Land Use and CEQA Litigation Update

Wednesday, May 4, 2016 Opening General Session; 1:00 – 3:00 p.m.

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Notes:_____

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League of Cities
CEQA and Land Use Update

Cases Reported from
September 2015 through March 2016

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Wednesday, May 4, 2016
1:00 – 3:00 p.m.
Newport Beach Marriott Hotel
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CEQA AND LAND USE LITIGATION UPDATE[1]

I. PUBLISHED CEQA DECISIONS

Between September 10, 2015, and April 7, 2016, California courts of appeal published 15 decisions under the California Environmental Quality Act (CEQA), granting relief in favor of the petitioner (and against the public agency) in 8 cases (a majority) on CEQA or other grounds.

A. Scope of CEQA

1. *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369

- Agencies conducting CEQA review are not required to analyze the impact of existing environmental conditions on the project's future users or residents, absent a specific statutory mandate.

- When a proposed project risks exacerbating hazards that are already present, an agency must evaluate those hazards in light of the project's impacts.

In 2010, the Bay Area Air Quality Management District (BAAQMD) adopted thresholds of significance for determining when increases in air pollutants from proposed projects are significant in the context of CEQA review, including thresholds for "new receptors"—i.e., workers and residents who will be brought into the project area as a result of the proposed projects. The California Building Industry Association (CBIA) successfully challenged the thresholds in Superior Court by arguing that adoption of the thresholds itself constituted a "project" subject to CEQA review, which had not been performed by BAAQMD. The Court of Appeal reversed on this point and rejected CBIA's other arguments, including its claim that the "new receptor" thresholds were invalid because CEQA does not require analysis of the impacts that existing hazardous conditions—here, levels of toxic air contaminants and particulate matter in the project area—will have on a new project's occupants. The Supreme Court granted CBIA's petition for review, but limited the scope of review to whether CEQA requires an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project.

The Court focused its analysis on the interpretation of Public Resources Code section 21083, which states that a proposed project may have a "significant effect on the environment," and therefore require preparation of an environmental impact report (EIR) under CEQA if the "environmental effects of the project will cause substantial adverse effects on human beings, either directly or indirectly." The CEQA Guidelines had interpreted this provision to require an EIR to identify "any significant environmental effects the project might cause by bringing development and people to into the area affected," and to "evaluate any potentially significant

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

impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas . . . ." (Guidelines § 15126.2(a).)

The Court held that requiring analysis of the existing environment's effects on a project, as a general matter, would "impermissibly expand the scope of CEQA," even if one assumes that CEQA's definition of "environment" includes the people associated with the project in question: "Despite the statute's evident concern with protecting the environment and human health, its relevant provisions are best read to focus almost entirely on how projects affect the environment." In support of its finding, the Court pointed out several exceptions to this rule that are specified in the statute. For example:

- Existing airport-related hazards must be addressed for projects proposed to be located in the surrounding area (Pub. Res. Code § 21096);

- Review of proposed schools must consider certain health and safety risks posed by hazardous emissions from existing hazardous waste sites, freeways, and other potential sources of hazardous emissions (Pub. Res. Code § 21151.8); and

- Use of CEQA exemptions is limited where future residents or users of certain housing development projects may be harmed by existing conditions (e.g., Pub. Res. Code §§ 21159.21, 21159.22, 21159.23, 21159.24, 21155.1).

The Court reasoned that if the legislature intended for all CEQA review to include the effects of the existing environment on future project users, it would not have included these limited and specific requirements.

Finally, the Court confirmed that—regardless of the rule discussed above—CEQA does require analysis of "existing conditions in order to assess whether a project could exacerbate hazards that are already present," and upheld the provisions of Guidelines section 15126.2(a) as consistent with that rule. However, while giving due deference to the Natural Resources Agency's interpretation of CEQA, the Court invalidated another portion of Section 15126.2(a) as "clearly erroneous and unauthorized" by the Court's interpretation of CEQA: "An EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there."

2. ***Union of Medical Marijuana Patients, Inc. v. City of Upland*** **(2016) 245 Cal.App.4th 1265**

- City ordinance restating existing law prohibiting mobile marijuana dispensaries is not a "project" subject to CEQA.

- Even if the ordinance does not restate existing law, it still is not a "project" because the claimed environmental impacts of the ordinance are "based on layers of speculation."

In 2007, the City of Upland adopted a municipal ordinance stating that "[n]o medical marijuana dispensary . . . shall be permitted in any zone within the city," and defining a dispensary as including any "fixed or mobile" facility or location. The City prepared and adopted a negative declaration for this ordinance, which went unchallenged. In 2013, the City adopted another ordinance, which added a new chapter to the municipal code expressly stating that mobile dispensaries "are prohibited" in the City. The 2013 ordinance contained recitals asserting that such facilities were associated with criminal activity and highly likely to "flourish in the City without the adoption of this Ordinance."

Prior to the adoption of the 2013 ordinance, the Union of Medical Marijuana Patients, Inc. (UMMP) submitted comments opposing the ordinance and arguing that CEQA review was required. UMMP asserted that the ordinance was a "project" for purposes of CEQA because it would have foreseeable effects on the environment, resulting from increased travel by residents outside the City to obtain marijuana, as well as increased cultivation within the City. However, the City did not conduct CEQA review of the ordinance before adopting it, and UMMP filed a petition for writ of mandate. The trial court denied the petition.

The Fourth Appellate District affirmed, holding that, as a matter of law, the ordinance is not a project subject to CEQA. The Court determined that the 2013 ordinance "merely restates the prohibition on mobile dispensaries that was first imposed by the 2007 ordinance" and therefore will not cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. In doing so, it rejected UMMP's argument that the 2007 ordinance was solely a land use regulation that did not "regulate activities carried out through vehicular means," noting that (1) the language of the 2007 ordinance does not support this interpretation, (2) the fact that the 2007 ordinance is codified in the zoning title of the municipal code is not dispositive, (3) the City has the authority to regulate both land uses and other conduct and activities through its police power, and (4) the City could enforce a violation of the 2007 ordinance by a mobile dispensary, through an action for public nuisance.

The Court also held that, even if it were to conclude that the 2013 ordinance is not just a restatement of existing law, the ordinance is still not a "project" subject to CEQA review: the environmental impacts cited by UMMP are "based on layers of speculation"—e.g., concerning the existence and number of patients within the City, their usage rates of marijuana and of mobile dispensaries, and the likelihood of their beginning to cultivate marijuana in response to the ordinance—and therefore are too speculative to be deemed reasonably foreseeable.

B. Exemptions

1. *Save our Schools v. Barstow Unified School District* **(2015) 240 Cal.App.4th 128**

- In approving two school closures and transfer of students to receptor schools, the District lacked sufficient evidence to support use of categorical exemption under Guideline section 15134 (minor additions) where record could not show that limits specified in the exemption for receptor schools would not be exceeded.

- Employing the flexible rules governing remedies under Public Resources Code section 21168.9, appeals court provided that the District, on remand, could consider new evidence in re-evaluating whether the closures and transfers were exempt from CEQA.

A local group of individuals formed "Save Our Schools" to challenge the Barstow Unified School District's decision to close two elementary schools and transfer their students to other "receptor" schools. The District had decided to close the schools due to budgetary constraints projected in future years. The District did not identify which receptor school would receive the students, and did not place any limit on how many students a single receptor school could accept. In rendering its decision, the District relied on the categorical exemption for "minor additions" to schools set forth in Section 21080.18 of CEQA and Section 15134 of the Guidelines.

Save Our Schools filed suit, arguing that there was insufficient evidence to support the District's school closures as exempt under the Section 15134. They also urged that, even if exempt, the school closures were precluded from relying on the exemption due to the "cumulative impacts" and "unusual circumstances" exceptions. The trial court denied the writ petition. The Fourth Appellate District reversed, calling on the trial court to void the District's closure approvals and to direct the District to reconsider its determination that the closures were exempt.

Section 15314 of the Guidelines excludes "minor additions to existing schools . . . where the addition does not increase original student capacity by more than 25% or ten classrooms, whichever is less." In an earlier decision, the Sixth Appellate District had interpreted the phrase "original student capacity" as the receptor school's "enrollment capacity"—i.e., the "physical space for housing students" or "number of students that can be accommodated physically at the receptor school." (Citing *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356.)

Save Our Schools claimed, and the appeals court agreed, that the District lacked sufficient evidence to conclude that "original student capacity" at any of the receptor schools would not exceed "25% or ten classrooms." Indeed, while the record included information on receptor school enrollment, it was devoid of any evidence showing the "original student capacity" or "enrollment capacity" of those schools at the time of the District's closure decision. Conversely, the record showed that 610 students would transfer to the receptor schools as a consequence of the closures. The record thus contained no evidentiary basis upon which the District could have estimated each receptor school's original student capacity or physical ability to house students.

