Land Use and CEQA Litigation Update

Thursday, September 6, 2012 General Session; 1:00 – 2:30 p.m.

Andrew W. Schwartz, Shute Mihaly & Weinberger

Notes . . .

League of California Cities
2012 Fall Conference
September 6, 2012
San Diego, California

LAND USE AND CEQA LITIGATION UPDATE

(April 2012 to Present)

Andrew W. Schwartz
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
Email: schwartz@smwlaw.com
Phone: (415) 552-7272

TABLE OF CONTENTS

LAND USE

Federal Preemption of State Building Codes

Building Industry Ass'n of Washington v. Washington State Building Code Council (Jun. 25, 2012) 683 F. 3d 1144

HOLDING

Washington State's building code, which required new buildings to meet heightened energy conservation goals, was not preempted by the federal Energy Policy and Conservation Act.

SUMMARY

The Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. section 6295 *et seq*., establishes nationwide energy efficiency standards for certain residential home appliances, and expressly preempts state standards requiring greater efficiency than the federal standards. However, the EPCA exempts from preemption state building codes promoting energy efficiency, so long as those codes meet seven statutory conditions. (§ 6297 (f)(3).) Washington's Building Industry Association challenged Washington State's building code (WSBC), alleging that the code failed to meet two of those conditions, subsections 6297(f)(3)(B) and (C).

Subsection (B) states that a state building code cannot require energy consuming fixtures such as water heaters and refrigerators to be more efficient than the standards established by the US Department of Energy. The WSBC requires builders to reduce a building's energy use by a certain amount and provides several options to satisfy that requirement, including installing appliances that exceed federal energy efficiency standards. The Building Association argued that because installing these appliances was the least expensive option, the WSBC "required" builders to use products exceeding federal standards. The Ninth Circuit disagreed, holding that creating an economic incentive to install energy efficient products was not the same as requiring it. Section 6297(f)(3)(B) is violated only when a code requires a builder, as a matter of law, to select a particular product or option.

Subsection (C) states that local building codes must grant credits on the basis of how much each option reduces energy use or cost, without favoring particular products or methods. It requires that the credits be allowed on the basis of "one-for-one equivalent energy use or equivalent cost." The Building Association argued that the credits were not granted on a precise one-for-one equivalent energy use basis. The Ninth Circuit rejected the argument, finding that even where there is not an exact match, some approximation is necessarily included in the concept of equivalence when comparing methods that use different products to obtain an energy conservation goal.

DISCUSSION

1. A state building code can promote more efficient energy standards through use of appliances that surpass federal energy efficiency standards, so long as it does not require builders to select a particular product.

2. Some approximation is allowed in meeting the one-for-one equivalent energy use credits of the EPCA.

Substantive and Procedural Due Process Challenge to Building Moratorium

Samson v. City of Bainbridge Island
(Jun. 15, 2012) 683 F. 3d 1051

HOLDING

City ordinances establishing and extending a development moratorium were not arbitrary and unreasonable and thus did not violate federal substantive and procedural due process rights, even where they violated the state constitution.

SUMMARY

To facilitate an update of its comprehensive Shoreline Master Program, the City of Bainbridge Island imposed a moratorium on all shoreline and over-water development in Blakely harbor. The City passed the moratorium ordinance on an emergency basis, before holding a public hearing. The City extended the moratorium three more times, holding a public hearing before each extension.

Property owners Samson et al. (Samson) challenged the moratorium in state court. The court found in Samson's favor, holding that the "rolling moratoria" violated the Washington State constitution. The City appealed and won a stay of judgment pending appeal. While the stay was pending, the City enacted an ordinance again extending the moratorium, and then permanently amended the Shoreline Master Program to prohibit development in Blakely Harbor. The Court of Appeals ruled for the City. The Washington Supreme Court held that the rolling moratoria violated the state constitution, but in a separate case, two years later, the Court of Appeals upheld the permanent ban on development imposed in the Shoreline Master Program and the Supreme Court denied review.

Samson brought suit in federal district court under 42 U.S.C. section 1983, alleging that the moratoria denied federal substantive and procedural due process. The District Court granted summary judgment for the City and Samson appealed.

The Ninth Circuit affirmed. The court held that the rational basis test, rather than heightened scrutiny, applied to Samson's substantive due process claim because Samson's

interest in developing their property was strictly economic, and therefore not a "fundamental right." The court determined that the City's justifications for adopting and extending the moratorium—protecting salmon habitat, preserving Blakely Harbor as the last undeveloped harbor in Puget Sound, and preventing a flurry of permit applications before the Shoreline Master Program was updated—were not clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Accordingly, the City's action satisfied the rational basis test. The court refused to incorporate Washington State constitutional provisions in federal substantive due process doctrine.

The court also rejected Samson's procedural due process claim because the City adhered to its ordinary protocols for passing ordinances when it passed the moratoria. The ordinances were legislative in nature because they applied generally to all owners of shoreline property on Bainbridge Island. For legislative acts, federal due process is satisfied when the legislative body performs its responsibilities in a manner according to law.

DISCUSSION

1. The rational basis test applies to substantive due process challenges to development moratoria. Although the rational basis test does not require it, in adopting land use regulations, agencies should identify the purpose of the regulation and how the regulation will achieve the purpose in the preamble to the ordinance.

2. Violations of state constitutional law are not per se infringements of federal constitutional rights. Section 1983 does not provide redress in federal court for violations of state law.

3. An emergency, temporary moratorium on development does not violate federal procedural due process where a property owner is given notice of the moratorium and provided an opportunity to be heard within a reasonable time before or after the moratorium is imposed. Wherever possible, however, agencies should endeavor to give notice and a hearing before the moratorium is imposed to minimize procedural due process challenges.

Streamlined Island Annexation Process

Attorney General Opinion
(Kamala Harris and Marc Nolan, Jun. 1, 2012, No. 10-902)

HOLDING

Government Code section 56375.3 allows a city to streamline the annexation of an unincorporated island of territory that is entirely or partially surrounded by the city. A Local Agency Formation Commission (LAFCO), however, may not split up an unincorporated island of more than 150 acres into smaller segments of 150 acres or less to

use the streamlined procedures and thereby avoid the landowner/voter protest proceedings that would otherwise be required.

SUMMARY

The County LAFCO is responsible for approving annexation of unincorporated territory by a city. While annexation typically occurs through a process that includes a petition, an initial public hearing, and a post-approval public hearing to record protests from landowners, a LAFCO may use streamlined procedures to approve a proposed annexation and waive the protest proceeding if a city initiates an annexation proposal between January 1, 2000 and January 1, 2014, and the LAFCO determines that the area to be annexed is an "island" of territory that is 150 acres or less.

The term "island" is not defined in the Government Code. In her Opinion, the Attorney General considers a territory to be an "island" even if it is not completely surrounded by a city. The Opinion defines an "island" as an area of unincorporated territory that is (1) completely surrounded, or substantially surrounded—to a large degree, or in the main—either by the city to which annexation is proposed or by the city and a county boundary, or the Pacific Ocean, or (2) completely surrounded by the city to which annexation is proposed and adjacent cities. The Opinion further concludes that an "island" may not be part of another island that is surrounded or substantially surrounded in this manner.

The Opinion does not propose a mathematical definition of "substantially surrounded." It notes, however, that courts have found territories that are as little as 68% surrounded to be substantially surrounded. The Opinion also notes that a territory that is contiguous to another unincorporated territory could still be an island, so long as it is "substantially surrounded."

To qualify for the streamlined annexation procedures, the annexed territory must be 150 acres or less and may not be part of a larger island that is itself surrounded. For example, if a particular area was substantially surrounded by a city, but was part of a larger island that was also substantially surrounded and the combined acreage of the two exceeded 150 acres, the smaller portion could not be split off and annexed under the streamlined procedures. The purpose of this distinction is to preserve citizen participation in the annexation process for larger parcels and to avoid circumvention of those protections by segmenting unincorporated territory into smaller parts.

DISCUSSION

A city may not break an island of unincorporated territory into smaller pieces to allow for a streamlined annexation process of the smaller pieces.

