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Update On Land Use And CEQA Cases

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V. POLICE POWER

B. LAND USE

1. General

2. Planning

3. Zoning

a. General

***Adrian Hernandez v. City of Hanford* (2007) 41 Cal. 4th 279**

The owners of a stand-alone home furnishings and mattress store located within a planned commercial (PC) sued a city, challenging the validity of an ordinance that generally prohibited the sale of furniture in the PC district. The ordinance created a limited exception to the general prohibition on the sale of furniture in the PC district, permitting large department stores (those with 50,000 or more square feet of floor space) located within the PC district to sell furniture within a specifically prescribed area (occupying no more than 2,500 square feet of floor space) within the department store. The trial court rejected the constitutional challenge. The Court of Appeal reversed, concluding that the disparate treatment of similarly situated retailers based on square footage was not rationally related to the purpose behind the ordinance and was unconstitutional as a violation of equal protection.

The Supreme Court reversed. The court concluded that the ordinance's differential treatment of large department stores and other retail stores was rationally related to one of the legitimate legislative purposes of the ordinance, which was to attract and retain large department stores within the PC district. Because the city viewed large department stores as particularly significant elements of the PC district, and because the management of those stores had made clear the importance to them of retaining their ability to offer furniture sales, it was rational for the city to decide to provide an exception from the general prohibition on furniture sales in the PC district for such large department stores and only such stores. Therefore, the Court of Appeal erred in finding the ordinance unconstitutional.

b. Public Agencies

c. Conditional Use Permits

4. Growth Management

5. Subdivision Map Act

***Kalway v. City of Berkeley* (2007) 151 Cal. App. 4th 827**

The superior court denied a petition for writ of mandamus challenging a city's decision to merge two contiguous parcels of real estate. The trial court also cancelled a grant deed from one owner to the other. One parcel was undeveloped and was below the minimum lot size. The owners, a married couple, initially had title to both parcels solely in the husband's name. When the husband

learned that the city was taking action to merge the parcels, he deeded the undeveloped parcel to the wife. The grant deed was executed just before the city filed notice of intention to determine status. The city concluded that the transfer had no effect on the merger proceedings and adopted a resolution merging the two parcels.

The Court of Appeal affirmed the denial of the petition for writ of mandamus and reversed the purported cancellation of the grant deed. The court held that under Gov. Code § 66451.11 (c), paper title to a parcel is only one indicator of ownership for purposes of exempting property from the merger provisions of the Subdivision Map Act (Gov. Code § 66410 et seq.). Where two or more properties have the same owner in substance, even if not in form, on the filing date of the notice of intention to determine status, they are not exempt from merger. Moreover, equity would not aid the owners in a scheme designed to circumvent the law. Cancelling the grant deed was not authorized under Gov. Code §§ 66499.32, 66499.33, under Civil Code § 3412, or under the Uniform Fraudulent Transfer Act (Civil Code § 3439.01 et seq.).

6. Environmental Constraints

7. Building Regulations

8. Housing

9. Tidelands and Beaches

***LT-WR, LLC. v. California Coastal Com.* (2007) 151 Cal. App. 4th 427**

The California Coastal Commission denied a property owner's application for a coastal development permit to maintain gates and no trespassing signs on the owner's property. On the owner's petition for writ of administrative mandate, the trial court directed the commission to vacate its denial of the application.

The Court of Appeal affirmed. The court concluded that the trial court erred as a matter of law in ruling that the gates and signs were not "development" within the meaning of the California Coastal Act of 1976. However, the trial court did not err in overturning the commission's denial of the permit for the gates and no trespassing signs. In prohibiting the property owner from excluding the public from its property on the theory that a potential existed to establish prescriptive rights for public use, the commission in effect decreed the existence of such rights. However, the commission is not vested with the authority to adjudicate the existence of prescriptive rights for public use of privately owned property. The commission's denial of the permit for the gates and signs, premised on the existence of "potential" prescriptive rights, was speculative. Therefore, the trial court properly directed the commission to vacate its denial of the permit with respect to the owner's gates and no trespassing signs.

10. Historic Preservation

11. Dedications and Exactions

12. Challenges

    a. General

***California State Parks Foundation v. Superior Court* (2007) 150 Cal. App. 4th 826**

The superior court transferred venue to another county in a CEQA action challenging an agency's certification of an environmental impact report for, and the decision approving construction of, a toll road that would traverse portions of both counties. The agency was not located in the county where the action was brought. The trial court found that the exception in Code Civ. Proc. § 393 (b), for actions against public officers did not apply and that the general venue provisions of Code Civ. Proc. § 395, required the action to be filed in the county where one of more of the defendants resided.

