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Land Use and Development Case Summaries

2016 Breakfast Briefing

1. PLANNING & ZONING

CARSON HARBOR VILLAGE, LTD. V. CITY OF CARSON

239 Cal.App.4th 56 (2015)

The City of Carson rejected an application to convert a mobile home park to a subdivision of resident-owned lots, finding that the proposed subdivision was inconsistent with the open space element of its general plan. The owner sued, contending that the Mobilehome Conversion Statute precluded the city from considering general plan consistency in evaluating the application. Applying the reasoning of the California Supreme Court concerning a mobile home park conversion in the Coastal Zone, and noting policy parallels between the Coastal Act and statutes governing general plan open space elements, the court held that the city could properly deny the proposed conversion based on inconsistency with the open space element. (A more detailed analysis of this case appears under Tab 2, below).

LEVI FAMILY PARTNERSHIP V. CITY OF LOS ANGELES

241 Cal.App.4th 123 (2015)

Under the city's zoning code, to approve an elder care facility, the zoning administrator must make specified findings, including the finding that the project would be compatible with the character of adjacent properties and would not have an adverse impact on street access, and circulation. The zoning administrator made each of the required findings and approved the project but, on appeal, the Planning Commission overturned the decision, concluding that none of the required findings had been demonstrated. The project developer challenged this decision on the ground that the Planning Commission could not merely make negative findings regarding the facts required for the project's approval, but was obliged to support those negative findings with additional sub-findings explaining the decision. The court rejected the challenge, holding that where a zoning ordinance requires specific findings regarding the benefits and burdens of the project, it is sufficient, without more, for the deciding body to state that the required findings cannot be made.

SAVE OUR HERITAGE ORGANIZATION V. CITY OF SAN DIEGO

237 Cal. App. 4th 163 (2015)

The San Diego Municipal Code requires that permits for site development "not adversely affect the applicable land use plan." Project opponents argued that because the Balboa Bridge project was in conflict with several policies protecting historic resources in the City's general plan, the project would necessarily have adverse effects on the plan. The City's findings acknowledged the inconsistencies with several general plan policies, but concluded that the project "would not adversely affect the General Plan and the project as a whole would be consistent with several of the goals and policies of San Diego General Plan." Noting the great deference accorded a local agency's determination of consistency with its own general plan, the court concluded that substantial evidence supported the City's finding that the project would be consistent with a majority of the applicable goals and policies. (A more detailed analysis of this case appears under Tab 2, below).

SCHAFER V. CITY OF LOS ANGELES (TRIANGLE CENTER LLC)
237 Cal.App.4th 1250 (2015)

Under the doctrine of equitable estoppel, a public agency may be barred, or "estopped," from asserting that an existing use of property is invalid if the property owner justifiably relied on the agency's representation that the use was consistent with applicable zoning ordinances. Plaintiff claimed that the City had repeatedly recognized its parking lot as an existing use, and therefore was estopped from discontinuing this use. Giving heavy weight to the public's interest in the "enforcement of the land use laws enacted by its elected representatives," the court held that reliance on express or implied representations by city staff about the validity of an existing use was not sufficient to establish estoppel, even if reasonable reliance on such representations had caused economic injury. (A more detailed analysis of this case appears under Tab 2, below).

T-MOBILE SOUTH, LLC V. CITY OF ROSWELL,
135 S.Ct. 808 (2015)

Pursuant to the Telecommunications Act of 1996, local governments are empowered to consider cell tower applications, subject to the requirement that any denial must be supported by substantial evidence contained in a written record. In this case, the City of Roswell rejected T-Mobile's tower application, but did not provide a rationale or supporting evidence relating to the denial in its written transmittal to T-Mobile. Stepping in to resolve a split amount Circuit Courts of Appeal, the U.S. Supreme Court held that local governments must explain a cell tower denial in a timely fashion (26 days after the denial was deemed inadequate based on the facts), even if that explanation comes in a separate document that accompanies the formal denial.

WALNUT ACRES NEIGHBORHOOD ASSN. V. CITY OF L.A.
235 Cal.App.4th 1303 (2015)

The Zoning Administrator for the City of Los Angeles approved a change of zoning that would allow an elder care facility in a residential zone based in part on a finding that application of residential zoning would cause undue financial hardship. The finding was based on the applicant's claim that strict application of zoning controls would prevent the facility from achieving economies of scale. The court found that although financial constraints may constitute undue hardship, such a finding cannot be supported in the absence of concrete evidence that financial difficulties would result from application of the relevant zoning controls. Because the applicant had not presented such evidence of financial hardship, the court held that the Zoning Administrator's decision to approve the elder care facility was not based on substantial evidence.

WOODY'S GROUP V. CITY OF NEWPORT BEACH
233 Cal. App. 4th 1012 (2015).

A city council member who appealed a planning commission approval to the city council was an interested party and therefore could not participate in the appeal of a quasi-adjudicative decision. Moreover, the city council could not consider the appeal at all because the council member had initiated the appeal through an email to the city clerk and thus had failed to follow the appeal procedures prescribed by the municipal code. The court concluded that a city council's consideration of an appeal not authorized under the municipal code required nullification of the council's decision rather than remand for reconsideration. (A more detailed analysis of this case appears under Tab 2, below).

2. LAND USE LITIGATION

CITY OF BERKELEY V. 1080 DELAWARE, LLC
234 Cal.App.4th 1144 (2015)

An administrative mandate action is generally is held to be the exclusive method of challenging an administrative (or quasi-judicial) land-use decision, and failing to bring such a challenge within the applicable statute of limitations renders the agency decision final and immune from attack. Plaintiff in this case challenged an affordable housing condition on the ground that a very similar condition had been invalidated by a court of appeal in a different case. Although all parties agreed that the permit condition was invalid under that decision, the court held that the developer could not challenge the condition because its predecessor-in-interest had not filed a timely administrative mandamus proceeding following imposition of the condition. (A more detailed analysis of this case appears under Tab 2, below).

COALITION FOR A SUSTAINABLE FUTURE IN YUCAIPA V. CITY OF YUCAIPA
238 Cal. App. 4th 513 (2015)

Plaintiff challenged project entitlements for a Target store under CEQA, but lost in the trial court. While plaintiff's appeal was pending, Target abandoned the project and the City revoked the entitlements, rendering the appeal moot. Plaintiff then sought attorneys' fees, claiming that its CEQA lawsuit was the "catalyst" that motivated the City to revoke the entitlements. The court rejected the claim, concluding that the City did not revoke the entitlements for reasons related to the plaintiff's claim or any violation of CEQA. Consistent with prior rulings, the court held that the "fact that [plaintiff] filed an appeal from the adverse judgment did not convert the action into a meritorious one under the catalyst theory." (A more detailed analysis of this case appears under Tab 2, below).

COLONIES PARTNERS L.P. V. SUPERIOR COURT (THE INLAND OVERSIGHT COMMITTEE)
239 Cal.App.4th 679 (2015)

Code of Civil Procedure § 526a gives citizens standing to challenge governmental action involving illegal expenditures or waste of public funds. Relying on such "taxpayer standing," plaintiffs sued to set aside a settlement agreement entered into by the county on the ground that a county supervisor had accepted bribes relating to the subject matter of the agreement. The court held that plaintiffs lacked standing because they were effectively seeking to compel the county to engage in a discretionary act -- invalidation of a contract. Taxpayer suits, the court reasoned, are authorized only if the government body has an affirmative duty to act and has refused to do so; if it has discretion and chooses not to act, the courts may not interfere with that decision.

HONCHARIW V. COUNTY OF STANISLAUS
237 Cal. App. 4th 1 (2015)

Plaintiff successfully challenged the denial of his subdivision map based on failure to make certain findings specified in the Housing Accountability Act, and the County subsequently approved the subdivision. Plaintiff then filed a second lawsuit asserting that denial of the map resulted in a temporary taking of his property without just compensation. The court of appeal held that the takings claim was barred because it had not been filed within the 90-day statute of limitations for challenges to decisions under the Map Act. Only if such a claim is timely filed within that period and litigated to a successful conclusion, the court ruled, may a plaintiff then seek damages for the unconstitutional taking. (A more detailed analysis of this case appears under Tab 2, below).

SAN DIEGANS FOR OPEN GOV'T V. HAR CONSTRUCTION
240 Cal.App.4th 738 (2015)

Anti-SLAPP motions (which allow for prompt dismissal of cases that interfere with rights of free speech or government petition) is subject to an exception for cases brought "solely in the public interest or on behalf of the general public" where private enforcement is necessary and places a disproportionate financial burden on the plaintiff relative to the plaintiff's stake in the matter. The court in this case held that (1) a plaintiff who does not seek any financial benefit from a lawsuit will generally satisfy the statute's "disproportionate financial burden" requirement; and (2) a party that has no possibility of personally benefiting from the litigation generally need not prove it will personally bear the potential cost and attorney fee burden of the litigation. A contrary finding, the court reasoned, would create a loophole in the public interest exemption that the Legislature could not have intended.

SIMONELLI V. CITY OF CARMEL-BY-THE-SEA
240 Cal.App.4th 480 (2015)

The trial court dismissed plaintiff's challenge to the approval of a development permit on the ground that plaintiff had not named an indispensable party within the 90-day statute of limitations under Code of Civil Procedure section 1094.6 for challenges to permit decisions. The court of appeal reversed, finding that under the plain language of Section 1094.6, its 90-day limitations period applies only to a decision to deny a revoke or deny a permit, not to a decision to grant one.

3. TAKINGS

GOLDEN STATE WATER CO. V. CASITAS MUNICIPAL WATER DISTRICT
235 Cal.App.4th 1246 (2015)

The court of appeal rejected a challenge to a municipal water district's decision to acquire all of the assets of Golden State Water Company, a private utility, using Mello-Roos financing. The court found no support for the utility's claim that Mello-Roos cannot be used to acquire property through eminent domain, finding that the word "purchase" in the Act connoted acquisition in exchange for compensation regardless of whether the property was being acquired voluntarily. This may include intangible property incidental to the real or tangible property being acquired. (A more detailed analysis of this case appears under Tab 2, below).

JEFFERSON STREET VENTURES, LLC V. CITY OF INDIO
236 Cal.App.4th 1175 (2015)

Plaintiff owned a vacant parcel that included the site of a long-proposed highway interchange project. When plaintiff sought to develop the property, the City Council conditioned approval upon nine acres being left undeveloped for the future interchange and reserved a two-acre temporary no-build area for a highway off-ramp during the interchange construction. The court of appeal held that the City's conditional approval resulted in an uncompensated taking of the 11 acres. The conditions imposed by the City, the court concluded, denied plaintiff all economically beneficial use of the 11 acres that the City intended to acquire in the future for the interchange project, and amounted to a taking requiring just compensation. The City could not "bank" the undeveloped property for the purpose of making its future acquisition less expensive. (A more detailed analysis of this case appears under Tab 2, below).

4. ESA/NEPA

BUILDING INDUSTRY ASSOCIATION V. DEPARTMENT OF COMMERCE

792 F.3d 1027 (9th Cir. 2015)

Plaintiffs contended that, when designating critical habitat for the green sturgeon, the National Marine Fisheries Service ("NMFS") violated the Endangered Species Act by failing to follow a specific methodology involving balancing the conservation benefits of designation against the economic benefits of exclusion from designation. Plaintiffs also argued that NMFS violated NEPA by failing to prepare either an Environmental Assessment or an Environmental Impact Statement. The court held that, when considering the economic impact of its designation, NMFS complied with the ESA and was not required to follow any specific balancing-of-the-benefits methodology. The court also rejected plaintiffs' NEPA claim, finding that NEPA does not apply to critical habitat designations.

SHEARWATER V. ASHE

No.14-CV-02830-LHK (N. Dist. Ca, Aug. 11, 2015).

The U.S. District Court for the Northern District of California invalidated the U.S. Fish and Wildlife Service's adoption of a new rule increasing the maximum duration of programmatic permits to "take" bald and golden eagles from 5 years to 30 years. This 30-Year Rule was adopted in response to concerns that the uncertainty surrounding renewal of programmatic eagle take permits (which allow for the incidental take of eagles from operation of wind turbines) was preventing operators from obtaining financing for wind energy projects that might last up to thirty years. The Fish and Wildlife Service issued the 30-Year Rule without preparing either an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act, concluding that the 30-Year Rule was categorically exempt. In striking the rule, the court found that the Service had not demonstrated an adequate basis in the administrative record for its decision not to prepare an EIS or EA and therefore failed to comply with NEPA's procedural requirements.

SIERRA CLUB V. BUREAU OF LAND MANAGEMENT

786 F.3d 1219 (9th Cir. 2015)

NEPA requires federal agencies to evaluate not only the actions under federal control, but also "connected" and "cumulative" actions that may require state or local permits. The court held that a right-of-way for an access road over Bureau of Land Management land to connect a wind project to a state highway did not trigger further action under the Endangered Species Act. The access road was not a "connected action," the court reasoned, because the developer could have proceed with the wind project without the access road project.

5. FEES AND EXACTIONS

CALIFORNIA BUILDING INDUSTRY ASS'N V. CITY OF SAN JOSE

61 Cal.4th 435 (2015)

The CBIA challenged the City of San José's affordable housing ordinance on the ground that the city had failed to demonstrate that the need for affordable housing resulted from new development and that the ordinance thereby imposed an unconstitutional exaction. The California Supreme Court held that the affordable housing requirements did not constitute an "exaction," and hence the constitutional limitations on a public agency's ability to exact property as a condition of development were inapplicable. Rather, the court found, the ordinance operated like other zoning measures, such as density, height and setback restrictions, that limit the use developers may make of their property. Such regulations on the use of land are constitutionally permissible as long as they are reasonably related to

the city's interest in promoting the health, safety, and welfare of the community. The affordable housing ordinance was enacted to increase the amount of affordable housing and to promote economically diverse developments, which were legitimate public purposes that easily satisfied the broad standards governing zoning enactments. (A more detailed analysis of this case appears under Tab 2, below).

WALKER V. CITY OF SAN CLEMENTE

239 Cal.App.4th 1350 (2015)

Under the Mitigation Fee Act, for all unexpended development fees, the agency must make findings every five years that demonstrate a reasonable relationship between the unexpended balance and the purpose for which the fee was charged and designate the approximate date the agency expects the funding for uncompleted improvements. The court determined that a local agency's five-year findings must "affirmatively demonstrate that it still needs the unexpended fee to achieve the purpose for which it was originally imposed, and that the agency has a plan on how to use the unexpended balance to achieve that purpose." Measured against this standard, the city's findings in support of its beach parking fee were "clearly inadequate" because they were "mere conclusions, not the specific findings required under the [Mitigation Fee] Act." The court ordered the refund of over $10 million in accumulated development impact fees, rejecting the city's argument that remand for reconsideration was the appropriate remedy. (A more detailed analysis of this case appears under Tab 2, below).

6. SUBDIVISION MAP ACT

COPPINGER V. RAWLINS

239 Cal.App.4th 608 (2015)

The county's acceptance of an offer to dedicate three lots with the proviso that two of the lots "would not immediately become part of the county-maintained road system" did not constitute a "rejection of the dedication" that would cause title to revert to the private owner. A county may properly accept an owner's offer to dedicate private property to the public for street and utilities purposes without immediately assuming responsibility for maintenance of the road as part of the county road system. The fact that the County does not accept a road for maintenance purposes, the court reasoned, is not inconsistent with its status as a "public road." (A more detailed analysis of this case appears under Tab 2, below).

SAVE MOUNT DIABLO V. CONTRA COSTA COUNTY (NUNN)

240 Cal.App.4th 1368 (2015)

The Nunns purchased land on which a water district had previously condemned two intersecting strips of land across the tract, one for a roadway and the other for a pipeline. The two strips effectively divided the property into four separate parcels. The Nunns argued that the condemnation of the strips created a lawful "division" of the property into four discrete parcels under the Subdivision Map Act. While acknowledging that the condemnation created separate fee estates in the four parcels, the court held that condemnation did not divide the property for purposes of the Map Act because the condemnation was not a division of property recognized by the Act. The court observed that, under the Map Act's definition of "subdivision," property may be considered a contiguous unit even if it is separated by roads, streets, utility easements, or railroad rights-of-way. (A more detailed analysis of this case appears under Tab 2, below).

TARBET V. EAST BAY MUNICIPAL UTILITY DISTRICT
236 Cal.App.4th 348 (2015)

Plaintiff sued a water district claiming a vested right to water service based upon the district's issuance of a will-serve letter that was included in plaintiff's approved parcel map. The court found that the district was not subject to the vesting provisions of the Map Act. Rather, the County acted as the "local agency" under the Map Act for purposes of the map approval process, and vested rights can be asserted only against the approving local agency (city or county), not against other agencies that may issue approvals or provide services for the project. (A more detailed analysis of this case appears under Tab 2, below).

7. BROWN ACT

CASTAIC LAKE WATER AGENCY V. NEWHALL COUNTY WATER DISTRICT
238 Cal.App.4th 1196 (2015)

A water district's board indeed met in closed session with its counsel concerning two litigation matters. The closed session agenda item announced the meeting regarding litigation, but cited to the wrong section of the Brown Act. After the mistake was brought to its attention, the district posted an updated agenda for a later meeting during which it ratified the litigation action item. The court of appeal held that there was no violation of the Brown Act in the first instance because the agenda item was sufficient to apprise the public that the board was meeting in closed session with its counsel to discuss two pending cases.

8. CLEAN WATER ACT

STATE OF OHIO V. U.S. ARMY CORPS OF ENGINEERS
803 F.3d 804 (6th Cir., 2015).

A federal court of appeals blocked implementation of new Clean Water Act rules adopted by the Army Corps of Engineers and EPA. In issuing the stay pending full consideration of the case, the court concluded there was a substantial possibility that the challenge to the new rules would succeed on the merits. The court found the new rule's definitions of "tributaries," "adjacent" waters and "significant nexus" to navigable waters to be inconsistent with the U.S. Supreme Court's decision in *Rapanos v. United States*. The court also observed that the rule-making process leading to adoption of the new rules likely was not conducted in accordance with the Administrative Procedure Act and that "the sheer breadth of the ripple effects caused by the [r]ules' definitional changes counsels strongly in favor of maintaining the status quo for the time being."

9. PUBLIC RECORDS ACT

NEWARK UNIFIED SCHOOL DISTRICT V. SUPERIOR COURT (BRAZIL)
239 Cal.App.4th 33 (2015)

Harmonizing two statutes governing privileged documents, the court ruled that inadvertent disclosure of documents containing attorney-client communications in response to a Public Records Act request does not result in a waiver of the privilege. The principal issue before the court was whether accidental inclusion of attorney-client documents in a Public Records Act production constitutes "disclosure" of those documents for purposes of section 6254.5 of the Act, which provides that disclosure of any public record results in waiver of applicable privileges. The court concluded that unintentional inclusion of privileged documents could not be construed as a "disclosure" of these records under the statute. A contrary interpretation, the court reasoned, would not advance the purposes of the statute and would

create an irreconcilable conflict with Evidence Code section 912, under which accidental disclosure of attorney-client information does not constitute a "disclosure" triggering its waiver provisions. (A more detailed analysis of this case appears under Tab 2, below).

10. SCHOOL DISTRICTS

DAVIS V. FRESNO UNIFIED SCHOOL DISTRICT

237 Cal.App.4th 261 (2015)

In a decision that may jeopardize many pending school construction projects, a court of appeal ruled that, to qualify for exemption from public bidding, a lease-leaseback transaction must include a "genuine lease" that provides for school district use of the facilities during the lease term and "a financing component." The court determined that the contract before it did not meet these criteria. The "lease" document was inadequate because the contractor never acted in the capacity of a landlord and the district never occupied and used the new facilities as a tenant, but rather obtained full title to the buildings as they were completed. The terms of the lease also did not contain any financing provisions, but simply required payment to the contractor for the construction as it occurred. (A more detailed analysis of this case appears under Tab 2, below).

11. REAL ESTATE

DM RESIDENTIAL FUND II, LLC V. FIRST TENNESSEE BANK NAT. ASS'N

No. 13–56309 (9th Cir., Dec 30, 2015)

The buyer of a residential lot sued the seller for failure to disclose that the property lacked a utilities easement needed to provide electrical service to the new home that had been constructed on the property and also lacked a certificate of occupancy. The buyer discovered the easement issue shortly after buying the property, but did not bring suit to rescind the transaction until two years later. The court held that the action was barred under Civil Code § 1691, which requires a party seeking rescission to do so "promptly upon discovering the facts which entitle him to rescind." The discovery that the home did not have electricity, the court reasoned, put the buyer on inquiry notice as to whether there had been wrongdoing in the sale, and the buyer was therefore deemed to know all facts that could have been discovered from a reasonable investigation. Rather than promptly seeking rescission, the buyer took actions inconsistent with unwinding the contract, including encumbering the property, adding improvements, and attempting to sell it. By taking those actions and waiting two years before filing suit, the buyer effectively affirmed the transaction and lost the right to rescind.

RICHARDSON V. FRANC

233 Cal. App. 4th 744 (2015)

Plaintiffs had a 30-foot-wide roadway and utility easement across their neighbor's property, on which they built a 12-foot-wide driveway they used to access their home. Over a 20-year period, plaintiffs also added and maintained landscaping on both sides of the driveway, within the 30-foot easement. After their neighbors demanded they remove the landscaping, plaintiffs filed suit seeking an equitable easement or, in the alternative, an irrevocable license. The court held that although plaintiffs were not entitled to an equitable easement -- since they had installed and maintained the landscaping with the knowledge that it went beyond the scope of the recorded easement -- they had established the facts necessary for an irrevocable license based on the substantial sums expended by them over a prolonged period with the full knowledge and express or implied consent of the neighbors. (A more detailed analysis of this case appears under Tab 2, below).

2

1. RISKS TO OPEN SPACE DESIGNATED IN GENERAL PLAN WARRANTED DENIAL OF MOBILEHOME PARK SUBDIVISION

CARSON HARBOR VILLAGE, LTD. V. CITY OF CARSON
239 Cal. App. 4th 56 (2015)

Carson Harbor Village applied to the City of Carson to convert its mobilehome park to a subdivision of resident-owned lots. The park consisted of 420 rental spaces on 70 acres, 17 of which were wetlands and constituted the only remaining open space within the city. The city rejected the park's application on the grounds, among other things, that the proposed subdivision was inconsistent with the open space element of its general plan.

The court upheld the city's decision, holding that inconsistency with the city's general plan was a legally permissible basis for denying the application and that the city's finding of inconsistency was supported by substantial evidence. The court relied on a recent California Supreme Court decision holding that a proposal to subdivide a mobilehome park in the coastal zone was subject to the limitations of the Coastal Act and the Mello Act. The court determined that the policy concerns reflected in the statutes governing open space elements were strikingly similar to those of the Coastal Act, such as the policy that local agencies take positive action to protect open space, and that open space protection is "necessary" to promote the general welfare and protect the public's interest in maintaining this valuable resource. The court noted the California Supreme Court's ruling that the mobilehome park conversion statute is intended to operate in conjunction with other state laws, and that inconsistencies between statutory provisions must be reconciled whenever possible.

The court also concluded that substantial evidence supported the city's finding that conversion would be inconsistent with the open space element because it would place at risk the wetlands area within the mobilehome park. The cost of maintaining the wetlands totaled approximately $50,000 annually, and several park residents testified about their reluctance to take on responsibility for maintaining the wetlands. Thus, the city reasonably concluded that the wetlands, which also constituted the city's only open space, would be at risk from the proposed conversion to a common interest ownership because, upon conversion, the residents were unlikely to be willing and suitable stewards of that natural resource.