The court described this as "a critical gap in the evidence":

> Without knowing the enrollment capacity of each receptor school, it was impossible for the District to properly determine that transfers would not cause the enrollment at any of the receptor schools to exceed 125 percent of the receptor school's enrollment capacity, or require fewer than 10 portable or permanent classrooms to be added to the receptor school.

The fact that transferring students could choose which receptor school to attend "compound[ed]" this lack of evidence. By way of example, the court noted with some irony that if all 547

kindergarten through sixth-grade students chose to transfer to Skyline North Elementary School (one of the eligible receptor schools), "actual enrollment would have more than doubled, from 422 students in 2012-2013 to 969 students in 2013-2014." That simple math combined with no limit or other analysis of operating capacity at the receptor schools was fatal to the District's decision.

In a last-ditch effort to preserve its school closures, the District argued that the closures were also exempt under Guidelines section 15378(b)(5), which states that "[o]rganizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment" are not projects under CEQA. The court was not persuaded. If increases in student enrollment at any receptor schools exceeded the limits set in Guidelines section 15314, it followed that the closures would result in direct or indirect physical changes in the environment, removing them from both the Section 15134 and Section 15378(b)(5) exemptions.

Rather than preclude the District from relying on an exemption in reapproving the school closures on remand, the court of appeal provided that the District could reconsider whether the closures and transfers were exempt from CEQA and "consider additional evidence not before it when it determined, at the February 26, 2013, meeting of its board, that closures and transfers were exempt from CEQA." This sort of flexible and narrow remedy is indicative of the increasing latitude courts are providing unmeritorious respondents under Public Resources Code section 21168.9. As a counterbalance, the court admonished that, "[i]f the District wishes to rely on the minor additions exemption on remand, it is critical that it ascertain the original student capacity of each receptor school before the transfers, and whether the transfers required the addition of any new classrooms to any of the receptor schools." The court also emphasized that Save Our Schools and others "must be given an opportunity to produce evidence supporting any exceptions to the categorical exemptions"—e.g., the "cumulative" and "unusual circumstances" exceptions under Sections 15300.2(b)-(c).

2. *Defend Our Waterfront v. California State Lands Commission* **(2015) 240 Cal.App.4th 570**

- Project opponents are not required to exhaust administrative remedies under Public Resources Code section 21177(b) when the agency provides no prior notice of its intent to rely on exemption.

- The statutory exemption in Public Resources Code section 21080.11 for land exchanges does not apply where there is no title or boundary dispute.

This case involved a local group's challenge to the State Lands Commission's approval of a land exchange with the City of San Francisco, which sought to terminate public trust restrictions on filled tide and submerged lands needed for development of the 8 Washington Street Project in exchange for the transfer of other lands into the trust. The State and San Francisco are authorized to enter exchange agreements under a special legislative grant to the City (Stats. 1987, ch. 310). (The City's special legislation is similar to the provisions in Section 6307 of the Public Resources Code, which authorize the State to enter land exchange agreements of filled tide or submerged lands where the lands are "relatively useless" for trust purposes and the exchange is

need to "resolve [a] boundary or title dispute[].") As planned, the Project sought to develop the waterfront with non-trust uses, including condominiums, subsurface parking, restaurants, retail, and a tennis and swim club. The stated purpose of the exchange was to "allow non-trust uses to be developed on lands formerly encumbered by the Trust, thereby settling a title problem."

While the land exchange was approved to make way for the development (an action normally subject to CEQA), the Commission relied on the statutory exemption that applies to "settlements of title and boundary problems by the State Lands Commission and to exchanges or leases in connection with those settlements." (Pub. Res. Code § 21080.11.) The trial court ruled that the land exchange was not statutorily exempt, and the Commission, City, and developers appealed arguing that: (1) respondent failed to exhaust its administrative remedies under Public Resources section 21177 by failing to object to the State's exemption during the administrative approval process; and (2) the land exchange agreement was exempt from CEQA review. The First Appellate District disagreed, and affirmed the trial court's ruling.

First, the appeals court held that, because there was no prior notice to the public of the Commission's intent to rely on the statutory exemption, the project opponents were not required to exhaust administrative remedies under Section 21177 of CEQA. Under Section 21177, a complaining party must have objected and the "alleged grounds for noncompliance" must have been raised during the approval process before suit may be filed. (Pub. Res. Code § 21177(a)-(b).) But there is an important exception for CEQA determinations rendered where "there was no public hearing or other opportunity" for the public to raise objections. (Pub. Res. Code § 21177(e).) Here, the staff report for the August 7, 2012 approval hearing included a set of recommended findings—including a finding that the statutory exemption applied—but there was no other notice in advance of the public hearing that the State intended to rely on the statutory exemption. Merely listing the exemption in a staff report made available via a hyperlink a few days before the hearing (and not 10 days as required under Section 11125(a) of the Government Code) was insufficient. Because the final approval hearing had not been properly noticed, the exhaustion doctrine did not bar the action.

Second, in applying de novo review to the scope of the statutory language, the appeals court held that the land exchange did not fit within the exemption. The exemption in Section 21080.11 states that: "[CEQA] shall not apply to settlements of title and boundary problems by the State Lands Commission and to exchanges or leases in connection with those settlements." The record, however, was "silent" on how the State concluded that the exchange fell within the exemption. The statutory language defining the scope of Section 21080.11 is clear, the court noted, and it creates an exemption from environmental review for "settlements" of title or boundary disputes and for land exchanges executed in connection with "those settlements." Here, the State's approvals acknowledged that the purpose of the exchange was to "remove an impediment to the development of the 8 Washington Street Project." The appeals court noted that while the public trust undoubtedly presented a "'problem' for the City" in approving the development, it was not a problem "grounded on the need for the [State] to exercise authority to 'settle' title and boundary disputes over filled tidelands." Thus, the statutory exemption did not apply.

3. *Save Our Big Trees v. City of Santa Cruz* **(2015) 241 Cal.App.4th 694**

- An agency must demonstrate with substantial evidence that the claimed categorical exemption applies.

- Class 7 and 8 Exemptions do not apply to actions that diminish existing environmental protections even if the actions increase environmental protection in other ways.

In 1976, the City of Santa Cruz adopted an ordinance that protected "heritage trees," determined by the tree's size and historical or horticultural significance. In 2013, the City adopted amendments to the ordinance, including changes that:

(i) Removed heritage shrubs from protection;

(ii) Made listing heritage trees more difficult and removal from listing easier (particularly for non-native invasive trees); and

(iii) Added new methods to protect heritage trees, including increased penalties.

The City concluded that CEQA's Class 7 and Class 8 categorical exemptions, which exempt actions that "assure the maintenance, restoration, or enhancement" of natural resources or the environment, applied to the amendments. The plaintiff, Save Our Big Trees, argued that the amendments were not exempt from CEQA because they weakened the existing heritage tree ordinance, and would likely result in more heritage tree removals.

The Court of Appeals made two key findings. First, the Court explained that the City bore the burden of demonstrating, with substantial evidence, that the claimed exemption applied to the City's amendments. While the City argued that there was insignificant environmental impact from the amendments, it failed to provide substantial evidence that the amendments assured environmental or natural resource protection, i.e. that the CEQA exemptions actually applied. Second, the Court explained that Class 7 and 8 exemptions only apply to actions that "combat environmental harm" and do not apply to actions that diminish existing environmental protections. Since the City's amendments would protect "fewer heritage trees more effectively," the amendments would probably lead to the removal of more heritage trees and would not fall within the claimed exemptions.

The Court refused to resolve one important issue pertaining to the Class 7 and 8 exemptions. The City argued that when evaluating whether the new amendments strengthened or weakened environmental protection, the Court should look at the amendments "on the whole"; if overall the amendments resulted in more environmental protection, then the exemptions should apply. In the plaintiff's view, if the amendments included any "unfavorable" impacts, then the exemptions should not apply. As noted, the Court sidestepped this issue because even taking the City's view, the City failed to carry its burden so deciding the issue was not necessary to resolve the case.

4. ***Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943**

- Petitioner admonished for not addressing evidence in support of City's finding that circumstances were not "unusual" under the exception to categorical exemptions.

- A standard condition requiring a traffic plan did not constitute mitigation; normally mitigation cannot be relied upon to ensure consistency with a categorical exemption.

On remand from the California Supreme Court, the First Appellate District once again had occasion to consider the City of Berkeley's approval of a 6,478 square-foot, single-family home and attached 10-car garage in the hills overlooking the City. The City originally found the project exempt from CEQA under the categorical exemptions for single-family homes and infill developments (Guidelines sections 15303(a) and 15332, respectively). Several residents sued claiming that CEQA's categorical exemptions did not apply due to "unusual circumstances"—namely, the project's "unusual size, location, nature and scope." In addition to the building's size, the challengers argued that to achieve the home's proposed elevations, massive grading and retaining walls would be necessary. The Supreme Court ultimately ruled in the City's favor and resolved a number of key issues surrounding the application of categorical exemptions, including the evidence and standards governing review of the "unusual circumstances" exception for otherwise exempted projects. In the decision, the Court remanded the matter to the First Appellate District for further proceedings.

