



Land Use & CEQA Update

Presented to the League of California Cities
2021 City Attorneys Spring Conference

Bill Ihrke / Rutan & Tucker, LLP
b ihrke@rutan.com



18575 Jamboree Road, 9th Floor, Irvine, CA 92612 | 714-641-5100

1

AGENDA

- GENERAL OBSERVATIONS re CASES
- SUMMARY OF FEDERAL CASES
 - SUMMARY OF STATE APPELLATE COURT CASES



18575 Jamboree Road, 9th Floor, Irvine, CA 92612 | 714-641-5100

2

2

Federal Cases

3

Tandon v. Newsom

-- U.S. ---, -- S. Ct. ---, 2021 WL 1328507 (Apr. 9, 2021)

- COVID-19 *Per Curiam* Opinion
- Free Exercise Clause
- State restrictions on private gatherings with exceptions for secular activities comparable to religious activities = STRICT SCRUTINY
- State Must Explain Why At-home Worship Not Allowed / Injunction Issued
- Dissent: Law Does Not Require State Equally Treat “Apples And Watermelons”

4

South Bay United Pentecostal Church v. Newsom

985 F.3d 1128 (9th Cir., Jan. 22, 2021),
injunction issued, 141 S. Ct. 716 (Feb. 5, 2021)

- Also COVID-19 *Per Curiam* Opinion / Injunction Issued
- State Enjoined from Blueprint's Tier 1 Prohibition on Indoor Worship Services
- Supreme Court = No Limits Lingerin in Shopping Malls, Salons, or Bus Terminals
- State Not Enjoined on 25% Capacity or Singing
- Again, Dissenting Opinion
- Ninth Circuit = Complete Closure in Tier 1 Met Strict Scrutiny

5

United States Fish & Wildlife Service v. Sierra Club

141 S. Ct. 777, 2021 WL 816352 (Mar. 4, 2021)

- FOIA on U.S. EPA Rule Making Process
- Holding: FOIA Deliberative Process Exemption Protected Federal Agency Draft Opinion, Even If Draft Opinion Reflected Last Views, In Effect EPA's Initial Proposed Rule was Likely To Have
- More Informational for Project Sites subject to Federal Law
- But, Cal. Public Records Act Cases look to FOIA cases for guidance
- Dissent = "Drafts of Draft Biological Opinion"

6

United States v. State Water Resources Control Board

988 F.3d 1194 (9th Cir., Feb. 24, 2021)

- U.S. Filed in Federal & State Court Cases with Identical CEQA Violation Claims, and Intergovernmental Immunity in Fed. Court Only
- Facts: State Board Manages the Delta / includes New Melones Dam, operated by the U.S. BOR / State Board Modified Flow Objectives and Salinity Levels / BOR Claimed Adverse Effect on Dam Operation
- Procedure Holdings: Stay Order on Appeal / Partial Stay under *Colorado River*



18575 Jamboree Road, 9th Floor, Irvine, CA 92612 | 714-641-5100

7

7

Center for Biological Diversity v. Bernhardt

982 F.3d 723 (9th Cir., Dec. 7, 2020)

- Challenge to Federal Agency Approval of Off-shore Oil Drilling under NEPA, ESA, MMPA
- Outer Continental Shelf Lands Act (OCSLA) gives Court of Appeals jurisdiction over groups' claim under the ESA
- Environmental Impact Statement (EIS) = Arbitrary & Capricious for Failing to Adequately Consider Foreign Oil Consumption
- Deference Applies Only When Agency Predictions Are in its Expertise



18575 Jamboree Road, 9th Floor, Irvine, CA 92612 | 714-641-5100

8

8

Hotop v. City of San Jose

982 F.3d 710 (9th Cir., Dec. 7, 2020)

- Facts: Owners of Rent-Controlled Housing Brought §1983 Action for Unreasonable Searches, Takings, Equal Protection and Contract Interference
- Landlords Challenged Disclosure Obligations & Ability to Increase Rents under Ordinance
- City's Motion to Dismiss Amended Complaint w/o Prejudice
- Plaintiffs Relied on that Amended Complaint
- Ninth Circuit Affirmed under *de novo* Review