The Court of Appeal issued a writ of mandate directing the trial court to vacate the order that had transferred venue**.** The court held that Code Civ. Proc. § 393 (b), is not limited to actions seeking to vindicate private, as opposed to public, rights. Although some case law contains language referring to actions involving private rights or property, the court observed that these cases do not limit the application of § 393 (b), to such actions but instead address whether the complaint alleged an affirmative act by a public official, as opposed to a mere omission or threatened future action. The plain language of § 393 (b), demonstrated that it applied to the action. Moreover, because the terms of § 393 (b), are to be liberally construed in favor of affording a forum to citizens, the court could not imply a limitation on the types of cases that fell thereunder.

***Ciraulo v. City of Newport Beach* (2007) 147 Cal. App. 4th 838**

Homeowners sought an order requiring a city to grant a variance, thereby allowing them to retain an enlarged rooftop structure that had been constructed on their home in violation of the building code. The trial court denied the homeowners' request to take limited discovery to augment the administrative record and denied their petition for writ of mandate.

The Court of Appeal affirmed. The court rejected the city's argument that the homeowners failed to timely serve their writ petition in accordance with Gov. Code, § 65009. The petition was timely because the applicable statute of limitations was stayed until the city actually served the written notice required by Code Civ. Proc., § 1094.6. The homeowners filed and served their writ petition within 90 days of that date. On the merits, the homeowners were not entitled to take discovery in connection with their collateral claim of equitable estoppel because that claim failed as a matter of law. Nothing the city's inspectors were alleged to have done vitiated the misconduct of the homeowners' contractor in building the expansion without the proper approval. The fact that the homeowners were victimized by the contractor's misconduct was of no moment. A principal cannot benefit from the fraud of its agent who is acting in the course and scope of the agency.

The Supreme Court granted the request by the City, the League and CSAC for depublication of the Opinion imposing Section 1094.6's notice requirement on Section 65009.

***Daro v. Superior Court* (2007) 151 Cal. App. 4th 1079**

The superior court issued an injunction requiring property owners to comply with the Subdivided Lands Act (Bus. & Prof. Code § 11000 et seq.) before either offering their interests in an apartment building for sale or exercising their rights under the Ellis Act (Gov. Code § 7060 et seq.) to recover possession of the building from tenants in the tenants' action under California's unfair competition law (UCL) (Bus. & Prof. Code § 17200 et seq.). The trial court found that the owners had committed an unfair business practice by attempting to sell subdivided interests in property without obtaining a public report that had to be provided to potential buyers pursuant to the Subdivided Lands Act. The trial court described the owners' unfair business practice as purchasing residential rental properties, subdividing them through the vehicle of tenancy-in-common agreements accompanied by the right to exclusive occupancy of individual units, and then selling or attempting to sell the subdivided interests without complying with the Subdivided Lands Act. In order to create vacancy in the buildings they sought to subdivide and sell, the owners utilized the Ellis Act to evict the tenants and remove the buildings from the rental market.

The Court of Appeal reversed. The court noted that, after Proposition 64, a private person has standing to sue under the UCL for unfair competition only if he or she has suffered injury in fact and has lost money or property as a result of such unfair competition (Bus. & Prof. Code § 17204). Any threatened loss of the tenants' leasehold interests in the case at bar resulted not from the owners' alleged noncompliance with the Subdivided Lands Act but instead from the owners' lawful exercise of their right to withdraw property from the rental market under the Ellis Act. The tenants lacked standing under the UCL to seek relief based on a purported violation of the Subdivided Lands Act because their claimed injury did not result from the alleged violation of that statutory scheme. Because the owners' exclusive rights of occupancy were created by an agreement not contained or referenced in the deed, the property did not constitute a community apartment project. As a consequence, the Subdivision Map Act (Gov. Code § 66410 et seq.) was inapplicable. The tenants were not among the class of persons the Subdivided Lands Act was intended to protect. In effect, they were attempting to assert claims on behalf of parties not present before the court--i.e., actual or potential purchasers of subdivided interests aggrieved by a violation of the Subdivided Lands Act. The court concluded that the Ellis Act evictions did not afford the tenants standing to challenge any alleged violations of the Subdivided Lands Act.