County Ban on Medical Marijuana Dispensaries Preempted

County of Los Angeles v. Alternative Medicinal Cannabis Collective
(Jul. 2, 2012) 207 Cal. App. 4th 601

HOLDING

The Court of Appeal construed state medical marijuana laws broadly to find that a County's complete ban on all medical marijuana dispensaries, including collectives and cooperatives authorized under Health and Safety Code section 11362.775, conflicts with and is preempted by California law.

SUMMARY

Los Angeles County banned medical marijuana dispensaries in all unincorporated areas of the County. The County then filed a nuisance suit under the new ban, enjoining Alternative Medical Cannabis Collective from operating a medical marijuana dispensary, and alleging that the Collective was operating a dispensary not protected by state law. The County also sought declaratory relief that the Collective violated the County's zoning ordinance by operating a dispensary. The trial court agreed with the County and the Collective appealed.

California's Compassionate Use Act and Medical Marijuana Program (Program) provides that qualified patients and caregivers will not be subject to criminal sanctions or nuisance actions on the sole grounds that they associate collectively or cooperatively to cultivate medical marijuana. (H & S Code § 11362.775.) Even though the Program does not provide express protections for *dispensaries*, the Court of Appeal found that the County's regulations were preempted by state law. The court determined that dispensaries are included in the protections against nuisance actions because other provisions of the Program indicate that the Legislature contemplated that collective or cooperative cultivation projects would likely be dispensing medical marijuana.

The court rejected the County's argument that state law only grants immunity from criminal prosecution to dispensaries and collectives and does not proscribe civil nuisance actions. Section 11570 of the Program, which is incorporated by reference into section 11362.775, confers immunity from civil nuisance abatement actions. The Court of Appeal also relied on Civil Code section 3482, which provides that nothing expressly authorized by state statute can be deemed a nuisance.

The court further held that the County's total ban on dispensaries could not be validly based on the Program's preservation of local agencies' authority to restrict or regulate the location of dispensaries and collectives granted under Health and Safety Code sections 11362.768 and 11362.83. An outright ban goes well beyond the right to regulate or restrict. Next, the court denied the County's claim that section 11362.5(b)(2) of the Program, which protects from preemption legislation prohibiting persons from endangering others or diverting medical marijuana for non-medical purposes, gave the County the right to ban medical marijuana dispensaries engaged in medical uses. Finally,

the court found that the County's ban on dispensaries could not escape preemption merely because it was codified in a zoning law.

DISCUSSION

1. Outright bans on medical marijuana dispensaries are preempted by state law.

2. Local agencies can regulate the location of medical marijuana dispensaries and may regulate the dispensation of marijuana for non-medical use. They are prohibited from most other restrictions on dispensing medical marijuana.

City Regulation of Medical Marijuana Collectives and Prohibiting Establishment of New Collectives Upheld

420 Caregivers, LLC v. City of Los Angeles
(Jul. 3, 2012) 207 Cal. App. 4th 703

HOLDING

In a decision potentially conflicting with *Los Angeles County v. Alternative Medicinal Cannabis Collective* summarized above, the court interpreted state medical marijuana laws narrowly to hold that a city ordinance that prohibited creation of new medical marijuana collectives and required existing collectives to meet new regulatory requirements, including collection of information on their users, did not violate equal protection, privacy, or due process rights, and was not preempted by state law.

SUMMARY

The City of Los Angeles enacted an Interim Control Ordinance (ICO) prohibiting the establishment of or operation of a medical marijuana *dispensary* within City limits. However, it created an exception for dispensaries established before 2007 that filled out certain paperwork within 60 days of the ICO's adoption. The City then passed a permanent ordinance capping the total number of medical marijuana *collectives* in city limits and requiring collectives to register with the city. Only collectives that started operation before a certain date, met listed requirements, and had submitted paperwork in compliance with the ICO were eligible to register. Other collectives were required to cease operation but could enter a lottery for a future spot. The permanent ordinance also contained a sunset clause stating that it would expire in two years, at which point, if the ordinance was not extended, all collectives must cease operation. Various collectives sought to enjoin the ordinance on equal protection, due process, right to privacy, and state law preemption grounds. The trial court granted a preliminary injunction preventing enforcement of ordinance. The City appealed.

The Court of Appeal found the equal protection challenge to be meritless. The ordinance fit squarely under the umbrella of an economic regulation creating a classification that bore a rational relationship to state interest. The ordinance grandfathered

in collectives that had demonstrated a willingness to engage in lawful activity by registering with the City. The court found the registration requirement to be based on a legitimate state interest in reducing crime and unlawful behavior that, according to testimony from police officers, was associated with collectives.

The court also rejected the collectives' procedural due process claim finding that the collectives had no statutory right or entitlement to collectively cultivate medical marijuana, which was a prerequisite to asserting a procedural due process right. The City was not required to provide an administrative appeal process in the ordinance. The right to defend against civil abatement actions or criminal prosecution provided the collectives with adequate due process. That the City sent letters to collectives that had not provided the required registration information to the City, alerting them that the City Attorney believed that they were now in violation of the ordinance, did not violate due process rights because the City would still be required to file a lawsuit against an alleged violator, where the collectives would enjoy full procedural protections.

Nor did the City violate the California Constitutional privacy rights of the collectives or their individual members by requiring the collectives to collect, maintain, and provide to police upon request, documentation of names, addresses, and phone numbers of patients, patients' government issued medical marijuana cards, and doctor recommendations for cards. The collectives are closely regulated businesses, the court found, with lowered expectations of privacy, and information sought from collectives was the same as that required from traditional pharmacies. The information the City sought from individuals was limited and non-intimate in nature and was already subject to disclosure to traditional health care providers.

The California Compassionate Use Act and the Medical Marijuana Program Act (Program), did not preempt the City's ordinance through express or implied occupation of an entire area of law. The court construed the Program narrowly to grant limited criminal immunity and noted that the Program expressly acknowledges the potential validity of other legislation regulating medical marijuana's use, growth, and distribution.

The court found that the provisions of the City's ordinance governing the location and operation of collectives and a "sunset provision" that would ban all collectives of four or more members, were not preempted because the Program expressly allows criminal enforcement of local ordinances regulating the location, operation, or establishment of collectives. (H & S Code § 11362.83(a), (b).) The ability to regulate *establishment* of collectives, the court found, included the power to regulate *creation* of collectives, including the number and location of collectives allowed. Moreover, the court upheld the sunset clause because the Program did not create any affirmative right to operate collectives; it merely afforded specific affirmative defenses to criminal sanctions. Therefore, it did not mandate any local agency to allow or authorize collectives. The court noted that the sunset provision would not result in a ban of all collectives because it would only prevent the formation of new collectives of four or more people, and would not apply to collectives of three or fewer members.

DISCUSSION

1. State law providing affirmative defenses to criminal sanctions for operating medical marijuana collectives does not create a right to operate a medical marijuana collective.

2. Local agencies may continue to regulate the location, operation, or establishment of medical marijuana collectives by imposing criminal sanctions for violation of local requirements.

3. Local agencies may limit the number and location of medical marijuana collectives within their jurisdiction.

4. Medical marijuana collectives are "closely regulated businesses" and therefore the collectives and their members have diminished privacy expectations. Under its police power, local ordinances can require members of collectives to provide the same information required by traditional health care providers and pharmacies.

Rialto Citizens for Responsible Growth v. City of Rialto
(July 31, 2012) ---Cal. App. 4th ---, 2012 WL 3089826

**Certified for partial publication.*

HOLDING

Rialto Citizens for Responsible Growth had public interest standing to challenge a commercial retail project. The trial court erroneously invalidated the City of Rialto's plan amendments and ordinance approving the development agreement. Even though the City had violated the Planning and Zoning Law, its errors and omissions did not result in prejudice and substantial injury and a different result was not probable in their absence.

SUMMARY

The City of Rialto approved a commercial development project that included a Wal-Mart Supercenter. Rialto Citizens for Responsible Growth petitioned the trial court for a writ of administrative mandate invalidating several project approvals, including the City's certification of the project's final EIR, several resolutions amending the City's general plan and the specific plan governing the project site, and an ordinance approving a development agreement for the project. The trial court ruled in favor of Rialto Citizens and issued a preemptory writ invalidating the challenged resolutions and ordinance. Wal-Mart and the City appealed.