2. PROJECTS MAY CONFLICT WITH SPECIFIC GENERAL PLAN POLICIES AS LONG AS THEY ARE GENERALLY IN HARMONY WITH THE MAJORITY OF APPLICABLE GOALS AND POLICIES

SAVE OUR HERITAGE ORGANIZATION V. CITY OF SAN DIEGO, ET AL.
237 Cal. App. 4th 163 (2015)

The San Diego Municipal Code provides that permits for site development "shall not adversely affect the applicable land use plan." Opponents of a project to improve Balboa Bridge argued that the project conflicted with several policies in the City's general plan intended to preserve historic resources and thus would "adversely affect" the general plan. The City's findings acknowledged inconsistencies with several general plan policies but concluded that the project "would not adversely affect the General Plan and the project as a whole would be consistent with several of the goals and policies of San Diego General Plan." Citing the substantial deference accorded a local agency's determination of consistency with its own general plan, the court concluded that substantial evidence supported the City's finding that the project would be consistent with a majority of the applicable goals and policies.

The opponents also challenged the City's determination that there would be no "reasonable beneficial use" of the property if the project were denied — a finding required under the City's Municipal Code for approval of projects with adverse impacts on historical resources. The opponents argued that this finding could not be made because there was evidence in the record that *some* beneficial use was currently being made of the property. The court disagreed. Focusing on the word "reasonable" and the deference owed to the City's determination, the court found that substantial evidence supported the City Council's findings that Balboa Park would not have a *reasonable* beneficial use without the project due to escalating traffic congestion and vehicular-pedestrian conflicts.

The decision follows a trend of judicial deference toward local agency approvals of projects that have obvious conflicts with specific general plan policies but are consistent with the majority of applicable goals and policies – at least where, as here, the agency's weighing and balancing of plan policies is reflected in carefully prepared findings.

3. REASONABLE RELIANCE ON PUBLIC AGENCY REPRESENTATIONS DOES NOT ESTABLISH ENTITLEMENT TO AN EXISTING USE OF PROPERTY

SCHAFER V. CITY OF LOS ANGELES

237 Cal. App. 4th 1250 (2015)

Under the doctrine of equitable estoppel, a public agency may be barred, or "estopped," from asserting that an existing use of property is invalid if the property owner justifiably relied on the agency's representation that the use was consistent with applicable zoning ordinances. In land use cases, courts are required both to find that the requirements of estoppel are met and to weigh any adverse effect on public interest against the avoidance of injustice caused by failing to uphold the estoppel claims. Courts usually consider the public's interest in maintaining the character of an area through established zoning plans and processes to be dispositive.

Over the course of fifty years, Los Angeles and a property owner, Triangle Center, interacted several times regarding two adjacent lots being used as a parking lot. During this period, Los Angeles repeatedly recognized the parking lot as an existing use. While determining that the parking lot was not a legal nonconforming use, the planning commission found that its prior interactions with Triangle estopped Los Angeles from disallowing continued use of the property as a parking lot.

When evaluating equitable estoppel claims against a government, courts must balance the interests of the property owner with those of the general public. The court pointed out that special caution was needed in considering estoppel against governments, explaining that such a grant of equitable estoppel could negatively affect public policy if "estoppel can too easily replace the legally established substantive and procedural requirements for obtaining permits."

In conducting the balancing test, the court gave heavy weight to the public's interest in the "enforcement of the land use laws enacted by its elected representatives" and concluded that economic hardship to the owner alone was insufficient injustice to outweigh the public's interest.

4. COUNCIL MEMBER BARRED FROM CONSIDERING OWN APPEAL

WOODY'S GROUP V. CITY OF NEWPORT BEACH
233 Cal. App. 4th 1012 (2015)

Councilmember Henn appealed a planning commission decision approving a conditional use permit for a restaurant, stating that he "strongly believed" the approval was inconsistent with policies in the City's General Plan. The city council subsequently voted 4 to 1 to reverse the planning commission decision, with Henn in the majority..

The court of appeal held that the appeal did not comport with due process because the council member who brought the appeal also took part in the decision. The court held that an interested party for the purposes of bringing the appeal cannot simultaneously be a disinterested person for the purposes of affording due process in hearing the appeal, where the council is acting in an adjudicatory capacity. The court invoked the "cardinal rule" that "a person cannot be a judge in his or her own case," and stated, "we will not assume the drafters of Newport Beach's Municipal Code intended to contravene a cardinal rule of justice in the absence of a clear statement of such remarkable intent."

The court also found that the city council violated its own municipal code by entertaining Henn's appeal because he did not comply with the procedures laid out in the code. The Municipal Code required such appeals to be submitted on a specific form, accompanied by an appeal fee, but Henn had initiated the appeal simply with an email to the City Clerk. The City argued that there was a longstanding practice of allowing council members to appeal without paying a filing fee because their appeals are taken for the benefit of the City's residents. The court rejected this argument, finding "no room for unwritten rules, policies or customs outside the municipal code or for the city council to give its members special privileges to appeal."

The court concluded that a city council's consideration of an appeal not authorized under the municipal code required nullification of the council's decision rather than remand for reconsideration.

5. FAILURE TO CHALLENGE AFFORDABLE HOUSING CONDITION BARRED SUBSEQUENT CLAIM OF INVALIDITY OF ENABLING ORDINANCE UNDER COSTA-HAWKINS ACT

CITY OF BERKELEY V. 1080 DELAWARE, LLC
234 Cal. App. 4th 1144 (2015)

In 2004, the City issued a conditional use permit for construction of residential rental units. One of the permit conditions required that 20% of the units be rented at rates affordable to below-median-income households pursuant to the City's affordable housing ordinance. Market conditions delayed construction of the building for several years, after which the owner declared bankruptcy and the property was acquired by 1080 Delaware through foreclosure. In the interim, the court in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396 (2009), invalidated an affordable housing ordinance similar to the City's under the Costa-Hawkins Act, which generally precludes cities from restricting the initial rents that may be charged by landlords.

Although there was no dispute that the City's affordable housing ordinance was preempted under Costa-Hawkins insofar as it applied to rental units, the court held that the developer was precluded from challenging the condition because the prior owner had failed to file a timely administrative mandate action seeking judicial review of the condition. The court relied on prior decisions holding that

administrative mandamus is the exclusive method of challenging the validity of a permit condition, and failure to seek mandamus review within the applicable 90-day statute of limitations bars the developer from challenging the validity of the condition in a subsequent action.

The court also ruled that the permit condition remained enforceable against a subsequent owner of the property despite the intervening decision invalidating the enabling ordinance. The original owner waived the right to seek review of validity of the condition by failing to mount a timely mandamus challenge, and the developer acquired the property with the same limitations and restrictions that bound its predecessor in interest.

6. LOSING PLAINTIFF CANNOT RECOVER LEGAL FEES

COALITION FOR A SUSTAINABLE FUTURE IN YUCAIPA V. CITY OF YUCAIPA
238 Cal. App. 4th 513 (2015).

Commenting that "we have not found a threat of victory in this record," the court of appeal ruled against a citizens' group that brought a motion for attorneys' fees after losing a CEQA challenge in the trial court.

In 2005, Target entered into a contract to purchase land for a shopping center. The City Council approved the shopping center project in October 2007 based on an EIR. Later that same month, Target sued to force the property owner to complete the land sale. Plaintiff, a citizens' group, then filed this action challenging the project entitlements under CEQA. Target defended the action on the City's behalf pursuant to an indemnity requirement in its conditions of approval. The trial court ruled against the plaintiff. While plaintiff's appeal was pending, Target abandoned the project and withdrew its defense of the City. The City then revoked the shopping center entitlements, rendering the appeal moot.

Plaintiff sought attorneys' fees, claiming that its CEQA lawsuit, and specifically its appeal from the trial court's judgment, was the "catalyst" that motivated the City to revoke the entitlements. The appellate court had no difficulty concluding otherwise. Citing City Council hearing minutes indicating that the entitlements were revoked because Target had breached the indemnity condition of approval, the court determined that the City "did not revoke the entitlements for any reason related to the EIR or any violation of CEQA." Consistent with prior decisions and common sense, the court held that the "fact that [plaintiff] filed an appeal from the adverse judgment did not convert the action into a meritorious one under the catalyst theory."

7. 90-DAY STATUTE OF LIMITATIONS UNDER THE SUBDIVISION MAP ACT INCLUDES TAKINGS CLAIMS ARISING OUT OF MAP ACT DECISIONS

HONCHARIW V. COUNTY OF STANISLAUS
238 Cal. App. 4th 1 (2015)

Honchariw prevailed in a lawsuit challenging denial of his tentative subdivision map for failure to make certain findings specified in the Housing Accountability Act, Government Code section 65589.5(j). The County Board of Supervisors subsequently approved the tentative map.

Honchariw then filed a second lawsuit contending that the denial of his tentative map resulted in a temporary taking of his property without just compensation. He sought damages of $2.5 million for the

alleged taking. On appeal from denial of his claim, Honchariw acknowledged the California Supreme Court's 1994 decision in *Hensler v. City of Glendale* that an inverse condemnation claim arising from a Map Act decision was subject to that statute's 90-day limitations period. He argued, however, that *Hensler* allowed the inverse condemnation action to be filed after the successful conclusion of a mandamus action challenging the decision, as long as the latter case was timely filed under the Map Act.

The court of appeal rejected this expansive interpretation of *Hensler*. It pointed out that *Hensler* allowed an inverse condemnation action to be filed after the conclusion of an administrative mandamus action only if it "alleges the existence of a final judgment establishing that there has been a compensable taking of the plaintiff's land." In other words, the initial mandamus action must present the unconstitutional takings claim to the court as one basis for invalidation of the Map Act decision. Only if such a claim is timely filed under the 90-day Map Act statute and litigated to a successful conclusion may a plaintiff then seek damages for the unconstitutional taking. Because Honchariw's original mandamus action did not include a takings claim, his subsequent effort to obtain damages for a taking was time-barred.

8. MELLO-ROOS FINANCING MAY BE USED TO ACQUIRE A PRIVATE WATER UTILITY THROUGH EMINENT DOMAIN

GOLDEN STATE WATER CO. V. CASITAS MUNICIPAL WATER DISTRICT
235 Cal. App. 4th 1246 (2015)

The Casitas Municipal Water District elected to acquire all of the assets of Golden State Water Company, a private utility and formed a Mello-Roos Community Facilities District (CFD) to finance the purchase. Golden State sued to invalidate the resolutions forming the CFD and authorizing the bond financing, arguing that Mello-Roos financing cannot be used to finance acquisition of property by eminent domain or to acquire intangible assets such as goodwill and contractual water rights.

The court found no support for the proposition that Mello-Roos cannot be used to acquire property through eminent domain. Observing that the Act states that its provisions shall be liberally construed, the court found that the word "purchase" in the Act connoted acquisition in exchange for compensation regardless of whether the property was being acquired voluntarily. In an acquisition by condemnation, the court noted, the public entity must pay the same price the owner would have received in an arm's length transaction. Given the obvious practical need in certain circumstances to use condemnation powers, the court concluded that the word "purchase" was properly construed to include taking by eminent domain upon payment of just compensation.

As to acquisition of intangible business assets, the court acknowledged that the Act authorizes only purchase of "real or other tangible property with an estimated useful life of five years or longer," and hence that a CFD may not directly purchase intangible property. However, the Act also authorizes financing of "costs . . . incidental to, or connected with, the accomplishment of the purpose for which the proposed debt is to be incurred." The court interpreted this language to reasonably include intangible property rights — such as goodwill and water rights — that were "closely connected with the acquisition of its facilities for delivering water."

Finally, the court dismissed the argument that Mello-Roos financing was being improperly used to fund services that were already being provided, a use expressly prohibited by the Act. The Mello-Roos funds were being used for acquisition of facilities and incidental costs, the court said, not for provision of services.

9. PROHIBITION OF DEVELOPMENT ON MORE THAN ONE-THIRD OF A DEVELOPABLE SITE IN ANTICIPATION OF FUTURE CONDEMNATION CONSTITUTED A TAKING

JEFFERSON STREET VENTURES, LLC V. CITY OF INDIO
236 Cal. App. 4th 1175 (2015)

Jefferson Street Ventures submitted a proposal to develop a shopping center on a 27-acre parcel that included the site of a long-proposed highway interchange project. The City Council approved the project, but conditioned approval on Jefferson leaving nine acres for the future interchange undeveloped and reserving a two-acre temporary no-build area for a highway off-ramp. The City Council included the conditions based on the advice of its staff that it would be much more expensive to acquire property for the interchange project if Jefferson developed the entire site because the City would then incur additional condemnation costs for demolition of buildings and relocation of tenants

The court held that the City's conditional approval of Jefferson's development plan resulted in an uncompensated taking of the 11 acres. Under applicable land use regulations, Jefferson's entire 27-acre property was developable, and its plan was in full compliance with governing regulations. The conditions imposed by the City, the court concluded, denied Jefferson all economically beneficial use of the 11 acres that the City intended to acquire in the future for the interchange project, and were a taking requiring just compensation. The City could not "bank" the undeveloped property for the purpose of making its future acquisition less expensive.

When evaluating regulatory takings cases, courts generally consider the nature and extent of the land use restrictions on the property as a whole. This court, however, considered the effect of the City's restrictions solely on the 11-acre portion on which it prohibited development, explaining that "[i]t would exalt form over substance to conclude because some of the Property could be built upon, there was no taking of the remainder declared undevelopable." Additionally, while a public agency normally must be given the opportunity to rescind its action rather than pay compensation for a taking, the court found that option was foreclosed because the interchange project had been transferred to the County of Riverside, which had commenced a direct condemnation action to acquire the land needed for the interchange. The direct condemnation action, the court reasoned, "will encompass many, if not all, of the damage claims Jefferson asserts against the City in this action."

10. CALIFORNIA SUPREME COURT BROADLY CONSTRUES MUNICIPAL POWER TO ENACT AFFORDABLE HOUSING MEASURES

CALIFORNIA BUILDING INDUSTRY ASSOCIATION V. CITY OF SAN JOSE
61 Cal. 4th 435 (2015)

San José adopted an inclusionary housing ordinance requiring that the sale price of at least 15 percent of for-sale units in projects of 20 or more units be affordable to low or moderate income households. The ordinance gave developers the option of meeting their inclusionary housing obligations by constructing affordable units off site, paying an in-lieu fee or dedicating land of an equivalent value, or acquiring and rehabilitating a comparable number of inclusionary units. The ordinance also provided various incentives to encourage developers to meet the ordinance's affordable unit requirements onsite.

The California Building Industry Association challenged the San Jose ordinance under the "unconstitutional conditions" doctrine, which prevents government from using the permit process to

exact property for which it would have been required to pay just compensation outside of the permit context unless it has shown that the property is needed to mitigate an adverse public impact of the development. It contended that, in adopting the ordinance, San Jose did not demonstrate that the problem the ordinance addressed – the need for affordable housing – resulted from construction of new homes. In the absence of such a showing, CBIA argued, the ordinance imposed an unconstitutional condition because it required the developer to give up a property interest for which the government would had to pay just compensation under the takings clause outside of the permit process.

The court rejected the claim, concluding that the requirements of the San Jose ordinance did not amount to an "exaction" of property, and thus the constitutional limitations on a public agency's ability to exact property for public use as a condition of development were inapplicable. The court reasoned that it is the requirement that a property owner convey a property interest – a dedication of property or the payment of money – that constitutes the "exaction" that brings the unconstitutional conditions doctrine into play. It concluded, however, that the ordinance did not require developers to convey any property interests for public purposes.

Instead, the court found, the ordinance operated like zoning and other land use measures that restrict the use developers may make of their property by regulating matters such as permitted uses, unit size, maximum heights, and development density. Such regulations on the use of land are constitutionally permissible as long as they are reasonably related to the city's interest in promoting the health, safety, and welfare of the community. The city had determined there was a significant need for affordable housing in San Jose and that the public interest would best be served by integrating new affordable housing into economically diverse development projects. It enacted the ordinance to further these objectives. This, the court concluded, constituted a legitimate public purpose sufficient to pass constitutional muster under the broad standards governing zoning enactments.

The court also concluded that the fact the ordinance imposed price controls, rather than restrictions on the use of land, did not change the applicable legal standard. Price controls on for-sale units, the court reasoned, are similar to rent control, which has long been deemed a constitutionally permissible means of achieving legitimate public purposes, so long as it is not confiscatory. Nor did it matter, the court found, that the ordinance would adversely affect the value of developers' property. In this respect, the court observed, the city's affordable housing ordinance was no different from other zoning ordinances and regulations that limit the use a developer may make of its property.

11. FAILURE TO MAKE FINDINGS SPECIFIED IN MITIGATION FEE ACT REQUIRES REFUND OF ALL UNEXPENDED DEVELOPMENT FEES

WALKER V. CITY OF SAN CLEMENTE
239 Cal. App. 4th 1350 (2015)

Under the Mitigation Fee Act, Gov't. Code §§ 66000 *et seq.*, each development fee must be deposited in a separate capital facilities account and may be expended only for the purposes for which it was collected. For all unexpended fees, the agency must make findings every five years that (1) demonstrate a reasonable relationship between the unexpended balance and the purpose for which the fee was charged; (2) identify the sources and funding for any as-yet uncompleted public improvements; and (3) designate the approximate date the agency expects the funding for uncompleted improvements to be deposited in the account. § 66001(d)(1) The Act provides that "[i]f the findings are not made as required by [the Act], the local agency shall refund the moneys in the account" to the current owners of the properties for which the fees were paid. § 66001(d)(2).

In 1989, the City of San Clemente adopted a "Beach Parking Impact Fee" whose purpose was to "mitigate the impact of the increased demand on beach parking caused by new residential development." For some 20 years, the City collected the fee, but expended very little of it (less than 3%) on beach parking improvements. In 2009, the City Council "receive[d] and file[d]" a "Five-Year Required Report" prepared by staff to justify its continued retention of the fees under the Mitigation Fee Act. Plaintiffs challenged the City's retention of the fees, contending that the Five-Year Report failed to satisfy the requirements of the Act.

Based on the language and legislative history of the Act, the court determined that a local agency's five-year findings must "affirmatively demonstrate that it still needs the unexpended fee to achieve the purpose for which it was originally imposed, and that the agency has a plan on how to use the unexpended balance to achieve that purpose." Measured against this standard, the court held, the City's findings were clearly inadequate. The City's finding regarding the reasonable relationship failed to meet the statutory requirements because it did not discuss the relationship between the $10 million balance account and the purpose for which the fee was established, "let alone demonstrate a reasonable relationship between the unexpended fees and their purpose."

The City's finding regarding the sources and funds anticipated to complete financing for remaining beach parking improvements also fell short because it failed to identify the amount of funding needed to complete the improvements and referred only generally to "identified improvements" without specifying or describing those improvements. The City could not rely on the findings it made to justify the original establishment of the Beach Parking Impact Fee. Instead, the court ruled, the City needed to make new findings identifying the public improvements intended to be financed with the fees and demonstrating a continuing need for those improvements, which it failed to do.

As to the requirement that the City identify the approximate date on which it anticipated the funding for uncompleted improvements to be available, the 2009 Five-Year Report stated "*Not applicable*." This was appropriate, the City claimed, because the specific improvements to be funded had not yet been identified. However, the court said, the City could not fail to identify the public improvement projects it intended to finance with the Beach Parking Impact Fee 20 years after establishing the fee and still retain the unexpended balance.

The City argued that the appropriate remedy under the circumstances was to remand the matter to the City Council to make new findings, rather than requiring a refund of the fees. This was impermissible, the court determined, because the Mitigation Fee Act "clearly and unambiguously" established that the sole remedy for failure to make the required findings was refund of the moneys in the account or fund. Nor, the court said, was there any merit to the City's argument that the Act requires a refund only when a local agency fails to make *any* findings; rather, the Act expressly requires a refund when "the findings are not made *as required by this subdivision*." (Emphasis added.) Under the City's interpretation, the court observed, "a local agency could avoid refunding unexpended development fees by making any findings no matter how inadequate, and the only repercussion would be another opportunity to repeat the process. That is not what the statute's clear language requires."

Under the *Walker* decision, local agencies may not continue to hold development fees for extended periods without making findings reflecting "a clear and demonstrable plan to use the fee for the purpose for which it is imposed." The findings may not simply refer back to the purposes and uses of the fee described in the enabling ordinance, and may not defer to a later date identification of the improvements to be financed, cost estimates, funding requirements or other matters specified in the Act. Rather, the findings must (1) affirmatively demonstrate that the agency intends to construct specific improvements with the accumulated funds; (2) explain how the City intends to use the funds to acquire

or construct the improvements; (3) specify the estimated cost of the improvements; and (4) indicate whether the agency requires additional funds and, if so, when it anticipates receiving those funds.

12. A COUNTY'S ACCEPTANCE OF LAND DEDICATED AS A PUBLIC ROAD DOES NOT AUTOMATICALLY CAUSE THE DEDICATED LAND TO BE INCORPORATED INTO THE COUNTY-MAINTAINED ROAD SYSTEM

COPPINGER V. RAWLINS
239 Cal. App. 4th 608 (2015)

As part of a parcel map, a landowner dedicated property to the County of Riverside for public roadway purposes. By way of a certificate included on the recorded parcel map, the Board of Supervisors approved the parcel map and accepted the owners' offer for dedication of the property with the proviso that it was "accepted to vest title in the County on behalf of the public for said purposes, but said road shall not become part of the county-maintained road system until accepted by resolution" of the Board of Supervisors." As part of a quiet title action, the landowner subsequently claimed that the County's acceptance of the offer of dedication of the property was ineffectual because the property had not been incorporated into the County's road system, and hence title to the property had reverted to plaintiffs.

A dedication is effected when, in compliance with the Subdivision Map Act, an offer of dedication is accepted by the public agency. To establish a dedication of land for public use, there must be an "unequivocal and clear manifestation of an intent to dedicate," and there must be an unequivocal acceptance of the offer to dedicate. Under Code of Civil Procedure Section 771.010, there is a "conclusive presumption" that a proposed offer for dedication was not accepted if all of the following conditions are satisfied: (a) the proposal was made by filing a map only, (b) no acceptance of the dedication was made and recorded within 25 years after the map was filed, (c) real property was not used for the purpose for which the dedication was proposed within 25 years after the map was filed, and (d) the real property was sold to a third person after the map was filed and used as if free of the dedication. Based on this provision, the landowner argued the dedication had never been effected because the only acceptance of the offer of dedication within the 25-year period was qualified or incomplete because it excepted the public road dedication from the county-maintained system.

The court disagreed. It pointed out that under Streets and Highway Code Section 941, no public or private road shall become a highway except by resolution adopted by the Board of Supervisors including such road in the county road system. The fact that the County does not accept a road as a county road and thereby assume responsibility for maintenance, the court reasoned, is not inconsistent with its status as a "public road." Section 941, according to the court, "creates a presumption that an offer of dedication of land 'for use as a public road' -- without more -- *will not* be included in the county-maintained road system, because additional action is necessary to achieve that end." The offer of dedication of the property for street purposes was expressly accepted by the County Board of Supervisors, and the proviso regarding the property not becoming part of the County-maintained road system "was surplusage [and] did not signify a qualified acceptance or rejection of the offer of dedication."