***Morongo Band of Mission Indians v. State Water Resources Control Board* (2007) 153 Cal. App. 4th 202**

The superior court issued a writ of mandate, ordering the disqualification of a State Water Resources Control Board (Water Board) attorney as a prosecutor in a proceeding in which the Water Board sought to revoke the water right license of a licensee, a federally recognized Indian tribe of California. The licensee based its petition to disqualify the entire enforcement team prosecuting the case on the fact that the attorney had concurrently acted as advisory counsel to the Water Board in an unrelated proceeding.
The Court of Appeal affirmed. The court agreed with the trial court's finding that a water right holder facing license revocation by the Water Board is deprived of due process of law when the

revocation is being prosecuted by the same attorney who simultaneously acted as legal advisor to the Water Board in an unrelated administrative proceeding. The court held that the right to an impartial tribunal is compromised when an agency prosecutor is allowed to maintain too close a relationship with the administrative decision maker. While the provisions of California's Administrative Procedure Act (Gov. Code §§ 11370, 11340 et seq.) are helpful as indicating what the Legislature believes are the elements of a fair and carefully thought out system of procedure for use in administrative hearings, it is a matter for the courts, not the Legislature, to decide whether an administrative proceeding complies with procedural due process. As the trial court pointed out, a firm rule against a single attorney concurrently carrying out both prosecutorial and advisory functions was essential not only as a practical matter, but to avoid unseemly judicial inquiry into attorney-client communications and attorney work product materials that might otherwise be privileged. Allowing an attorney from the administrative board to act both as prosecutor and the decision maker's advisor in proceedings that overlap necessarily puts a licensee facing prosecution at an unfair disadvantage.

***Travis v. County of Santa Cruz* (2007) Cal.App. Unpub. LEXIS 892 (February 2, 2007)**

1. Rent restrictions imposed by County's second unit ordinance are not preempted by the Costa-Hawkins Act.

2. The condition imposed by the second unit ordinance creating a preference for seniors constitutes discrimination on the basis of age, in violation of the Unruh Act and Government Code Section 65008.

3. Income-based restrictions are not invalid under Government Code Section 65008.

The Supreme Court has granted review.

***Wang v. Wal-Mart* (2007) ___ Cal.App.4th ___, 7/25/07 CA4/1**

The superior court dismissed a lawsuit against Wal-Mart and the City of San Bernadino, and awarding attorneys fees, under the anti-SLAPP statute. The court found that the anti-SLAPP statute was applicable because the Plaintiffs' causes of action arose out of protected petitioning activity in connection with the development of the Wal-Mart property.

The Court of Appeal reversed. The court ruled that the trial court erroneously found that the references in the various causes of action to the Wal-Mart applications for City development permits, as carried out by the other defendants, converted these causes of action into liability claims that were based principally upon protected speech or conduct. Rather, the Plaintiffs' breach of contract, fraud, and related causes of action are factually based on allegations about the manner in which the private transactions between the parties were conducted, and the governmental development permit applications were only incidental or collateral to the principal purposes of those transactions.

b. Regulatory Taking

c. Civil Rights

C. REDEVELOPMENT

***Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal. App. 4th 1350**

Plaintiff sued a city's redevelopment agency, a partnership, and one of its partners, alleging that the partner, in violation of Gov. Code § 1090, had a financial interest in a development agreement between the agency and the partnership in violation of Gov. Code § 1190, and that the agreement was therefore void pursuant to Gov. Code § 1092. The partner was a member of the redevelopment agency's board. The superior court sustained defendants demurrer to plaintiff's complaint without leave to amend and entered judgment for defendants on the ground that plaintiff's complaint was filed after the three-year statute of limitations set forth in Code Civ. Proc. § 338 (a), had expired.

The Court of Appeal affirmed. The court concluded that plaintiff's action was untimely because it was filed after the one-year limitations period set forth in Code Civ. Proc. § 340 (a), had expired. Plaintiff's causes of action accrued on or before December 21, 2001, the date of execution of the development agreement. Plaintiff filed her complaint on September 12, 2005, nearly four years later. The three-year limitations period set forth in Code Civ. Proc. § 338 (a), did not apply because Gov. Code § 1090, is not a liability created by statute. The agreement was subject to forfeiture without regard to any showing of actual damages or fraud. Plaintiff's action did not impose the loss of rights and property without regard to actual damages as the consequence of commission of a public wrong or breach of a duty to the public, and was an action upon a statute for a penalty or forfeiture within the meaning of § 340 (a). Because plaintiff's complaint was filed more than three years after her causes of action had accrued, her action was subject to dismissal pursuant to § 340 (a).