On October 28, 2015, the Court of Appeal published its decision on remand. The Court's opinion applies the framework announced by the Supreme Court, affirms the trial court's ruling that the "unusual circumstances" exception did not apply to the project, and holds that the project was categorically exempt from CEQA review. The Court of Appeal's conclusion was a departure from its original ruling. Throughout the proceedings petitioners had conceded that the project fit within the two categorical exemptions. Petitioners instead sought to challenge the project solely on an interpretation of the "unusual circumstances" exception that was ultimately rejected by the Supreme Court. On remand, the Court of Appeal held that petitioners' concession had the effect of placing "the proposed project within a class [of projects] that presumptively does not have an effect on the environment," thereby conceding "in effect, that there is no feature distinguishing it from the exempt class"—and therefore no "unusual circumstances" prohibiting use of the exemptions. Of note, the Court ultimately found that there was sufficient evidence supporting the City's position that the house was not unusual from a size, setting, or geotechnical standpoint.

The Court of Appeal also ruled for the City on a separate issue that the Supreme Court did not address, but left for the lower court to resolve: petitioners' contention that the City's imposition of traffic mitigation measures on the project precluded the use of categorical exemptions. When the City approved the project, it included a condition requiring that the applicant obtain approval of a construction traffic management plan from the City's traffic engineer, in part to address the need for removal of 940 cubic yards of soil from the project site in large trucks. The staff report to the City Council noted that this condition, along with all other conditions (except for one) were "standard conditions imposed on residential development in the [project area] which are not

intended to address any specific environmental impacts resulting from construction of this project." The only non-standard condition imposed on the project required circulation of the draft version of the traffic management plan to local residents.

The Court of Appeal recognized that prior decisions have held that a project's eligibility for a categorical exemption from CEQA review should be determined without any reliance on mitigation measures, because only projects that have no significant effect on the environment are eligible for such exemptions. In this instance, the Court found that the traffic management plan was not a measure that was implemented to mitigate a significant project effect: "Managing traffic during the construction of a home is a common and typical concern in any urban area, and especially here given the narrow roads in the area and the volume of dirt to be removed. We reject appellants' argument that implementing a traffic plan amounted to a mitigation measure that precluded the application of two categorical exemptions."

5. ***Citizens for Environmental Responsibility v. State ex rel. 14th District Agricultural Association***
(2015) 242 Cal.App.4th 555

- Categorical exemption does not impermissibly rely on mitigation where the alleged mitigation (a manure management plan) was an ongoing practice and obligation.

- Petitioners failed to present substantial evidence that the project would have a significant effect, and thus could not establish that unusual circumstances existed under the test articulated by the Supreme Court in *Berkeley Hillside*.

On November 23, 2015, the Third District Court of Appeal issued its final decision in *Citizens for Environmental Responsibility v. State of California*, on remand from the California Supreme Court for reconsideration in light of the Court's decision last year in *Berkeley Hillside Preservation v. City of Berkeley*. In *Citizens*, the Third District analyzes the same two issues concerning the use of categorical exemptions that were recently evaluated by the First District Court of Appeal on remand in *Berkeley Hillside*, above, and upholds the lead agency's use of a categorical exemption for a rodeo held at the Santa Cruz County Fairground in 2011.

The Court of Appeal affirmed a lower court ruling that the rodeo was exempt from CEQA review, pursuant to the Class 23 categorical exemption for "normal operations of existing facilities for public gatherings for which the facilities were designed, where there is a past history of the facility being used for the same or similar kind of purpose." The notice of exemption (NOE) discussed the Fairground's routine hosting of equestrian/livestock events since 1941, with an average of two to four such events taking place each month for the past 25 to 30 years, and about two dozen such events being held annually in each of the prior three years. The NOE also stated that horse and livestock manure would be strictly managed in accordance with the Fairground's Manure Management Plan (MMP), to prevent further pollution of a nearby creek that was already impaired by animal fecal coliform. Although the MMP was not written until 2010, it formalized manure management practices that had been implemented for decades at the Fairground.

The Court rejected petitioners' contentions that (1) the MMP constituted a project mitigation measure that precluded use of the Class 23 exemption, because categorical exemptions must be determined without reliance on any such measures; and (2) the unusual circumstances exception to categorical exemptions was applicable, because storm water runoff would transport manure from the rodeo into the impaired creek.

On the first point, petitioners claimed that the MMP fell within the definition of "mitigation" in the CEQA Guidelines, because it reduced or eliminated the impact of manure generated by the rodeo on the impaired creek, and the NOE relied on the MMP to prevent those impacts. The Court disagreed, finding that the MMP was not a new measure proposed for the rodeo project, but instead was a "preexisting measure previously implemented to address a preexisting concern" and therefore was part of the "normal operations" of the Fairground. As such, use of the MMP did not preclude application of the Class 23 exemption.

On the second point, petitioners asserted that the exception applies where there is a "reasonable possibility" that the project will have a significant effect on the environment due to "unusual circumstances." Applying the two-part framework laid out by the Supreme Court in the *Berkeley Hillside* case, the Court of Appeal found that no such unusual circumstances existed here, because substantial evidence supported the lead agency's decision that there were no unusual circumstances based on the features of the project. The Court rejected petitioners' argument that the rodeo project should be compared to activities held at other facilities that would be exempt under Class 23, holding instead that the appropriate comparison is with other activities at the same facility. The Court then found that the rodeo project had no unusual circumstances to distinguish it from the other "normal operations" of the Fairground: it did not involve more horses or livestock than were used for other routine events held there, no changes to the facility or operations were required, and the nature and scope of the rodeo was no different from other Fairground events. The Court also noted that the rodeo was consistent with the surrounding zoning and land uses.

Conversely, petitioners had failed to present substantial evidence that the project would have a significant effect, and thus could not establish that unusual circumstances existed. The Court noted that petitioners had not attempted to prove that the rodeo project *would* actually have a significant effect on the environment (as is required under the test announced by the Supreme Court in *Berkeley Hillside*), but instead only asserted that there was a reasonable possibility that the rodeo *might* result in significant adverse pollution effects on the creek. The Court evaluated the evidence relied upon by petitioners and found that it fell "well short" of what is required under *Berkeley Hillside*.

C. Negative Declarations

1. ***Preserve Poway v. City of Poway*** **(2016) 245 Cal.App.4th 560**

- "Community character"—apart from aesthetic impacts—is not a cognizable impact area under CEQA.

- In line with *CBIA v. BAAQMD*, CEQA does not require environmental documents to analyze impacts of existing environmental conditions (nearby operations) on a proposed project's future residents.

On March 9, 2016, the Fourth District Court of Appeal issued its opinion in *Preserve Poway v. City of Poway*, upholding the use of a mitigated negative declaration (MND) for a project to subdivide a property currently occupied by an equestrian boarding and training facility. The Court held that evidence of the project's social and psychological impacts to the community does not require preparation of an environmental impact report (EIR), as CEQA does not address such impacts.

The property, located in the City of Poway (which calls itself the "City in the Country"), was being used as a boarding facility for approximately 100 horses across the street from a 12-acre rodeo and polo grounds operated by the Poway Valley Riders Association (PVRA). The project involved the subdivision of the property into twelve residential lots, grading of the property, extension of an existing sewer line, undergrounding of existing utilities, installation of new curb, gutters, and fire hydrants, and flood channel improvements. No home construction was included in the project—any such construction would be subject to further environmental review and City approval. PVRA and a number of community residents opposed the project on the grounds that replacing the Stock Farm with a residential subdivision would negatively impact the "country character" and "equestrian lifestyle" of the community. The City Council approved the tentative tract map and adopted the MND.

In the trial court, petitioner presented ten arguments, but the trial court rejected all except one: that there was substantial evidence creating a fair argument that the project would have a significant effect on the community character of the City. The trial court granted the petition on this ground. The Fourth District reversed the trial court's ruling, holding that "community character"—separate and apart from aesthetic impacts—is not cognizable under CEQA. Prior precedent establishes that CEQA addresses physical changes to the environment, and therefore economic and social changes need not be studied, avoided, or mitigated. The Court noted that published decisions that have discussed "community character" have been limited to aesthetic impacts, which must be evaluated under CEQA. Here, the trial court did not invalidate the MND due to aesthetic impacts: the project was fully consistent with existing zoning and all other land use regulations, and there was "no substantial evidence creating a fair argument that the Project is visually out of character with the surrounding community," which includes single-family homes to the immediate north, east, and northwest.