13. CONDEMNATION DOES NOT RESULT IN SUBDIVISION OF REMAINING PROPERTY UNDER MAP ACT

SAVE MT. DIABLO V. CONTRA COSTA COUNTY

240 Cal. App. 4th 1368 (2015)

The Nunns purchased a tract of land on which a water district had condemned two intersecting strips of land (for a road and a pipeline) that effectively divided the property into four parcels. The Nunns requested certificates of compliance confirming that each of the four parcels constituted a separate legal parcel consistent with the Map Act and local law. These certificates, if issued, would have allowed the Nunns to sell, lease, or finance the four parcels without obtaining approval of a parcel map. The Nunns argued that the water district's condemnation of the strips created a lawful "division" of the property into four discrete parcels and that they were entitled to certificates of compliance to recognize the prior division.

While acknowledging that the condemnation created separate fee estates in the various portions of the property, the court determined that condemnation did not divide the property for purposes of the Map Act. It stated that "regardless of whether a piece of property can be characterized as a parcel, it is entitled to a certificate of compliance only if it was the result of a prior division recognized by the Act." The court reasoned that the mere fact that parts of a property do not touch does not mean that a division has been achieved, and noted that, under the Map Act's definition of "subdivision," property may be considered a contiguous unit even if it is separated by roads, streets, utility easements, or railroad rights-of-way.

The court also considered what it described as the Map Act's "condemnation exemption," which provides that "land conveyed to or from a governmental agency [or] public entity . . . for rights-of-way. . ." is exempt from the parcel map requirement. The Nunns argued that because the condemnation proceeding involved a conveyance of land to a government agency, the four parcels accordingly qualified for the exemption. The court disagreed, observing that the statute exempted only the land conveyed to or from the government agency, not any remaining parcels.

Finally, the court rejected the Nunn's position that they were entitled to conditional certificates of compliance. Under the Map Act, conditional certificates may be issued where a prior, unlawful division of property occurred (for example, by a conveyance in violation of the Map Act). The responsible agency may attach conditions to certificates of compliance to legitimize the divisions while ensuring that the parcels comply with the Map Act and local law. As applied to the Nunns' property, the court found, conditional certificates were unavailable because the property had not previously been divided for purposes of the statute, legally or illegally.

14. VESTING RIGHTS RESTRICTIONS OF SUBDIVISION MAP ACT DO NOT BIND WATER DISTRICT

TARBET V. EAST BAY MUNICIPAL UTILITY DISTRICT

236 Cal. App. 4th 348 (2015)

In 2005, the County of Alameda approved a parcel map that subdivided a parcel into three lots. A condition of approval required that that each lot be connected to the East Bay Municipal Water District water system. When the subdivider sought a letter confirming that water service would be available for each lot, the District indicated it would provide water service contingent upon compliance with its regulations.

After the District demanded an easement as a condition to supplying water, the subdivider sued, seeking to compel the District to provide water service in compliance with the water service provision in the approved parcel map. The court rejected the claim, finding that the District, which was not a "local agency," was not subject to the same constraints as a local agency under the Subdivision Map Act. Rather, the County acted as the "local agency" under the Map Act for purposes of the map approval process, and the Map Act applies to the local agency only.

The court also found that the District did not waive its right to seek an easement by not including it in the conditions to the map. To the contrary, the Subdivision Map Act does not require a water agency to agree to serve water to individual customers, or to acquire an easement from property owners for the purposes of providing water service. Thus, the District had no obligation to seek or acquire an easement on the property at the time the parcel map was reviewed and approved.

15. COURT REJECTS WAIVER UNDER PUBLIC RECORDS ACT

NEWARK UNIFIED SCHOOL DISTRICT V. SUPERIOR COURT
239 Cal. App. 4th 33 (2015)

Two community organizations requested documents from a school district under the Public Records Act. Within hours of releasing the documents, the district realized it had inadvertently included documents containing attorney-client communications. It immediately contacted the recipients, informing them of the inadvertent inclusion and seeking return of the privileged documents. The two organizations refused, contending that disclosure of the documents waived any privileges by operation of section 6254.5 of the Act, which states that disclosure of a public record to any member of the public waives otherwise applicable exemptions.

The principal issue before the court was whether the inadvertent inclusion of attorney-client documents in a Public Records Act production constitutes "disclosure" of those documents for purposes of section 6254.5. On this point, the two organizations contended that providing a document to a member of the public constitutes "disclosure" of that document under the plain meaning of the statute regardless of whether the release was intentional or inadvertent. The school district, on the other hand, argued the term "disclosure" requires an intentional release of the document, and that inadvertent releases are not within the scope of the waiver provision.

The court found that the principal purpose of section 6254.5 was to prevent government officials from selectively withholding documents by asserting exemptions against some members of the public while waiving them as to others. This purpose, according to the court, supported the district's interpretation of the statute: when a release is inadvertent, no "selection" occurs because the agency has not exercised choice in making the release. An inadvertent release thus cannot involve an attempt to assert the exemption as to some but not all members of the public, the problem section 6254.5 was intended to address.

This interpretation was also necessary, in the court's view, to avoid a direct conflict between section 6254.5 and analogous provisions in the Evidence Code. Section 912(a) of the Evidence Code states that waiver of the attorney-client privilege occurs "if any holder of the privilege, without coercion, has *disclosed* a significant part of the communication . . . ." This statute is not limited to judicial proceedings but applies to any ostensible waiver of these privileges, and hence overlaps section 6254.5's provisions. As with section 6254.5, nothing in Evidence Code section 912 expressly restricts its application to intentional disclosures — both simply provide that disclosing a document results in waiver. However, courts have consistently interpreted Evidence Code section 912 to mean that the

inadvertent disclosure of privileged documents does *not* effect a waiver. The court's decision harmonized the waiver provisions of the two statutes.

16. "TRUE LEASE" REQUIRED FOR LEASE-LEASEBACK EXEMPTION FROM PUBLIC BIDDING

DAVIS V. FRESNO UNIFIED SCHOOL DISTRICT
237 Cal. App. 4th 261 (2015)

In a decision that may imperil many pending school construction transactions, the court held that, to qualify for exemption from public bidding, a lease-leaseback transaction must include "a financing component" and a "genuine lease" that provides for school district use of the facilities during the lease term.

An exception to public bidding exists under Public Contract Code § 17406, which provides that a district "without advertising for bids, may let . . . real property that belongs to the district if the [lease] requires the lessee . . . to construct . . . a building or buildings for the use of the school district." Under such a "lease-leaseback" arrangement, the district leases land to the contractor on which the contractor agrees to build school facilities to be leased back to the district for a specified time and rental amount. At the end of the lease term, title to the school facilities must vest in the school district. § 17406(a)(1). The Fresno Unified School District entered into such a lease-leaseback arrangement for construction of a $36 million middle school.

Based on its review of the statute and its legislative history, the court concluded that the lease-leaseback transaction must satisfy two requirements to qualify for exemption from public bidding:

First, the transaction must include a "true lease" that provides for the district's use and occupancy of the new buildings during its term, not simply a traditional construction contract designated by the parties as a lease. The court found that the "lease" document before it did not meet this requirement because, among other things, (i) the monthly lease payments to the contractor were not correlated to any specific period but were based on the progress of construction; (ii) the lease terminated immediately upon completion and acceptance of the construction; (iii) the contractor never acted in the capacity of a landlord holding rights to real property occupied by a tenant; and (iv) the district never occupied and used the new facilities as a tenant, but rather obtained full title to the buildings as they were completed.

Second, the contracts must include a "financing component" for the project. The court determined that "obtaining a new source of school financing was the primary purpose of the lease-leaseback provisions" in the statute, and hence that a transaction must include such a component in order to qualify for the exemption. The court found that the terms in the lease before it did not provide any financing to the district, but simply required payment to the contractor for the construction as it occurred.

This decision will require significant restructuring of the traditional lease-leaseback model commonly used by school districts. Provisions in the documents needing careful review in light of this case include (1) the particular property rights held by each party and the timing of transfer of those rights between the parties; and (2) the amount and timing of the lease payments. The payment provisions — particularly the source of payment funds and the length of time over which payments are made — will be important in light of the court's conclusion that the primary purpose of the lease-leaseback legislation was to provide a source of financing for school construction.

17. SUBSTANTIAL IMPROVEMENTS WITHIN EASEMENT AREA WITH IMPLIED CONSENT OF LANDOWNER MAY GIVE RISE TO IRREVOCABLE LICENSE

RICHARDSON V. FRANC
233 Cal. App. 4th 744 (2015)

In order to access their home, plaintiffs had to cross land belonging to their neighbors on which they owned a 30-foot-wide access and utility easement. They installed a 12-foot-wide driveway for this purpose. Plaintiffs also installed landscaping, irrigation, and lighting improvements on both sides of the driveway. These improvements -- which included a variety of plants and trees, a centrally-controlled drip irrigation system, and electrical and solar lighting -- were within the 30-foot easement, but went beyond the scope of the access and utility rights granted by the easement.

For approximately 20 years, plaintiffs maintained the landscaping and lighting improvements without objection from the neighbors. However, a dispute subsequently arose, during which the neighbors demanded removal of the landscaping on the ground that these and other improvements exceeded the purpose for which the easement was granted. Plaintiffs filed suit seeking an equitable easement or, in the alternative, an irrevocable license which would grant them an uninterrupted right to continue to maintain the landscaping and other improvements.

The court concluded that plaintiffs had not established a right to an equitable easement, since they had had actual or constructive notice that the landscaping improvements went beyond the scope of the recorded easement. However, it upheld the trial court's determination that plaintiffs had satisfied the requirements for an implied license based on (1) the substantial expenditures by plaintiffs to install, maintain and repair the landscaping and lighting improvements; and (2) the tacit permission or acquiescence of the neighbors with full knowledge of the facts surrounding the use of the easement area over a prolonged period. In light of the 20-year course of conduct of the parties and their predecessors regarding the installation and maintenance of the landscaping and lighting within the easement and the significant amounts expended by the plaintiffs in reasonable reliance on the apparent consent of the neighbors, it was well within the discretion of the trial court to make the license irrevocable.

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New Ways to Analyze Transportation Impacts Under SB 743 and the California Environmental Quality Act

By Cecily T. Barclay, Partner, Perkins Coie LLP

THE TRAFFIC IMPACTS of development projects have traditionally been evaluated in light of roadway capacity. If a project is projected to cause excessive delays, impacts are usually considered significant and the mitigation imposed is generally directed at increasing roadway capacity or otherwise reducing delays. Recent amendments to the California Environmental Quality are about to change that long-standing practice.

In 2013, the California Legislature enacted Senate Bill 743, which directs the Governor's Office of Planning & Research to develop new CEQA guidelines for transit analyses. It directs OPR to recommend alternative metrics, such as vehicle miles travelled (VMT) or trip generation rates, as thresholds of significance, with an overarching goal of balancing congestion management with statewide goals promoting infill development, public health through active transportation, and reduction of greenhouse gas emissions. SB 743 requires use of the new standards in transit priority areas, which are areas within one-half mile of a major transit stop. The Legislature further authorized, but did not require, OPR to develop similar guidelines for areas located outside transit priority areas. SB 743 indicates that the new guidelines will take effect inside transit priority areas when they are filed with the Secretary of Resources, and that their effect on areas outside transit priority areas will depend upon the language of the new guidelines.

In August 2014, OPR circulated its draft SB 743 guidelines for public comment. The draft guidelines propose to use VMT to measure transportation impacts throughout the state, and suggest agencies compare project-specific VMT to an undefined regional average. The draft guidelines also suggest that development projects located within one-half mile of an existing major transit stop, and those that result in a net decrease in VMT compared to existing conditions, generally should be considered to have a less-than-significant environmental impact. OPR's initial draft indicates that the provisions applicable to locations outside transit priority areas would take effect in January 2016.

In response to its 2014 draft, OPR received voluminous public comments. The completion of the new guidelines has, accordingly, been delayed well beyond January 2016. Most stakeholders expect to see another draft circulated for public comment before OPR releases its final version of the new guidelines.

Significant uncertainty remains regarding the timing and content of the new requirements. Even simple questions, such as whether the new requirements will apply to an EIR already in progress, have not been formally addressed. In the Bay Area, the question surrounding subsequent approvals is likely to arise often. Bay Area planning efforts tend to be robust, and it is common for jurisdictions to require

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multiple levels of approvals for a single project. One issue likely to require extensive analysis is whether the new guidelines will trigger a requirement for supplemental analysis for a project that has already undergone environmental review, but which is seeking a subsequent discretionary project approval. More far-reaching policy questions will likely take years to resolve. For example, many characterize the community separators in Sonoma County as isolating a myriad of small urban centers from each other, thereby extending travel distance and VMT. VMT obviously would be reduced with development patterns that emphasize large, combined urban centers surrounded by open space and agricultural uses, which would promote the goals of SB 743. However, the prospect of evaluating long-standing travel patterns between relatively small cities as significant impacts under CEQA seems unlikely to cause a fundamental change in long development patterns and attitudes that have been embedded in suburban local planning for decades.

OPR's initial draft does, however, give some insight into how the world of traffic analysis may change in light of SB 743, allowing some conclusions to be drawn.

1. Agencies should continue to analyze congestion and delay. Unless and until the revised guidelines are adopted, the current thresholds, which address traffic congestion and delay, will continue to apply. In addition, SB 743 does not prohibit agencies from using "level of service" standards as part of their local planning process. Accordingly, even though the revised guidelines may eliminate traffic congestion and delay as traffic impact thresholds under CEQA, cities and counties may continue to impose level of service standards and corresponding conditions of approval outside of CEQA.

2. Agencies should gather data concerning the VMT a new project is anticipated to produce. VMT is already being analyzed under CEQA to evaluate a project's potential greenhouse gas emissions. That data should be analyzed carefully (and perhaps expanded) in anticipation that it also may be used to assess transportation impacts once the revised guidelines are adopted.

3. Agencies should consider new measures to reduce VMT. Reducing the size of a project often reduces traffic congestion under current standards. However, VMTs are often assessed per square foot or per person. When that practice is employed, the significance of VMT cannot be reduced through the simple expedient of reducing the project size. Similarly, the flex-schedule aspects of many transportation demand management programs – which are often used to reduce peak hour congestion – will not reduce VMT. Agencies may, accordingly, want to start work now on developing more robust means of encouraging and enabling people to take public transit, share transportation, and live closer to their destinations.

4. Continue to consider measures to reduce traffic impacts on air quality, noise and safety. SB 743 specifically retained a public agency's authority under CEQA to analyze and

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> mitigate a project's transportation-related impacts on air quality, noise and safety. Studies of roadway capacity and delay may still be required for this purpose. For example, a study of roadway capacity may be required so that an agency can assess whether a project results in increased congestion and delay that, in turn, results in localized pollution impacts.

The coming year is expected to bring significant changes to how traffic impacts will be evaluated under CEQA, as well as additional uncertainty as to how the revisions will be applied to projects in practice. In the meantime, agencies and developers are well advised to be prepared to study and mitigate the traffic impacts associated with both roadway congestion and VMT in 2016.

WESTERN REAL ESTATE BUSINESS
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Impending Changes in Analyzing Transportation Impacts Under the California Environmental Quality Act; Are you Ready?

By Cecily T. Barclay, Partner, Perkins Coie LLP

FOR DECADES, the California Environmental Quality Act ("CEQA") has required California cities and counties evaluate potential traffic impacts associated with new development by determining whether a proposed project would conflict with traffic standards designed to ensure efficient operation of existing roadways. This mandate has resulted in a consistent agency focus on reducing traffic congestion and maintaining traffic flows throughout the state.

That focus is about to change. In 2013, the California Legislature enacted Senate Bill 743, which directed the Governor's Office of Planning & Research ("OPR") to develop new CEQA guidelines aimed at reducing greenhouse gas emissions. Specifically, for "transit priority areas" (areas within one-half mile of a "major transit stop"), OPR was directed to develop guidelines that would recommend new metrics to evaluate transportation impacts, such as vehicle miles travelled (VMT) or trip generation rates. The Legislature further authorized (but did not mandate) OPR to develop similar guidelines for areas in the state outside transit priority areas.

In August 2014, OPR circulated its draft guidelines for public comment. The draft guidelines proposed to use VMT to measure transportation impacts throughout the state, and suggested agencies compare project-specific VMT to an undefined "regional average" for similar land uses. The draft guidelines also suggested development projects that locate within one-half mile of an existing major transit stop or result in a net decrease in VMT compared to existing conditions generally would be considered to have a less-than-significant environmental impact.

In response to its 2014 draft, OPR received extensive public comments, which appear to have delayed OPR's preparation of the final guidelines, though many anticipate the final guidelines will be published in early 2016.

What does SB 743 mean for studying a project's transportation impacts under CEQA in 2016? While significant uncertainty remains regarding the new requirements, and the timing and scope of the revised guidelines, there are several steps California cities, counties and developers can and should take now.

1. Continue to analyze traffic congestion and automobile delay. Unless and until the revised guidelines are adopted, the current guidelines, which address traffic congestion and delay, will continue to apply. In addition, SB 743 does not prohibit cities and counties from using "level of service" standards as part of their local planning process. Accordingly, even though the revised guidelines may eliminate traffic congestion and

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delay under CEQA, cities and counties may continue to impose level of service standards and corresponding conditions of approval.

2. Gather data concerning the VMT a new project is anticipated to produce. VMT is already being analyzed under CEQA to evaluate a project's potential greenhouse gas emissions. That data should be analyzed carefully (and perhaps expanded) in anticipation that it also may be used to assess transportation impacts once the revised guidelines are adopted.

3. Consider measures to reduce VMT. Reducing the size of a project often reduces traffic congestion under current standards. However, a smaller project will not reduce the VMT per employee, customer, and/or resident when compared to a regional average. Instead, to avoid significant impacts, other solutions that reduce the average trip may need to be developed, such as contributing to existing or planned transportation services.

4. Continue to consider measures to reduce traffic impacts on air quality, noise and safety. SB 743 specifically retained a public agency's authority under CEQA to analyze and mitigate a project's transportation impacts on air quality, noise and safety. For example, if a project results in increased congestion that, in turn, poses a safety hazard to pedestrians or bicyclists, other local roadway improvements may be required to reduce such impacts.

The coming year is expected to bring significant changes to how traffic impacts will be evaluated under CEQA, as well as additional uncertainty as to how the revisions will be applied to projects in practice. In the meantime, agencies and developers are well advised to be prepared to study and mitigate the traffic impacts associated with both roadway congestion and VMT in 2016.

Senate Bill 743 (Steinberg, 2013)

Excerpt of Public Resources Code § 21099

(b) (1) The Office of Planning and Research shall prepare, develop, and transmit to the Secretary of the Natural Resources Agency for certification and adoption proposed revisions to the guidelines adopted pursuant to Section 21083 establishing ***criteria for determining the significance of transportation impacts*** *of projects within transit priority areas. Those criteria shall* ***promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses****. In developing the criteria, the office shall recommend potential metrics to measure transportation impacts that* ***may include, but are not limited to, vehicle miles traveled****, vehicle miles traveled per capita, automobile trip generation rates, or automobile trips generated. The office may also establish criteria for models used to analyze transportation impacts to ensure the models are accurate, reliable, and consistent with the intent of this section.*

(2) Upon certification of the guidelines by the Secretary of the Natural Resources Agency pursuant to this section, ***automobile delay****, as described solely by level of service or similar measures of vehicular capacity or traffic congestion* ***shall not be considered a significant impact on the environment*** *pursuant to this division, except in locations specifically identified in the guidelines, if any.*

(3) This subdivision does not relieve a public agency of the requirement to analyze a project's potentially significant transportation impacts related to air quality, noise, safety, or any other impact associated with transportation. The methodology established by these guidelines shall not create a presumption that a project will not result in significant impacts related to air quality, noise, safety, or any other impact associated with transportation. Notwithstanding the foregoing, the adequacy of parking for a project shall not support a finding of significance pursuant to this section.

(4) This subdivision ***does not preclude the application of local general plan policies, zoning codes, conditions of approval, thresholds, or any other planning requirements*** *pursuant to the police power or any other authority.*

(5) ***On or before July 1, 2014****, the Office of Planning and Research shall circulate* ***a draft*** *revision prepared pursuant to paragraph (1).*

(c) (1) The Office of Planning and Research ***may adopt guidelines*** *pursuant to Section 21083* ***establishing alternative metrics to the metrics used for traffic levels of service for transportation impacts outside transit priority areas****. The alternative metrics may include the retention of traffic levels of service, where appropriate and as determined by the office.*

(2) This subdivision shall not affect the standard of review that would apply to the new guidelines adopted pursuant to this section.

II. *Revised* Proposed Changes to the CEQA Guidelines

Section II of this document includes proposed additions to the CEQA Guidelines, which are found in Title 14 of the California Code of Regulations. Note, these additions, must undergo a formal administrative rulemaking process, and once adopted by the Natural Resources Agency, be reviewed by the Office of Administrative Law.

Proposed New Section 15064.3. Determining the Significance of Transportation Impacts

(a) Purpose.

Section 15064 contains general rules governing the analysis, and the determination of significance of, environmental effects. Specific considerations involving transportation impacts are described in this section. Generally, vehicle miles traveled is the most appropriate measure of a project's potential transportation impacts. For the purposes of this section, "vehicle miles traveled" refers to the amount and distance of automobile travel attributable to a project. Other relevant considerations may include the effects of the project on transit and non-motorized travel and the safety of all travelers. A project's effect on automobile delay does not constitute a significant environmental impact.

(b) Criteria for Analyzing Transportation Impacts.

Lead agencies may use thresholds of significance for vehicle miles traveled recommended by other public agencies or experts provided the threshold is supported by substantial evidence.

(1) Vehicle Miles Traveled and Land Use Projects. A development project that results in vehicle miles traveled exceeding an applicable threshold of significance may indicate a significant impact. Generally, development projects that locate within one-half mile of either an existing major transit stop or a stop along an existing high quality transit corridor may be presumed to cause a less than significant transportation impact. Similarly, development projects that decrease vehicle miles traveled in the project area compared to existing conditions may be considered to have a less than significant transportation impact.

(2) Induced Vehicle Travel and Transportation Projects. Additional lane miles may induce automobile travel, and vehicle miles traveled, compared to existing conditions. Transportation projects that reduce, or have no impact on, vehicle miles traveled may be presumed to cause a less than significant transportation impact. To the extent that the potential for induced travel has already been adequately analyzed at a programmatic level, a lead agency may incorporate that analysis by reference.

(3) Qualitative Analysis. If existing models or methods are not available to estimate the vehicle miles traveled for the particular project being considered, a lead agency may analyze the project's vehicle miles traveled qualitatively. Such a qualitative analysis would evaluate factors such as the availability of transit, proximity to other destinations (such as homes, employment and services), area demographics, etc. For many projects, a qualitative analysis of construction traffic may be appropriate.

(4) Methodology. The lead agency's evaluation of the vehicle miles traveled associated with a project is subject to a rule of reason. A lead agency should not confine its evaluation to its own political boundary.

A lead agency may use models to estimate a project's vehicle miles traveled, and may revise those estimates to reflect professional judgment based on substantial evidence. Any assumptions used to estimate vehicle miles traveled and any revisions to model outputs should be documented and explained in the environmental document prepared for the project.

(c) Applicability.