9

Bair v. California Department of Transportation

982 F.3d 569 (9th Cir., Dec. 2, 2020)

- Richardson Grove - Redwoods
- Two-lanes Nonstandard Alignment / "California Legal" Trucks OK, Industry-Standard U.S. Trucks Not OK / Widening Project
- 2010 & 2014 NEPA Challenges / Caltrans Ordered To Prepare New Maps for Old Growth Root Zones and Impacts to Each Tree
- This is 2017 Case: Ninth Circuit Reversed / Held: Caltrans took the requisite "hard look" at the Project / No Comments in Record that STAA Trucks Cause More Damage

10

San Francisco Taxi Coalition v. City and County of San Francisco

979 F.3d 1220 (9th Cir., Nov. 9, 2020)

- Taxi Drivers Sued City Transit Rules Favoring Recent Owners of Medallions as Violating CEQA, Equ. Protection/D.P., Age Discrimination
- CEQA: Rules Not A “Project” / Judgment on Pleadings Affirmed but Remand CEQA and Age Discrimination Claims to Amend Complaint
- Agency & Courts Look at “General Nature” of Proposed Action to Determine “Project”
- Complaint Did Not Allege Regulations Increased Taxis in Circulation or Authorized More Fares

11

Sierra Club v. Trump

977 F.3d 853 (9th Cir., Oct. 9, 2020)

- Border Wall & Nat’l Security Act (NEA) Case
- States (including Cal.) had Article III Standing
- Environmental Groups Had Standing / Cut Through Habitat / Infringe on State’s Interests in their Natural Resources
- Wall Projects Not Within NEA’s definition of “military installation” [Dissenting Opinion tho]
- District Court Did Not Abuse Discretion Granting Environmental Organization Permanent Injunction

12

State Appellate Court Cases

13

Lent v. California Coastal Commission

(Apr. 5, 2021) -- Cal.App.5th ---,
2021 WL 1248022

- First of Few Coastal Comm'n Cases
- Lents Owned Beachfront Property in Malibu
- Prior Owner's CDP Required 5-ft Access / 1980 Recorded Offer of Dedication / Still Constructed Gate and Deck that Encroached
- 1993: Notice of Access Easement Rights / 2002: Lents Purchased Property / 2007: First of Many Coastal Com. Notices
- Holding: Cease & Desist Order Upheld / \$4M+ Penalty Not Excessive or Violation of D.P.

14

11 Lagunita, LLC v. California Coastal Commission

(Dec. 4, 2020) 58 Cal.App.5th 904

- Existing 1950s Seawall for Home in Laguna Beach
- 2015 CDP Provided Seawall Use Would Expire & Remove if Home Redeveloped under Functional Equivalent of “New Development”
- Owners Reinforced Seawall, Then Redeveloped / Coastal Com. Found Out
- Court Upheld Cease and Desist Order to Remove Seawall and Imposing \$1M penalty

15

Spotlight on Coastal Corruption v. Kinsey

(Nov. 24, 2020) 57 Cal.App.5th 874

- Nonprofit Sued Coastal Commissioners for Nondisclosure of *ex parte* Communications and Participation in Matter without Disclosing
- Plaintiff Was Lawyer-created Entity Never Appearing at a Commission Hearing
- Plaintiff Lacked Public Interest Standing / Not Beneficially Interested in a Writ
- Merits: Statutory Construction = Coastal Act §30820(a)(2) [\$30,000 Penalty] Did Not Apply to More Specific *ex parte* Disclosure Statutes

