be the most important element of the opinion, as the scope of available remedies is a common issue in any case where a writ of mandate has been granted.

### 2. *Communities for a Better Environment v. Bay Area Air Quality Management District* (2016) 1 Cal.App.5th 715

- Where no notice has been issued under CEQA, the 180-day statute of limitations begins to accrue when there is an "approval" of a permit for the project, even if there is no public notice of that approval.

- The "discovery rule," which postpones accrual of an action until the date the plaintiff has actual or constructive notice of the facts constituting the injury, does not apply in CEQA cases where one of the statutory triggering dates occurs (notice, approval, or commencement); however, if there is no statutory triggering date, an action may accrue "on the date a plaintiff knew *or reasonably should have known* of the project" (*Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929).

In this case, Communities for a Better Environment (CBE) and a host of other environmental groups sought to challenge a rail-to-truck facility for the transloading of crude oil permitted by the Bay Area Air Quality Management District (BAAQMD). The trial and appeals courts held that CBE's petition was time barred under Section 21167(d) of the Public Resources Code for failure to bring the claim within 180 days of BAAQMD's approval of an Authority to Construct (ATC) that authorized certain air emissions from the transloading of Bakken Crude. In doing so, the courts rejected the argument by CBE that the "discovery rule" should apply in CEQA cases where, as here, there is no public notice of the approval.

The rail-to-truck facility had been transloading ethanol through Richmond since 2009. In February 2013, however, the operator (Kinder Morgan) applied to BAAQMD for approval to alter the facility and begin transloading Bakken crude oil, a form of crude that CBE alleged was "highly volatile and explosive" (among other environmental risks). Without any public notice, BAAQMD in July 2013 found the approval "ministerial" (not subject to CEQA) and issued an ATC for transloading Bakken crude. The facility began transloading Bakken crude in September 2013 and BAAQMD later modified two conditions of the ATC in October and December 2013. BAAQMD in February 2014 finally issued Kinder Morgan a Permit to Operate (PTO)—a follow-on permit to the ATC's that incorporated the modified conditions. BAAQMD exercised its discretion and declined to file a Notice of Exemption, which it could have done under Section 15062 of the CEQA Guidelines.

CBE filed suit in March 2014 to challenge the transloading of Bakken Crude, which was within 180 days of the PTO but long after BAAQMD's approval of the original ATC authorizing the switch to Bakken crude. CBE argued that its petition was timely because its first discovery (i.e., "notice") of the approval of Bakken crude did not occur until January 2014, "when one of CBE's staff members received an email disclosing that the Richmond facility had begun transloading crude oil." Citing *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, CBE argued that:

> [I]t could not with reasonable diligence have learned, of the project any earlier, because BAAQMD 'gave the public no notice of Kinder Morgan's switch to ...

> Bakken crude oil' and 'Kinder Morgan's transloading operation is entirely enclosed, making the transported commodity, and any change to it, invisible.'

In *Costa Mesa*, the Supreme Court had held that when the project under construction differs from the project originally approved by the agency, "an action challenging the agency's noncompliance with CEQA may be filed within 180 days of the time the plaintiff *knew or reasonably should have known* that the project under way differs substantially from the one described in the EIR." (*Id.*, at 939–940.) But in that case, there was no formal "approval" and the project opponents were not aware of substantial changes in an amphitheater project until the venue held its first concert. The court reasoned that this interpretation of the statute of limitations was appropriate because the opponents "could not with reasonable diligence have discovered" the changes earlier.

The First Appellate District declined to apply *Costa Mesa*, citing an important distinction—here, BAAQMD had issued its approval of the switch to Bakken crude in July 2013, which served as one of three alternative dates specified in Section 21167(d) that starts the limitations period (from "notice," "approval," or "commencement" of the project). At that point—and despite no public notice of the approval—the public is deemed to have "constructive notice" of the project under CEQA.