The provisions of this section shall apply prospectively as described in section 15007. A lead agency may elect to be governed by the provisions of this section immediately provided that it updates its own procedures pursuant to section 15022 to conform to the provisions of this section. After [two years from expected adoption date], the provisions of this section shall apply statewide.

Note: Authority cited: Sections 21083 and 21083.05, Public Resources Code. Reference: Sections 21099 and 21100, Public Resources Code; *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal. App. 4th 173.

Proposed Changes to Existing Appendix G

XVI. TRANSPORTATION~~/TRAFFIC~~ -- Would the project:	**Potentially Significant Impact**	**Less Than Significant with Mitigation Incorporated**	**Less Than Significant Impact**	**No Impact**
	☐	☐	☐	☐
a) Conflict with a~~n applicable~~ plan, ordinance or policy ~~establishing measures of effectiveness for the~~ addressing the safety or performance of the circulation system, including transit, roadways, bicycle lanes and pedestrian paths (except for automobile level of service)? ~~, taking into account all modes of transportation including mass transit and non-motorized travel and relevant components of the circulation system, including but not limited to intersections, streets, highways and freeways, pedestrian and bicycle paths, and mass transit~~?	☐	☐	☐	☐
b) ~~Conflict with an applicable congestion management program, including, but not limited to level of service standards and travel demand measures, or other standards established by the county~~				

~~congestion management agency for designated roads or highways?~~ Cause substantial additional vehicle miles traveled (per capita, per service population, or other appropriate efficiency measure)?

c) ~~Result in a change in air traffic patterns, including either an increase in traffic levels or a change in location that results in substantial safety risks~~?

Substantially induce additional automobile travel by increasing physical roadway capacity in congested areas (i.e., by adding new mixed-flow lanes) or by adding new roadways to the network? ~~increase hazards due to a design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment)~~?

d) Result in inadequate emergency access?

~~f) Conflict with adopted policies, plans, or programs regarding public transit, bicycle, or pedestrian facilities, or otherwise decrease the performance or safety of such facilities?~~

4

PERKINSCOIE
COUNSEL TO GREAT COMPANIES

Assembly Bill 52 and Tribal Cultural Resources

ASSEMBLY BILL NO. 52, which went into effect on July 1, 2015, establishes "tribal cultural resources" as a new category of environmental resources that must be considered under CEQA. AB 52 imposes new requirements for consultation regarding projects that may affect a tribal cultural resource, includes a broad definition of what may be considered to be a tribal cultural resource, and includes a list of recommended mitigation measures. In recent months, the Governor's Office of Planning and Research (OPR) has issued two related draft documents, which are discussed below.

DRAFT TECHNICAL ADVISORY REGARDING NEW CEQA REQUIREMENTS FOR TRIBAL CULTURAL RESOURCES

In May 2015, the Governor's Office of Planning and Research announced the availability of a draft technical advisory discussing the new CEQA requirements for tribal cultural resources that have been added by Assembly Bill 52. The new law went into effect on July 1, 2015.

The draft technical advisory describes the new substantive and procedural requirements and provides guidance to lead agencies regarding consultation with California Native American tribes and consideration of tribal cultural resources. It also discusses the reasons for these legislative changes. Of particular note, the draft technical advisory summarizes the specific steps and timeframes for notice and consultation under the new law, and it includes a flowchart on timing and notice. Other topics addressed in the draft technical advisory include the following:

- **CONSULTATION:** AB 52 requires a lead agency to consult with any California Native American tribe that requests consultation and is traditionally and culturally affiliated with the geographic area of a proposed project. The consultation must take place before the determination of whether the project requires a negative declaration, mitigated negative declaration, or environmental impact report. The draft technical advisory discusses the meaning and potential topics for consultation, noting that consultation is an ongoing process, not a single event.
- **TRIBAL CULTURAL RESOURCE:** To be considered a "tribal cultural resource" under AB 52, a resource must be either (1) listed, or determined to be eligible for listing, on a national, state, or local register of historic resources; or (2) a resource that the lead agency chooses, in its discretion, to treat as a tribal cultural resource. For the latter, the draft technical advisory explains that a lead agency must determine, based on substantial evidence, that the resource meets the criteria for listing in the state register of historic resources.
- **MITIGATION:** If a lead agency determines that a project may cause a substantial impact to tribal cultural resources, the lead agency must consider mitigation measures for that impact. Mitigation may include such measures as avoidance and preservation of the resources in place, treating the resource with culturally appropriate dignity, or permanent conservation easements or other interests in real property.
- **CONFIDENTIALITY:** The draft technical advisory also describes the new rules governing confidentiality during tribal consultation. For example, information submitted by a California Native American tribe during the environmental review process may not be included in the environmental document or disclosed to the public without the prior written consent of the tribe. However, the information may be described in general terms in the environmental document to inform the public

of the basis of the decision. In addition, a lead agency and the tribe may share confidential information regarding tribal cultural resources with the project applicant and its agents, in which case the project applicant is responsible for keeping the information confidential to prevent looting, vandalism, or damage to the resource.

The draft technical advisory is available online at http://www.opr.ca.gov/docs/DRAFT_AB_52_Technical_Advisory.pdf.

DISCUSSION DRAFT OF PROPOSED CHANGES TO APPENDIX G OF THE CEQA GUIDELINES TO INCORPORATE TRIBAL CULTURAL RESOURCES

In November 2015, OPR announced the availability of a discussion draft of proposed changes to Appendix G of the CEQA Guidelines incorporating tribal cultural resources, pursuant to AB 52. The discussion draft provides background on AB 52 and Appendix G, an explanation of the three alternatives put forth as draft questions about tribal cultural resources for inclusion in the initial study form, and information about effective public comment.

- **AB 52:** AB 52 went into effect in July 2015 and establishes tribal cultural resources as a new category of resources under CEQA. AB 52 also creates a process for consultation with California Native American Tribes in the CEQA process. Under the new law, tribal governments may request consultation with a lead agency and give input into potential impacts to tribal cultural resources. The Public Resources Code now requires avoiding damage to tribal cultural resources or mitigating impacts to the extent feasible. Additional information about AB 52 is available in OPR's Draft Technical Advisory issued in May 2015.
- **APPENDIX G:** Appendix G in the CEQA Guidelines contains a sample initial study form, the purpose of which is to assist lead agencies in determining whether a project may cause a significant impact on the environment. Appendix G asks a series of questions regarding a range of environmental resources and potential impacts. As a result of AB 52, the sample environmental checklist form must be revised to include questions about tribal cultural resources.
- **3 ALTERNATIVES:** The discussion draft presents three alternative sets of draft Appendix G questions regarding tribal cultural resources. OPR drafted the alternatives following intensive outreach to California Native American tribes, local governments, CEQA practitioners, and others. OPR now seeks further public input on the three alternatives, which vary as to the amount of detail.
    - Alternative 1 is minimal and merely cites to the definition of tribal cultural resources in the Public Resources Code.
    - Alternative 2 paraphrases the definition of tribal cultural resources, rather than simply providing a citation to the Public Resources Code.
    - Alternative 3 is the most detailed. It creates a new section of Appendix G, titled Tribal Cultural Resources, and it includes introductory language for context, similar to the agricultural resources and air quality sections of Appendix G.

The discussion draft is available online at http://www.opr.ca.gov/docs/Discussion_Draft_Appendix_G_Questions_re_Tribal_Cultural_Resources_Nov_17_2015.pdf

Assembly Bill No. 52

CHAPTER 532

An act to amend Section 5097.94 of, and to add Sections 21073, 21074, 21080.3.1, 21080.3.2, 21082.3, 21083.09, 21084.2, and 21084.3 to, the Public Resources Code, relating to Native Americans.

[Approved by Governor September 25, 2014. Filed with Secretary of State September 25, 2014.]

LEGISLATIVE COUNSEL'S DIGEST

AB 52, Gatto. Native Americans: California Environmental Quality Act.

Existing law, the Native American Historic Resource Protection Act, establishes a misdemeanor for unlawfully and maliciously excavating upon, removing, destroying, injuring, or defacing a Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources.

The California Environmental Quality Act, referred to as CEQA, requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of, an environmental impact report on a project that it proposes to carry out or approve that may have a significant effect on the environment or to adopt a negative declaration if it finds that the project will not have that effect. CEQA also requires a lead agency to prepare a mitigated negative declaration for a project that may have a significant effect on the environment if revisions in the project would avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment. CEQA requires the lead agency to provide a responsible agency with specified notice and opportunities to comment on a proposed project. CEQA requires the Office of Planning and Research to prepare and develop, and the Secretary of the Natural Resources Agency to certify and adopt, guidelines for the implementation of CEQA that include, among other things, criteria for public agencies to following in determining whether or not a proposed project may have a significant effect on the environment.

This bill would specify that a project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource, as defined, is a project that may have a significant effect on the environment. The bill would require a lead agency to begin consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project, if the tribe requested to the lead agency, in writing, to be informed by the lead agency of proposed projects in that geographic area and the tribe requests consultation, prior to determining whether a negative declaration, mitigated negative declaration, or environmental impact report is required for a project. The bill would

specify examples of mitigation measures that may be considered to avoid or minimize impacts on tribal cultural resources. The bill would make the above provisions applicable to projects that have a notice of preparation or a notice of negative declaration filed or mitigated negative declaration on or after July 1, 2015. The bill would require the Office of Planning and Research to revise on or before July 1, 2016, the guidelines to separate the consideration of tribal cultural resources from that for paleontological resources and add consideration of tribal cultural resources. By requiring the lead agency to consider these effects relative to tribal cultural resources and to conduct consultation with California Native American tribes, this bill would impose a state-mandated local program.

Existing law establishes the Native American Heritage Commission and vests the commission with specified powers and duties.

This bill would additionally require the commission to provide each California Native American tribe, as defined, on or before July 1, 2016, with a list of all public agencies that may be a lead agency within the geographic area in which the tribe is traditionally and culturally affiliated, the contact information of those agencies, and information on how the tribe may request those public agencies to notify the tribe of projects within the jurisdiction of those public agencies for the purposes of requesting consultation.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) Current state law provides a limited measure of protection for sites, features, places, objects, and landscapes with cultural value to California Native American tribes.

(2) Existing law provides limited protection for Native American sacred places, including, but not limited to, places of worship, religious or ceremonial sites, and sacred shrines.

(3) The California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) does not readily or directly include California Native American tribes' knowledge and concerns. This has resulted in significant environmental impacts to tribal cultural resources and sacred places, including cumulative impacts, to the detriment of California Native American tribes and California's environment.

(4) As California Native Americans have used, and continue to use, natural settings in the conduct of religious observances, ceremonies, and cultural practices and beliefs, these resources reflect the tribes' continuing cultural ties to the land and their traditional heritages.

(5) Many of these archaeological, historical, cultural, and sacred sites are not located within the current boundaries of California Native American reservations and rancherias, and therefore are not covered by the protectionist policies of tribal governments.

(b) In recognition of California Native American tribal sovereignty and the unique relationship of California local governments and public agencies with California Native American tribal governments, and respecting the interests and roles of project proponents, it is the intent of the Legislature, in enacting this act, to accomplish all of the following:

(1) Recognize that California Native American prehistoric, historic, archaeological, cultural, and sacred places are essential elements in tribal cultural traditions, heritages, and identities.

(2) Establish a new category of resources in the California Environmental Quality Act called "tribal cultural resources" that considers the tribal cultural values in addition to the scientific and archaeological values when determining impacts and mitigation.

(3) Establish examples of mitigation measures for tribal cultural resources that uphold the existing mitigation preference for historical and archaeological resources of preservation in place, if feasible.

(4) Recognize that California Native American tribes may have expertise with regard to their tribal history and practices, which concern the tribal cultural resources with which they are traditionally and culturally affiliated. Because the California Environmental Quality Act calls for a sufficient degree of analysis, tribal knowledge about the land and tribal cultural resources at issue should be included in environmental assessments for projects that may have a significant impact on those resources.

(5) In recognition of their governmental status, establish a meaningful consultation process between California Native American tribal governments and lead agencies, respecting the interests and roles of all California Native American tribes and project proponents, and the level of required confidentiality concerning tribal cultural resources, at the earliest possible point in the California Environmental Quality Act environmental review process, so that tribal cultural resources can be identified, and culturally appropriate mitigation and mitigation monitoring programs can be considered by the decisionmaking body of the lead agency.

(6) Recognize the unique history of California Native American tribes and uphold existing rights of all California Native American tribes to participate in, and contribute their knowledge to, the environmental review process pursuant to the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(7) Ensure that local and tribal governments, public agencies, and project proponents have information available, early in the California Environmental Quality Act environmental review process, for purposes of identifying and addressing potential adverse impacts to tribal cultural resources and to reduce the potential for delay and conflicts in the environmental review process.

(8) Enable California Native American tribes to manage and accept conveyances of, and act as caretakers of, tribal cultural resources.

(9) Establish that a substantial adverse change to a tribal cultural resource has a significant effect on the environment.

SEC. 2. Section 5097.94 of the Public Resources Code is amended to read:

5097.94. The commission shall have the following powers and duties:

(a) To identify and catalog places of special religious or social significance to Native Americans, and known graves and cemeteries of Native Americans on private lands. The identification and cataloguing of known graves and cemeteries shall be completed on or before January 1, 1984. The commission shall notify landowners on whose property such graves and cemeteries are determined to exist, and shall identify the Native American group most likely descended from those Native Americans who may be interred on the property.

(b) To make recommendations relative to Native American sacred places that are located on private lands, are inaccessible to Native Americans, and have cultural significance to Native Americans for acquisition by the state or other public agencies for the purpose of facilitating or assuring access thereto by Native Americans.

(c) To make recommendations to the Legislature relative to procedures which will voluntarily encourage private property owners to preserve and protect sacred places in a natural state and to allow appropriate access to Native American religionists for ceremonial or spiritual activities.

(d) To appoint necessary clerical staff.

(e) To accept grants or donations, real or in kind, to carry out the purposes of this chapter.

(f) To make recommendations to the Director of Parks and Recreation and the California Arts Council relative to the California State Indian Museum and other Indian matters touched upon by department programs.

(g) To bring an action to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, pursuant to Section 5097.97. If the court finds that severe and irreparable damage will occur or that appropriate access will be denied, and appropriate mitigation measures are not available, it shall issue an injunction, unless it finds, on clear and convincing evidence, that the public interest and necessity require otherwise. The Attorney General shall represent the commission and the state in litigation concerning affairs of the commission, unless the Attorney General has determined to represent the agency against whom the commission's action is directed, in which case the commission shall be authorized to employ other counsel. In any action to enforce the provisions of this subdivision the commission shall introduce evidence showing that such cemetery, place, site, or shrine has been historically regarded as a sacred or sanctified place by Native American people and represents a place of unique historical and cultural significance to an Indian tribe or community.

(h) To request and utilize the advice and service of all federal, state, local, and regional agencies.

(i) To assist Native Americans in obtaining appropriate access to sacred places that are located on public lands for ceremonial or spiritual activities.

(j) To assist state agencies in any negotiations with agencies of the federal government for the protection of Native American sacred places that are located on federal lands.

(k) To mediate, upon application of either of the parties, disputes arising between landowners and known descendents relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials.

The agreements shall provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction and provide for sensitive treatment and disposition of Native American burials, skeletal remains, and associated grave goods consistent with the planned use of, or the approved project on, the land.

(*l*) To assist interested landowners in developing agreements with appropriate Native American groups for treating or disposing, with appropriate dignity, of the human remains and any items associated with Native American burials.

(m) To provide each California Native American tribe, as defined in Section 21073, on or before July 1, 2016, with a list of all public agencies that may be a lead agency pursuant to Division 13 (commencing with Section 21000) within the geographic area with which the tribe is traditionally and culturally affiliated, the contact information of those public agencies, and information on how the tribe may request the public agency to notify the tribe of projects within the jurisdiction of those public agencies for the purposes of requesting consultation pursuant to Section 21080.3.1.

SEC. 3. Section 21073 is added to the Public Resources Code, to read:

21073. "California Native American tribe" means a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004.

SEC. 4. Section 21074 is added to the Public Resources Code, to read:

21074. (a) "Tribal cultural resources" are either of the following:

(1) Sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are either of the following:

(A) Included or determined to be eligible for inclusion in the California Register of Historical Resources.

(B) Included in a local register of historical resources as defined in subdivision (k) of Section 5020.1.

(2) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Section 5024.1. In applying the criteria set forth in subdivision (c) of Section 5024.1 for the purposes of this paragraph, the

lead agency shall consider the significance of the resource to a California Native American tribe.

(b) A cultural landscape that meets the criteria of subdivision (a) is a tribal cultural resource to the extent that the landscape is geographically defined in terms of the size and scope of the landscape.

(c) A historical resource described in Section 21084.1, a unique archaeological resource as defined in subdivision (g) of Section 21083.2, or a "nonunique archaeological resource" as defined in subdivision (h) of Section 21083.2 may also be a tribal cultural resource if it conforms with the criteria of subdivision (a).

SEC. 5. Section 21080.3.1 is added to the Public Resources Code, to read:

21080.3.1. (a) The Legislature finds and declares that California Native American tribes traditionally and culturally affiliated with a geographic area may have expertise concerning their tribal cultural resources.

(b) Prior to the release of a negative declaration, mitigated negative declaration, or environmental impact report for a project, the lead agency shall begin consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project if: (1) the California Native American tribe requested to the lead agency, in writing, to be informed by the lead agency through formal notification of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe, and (2) the California Native American tribe responds, in writing, within 30 days of receipt of the formal notification, and requests the consultation. When responding to the lead agency, the California Native American tribe shall designate a lead contact person. If the California Native American tribe does not designate a lead contact person, or designates multiple lead contact people, the lead agency shall defer to the individual listed on the contact list maintained by the Native American Heritage Commission for the purposes of Chapter 905 of the Statutes of 2004. For purposes of this section and Section 21080.3.2, "consultation" shall have the same meaning as provided in Section 65352.4 of the Government Code.

(c) To expedite the requirements of this section, the Native American Heritage Commission shall assist the lead agency in identifying the California Native American tribes that are traditionally and culturally affiliated with the project area.

(d) Within 14 days of determining that an application for a project is complete or a decision by a public agency to undertake a project, the lead agency shall provide formal notification to the designated contact of, or a tribal representative of, traditionally and culturally affiliated California Native American tribes that have requested notice, which shall be accomplished by means of at least one written notification that includes a brief description of the proposed project and its location, the lead agency contact information, and a notification that the California Native American tribe has 30 days to request consultation pursuant to this section.

(e) The lead agency shall begin the consultation process within 30 days of receiving a California Native American tribe's request for consultation.

SEC. 6. Section 21080.3.2 is added to the Public Resources Code, to read:

21080.3.2. (a) As a part of the consultation pursuant to Section 21080.3.1, the parties may propose mitigation measures, including, but not limited to, those recommended in Section 21084.3, capable of avoiding or substantially lessening potential significant impacts to a tribal cultural resource or alternatives that would avoid significant impacts to a tribal cultural resource. If the California Native American tribe requests consultation regarding alternatives to the project, recommended mitigation measures, or significant effects, the consultation shall include those topics. The consultation may include discussion concerning the type of environmental review necessary, the significance of tribal cultural resources, the significance of the project's impacts on the tribal cultural resources, and, if necessary, project alternatives or the appropriate measures for preservation or mitigation that the California Native American tribe may recommended to the lead agency.

(b) The consultation shall be considered concluded when either of the following occurs:

(1) The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists, on a tribal cultural resource.

(2) A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached.

(c) (1) This section does not limit the ability of a California Native American tribe or the public to submit information to the lead agency regarding the significance of the tribal cultural resources, the significance of the project's impact on tribal cultural resources, or any appropriate measures to mitigate the impact.

(2) This section does not limit the ability of the lead agency or project proponent to incorporate changes and additions to the project as a result of the consultation, even if not legally required.

(d) If the project proponent or its consultants participate in the consultation, those parties shall respect the principles set forth in this section.

SEC. 7. Section 21082.3 is added to the Public Resources Code, to read:

21082.3. (a) Any mitigation measures agreed upon in the consultation conducted pursuant to Section 21080.3.2 shall be recommended for inclusion in the environmental document and in an adopted mitigation monitoring and reporting program, if determined to avoid or lessen the impact pursuant to paragraph (2) of subdivision (b), and shall be fully enforceable.

(b) If a project may have a significant impact on a tribal cultural resource, the lead agency's environmental document shall discuss both of the following:

(1) Whether the proposed project has a significant impact on an identified tribal cultural resource.

(2) Whether feasible alternatives or mitigation measures, including those measures that may be agreed to pursuant to subdivision (a), avoid or substantially lessen the impact on the identified tribal cultural resource.

(c) (1) Any information, including, but not limited to, the location, description, and use of the tribal cultural resources, that is submitted by a California Native American tribe during the environmental review process shall not be included in the environmental document or otherwise disclosed by the lead agency or any other public agency to the public, consistent with subdivision (r) of Section 6254 of, and Section 6254.10 of, the Government Code, and subdivision (d) of Section 15120 of Title 14 of the California Code of Regulations, without the prior consent of the tribe that provided the information. If the lead agency publishes any information submitted by a California Native American tribe during the consultation or environmental review process, that information shall be published in a confidential appendix to the environmental document unless the tribe that provided the information consents, in writing, to the disclosure of some or all of the information to the public. This subdivision does not prohibit the confidential exchange of the submitted information between public agencies that have lawful jurisdiction over the preparation of the environmental document.

(2) (A) This subdivision does not prohibit the confidential exchange of information regarding tribal cultural resources submitted by a California Native American tribe during the consultation or environmental review process among the lead agency, the California Native American tribe, the project applicant, or the project applicant's agent. Except as provided in subparagraph (B) or unless the California Native American tribe providing the information consents, in writing, to public disclosure, the project applicant or the project applicant's legal advisers, using a reasonable degree of care, shall maintain the confidentiality of the information exchanged for the purposes of preventing looting, vandalism, or damage to a tribal cultural resources and shall not disclose to a third party confidential information regarding tribal cultural resources.

(B) This paragraph does not apply to data or information that are or become publicly available, are already in the lawful possession of the project applicant before the provision of the information by the California Native American tribe, are independently developed by the project applicant or the project applicant's agents, or are lawfully obtained by the project applicant from a third party that is not the lead agency, a California Native American tribe, or another public agency.

(3) This subdivision does not affect or alter the application of subdivision (r) of Section 6254 of the Government Code, Section 6254.10 of the Government Code, or subdivision (d) of Section 15120 of Title 14 of the California Code of Regulations.

(4) This subdivision does not prevent a lead agency or other public agency from describing the information in general terms in the environmental document so as to inform the public of the basis of the lead agency's or other public agency's decision without breaching the confidentiality required by this subdivision.

(d) In addition to other provisions of this division, the lead agency may certify an environmental impact report or adopt a mitigated negative declaration for a project with a significant impact on an identified tribal cultural resource only if one of the following occurs:

(1) The consultation process between the California Native American tribe and the lead agency has occurred as provided in Sections 21080.3.1 and 21080.3.2 and concluded pursuant to subdivision (b) of Section 21080.3.2.

(2) The California Native American tribe has requested consultation pursuant to Section 21080.3.1 and has failed to provide comments to the lead agency, or otherwise failed to engage, in the consultation process.

(3) The lead agency has complied with subdivision (d) of Section 21080.3.1 and the California Native American tribe has failed to request consultation within 30 days.