On appeal, Wal-Mart argued that Rialto Citizens lacked both "beneficially interested" and "public interest" standing to challenge the project approvals. The Court of Appeal chose not to address whether Rialto Citizens had beneficial interest standing because it found that the group had public interest standing. Public interest standing is an

exception to the general rule that party must be beneficially interested in the issuance of a writ in order to petition for the writ. The public interest exception applies where the question is one of right, and the object of the action is to enforce a public duty. To meet the public interest exception the plaintiff must be interested as a citizen in having the laws executed and the public duty enforced.

Wal-Mart argued that Rialto Citizens had not met the four-part test, set forth in *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal. App. 4th 734, for whether a corporate entity has public interest standing. The Court of Appeal recognized that *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal. 4th 155 had disproved *Waste Management* to the extent that it held corporate parties to heightened scrutiny when they assert public interest standing. Absent compelling policy reasons to the contrary, corporate entities are as free as natural persons to litigate in the public interest, so long as their business or competitive interests are not an impediment.

The Court of Appeals held that because Rialto Citizens was a non-profit corporation devoted to promoting social welfare and because the City's actions would have long-term environmental effects, the City had a public duty to comply with the Planning and Zoning Law. Rialto Citizens had public interest standing to challenge its actions, even though none of its members had a direct or substantial beneficial interest in the issuance of the writ.

However, even though the City's notice of the public hearing before the city council was defective, there was no showing that the defective notice was prejudicial. Thus, the Court of Appeal held, the trial court incorrectly invalidated the City's amendments and development agreements. As the party seeking to set aside the City's actions, Rialto Citizens bore the burden of demonstrating prejudice, substantial injury, and the probability of a different result, but failed to do so.

Likewise, even though the City erroneously approved the development agreement without finding that its provisions were consistent with the general plan and the specific plan governing the project, Rialto Citizens again failed to demonstrate that the finding was prejudicial or caused substantial injury, or that absent the City's omission the result in the case would have been different.

DISCUSSION

Business and non-profit corporations may have standing in an action if they are acting as "citizens interested in having the laws executed and the public duty enforced." By doing so they may fall into the "public interest exception" to the classic beneficial interest requirement to standing, so long as there are no compelling policy reasons, such as business or competitive interests, to the contrary.

CEQA

Procedural Issues
Documents Included in Administrative Record

Consolidated Irrigation District v. Superior Ct. of Fresno County
(Apr. 26, 2012, modified May 23, 2012) 205 Cal. App. 4th 697

HOLDING

Under Public Resources Code section 21167.6 (e), an agency responding to a CEQA challenge should include in the administrative record documents referenced in a comment letter and either previously submitted to the agency or identified by web page address in the letter, as well as tape recordings of public agency hearings, where written transcripts are not available. The agency is not required to include subconsultants' files that are not in the agency's possession.

SUMMARY

The Consolidated Irrigation District ("CID") challenged the City of Selma's EIR for a commercial project. CID sought to augment the administrative record on the grounds that the City had omitted documents required by Public Resources Code section 21167.6(e).

The Court of Appeal held that for the purposes of section 21167.6(e)(10), tape recordings of public agency hearings qualify as "other written materials" and should be included in the record where no written transcript exists. The court further held that if both written minutes and a transcript exist, then both should be included in the record.

Under Public Resources Code sections 21167.6(e)(6) and (e)(7), the agency must include in the record of the administrative proceeding "written comments received" and "written evidence submitted." "Written comments received" include letters sent to the agency. Documents cited in those letters were not written comments. They may, however, constitute "written evidence submitted" that must be included in the record. Accordingly, the court held that the following documents must be included in the record: (a) documents referenced in a comment letter along with a specific website address identifying the document, and (b) documents that previously had been provided to the agency, so long as the comment letter named the document, requested that it be included, and offered to provide it in hard copy.

CID also sought to include subconsultants' files under section 21167.6(e)(10) on the grounds that of the agency relied on them in preparing the EIR. Section 21167.6(e)(10) states that the record of proceeding shall include copies of studies or other documents relied upon in any EIR prepared for the project and either made available to the public during the public review period or included in the public agency files on the project. The court found that the agency must include the subconsultants files only if the agency controls or actually possesses the files.

In the absence of actual possession, the court looked to the contract between the City and the primary consultant to determine if the City had constructive possession because it controlled the records—either directly or through another person. The Court held that the mere possibility of control over the subconsultants' work was not sufficient to establish constructive possession. Accordingly, the subconsultants' files did not fall under section 21167.6 (e)(10).

DISCUSSION

1. The "written materials" that must be included in the administrative record for a CEQA challenge is interpreted broadly. In addition to including audio recordings of public meetings where no written transcript exists, the agency should include power point presentations, video recordings and other less traditional documents. If a transcript and minutes exist for a given meeting, include both in the record.

2. If an agency does not want files of its consultants to be considered public records, it should word its contract so that it is clear the agency lacks actual and constructive possession of the consultant's files. Absent a clear indication of actual or constructive possession, the fact that the consultant would probably provide the files upon request is not sufficient to establish possession by the agency.

3. If an agency is provided with a reference to a specific website, then the document available at that web address is "submitted written evidence" and should be included in the record. Links to a general website, such as the home page of an organization that wrote a report, do not render that report "submitted."

Right to Appeal; Preparation of Subsequent EIRs

Abatti v. Imperial Irrigation District
(Apr. 24, 2012) 205 Cal. App. 4th 650

HOLDING

A judgment rendered on a CEQA claim is a final judgment that may be appealed, even where the petitioner dismisses other non-CEQA claims with or without prejudice, unless the parties have entered into an agreement permitting litigation of the dismissed claims in the future. Once an agency approves an EIR or negative declaration, a subsequent EIR is not required unless certain statutorily proscribed conditions occur, such as substantial changes to the project.

SUMMARY

In 2006, the Imperial Irrigation District prepared an EIR for a regulation pertaining to its Equitable Distribution Plan (EDP), which directed the distribution of water in the event of a water shortage. Concurrently, the District adopted a negative declaration in

which it concluded that the EDP would not have a significant effect on the environment. In 2007, the District adopted regulations to implement the EDP. In 2008, the District adopted new regulations which revised the 2007 regulations. The District determined that the 2008 regulations did not require additional environmental review.

Appellants sued maintaining that the District failed to comply with CEQA by failing to prepare a supplemental EIR when it adopted the 2008 regulations. The trial court determined that there was substantial evidence to support the District's decision not to conduct additional environmental review. Appellants dismissed their remaining non-CEQA claims without prejudice and the court entered a judgment on the CEQA claim for the District.

The Court of Appeal held that the judgment was appealable despite the dismissal of certain claims as long as the parties had not agreed to preserve the option of litigating the dismissed claims in the future. The court distinguished *Don Jose's Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115 and its progeny, which held that a cause of action that is dismissed without prejudice remains pending and is not appealable, on the grounds that in those cases, the parties had entered stipulations which left open the possibility that the parties may litigate those dismissed claims in the future. Here, the parties did not so stipulate.

The Court of Appeal also rejected appellants' claim that the District was required to prepare a supplemental EIR under CEQA section 21166. That section sets forth criteria for requiring supplemental environmental review for changes to a project that was originally analyzed in an EIR. The District, however, based its decision that supplemental review was not required on CEQA Guidelines section 15162, which provides criteria for requiring an agency to prepare a subsequent environmental review after it has certified an EIR *or a negative declaration*. Appellants argued that the Guidelines overstepped their authority by extending CEQA section 21166 to situations where a negative declaration was initially issued, whereas section 21166 only specifies when supplemental environmental review is required after an EIR is certified. Because the District initially issued a negative declaration for the project, and not an EIR, appellants asserted that the District was required to conduct a subsequent environmental review.

The court disagreed in reliance on *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, where the court held that Guidelines section 15162 does not exceed its statutory authority and is consistent with and furthers the purposes of section 21166 and CEQA. Accordingly, an agency is not required to prepare a subsequent environmental review for a project for which it has previously issued a negative declaration, unless certain circumstances are present, such as a substantial change to a project. The court also found that the District's decision that its approval of a water supply contract with the owner of a new power plant was not a substantial change was supported by substantial evidence, and therefore did not require subsequent environmental review.