***Fontana Redevelopment Agency v. Torres* (2007) ___ Cal.App.4th ___, 2007 Cal. App. LEXIS 1232**

The superior court granted a validation action filed by a redevelopment agency pursuant to Code Civ. Proc. § 860 et seq., Gov. Code § 53511, and Health & Saf. Code § 33501, to validate a settlement agreement and a resolution to issue tax allocation bonds. The settlement agreement required the agency to contribute redevelopment revenues to a housing fund after an audit found that the agency had failed to do so. The proposed bond issue exceeded the bonded debt limitation for the project under Health & Saf. Code § 33334.1.

The Court of Appeal reversed, holding that the settlement agreement did not fit the definition in Gov. Code § 53551 of bonds, warrants, contracts, obligations, or evidences of indebtedness used to secure financing for redevelopment. Thus, a validation action under Code of Civil Procedure § 860 and Gov. Code § 53511 was not the proper vehicle to challenge the settlement. The validation proceeding concerning the bond issue was properly brought under Code of Civil Procedure § 860 and Health & Safety Code § 33501. Because the proposed bond issue added secured debt in excess of the debt limitation in the redevelopment plan, the validation action should have been rejected, even though it arose from a previously validated amendment and the agency sought to characterize the proposed additional debt as reserve debt. The court noted that the agency also failed to provide affordable housing under Health & Safety Code §§ 33334.2, 33334.3, 33334.10.

Hesperia Citizens for Responsible Development v. City of Hesperia **(2007) 151 Cal. App. 4th 653**

The superior court upheld the approval of a municipal services agreement by a community redevelopment agency. The agency became a party to a municipal services agreement that obligated the city to provide police, fire, water, and sewer services for a proposed casino development to be located in part within a redevelopment project area.

The Court of Appeal affirmed, concluding that the agency did not violate Health & Safety Code § 33426.5, because it did not provide direct or indirect assistance to a gaming entity by becoming a party to the agreement. The agency itself was not responsible for providing municipal services to the casino. Nothing in § 33426.5 suggests that redevelopment agencies cannot be parties to contracts in which other governmental entities provide assistance to gaming entities. Whether or not the site of the proposed project was blighted under Health & Safety Code § 33030, was irrelevant because Health & Safety Code § 33321, makes it clear that not every property within a redevelopment area must be blighted. Moreover, the city council's prior determinations of blight in adopting the redevelopment plan and an amendment to the redevelopment plan were conclusive as provided in Health & Safety Code § 33368.

D. RELOCATION ASSISTANCE

VI. ENVIRONMENTAL QUALITY

A. GENERAL

Consejo De Desarrollo Economico De Mexicali, A.C. v. United States **(9th Cir. 2007) 482 F.3d 1157**

The United States District Court for the District of Nevada denied declaratory and injunctive relief to stop work on a Bureau of Reclamation project to build a concrete-lined canal to replace an unlined portion of the All-American Canal, one of the world's largest irrigation canals, carrying water from the Colorado River to the Imperial Valley in California. The canal is the valley's only source of water.

Based on intervening legislation, the Government filed a motion to vacate a temporary injunction pending appeal and to remand the action with instructions that several of the claims be dismissed as moot. The Ninth Circuit ruled that the Tax Relief and Health Care Act of 2006 exempts the Lining Project from claims based on NEPA, the Endangered Species Act, the Migratory Bird Treaty Act, and the Settlement Act (contained in Counts Five through Eight of the amended complaint).

B. CEQA

***Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal. App. 4th 91**

The superior court denied a group's petition for writ of mandamus that challenged a city's use of a mitigated negative declaration (MND) for a redevelopment project. The group argued that the city's failure to require preparation of an environmental impact report (EIR) for the project violated CEQA. Neither the group nor any of its individual members filed comments on the draft MND or submitted comments at public meetings. The city council then passed a resolution adopting the MND and approving a disposition and development agreement (DDA). A notice of determination was filed. In two resolutions passed later that year, the city council found that there had been no substantial changes that would warrant subsequent environmental analysis. The trial court found that the group's challenges to the MND were untimely under Public Resources Code § 21167 (b), because the group had not brought suit within 30 days of the notice of determination. The trial court applied the substantial evidence standard of Public Resources Code § 21166, which provides that no subsequent or supplemental EIR shall be required except in limited circumstances, in upholding the city's findings of no substantial changes.