(e) If the mitigation measures recommended by the staff of the lead agency as a result of the consultation process are not included in the environmental document or if there are no agreed upon mitigation measures at the conclusion of the consultation or if consultation does not occur, and if substantial evidence demonstrates that a project will cause a significant effect to a tribal cultural resource, the lead agency shall consider feasible mitigation pursuant to subdivision (b) of Section 21084.3.

(f) Consistent with subdivision (c), the lead agency shall publish confidential information obtained from a California Native American tribe during the consultation process in a confidential appendix to the environmental document and shall include a general description of the information, as provided in paragraph (4) of subdivision (c) in the environmental document for public review during the public comment period provided pursuant to this division.

(g) This section is not intended, and may not be construed, to limit consultation between the state and tribal governments, existing confidentiality provisions, or the protection of religious exercise to the fullest extent permitted under state and federal law.

SEC. 8. Section 21083.09 is added to the Public Resources Code, to read:

21083.09. On or before July 1, 2016, the Office of Planning and Research shall prepare and develop, and the Secretary of the Natural Resources Agency shall certify and adopt, revisions to the guidelines that update Appendix G of Chapter 3 (commencing with Section 15000) of Division 6 of Title 4 of the California Code of Regulations to do both of the following:

(a) Separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions.

(b) Add consideration of tribal cultural resources with relevant sample questions.

SEC. 9. Section 21084.2 is added to the Public Resources Code, to read:

21084.2. A project with an effect that may cause a substantial adverse change in the significance of a tribal cultural resource is a project that may have a significant effect on the environment.

SEC. 10. Section 21084.3 is added to the Public Resources Code, to read:

21084.3. (a) Public agencies shall, when feasible, avoid damaging effects to any tribal cultural resource.

(b) If the lead agency determines that a project may cause a substantial adverse change to a tribal cultural resource, and measures are not otherwise identified in the consultation process provided in Section 21080.3.2, the following are examples of mitigation measures that, if feasible, may be considered to avoid or minimize the significant adverse impacts:

(1) Avoidance and preservation of the resources in place, including, but not limited to, planning and construction to avoid the resources and protect the cultural and natural context, or planning greenspace, parks, or other open space, to incorporate the resources with culturally appropriate protection and management criteria.

(2) Treating the resource with culturally appropriate dignity taking into account the tribal cultural values and meaning of the resource, including, but not limited to, the following:

(A) Protecting the cultural character and integrity of the resource.

(B) Protecting the traditional use of the resource.

(C) Protecting the confidentiality of the resource.

(3) Permanent conservation easements or other interests in real property, with culturally appropriate management criteria for the purposes of preserving or utilizing the resources or places.

(4) Protecting the resource.

SEC. 11. (a) This act does not alter or expand the applicability of the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) concerning projects occurring on Native American tribal reservations or rancherias.

(b) This act does not prohibit any California Native American tribe or individual from participating in the California Environmental Quality Act on any issue of concern as an interested California Native American tribe, person, citizen, or member of the public.

(c) This act shall apply only to a project that has a notice of preparation or a notice of negative declaration or mitigated negative declaration filed on or after July 1, 2015.

SEC. 12. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code.

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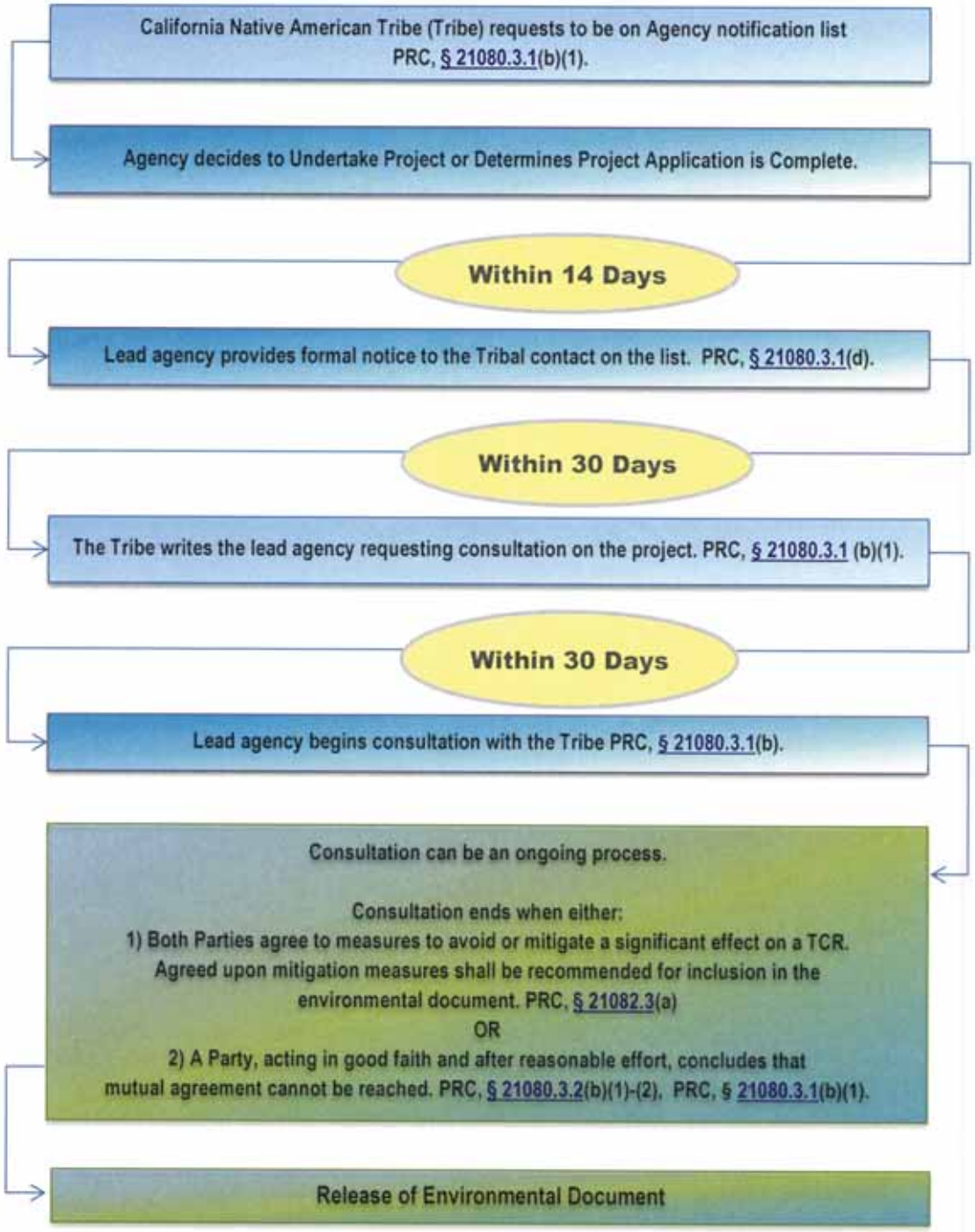
Compliance Timeline and Consultation Process Flowchart



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PERKINSCOIE
COUNSEL TO GREAT COMPANIES

CEQA YEAR IN REVIEW 2015

A SUMMARY OF PUBLISHED APPELLATE OPINIONS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

By: Steve Kostka, Marc Bruner, Julie Jones, Geoff Robinson, Barbara Schussman, Laura Zagar, Marie Cooper, Kathryn Bilder, Christopher Chou and Alan Murphy

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In 2015 the California appellate courts continued to chart new ground as they grappled with some of CEQA's most difficult and controversial questions. The Supreme Court of California led the way, issuing four opinions on hotly contested issues. For the first time, the court addressed the problematic question of what thresholds of significance should be used to measure the significance of greenhouse gas emissions. In a decision that will likely please only a few, the court blessed consistency with AB 32's emissions reduction goal as an appropriate standard, but provided little guidance on how agencies might show consistency for specific projects. On the other hand, the court issued two decisions that place reasonable, common-sense limits on CEQA's reach. In one decision the court set constraints on the ability of project opponents to contest categorical exemption determinations by asserting that significant impacts will occur due to unusual circumstances. In the other decision, the court put an end to the counter-intuitive, but persistent, argument that CEQA extends beyond a project's effects on the environment to take in the environment's effects on the project. In its remaining decision, the court held that a state university cannot use the legislature's failure to appropriate earmarked funds as an excuse to avoid adopting mitigation measures for off-site impacts, but it did not decide when a public agency can reject a proposed mitigation measure as infeasible due to budgetary constraints.

A relatively large number of opinions dealing with CEQA exemptions were issued by the courts of appeal in 2015. Two of the cases upheld categorical exemptions, applying the standards set by the supreme court in its decision on the unusual circumstances exception. In three others, the courts overturned the agency's exemption determination, ruling in one case that the agency had interpreted the exemption too broadly, and in the others that the agency had failed to point to evidence in the record of its proceedings sufficient to show the exemption applied.

Seven court of appeal decisions addressed EIR adequacy, and the EIR was upheld in each one of them. The proper baseline for analyzing impacts was an important theme, with the courts making it clear that a lead agency has broad discretion to set a baseline that reflects historical conditions occurring well before CEQA review starts. In another precedent-setting decision, a court held that an increased demand for emergency services due to a project is not an environmental impact that triggers CEQA's mitigation requirements. The use and benefits of program EIRs also received significant attention in

opinions recognizing that agencies may use program EIRs to defer evaluation of project-specific impacts and mitigation strategies to a later stage of approval when the information necessary for a detailed analysis becomes available. Finally, in what may prove to be one of the year's most influential decisions, a court disapproved the practice of besieging the lead agency with burdensome comments on a draft EIR in order to stymie the EIR process, emphasizing that the purpose of comments should be to improve the EIR, and that the opportunity to comment should not be used as a means to wear out the lead agency.

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(2014) 231 CA4th 1056, No. S223603, review granted March 11, 2015 28

A. THE LIMITS ON THE SCOPE OF CEQA REVIEW

1. Supreme Court Rules that CEQA Does Not Require an Analysis of the Environment's Impact on Project Residents and Users

California Building Industry Ass'n v. Bay Area Air Quality Mgt. Dist.,
(2015) ___C4th___ (No. S 213478, Dec. 17)

CEQA generally does not require that public agencies analyze the impact that existing environmental conditions might have on a project's future users or residents, according to the California Supreme Court. In an opinion that resolves a long-debated question, the court held that an analysis of environmental impacts is ordinarily limited to the project's effects on the environment, and need not extend to the effects conditions in the surrounding environment might on the project. An analysis of whether environmental conditions might adversely affect a project's residents or users is required only where the project might worsen existing environmental hazards, or where one of a handful of CEQA provisions which expressly require such an analysis applies (certain airport, school, and housing projects).

Background. The California Building Industry Association, along with other organizations interested in the development of infill housing, objected to CEQA thresholds of significance proposed for adoption by the Bay Area Air Quality Management District. Their key concern was that the thresholds would impede development of infill housing by making an EIR necessary any time future residents might be adversely affected by existing air pollution, which was more likely to occur at infill sites near busy roadways and freeways. CBIA filed a legal challenge after the thresholds were adopted, arguing that CEQA does not require an analysis of the impacts that existing environmental conditions might have on a new project's residents.

An analysis of the environment's impact on a project's residents or users is generally not required. A key issue before the supreme court was the validity of a provision of the CEQA Guidelines that indicates that CEQA requires an evaluation of existing environmental conditions at the site of a proposed project that might cause significant adverse impacts to future residents or users of the project. The District contended that CEQA's references to adverse effects on people imply that such an analysis is required. The supreme court disagreed, concluding that in light of CEQA's text, structure and purpose, a general requirement for an analysis of how existing environmental conditions will affect a project's future users or residents would improperly expand the scope of the statute and add significantly to the burdens of compliance. As the court put it: "Given the sometimes costly nature of the analysis required under CEQA when an EIR is required, such an expansion would tend to complicate a variety of residential, commercial, and other projects beyond what a fair reading of the statute would support."

An analysis of whether a project may exacerbate existing environmental hazards is required. While there is no general requirement in CEQA that the environment's effects on a project be evaluated, CEQA does mandate that an analysis of a project's impacts consider whether the project might worsen the effects of existing environmental hazards. The court accordingly upheld language in the Guidelines which require an analysis of any significant effects a project might cause by bringing development and people into an area, or by locating development in areas susceptible to hazardous conditions. "Because this type of inquiry still focuses on the project's impacts on the environment—how a project might worsen existing conditions—directing an agency to evaluate how such worsened conditions could affect a project's future users or residents is entirely consistent with this focus and with CEQA as a whole."

Several statutory exceptions to the general rule require an analysis of impacts to project users or residents in specific situations. The court also discussed several provisions of CEQA that require an analysis of the adverse effects of existing environmental conditions on persons who will occupy or use a project site. These statutes address certain airport and school construction projects, and the applicability of certain CEQA exemptions to specified types of housing development

projects. The court emphasized, however, that "these statutes constitute specific exceptions to CEQA's general rule requiring consideration only of a project's effect on the environment, not the environment's effects on project users."

Comment. Although several court of appeal decisions make it clear that CEQA does not require an analysis of the impacts of the surrounding environment on the project, the supreme court's decision finally puts the remarkably persistent arguments to the contrary to rest. This will not only reduce the number of unnecessary EIRs for infill residential development projects, it will also significantly reduce the burden of preparing initial studies and EIRs for a broad range of projects by directing their focus where it belongs: on the significant impacts to the environment that may result from the project.

Perkins Coie attorneys Geoff Robinson and Steve Kostka represented a coalition of organizations interested in the development of infill housing, together with various industry groups, who participated in the case as Amici Curiae.

B. EXEMPTIONS FROM CEQA

1. California Supreme Court Clarifies Unusual Circumstances Exception to Use of a Categorical Exemption

Berkeley Hillside Preservation v. City of Berkeley,
(2015) 60 C4th 1086

In an eagerly awaited decision, the California Supreme Court cleared up conflicting appellate decisions about how to apply the "unusual circumstances" exception when using a categorical exemption. The court took the middle ground. It recognized that the exception is not automatically triggered whenever a project may have a significant environmental impact, and that unusual circumstances must be present. But it also acknowledged that evidence that a project will have significant impacts may tend to show that its circumstances are unusual.

Summary. The case involved construction of a large single-family house in the City of Berkeley. The city granted a use permit and found the project exempt from CEQA under two categorical exemptions—Class 3 (construction of small structures) and Class 32 (in-fill development). The city also determined that no exceptions applied, including the exception for a "significant effect on the environment due to unusual circumstances," to negate the use of the exemptions.

The court of appeal overturned the city's determination. It ruled that the possibility that a project might have a significant environmental effect "is itself an unusual circumstance" that bars using a categorical exemption. The supreme court disagreed, holding that the project opponent needed to establish ***both*** that there are unusual circumstances ***and*** that there is a reasonable possibility of a significant environmental impact due to those unusual circumstances.

Unusual circumstances exception not triggered by significant impacts standing alone. The court began by examining the text of CEQA Guidelines section 15300.2(c), which states: "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Based on the plain language of this provision, the court explained that that there must be some showing of unusual circumstances to trigger the exception. Otherwise, the court reasoned, the phrase "due to unusual circumstances" would be rendered meaningless.

The court further reasoned that under the court of appeal's interpretation, categorical exemptions would have little, if any, effect. When there is no evidence that a project will have a significant impact, "further CEQA review is unnecessary; no CEQA exemption is necessary to establish that proposition." Thus, if categorical exemptions could be used only when there is no evidence of a significant impact—when no CEQA review is required to begin with—the exemptions would serve no purpose.

In addition to the text of the CEQA Guidelines, the court explained that its ruling found support in the legislative foundation for categorical exemptions. Specifically, the Legislature directed the Natural Resources Agency and Office of Planning and Research to identify classes of projects that they found would not have a significant environmental effect and to exempt these classes of projects from CEQA. According to the court, requiring CEQA review for projects that are claimed to cause a significant effect, but that these agencies already have determined do not cause a significant effect, would undermine the Legislature's purpose in requiring the statewide adoption of categorical exemptions.

Factors that can establish unusual circumstances. As a counterbalance to the court's ruling that unusual circumstances must be present to trigger the exception, the court adopted an expansive view of how unusual circumstances may be shown. First, the party invoking the exception may establish an unusual circumstance by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. Alternatively, a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect. That evidence, the court stated, "if convincing necessarily also establishes a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."

Two standards of review. The court established two different standards of judicial review—one for the determination whether there are unusual circumstances, and another for the determination whether there are significant effects due to those unusual circumstances. The first determination is reviewed under the deferential substantial evidence standard. Under this standard, an agency's factual determination whether a project presents circumstances that are unusual for the exempt class must be upheld if there is any substantial evidence in the agency's record, contradicted or uncontradicted, that would support that determination. But once an agency determines that a project presents unusual circumstances, the court applies the much less deferential "fair argument standard" in assessing whether there is a reasonable possibility of a significant environmental effect.

Evidence about activities not approved as part of the project is irrelevant. The court also considered how the scope of the project should be defined in assessing its potential environmental impacts. An expert had testified that the house at issue could not be built as proposed and would require additional grading and fill work that likely would result in significant impacts. The court found that this evidence was irrelevant, stating: "A finding of environmental impacts must be based on the proposed project as actually approved and may not be based on unapproved activities that opponents assert will be necessary because the project, as approved, cannot be built." If a project cannot be built as approved, the court reasoned, then the project proponents would have to seek approval to revise the project, and at that time the potential impacts of the revised project would have to be addressed.

The judicial remedy should allow the agency to pursue appropriate options for CEQA compliance. Finally, the court addressed the appropriate remedy where a court overturns an agency's use of a categorical exemption. In such an instance, a court generally should not order the agency to prepare an EIR (as the court of appeal had done), but instead should require the agency to take further action to comply with CEQA, without directing how the agency must exercise its discretion. Depending on the circumstances, such further action by the agency typically would consist of preparing an initial study to determine whether an EIR or mitigated negative declaration would be required.

Comment. The court's ruling charts a middle ground in two important respects: First, it requires a showing of "unusual circumstances," but allows evidence of significant environmental impacts to help make that showing. Second, it establishes two separate standards of judicial review—the more deferential substantial evidence standard to assess the agency's determination whether there are unusual circumstances, and the less deferential "fair argument" standard to assess whether there is a reasonable possibility of a significant environmental effect. It remains to be seen whether and how the court's ruling will be applied to exemption decisions that do not implicate the "unusual circumstances" exception.

2. No Unusual Circumstances Found When Berkeley Hillside Case Returns to the Court of Appeal

Berkeley Hillside Preservation v. City of Berkeley,
(1st Dist. 2015) 241 CA4th 943

On remand from the California Supreme Court, the court of appeal ruled that the unusual circumstances exception did not apply and therefore upheld the City of Berkeley's determination that the proposed single-family residence was exempt from CEQA.

Substantial evidence supported use of the categorical exemptions. The project opponents continued to argue on remand that the project, a large single-family home in the Berkeley hills, posed unusual circumstances due to its size, setting, and impacts and thus should not be allowed under a categorical exemption. In rejecting this claim, the court of appeal explained the limited nature of its review of whether unusual circumstances were present, in light of the direction provided by the supreme court. The court emphasized that it must resolve all evidentiary conflicts and inferences on this issue in the city's favor and affirm the city's finding of no unusual circumstances if there is any substantial evidence to support it.

With respect to the project's size, the court acknowledged that the home "certainly could be considered unusually large, as that term is generally understood by a layperson." But the court refrained from substituting its judgment for the city's, given that evidence in the record supported a conclusion that other homes in the immediate vicinity of the project were similar in size.

With respect to the project's setting on a steep slope within an earthquake hazard zone, the court explained that while there was evidence that the area of the city where the project was located had the potential for earthquake-induced landslides, a site-specific study supported the conclusion that no such hazard was present at the project location. The opponents also asserted that the project setting made the house inconsistent with the city's general plan, but the court found a lack of evidence to support this claim.

With respect to the project's alleged geotechnical impacts, the court of appeal explained that, given the supreme court's ruling, it was not sufficient for the project opponents merely to present a fair argument of a potentially significant impact. Rather, the opponents had to show that substantial evidence did not support the city's finding that there were no unusual geotechnical circumstances. In the court's view, the opponents failed to meet this higher burden.

The traffic management plan for the project was not mitigation. The court of appeal also rejected the claim that the imposition of traffic control measures during project construction amounted to mitigation that precluded the use of a categorical exemption. In so doing, the court distinguished a prior decision in which it held that a project is not eligible for a categorical exemption if it relies on mitigation measures to reduce its significant environmental effects to a less-than-significant level. The court reasoned that managing traffic during project construction "is a common and typical concern in any urban area," and therefore did not constitute mitigation that removes a project from an exemption. In contrast, the project at issue in the prior case required special conditions to protect habitat for a threatened species, in an area the county had designated as "an environmental resource of critical concern."

Comment. The court's ruling on remand highlights the deferential standard of judicial review of the question whether the unusual circumstance exception is triggered. The court's ruling also reinforces the principle that imposition of common, generally applicable conditions on a project approval does not equate with CEQA mitigation that would preclude reliance on a categorical exemption.

3. Categorical Exemption for Rodeo Not Barred by Unusual Circumstances Exception

***Citizens for Environmental Responsibility v. State of California ex rel 14th Dist. Agricultural Ass'n,* (3d Dist. 2015) ___CA4th___ (No. C070836, Nov. 23)**

The court upheld the use of a categorical exemption for a proposed rodeo at a county fairground despite claims that waste from the rodeo would pollute a nearby creek. Applying the standards the supreme court identified in *Berkeley Hillside*, the court rejected arguments that the applicable categorical exemption was barred by the unusual circumstances exception.

Background. In 2011, Stars of Justice proposed a two-day rodeo at the Santa Cruz County fairground. The 14th Agricultural District, which administers the fairground, found the project exempt from CEQA under the Class 23 Categorical Exemption—an exemption that applies to "normal operations of existing facilities for public gatherings for which the facilities were designed, where there is a past history of the facility being used for the same or similar kind of purpose." In granting the exemption, the District noted the long history of similar activities at the fairground involving equestrian events, livestock shows and several annual rodeos. The project opponent challenged the exemption asserting significant impacts would occur due to unusual circumstances and that the exemption improperly relied on mitigation measures.

No showing of unusual circumstances. In concluding the project opponent failed to establish the unusual circumstance exception, the court fashioned a "two-alternative" framework based on the supreme court's decision in *Berkeley Hillside*.

Under the first alternative of this framework, courts must determine (1) whether the project presents circumstances unusual for projects in an exempt class, applying the substantial evidence standard and (2) whether there is a reasonability possibility that the unusual circumstance will produce a significant effect on the environment. Here, the court concluded that the project opponent did not meet the first prong of this test, emphasizing that the unusual circumstances inquiry is exemption- and facility-specific: When determining whether the circumstances of the project differ from the general circumstances covered by the exemption for normal operations of a public gathering facility, it is appropriate to look at the facility's other activities—events or operations that comprise the normal operations of that facility—and compare those circumstances against those presented by the proposed project.

The court rejected the assertion that the basis for comparison should be public gathering facilities in general, not other activities at the fairground. The Class 23 exemption, unlike other exemptions, concerns activities that are "normal operations" of a public gathering facility; the focus, therefore, should be on the activities that make up the specific facility's normal operations.

Applying this standard, there were no unusual circumstances: the project did not propose a significant change from normal operations at the fairground; no unusual environmental risks were presented; and the scope and size of the project were similar to other activities at the site.