The court further emphasized that the "discovery rule" has never been applied in CEQA cases to postpone accrual of the statute of limitations. The discovery rule, which has been applied in non-CEQA cases, "postpones the accrual of an action . . . until the date the plaintiff has actual or constructive notice of the facts constituting the injury." The Supreme Court in *Concerned Citizens*, however, "specifically rejected 'as contrary to the Legislature's intent' the plaintiffs' position 'that their action was timely because it was filed a few days before the expiration of 180 days after the first concert was held at the theater." Rather, the Supreme Court held that "an action accrues on the date a plaintiff *knew or reasonably should have known* of the project *only if no statutory triggering date has occurred*." In *Costa Mesa*, there was no "notice" and no formal "approval" of the changed amphitheater project, and thus no earlier "triggering date" for accrual of the limitations period.

In the end, the First Appellate District acknowledged that while public participation plays an important role in CEQA, "arguments about the proper balance between the interests of public participation and of timely litigation are better directed at the Legislature."

## II. PUBLISHED LAND USE CASES[6]

### 1. *Stewart Enterprises, Inc. v. City of Oakland* (2016) 248 Cal.App.4th 410

- Under city permit-vesting ordinance, which shielded the holder of a lawfully issued building permit from having to comply with any subsequently adopted zoning regulations, landowner's building permit provided a vested right to construct a crematorium, even if subsequent emergency ordinance requiring a CUP was lawfully passed and the city council intended it to override the permit-vesting ordinance.

- Application of emergency ordinance requiring a conditional use permit to operate new crematoria constituted an impairment of landowner's vested right because it "prohibited" landowner's crematorium project, for which landowner had acquired a building permit.

- Evidence did not establish a sufficient threat to the public welfare justifying impairment of landowner's vested right.

Plaintiffs obtained a building permit to construct a crematorium on a site in East Oakland. Five days later, the Oakland City Council passed an emergency ordinance requiring a conditional use permit (CUP) to operate new crematoria. Plaintiffs administratively appealed a determination that the emergency ordinance applied to its proposed crematorium, but Oakland's Planning Commission denied the appeal. Plaintiffs then filed a complaint, which included administrative mandamus claims, against the City of Oakland, the City Council, and the Planning Commission.

The trial court granted one of Plaintiffs' claims, ruling that Plaintiffs had a vested right in the building permit based on a preexisting local ordinance and that the emergency ordinance was not sufficiently necessary to the public welfare to justify an impairment of that right. On appeal, the City argued that: (1) Plaintiffs had no vested right; (2) even if Plaintiffs had a vested right, it was not impaired; and (3) even if Plaintiffs had a vested right that was impaired, the impairment was supported by substantial evidence.

The appeals court affirmed the trial court's decision, holding that although governmental agencies may generally apply new laws retroactively where such an intent is apparent, that retrospective application may be unconstitutional if it deprives a person of a vested right without due process of law. In so holding, the First Appellate District relied on *Davidson v. County of San Diego*, resolving the following issues: (1) whether Plaintiffs had a vested right in the building permit under the permit-vesting ordinance; (2) if so, whether the emergency ordinance impaired that right; and (3) if there was a vested right that was impaired, whether the impairment was justified because it was sufficiently necessary to the public welfare.

[6] Three cases that included published rulings on both CEQA and land use claims—*Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677 (community planning), *Spring Valley Lake Association v. City of Victorville* (2016) 248 Cal.App.4th 91 (subdivisions), and *Coastal Hills Rural Preservation v. County of Sonoma* (2016) __ Cal.App.5th __ (general plan and zoning)—are covered in Sections I.C, I.D, and I.E, above.

The appeals court found that: (1) the plain terms of the City's permit-vesting ordinance shielded the holder of a lawfully issued building permit from having to comply with any subsequently adopted zoning regulations if such would prohibit the construction authorized by the permit; (2) the emergency ordnance impaired Plaintiffs' vested right because the ordinance prohibited the construction of a crematorium as authorized by Plaintiffs' building permit; (3) there was insufficient evidence of a danger or nuisance to the public that justified the City's application of the emergency ordinance to Plaintiffs' project—the City's evidence showed that there were concerns only over the impact the crematorium *might* have on the public and local businesses.