The Court of Appeal affirmed, holding that the superior court properly concluded that the fair argument standard of Public Resources Code § 21151, did not apply because the activity contemplated by the DDA was a project as defined in § 21065, and was approved more than 30 days before the group filed suit. Accordingly, the case was governed by § 21166, and the applicable standard of review was substantial evidence. The court concluded that substantial evidence supported the city's determination that there was no new information that would have required preparation of an EIR.

***Regency Outdoor Advertising, Inc. v. City of West Hollywood* (2007) ___ Cal.App.4th ___, 2007 Cal. App. LEXIS 1223**

A billboard company filed a petition for a writ of mandate seeking to invalidate an amendment to a city's tall wall sign ordinance because the city had not subjected the amendment to review under CEQA. The trial court dismissed the writ petition and entered judgment for the city. The trial court determined that the company was urging CEQA review to pursue its commercial interests against competitors and that the company lacked standing to compel CEQA review.

The Court of Appeal affirmed. The court concluded that the company had no beneficial interest in a petition compelling CEQA review. The amendment did not have environmental effects on the company that were any greater than the effects it had on other businesses and property owners in the city. Hence, the amendment did not bestow CEQA standing on the company. Although the company contended that it had citizen standing under CEQA, the criteria for a corporation to enjoy citizen standing did not apply to the company, a for-profit corporation whose principal activity was owning billboards and tall wall signs. Although the company also claimed it had a continuing interest in the environmental effects of billboards and cited lawsuits it had filed to compel competing billboard companies to comply with CEQA, the company had a financial interest in each lawsuit's outcome. The company did not have taxpayer standing because its lawsuit against the city did not involve the city spending taxpayer money unlawfully.

***County of Amador v. City of Plymouth* (2007) 149 Cal. App. 4th 1089**

The superior court granted a writ of mandate invalidating a municipal services agreement (MSA) between an Indian tribe and a city on the ground that the city entered the agreement without complying with CEQA. The tribe intended to build a gaming development, comprised of a hotel, restaurants, and night clubs or bars, on land located in or adjacent to the city. The MSA unconditionally obligated the city to vacate a portion of a city road to provide access to the casino hotel and to remodel the existing fire station. It conditionally obligated the city to construct connections to the casino's sewer and water systems and to increase their capacities to meet the needs of the gaming development.

The Court of Appeal affirmed. The court found that the tribe had miscast the project as the acquisition of the trust lands and the gaming development. Although neither the taking of lands in trust nor the gaming development required the formal approval of the city, the city's construction of public works and the vacation of a city road to the casino hotel did require its approval. It was those activities that constituted a project within the scope of CEQA, and the MSA that constituted an approval of the project. The purpose of CEQA is to require a public entity to consider the environmental consequences of a project before it is approved. The city cannot evade this responsibility by a contract that commits the city to a course of action that would involve the very activities that require an environmental analysis before their approval. The city project included public works and a road transfer and other activities that were subject to CEQA because they might cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment.

***County of Imperial v. Superior Court* (2007) 152 Cal. App. 4th 13**

A water transferor and transferee entered into an agreement for a long-term transfer of water, and the State Water Resources Control Board approved the transfer. The county challenged the approval, and the trial court sustained, without leave to amend, demurrers to the challenge. According to the trial court, the county failed to name two water districts that were contemplated in the agreement for possible future acquisition of water, and the statute of limitations had run as to the unnamed districts, which the trial court found to be indispensable parties.

The Court of Appeal denied the county's petition for a writ of mandate and affirmed the trial court's judgment. The court held that the unnamed districts were "recipients of an approval" within the meaning of Public Resources Code § 21167.6, requiring them to be named in the county's petition, because the board's order approving the transfer unambiguously approved the future transfer of 100,000 acre-feet of water per year (afy) to the unnamed districts. Further, there was no abuse of discretion in finding that the unnamed districts were indispensible parties under the factors set forth in Code of Civil Proc. § 389 (b). The trial court correctly articulated possible prejudice: the loss of 100,000 afy under the transfer agreement and the potential unraveling of a quantification settlement agreement and protest dismissal agreement. The indispensable parties finding was also supported by the county's silence as to any fashioning of relief to avoid prejudice, by differing and possibly conflicting interests of the named and unnamed parties, and by the county's ability to assert its interests in coordinated proceedings.