This court also described the second alternative for proving the unusual circumstance exception where a party establishes that a project ***will have*** a significant environmental effect. The court emphasized that it was not enough to establish that there is a risk the project ***may have*** a significant effect on the environment; instead, a challenger must establish that the project will actually have an effect on the environment and that it will be significant. Based on the record, the court concluded that the project opponents failed to meet these requirements.

Actions to prevent water pollution were part of normal fairground operations, not a mitigation measure precluding use of an exemption. The District had concluded that its manure management plan would prevent water pollution impacts to a nearby creek. The court found the plan was not a mitigation measure (which would preclude a categorical exemption) because it was a preexisting measure adopted and implemented as part of the ongoing "normal operations" of the fairground.

Comment. The case is one of two published after the supreme court's decision in *Berkeley Hillside* that apply the requisite deferential standard of review to a lead agency's determination that a project does not present unusual circumstances. Essentially, the courts appear to be recognizing a presumption that a project that, on its face, fits within one of the Resource Agency's listed categorical exemptions will not necessitate CEQA review, despite arguments to the contrary about its environmental impacts.

4. Conditions After Completion of Emergency Repair Work Set New Baseline for Later Restoration Work on Site

CREED-21 v. City of San Diego,
(4th Dist. 2015) 234 CA4th 488

The court in *CREED-21 v. City of San Diego* brought some clarity to the relationship between activities that are exempt from CEQA review and the baseline used for analysis of later, related projects. The court determined that CEQA requires that the baseline be based on circumstances existing after the exempt work is completed.

Background. In the mid-2000s, the City of San Diego was faced with significant erosion along a coastal hillside in La Jolla. The city's engineer determined that if the erosion were allowed to continue, it would present an imminent threat to public safety. The city conducted investigations into potential impacts to biological resources. Somewhat later, the city issued an emergency development permit, and found the permit exempt from CEQA due to the emergency. Pursuant to standard city requirements, the emergency permit was subject to a condition requiring that the city's engineering department "apply for a regular coastal permit to have the emergency work be considered permanent."

The city completed the emergency work and then started processing its application for the regular coastal development permit. The application included a plan to revegetate and restore the affected area, using native vegetation that would improve the biological resources of the site. The city issued the permit based on other CEQA exemptions.

The city described the project as including the emergency repair work that had already been completed, plus the proposed revegetation plan. It found the project exempt under the "common sense exemption" in Guidelines section 15061(b)(3) because the revegetation plan would not cause any adverse environmental impacts. The city also cited Guidelines sections 15301 and 15302 (minor repair or replacement of existing facilities), which it determined applied because the project replaced an existing storm drain without increasing capacity.

Baseline is site conditions after completion of emergency work. CREED-21, a group claiming to promote environmental interests, sued. All parties conceded that the emergency work was properly found exempt from CEQA, but they disagreed about the appropriate baseline for reviewing the impacts of the regular permit. CREED argued that the baseline should be circumstances existing when environmental review began, and that environmental review pre-dated the emergency work. The court ruled that the baseline should be set after the emergency work was completed, reasoning that CREED's proposal would, in effect, negate the exemption which applied to the emergency permit. The work completed pursuant to the emergency permit changed the physical environment without any requirement for CEQA review of that work, and review of any further work "must be considered based on the post emergency work physical environment of the site."

CEQA review is limited to further work on the site. The court also disagreed with CREED's argument that the condition requiring a regular permit made the emergency work temporary, and that environmental review was required to determine whether the completed work, which included storm drain repairs, may have a significant impact on the environment. The court concluded that, because the revegetation plan was the only "project" proposed to be carried out at the site after completion of the emergency work, CEQA applied only to that plan, and not to the previously-completed emergency work: in reviewing the

revegetation project under CEQA, the city was required to compare the conditions expected to be produced by the revegetation project with physical conditions as they existed after the emergency work was completed.

No adverse impacts from revegetation plan. The court then evaluated the city's determination that the revegetation plan was exempt. The evidence that the bare dirt and non-native plants existing in the baseline circumstances would be replaced by native plants was sufficient to comprise substantial evidence that supported the city's exemption determination. Because the common sense exemption of Guidelines section15061(b)(3) was adequate, the court found it unnecessary to examine the existing facility exemptions the city also cited.

Comment. CEQA's exemption for actions taken to prevent or mitigate an emergency is intended to allow agencies to start work immediately without having to complete CEQA review before doing so. The city's determination the initial phase of work was exempt necessarily meant that only later work on the site would be subject to CEQA, and would necessarily be limited to impacts of that later phase of the work.

5. Categorical Exemption for School Closures Not Supported by Sufficient Evidence

Save Our Schools v. Barstow Unified Bd. of Education,
(4th Dist. 2015) 240 CA4th 128

The Fourth District Court of Appeal held that a school district's determination that school closures were categorically exempt from CEQA was not supported by substantial evidence in the record.

Background. The Barstow Unified School District approved closure of two elementary schools and the transfer of the students to other schools. The District Board concluded that these decisions were exempt from environmental review under the categorical exemption in CEQA Guidelines section 15314 for "minor additions to existing schools," which exempts school closures and student transfers "where the addition does not increase original student capacity" of any receptor school "by more than 25% or ten classrooms, whichever is less."

No substantial evidence to support use of exemption. The court of appeal found that although the administrative record included current *enrollment* figures for the receptor schools, it did not contain any information regarding the enrollment *capacity* of these schools, rendering it impossible to determine whether the transfers would increase capacity in any of these schools by more than 25% or ten classrooms. This court found this omission was exacerbated by the Board's decision to allow transferring students to attend any receptor school of their choice. The record thus contained no substantial evidence to support the Board's conclusion that student capacity of any receptor school would not increase beyond the levels allowed under the categorical exemption, and reliance on the categorical exemption was accordingly invalid.

Comment. The court of appeal directed issuance of a writ of mandate voiding the District's decision, noting that, upon reconsideration, the Board could consider evidence not contained in the original record, including the enrollment capacity of the receptor schools. This relief is consistent with a recent trend in which reviewing courts do not dictate the specific action the agency should take in response to a decision finding a violation of CEQA, but instead leave it to the agency to determine the steps that should be taken to correct the error.

6. Agency Has Burden to Produce Evidence Showing that Categorical Exemption for Actions that Enhance or Protect the Environment Applies

Save Our Big Trees v. City of Santa Cruz,
(6th Dist. 2015) 241 CA4th 694

The City of Santa Cruz failed to establish with substantial evidence that amendments to its Heritage Tree Ordinance and Heritage Tree Removal Resolution were categorically exempt from CEQA.

Background. In 2013, the city amended its Heritage Tree Ordinance and Heritage Tree Removal Resolution. The ordinance governs the protection of large trees and other significant trees within the city, while the resolution governs the removal of heritage trees. The city deemed the amendments categorically exempt from CEQA, reasoning that they qualified for the exemptions that apply to projects that assure the "maintenance, restoration, enhancement, and protection" of natural resources or the environment. A community group sought to have the amendments set aside, asserting that the amendments could not be exempted because they weakened existing tree protections. The trial court denied their petition, but the court of appeal reversed.

City must show terms of exemption are met. The court of appeal emphasized the standard that applies in reviewing the exemptions for activities that will protect natural resources or the environment (the Class 7 and Class 8 exemptions) is "whether substantial evidence supports the determination that the project will assure the maintenance, restoration, or enhancement of the environment." The lead agency bears the burden of producing such evidence. The challenger is not required to produce evidence that the project will harm the environment.

The amendments would reduce some environmental protections. The court interpreted the exemptions to be limited to "projects that combat environmental harm, but not those that diminish existing environmental protections." The court observed that the ordinance amendments removed protection from trees that formerly would have been protected, because the amendments require a city council resolution to designate a heritage tree based on its horticultural significance; previously, a tree could easily acquire a heritage tree designation, for instance, if a person planted it as a "commemorative" tree. Further, the amendments relaxed existing protections for heritage trees by making it easier to remove them. While the city's intent may not have been to encourage the removal of such trees, that did not matter to the court: the amendments allowed for removal of heritage trees under circumstances where removal was not previously permitted, reducing the protections for such trees.

No showing the amendments would maintain or enhance the environment. The court also found that the city offered no evidence that the required replacement of trees would contribute beneficially to the urban environment in the same way as the heritage trees that could be removed. And there was little other evidence that the amendments would enhance the environment in some way. Accordingly, the court held that the city had failed to identify evidence that the amendments would assure the maintenance, restoration, or enhancement of the environment, evidence necessary to support an exemption. The court directed that the city be required to set aside its amendments of the Heritage Tree Ordinance and Heritage Tree Removal Resolution.

Comment. Lead agencies have the burden to produce evidence to support a determination that a project falls within a categorical exemption. The standard for determining whether a project will qualify for a categorical exemption is not whether significant impacts will be avoided, but rather whether there is evidence in the record sufficient to show that the terms of the exemption are satisfied. In this case, there was significant disagreement about the effects of the amendments and their desirability, and relatively little evidence showing how the amendments would enhance the environment. When the applicability of an exemption to a project is not clear on its face, the agency should make certain that the record contains evidence supporting its exemption determination.

7. Court Holds CEQA Requires Public Notice of Intent to Rely on CEQA Exemption

Defend Our Waterfront v. California State Lands Commission,
(1st Dist. 2015) 240 CA4th 570

In a decision that appears to reflect an emerging judicial trend, a court of appeal has taken an expansive view of a public agency's obligation to give public notice of its intentions under the California Environmental Quality Act. The court held that the State Lands Commission violated CEQA where its public notice did not mention the agency's intent to rely on a CEQA exemption for a land exchange agreement. In addition, the court held that where there is no boundary or title dispute, CEQA's statutory exemption for "settlements of boundary and title problems by the State Lands Commission" does not apply.

Background. The State Lands Commission is responsible for enforcing California's public trust rights to submerged and formerly submerged lands. To facilitate a development along San Francisco's Embarcadero, the Commission agreed to a "trust exchange" with the City of San Francisco and developers to remove the public trust from one lot and apply it to a different area within the proposed development footprint. Project opponents petitioned for a writ of mandate, challenging the Commission's determination that the agreement was exempt from CEQA review.

Notice and exhaustion of remedies. The Commission's first defense was that the petitioner had not exhausted its administrative remedies before filing suit, as CEQA requires, because its members had not objected to the CEQA exemption before the Commission approved the trust exchange. The court held, however, that because the Commission's public hearing notice did not mention CEQA, much less the CEQA exemption being relied upon, the Commission "failed to give the notice required by law" within the meaning of CEQA section 21177(e), and therefore the petitioner was not required to exhaust its remedies by objecting to the exemption. Notably, the court did not cite any provision of CEQA or other statutes requiring that notice of intent to rely on a CEQA exemption be included in public agency notices.

Trust exchange exemption. Public Resources Code section 21080.11 provides a statutory exemption from CEQA for "settlements of title and boundary problems by the State Lands Commission and . . . exchanges or leases in connection with those settlements." In this case, the Commission conceded that the only "problem" addressed by the exchange agreement was that the public trust obstructed construction of a development project. Noting the use of the word "settlement" in the exemption, as well as the Commission's authority to "resolve boundary or title disputes," the court held that the word "problems" referred to "disputes," not to the public trust's potential interference with local economic goals. The Commission had the power to enter into a land exchange agreement, but could do so only after complying with CEQA.

Comment. Although State Lands Commission land exchange agreements are common, the most important holding of this case may be the determination that the Commission violated CEQA by issuing a public notice that did not mention the Commission's intent to rely on a CEQA exemption. Nothing in CEQA or the notice statute under which the Commission operates requires that information to be included. The case reflects a judicial trend toward demanding CEQA information in public notices even where no statute or regulation requires them, and thus creates a trap for the unwary public agency that looks only to such sources when issuing its notices.

C. NEGATIVE DECLARATIONS

1. Adoption of Mitigated Negative Declaration Proves To Be an Uphill Battle

Keep Our Mountains Quiet v. County of Santa Clara,
(6th Dist. 2015) 236 CA4th 714

CEQA sets a low bar for preparation of an environmental impact report: if substantial evidence supports a fair argument that a project may result in a significant environmental impact, the agency must prepare an EIR rather than adopt a negative declaration.

In *Keep Our Mountains Quiet*, the court reviewed a county's mitigated negative declaration for a use permit to allow weddings and other events on a rural property in the Santa Cruz mountains. Based on competing expert reports, agency comments, and lay testimony about noise and traffic, the Sixth District Court of Appeal held the county violated CEQA when it adopted the MND in instead of preparing an EIR.

Background. Candice Clark Wozniak owned a rural property in the Santa Cruz Mountains, which she regularly rented out for weddings and other events. After receiving complaints from neighbors regarding loud noise from music and party guests, the county required Wozniak to obtain a use permit. The permit limited the number of events, limited the number of guests per event, restricted amplified music, and allowed only one outdoor live band event with the potential to host additional outdoor live band events upon demonstration of compliance with county noise standards.

Evidence of noise and traffic effects. The county adopted a mitigated negative declaration based in part on noise studies performed during a test event at which an expert measured sound levels generated by music emanating from the project site. The neighbors contested the noise studies on the grounds that the expert had turned down the music to a level lower than the expert had testified commonly occurs, that the noise study did not account for crowd noise. With regard to the mitigated negative declaration's traffic conclusions, neighbors cited specific roadway conditions that could be exacerbated by increased traffic to and from the project site. Caltrans—the agency with jurisdiction over the mountain road leading to the site—opined that the project would result in significant traffic safety impacts. While Caltrans ultimately concluded it would address its concerns during its own encroachment permit process, it never clearly stated that impacts would be reduced to a less-than-significant level.

The court's analysis. First, the court ruled that compliance with general plan noise standards does not necessarily mean a project will not have a significant noise impact. Agencies also must evaluate the change in noise levels caused by a project, even if the total noise would be beneath numeric standards.

Second, the court determined information in the county's own expert report along with testimony from neighbors about the noise that they experienced during prior weddings on the same site constituted substantial evidence supporting a fair argument of a potential significant impact. Speculation about potential future impacts is not substantial evidence. But testimony based on past events can be. This was especially true where the expert reports left gaps as to why measurements were not taken at the sound levels the county's own expert had testified typically occur during weddings and other outdoor events.

Third, the court ruled that the combination of an expert report showing that the project would double peak traffic levels, testimony from neighbors about dangerous conditions on the mountain roads used to access the project site, and repeated concerns from Caltrans—the agency with jurisdiction over the access road—constituted substantial evidence supporting a fair argument that the project could result in significant traffic safety effects.

By contrast, the court ruled that there was no substantial evidence of possible adverse effects on potential users of possible future trails near the project site. The court noted that CEQA requires evaluation of impacts to the existing environment. "Thus, we need not consider the impacts on hypothetical users of nonexistent trails."

Comment. The opinion analyzes and distinguishes prior cases addressing the question whether lay testimony is substantial evidence for purposes of triggering preparation of EIR. This case does not indicate that lay testimony regarding noise and traffic effects will always constitute substantial evidence. Rather, lay testimony that clearly shows a factual foundation, and that is based on personal observations is far more likely to be treated as substantial evidence than lay opinion or argument about possible future effects.

D. ENVIRONMENTAL IMPACT REPORTS

1. Supreme Court Establishes Complex New Requirements for CEQA Analysis of Greenhouse Gas Emissions

Center for Biological Diversity v. Cal Dept of Fish & Wildlife,
(2015) ___C4th___(No. S217763, Nov. 30)

Newhall Land and Farming received still another setback in its 20-year effort to obtain entitlements to develop the 12,000-acre Newhall Ranch project, this time from the California Supreme Court. The court ruled that the California Department of Fish and Wildlife's environmental impact report on two natural resource plans for the development project failed to pass muster under CEQA.

Summary. The county had approved the land use plan for the development project in 2003. CDFW approval of resource plans and permits were still required, however, which necessitated additional CEQA review. CDFW and the Corps of Engineers prepared a joint EIS/EIR for the resource plans.

The California Supreme Court found CDFW's CEQA review legally inadequate, concluding that the analysis of greenhouse gas emissions was not supported by substantial evidence and that mitigation measures calling for capture and relocation of a fully protected species were invalid. The court's rulings on how greenhouse gas impacts should be assessed, especially its treatment of goals for statewide emissions reductions that were developed to implement A.B. 32, the Global Warming Solutions Act of 2006, will likely have a major long-term effect on environmental reviews for proposed projects throughout California.

Analysis of Greenhouse Gas Emissions. The EIR/EIS analyzed GHG emissions using A.B. 32 emissions reductions targets as standards of significance, specifically the 29 percent below "business as usual" goal set out in the Air Board's 2008 Scoping Plan. The EIR/EIS concluded that because the development project's GHG emissions would be 31 percent below the business as usual estimates for the project, it exceeded the statewide goals set out in the Scoping Plan, and would therefore not have any significant GHG impacts.

The court approved CDFW's use of consistency with A.B. 32 and the Scoping Plan emissions reductions goal as a standard of significance. Under the court's reasoning, agencies may show that a project would have no significant impact due to GHG emissions by demonstrating that the project will not interfere with attainment of the Scoping Plan's goal that GHG emissions statewide be reduced by 29 percent from business as usual.

The court, however, disagreed with CDFW's conclusion that showing a "project-level reduction" that meets or exceeds the reduction goal of 29 percent below business as usual is sufficient to show that the individual project's GHG emissions would be reduced sufficiently to achieve the statewide goal. A 29 percent reduction by an individual project is not necessarily consistent with the goal that all emissions throughout the state be reduced by 29 percent: "the Scoping Plan nowhere related

that statewide level of reduction effort to the percentage of reduction that would or should be required from individual projects, and nothing . . . in the administrative record indicates the required percentage reduction from business as usual is the same for an individual project as for the entire state population and economy."

According to the court, the EIR simply assumed that the level of effort required to achieve a 29 percent reduction from business as usual statewide emissions equates to a 29 percent reduction from individual development projects. The court noted that an agency might be able to determine what level of reduction from business as usual emissions is required for an individual project based on an examination of the data behind the Scoping Plan's model. But it provided little guidance on how such an examination might proceed. The court also noted that agencies may resort to numerical thresholds for analysis of the significance of greenhouse gas emissions but left unanswered the question of when use of such thresholds might be sufficiently supported by evidence in the record.

Species capture and relocation mitigation. CDFW adopted numerous biological impact mitigation measures for the project, including measures that provided for collection and relocation of the unarmored three spine stickleback, a fully protected species under the California Endangered Species Act. The court acknowledged that CDFW may conduct capture and relocation of the stickleback as a "conservation measure to protect the fish and aid in its recovery," but held that an agency "may not rely in a CEQA document on the prospect of capture and relocation as mitigating a project's adverse impacts."

The court reasoned that Fish and Game Code section 5515 prohibits "taking" a fully protected species, and that actions to capture and relocate must be considered a taking given the statutory language, structure, and history.

Comment. The use of consistency with the Scoping Plan's emissions reduction target as a threshold of significance has become relatively common. Although the court approved use of such a threshold of significance, it found the EIR inadequate because if failed to show "a quantitative equivalence" between that goal and the EIR's project-level analysis of emissions reductions. In effect, the court's ruling assumes that greenhouse gas emissions reductions by new projects must be greater than the statewide goal for that goal to be achieved. The Scoping Plan does not, however, identify specific quantitative efficiency levels that various categories of new or existing projects should meet, and it is not at all clear how such efficiency measures might be formulated for individual projects. As a result, the court's opinion will introduce significant near-term confusion and uncertainty about how greenhouse gas emissions should be analyzed under CEQA, and may significantly increase the likelihood and risk of CEQA litigation brought to challenge project approvals.

2. Supreme Court Holds that a State Agency's Duty to Mitigate Significant Environmental Impacts Does Not Depend on a Legislative Appropriation of Funds for Mitigation

City of San Diego v. Board of Trustees of the Cal. State Univ.,
(2015) 61 C4th 945

The California State University system may not condition its funding of mitigation for off-site impacts of a campus expansion project on receipt of a legislative appropriation earmarked for that purpose, according to the California Supreme Court. The effect of the supreme court's decision is that state agencies will have to look to existing appropriations and other available sources to fund off-site mitigation for projects they undertake, and will be precluded from shifting the cost of mitigation to regional and local agencies simply because the Legislature has not appropriated funds for mitigation. The court's opinion does, however, leave a key question unanswered: When can a public agency considering its own project decide that a measure is economically infeasible?

Background. The case involved a challenge to the environmental impact report for a plan to expand the San Diego State University campus. The plan calls for development of faculty and staff housing; a hotel and campus conference center; new

student housing; expansion and renovation of the student union; and new buildings for academic, research and medical use, along with a supporting parking structure.

The EIR found that the expansion project would worsen congestion on city streets and a nearby freeway. The CSU Board agreed with the city and CalTrans on the University's fair share of the cost of mitigation—about $15 million—but declined to commit the funding, taking the position that the University is required to pay for off-campus mitigation only if the Legislature appropriates funds specifically for that purpose.

Reasoning that the Legislature might not appropriate funds for mitigation, the Board determined that off-campus traffic mitigation was infeasible and adopted a statement of overriding considerations.

No legal support for University's determination off-site mitigation is infeasible. The California Supreme Court unanimously rejected the University's legal arguments, concluding that:

- The court's 2006 decision discussing the University's duties under CEQA to mitigate environmental impacts through fair-share payments (*City of Marina v. Board of Trustees*) did not support the Board's claim that the University may lawfully contribute funds for off-campus mitigation only through a legislative appropriation earmarked for that purpose.
- Most of the proposed new campus facilities will be financed with non-appropriated funds through revenue bonds, student fees, donations, and joint ventures with private interests. The University's authority to undertake such projects necessarily includes the authority to budget for the costs of mitigation.
- The expansion plan EIR calls for a variety of on-site mitigation measures that will be funded through project budgets. There is no reason to conclude that off-site mitigation measures cannot be funded the same way. CEQA does not draw a distinction between on-site impacts and off-site impacts, and instead refers to the environment as the area that "will be affected by a proposed project."
- CEQA expressly subjects the Board's decisions concerning campus master plans to its requirements and does not exempt those plans from the duty CEQA imposes to mitigate significant environmental impacts when it is feasible to do so.

A rule allowing state agencies to avoid off-site mitigation would have significant negative consequences. The court also identified what it viewed as the broader consequences of a rule allowing state agencies to condition off-site mitigation on the availability of a specific legislative appropriation. Such an appropriation condition, the court concluded, would necessarily apply to all state agencies, forcing the Legislature to decide, on a case-by-case basis, whether off-site impacts of state projects should be mitigated. Any time the Legislature failed to make a requested appropriation for a state project, local and regional agencies would be saddled with the state's share of the cost of addressing the project's impacts on local infrastructure.

The court also pointed out that the Board's proposed exception would result in off-site mitigation being found infeasible for many state projects that receive funding from sources other than the Legislature. A state agency's authority to participate in such projects necessarily includes the authority to ensure that mitigation costs are included in the project budget, and an earmarked legislative appropriation for mitigation cannot necessarily be expected for such projects.

An unanswered question: When can a public agency find a mitigation measure economically infeasible? Turning to the University's more general arguments, the court rejected the contention that the University should not be required to demonstrate, in the EIR process, "that its budget has adequately balanced competing educational and environmental demands" such as whether its funds "would be better spent on more classrooms or more traffic lights."

These arguments, according to the court, missed a fundamental point: that an agency cannot leave a project's significant environmental impacts unmitigated "based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible."