### 2. *Naraghi Lakes Neighborhood Preservation Association v. City of Modesto* (2016) 1 Cal.App.5th 9

- Judicial review of lead agency's determination of general plan consistency is highly deferential and will only be reversed if no reasonable person could have reached the same conclusion.

- Evidence was sufficient to support city's determination that shopping center project adjacent to residential neighborhood was consistent with general plan, including neighborhood plan prototype policies; based on language of the policies and city's past practices; acreage and square footage descriptions were reasonably construed as flexible guides to development rather than rigid development limitations.

A shopping center was proposed to be built on vacant land in Modesto adjacent to a residential neighborhood. In January 2014, the Modesto City Council approved the entitlements for the project—including a general plan amendment and zoning change—and certified the project EIR. A neighborhood group filed a challenge with the Stanislaus County Superior Court, alleging that the City's actions violated a number of policies in the City's general plan, including "neighborhood plan prototype" (NPP) policies, and that the EIR failed to comply with CEQA for that reason and on several other grounds (involving traffic mitigation, urban decay, and the statement of overriding considerations). The trial court denied the petition on all grounds.

The appeals court affirmed. In the published portion of the opinion, the court addressed the project's consistency with the general plan NPP policies. First, the court set forth a comprehensive summary of the applicable law and standard of review, which confirms the broad discretion enjoyed by local agencies when making general plan consistency determinations. In addition to citing and quoting numerous prior decisions, the court stated:

- "Where, as here, a governing body has determined that a particular project is consistent with the relevant general plan, that conclusion carries a strong presumption of regularity that can be overcome only by a showing of abuse of discretion";

- "Moreover, judicial review of consistency findings is highly deferential to the local agency"; and

- "In applying the substantial evidence standard, we resolve reasonable doubts in favor of the City's finding and decision. . . . The essential inquiry is whether the City's finding of

> consistency with the General Plan was 'reasonable based on the evidence in the record' . . . . Generally speaking, the determination that a project is consistent with a city's general plan will be reversed only if the evidence was such that no reasonable person could have reached the same conclusion."

With these principles in mind, the court upheld the City's determination that the project was consistent with the NPP policies. One of those policies stated that a 7 to 9-acre neighborhood shopping center, "containing 60,000 to 100,000 square feet of gross leasable space, should be located in each neighborhood." Here, the project at issue consisted of approximately 170,000 square feet of commercial space in an 18-acre shopping center. The City argued that the plain language of the policies demonstrated that they were intended as "guidance," not "mandatory limitations," and that the City's past practice in approving shopping centers exceeding the NPP policy size specifications demonstrated its consistent interpretation of the policies as flexible. Petitioner disagreed, taking the position that each of the NPP policies should be treated as a mandatory development standard.

The court ruled for the City, concluding that "the wording of the NPP [policies] is reasonably consistent with the interpretation given to it by the City." The court also found substantial evidence in the record to support the City's claim that it had "a consistent practice" of treating "the acreage and square footage description in the NPP policy as a flexible guide to neighborhood development, rather than a strict limitation on the size of shopping centers."

### 3. *City of Selma v. Fresno County Local Agency Formation Commission* (2016) 1 Cal.App.5th 573

- When a LAFCo sets a public hearing on a reorganization proposal and thereafter continues the hearing date beyond the 70–day limitation for continuances under Government Code section 56666, subdivision (a), it violates the 70–day limitation; however, the 70–day limitation is a directory rather than a mandatory provision, and as such, does not invalidate LAFCo's determinations.