***Fiorentino v. City of Fresno* (2007) 150 Cal. App. 4th 596**

Property owners challenged a city's adoption of a resolution by filing a petition for a writ of mandate to enforce CEQA. The trial court entered an order dismissing the owners' petition and subsequently denied the owners relief from the dismissal under Code of Civil Procedure § 473.

The Court of Appeal affirmed. Dismissal of the CEQA petition occurred because the owners did not file a request for hearing within 90 days of filing their petition, as required by § 21167.4 (a). The owners' attorney made a series of factual errors that led to the late filing. First, the 90-day deadline was miscalendared. Second, when the calendaring error was discovered, the attorney mistakenly believed he could not get the request for hearing filed in time because the clerk's office closed at 4:00 p.m. However, there was a drop box outside the clerk's office where documents deposited before 5:00 p.m. were deemed filed on the day deposited. Also, the document could have been filed timely if transmitted by facsimile to the clerk's office before 5:00 p.m. Filing a request for hearing on the 91st day did not cure the failure to meet the deadline, even though it was filed before the city's motion to dismiss.

***Landwatch Monterey County v. County of Monterey*, 2007 Cal. LEXIS 5925**

Depublished Court of Appeal opinion regarding evidence necessary to require EIR rather than MND.

***Mani Bros. Real Estate Group v. City of Los Angeles* (2007) ___ Cal.App.4th ___**

The superior court ruled that a city did not have to prepare a supplemental environmental impact report (SEIR) for a modified real estate development project, except as to one issue. The original project, a commercial development, was never constructed. The modified project was primarily residential. The city determined that a SEIR was not necessary and instead prepared an addendum. The trial court ordered the preparation of a SEIR addressing the increased need for police services but otherwise denied a peremptory writ of mandate and upheld the city's decision.

The Court of Appeal affirmed. The Court first held that the objecting property owners satisfied the requirement of exhaustion of administrative remedies under Public Resources Code § 21177(a) & (b), because they repeatedly voiced their objections to the addendum at various meetings. The court stated that substantial evidence is the proper standard of review for decisions made pursuant to Public Resources Code § 21166, in accordance with § 21083.1. The court concluded that substantial evidence supported the trial court's decision that, but for the issue of police services, the modified project's substitution of residential use in place of some office, retail, and cultural uses resulted in fewer significant impacts than the original project, even though the overall square footage and floor area were somewhat larger in the modified project.

Query: What anbout standing per *Regency Outdoor Advertising, Inc. v. City of West Hollywood*?

***Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal. 4th 372**

The superior court denied a property owner's CEQA challenge to an airport land use commission's adoption of an airport land use compatibility plan. The plan embraced existing restrictions on residential housing development for a large area near an Air Force base. The commission concluded that adopting the plan was not a project under CEQA and that the commonsense exemption set forth in the CEQA Guidelines, California Code of Regulations, Title 14, § 15061 (b)(3), was applicable. The Court of Appeal reversed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that adopting the plan was a project as defined in Public Resources Code § 21065, and CEQA Guidelines § 15378, because displaced development is not categorically outside the concern of CEQA and because the plan carried significant, binding regulatory consequences for local government as indicated in Government Code § 65302.3, and related statutes. The adoption of the plan fell within the commonsense exemption because local agencies already had restricted residential development to the same extent as the plan. Although the commission erred in failing to reference the factual record in its notice of exemption, detailed fact-finding was not necessary because the plan was consistent with existing general plans and zoning. Thus, streamlined review was permissible under Public Resources Code § 21083.3 (b), and CEQA Guidelines § 15183.

***Save Tara v. City of West Hollywood* (Waset, Inc.), 2007 Cal. LEXIS 5081**

Review granted to determine whether CEQA applies to a conditional agreement.

***Sierra Club v. California Dept. of Forestry & Fire Protection* (2007) 150 Cal. App. 4th 370**

The superior court denied two environmental groups' petition for writ of mandate that challenged a decision of the California Department of Forestry and Fire Protection (CDF) to issue a timber conversion permit (TCP) for a site of timberland. The timberland's owners sought the TCP so that they could convert the timberland to a vineyard. CDF issued the TCP after adopting a mitigated negative declaration that concluded that the timberland conversion project would not have a significant impact on the environment, and thus did not require the preparation of an environmental impact report (EIR).