The Court found that the impacts described by project opponents were not aesthetic, "rather, they are impacts to the collective psyche of Poway's residents related to living in the 'City in the Country' and *social* impacts caused by the loss of the Stock Farm." However, "CEQA does not require an analysis of subjective psychological feelings or social impacts," as these are not environmental impacts. As such, the trial court erred in determining that an EIR was required to study these impacts of the project.

The Fourth District also ruled that (1) given the California Supreme Court's recent decision in *California Building Industry Assn. v. BAAQMD*, addressed above, the trial court erred in requiring the MND to analyze the impact of existing environmental conditions (associated with

PVRA's operations) on the Project's future residents, and (2) Petitioner forfeited its right to challenge on appeal other portions of the trial court's ruling, as it did not file a cross-appeal.

D. Environmental Impact Reports

1. *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204

- Reliance on the "business as usual" approach to climate analysis is not invalid, but the EIR must show how individual projects will help achieve statewide goals for emissions reductions.

- Project opponents may exhaust administrative remedies by raising concerns during the CEQA-mandated public comment period or when alternative opportunities for public comment are provided (e.g., through a federal public comment period for a joint EIR/EIS).

- Courts will interpret the Fully Protected Species statutes literally, and CDFW may not authorize the capturing and relocation of state Fully Protected Species even if it serves to promote overall conservation of the species.

This case involves a challenge to the California Department of Fish & Wildlife's (CDFW's) certification of an EIR and related approvals for a resource management and conservation plan, streambed alteration agreement, and incidental take permits for the Newhall Ranch Specific Plan Project, a 12,000-acre development project proposed in the Santa Clara River Valley. The EIR adopted by CDFW determined that: (1) taking into account the project's design and the existing regulatory standards, the project's greenhouse gas emissions would have a less than significant impact on the global climate; and (2) the project could significantly impact the unarmored threespine stickleback, a fish that is fully protected under the state Fish and Game Code, but mitigation measures adopted by CDFW would avoid or reduce that impact below a level of significance. CDFW certified the EIR and approved the project in December 2010. Petitioners challenged the EIR, and the trial court ruled for petitioners on several grounds. The Second Appellate District upheld the EIR and other approvals under CEQA and the California Fish and Game Code.

On the greenhouse gas (GHG) emissions issue, the Supreme Court affirmed that CDFW did not abuse its discretion in adopting consistency with AB 32's goal—a statewide reduction in GHG emissions to 29 percent below "business as usual" levels" in 2020—as the criterion for determining the significance of the project's GHG emissions. The Court, however, ultimately held that CDFW abused its discretion in finding that the project's GHG emissions would have no cumulatively significant impact on the environment, because there was no substantial evidence in the administrative record showing that the project's project-level reduction (31 percent below "business as usual" levels) was consistent with achieving AB 32's statewide goal of a 29 percent reduction below those levels. The Court held that this "analytical gap" deprived the EIR of its sufficiency as an informative document, in violation of CEQA, and noted that "a greater degree of reduction may be needed from new land use projects" in order to achieve the statewide goal of 29 percent. And in a harbinger of its future opinion in *Cleveland National Forest v. San*

Diego Assoc. of Governments (see list of pending cases below), the Court further undermined the use of the AB 32 significance criterion in future EIRs:

> [O]ver time consistency with year 2020 goals will become a less definitive guide, especially for longterm projects that will not begin operations for several years. An EIR taking a goal-consistency approach to CEQA significance may in the near future need to consider the project's effects on meeting longer term emissions reduction targets.

The Court did not provide a clear pathway by which CDFW—or any other lead agency preparing an EIR—might cure the defect in the agency's GHG analysis identified by the Court. The opinion does state that, "[w]hile the burden of CEQA's mandate in this context can be substantial, methods for complying with CEQA do exist" (e.g., consistency with regional climate action plans or sustainable communities strategies). Yet before describing these options, the Court set forth a serious disclaimer: "We do not, of course, guarantee that any of these approaches will be found to satisfy CEQA's demands as to any particular project; what follows is merely a description of potential pathways to compliance, depending on the circumstances of a given project."

On exhaustion, the Court held that petitioners had, under Public Resources Code section 21177(a), adequately preserved two other challenges to the EIR by raising the disputed issues in letters submitted during a public comment period on the Final EIR/EIS noticed by the United States Army Corps of Engineers pursuant to NEPA. The Court acknowledged that the comments were not made during the earlier CEQA-mandated period for comments on the Draft EIR/EIS, and that CEQA does not require a comment period for a Final EIR. However, the record demonstrated that CDFW effectively treated the federal comment period as an opportunity to receive additional comments on CEQA issues, by independently reviewing the comments, helping to draft responses and related EIR/EIS revisions, and including those responses and revisions in the final version of the EIR/EIS that the agency certified. The Court held that, in these circumstances, the purpose of CEQA's requirement for exhaustion of administrative remedies had been served.

On the species issue, the Court strictly interpreted the state's Fully Protected Species statutes and held that the mitigation measures in the EIR providing for collection and relocation of the three-spined unarmored stickleback during project construction were invalid, because Fish and Game Code section 5515(a)(2) specifically prohibits the "take" of fully protected fish. Under the Fully Protected Species statutes, which are separate from the California Endangered Species Act, the definition of "take" includes to "pursue," "catch," or "capture" fully protected species—here, the stickleback. The EIR's mitigation called on the agencies to pursue and capture stickleback that might be harmed by construction activities and move them to a location more conducive to their recovery. CDFW argued that such mitigation did not run afoul of the Fully Protected Species statutes because it promotes "conservation" of the species. The Court disagreed, providing a literal interpretation of the Code: to "pursue," "catch," or "capture" really means to pursue, catch, or capture, whatever the purpose.

2. ***North County Advocates v. City of Carlsbad*** **(2015) 241 Cal.App.4th 94**

- Recent historical use may serve as CEQA baseline for replacement of vacant building where applicant has right to fully occupy vacant space without additional discretionary approvals.

- City may not recover costs for reviewing administrative record for completeness and accuracy, performing routine "chores" in making project files available, or for time spent in responding to a petitioner's reasonable motion to augment the record.

Real parties in interest Camino Real, LP and CMF PCR, LLC (collectively Westfield), proposed to renovate a portion of a former shopping center (Project) originally built in the City of Carlsbad over 40 years ago. The Project site was developed as a two- and three-story indoor shopping center with five main anchor department store buildings (four occupied and one vacant), and numerous smaller retail specialty shops. The site contained over 6,400 surface parking spaces as well as several outbuildings. Westfield owned the developed parcels within the shopping center; the City owned the surface parking lots. Under a "Precise Plan," Westfield was entitled to renovate the interior of the vacant department store building and fully occupy it without obtaining any further discretionary approvals from the City. The Project was reduced from its original size during the environmental review process, and ultimately would result in a net loss of 636 square feet of total gross leasable space. The City certified an EIR for the Project and issued two entitlements, a "Specific Plan" to facilitate future development at the shopping center area beyond the Project and a "Site Development Plan" allowing the immediate project.

Petitioners North County Advocates challenged the City's approval under CEQA, claiming the EIR used an improper baseline for traffic trips, that the City failed to consider as a mitigation measure a requirement that Westfield make a fair share contribution to the future widening of the El Camino Real bridge over State Route 78, and that the City failed to respond adequately to public comments concerning that mitigation measure. The trial court rejected petitioners' challenge, and subsequently awarded costs to the City and Westfield. Petitioners appealed the judgment and the award of costs to the City, but not to Westfield.

In determining the baseline traffic conditions for the Project, the EIR assumed 5,000 daily trips to the existing shopping center, which was based on the vacant department store being fully occupied, even though it was vacated in 2006. For the vacant space, the EIR used the San Diego Council of Government's (SANDAG) 2002 *Brief Guide of Vehicular Traffic Generation Rates for the San Diego Region*, for a "Super Regional Shopping Center" land use. Based on SANDAG's guide, the EIR assumed the building would generate 5,186 daily trips on a typical weekday. Those trips were then added into the actual traffic counts for the existing shopping center. Petitioners argued that the baseline used was "incorrect and misleading" because it did not follow normal rule of measuring conditions as they actually existed when environmental review begins—i.e., a vacant building. The Fourth District Court of Appeal disagreed. It held that "selection of a traffic baseline that assumed full occupancy of the [vacant] space was not merely hypothetical because it was not based solely on Westfield's entitlement to reoccupy the [] building 'at any time without discretionary action,' but was also based on the *actual historical operation* of the space at full occupancy for more than 30 years up until 2006." The court

emphasized lead agency discretion to "consider conditions over a range of time periods" so that the baseline may account for a "temporary lull or spike in operations." (Quoting *Communities for a Better Environment v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 327-28 [internal quotations omitted].) Thus, the Court upheld the City's selection of a traffic baseline.