DISCUSSION

1. Dismissed claims are not "pending" and a party can appeal a judgment as to non-dismissed claims, provided that the parties have not agreed to litigate the dismissed claims in the future.

2. After an agency has certified an EIR or a negative declaration, an agency is only required to prepare a supplemental environmental impact report if the statutorily prescribed circumstances of CEQA section 21166 or CEQA Guidelines section 15162 occur.

3. The court reviews an agency's decision to prepare additional environmental review under a deferential standard, in contrast to the de novo standard applied to an agency's decision to prepare an EIR in the first instance. Unless there is substantial evidence demonstrating that the new action significantly changes the previous action, Guidelines section 15162 does not mandate a supplemental environmental review.

Proper Evidence to Support a Demurrer

Jamulians Against the Casino v. Randell Iwasaki
(Apr. 26, 2012) C067138
**Ordered not to be officially published Aug. 8, 2012.*

HOLDING

A trial court cannot sustain a demurrer based on the existence or contents of a document not included in the pleadings unless it has taken proper judicial notice of the document.

SUMMARY

Petitioners challenged a settlement agreement between Caltrans and the Jamul Indian Village (Tribe) granting a permit for the Tribe's proposed highway interchange on the grounds that Caltrans failed to conduct environmental review of the agreement. Caltrans demurred to the petition on the grounds that the Tribe was an indispensible party and petitioners failed to name the Tribe as a real party in interest.

In support of its demurrer, Caltrans requested that the court take judicial notice of the agreement. However, Caltrans cited no authority that the court could take judicial notice of the truth of the agreement's contents. The trial court, citing to the contents of the agreement, sustained the demurrer and dismissed the action.

The Court of Appeal reversed. Although the court did not discuss the criteria for judicial notice, it held that the trial court could not consider documents extrinsic to the pleadings. The court reasoned that it cannot use judicial notice as a means of converting a demurrer into a summary judgment proceeding.

DISCUSSION

In ruling on a demurrer, a trial court cannot consider evidence outside of the pleadings unless the evidence is appropriate for judicial notice.

Retriggering 180-day Limitation Period for CEQA Challenges

Van De Kamps Coalition v. Board of Trustees of Los Angeles Community College District
(Jun. 5, 2012) --- Cal.App.4th ---, B234955

HOLDING

A CEQA action was time-barred because the challenged decision merely implemented a project that had been reviewed under CEQA and approved more than 180 days before suit was filed.

SUMMARY

A "project" under CEQA may include multiple discretionary approvals by government agencies. "Approval" means the decision that commits the lead agency to a definite course of action in regard to a project. The date of approval occurs when the agency first exercises its discretion to approve a permit application, execute a contract, or grant financial assistance, not when the last such discretionary decision is made. Where an agency approves a project and files a notice of determination (NOD), the statute of limitations for actions challenging CEQA review of the project is 30 days; where the agency does not file an NOD, the statute of limitations is 180 days.

The Los Angeles Community College District (District) prepared an EIR for a proposed satellite campus and approved the project. In 2008, the District realized that it would not be able to operate the facility as a satellite campus due to a budgetary shortfall, but recognized that the site could still be used for educational purposes. In 2009, the District postponed the project and authorized the lease of the property to another entity for an educational use if the District Board of Directors gave its approval. The District also purchased adjoining property that had potential use for the project, but stated that it had no current plans to develop the land (the decision to lease the property and purchase adjoining property, collectively, the "2009 decisions"). The District did not prepare a new EIR before the 2009 decisions because the leased site would have the same educational use analyzed in the original EIR for the satellite campus.

In 2010, less than 180 days after the 2009 decisions, petitioner challenged the adequacy of environmental review for the project. After petitioner filed suit, the District formally approved a lease of the property and amended its purchase agreement for the adjoining property (the "2010 decisions"). More than 180 days after the 2009 decisions, petitioner filed a second petition contending that the District failed to conduct environmental review of the 2010 decisions.

While the first suit was timely and not addressed by the Court of Appeal here, the court refused to allow petitioners to amend their first petition to include the claims based on the 2010 decisions. The court found that the 180-day limitations period started running with the 2009 decisions, not when the District executed the lease, and hence petitioner's action was time-barred. The Court held that the District's decision to approve and sign a specific lease was not a new and separate project, but was merely a discretionary act in furtherance of the project, which was to lease the property to some other party. Similarly, the District's approval of changes to the purchase agreement for the new parcel was not a separate project; it was a step in furtherance of the project to lease the property and did not substantially change the overall project.

The court rejected petitioner's contention that a new limitations period was triggered at the signing of the lease because it was only at that point that previously identified traffic impacts would be understood. The court found that the traffic impacts of the project had already been identified in the EIR before the District approved the project and were not a substantial change that would restart the 180-day statute of limitations.

Finally, the court rejected petitioner's claim that the District's approval of expenditures to change slightly the design of the property to accommodate new tenants—enclosure of a balcony and addition of a driveway—substantially changed the project such that additional environmental review would be required. The second action was therefore time barred. (The opinion did not address the merits of the first action.)

DISCUSSION

1. After initial project approval, subsequent approvals or decisions regarding a project, such as minor changes to design and execution of a lease that has already been nominally approved, are not new or separate projects requiring CEQA analysis and do not retrigger a limitations period for challenge under CEQA. CEQA analysis must be completed before the first decision-making step, not the last.

2. If a project is substantially changed after environmental review is completed, a new limitations period starts. Impacts that had already been considered in the environmental document for the initial discretionary decision for the project do not qualify as substantial changes.

Exhaustion of Administrative Remedies
Exhaustion Applies to Categorical Exemptions

Tomlinson v. County of Alameda
(Jun. 14, 2012) 54 Cal. 4th 281

HOLDING

Where a petitioner fails to challenge an agency's decision that a project is categorically exempt from CEQA review during the public comment period or before the close of the public hearing on the project application, it fails to exhaust its administrative remedies and is barred from later challenging the decision in court.

SUMMARY

A developer applied to the county planning department for approval to build a housing subdivision. The county deemed the subdivision to be infill development and accordingly exempt from CEQA review under CEQA Guidelines section 15332. The definition of infill development includes projects that are within city limits.

The developer gave written notice of the proposed project to neighbors and parties of interest, stating that the county had determined that the project was infill development and thus categorically exempt from CEQA, and that, "if you challenge the decision of the Commission in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the Planning Commission at or prior to the public hearing."

Public Resources Code section 21177(a) provides that a public agency's environmental review for a proposed project can be challenged in court only on grounds that were raised (a) during the public comment period for CEQA review, or (b) prior to the close of the public hearing on the project before the issuance of a notice of determination. At the public hearing on the development application for the project, residents expressed concerns about adverse impacts of the project but did not object to the categorical exemption. At the hearing the county determined that the project was categorically exempt from CEQA review and approved the application.

Petitioners sued, contending that the in-fill categorical exemption did not apply because the project was in an unincorporated part of the county and therefore not "within city limits." The Superior Court found against petitioners, holding that they had not exhausted their administrative remedies. The Court of Appeal reversed. The California Supreme Court granted review.

The Supreme Court held that section 21177(a)'s first exhaustion requirement, that a project can only be challenged in court on grounds raised during the "public comment period," only applies if the public comment period was "provided by" CEQA. Because CEQA does not provide for a public comment period preceding an agency's determination

that a project is categorically exempt, the first exhaustion requirement of section 21177(a) was inapplicable. (§ 21092.)

However, the court found that section 21177(a)'s second exhaustion requirement, that the objection to the finding of a categorical exemption must be raised before the close of the public hearing and before issuance of a notice of determination, did apply, even though the county did not issue a notice of determination. The court reasoned that an opportunity for comment at a public hearing is sufficient to require citizens to exhaust their administrative remedies. The court rejected petitioners' contention that they were not required to raise their objection to the categorical exemption at the public hearing on the development application because the County did not file a notice of determination. The court ruled that the filing of a notice of determination *after* the hearing is irrelevant to exhaustion and did not mislead petitioners. Where a claimant has an opportunity to raise an objection to a development project at a public hearing, but fails to raise the claim at the hearing, it is barred from suit on the claim.