Comment. CEQA specifies that a public agency may reject mitigation measures for a variety of reasons, including economic infeasibility. The opinion, however, does not address how public agencies should measure the economic feasibility of mitigation measures for the projects they undertake. The budgeting process for public agencies necessarily entails a balancing of competing agency goals and interests. Although the mitigation of environmental impacts is an important objective for all public agencies, by providing that only mitigation measures that agencies determine are feasible need be adopted, CEQA reserves their discretion to decide whether the cost of particular mitigation measures is practicable in light of the other demands on the limited financial resources available to them. While the courts have provided some guidance on how this question might be addressed when public agencies are considering the feasibility of mitigation measures for private projects, they have not yet considered the question in the context of public agency projects.

3. CDFW Program EIR that Provides Standards for Conducting Later Site-Specific Analyses of Impacts of Fish Hatchery and Stocking Programs Upheld

Center for Biological Diversity v. Department of Fish and Wildlife,
(3d Dist. 2015) 234 CA4th 214

The court of appeal held that the first-ever program environmental impact report for the state's fish hatchery and stocking programs complies with CEQA, but also found that three of the EIR's mitigation measures constituted "underground regulations" in violation of the Administrative Procedure Act.

The fish-stocking programs. Since the late 19th century, the California Department of Fish and Wildlife has been required by statute to conduct a massive fish hatchery and stocking program. But hatchery trout introduced into mountain lakes contribute to declining amphibian populations, and hatchery salmon and steelhead are causing hybridization, which reduces the genetic diversity and strength of the fish species. As the result of a CEQA lawsuit, the Department was required to prepare its first EIR on the state-mandated program. The Department decided to include in the EIR several other programs, including one that authorizes fish stocking in lakes and ponds by private aquaculture facilities.

The program EIR. The Department prepared a program EIR that analyzed the program's species impacts on a statewide, rather than a site-by-site, basis. The EIR included protocols and plans for discovering and mitigating site-specific impacts at the nearly 1,000 water bodies the Department stocks and the 24 hatcheries it oversees. The EIR's baseline for environmental review, and its no-project alternative, was ongoing operation of the program as it had functioned from 2004-2008.

As for the private fish stocking programs, the EIR identified, and the Department adopted, new prerequisites and monitoring and reporting obligations for private vendors.

CBD's CEQA challenge. The Center for Biological Diversity alleged the EIR was inadequate for failing to perform site-specific review for each fish stocking site; deferring formulation of protocols and management plans; using the current stocking enterprise as the environmental baseline; and failing to consider a reasonable range of alternatives, including cessation of all hatchery and stocking operations. The court rejected each of these claims.

First, the court found the EIR adequate because it analyzed "every impact that reasonably could occur by stocking fish in any water body in the state based on information currently known . . . . Site-specific analysis will likely not reveal any unanticipated impacts; instead, it will reveal whether the impacts discussed in the EIR are occurring at that site." The court further held that nothing in CEQA required that the later site-specific reviews occur in a public process.

Second, the court found that the EIR identified sufficient performance standards for the future development of aquatic biodiversity management plans and hatchery genetic management plans, so that mitigation of species impacts was not impermissibly deferred.

The court easily dispensed with CBD's third claim, stating: "CEQA and case authority hold the baseline for a continuing project is the current environmental condition including the project, even if the project has not undergone prior environmental review."

The court gave equally short shrift to CBD's argument that the range of alternatives studied in the EIR was inadequate, and particularly that a no-stocking alternative should have been analyzed, given that the Department was required by statute to stock millions of pounds of fish each year.

Comment. This case is most notable for its strong endorsement of program EIRs that do not include site-specific analysis, but instead set the rules for conducting them, and its approval of mitigation through management programs to be developed later and tailored to address site-specific conditions. It also stands out as a case presenting a good example of a situation in which existing conditions, measured over a period of years, can represent an acceptable baseline for CEQA review.

4. EIR for Basketball Arena Upheld Despite Multiple Challenges to Its Impact Analysis

***Saltonstall v. City of Sacramento*, (3d Dist. 2015) 234 CA4th 549**

Opponents took another shot at halting the new Sacramento Kings arena project, challenging the project EIR on a variety of grounds. But the court of appeal upheld the EIR, rejecting every one of the opponents' arguments.

The arena project. The Sacramento Kings have played in Sleep Train Arena, located in the Natomas area of Sacramento, since it opened in 1988. In March 2013, an investor group presented a plan to acquire the Sacramento Kings, construct a new downtown arena in partnership with the city, and keep the team in Sacramento on a long-term basis. The city council approved a preliminary nonbinding term sheet for development of a new entertainment and sports center in downtown Sacramento. In 2013, the NBA approved the sale of the Kings to the investor group, reserving the right to acquire and relocate the franchise to another city if a new arena was not opened in Sacramento by 2017.

To facilitate meeting this deadline, the Legislature amended CEQA exclusively for the downtown arena project. The legislation also specifically allowed the city to prosecute an eminent domain action to acquire the arena site before completing CEQA review.

After the EIR for the project was certified, opponents sued, challenging the constitutionality of state legislation that modified several CEQA deadlines. The court of appeal rejected the opponents' constitutional challenge to the state CEQA legislation. Undeterred, opponents filed this second case challenging various aspects of the city's CEQA review.

Premature commitment. Opponents argued that the city violated CEQA by committing itself to a definite course of action on the project by entering into the term sheet and prosecuting an eminent domain action before environmental review was completed. The appellate court rejected the claim, concluding that the term sheet did not constitute an impermissible commitment to the project. The term sheet included a disclaimer that the city had no obligation to build, finance, or approve the project until it completed CEQA review and secured all necessary permits for the project. The term sheet further stated the city retained sole discretion to weigh the environmental consequences and to reject the project entirely. Moreover, the term sheet was not a binding contract that would commit the city to proceed with the project.

The court also concluded that the city's exercise of eminent domain prior to completion of environmental review was both permissible under CEQA and explicitly sanctioned under the state legislation adopted for the Kings arena project.

Project alternatives. The court rejected opponents' argument that the city failed to study a reasonable range of alternatives by not considering a remodeled Sleep Train Arena. The city had evaluated a "no project" alternative that would have continued use of Sleep Train Arena as well as a new arena in the Natomas area, and concluded both of these alternatives failed to meet the city's key objective for the project: to revitalize the city's downtown area. The court concluded that the analyses of the arena reuse and new arena alternatives were sufficient, and the city was not required to study an alternative involving remodeling the Sleep Train Arena since that was simply a variation on the two alternatives that were examined.

Traffic impacts. Opponents also argued that while the EIR had studied the timing and extent of traffic congestion on I-5 that would result from the project, it was defective for failing to separately study the project's impacts on drivers from outside the area traveling on I-5. The court responded that the city had no obligation to separately consider the effect of the project on motorists subject to the same traffic conditions as local motorists "simply because their trip origins and destinations might have been different than local commuters."

Crowd safety. The court also rejected opponents' argument that the city failed to study post-event crowd safety and potential for violence because "mere speculation about possible crowd violence and its possible effect on the environment" does not require review in an EIR. Impacts to safety caused by event crowds, do not, according to the court "implicate an environmental issue that must be reviewed under CEQA."

Comment. *Saltonstall* represents the latest in a growing line of cases that have rejected claims a public agency improperly committed itself to approve a project before complying with CEQA. In *Save Tara v. City of West Hollywood*, decided in 2008, the California Supreme Court defined the proper test for a premature commitment to a project as being whether the agency had committed itself "as a practical matter" to approve the project before completing CEQA review. Cases addressing the issue since Save Tara have, however, largely ignored that test and focused instead on whether the agency had entered into a contract which prevented it from disapproving the contract or approving an alternative to it.

5. EIR Comments Should Improve the Environmental Review Process, Not Derail It

***City of Irvine v. County of Orange*, (4th Dist. 2015) 238 CA4th 526**

Comments on a draft EIR are not interrogatories and should not be treated as a mechanism for wearing down the lead agency. The CEQA Guidelines require only that a lead agency give detailed responses to comments on a draft EIR that identify an important new matter or raise questions about a significant environmental issue, according to the court's decision in *City of Irvine v County of Orange*.

Background. The decision resolved the third unsuccessful attempt by the City of Irvine to stop Orange County's proposed expansion of its Musick jail facility. Orange County first prepared an EIR for the project in 1996. The plans stalled due to lack of sufficient funding, but were revived in 2012, when the county certified a supplemental EIR which reflected changes to the project since the original EIR had been prepared. Irvine sued to challenge the EIR, asserting, among other claims, that the county's responses to Irvine's comments on the draft supplemental EIR were inadequate.

The county's responses to comments adequately addressed the important environmental issues raised in the comments. The court of appeal held that the county's responses to Irvine's comments were adequate and, to the extent any of them might be viewed as lacking in some respect, Irvine did not show any prejudice. The court noted that the key purpose of the comment process is to produce a better EIR by raising issues the lead agency may have overlooked in preparing the

draft EIR. The agency must confront comments that raise a significant environmental issue or that bring a new issue not previously addressed to the table. On the other hand, it need only provide brief responses to comments that are merely objections to the project itself. And a response can be sufficient if it refers a discussion in the draft EIR that addresses the environmental concerns raised by the comment. The court also referred to a significant recurring problem—that project opponents can use the comment process to wear down a lead agency by making onerous demands for information in an effort to delay or derail the project—and noted that this type of abuse of the process should not be condoned. Based on these principles, the court concluded that the county adequately responded to Irvine's comments.

Preparation of a supplemental EIR rather than a new EIR was appropriate. The court also rejected Irvine's argument that the county should have prepared an entirely new EIR rather than a supplemental EIR. The court explained that a lead agency has discretion to choose whether to prepare a supplemental EIR or a new, ground-up EIR, and that "the appropriate judicial approach is to look to the substance of the EIR, not its nominal title." The court held that the county did not abuse its discretion in choosing to prepare a supplemental EIR because many aspects of the project remained the same, and the supplemental EIR (which was several times longer than the original EIR) adequately addressed the new issues and changes to the project since preparation of the original EIR.

Interim traffic impacts need not be studied. The court held that it was sufficient for the county to evaluate traffic impacts at the beginning and end of the project, without studying interim traffic impacts during the period of time it would take to complete the project. The court concluded that an analysis of traffic impacts at the start of the project in 2014 and at the completion of the project in 2030 was sufficient, and the County was not required to do more, particularly since a comparison of the data showed no material difference in the impacts that would occur over time.

Farmland conservation not required as mitigation. Finally, the court held that the county properly concluded that three proposed mitigation measures for the loss of agricultural land on the project site—purchasing agricultural conservation easements, creating a transfer-of-development-rights program, and enacting a right-to-farm ordinance—were not feasible. A conservation easement does not actually replace lost agricultural land. And in Orange County the "astronomical expense of land" clearly supported the county's finding that the purchase of conservation easements is a "non-starter." And, for practical reasons, the county found neither a TDR program or a right-to-farm ordinance would be a viable option.

Comment. The court's opinion demonstrates the substantial discretion that a lead agency has in preparing an EIR, and the heavy burden on project opponents to show a prejudicial abuse of that discretion when challenging an EIR. The court's analysis of the arguments about the adequacy of the county's responses to comments will likely have a significant influence on how the courts evaluate such claims in the future; the decision explicitly recognizes that the responses should focus on comments that raise important issues that were missed in preparing the EIR, rather than on comments that contain nothing more than burdensome demands for collateral information. The court's detailed discussion of conservation easements as mitigation, and its recognition that they do not actually affect the quantity of farmland that is lost when farmland is developed, may also have an influence on how this issue is viewed in future cases.

6. Historical Level of Use May Serve as CEQA Baseline for Replacement of Vacant Building

North County Advocates v. City of Carlsbad,
(4th Dist. 2015) 241 CA4th 94

North County Advocates is a potentially groundbreaking decision on use of historical levels of operations as the baseline for gauging the environmental impacts of a proposed project under CEQA. In this case, which concerned renovation of a large Westfield shopping center in Carlsbad, the court upheld the city's use of a traffic baseline that assumed an existing department

store building was fully occupied, even though the store had been vacant for almost six years at the time the draft EIR was released.

Background. The shopping center was built in 1969, with five anchor department store buildings and numerous smaller retail shops, including a now-vacant Robinsons-May department store. Under the terms of an existing precise plan for the shopping center, Westfield was entitled to renovate the interior of the former department store and fully occupy it without obtaining discretionary approvals from the city. The development plan the city approved for renovation of the center, however, called for the building to be demolished and reconstructed.

The city's analysis. In its analysis of traffic impacts, the city's EIR, completed in 2012, assumed full-occupancy of the former Robinsons-May store, which had been vacant since 2006, three years before the city began work on the EIR. The EIR and supporting documents explained this baseline was appropriate because the "nature of a shopping center is that tenants change and the amount of occupied space constantly fluctuates" and that portions of the space are periodically occupied with temporary uses. The EIR noted that the new building would not increase the square footage allowed under the precise plan and that the vacant space could be reoccupied at any time without further discretionary action. It also pointed out that a full occupancy assumption comports with SANDAG's regional traffic modeling methodology, which assumes full occupancy of all entitled square footage.

The court's decision. The project opponents contended that the EIR's baseline was "incorrect and misleading" because it did not follow the general rule that conditions as they exist when environmental review begins should be used as the baseline for measuring a proposed project's changes to the environment. They asserted the city had "falsely inflated" existing traffic conditions by imputing over 5,000 daily trips from the vacant space to the baseline, resulting in a defective analysis of the project's true traffic impacts.

The court responded that CEQA does not impose a uniform, inflexible rule. Agencies may exercise discretion to account for a temporary lull or spike in operations that occurs over time. "As long as that exercise of discretion is supported by substantial evidence, the court will not disturb it."

The court held the city's use of the full occupancy traffic baseline was reasonable and supported by the evidence. Full occupancy was not a hypothetical condition. It was based on the actual historical operation of the space for more than 30 years, up until 2006. Fluctuations in occupancy are expected of a shopping center, and the city had discretion to take account of temporary swings in occupancy in selecting an appropriate baseline.

Comment. While the store had operated at such a low level for several years that operations there had virtually ceased, the court nevertheless ruled that "historical" operational levels could be used as the baseline, referring to the time during which the building had been fully occupied. The court's approval of the EIR's use of a historical conditions baseline is consistent with guidance in other recent cases on the appropriate baseline for an impact analysis. The court's opinion could be read narrowly as applying only to situations in which a vacant building is being replaced, and the owner has the right to continue operating at historical levels if the replacement project is not approved. It will likely be read more broadly, however, to mean that historical operational levels can be treated as the baseline whenever a facility is being replaced or reoccupied, despite a significant gap in occupancy or significant fluctuation in operations over time. This is an important ruling given that market conditions can cause operations to fluctuate substantially .over time. Under this case, an agency can look back to historic highs in operations to establish a baseline, rather than setting a baseline based on operations that happen to occur at commencement of environmental review.

7. Recirculation Not Required for New Information that Confirms EIR's Analysis; Localized Significance Thresholds Not Required for Construction Emissions

***Beverly Hills Unified School District v. Los Angeles County Metropolitan Transportation Authority,* (2d Dist. 2015) 241 CA4th 627**

The court upheld the CEQA analysis for an extension of the L.A. Metro subway against claims that significant new information had been disclosed relating to the viability of alternatives, and that localized air pollution and public health impacts had not been adequately studied.

Background. The Los Angeles County Metropolitan Transportation Authority prepared and certified an EIS/EIR for extension of Metro's subway system to the west side of Los Angeles. The EIS/EIR studied two alternative location options for a Century City station and recommended that the station be located at one of those locations. Metro approved the subway project with the station at the recommended location and a related tunnel alignment beneath Beverly Hills high school. The city and school district objected to the tunnel location and filed suit to challenge the EIR following Metro's approval.

Recirculation not required where new information confirms EIR's analysis. The court rejected the two CEQA claims raised by the project opponents. First, the court held that Metro was not required to recirculate the EIS/EIR for another round of public comment after introducing a fault investigation and tunnel safety reports in final EIR/EIR. The court ruled that the new information "merely confirmed" that the alternative Century City station location was not viable due to a potential seismic hazard, and "also confirmed and expanded upon" the draft EIS/EIR's analysis of the environmental impacts from the recommended station. The court also held that Metro did not trigger an obligation to recirculate by issuing an addendum to the final EIS/EIR that revised reported air quality impacts.

Air quality impacts need not be analyzed against localized significance thresholds. The court upheld the EIS/EIR's air quality analysis, concluding that CEQA did not require an assessment of localized air pollution and public health impacts from the project's construction. The court determined that Metro was not required to analyze air quality impacts against localized significance thresholds, given that the agency analyzed the impacts against thresholds established by the regional air quality management district. Similarly, the EIS/EIR appropriately included a technical report that identified potential adverse health effects from exposure to identified pollutants from construction emissions; the document did not also need to include "an analysis showing how the actual construction emissions will specifically impact public health."

Comment. Arguments that the EIR should have been recirculated are routinely made in cases challenging EIR adequacy. Courts, however, are generally reluctant to overturn an EIR on that ground, and tend to uphold a lead agency's decision that recirculation is not required, except where the new information added to the EIR relates to a new significant impact that was not previously disclosed.

8. Court Upholds Average Level of Operations as Baseline Used in EIR for Sand Mining

***San Francisco Baykeeper, Inc. v. California State Lands Commission,* (2015) 242 CA4th 202**

In *San Francisco Baykeeper*, the court of appeal confirmed that the State Lands Commission complied with CEQA when it renewed sand mining leases in San Francisco Bay. Among other rulings, the court upheld the environmental impact report's use of a five-year average operations baseline rather than a single-year baseline.

The court held, however, that before entering into the lease, the Commission was required to make findings that sand mining constituted a permissible use of public trust property. Because the Commission had made no such findings—taking the position that sand mining was indisputably a public trust use of sovereign land—the court remanded

Five-year average of extractions an appropriate baseline. The challengers' first claim was that because the Notice of Preparation for the EIR was issued in 2007, the level of sand extraction activity in 2007 was the only baseline the Commission could use to analyze the impacts of the lease renewals. The court, however, upheld the Commission's conclusion that the five-year average of extractions from 2002-2007 was a better indicator of existing mining conditions, because mining fluctuated from year to year, and 2007 was a particularly slow year due to economic factors.

Detailed erosion and sedimentation analysis upheld. The EIR concluded, based on multiple technical studies conducted throughout the EIR process, that the sand mining leases would contribute approximately 0.2-0.3 percent to long-term cumulative erosion, and that this effect was not cumulatively considerable. Challengers argued that this approach was based on a "ratio" theory which improperly assumed the project contribution was insignificant because it was a small proportion of a larger environmental problem. The court disagreed. The small proportion of erosion was not used as an excuse not to study the issue; the Commission had conducted an exhaustive analysis of erosion and sedimentation issues. In addition, the court held that adding new technical studies at the time of the Final EIR did not require the EIR to be recirculated for public comment, because the new studies did not alter any of the substantive conclusions of the Draft EIR or any of the points of disagreement between the parties.

Extraction of minerals is not an adverse impact on mineral resources. The challengers made the novel claim that the EIR's significance thresholds for mineral resource impacts, adopted from CEQA Guidelines Appendix G, required the Commission to treat extraction of minerals as an environmental impact on mineral resources. The court agreed with the common interpretation of the Appendix G language, which is that a project causes impacts to mineral resources if it interferes with access to those valuable resources, not if it extracts the resources.

No prejudicial error from deficient notice to other agencies. Without specifying which notice requirements it believed were violated, the court found that the Commission failed to consult properly with the California Coastal Commission and the City of San Francisco during the CEQA process. The court held, however, that no prejudice resulted; the challengers had failed to show that the violations resulted in the omission of pertinent information from the environmental review process.

Public trust findings required. Although the Commission's CEQA analysis was adequate, the court held that its public trust compliance was not. The public trust applies to submerged lands; uses that are consistent with the public trust include navigation, commerce, fishing, hunting, bathing, swimming, and preservation of trust lands in their natural state. The Commission enforces this trust and has traditionally assumed that sand mining is a valid public trust use, but did not make any findings to that effect. The court observed, however, that the fact that a use of a material serves a public need does not necessarily mean that its extraction is a public trust use. Because the Commission did not adopt findings supporting a determination that sand mining is consistent with the public trust, and the EIR had not analyzed the issue, the court ruled the Commission had erred in approving the lease.

Comment. This case is significant in two respects. First, it contributes to the substantial line of recent CEQA decisions upholding lead agencies' use of a baseline for analysis that differs from operations during the year environmental review began. Second, the case appears to reflect an increased willingness by courts to recognize that defects in the notice process are not fatal unless the error is shown to be prejudicial.

9. Increased Demand for Emergency Services Not an Environmental Impact that Must Be Mitigated

City of Hayward v. Board of Trustees of the Cal. State Univ.,
(1st Dist. 2015) ___ CA4th ___ (No. A131413, November 30)

Two important, recurring CEQA questions are addressed by the court of appeal's opinion in this case: whether CEQA requires funding of mitigation for a project's effects on public services; and whether an adaptive mitigation program amounts to improper deferral of mitigation. The court answered no to both questions.

Mitigation not required for increased demand for emergency services. The first question involved a claim that the California State University was required to mitigate the impacts of expansion of its Hayward campus on fire and emergency medical services that are provided by the City of Hayward. The court of appeal rejected the city's argument that an increased demand for emergency services is an environmental impact. It is instead, the court ruled, a social and economic effect that need not be mitigated under CEQA. Noting that providing fire and emergency medical services is the city's legal responsibility, the court found no legal support for the claim "that CEQA shifts financial responsibility for providing fire and emergency response services to the sponsor of a development project."

Adaptive mitigation program does not impermissibly defer mitigation. The second question involved the legal adequacy of a transportation demand management plan for mitigating traffic and parking impacts, which included a menu of measures to be put in place in stages, evaluated and then adjusted as conditions evolved. Ruling that the plan did not improperly defer decisions about mitigation, the court highlighted the components of the plan that together made it sufficiently concrete to pass legal muster:

- performance goals;
- identification of the types of policies to be evaluated;
- an implementation plan, including timelines;
- monitoring of effectiveness of measures as they are deployed; and
- an enforceable commitment to implement mitigation.

Comment. Three years ago, the supreme court accepted review of this case, but put the case on hold pending its decision in the San Diego State University case, discussed above. The case was transferred back to the court of appeal after the decision in the SDSU case was issued. The court of appeal then republished its earlier opinion, with modifications relating only to the question the supreme court had resolved in the SDSU case. The opinion leaves intact the court's key ruling that increased demand for emergency services is a social and economic impact, not an environmental impact that must be mitigated under CEQA.

E. CERTIFIED REGULATORY PROGRAMS

1. Detailed Environmental Review Not Required for Adoption of TMDL for Lake Bed Sediment

Conway v. State Water Resources Control Bd.,
(2d Dist. 2015) 235 CA4th 671

The court of appeal upheld the Regional Water Quality Control Board's adoption of the total maximum daily load limit for concentration of pollutants in the sediment in McGrath Lake. It also ruled that an environmental analysis of the impacts of

dredging was not required for adoption of the TMDLs because TMDLs are informational and do not dictate the remedial action that must be taken to meet their goals.

Background. The Clean Water Act requires states to identify polluted water bodies within their jurisdictions, and to set TMDLs for those water bodies. A TMDL is the maximum amount of pollutants that can be discharged into an impaired water body from point and nonpoint sources. California implements the TMDL program through the Porter-Cologne Water Quality Control Act.