16

Felkay v. City of Santa Barbara

(Mar. 18, 2021) 62 Cal.App.5th 30

- Felkay Bought Ocean-Front Residential “Flag Lot” with Narrow Driveway from Street & Sloped Downward To Ocean
- Construction Inconsistent with LCP Policy Prohibiting Development on a Bluff Face, But Top of Bluff Determined “Not Developable”
- Plan.Com. Staff Still Recommended Approval to Avoid Takings Issue (Coastal Act §30010)
- Plan.Com. and Council Denied CDP
- Holding: Admin. Procedures Exhausted / *De Facto* Taking Denying All Economic Use / Attorney’s Fees

17

San Luis Obispo Local Agency Formation Commission v. City of Pismo Beach

(Mar. 3, 2021) 61 Cal.App.5th 595

- LAFCO & Special District Risk Management Authority (SDRMA) sought fees from City & Developer for Defending a Lawsuit brought by Developer
- LAFCO Denied Application for Annexation
- LAFCO Indemnification Agreement Not Supported with Consideration
- Cortese-Knox-Hertzberg Act, Authorizing LAFCO fees, Does Not Apply to Post-administrative Matters
- LAFCO Lacked Authority to Require Indemnification Agreement

18

County of Los Angeles Department of Public Health v. Superior Court

(Mar. 1, 2021) 61 Cal.App.5th 478

- Second District's Decision re: COVID-19 Order
- L.A. County Petitioned for Writ To Stay Prel.Inj. Enjoining County from Enforcing Order Temporarily Prohibiting Outdoor Dining
- Writ Issued / County Order Could Be Enforced / Case Not Moot (even with Regional Stay At Home Order) / County May Rely on Advice of Public Health Officers (even without risk-benefit analysis) / No First Amendment Speech or Freedom of Assembly Violation (reasonable time, place, manner regulation)



18575 Jamboree Road, 9th Floor, Irvine, CA 92612 | 714-641-5100

19

19

Organizacion Comunidad De Alviso v. City of San Jose

(Feb. 9, 2021) 60 Cal.App.5th 783

- Plaintiff Asked for NOD (more than once)
- City Filed 2 NODs: (1st) Listed Wrong Applicant; (2nd) Correctly Listed Microsoft Corporation (Microsoft)
- City, Allegedly Failed to Send Plaintiff 2nd NOD
- Relying on the 1st NOD, Plaintiff Named Wrong R.P.I. in CEQA Writ Petition / Plaintiff Did Not File Amended Petition naming Microsoft Until Well after 30-day S.O.L. from 2nd corrected NOD
- Holding: Time Barred / Constructive Notice / No Estoppel Against City / Leave to Amend = Futile



18575 Jamboree Road, 9th Floor, Irvine, CA 92612 | 714-641-5100

20

20

Sweeney v. California Regional Water Quality Control Board, San Francisco Bay Region

(Mar. 18, 2021) 61 Cal.App.5th 1

- Duck Club Contested Regional Bd. Abatement & Civil Liability Order in Suisun Marsh
- Alleged Unpermitted Development Projects including Levee Restoration
- First District, Division 3 reversed Trial Court's Issuance of the Writ
- Holdings: Dredged Fill to Replace Breached Levee = "waste" under Porter-Cologne / Levee Project Violated Basin Plan Prohibiting Discharges into Surface Waters / \$2.8M Civil Penalty Correlated with Harm Caused



18575 Jamboree Road, 9th Floor, Irvine, CA 92612 | 714-641-5100

21

21

Santa Clara Valley Water District v. San Francisco Bay Regional Water Quality Control Board

(Dec. 29, 2020) 59 Cal.App.5th 199

- Water District Challenged Regional Board Order under U.S. Clean Water Act, Porter-Cologne, and CEQA re: Flood Control Project
- Order Issued when Project Almost Done & 2 Years After EIR / Rescinded & Superseded Previous Section 401 Certification and Replacing New Certification and WDRs
- Sediment Effects = "waste" under Porter-Cologne / Any Failure by Regional Board to Challenge EIR Mitigation Measures Did Not Bar Imposing Additional Mitigation under Porter-Cologne / Regional Board Not Estopped / Substantial Evidence Supported Larger Compensatory Mitigation Area