DISCUSSION

1. A public agency's determination that a project is categorically exempt from CEQA compliance cannot be challenged in court if challengers do not exhaust their administrative remedies by objecting to the CEQA exemption during a public hearing on the project application.

2. Where an agency issues a categorical exemption for a development project, the agency should provide a public hearing on the project application to allow citizens the opportunity to object to the decision. If a citizen fails to object to the categorical exemption at the hearing, the agency's decision to grant the categorical exemption will be insulated from judicial review.

Validity of Tolling Agreements

Salmon Protection and Watershed Network v. County of Marin
(Apr. 20, 2012) 205 Cal. App. 4th 195

HOLDING

A public agency and a party disputing the adequacy of an EIR prepared in connection with the adoption of a general plan amendment may agree to toll the limitations period for filing a petition challenging the adequacy of the EIR.

SUMMARY

In 2007, Marin County certified an EIR for the Marin Countywide General Plan Update and filed a notice of determination in compliance with section 21152(a) of the Public Resources Code and section 15094 of the CEQA Guidelines. In an effort to settle a

dispute as to the adequacy of the EIR, the Salmon Protection and Watershed Network (SPAWN) and the County entered into a series of tolling agreements, extending the 30-day limitation period in section 21167 for the filing of a petition challenging the sufficiency of the EIR. In 2010, however, following a series of unsuccessful settlement attempts, SPAWN filed a petition for a writ of mandate against the County alleging that the EIR failed to comply with CEQA.

A group of property owners who supported the Update and whose property value was allegedly diminished by the uncertainty of the Update were granted leave to intervene. The interveners alleged that SPAWN's petition was untimely because the agreement tolling the statute of limitations was invalid. They argued that the 30-day statute of limitations in section 21167 was mandatory and that the tolling agreements were therefore ineffective.

The Court of Appeal acknowledged that the 30-day statute of limitations for CEQA challenges implemented a public policy favoring prompt disposition of CEQA challenges. But the court also cited the equally strong public policy promoting settlement of controversies and thus avoiding litigation and concluded that the tolling agreements were valid.

The court also rejected the interveners' contention that the tolling agreements were invalid because interveners were not a party to the agreements. The court determined that interveners were not real parties in interest in the lawsuit because their properties were only indirectly affected by the tolling agreements. While interveners' interests may have been sufficient to justify permissive intervention, interveners were not "necessary" parties within the meaning of Code of Civil Procedure section 389.

The Court discussed but ultimately did not rule on interveners' novel argument that even if the tolling agreement was effective to preserve a CEQA challenge, the tolling agreement was barred by Government Code section 65009(c)(1)(A), which imposes a 90-day limitation period for suits challenging adoption of a general plan. Interveners argued that the statute is intended to provide certainty to property owners and local governments. They asserted that allowing certain property owners to toll the statute of limitations for challenges to the plan would deny other property owners affected by the plan the repose afforded by the statute of limitations. The court, however, elected not to decide whether section 65009(c)(1)(A) would apply to an action based solely on CEQA claims.

DISCUSSION

To facilitate settlement, parties to a potential CEQA suit may agree to postpone the CEQA litigation and toll the statute of limitations. Tolling agreements can be essential to enabling settlement of CEQA disputes before the agency incurs substantial costs of litigation.

Deliberative Process Privilege: Adequacy of EIRs and Res Judicata

Citizens for Open Government v. City of Lodi
(Apr. 24, 2012) 205 Cal. App. 4th 296
**Partially certified for publication.*

HOLDING

The City failed to establish the requisite conditions to invoke the deliberative process privilege, which provides government officials protection for materials used in the process of formulating government decisions. In preparing an EIR, there is no ironclad rule governing alternatives, the decision to use a particular baseline must be supported by substantial evidence, and cumulative impact analyses do not require technical perfection.

SUMMARY

In 2002, developers applied to the City of Lodi for a use permit to develop a shopping center project. In 2004 the City certified an EIR for the project, which was then challenged in court by Lodi First and Citizens for Open Government (Citizens). Citizens' claim was dismissed, but Lodi First successfully obtained a writ of mandate holding that the 2004 EIR was inadequate. Instead of appealing the court's ruling, in 2006 the City decertified the 2004 EIR and in 2008 published a final EIR that had been revised in five areas. In 2009, the City certified the final revised EIR and conditionally approved the project. The City then filed a petition to discharge Lodi First's writ and lodged the administrative record at issue in this case as evidence that it had executed the writ by decertifying and revising the EIR. In 2009, Citizens and Lodi First both filed suits challenging the 2008 EIR. Those suits were consolidated with the City's petition to discharge the writ. Lodi First and Citizens alleged that administrative record was incomplete and sought to include 27 emails. The trial court ruled that 22 of the emails were protected by the deliberative process privilege, discharged the 2005 writ against the City, and denied Citizens' and Lodi First's petitions. Citizens and Lodi First appealed.

Appellants contended that the trial court erred in applying the deliberative process privilege to exclude 22 city emails from the administrative record, by not considering documents attached to emails, and by holding that nine emails between the City and Wal-Mart's attorneys were privileged. The deliberative process privilege provides government officials a qualified, limited privilege not to disclose the mental processes or the substance of conversations, discussions, deliberations, and like materials used to formulate government decisions. To claim the privilege, an agency must demonstrate that the public interest in non-disclosure outweighs the litigant's interest in disclosure. The theory underlying the privilege is that the public will, in certain conditions, benefit if public officials are permitted to engage in a full and candid discussion of issues, allowing them to explore the pro's and con's before acting. Without a guarantee of confidentiality, however, these deliberations could be chilled. The result could be inferior quality decisions that could harm the public interest.

On the other hand, the public has an interest in transparency in government decisions. The agency asserting the privilege carries the burden to show that the balance of the two conflicting public interests weighs in favor of non-disclosure.

The Court of Appeal found that the deliberative process privilege did not apply because the City failed to demonstrate how the public interest in nondisclosure clearly outweighed the public interest in disclosure. Accordingly, the court held the trial court erred in excluding the 22 emails from the administrative record. Notwithstanding the trial court's error in excluding the emails, the Court of Appeal held that reversal was not required because Lodi First failed to meet its burden to demonstrate that the trial court's error was prejudicial.

Citizens and Lodi First also challenged the adequacy of the revised EIR. Relying on CEQA Guidelines section 15126.6, which provides that there is "no ironclad rule governing the nature or scope of the alternatives," the court found that the EIR contained a reasonable range of alternatives even though it did not include an alternative that feasibly met the project's objectives while avoiding or significantly decreasing the project impacts to less-than-significant levels. Moreover, the court held that the City did not abuse its discretion in maintaining an economic baseline from previous years. The court held that the City did not have to accept Citizen's heightened mitigation ratio for an impact that could not be mitigated. Because it was not possible to mitigate the effects on farmland, a statement of overriding considerations, and not heightened mitigation measures, was appropriate. In addition, the court held that the City's EIR adequately discussed urban decay as required under CEQA, and that CEQA does not require a discussion of blight. In the context of redevelopment, blight had a specific meaning different from urban decay and was not necessarily related to the retail environment. The court further upheld the City's cumulative impact analysis because when reviewing such analyses, courts do not look for technical perfection, but rather adequacy, completeness, and a good faith effort at full disclosure.

Finally, the court held that Lodi First's claim that the EIR failed adequately to analyze the impacts of the project on water supply was barred by res judicata where Lodi First had previously litigated the question to a final judgment in an earlier action.

DISCUSSION

1. To invoke the deliberative process privilege, an agency must establish that the public interest in non-disclosure outweighs the public interest in disclosure. To make this showing, the agency should:

a. cite evidence of the sensitive nature of the decision;

b. cite evidence that the public officials involved in the deliberations intended that their discussions remain confidential and the privilege was not waived by disclosure of the deliberations to any person outside the group engaged in the deliberations or their counsel;

c. argue that the decision itself is at issue, rather than the deliberations; and

d. argue that the thought processes and subjective impressions of the officials involved in the deliberations preceding the decision are irrelevant to the legal validity of the decision, which should be an objective determination by the court applying the law to the decision.