On the issue of traffic impacts, the EIR disclosed that the Project would have indirect cumulative impacts on three street segments in the neighboring City of Oceanside. The City's traffic consultant concluded that these impacts could be mitigated to less than significant by requiring Westfield to contribute its fair share (approximately $6,000) toward "adaptive-response signals" that adjust to address real-time traffic conditions. The City adopted that mitigation measure. Petitioners argued that the City should also have considered mitigation requiring Westfield to contribute its fair share ($85,000) toward widening of the bridge, a measure that was suggested by Oceanside. The Court concluded that the record contained substantial evidence supporting the City's rejection of that measure, as the EIR demonstrated that the Project would not have direct or indirect impacts on the bridge. Finally, the Court rejected petitioners' claims that the City did not adequately respond to public comments on the issue of traffic impacts.

As to the trial court's award of costs to the City, petitioners claimed that because they elected to prepare the administrative record, the trial court erred by awarding the City $5,802 for staff time to review, correct, and certify the record. The City responded stating that the City's work on the record "went far beyond simply reviewing the record for completeness," and instead included: (1) paralegal time reviewing and correcting the draft record; (2) locating attachments that were missing from the documents originally made available by the City; (3) obtaining additional files from the City's consultant; and (4) responding to petitioners' motion to augment the record with the missing attachments. The Court concluded that the trial court erred with respect to all but one subcategory (the third) in its award of costs.

For the first category, the trial court should have determined to what extent the petitioners' errors and omissions in the record were severe enough that the paralegal's work was tantamount to preparing a supplemental record, or that petitioners' errors revealed a total disregard for cost containment. In the second category, the trial court should not have awarded anything to the City for what was essentially the "expected chore" of making all City project files available to petitioners. The Court upheld the award of costs for obtaining additional consultant files, as the trial court found petitioners displayed "a total disregard for cost containment" for this category of costs. For the fourth category, the court held that awarding expenses incurred in the motion practice "'blur[s]' the line between record preparation and litigation strategy," and given that the trial court granted the motion to augment, the costs did not result from any disregard for cost containment on the part of petitioners.

3. ***Beverly Hills Unified School District v. Los Angeles County Metropolitan Transportation Authority*** **(2015) 241 Cal.App.4th 627**

- Where the addition of new information to a final EIR does not change the environmental impacts of a project, recirculation is not required.

In May 2012, the Los Angeles County Metropolitan Transportation Authority (Metro) approved the Westside Subway Extension Project and that project's associated EIR/EIS. The project proposed to add seven new stations to the subway line. The Draft EIR/EIS presented two possible subway line alignments for a Century City station, one of which required tunneling under Beverly Hills High School (Constellation Boulevard) and one that did not (Santa Monica Boulevard). The Draft EIS/EIR examined, among other things, air quality impacts from the construction and operation of each alternative, noise and vibration impacts, and geologic hazards along each of the alternative subway line alignments and at each station location option. The Draft EIS/EIR then evaluated each of the alignment and station options against various environmental factors and the goals and objectives of the Project. The DEIR concluded that the Santa Monica Boulevard alignment for the Century City station might not be a viable option due to seismic risk, although further studies were being conducted to determine that option's viability.

The Beverly Hills Unified School District and the City of Beverly Hills filed comments objecting to the proposed subway tunnel under the high school. Those comments centered around concerns for student and staff safety during the subway's operation and construction, decreases in surrounding property values, and interference with plans to modernize the school's buildings. After the comment period closed, the Metro Board directed that during preparation of the Final EIR/EIS, "staff fully explore the risks associated with tunneling under the high school," and that the staff continue to work with the community to provide information from the staff's analyses as it became available. Metro's further study expanded on the draft EIR/EIS analysis on tunneling and seismic risk, and supported the conclusion that the Constellation Boulevard alignment was the preferable alternative. The City and School District hired their own experts to evaluate the studies performed by Metro. Although the Final EIR/EIS responded to the comments submitted by the City and School District, it did not address the reports prepared by those entities' experts. Metro then certified the Final EIR/EIS without recirculating it for public comment, and approved the project.

The District and the City challenged Metro's approval, on the grounds that the EIR/EIS contained significant new information and analysis triggering recirculation of the EIR/EIS. The trial court upheld the agency's approval and the Second Appellate District affirmed. The Appeals Court concluded that substantial evidence supported Metro's decision not to recirculate the EIS/EIR, and that the EIS/EIR adequately discussed air pollution and public health impacts. Citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, the Court observed "that the addition of new information to an EIR after the close of the public comment period is not 'significant' unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project." But "recirculation is not required where the new information added to the EIR 'merely clarifies or amplifies or makes insignificant modifications in an adequate EIR." Here, the Court found that the new information in the EIR/EIS merely confirmed and expanded upon the analysis in the Draft EIR/EIS. Moreover, although that new information supported Metro's decision to eliminate the Santa Monica station, "elimination of the Santa Monica station as an option did nothing to change the potential environmental impacts of the Project, other than to eliminate a potential source of seismic hazard." As to the air quality analysis, the court reasoned that the Final EIR/EIS did not increase the size of the Project or work required to construct it.

And, since the Draft EIR/EIS based its significance conclusions regarding air quality on the intensity of the impacts rather than their duration, those conclusions did not change. Therefore, substantial evidence supported Metro's decision not to recirculate the EIR/EIS. Accordingly, Metro had not abused its discretion in determining that recirculation was not required.

4. ***San Francisco Baykeeper, Inc. v. California State Lands Commission* (2015) 242 Cal.App.4th 202**

- A cumulative effects analysis that dismisses the impact as less than cumulatively considerable based on an analysis of the controversy and a small percentage contribution to the problem does not run afoul of the "ratio" approach invalidated in *Kings County Farm Bureau*.

- Failure to properly notice and consult with trustee agencies does not amount to prejudicial error where the trustee agencies are provided some opportunity to comment and petitioner neglects to show that there was information omitted from the environmental review process that would have been provided by the trustee agencies.

- Private use of public trust property triggers affirmative duty to take the public trust into account and protect public trust uses whenever feasible, a duty that is separate and not necessarily fulfilled by complying with CEQA or other environmental statutes.

The California State Lands Commission (SLC) in 2012 certified an Environmental Impact Report (EIR) and renewed several leases of submerged lands for the mining of construction-grade sand from specific areas within San Francisco Bay. The lease parcels were sovereign lands, administered by the SLC and subject to the public trust. The SLC renewed the leases for a new 10–year term and a maximum mining rate of 2.04 million cubic yards per year, an amount less than previously permitted but more than the historical average from 2002 to 2007, the baseline period. San Francisco Baykeeper, Inc. (Baykeeper) challenged the lease renewals under CEQA and the common law public trust doctrine.

On review, the First Appellate District upheld the EIR and rejected all of Baykeeper's claims under CEQA. First, Baykeeper had argued that the baseline period (2002 to 2007), although it coincided with the date of the notice of preparation (2007), no longer represented existing conditions because, since that time, sand mining volumes had fallen substantially. The Court recognized, however, that environmental conditions can vary from year to year, and that the rules governing the environmental baseline are not "inflexible." The SLC's finding that the five-year average was a better indicator of existing mining conditions was supported by substantial evidence, including evidence that the more recent slowdown in mining emanated from the financial crisis that began in 2007.

Second, the EIR had addressed in some detail the possible environmental impacts of sand mining on sediment losses at coastal beaches, and ultimately concluded that the proposed project did not contribute cumulatively to coastal erosion based on studies of Bay bathymetry and numeric modeling prepared by SLC's geologists at Coast & Harbor Engineering (CHE Study), which quantified the Project's contribution to sediment losses amounted to less than 0.2 to 0.3 percent

of observed sediment losses on the outer coast. Baykeeper argued that the EIR improperly used the "ratio" approach first articulated in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, to dismiss the cumulative impacts analysis as insignificant. The Court disagreed, finding that a "more comprehensive analysis of the cumulative impact . . . was not required." Further, the Court found that the EIR's attempt to produce a numeric ratio was a "supplemental component" added to "reinforce the impact conclusions" in the EIR, and thus bore "little resemblance to the cursory analysis of the cumulative ozone impacts that was found lacking in *Kings County*."

Third, Baykeeper had argued that the Final EIR added "significant new information" and required recirculation. The new information encompassed the numeric modeling prepared for the EIR referenced above (the CHE Study), as well as two articles prepared by a coastal geologist at the U.S. Geological Survey that added to the scientific knowledge about the causal link between sediment transport and coastal erosion. While the CHE Study and new scientific articles were "relevant to the scientific controversy," the Court nevertheless found that the controversy had been "fully disclosed and considered" in the Draft EIR and the new information "did not alter any of the substantive conclusions" in the Final EIR. Consequently, the new information was not significant and did not trigger recirculation.