The Court of Appeal reversed, holding that there was substantial evidence to support a fair argument that the timberland conversion project, as mitigated, might have a significant effect on the environment. The court looked primarily to the detailed comment letter of a professional plant ecologist and botanist with a quarter-century of experience, which set forth his expert opinion that the mitigated project might have a significant environmental effect in numerous areas: the significant effect of increased sediment due to erosion; the cumulative interaction of sedimentation and eutrophication on downstream fish habitat; the potential of net reduction in groundwater discharges due to irrigation; the effect of the significant demand for water for irrigation on the summer low-flow conditions of adjacent creeks; and the permanent loss of 63 acres of spotted owl habitat. The court thus concluded that the groups met their burden of showing substantial evidence to support a fair argument that the mitigated project might have a significant effect on the environment. Thus, an EIR had to be prepared pursuant to Pub. Resources Code § 21151, and the trial court erred by denying the groups' challenge to the decision to approve the MND and to issue the TCP.

Compare *Landwatch Monterey*.

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova **(2007) 153 Cal. App. 4th 238**

In a land-use case that raised claims under CEQA, the Planning and Zoning Law (Government Code § 65000 et seq.), and the public trust doctrine, the trial court denied a petition to overturn a county's approval of a community plan and a specific plan (collectively, project) proposed by a developer. The California Supreme Court had previously granted review, concluded that some of the CEQA arguments had merit, and remanded the cause to the Court of Appeal for further proceedings. The Supreme Court concluded that the final environmental impact report's analysis of the near-term water supply was adequate, but its analysis of long-term water-supply was not. The Supreme Court also concluded that the analysis of the effects on a river was not adequate.

The Court of Appeal reversed the judgment with directions to the trial court to grant the petition for writ of mandate. Consistent with the Supreme Court's directive, the court held that revision and recirculation of the draft environmental impact report was required to address the issues of long-term water supply and the effect of the project on the river. The record contained evidence supporting the county's findings that each alternative discussed on appeal was infeasible. However, the further environmental review ordered by the supreme court might require reconsideration of those or other proposed mitigation measures. Approval of the project was not inconsistent with the general plan. The argument that the project violated the “open space” designation of the general plan collapsed when it was recalled that the 1993 general plan did not designate the land as “open space” but as an urban growth area. An expired housing element does not invalidate a general plan because the use of “shall” in Government Code § 65588, is directory, not mandatory. The county's findings explicitly addressed the project's consistency with the county's legal obligations under the settlement, finding it met and exceeded those targeted minimums relating to affordable housing. Petitioners failed to mention the county's consideration of that legal obligation in their brief, and thereby again omitted critical facts, forfeiting their claim of error.

Woodward Park Homeowners Assn., Inc. v. City of Fresno **(2007) 150 Cal. App. 4th 683**

The superior court denied local organizations' petition for a writ of mandate to set aside a city's approval of a new commercial development on vacant land. The organizations alleged violations of CEQA. The superior court found that an environmental impact report's (EIR) analysis for the project was adequate.

The Court of Appeal reversed and directed the trial court to issue a writ of mandate ordering the city to reverse its actions certifying the EIR, approving the rezoning, and approving the plan amendments. The court held that the city's actions violated CEQA and that it had to do the environmental review process over if it wanted to approve the project. The city failed to adopt feasible mitigation measures to lessen the environmental impacts of the project when it demanded no measures to ease the project's impact on an already-congested freeway interchange. Although the city calculated a freeway fee of the kind frequently imposed on developments in other cities, it did not impose the fee or any other mitigation measure. That was done based on a long-standing city policy of approving projects despite unmitigated freeway impacts, a policy apparently arising from the city's dissatisfaction with information provided to it by Caltrans. The policy was illegal because CEQA does not allow agencies to approve projects after refusing to require feasible mitigation measures for significant impacts. The city's review process failed to inform the public of the consequences of environmental decisions before those decisions were made because the two environmental documents the city produced--an EIR and a statement of overriding considerations--were deeply flawed. The EIR usually measured the project's impacts by comparing it to a massive hypothetical office park, instead of comparing it to the vacant land that actually existed at the project site. That hypothetical office park was a legally incorrect baseline which resulted in a misleading report of the project's impacts. The statement of overriding considerations engaged in a serious misrepresentation of project alternatives.