2. There is no ironclad rule governing the nature or scope of the alternatives that must be discussed in an EIR.

3. Courts review cumulative impact analyses in an EIR for adequacy, completeness, and a demonstration of a good faith effort at full disclosure, rather than technical perfection.

Is Environmental Review Required and How Much?
Ministerial Acts Exempt from Environmental Review

Sierra Club v. Napa County Board of Supervisors
(Apr. 20, 2012) 205 Cal. App. 4th 162

HOLDING

A county ordinance allowing sequential lot line adjustments is consistent with the Subdivision Map Act's exclusion of lot line adjustments from the requirements of the Act and are exempt from CEQA review as ministerial acts.

SUMMARY

Under the "general rule" of CEQA regarding exemptions from environmental review, a project is exempt from CEQA if it is certain that there is no possibility that the project may have a significant effect on the environment. (14 CCR § 15061(b)(3).) The CEQA Guidelines also provide for Class 5 exemptions for minor alterations in land use regulations in areas with an average slope of less than 20%, which do not result in any changes in land use or density, and allow minor lot line adjustments. (14 CCR § 15305.)

In 2002, Napa County revised its local subdivision ordinance to reflect changes made to the California Subdivision Map Act that exempted lot line adjustments between four or fewer adjacent parcels, so long as the adjustment was approved by the local agency. In 2009, the County adopted a new ordinance which continued the County's practice of ministerial approval of lot line adjustments affecting four or fewer parcels to readjust lots included in a prior subdivision application, known as "sequential lot line adjustments," provided that the prior adjustment had been completed and recorded. (Ministerial projects are exempt from CEQA review; discretionary projects require CEQA review.)

The County approved a sequential lot line adjustment application, finding that the project was exempt from CEQA based on a Class 5 categorical exemption and the general rule. The Sierra Club argued that the ordinance violated CEQA by classifying all lot line adjustment approvals as ministerial, the ordinance violated CEQA's prohibition on piecemealing environmental review of a single project, and the lot line adjustment approval did not qualify for any CEQA exemption.

The Court of Appeal found that approval of sequential lot line adjustments is ministerial and not discretionary. Discretionary projects, according to the court, require the exercise of judgment or deliberation. A government act is discretionary where the approval process allows the agency to shape the project to respond to concerns identified in an EIR. Ministerial projects, in contrast, require a mere determination whether the project conforms with applicable statutes, ordinances, or regulations. The court further held that the agency making a particular decision is best equipped to determine whether an act is ministerial for CEQA purposes, based on its analysis of its own laws.

Lot line adjustments in the County were ministerial, the court held, because the County's subdivision code listed lot line adjustments as ministerial acts, unless they required a variance or were processed concurrent with a related application for a use permit or other discretionary approval. Moreover, the ordinance listed twelve conditions that, if met in the lot line adjustment application, guaranteed the County's approval. The County's subdivision approval process for lot line adjustments was limited to a determination whether the application conformed to applicable ordinances and regulations. The official had no ability to exercise discretion to mitigate environmental impacts or change the County's existing general plan, or building and zoning ordinances.

DISCUSSION

1. Courts defer to local agency judgments as to whether a subdivision approval process, such as a lot line adjustment, is ministerial and therefore exempt from CEQA review.

2. Approvals of lot line adjustments are ministerial and exempt from CEQA review where the approval process (a) does not permit the government to modify the project to respond to concerns identified in an EIR or to change the agency's general plan, building codes, or zoning ordinances, and (b) is limited to a determination whether the application conforms to applicable ordinances and regulations.

Adequacy of Environmental Document
Baselines for Environmental Impacts

Neighbors for Smart Rail v. Exposition Metro Line Construction Authority
(Apr. 17, 2012) 205 Cal. App. 4th 552
**Certified for Partial Publication.*
***Review Granted and Opinion Superseded 8/8/2012*

HOLDING

For long term and phased development projects, CEQA does not preclude the use of projected traffic, air quality, and greenhouse gas emissions conditions as a baseline in an EIR.

SUMMARY

This is the latest decision to address the proper traffic baseline for CEQA review. Is the baseline against which the project's impacts are measured the condition existing at the time of the environmental review or at the time the project comes on line? For any project that has multiple phases or will take many years to complete, the traffic conditions existing before the project starts construction will have changed by the time the project is finished. It has therefore been common practice to project baseline traffic conditions to the time the project will be completed.

The tension in these cases stems from language in the CEQA Guidelines requiring that the agency should "normally" analyze the impacts of the project at the time the project undergoes environmental review. The rationale for this rule is obvious—existing traffic conditions can be measured accurately, whereas projections of future conditions are subjective and not as reliable, and there could be a temptation to manipulate the baseline to create a more or less favorable picture of the project's impacts. For projects that take many years to complete, existing conditions are not very relevant; it's the impacts at the time the project is completed that matter.

Exposition Metro follows on the *Sunnyvale West* and *Pfeiffer* decisions we reported on in our CEQA Update for the League at the Fall 2011 and Spring 2012 conferences. *Sunnyvale West* disapproved the use of projected traffic conditions for baseline comparisons; *Pfeiffer* allowed the use of future conditions for a baseline. In *Exposition Metro*, the court sided with the *Pfeiffer* court.

In *Exposition Metro*, petitioners challenged the use in a 2010 EIR of a 2030 baseline for traffic, air quality, and GHG emissions for the construction of a light rail line from Downtown Los Angeles to Santa Monica. The agency did not compare the project to existing traffic and emissions because the project's effects would not be felt until at least 2015, and the project would be built out in phases ending in 2030.

The court agreed with the agency that existing traffic conditions were illusory. Population increases in Los Angeles would inevitably produce increased traffic congestion and emissions. In analyzing the no-build alternative, the agency compared the project's impacts to conditions that would exist at the time the project was completed.

Petitioners argued that because conditions at intersections and emissions would be much worse in 2030, the impacts of the project would not appear as severe by comparison. The court rejected this reasoning, instructing that traffic, air quality, and emissions typically evolve with population growth and new development. In cases of larger, long-term projects, the court opined that it would be a "false hypotheses" to use the existing conditions as a baseline.

The court construed the CEQA Guidelines to permit the use of baselines other than those at the time of publication of the notice of preparation or when the environmental analysis begins. The court found that the Guidelines requirement that the baseline should "normally" be conditions at the time of preparation of the EIR did not foreclose the agency's discretion to select a reasonable baseline where it is supported by substantial evidence. The court drew a distinction between a baseline of "hypothetical" or "illusory" future conditions, which would be prohibited by the California Supreme Court's decision in *Communities for a Better Environment,* from the permitted use of a baseline of projected conditions supported by substantial evidence. In this case, the court found that the inevitable increase in Los Angeles' population, resulting in increased air pollution and traffic congestion, was realistic and rational, not hypothetical or illusory.

DISCUSSION

1. *Pfeiffer* and *Exposition Metro* seem to be correct. Requiring that CEQA review of a multi-phased project that will take years to complete should only compare the project to existing conditions is unrealistic and of little practical use. Projections are not always easy to make, nor are they perfect, but in most cases they provide a more accurate baseline and a truer picture of environmental impacts than the assumption that environmental conditions will not change over time.

2. After *Pfeiffer and Exposition Metro*, agencies have more flexibility when identifying baselines against which to assess the project's impacts. If an agency can show that future environmental conditions affected by the project are likely to change before the project begins or that such future conditions could vary, it will have discretion in choosing an appropriate baseline for evaluating environmental impacts—provided that the choice is supported by substantial evidence.

3. Challengers to an EIR that uses only a projection of future traffic and GHG conditions might argue that the circumstances are not appropriate for a baseline of projected conditions or that the methodology used to project conditions is erroneous or unreliable. Therefore, the safest course, albeit a more expensive option, is to measure a project's traffic impacts against both existing and future conditions, as the agency did in *Pfeiffer*.

4. *Exposition Metro* and *Pfeiffer* created a split of authority with *Sunnyvale West* and other cases. Because the baseline issue is so controversial and significant, it is not surprising that the California Supreme Court granted review in *Exposition Metro*. So stay tuned.