Fourth, Baykeeper challenged the EIR's application of the Appendix G threshold to the assessment of mineral resources impacts. To assess mineral resource impacts, Appendix G asks whether the project would "[r]esult in the loss of availability of a known mineral resource." The EIR concluded that, while sand mining would "reduce the amount of sand that would be available for future mining," there was no adverse impact under the Appendix G threshold because the project did not propose to limit the availability of mineral resource. Reciting Appendix G as encompassing only "suggested" thresholds, the Court found that the impact conclusion was supported by substantial evidence that "the project will not lead to the loss of the availability of a mineral resource, but instead will provide the citizens of this state with access to that very resource."

Fifth, in one of the more significant rulings in the case, the Court concluded that while the SLC had failed to properly notice and consult with two trustee agencies—the Coastal Commission and City of San Francisco—that error was not prejudicial. Despite the failure to properly notice and consult with trustee agencies, the Court emphasized that error is only prejudicial "where failure to comply with the law results in 'a subversion of the purposes of CEQA by omitting information from the environmental review process. . . .'" (Quoting *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 959; *see also* Pub. Res. Code § 21005(a).) In this case, San Francisco and the Coastal Commission had the opportunity to comment on the Project but elected not to do so. And because Baykeeper could not identify "any information that was omitted from the environmental review process that would have been provided by these other agencies," the Court could not find that the error was "prejudicial."

Baykeeper asserted a second cause of action under the common law public trust doctrine arguing that the SLC violated the public trust in approving the lease renewals by failing undertake a separate trust analysis and adopt public trust findings. The SLC had conducted an environmental analysis of many public trust uses and resources in the EIR (e.g., navigation, recreation, fisheries,

Bay habitats, land uses, and consistency with plans and policies), and the SLC contended on appeal that it fulfilled its duty to consider the public trust in the CEQA process. The Court rejected this view. Private uses of trust property trigger affirmative obligations under the trust doctrine, including the "affirmative duty to take the public trust into account . . . and to protect public trust uses whenever feasible." (Quoting *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446.) While compliance with environmental statutes such as CEQA can serve to fulfill an agency's trust obligations, the Court held that the record of the CEQA review process in this instance did not address the SLC's obligation to conduct such analysis.

5. ***City of Hayward v. Board of Trustees of the California State* University (2015) 242 Cal.App.4th 833**

- Lead agency directed to reconsider feasibility of funding fair-share contributions to off-site traffic mitigation; lack of appropriations by Legislature does not render mitigation infeasible.

- Increased fire and emergency vehicle response times are not environmental impacts that require mitigation under CEQA; the City is responsible for providing adequate emergency services and cannot shift that financial burden to project proponents.

- Transportation Demand Management (TDM) plans do not constitute improper deferral of mitigation for traffic and parking impacts, provided that they contain appropriate standards and measurable objectives.

- Program-level EIR for university expansion master plan violated CEQA by analyzing impacts of increased student population on parks system, generally, without looking at impacts on particular parks.

In November 2015, the First Appellate District issued a modified opinion in *City of Hayward v. Board of Trustees of California State University* (*City of Hayward*), updating the opinion to address the test for "feasibility" as applied to fair share mitigation payments an agency intends to fund via legislative appropriations. In *City of Hayward*, the City challenged the adequacy of an EIR certified by the Board of Trustees of the California State University (the "Trustees") for a university expansion master plan to accommodate forecasted increases in the student population on the Hayward campus over 20-30 years. The EIR concluded that buildout under the master plan would result in significant impacts as to aesthetics, air quality, cultural resources, and traffic. The Trustees certified the EIR, adopted a statement of overriding considerations, and approved the plan.

The City of Hayward and local community groups filed petitions for writ of mandate challenging the certification of the EIR and approval of the master plan, and the cases were coordinated for trial. In October 2010, the trial court issued an order granting petition for writ of mandate, holding that the EIR failed to adequately analyze impacts on fire protection and public safety, traffic and parking, air quality, and parklands.

In May 2012, the First Appellate District issued an opinion reversing the trial court on all grounds except one: the court of appeal agreed that the EIR failed to adequately analyze potential effects on two regional parks adjacent to the campus. The California Supreme Court granted review, but then transferred the case back to the appellate court with directions to reconsider the case in light of the Supreme Court's decision in *City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945 (City of San Diego). The 2015 decision was modified only as to mitigation for off-site traffic impacts. The remainder of the opinion was left unchanged.

The modifications to the opinion concerned the test for "feasibility" as applied to fair share mitigation payments an agency intends to fund via legislative appropriations. The EIR committed the Trustees to request appropriations from the legislature to support fair share mitigation costs for off-site traffic impacts. However, because the Trustees could not require the legislature to approve those appropriations, they concluded that the fair share mitigation was potentially infeasible and issued a statement of overriding considerations. The trial court found that the Trustees had violated CEQA in concluding that they were "not obligated to mitigate a significant effect consequent to a CEQA project simply because the Legislature declined to fund mitigation while otherwise funding the project."

In its original opinion, the First Appellate District found in favor of the Trustees, rejecting the trial Court's rationale as to off-site traffic impacts based, in part, on principles articulated in *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 359-360. The Court upheld the Trustees' determination that the fair share payments were potentially infeasible, stating that "[n]othing in CEQA requires the Trustees to commit to a mitigation measure that is not feasible." The Court went on to find that the City had failed to exhaust administrative remedies as to its argument that reliance on legislative appropriation to determine the feasibility of paying for the mitigation measures "ignores the fact that it has alternative funding available to it." However, in *City of San Diego*, the Supreme Court rejected the Trustees' argument that a state agency may contribute funds for off-site environmental mitigation only through earmarked appropriations, to the exclusion of other available sources of funding. Reexamining dicta in *City of Marina*, the court found that this "erroneous assumption" invalidated the finding that mitigation was infeasible and the statement of overriding considerations. The Court emphasized that an agency's duty to mitigate for the environmental impacts of its project is not conditioned upon its ability to obtain funding through appropriations.

In response to the Supreme Court's decision in *City of San Diego*, the First District modified section 3(c) of its *City of Hayward* opinion to affirm the trial court's decision, which required reconsideration of the feasibility of funding the University's fair-share contribution as a mitigation measure. Regarding exhaustion, the court stated that "[a]lthough the issue was not fully presented when the adequacy of the EIR was before the Trustees, in view of the clarification provided by *City of San Diego* and the scope and public importance of the project in question, it is appropriate for the Trustees to heed the Supreme Court's guidance with respect to this project . . ."

The Court of Appeal reversed the trial court's finding that the EIR's analysis of impacts associated with expanded fire and emergency medical services required by the project was

inadequate. The EIR had acknowledged that the project would give rise to a need for additional firefighters and new fire facilities, and that CEQA review would be required for those additions. However, the EIR concluded that the impacts of addition a new fire station would be less than significant "due to the limited area that is typically required to build a fire station (between 0.5 and 1 acre) and its urban location." The trial court found this analysis inadequate, but the court of appeal disagreed, finding that it was "reasonable and sufficient" for the EIR to conclude that the fire station would likely be approved via an exemption or a negative declaration, and that the impacts would therefore be less than significant.

The appellate court also rejected the trial court's conclusion that the Trustees were required to provide mitigation for increases in emergency vehicle response times. The court found that these were social impacts, stating that "[t]he need for additional fire protection services is not an environmental impact that CEQA requires a project proponent to mitigate." The Court focused on the fact that "the obligation to provide adequate fire and emergency medical services is the responsibility of the city" (citing Cal. Const., art. XIII, § 35(a)(2)), and went on to state that there is no authority upholding the city's view that CEQA shifts financial responsibility for the provision of adequate fire and emergency response services to the project sponsor." The Court relied, in part, on *Goleta Union School Dist. v. Regents of University of California* (1995) 37 Cal.App.4th 1025, which held that increased school enrollment is not, in and of itself, an environmental impact.

The trial court found that the EIR's analysis was inadequate as to the traffic and parking impacts associated with proposed faculty housing. The appellate court disagreed, however, finding that the limited analysis of impacts of a potential site for faculty housing – which looked only at impacts on major area intersections – was sufficient because no site had yet been selected. The court found that the level of analysis was appropriate for a program EIR, and that the future impacts of the housing project were appropriately deferred to a future proceeding. To mitigate general parking and traffic impacts associated with the increased student population, the EIR relied upon a Transportation Demand Management (TDM) plan, which aimed to reduce student and faculty reliance on single-occupancy vehicles for commuting to campus. The court of appeal disagreed with the trial court's conclusion that the TDM plan constituted improper deferral of mitigation. The court pointed out that, although the TDM had not yet been finalized, the EIR contained specific policy goals, quantitative criteria, and specific deadlines for completion of the parking and traffic studies, as well as a monitoring program to ensure the program's effectiveness. The court found that the TDM did not constitute improper deferral of mitigation, and that the plan was sufficiently concrete as to pass muster under CEQA.