On October 22, 2012, the City of Kingsburg submitted to the Fresno County Local Area Formation Commission (LAFCo) application materials for the annexation of approximately 430 acres of land in Fresno County. The annexation territory included 350 acres that had been developed with industrial/commercial uses, 52 undeveloped acres, and approximately 28 acres of street rights-of-way. After having initially rejected Kingsburg's application as incomplete, on March 18, 2013, LAFCo's executive officer sent a letter to Kingsburg certifying that its application was accepted for filling, and on the same date published a notice of public hearing. The notice indicated that on April 10, 2013, LAFCo would be considering Kingsburg's requested annexation. On that date, however, LAFCo continued the hearing on the reorganization "to a date uncertain" to allow time for Kingsburg and the Fresno County Fire Protection District (FCFPD) to negotiate a transition agreement consistent with LAFCo policy. By June 5, 2013, Kingsburg and the FCFPD were still in negotiations regarding a transition agreement. On June 24, 2013, LAFCo republished a notice of a public hearing on the annexation for July 17, 2013.

On July 15, 2013, the City of Selma sent a letter to LAFCo, objecting to the notice of hearing for the July 17, 2013 meeting. Selma asserted that under Section 56666 (a), LAFCo could not

continue the hearing to July 17, 2013, because it was more than 70 days after the originally noticed date of April 10, 2013. LAFCo's counsel responded that the 70–day limitation in section 56666(a) was, pursuant to section 56106, 'directory' rather than 'mandatory.'

After the public hearing, LAFCo then determined the CEQA documents prepared by Kingsburg were legally adequate, and the annexation was consistent with LAFCo's standards and the Reorganization Act. LAFCo approved the annexation, subject to several conditions, and on July 24, 2013, LAFCo filed a notice of determination. Selma filed a writ of mandate challenging LAFCo's approval of the annexation. The trial court denied the writ and Selma appealed.

The appeals court agreed with LAFCo that the 70-day limitation in Section 56666(a) is directory rather than mandatory, and as such, did not warrant invalidating the LAFCo's determination. Initially, the Appellate court discussed Section 56106, which provides: "Any provisions in this division governing the time within which an official or the commission is to act shall in all instances, except for notice requirements and the requirements of subdivision (h) of Section 56658 and subdivision (b) of Section 56895, be deemed directory, rather than mandatory."

The appeals court then elaborated that the 'directory' or 'mandatory' designation does not refer to whether a particular statutory requirement is 'permissive' or 'obligatory,' but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates. Because Section 56666(a) permits continuation of a hearing "not to exceed 70 days from the date specified in the original notice," the court held that it constitutes a scheduling requirement for continued hearings, not a notice requirement. Therefore, although LAFCo violated the 70-day limitation, this violation did not invalidate LAFCo's decision regarding the annexation.

#### 4. *The Kind and Compassionate v. City of Long Beach* (2016) 2 Cal.App.5th 116

- Ordinances banning medical marijuana dispensaries within city did not discriminate against medical marijuana users in violation of state or federal law; the Compassionate Use Act (CUA) and the Medical Marijuana Program Act (MMPA) do not expressly or impliedly preempt a city's zoning provisions declaring a medical marijuana dispensary to be a prohibited use, and a public nuisance, within city limits.

- Enforcement of medical marijuana ban by allegedly issuing threats and citations to landlords and members did not violate the Bane Act; the enforcement of the ordinances did not interfere with any federal or state law granting any right to lease property to operate marijuana collectives.

Plaintiffs, two medical cannabis "collectives/dispensaries," and three medical cannabis patients who are members of one of the collectives, sued the City of Long Beach and its staff, with claims that all stemmed from the City's enforcement of municipal ordinances that first regulated and then entirely prohibited city-wide operation of medical marijuana dispensaries. Specifically, the City's Code chapter 5.89 imposed a complete ban on medical marijuana collectives within the City.