18575 Jamboree Road, 9th Floor, Irvine, CA 92612 | 714-641-5100

22

22

City of Duarte v. State Water Resources Control Board

(Feb. 19, 2021) 60 Cal.App.5th 258

- City Challenged State & Regional Boards' Decisions to Impose Water quality-based effluent limitations (WQBELs) in NPDES Permit
- Trial Court Granted Writ, Invalidating Permit's Numeric Effluent Limitations / Boards appealed
- Fourth District, Division 3 Reversed
- Matter of first impression & Boards Sufficiently Considered Economic Effects of Numeric WQBELs Before Issuing Permit
- No Statement of Decision = Harmless Error



18575 Jamboree Road, 9th Floor, Irvine, CA 92612 | 714-641-5100

23

23

Schmid v. City and County of San Francisco

(Feb. 1, 2021) 60 Cal.App.5th 470

- Taxpayers Challenged Order to Remove "Early Days" Pioneer Period Bronze Sculpture
- Trial Court Sustained Demurrer without Leave to Amend / Affirmed *in toto*
- For CEQA: No Cognizable Claim because Plaintiff Did Not Take Full Administrative Appeals / Failed to Exhaust administrative remedies
- Intermediate City Commission Issued Defective Public Hearing Notice b/c No CEQA Determination
- Did Not Excuse Plaintiffs' Failure to Exhaust Remedy to Appeal to the Full Board of Supervisors



18575 Jamboree Road, 9th Floor, Irvine, CA 92612 | 714-641-5100

24

24

Self v. Cher-Ae Heights Indian Community of Trinidad Rancheria

(Jan. 26, 2021) 60 Cal.App.5th 209

- Cher-Ae Heights Indian Community of the Trinidad Rancheria = U.S. Recognized Tribe
- Tribe Applied to BIA To Take Coastal Property into Trust / BIA Determined Tribe Proposal Consistent with Public Access per Coastal Act
- Plaintiffs Used Tribe's Property for Coastal Access and Kayaking Business
- Brought Quiet Title Action Alleging Prior Owner Dedicated Portion To Public Use
- Tribal Immunity Barred Action / Dismissed



18575 Jamboree Road, 9th Floor, Irvine, CA 92612 | 714-641-5100

25

25

Decea v. County of Ventura

(Jan. 15, 2021) 59 Cal.App.5th 1097

- Landowner Petitioned for Exclusion Under Map Act Restoring Historical Lot Lines
- Holding: Action Barred by Laches Doctrine
- House within "Parcel A" in 1974 Map / Showed Historical Lot Lines from 1923 Map / Parcel A overlaid 3 of Historical Lots and Parts of 2 Others / Total of 1.04 acres
- County Surveyor told Landowner Parcel A = 1 Legal Lot, not 5 / Could Not subdivide into 2 Lots b/c Below 1-acre Minimum Lot Size / Disputed Validity of 1974 Map & Merger of Five Original Lots into One
- Substantial Evidence Supported Finding Original Owner Knew 1974 Map Had Error, Never Corrected, and Acknowledge 1 Lot / So, in 2017 = Too Late



18575 Jamboree Road, 9th Floor, Irvine, CA 92612 | 714-641-5100

26

26

Sierra Club v. County of Fresno

(Nov. 24, 2020) 57 Cal.App.5th 979

- Latest Appeal at the Friant Ranch / Appeal of Writ on Remand (See, 6 Cal.5th 502 (2018))
- Master Planned Community for Seniors on 942-acre Site in North-central Fresno County
- 2011 – Certified EIR, but Air Quality Inadequate / Cal. Supreme Court Set Standard of Review for Specific Topic: Whether EIR Has Enough Detail to Enable those Who Did Not Participate in its Preparation to Understand Meaningfully Issues Raised by Project
- Developer Argued = Writ on Remand Should Decertify *In Part* EIR per PRC §21168.9, and Remainder Valid
- Court of Appeal – No Violation of CEQA by Failing to Direct County to Partially Decertify

27

Questions?

28