The court of appeal also rejected the trial court's holding that the air quality analysis in the EIR was inadequate because it relied upon the TDM plan to reduce emissions. The trial court had determined that there was no substantial evidence to support the determination that the TDM plan would be effective. The court of appeal rejected this contention, finding the TDM plan adequate, and thus reversed the trial court's finding on air quality.

Parklands

Finally, the court of appeal affirmed the trial court's determination that the EIR was inadequate in its analysis of the project's impacts on area parklands. The EIR analyzed east bay parks on a

system-wide basis, rather than evaluating impacts on individual parks, and concluded that, based on "long-standing use patterns" and ample on-campus recreation options, impacts on area parks would be less than significant. The court found that the EIR lacked substantial evidence to show that students would make the same "nominal" use of the parks, and that none of the parks would be significantly impacted by the project.

6. *North Coast Rivers Alliance v. Kawamura* **(2016) 243 Cal.App.4th 647**

- Agency adopted an alternative pest management program (multi-year control) that was not evaluated in original EIR and conflicted with original project and objectives (complete eradication), leading to incomplete alternatives and cumulative impacts analysis.

In this opinion, the Third Appellate District reversed the Sacramento Superior Court and held that a programmatic EIR for a seven-year plan to control an invasive pest—the light brown apple moth—violated CEQA. In 2009, the California Department of Food and Agriculture (CDFA) issued a draft program EIR for a seven-year plan to eradicate the moth in the State of California, relying primarily on biological control methods. The Draft EIR's alternatives analysis did not analyze any alternatives to the eradication program—such as a program to control the moth population—but instead evaluated seven tools (five of which were approved) as "alternative" means for achieving the goal of eradication.

Shortly after the Final EIR was published in 2010, CDFA received notice that the United States Department of Agriculture had determined that eradication of the moth was no longer feasible, due to its continued spreading throughout the state, and the federal agency would be shifting to a "control and suppression strategy." Ten days after receiving this notice, CDFA certified the final program EIR for the eradication program, but approved a seven-year control program, finding that the new project objectives only "differ[ed] somewhat" from the objectives studied in the EIR (despite the fact that the Draft EIR had stated that eradication was "fundamentally different" from control). Several petitioners sought writs of administrative mandate to invalidate the EIR, but the lower court denied their petitions.

The Third Appellate District reversed, holding that the EIR violated CEQA because it failed to analyze a control program as an alternative to the eradication program. The Court found that the Draft EIR applied an "artificially narrow" definition of the program's actual objective: "eradication" of the moth, rather than "protect[ion of] California's native plants and agricultural crops from damage." This mistake "infected the entire EIR" by causing CDFA to reject consideration of any alternative that would not result in the complete eradication of the moth, despite the fact that "the goal of eradication was always known to be tenuous, because [the moths] kept spreading" during the EIR process. CDFA's last-minute selection of an alternative that was not analyzed in the EIR—a control program—rendered the EIR inadequate, as the document failed to include relevant information and precluded informed decisionmaking and public participation. As such, the Court concluded that the EIR was "fatally defective" in failing to study a range of reasonable alternatives.

The Court rejected two of petitioners' other contentions: that substantial evidence did not support CDFA's assumptions about the "no project alternative" and that CDFA failed to adequately analyze certain program impacts. Lastly, the court found it unnecessary to review petitioners' claim that the EIR's cumulative impacts analysis violated CEQA, because the statute does not require a court to "address additional alleged defects that may be addressed in a completely different and more comprehensive manner upon further CEQA review following remand." (Citing *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 101-102.)

E. Litigation Procedures

1. *Highland Springs Conference & Training Center v. City of Banning* (2016) 244 Cal.App.4th 267

- A related corporate entity can, under certain circumstances, be considered an alter ego of a single purpose entity (SPE) and be liable for attorney's fees and costs if the SPE dissolves.

- Development company was not prejudiced by plaintiffs' delay in filing a motion to amend the judgment to add it as a debtor acting as the alter ego of real party SPE that was dissolved during the litigation.

In 2006, defendant and respondent City of Banning certified an EIR for a 1,500–acre real estate development project known as the Black Bench project. Plaintiffs Highland Springs Conference and Training Center (Highland Springs), Banning Bench Community of Interest Association (Banning Bench), and three additional parties (not parties in this appeal) filed a total of four separate CEQA actions challenging the approval in November 2006, which were later consolidated. The actions named "SCC/Black Bench, LLC, dba SunCal Companies" (SCC/BB), as the only real party in interest. Judgment was entered in favor of plaintiffs, and thereafter plaintiffs moved to recover attorney's fees and costs incurred in the CEQA proceeding. At that time, it was apparent that SCC/BB was having financial difficulties. SCC/BB did not oppose the motion and the trial court ultimately awarded the plaintiffs over $1 million in attorney's fees and costs.

Four years later, the four plaintiffs jointly moved to amend the judgment to add SCC Acquisitions, Inc. (SCCA) as an additional judgment debtor under Code of Civil Procedure section 187 and make SCCA liable for paying the fees and costs, on the grounds that it was the alter ego of SCC/BB. Plaintiffs claimed they did not discover until 2012 that SCC/BB had been dissolved in 2010. After several rounds of briefing, three hearings, and several evidentiary submissions, the trial court denied the motion on the sole basis that plaintiffs failed to act with due diligence in bringing the motion. The court reasoned plaintiffs knew, or reasonably should have known, of SCCA's alleged alter ego relationship to SCC/BB long before plaintiffs moved to amend the judgments in October 2012. Highland Springs and Banning Bench appealed the trial court's order.

The Fourth Appellate District reversed, finding that SCCA made an insufficient evidentiary showing that it was prejudiced by the delay and did not meet its burden of proving the motion

was barred by laches. The court noted that SCCA could not "simply assert, without specifics or supporting evidence, that it no longer had the same resources it had before the real estate market 'collapsed' in 2008 and that other unspecified 'circumstances [had] materially changed.'" The Court also clarified that "[n]o statute of limitations applies to a section 187 motion to amend a judgment to add a judgment debtor." The court remanded the case to the trial court to determine whether plaintiffs met their burden of demonstrating that: (i) SCCA effectively controlled the CEQA litigation; (ii) there was such a unity of interest and ownership in SCCA and SCC/BB; and (iii) an inequitable result will follow unless SCCA is held liable. The decision in *Highland Springs*, establishes that a related corporate entity can be considered an alter ego of an SPE and be liable for attorney's fees and costs if the SPE dissolves, even though the purpose of creating the SPE was to limit liability.

II. LAND USE DECISIONS

A. *Save Mount Diablo v. Contra Costa County* (2015) 240 Cal.App.4th 1368

- Where property has been previously separated through eminent domain action, but there is no "division" (e.g., conveyance) of property, property owner is not, ipso facto, entitled to a certificate of compliance under the Subdivision Map Act (SMA).

Property owners in this case had purchased land that had previously subject to condemnation by the Contra Costa Water District. Roughly rectangular in outline, the property was crossed by two narrow, intersecting strips of land that were acquired by the District through 1997 condemnation proceedings. One strip was acquired to accommodate a road, the other strip to accommodate an underground pipeline. When the owners acquired the property in 2006, the deed described it as a single parcel. But as a result of the exclusions, the property consisted of four parts, separated from each other by the narrow strips of District-owned land. The owners later applied to the county to subdivide the property into four parcels and one remainder parcel in conformance with the SMA. A nonprofit group, Save Mount Diablo (SMD), objected to the application, raising a number of environmental impact concerns.

With the objections, the owners abandoned their application and instead asked the county to issue a certificate of compliance for each of the property's four parts, which the County Planning Commission issued. A certificate of compliance allows an owner to legitimize a division of property that has already occurred. This is appropriate, for example, when a statutory exemption from the map requirements applies for properties that were divided under earlier provisions of law. A conditional certificate of compliance, on the other hand, is appropriate where no statutory exemption from the map requirements applies (e.g., when a part of a larger landholding is illegally conveyed by deed). SMD filed a writ of mandate against the County seeking to set aside the certificates. The trial court granted the petition, concluding that no legal authority supported the owner's theory that the condemnation effected a subdivision of the property. The owners appealed, their main argument being that the condemnation effected a de facto division of the property into four parcels.

The Appeals Court held that regular and conditional certificates of compliance are limited to legitimizing divisions of property that have already occurred, such as divisions covered by the

SMA's grandfather clauses or divisions resulting from a property's illegal conveyance. Because there was no division of the four parts of the property, the owners were not entitled to either certificate. The County and owners further argued that the condemnation exemption applied and thus no subdivision under the SMA was required. The condemnation exemption applies to land conveyed to or from a governmental agency or public entity for rights-of-way, unless a showing is made, upon substantial evidence, that public policy necessitates a parcel map. The Court disagreed, finding that the condemnation exemption did not apply because owners' property was neither conveyed to nor from a public entity. Indeed, the parcels were not conveyed at all and remained in private ownership.