In their complaint, Plaintiffs principally claimed that the City discriminated against them by enacting and enforcing ordinances, which Plaintiffs asserted were facially discriminatory and had a disparate and adverse impact on persons with disabilities. Plaintiffs' complaint alleged that the enforcement of the ban violated six statutes: (1) the Disabled Persons Act; (2) Unruh Civil Rights Act; (3) the ADA; (4) Rehabilitation Act of 1973; (5) the Bane Act; and (6) the Federal Civil Rights Act (Section 1983). The trial court sustained the City's demurrer to these claims, with leave to amend, but the Plaintiffs did not file an amended complaint. After the court entered a judgment of dismissal, Plaintiffs appealed.

Regarding the discrimination claims, the appeals court held that although the CUA and MMPA remove state-level criminal and civil sanctions from specified medical marijuana activities, they do not establish a comprehensive state system of legalized medical marijuana; grant a 'right' of convenient access to marijuana for medicinal use; override the zoning, licensing, and police powers of local jurisdictions; or mandate local accommodation of medical marijuana cooperatives, collectives, or dispensaries. Therefore, municipal regulation of, and bans on, medical marijuana dispensaries could not operate to discriminate against persons with disabilities, because those persons have no right of convenient access to medicinal marijuana in the first place.

Regarding the Plaintiffs' Bane Act challenge, the court held that City's enforcement of ordinances banning medical marijuana dispensaries within the City, by allegedly issuing threats and citations to landlords and members of the dispensaries, did not violate the Act, since the enforcement of the ordinances did not interfere with any federal or state law granting any right to lease property to operate a marijuana collective—therefore, defendants could not have interfered with any such right.

Regarding Plaintiffs' Section 1983 claim, the court held that the City's enforcement of ordinances banning medical marijuana dispensaries within the City did not interfere with any vested property right of medical marijuana dispensary operators and members, and thus did not support a claim under Section 1983; the City never issued a permit for them to operate a medical marijuana dispensary in the City.

Lastly, the appeals court held that the Plaintiff's state law tort claims related to tortious interference with business relations, intentional infliction of emotional distress, and civil conspiracy, all failed to state facts sufficient to support a valid complaint.

## III. PENDING CALIFORNIA SUPREME COURT CASES

### A. Pending CEQA Cases

#### 1. *Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (Review granted January 1, 2014)

The San Mateo Community College District approved a change to a previously-approved campus master plan, which change involved demolition of a building that had originally been slated to be preserved. The District relied on a previous EIR, finding that the "change" did not require major revisions to the EIR under CEQA or its Guidelines. In an unpublished opinion, the

First Appellate District invalidated the College District's approval, holding that the agency could not rely on the previous EIR because the demolition constituted a "new" project with new and potentially significant impacts. The Supreme Court accepted review and will address the following issues:

> (1) When a lead agency performs a subsequent environmental review is the agency's decision reviewed under a substantial evidence standard of review (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385), or is the agency's decision subject to a threshold determination whether the modification of the project constitutes a "new project altogether," as a matter of law (*Save our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288)?
>
> (2) Under Guidelines section 15162, what standard of judicial review applies to an agency's determination that no EIR is required as a result of proposed modifications to a project that was initially approved by negative declaration or mitigated negative declaration? (*See generally Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1479–1482.)
>
> (3) Does CEQA Guidelines section 15162, as applied to projects initially approved by negative declaration or mitigated negative declaration rather than EIR, constitute a valid interpretation of the governing statute? (Compare *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1073–1074 with *Benton* at 1479–1480.)

Oral argument occurred on May 4, 2016, and a ruling is expected by September 21, 2016.

### 2. *Sierra Club v. County of Fresno* **(Review granted October 1, 2014)**

This case presents issues concerning the standard and scope of judicial review of an EIR under CEQA for the Friant Ranch Project, an active adult community in Fresno County. After an adverse ruling in the appellate district below, the County petitioned for review to address the applicable standard of judicial review when evaluating claims that an EIR provides insufficient information on an issue and to clarify when mitigation measures are adopted to reduce but not eliminate an unavoidable impact. Without providing any deference to the County's methodology, the Fifth Appellate District had concluded that, as a matter of law, the EIR had failed to include sufficient information regarding air quality impacts. The case was fully briefed in March 2015.