Substantial Evidence Test for Certification of EIR

City of Hayward v. Board of Trustees of the California State University
(May 30, 2012) 207 Cal. App. 4th 446

HOLDING

An EIR prepared for an expansion of California State University East Bay's campus adequately analyzed impacts on fire protection, public safety, traffic and parking, and air quality, but did not support its analysis of impacts to parkland. CEQA did not require trustees to mitigate need for new fire protection services.

SUMMARY

The University, located in the City of Hayward, developed a master plan to expand its campus. It prepared an EIR that addressed the master plan as a whole as well as two project-specific evaluations of student housing and parking. The EIR concluded that the master plan would result in significant impacts to air quality and traffic, despite mitigation measures. The EIR found that the housing project would have no significant impacts. Finally, the EIR concluded that the parking structure would have significant traffic impacts. The University certified the EIR, concluding that all feasible mitigation measures would be implemented and that significant impacts were outweighed by overriding benefits. The City challenged the certification of the EIR and approval of the master plan. The Court of Appeal held that the EIR adequately analyzed all impacts with the exception of impacts on parkland.

First, the court rejected the City's argument that the University failed to fully analyze the potential impact of the master plan on the provision of fire and emergency response services. The EIR sufficiently analyzed emergency response times and their impact on public safety and determined that they would be offset by the construction of one additional fire station. The court held that the University's conclusion that construction of the new station would have no significant environmental impacts was supported by substantial evidence because the new station would be constructed as infill on a small lot.

The court further rejected the City's related contention that the University was required to mitigate the need for additional fire protection and emergency services due to the project by providing more than one fire station and other emergency services. The court observed that demand for fire protection and emergency services from new development is not an environmental impact; CEQA does not shift financial responsibility

for provision of fire and emergency services to the proponent of a project. Instead, the court held, the City has the obligation under state law to provide fire and emergency services to the new development. The University, the court held, adequately analyzed the physical environmental impacts of the new fire station; nothing more was required under CEQA.

Second, the court rejected the City's claim that the University failed to properly analyze traffic impacts for potential faculty housing. The court found that the University had not yet selected the site for the faculty housing from three alternatives proposed in the EIR and that further studies would be required when a specific site had been chosen. The court held that the EIR was a programmatic EIR, and that further environmental review for specific facilities could be tiered off the programmatic EIR when those facilities are identified in the future.

Third, the court held that the EIR sufficiently considered increased parking and traffic impacts of the master plan, given that it incorporated mitigation measures in the form of traffic studies and public transit improvements. The court noted that some impacts were unavoidable and accepted the University's statement of overriding considerations.

Fourth, the court upheld the University's finding that the master plan would cause significant off-campus traffic impacts, but that such impacts were outweighed by overriding considerations. The City argued that University should be obligated to fund traffic mitigation itself if the Legislature would not. The court, however, found that because the City had not raised this claim during the administrative challenge, the City failed to exhaust its administrative remedies on this issue.

Fifth, the court upheld the University's statement of overriding considerations with respect to unmitigated significant and unavoidable air quality impacts. The court determined that that the University's implementation of mitigation measures would reduce some emissions to a less than significant level and the City did not suggest further mitigation measures. Accordingly, the court found no grounds to disturb the City's statement of overriding considerations.

Finally, the court held that the EIR did not sufficiently analyze impacts to parkland from the student housing project because it only analyzed impacts to the regional park district, rather than impacts to two neighboring parks. The University provided no factual basis to support the "long-standing use patterns" of parks by students on which it relied. The court agreed with the City that the EIR should have considered data showing actual current use of neighboring parks by students and extrapolated how that would increase with more students living in the housing project.

DISCUSSION

1. A city, not the project proponent, bears the legal responsibility to ensure that adequate emergency facilities exist for its residents. A project proponent need only analyze the environmental impacts of providing increased emergency services to comply with

CEQA. The project proponent is not required to provide funding to mitigate the increased need of emergency services as a result of its project, unless the mitigation is for environmental impacts.

2. When analyzing impacts to parkland, a project proponent should consider the location of the parks relative to the proposed projects and should rely on data outlining current park use. Assessing impacts to an entire regional park district is not appropriate where the location of the project in relation to specific parklands suggests that more serious impacts will be felt at individual parks.

Attorneys' Fees
Award of Private Attorney General Fees to Attorney who is Member of Suing Group

Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg
(June 4, 2012) 206 Cal. App. 4th 988
* *Partially certified for publication.*

HOLDING

In a CEQA enforcement action, the trial court properly awarded attorneys' fees under Code of Civil Procedure 1021.5 to an attorney who represented a public interest group of which she was a member.

SUMMARY

Healdsburg Citizens for Sustainable Solutions successfully challenged the certification of an EIR for a resort development. The trial court awarded attorneys' fees to the group and to Grattan, an attorney who was both a member of the citizen group and represented the group on a contingent fee basis. The court found that petitioners were entitled to attorneys' fees under Code of Civil Procedure section 1021.5 because the action had enforced an important right affecting the public, it had conferred benefits on a large group, and the necessity of the action and the financial burden made the award appropriate.

On appeal, defendants argued that Grattan was not entitled to attorneys' fees because she was a party to the action. Defendants contended that under Code of Civil Procedure section 1717, an attorney who chooses to litigate in "propria persona" cannot recover attorneys' fees for the time and effort she expends on her own behalf, or for the professional business opportunities she forgoes as a result of her decision.

In finding that attorneys' fees were properly awarded, the Court of Appeal acknowledged the restrictions of section 1717, but noted that Grattan sought recovery under 1021.5 to enforce an important public right. The court determined that she had enforced such a right while taking a risk. The record showed that Grattan had expertise in CEQA litigation, had agreed to take on the fact-intensive and complicated case on a contingent fee basis along with another partner at her firm, and that the citizen group had more than 100 members. Based on this evidence, the Court of Appeal found that a genuine

attorney-client relationship existed between Grattan and her co-petitioners, despite her membership, and that her own interests were not interchangeable with or legally indistinct from the group's.

DISCUSSION

An attorney for a petitioner public interest organization seeking section 1021.5 attorneys' fees, where the attorney is also a member of the organization, should be required to show that (a) the litigation, including the outcome she achieved, meets the requirements of section 1021.5, (b) a genuine attorney-client relationship exists between the attorney and the organization, (c) the organization has a large membership, such that the organization is not the alter ego of the attorney, and (d) the attorney's compensation is a contingent fee or some other form of monetary compensation that demonstrates that the attorneys' economic interest is not identical to the organization's economic interest.

Award of Attorneys' Fees in Enforcement Action Between Public Entities

City of Maywood v. Los Angeles Unified School District
(July 18, 2012) 207 Cal. App. 4th 1075
* *Partially certified for publication.*

HOLDING

Where one public entity seeks an award of private attorney general fees in an enforcement action against another public entity, the court should not consider the claimant's nonpecuniary interests when determining whether the entity meets the "financial burden" criteria of Code of Civil Procedure section 1021.5.

SUMMARY

The City of Maywood successfully challenged the Los Angeles School District's certification of a final EIR, analyzing the environmental consequences of constructing a high school. The Los Angeles Unified School District appealed the trial court's award to the City of Maywood of private attorney general fees under Code of Civil Procedure section 1021.5. The Court of Appeal reversed and remanded for a redetermination of the fee award.

The Court of Appeal provided instructions to the trial court in applying section 1021.5's "necessity and financial burden" criteria where one public entity seeks attorneys' fees against another public entity. Section 1021.5 provides that a court may award attorneys' fees in an action enforcing an important right affecting the public interest if the award is appropriate given the necessity and financial burden of private enforcement or enforcement by one public entity against another public entity. The District contended that Maywood could not satisfy the "necessity and financial burden" criteria because the City had a personal interest in the litigation—to preserve its tax base and avoid environmental impacts—that transcended the burdens of enforcement. Maywood argued that its

nonfinancial interests in pursuing the litigation were irrelevant to determining whether it satisfied section 1021.5.