B. *Levi Family Partnership, L.P. v. City of Los Angeles* (2015) 241 Cal.App.4th 123

- When a zoning ordinance authorizes an agency to approve a conditional use (rather than variance) upon making specified factual findings, the agency is not required to adopt sub-findings.

Pursuant to Los Angeles Municipal Code section 14.3.1(B), a developer sought to construct a 128-unit eldercare facility in an area zoned for single family dwellings, public parks, farming, trucking gardening, and limited golf courses. Although not specifically enumerated under Section 14.3.1(B), the zoning administrator is authorized to approve eldercare facilities within enumerated zones when "it does not meet the use, area, or height provisions of the respective zone." The zoning administrator approved the developer's project, but the Commission reversed all of the zoning administrator's findings, concluding that none of the findings required under Section 14.3.1(E) had been demonstrated. For the zoning administrator to apply the Section 14.3.1(B) exemption, the administrator must first make an "unnecessary hardship" finding—that "strict application of the land use regulations" to the subject property would result in "practical difficulties or unnecessary hardships." In addition, the administrator is required to make specific findings relating to the proposed facility's potential benefits and burdens. To grant approval, the administrator must find that the proposed facility provides eldercare services "to meet the citywide demand."

The developer filed a petition for administrative mandamus, but the trial court denied the petition and entered judgment in favor of the City and Commission. The developer appealed, asserting that for the Commission to satisfy the requirements imposed on administrative decisions, it was required to support its negative findings with additional sub-findings. Likening the findings to those required for conditional uses, the Court of Appeal held that the Commission's negative "benefit and burden" findings were adequate by themselves to support the Commission's decision, and sub-findings were not required under *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506. Under *Topanga*, which set forth the standards involving variances (not conditional uses), an administrative agency must make findings sufficient "to bridge the analytic gap between the raw evidence and ultimate decision or order," including "legally relevant sub-conclusions supportive of its ultimate decision." That standard, however, did not apply here.

C. *HPT IHG-2 Properties Trust v. City of Anaheim* (2015) 243 Cal.App.4th 188

- A city may be estopped from approving and relying on a use permit for construction of a project that is inconsistent with a previously-approved use permit where the holder of the earlier permit has relied to its detriment and exceptional circumstances justify application of equitable estoppel.

In 1999, the City of Anaheim approved a CUP for a developer to build two hotels near Disneyland, which included plans for a two-level parking structure that would later be built by the City. At the time the CUP was approved, Anaheim had plans to build an overpass that would take part of developer's property. The CUP was supported by a Parking Study (which identified the "Parking Structure") that was incorporated into the Ultimate Site Plan, and which were both approved by the City of Anaheim. The Ultimate Site Plan stated that, after the overpass was built, there would be 300 surface stalls and 55 stalls in a "below-grade parking structure." This was intended to meet the needs of the two hotels that the developer was to construct. Based on the approved Site Plan, the developer made a number of design changes, including a significant 44-room reduction in the number of rooms that could otherwise have been built. Thereafter, the developer constructed the project at a cost of $40 million.

In 2011, while the overpass was being constructed, Anaheim applied for a separate CUP that proposed to eliminate the parking structure as described in the developer's CUP, which the planning commission then adopted. Anaheim thereafter built the surface parking lot rather than the two-level structure agreed upon in the developer's CUP. The developer filed a petition to set aside Anaheim's CUP. The trial court granted the petition and held that Anaheim was equitably estopped from changing the Ultimate Site Plan approved in the initial CUP, finding that the plaintiff had reasonably relied on the construction/design of the two-level structure to its detriment.

The Appeals Court affirmed the trial court's decision. Specifically, the Court found that substantial evidence supported the trial court's finding that city agreed to build two-story parking structure; that the City charter did not preclude the City from being bound by equitable estoppel; that the developers relied to their detriment on the original CUP; and exceptional circumstances justified application of equitable estoppel against the City. The Court restated the four elements necessary to establish equitable estoppel, including: (i) the party to be estopped must be apprised of the facts; (ii) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (iii) the other party must be ignorant of the true state of facts; and (iv) he must rely upon the conduct to his injury.

The City had attempted to show the lack of any agreement to construct the parking structure by taking issue with some of the evidence relied upon by the trial court. But the Appeals Court emphasized that such evidence was "only a small portion of the evidence in the extensive record" that supported the trial court's finding that the City had agreed to construct the parking structure, including the CUP itself which included the final parking study approved by the City. The trial court record contained sufficient evidence of the City's commitment, for example, in numerous site plans, witness testimony, project documents, studies, letters, and memoranda, as well as of the extensive negotiations between the City and the developer. Moreover, the Court

emphasized the grave injustice that would ensue if the City were not equitably estopped: "plaintiffs spent $40 million to develop the Project, despite losing a significant amount of the Property to defendants for the Overpass, and were induced to do so based on defendants' agreement to construct the Parking Structure and comply with Resort Development Standards on the Triangle." Given the evidence of the City's commitment and the developer's reliance on that commitment, combined with the grave injustice that would result otherwise, the Court found that equitable estoppel was appropriate in this case.

D. *Safe Life Caregivers v. City of Los Angeles* (2016) 243 Cal.App.4th 1029

- State Zoning Act's minimum procedural requirement that a city's planning commission provide notice and hold a hearing before a zoning ordinance is adopted does not apply to the enactment of zoning by initiative/referendum.

- The L.A. City Charter, which requires proposed ordinances to be referred to the Planning Commission, does not apply to ordinances enacted by referendum.

- Immunity for grandfathered medical marijuana businesses is a legislative act and not subject to administrative requirements of a CUP or variance.

California's Compassionate Use Act (CUA) of 1996 provided that two specific criminal penalties (relating to the possession of and cultivation of marijuana) shall not apply to a patient or to patient's primary caregiver, providing a limited criminal immunity. In 2003, the Legislature passed the Medical Marijuana Program Act (MMPA) which expanded the criminal immunities of the CUA to the collective cultivation of marijuana. The CUA and MMPA constituted limited exceptions to the sanctions of the state's criminal and nuisance laws relating to marijuana.

On May 21, 2013, Los Angeles voters approved "Prop D," an ordinance that bans all medical marijuana businesses but grants a limited exemption from civil or criminal liability to collectives meeting a list of requirements, including: registration pursuant to an Interim Control Ordinance (banning establishment/operation of all dispensaries in the City), and a Grandfather/Lottery Ordinance (capping the number of collectives that could be grandfathered). Other requirements include restrictions on hours of operation, limits on proximity to land zoned residential, and limits on proximity to schools, parks, religious institutions, and other medical marijuana businesses. Twenty medical marijuana collectives and a handful of patients challenged Prop D, challenging both the process for Prop D's enactment and the substantive provisions of the ordinance. The collectives lost in the trial court and appealed.

On appeal, the collectives challenged the process for enactment of Prop D, claiming that the process violated Government Code section 65804 (the California Zoning Act), the L.A. City Charter, and the requirements governing conditional use permits and variances (claiming that the Ordinance was analogous and therefore required to comply). The Appeals Court rejected each of these arguments. First, the Court recited the long case history and the general proposition that state Zoning Act requirements that normally apply to enactment of ordinances by local

legislative bodies *do not* apply to enactments by initiative or referendum. Similarly, the Court held that the City's Charter, "by its plain language," does not apply to ordinance enacted by referendum but only "to the adoption, amendment or repeal of ordinances, orders or resolutions by the Council."

The collectives' last procedural claim attempted to analogize Prop D to the granting of a conditional use permit or variance to medical marijuana businesses meeting certain qualifications. Because conditional use permits and variances must follow certain procedures, they argued, Prop D must as well. The Court rejected the analogy: "Facially, Prop D does not grant either a conditional use permit or a variance." And in effect, Prop D "is not an affirmative grant of any land use right (permit or variance) *but a limited immunity* applicable only when certain conditions are met." Thus, the procedural requirements that normally attach to conditional use permits do not apply.

Finally, as to the collectives' substantive challenges to the Ordinance, the Appeals Court found that there is no constitutional or statutory right to possess, cultivate, distribute, or transport marijuana for medical purposes. For example, the Court noted that Subdivision 11362.5(a) of the state Health and Safety Code sets forth "broad purposes," but its "substantive provisions . . . are actually quite narrow, providing not an affirmative right, but merely a limited criminal immunity." Consequently, state laws providing limited immunity did not "preempt" local ordinances that might limit land uses.

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 Dist.* **(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 District's approval, holding that the District 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 circumstances under which public agencies must prepare subsequent EIRs when evaluating "changes" to previously-approved projects, as well as the level of deference agency decisions may receive from the courts. Oral argument has been set for May 4, 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 appellate 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 Found. v. San Diego Assoc. 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 appellate 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?

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 Court of Appeal 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 is fully briefed.

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 is fully briefed.

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