C. AIR QUALITY

D. WATER QUALITY

National Association of Home Builders v. Defenders of Wildlife **(2007) ___ U.S. ___, 127 S. Ct. 2518**

The Environmental Protection Agency (the "EPA") determined to transfer the National Pollutant Discharge Elimination System program under CWA section 402(b) to the state of Arizona. That section of the CWA provides "that the EPA ‘shall approve' a transfer application unless it determines that a state lacks adequate authority to perform the nine functions specified in the section." 33 U.S.C. § 1362(b).

The Supreme Court ruled that the list under CWA section 402(b) is both exclusive and mandatory and is not to be enlarged by the ESA. The Court emphasized that because Arizona's application satisfied all nine criteria, the EPA lacked the discretion to make any decision other than to approve the transfer to Arizona, and the consultation requirement under ESA section 7(a)(2) was simply not triggered in this case. As reasoned by the Court, any other interpretation would have resulted in a partial repeal of the CWA, with the ESA imposing a 10 criterion on the transfer of permitting authority a result that the Court went to great lengths to reject. According to the Court, "nothing in the text of section 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application."

Northern California River Watch v. City of Healdsburg **(9th Cir. 2007) ___ F.3d ___, 2007 U.S. App. LEXIS 18615**

Plaintiff Northern California River Watch ("River Watch"), an environmental group, sued the City of Healdsburg, alleging that the City, without first obtaining a National Pollutant Discharge Elimination System ("NPDES") permit, violated the Clean Water Act ("CWA") by discharging sewage from its waste treatment plant into waters covered by the Act. Healdsburg discharged the sewage into a body of water known as "Basalt Pond," a rock quarry pit that had filled with water from the surrounding aquifer, located next to the Russian River. The District Court ruled in Plaintiff's favor, and entered judgment in its favor.

The Ninth Circuit affirmed. It ruled that Basalt Pond is subject to the CWA because the Pond, containing wetlands, borders additional wetlands that are adjacent to a navigable river of the United States. The district court held that discharges into the Pond are discharges into the Russian River, a navigable water of the United States protected by the CWA. Under the United States Supreme Court decision in *Rapanos v. United States*, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006), to qualify as a regulable water under the CWA the body of water itself need not be continuously flowing, but that there must be a "significant nexus" to a waterway that is in fact navigable. The Court concluded that Basalt Pond possesses such a "significant nexus" to waters that are navigable in fact, not only because the Pond waters seep into the navigable Russian River, but also because they significantly affect the physical, biological, and chemical integrity of the River. The Court also ruled that neither the waste treatment system nor the excavation operation exceptions in the Act apply to Healdsburg's discharges.

United States v. Moses **(9th Cir. 2007) ___ F.3d ___, 2007 U.S. App. LEXIS 18483**

Despite numerous warnings over the years, defendant real estate developer continued to do work in the channel of Teton Creek in Idaho for the purpose of rerouting, reshaping and otherwise controlling the flow of the waters of the Creek. After some 20 years, the government finally prosecuted him for violating the Clean Water Act (CWA), but only for discharges made between 2002-2004. The jury convicted defendant; the District Court sentenced him to 18 months imprisonment, and imposed a $ 9,000 fine, a $ 300 special assessment, and one year of supervised release. Defendant appealed, claiming there was no discharge of pollutants into the waters of the United States. The Ninth Circuit affirmed, holding that a seasonally intermittent stream which ultimately empties into a river that is a water of the United States is, itself, a water of the United States, citing *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001)

Great quotes:

> "Suffice it to say that while they are designed to bring clarity to the Nation's waters, they, themselves, are not ***hyaline***."
>
> "Nor does Nationwide Permit … supply the ***apotropaion*** that Moses seeks."
>
> "Moses was not much interested in the subtleties involved; he should have been before he undertook to ignore the government's steady trickle of warnings."
>
> "[O]n this record Teton Creek constitutes a water of the United States and… "no one contends that federal jurisdiction appears and evaporates along with the water in such regularly dry channels." … That ***glissades*** to consideration of Moses' next claim."

"Moses chose to ignore all demands by the EPA and the Corps that he comply with the Clean Water Act before he undertook his activities in Teton Creek. Even if he was convinced that the Corps had eschewed jurisdiction in 1980, it is not clear why he thought that gave him a ***sempiternal*** right to continue after jurisdiction was duly asserted. And while his ***sang-froid*** (or even contempt) in the face of agency demands may show either courage or foolhardiness, it does not save him from the consequences of his actions."