The Court of Appeal ruled that a prior case, *Conservatorship of Whitley* (2010) 50 Cal. 4th 1214, controlled the interpretation of "necessity and financial burden," and that *Whitley* applied not only to private but also public entity enforcement actions against other public entities. Prior to *Whitley*, courts held that the "necessity and financial burden" element was satisfied when "the cost of the claimant's legal victory transcended his personal interest." *Whitley* clarified that a court may only consider pecuniary interests as "personal interests." In the instant case, the Court of Appeal extended *Whitley* to public enforcement actions, agreeing with Maywood that its nonfinancial interests in pursuing the litigation were irrelevant to determining whether it met the financial burden required by section 1021.5.

The Court of Appeal, however, agreed with the District that when applying the financial burden criterion of section 1021.5 to political subdivisions, a court should consider whether the burden of the litigation transcends the pecuniary interests of both the political entity and the collective interests of the individuals that the entity represents.

DISCUSSION

1. When a public entity pursues an enforcement action against another public entity, it may be entitled to attorneys' fees if it can prove that its pecuniary interests and the pecuniary interests of its citizens are outweighed by the costs of the action. To convincingly meet this burden a public entity should also argue that the enforcement action benefits the public at large, beyond its own constituents.

2. The non-financial benefits that a public entity or political subdivision gains from an enforcement action, such as environmental protection, may not be considered by the court to determine if attorneys' fees should be awarded under Code of Civil Procedure section 1021.5.

CEQA Guidelines Update

Proposed CEQA Guideline Section 15183.3: Streamlining for Infill Projects
(Draft Guideline submitted by Office of Planning and Research on June 25, 2012. The Natural Resources Agency will now begin the formal rulemaking process to finalize these guidelines.)

The authority for this proposed guideline comes from the recent legislation, SB 226, discussed in the Spring 2012 Land Use Law update. The proposed guidelines flesh out SB 226's new streamlined infill project environmental review process. The new section 15183.3 would streamline environmental review for eligible infill projects by limiting the need for project level review where the effects of infill developments have already been generally addressed in a planning level decision or by uniformly applicable development policies.

Eligibility: To be eligible for streamlining procedures, an infill project must meet certain requirements. First, it must be located in an urban area, on a site that has either been previously developed or that is adjacent to at least seventy-five percent urban uses. Second it must conform with the performance standards provided in the newly created Appendix M. Third, it must be consistent with the general use designation, density, building intensity, and applicable policies of the project area in either a sustainable communities strategy or an alternative planning strategy.

The proposed guidelines carve out two exceptions to this last requirement. If an infill project is proposed within the boundaries of a metropolitan planning entity which has not implemented a sustainable communities strategy or an alternative planning strategy, then a residential infill project must have at least 20 units per acre, and a commercial project must have a floor area ratio of at least .75. If the infill project is proposed outside of the boundaries of a metropolitan planning entity then it must meet the definition of a "small walkable community project" which the guidelines define in detail at section 15183.3(f)(6).

Streamlined Review: Under the proposed streamlined review process, certain infill projects could conduct a range of lessened environmental reviews, from a complete exemption to preparation of a narrowed, project-specific environmental document. CEQA will not apply to eligible infill projects under two circumstances. First, if the prior EIR addressed an effect as a significant effect, then an individual infill project will not need to reanalyze that effect, even if the new project cannot reduce the effect to a less than significant level. Second, even if an effect was *not* analyzed in a prior EIR or is now more significant than previously analyzed, an infill project does not need to analyze the effect if uniformly applicable development policies or standards apply to the project and would substantially mitigate it.

Procedure: After preliminary review of an infill project, the lead agency must determine if the infill project will cause any effects that would require additional CEQA review. The lead agency must prepare a detailed checklist to determine if the project is eligible for streamlining. This checklist should specifically analyze whether the infill project meets the requirements of Appendix M, provide detailed citations as to whether a prior EIR analyzed the effects of the project, indicate whether the infill project incorporates all applicable mitigation measures from the prior EIR, and explain whether the project will cause "new specific effects," or whether adverse environmental effects are "more significant" than identified in the prior EIR. If the infill project will cause "new specific" or "more significant" effects, then the checklist should indicate whether uniformly applicable development policies or standards will "substantially mitigate" those effects.

Finally, the lead agency must determine what type of environmental document should be prepared for the infill project, choosing from No Further Review, Negative Declaration, Mitigated Negative Declaration, Sustainable Communities Environmental Assessment, or Infill EIR. No Further Review is appropriate when the infill project would not cause any new specific effects or more significant effects, or if uniformly applicable

development policies or standards would substantially mitigate such effects. A Negative Declaration, is appropriate if a new specific effect is less than significant. A Mitigated Negative Declaration is proper if new specific effects or more significant effects can be mitigated to a less than significant level through project changes. A lead agency must prepare an Infill EIR when the written checklist shows that effects of the infill project that are subject to CEQA would be potentially significant. Special procedures apply to infill transit priority projects.

Infill EIR: An Infill EIR only needs to address those significant effects that uniformly applicable development policies or standards do not substantially mitigate, and that are either new specific effects or are more significant than a prior EIR analyzed. The written checklist will cover all other effects. The written checklist should be circulated in tandem with the EIR. An Infill EIR is less thorough than a regular EIR and does not need to address alternate locations, densities, building intensities, or growth inducing impacts.

EMINENT DOMAIN

Severance Damages

City of Livermore v. Baca
(May 16, 2012) 205 Cal. App. 4th 1460

HOLDING

In an eminent domain action, the trial court's exclusion of the property owner's evidence of severance damages through an in limine motion amounted to the improper granting of a nonsuit in favor of the condemning agency. The trial court also erred in defining the project to include work by the State of California, which was not a party to the condemnation action.

SUMMARY

The City of Livermore brought an eminent domain action to acquire portions of the frontage of Baca's commercial property for a road construction project. Baca did not oppose the taking, but sought permanent and temporary severance damages. Severance damages are damages to the owner's remaining property following the acquisition of a part of the property for a public project. At the trial, the court granted the City's in limine motion to exclude Baca's evidence of severance damages, on the grounds that Baca's severance damages claims could not go to a jury unless Baca could make a threshold showing of "substantial impairment" to the use of the remainder.

Rather than applying the normal abuse of discretion standard to review evidentiary rulings, the Court of Appeal treated the trial court's grant of the in limine motion as a nonsuit and accordingly applied a de novo standard of appellate review. The court cautioned that the use of in limine motions as a nonsuit has no statutory basis and potentially denies parties their constitutional right to a jury trial in an eminent domain case.

The Court of Appeal determined that the trial court improperly held Baca to an elevated standard of evidence when it required a preliminary finding of "substantial impairment" to Baca's remaining property before it would permit evidence of severance damages to go to the jury. Such a finding is only necessary, the court held, when the alleged severance damage consists of interference with access to the property from a public road. Because Baca's claims for permanent severance damages and most of his claims for temporary severance damages were based on an alleged decrease in value to his property from loss of view, adverse effects on drainage, changes in the depth of utility lines, increased traffic hazards, and removal of landscaping and driveway access, the lower court misapplied the standard for admissibility of evidence of severance damages.

The Court of Appeal noted, however, that a preliminary finding of substantial impairment would have been appropriate for Baca's severance damages claim based on the requirement that Baca access his property by a 1.4 mile detour during construction of the project. The appellate court found that substantial impairment existed.

Under the Eminent Domain Law, severance damages can be offset by benefits to the remainder conferred by the project. In ruling on the admissibility of evidence of project benefits, the trial court improperly defined the Project to include three separate contracts for different portions of the roadway project. The court found that the City's acquisition of Baca's property was for the purpose of completing work for the first contract only, covering a specific area adjacent to Baca's property. The court held that work under the second contract was not in an area affecting Baca's property, and work under the third contract was completed by the State, which was not a party to the action. The court held that only the first contract should have been considered for the purposes of determining whether benefits from the project offset severance damages from the project.

DISCUSSION

1. Avoid using in limine motions to dispose of severance damages claims, unless the claim depends on impairment of access to the remainder. In the latter case, an in limine motion may be appropriate. To overcome the motion, the property owner must make a threshold showing of a substantial impairment of access from the project.

2. When calculating project benefits to offset severance damages, only benefits from the condemning agency's project that directly affect the property in question can be considered. If the project is part of a larger project involving other government agencies, the agency should consider joining the other agencies in the eminent domain action to enlarge the scope of benefits that may offset severance damages.