### 3. *Friends of the Eel River v. North Coast Railroad Authority* **(Review granted December 10, 2014)**

This case includes the following issues: (1) Does the Interstate Commerce Commission Termination Act (ICCTA) preempt the application of CEQA to a state agency's proprietary acts with respect to a state-owned and funded rail line, or is CEQA not preempted in such circumstances under the market participant doctrine (see *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314)? (2) Does the ICCTA preempt a state agency's voluntary commitments to comply with CEQA as a condition of receiving state funds

for a state-owned rail line and/or leasing state-owned property? The appeals court held that CEQA's requirement to prepare an EIR was preempted and that a petition for writ of mandate was not an appropriate method to enforce an agency's voluntary agreement to prepare an EIR. The case was fully briefed in April 2015.

#### 4. *Cleveland National Forest Foundation v. San Diego Association of Governments* (Review granted March 11, 2015)

The Court limited review to a single issue—whether an EIR for a regional transportation plan must include an analysis of the plan's consistency with the GHG emission reduction goals reflected in Executive Order No. S–3–05 (80% below 1990 levels by the year 2050) in order to comply with CEQA. The appeals court held that the EIR failed to adequately disclose, analyze, and mitigate GHG emissions and air quality impacts by, among other things, failing to analyze the plan's consistency with the targets set forth in Executive Order S-3-05. The case was fully briefed in August 2015.

#### 5. *Banning Ranch Conservancy v. City of Newport Beach* (Review granted August 19, 2015)

This appeal pertains to a challenge brought to review an EIR for a residential and commercial development in the coastal zone. The Fourth Appellate District upheld the EIR, finding that the City complied with its general plan policy requiring it to coordinate with appropriate state and federal agencies in connection with the approval, and that the City could defer the identification of environmentally sensitive habitat areas to the California Coastal Commission so long as the EIR evaluated the project's potential inconsistencies with the Coastal Act. The Supreme Court granted review on the following issues: (1) Did the City's approval comport with the directives in its general plan to "coordinate with" and "work with" the California Coastal Commission to identify habitats for preservation, restoration, or development prior to project approval? (2) What standard of review should apply to a city's interpretation of its general plan? (3) Was the City required to identify environmentally sensitive habitat areas—a legal determination under the Coastal Act—in the EIR? The case was fully briefed in April 2016.

### B. Pending Land Use Cases

#### 1. *Orange Citizens for Parks and Recreation v. Superior Court* (Review granted October 30, 2013)

This case presents the issue of whether a proposed development project of low density housing was consistent with the city's general plan. The appeals court held that the city council acted reasonably in concluding that a project was consistent with the city's general plan because there was substantial support for the finding that the general plan allowed low-density residential development at the property. This case was fully briefed in April 2014 and is scheduled for oral argument on September 29, 2016.

### 2. *Lynch v. California Coastal Commission* **(Review granted December 10, 2014)**

In a matter under the Coastal Act, this case addresses the following issues: (1) Did plaintiffs, who objected in writing and orally to certain conditions contained within a coastal development permit approved by defendant California Coastal Commission, waive their right to challenge the conditions by subsequently executing and recording deed restrictions recognizing the existence of the conditions and constructing the project as approved? (2) Did the permit condition allowing plaintiffs to construct a seawall on their property, but requiring them to apply for a new permit in 20 years or to remove the seawall violate Public Resources Code section 30235 or the federal Constitution? (3) Were plaintiffs required to obtain a permit to reconstruct the bottom portion of a bluff-to-beach staircase that had been destroyed by a series of winter storms, or was that portion of the project exempt from permitting requirements pursuant to Public Resources Code section 30610(g)(1)? This case was fully briefed in June 2014.