McGrath Lake, located in Ventura County, was placed on the Clean Water Act section 303(d) list of impaired waters due to excessive levels of organochlorine pesticides and PCBs. The Los Angeles Regional Water Quality Control Board then established TMDLs for the lake through an amendment to the Los Angeles Basin Plan. The Board concluded that exposure of the McGrath Lake ecosystem to the organochlorine pesticides and PCBs had impaired beneficial uses, including aquatic life and recreational uses. The plan amendment set TMDLs for contaminants from two primary sources: agricultural runoff from surrounding fields and from lake bed sediment.

The Basin Plan Amendment designated landowners within the lake's watershed as "cooperating parties," giving them two years from the effective date of the amendment to enter into agreements with the Regional Board to implement the TMDLs. Adjacent landowners challenged the TMDL in the plan amendment, contending that the TMDL violated provisions of the Clean Water Act, the Porter-Cologne Act and CEQA.

No basis for Clean Water Act and Porter-Cologne Act claims. The challengers argued that the Clean Water Act did not authorize the Regional Board to set load allocations expressed in terms of concentrations of pollutants in lake bed sediments. The court of appeal summarily rejected the claim, concluding that: "The lake is its water and its sediment." The court also concluded that the lake bed sediment TMDL was consistent with Clean Water Act regulations, which give the Regional Board broad authority to select an "appropriate measure" of TMDL, and that such selection deserved substantial deference, particularly where, as here, the EPA had reviewed and approved the lake bed sediment TMDL. The petitioners' additional claim that dredging was the only way to meet the TMDL, and that the TMDL therefore inappropriately dictated the means of compliance in violation of the Porter-Cologne Act, also failed. The court observed that no showing had been made that there were no alternatives to dredging, and even if such a showing had been made, there can be no violation "where lack of available alternatives is a constraint imposed by present technology and the law of nature" rather than a Board-specified manner of compliance.

Review of environmental impacts of implementing TMDL not required. The challengers asserted that the CEQA-equivalent document the Board prepared was deficient because it inadequately analyzed the environmental impacts associated with dredging. The court rejected the argument, reasoning that the lake bed sediment TMDL the Board adopted does nothing more than establish maximum pollution loads. "A TMDL is an informational document, not an implementation plan." It does not prohibit or require any particular actions, but instead "represents a goal for the level of a pollutant in a water body." Dredging, by contrast, is a potential remediation measure, and the TMDL does not dictate remediation measures. The remediation plan to implement the goal set by the TDML had not yet been developed, and, according to the court, a full environmental analysis would not be required until the plan is formulated.

The challengers also argued that the impacts of dredging should have been evaluated because dredging is the only practical method of remediation. The court disagreed, noting again that an environmental analysis of any particular method of remediation, before a remediation plan is developed, would be premature.

Comment. Under the standard test for defining the scope of a project, CEQA review should include not only the activity being approved, but also extend to related future activities that are a reasonably foreseeable consequence of project approval. The decision in this case could be taken to illustrate a limiting principle that has been applied by some courts: that environmental

review need not extend to future activities, even if they could be viewed as a foreseeable consequence of the project, that are not sufficiently well-defined to allow a useful environmental review to be conducted.

F. CEQA LITIGATION

1. Appellate Court Reaffirms Broad Discretion of Trial Courts to Limit Attorneys' Fees Award when a Petitioner Fails to Prevail on Most Claims

***Save Our Uniquely Rural Environment v. County of San Bernardino,* (4th Dist. 2015) 235 CA4th 1179**

The court of appeal upheld the trial court's award of less than 10 percent of the fees requested by the prevailing petitioner in a CEQA case, finding no abuse of the broad discretion trial courts have in determining the proper amount of a fee award.

Background. Al-Nur Islamic Center proposed to build an Islamic community center and mosque in a residential neighborhood in an unincorporated area of San Bernardino County. The county adopted a mitigated negative declaration and issued a conditional use permit for the project. A community group, Save Our Uniquely Rural Community Environment, challenged the negative declaration, but prevailed on only one of many grounds asserted. The trial court found a CEQA violation for failure to study environmental impacts relating to wastewater disposal. SOURCE sought an award of $231,098 for attorneys' fees.

The trial court granted the motion for a fee award, but reduced the award to $19,176, noting that SOURCE had succeeded on only one of its six CEQA arguments and on none of its four conditional use permit arguments.

The court of appeal decision. The court of appeal upheld the trial court's fee award, holding that SOURCE failed to demonstrate any abuse of discretion. The extent of a party's success, the court stated, is a key factor in determining the amount of attorneys' fees to be awarded to the prevailing party. SOURCE had advanced multiple land-use and CEQA claims and sought an order setting aside the approvals pending preparation of an EIR. However, it succeeded on only one of its CEQA claims and obtained only an order setting aside the approvals pending further review on the single issue of wastewater treatment. The trial court thus acted well within its discretion in reducing the requested fee award based on the degree of success.

The trial court likewise did not abuse its discretion in finding several elements of the fees excessive, including 40 hours preparing a reply brief that essentially repeated the arguments made in the opening brief; charging nearly $10,000 for a "run-of-the-mill" attorneys' fees motion; and billing time at partner rates for research on basic matters such as standards of review, "CEQA law and guidelines" and "requirements for opening brief."

Additionally, the court remarked that while SOURCE claimed its attorneys' rates were reasonable for the Los Angeles area, it failed to show why those rates were reasonable in San Bernardino County. Absent a specific showing of why adequate lawyers in the local market could not be obtained, the trial court was justified in calculating attorneys' fees based on reasonable local market rates.

The court also found no justification for petitioner's request for a multiplier of two based on the purported risk assumed by the law firm, the complexity of the questions involved, or the superior skills allegedly displayed by its attorneys in presenting them.

Comment. In CEQA cases, trial courts often award attorneys' fees to a prevailing petitioner for all of the time its lawyers spent on the case, without considering how much of that time was devoted to pursuit of fruitless claims. *Save Our Uniquely Rural Environment* stands out as one of the few reported appellate decisions that have recognized a trial court's broad discretion to deny attorneys' fees to a petitioner for time its attorneys incurred pressing non-meritorious claims.

2. A Petitioner Cannot Recover Attorneys' Fees When Pendency of Suit Challenging Approvals Was Not the Catalyst for Revocation of Entitlements

Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa,
(4th Dist. 2015) 238 CA4th 513

Commenting that "we have not found a threat of victory in this record," the court of appeal ruled against a citizens' group that brought a motion for attorneys' fees after losing a CEQA challenge in the trial court.

In 2005, Target entered into a contract to purchase land for a shopping center. The City of Yucaipa city council approved the shopping center project two years later based on an EIR. Target then sued to force the property owner to complete the land sale. Petitioner, a citizens' group, then filed suit challenging the project entitlements under CEQA. Target defended the action on the city's behalf pursuant to an indemnity requirement in its conditions of approval. The trial court ruled against the citizens' group. While the citizens' group's appeal was pending, Target abandoned the project and withdrew its defense of the entitlements. The city then revoked the shopping center entitlements, rendering the appeal moot.

The citizens' group sought attorneys' fees, claiming that its CEQA lawsuit, and specifically its appeal from the trial court's judgment, was the "catalyst" that motivated the city to revoke the entitlements. The appellate court had no difficulty concluding otherwise. Citing city council hearing minutes indicating that the entitlements were revoked because Target had breached the indemnity condition by withdrawing from defending the case. The court determined that the city "did not revoke the entitlements for any reason related to the EIR or any violation of CEQA." Consistent with prior decisions and common sense, the court held that the "fact that [plaintiff] filed an appeal from the adverse judgment did not convert the action into a meritorious one under the catalyst theory."

Comment. A petitioner in a CEQA case can receive an award of attorneys' fees, even though it did not obtain a judgment in its favor, if the lawsuit led the respondents to take action which gives the petitioner the relief it seeks. For a petitioner to obtain a fee award under this "catalyst" theory, the petitioner must show that the lawsuit motivated the respondents to provide the "primary relief" sought in the litigation and that it had that effect by presenting a threat of victory. The petitioner here failed to show that either requirement was met.

G. CASES PENDING IN THE CALIFORNIA SUPREME COURT

1. What Greenhouse Gas Reduction Targets Must Be Used in an EIR on a Long Range Transportation Plan in Order to Comply with CEQA?

Cleveland National Forest Foundation v. San Diego Association of Governments,
(4th Dist. 2014) 231 CA4th 1056, No. S223603, review granted March 11, 2015.

The California Supreme Court has agreed to review the appellate court decision in *Cleveland National Forest Foundation v. San Diego Association of Governments*. The court of appeal in that case invalidated the EIR for the Association's 2050 Regional Transportation Plan and Sustainable Communities Strategy.

In its petition for review filed with the supreme court, SANDAG raised a number of issues. However, the supreme court's order granting review limits the issues it will consider to the most important and controversial one raised in the case: whether the EIR for a regional transportation plan must include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S-3-05 issued by Governor Schwarzenegger in 2005.

The reduction goals in the executive order call for emissions to be reduced to 1990 levels by 2020 and to 80 percent below 1990 levels by 2050. The EIR found that SANDAG's plan would reduce greenhouse gas emissions until 2020, but would

increase them after that. While the EIR discussed the executive order's 2050 emissions reduction target, it did not treat the 2050 target as a standard for assessing the significance of the plan's greenhouse gas impacts. The court of appeal ruled that the EIR's greenhouse gas impacts analysis was inadequate because it had not analyzed the plan's consistency with the executive order's 2050 emissions reduction target.

The supreme court will be reviewing the case to consider the following question: Whether the environmental impact report for a regional transportation plan must include an analysis of the plan's consistency with the greenhouse gas emission reduction goals in Executive Order No. S-3-05 in order to comply with the California Environmental Quality Act.

Comment. The supreme court's decision in this case will have a far-ranging effect on how analyses of greenhouse gas emissions will be conducted in the future. Unlike the Executive Order's 2020 standards, which were adopted by the State Legislature in A.B. 32, the 2050 goals are not legislatively imposed and have no legal effect on local agencies. To require agencies to treat goals in an Executive Order as CEQA thresholds of significance would transmute such goals into the equivalent of statutory policy requirements.

2. **What Information Must an EIR Include in Order to Adequately Consider Environmentally Sensitive Habitat Areas on a Project Site?**

Banning Ranch Conservancy v. City of Newport Beach,
(4th Dist. 2015) 236 CA4th 1341, No. S227473, review granted Aug. 19. 2015.

The California Supreme Court will consider three issues in this case. First, whether the city's approval of the project complied with the provisions of its general plan directing that the city "coordinate with" and "work with" the California Coastal Commission to identify habitats for preservation, restoration, or development before the project was approved. Second, what standard of review should apply when a court considers a city's interpretation of its own general plan. And third, whether the city's environmental impact report was required to identify environmentally sensitive habitat areas, as that term is defined by the California Coastal Act, on the project site.

Comment. The deference that a court affords to a city's interpretation of its own general plan stems from the separation of powers doctrine. For a court to second-guess the sufficiency of "coordination" efforts in determining whether general plan consistency has been achieved could place the court in the role of fact-finder and policy-maker-- a role that courts necessarily should decline to accept.

6

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RECENT DEVELOPMENTS:

CLEAN WATER ACT JURISDICTION, ENDANGERED SPECIES, AND PROTECTED BIRDS

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JANUARY 15, 2016

I. CLEAN WATER ACT JURISDICTION

A. NEW REGULATIONS DEFINING "WATERS OF THE UNITED STATES"

Nearly ten years ago, the Supreme Court issued its fractured 4-1-4 decision in *Rapanos v. United States*, 547 U.S. 715 (2006). Under Justice Kennedy's oft-cited concurring opinion in that case, only those water bodies with a "significant nexus" to a traditional navigable water are covered by the federal Clean Water Act. But neither the Act nor the *Rapanos* decision provides a clear definition of what the phrase "significant nexus" means. As a result, uncertainty and controversy have prevailed over the last ten years regarding the fundamental threshold question of when the Act's permitting requirements apply.

In 2008, the U.S. Environmental Protection Agency and the Army Corps of Engineers issued an interpretive guidance document that sought to define the boundary of federal jurisdiction in the wake of the *Rapanos* decision. But the guidance, which was not a binding regulation, did little to clarify the issue. One significant problem with the 2008 guidance is that, for many smaller water bodies such as intermittent streams and isolated wetlands, the determination of whether federal jurisdiction exists requires a site-specific, fact-intensive analysis of whether the water has a "significant nexus" to a river, lake or bay. As a result, the process of issuing jurisdictional determinations has become increasingly complicated, time-consuming and contentious, with different Corps districts applying differing standards.

The EPA and the Corps issued revised draft guidance in 2011, which reflected a more expansive view of federal jurisdiction than the 2008 guidance. The new draft guidance triggered a political maelstrom and was ultimately abandoned.

In 2012, Justice Alito lamented:

> The reach of the Clean Water Act is notoriously unclear.... Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act. When Congress passed the Clean Water Act in 1972, it provided

> that the Act covers "the waters of the United States." 33 U.S.C. § 1362(7). But Congress did not define what is meant by "the waters of the United States"; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate... For 40 years, Congress has done nothing to resolve this critical ambiguity; and the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase.

Sackett v. U.S. Environmental Protection Agency, 132 S. Ct. 1367, 1376 (2012) (Justice Alito's concurring opinion).

In June 2015, nine years after the *Rapanos* decision, the EPA and the Corps of Engineers issued joint regulations that sought to establish a firm definition of the key phrase "waters of the United States." 80 Fed. Reg. 37054 (June 29, 2015). But before the regulations took effect, numerous legal challenges were filed, including by more than half the States. In October 2015, the Sixth Circuit issued an order staying the effectiveness of the regulations nationwide pending judicial review. *In re Environmental Protection Agency & Dept. of Defense Final Rule*, 803 F.3d 804 (6th Cir. 2015). The threshold issue in the case is whether the various lawsuits challenging the new regulations are properly heard in the federal district courts or whether they should proceed directly to the appellate level. In addition to the legal challenges, on January 13, 2016, Congress passed a joint resolution (S.J. Res. 22) to nullify the regulations, although the President has made it clear that he strongly opposes the resolution and will veto it.

In any event, due to the Sixth Circuit's ruling, the new regulations are not currently in effect. As a result, the significant uncertainty and open-endedness under the previous 2008 interpretive guidance will continue to govern for the time being. Under this guidance, as explained above, local Corps districts rely in many instances on a painstaking case-by-case scientific analysis to determine whether a "significant nexus" exists.

The new regulations, if and when they do take effect, would establish eight categories of jurisdictional waters:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters, including interstate wetlands;
3. The territorial seas;
4. All impoundments of waters otherwise identified as waters of the United States;
5. All "tributaries" of waters listed in the first three categories;
6. All waters that are "adjacent" to waters listed in the first five categories;

7. Certain types of waters (including western vernal pools) that are determined on a case-by-case basis, when combined with similarly situated waters in the watershed, to have a "significant nexus" to a water listed in the first three categories; and

8. Other waters that are determined, on a case-by-case basis to have a "significant nexus" to a water listed in the first three categories, including: (a) waters within the 100-year floodplain of a water listed in the first three categories; and (b) waters within 4,000 of the high tide line or ordinary high water mark of a water listed in the first five categories.

The regulations also specify that the following waters are exempt from federal jurisdiction: waste treatment systems (including ponds and lagoons) designed to meet the requirements of the Clean Water Act; prior converted cropland; certain types of ephemeral and intermittent ditches; certain types of artificial and erosional features;[1] groundwater; storm water control features created in dry land; wastewater recycling ponds, basins and other facilities constructed in dry land; and puddles.

The latter four jurisdictional categories above are particularly controversial due to the breadth of the definition of the key terms "tributary," "adjacent," "significant nexus":

- "Tributary" is defined to include any natural or man-made channel with physical indicators of a bed and banks and an ordinary high water mark that contributes flow, either directly or indirectly, to a jurisdictional water in the first three categories above. A tributary does not lose its jurisdictional status if "for any length, there are one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark can be identified upstream of the break."

- With respect to the category of "adjacent" waters, the definition encompasses waters that extend out to 1,500 feet from the ordinary high water mark or high tide line of a jurisdictional water body. In particular, the definition includes: (1) all waters within 100 feet of the ordinary high water mark of a jurisdictional water within the first five categories above; (2) all waters in a floodplain of a jurisdictional water within the first five categories above that are not more than 1,500 feet from the ordinary high water mark of the jurisdictional water; and (3) all waters within 1,500 feet of the high tide line of the territorial seas or a navigable waterway.

- Finally, the regulations contain an expansive definition of what constitutes a "significant nexus." This term means that a water "either alone or in combination with other similarly situated waters in the region, significantly affects the chemical, physical, or biological integrity" of a jurisdictional water in the first three categories above. For an effect to be significant, "it must be more than speculative or insubstantial." A "significant nexus" finding can be based on any one or more of nine different functions, including sediment trapping; nutrient recycling; pollutant trapping, filtering or transport; retention and attenuation of flood waters; runoff storage; export of organic

[1] This category includes (i) artificially irrigated areas that would revert to dry land should application of water to that area cease; (ii) artificial, constructed lakes and ponds created in dry land such as farm and stock watering ponds, irrigation ponds, settling basins, fields flooded for rice growing, log cleaning ponds, or cooling ponds; (iii) artificial reflecting pools or swimming pools created in dry land; (iv) small ornamental waters created in dry land; (v) water-filled depressions created in dry land incidental to mining or construction activity, including pits excavated for obtaining fill, sand, or gravel that fill with water; and (vi) erosional features such as gullies and rills.

matter or food resources; or providing life cycle dependent aquatic habitat. As discussed above, waters within a flood plain, and waters within 4,000 of a high tide line or ordinary high water mark, are eligible for a significant nexus finding.

The intense debate over the proper scope of federal jurisdiction under the Clean Water Act is far from resolved. The fate of the new regulations awaits judicial resolution, and if the regulations are struck down by the courts or nullified by Congress under a new administration, the question remains how the phrase "waters of the United States" should be defined to satisfy the standards articulated by the Supreme Court in *Rapanos* while providing much-needed clarity and certainty to the regulated community.

B. JUDICIAL REVIEW OF JURISDICTIONAL DETERMINATIONS

When the local Corps district issues an Approved Jurisdictional Determination (or "Approved JD") – which is an official, written determination by the Corps that identifies the precise limits of Clean Water Act jurisdiction on a particular property – the landowner may seek formal review within the Corps in accordance with the agency's administrative appeal procedures. 33 C.F.R. Part 331. However, the Ninth Circuit has ruled that an Approved JD that finds that a property contains jurisdictional waters cannot be challenged in court. *Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, (9th Cir. 2008). The court ruled that such an Approved JD is not a final agency action subject to judicial review, since it creates no legal rights and imposes no legal obligations. In the court's view, such an Approved JD does nothing more than put the landowner on notice that the Corps believes a Clean Water Act permit would be necessary if the landowner ultimately decides to develop his or her property. The court emphasized that the landowner retains the ability to dispute the scope of federal jurisdiction by challenging the final issuance or denial of a permit, or as a defense in an administrative enforcement or court proceeding. The court also explained that an Approved JD finding that there are no jurisdictional waters on a site is a final, reviewable action, since it effectively terminates the Corps' decision-making process and establishes the landowner's right to proceed with development without having to secure a Clean Water Act permit.

But in *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012), the Supreme Court adopted a different view and rejected the EPA's argument that a compliance order, which it had issued to the owners of a small parcel of land in Idaho, was not subject to judicial review. The EPA order proclaimed that the landowners, who had placed dirt on the land to build a home, were in violation of the Clean Water Act for filling a wetland without a permit. The order also directed the landowners to restore the site to its previous condition. The Court held that the compliance order was subject to judicial review as a "final agency action." Thus, the landowners did not have to wait to assert their challenge until a final permit decision or an EPA enforcement proceeding. The Court reasoned that the compliance order met the two requirements for final agency action under the Administrative Procedure Act in that it (1) marked the consummation of the EPA's decision-making process on whether the site was a wetland, and (2) imposed legal obligations on the landowners to restore their property. The Court emphasized that the landowners were potentially liable for administrative penalties of up to $75,000 for each day they refused to comply ($37,500 per day for violating the Clean Water Act's requirement for a permit and another $37,500 per day for violating the compliance order). In a sharp rebuke to the EPA, the Court declared "there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." *Sackett*, 132 S. Ct. at 1374.

The question remains whether the Supreme Court's decision in *Sackett* will affect the Ninth Circuit's ruling in *Fairbanks North Star Borough* that an Approved JD is not a final agency action subject to challenge in court. In *Belle Company v. U.S. Army Corps of Engineers*, 761 F.3d 383 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1548 (2015), the court ruled that, unlike the compliance order at issue in *Sackett*, an Approved JD does not by itself determine rights or obligations or have legal consequences. The court accordingly ruled that an Approved JD is not a reviewable final agency action. The court reached a similar conclusion in *National Assn. of Home Builders v. U.S. Environmental Protection Agency*, 956 F. Supp. 2d 198 (D.D.C. 2013), aff'd on other grounds, 786 F.3d 34 (D.C. Cir. 2015). But the Eighth Circuit reached the opposite result in *Hawkes Co., Inc. v. U.S. Army Corps of Engineers*, 782 F.3d 994 (8th Cir. 2015), concluding that an Approved JD has "a powerful coercive effect" and should be subject to "immediate judicial review."

In December 2015, the Supreme Court agreed to review the Eighth Circuit's decision (Supreme Court Case No. 15-290). The Court's decision likely will definitively resolve the issue of whether an Approved JD is judicially reviewable.

II. ENDANGERED SPECIES

A. FEDERAL ENDANGERED SPECIES ACT – NINTH CIRCUIT CASE LAW

1. "AGENCY ACTION" TRIGGERING CONSULTATION

Under Section 7 of the ESA, whenever the federal government takes an "agency action" that may impact a threatened or endangered species, the federal agency that undertakes that action must consult with either the U.S. Fish & Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS"), depending on the particular species at issue, to ensure that the "agency action" does not jeopardize the species' continued existence or result in the destruction or adverse modification of the species' designated critical habitat. 16 U.S.C. §§ 1532(5), 1536(a)(2). If adverse impacts to the species are likely to occur, this consultation process culminates in the issuance of a Biological Opinion, which sets forth measures to minimize the impacts and delineates the extent of "take" that is allowed.

The meaning of the term "agency action" is therefore a critical starting point for defining a federal agency's obligations under the ESA. "Agency action" refers to public projects that are directly undertaken by the federal government, as well as private projects that receive federal funding or that require a federal license or permit. The courts have made clear that the consultation requirement applies only to discretionary federal action, and does not apply to a federal agency's ministerial action or its failure to act on a private project. But the line between "agency action" and private actions that do not trigger consultation is not always clear. In recent years, the definition of this key term has been a subject of controversy and a number of Ninth Circuit opinions.

In 2012, the Ninth Circuit, in a 7-4 en banc decision, adopted a broad view of what constitutes agency action triggering Section 7 consultation. In *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2012), the court ruled that the U.S. Forest Service took an affirmative, discretionary action triggering consultation by not requiring a more in-depth agency review of a Notice of Intent to conduct recreational mining activities in a national forest. The dissent, which viewed the case as one of agency inaction, emphasized that the miners had a statutory right under the General Mining Law of 1872 to conduct mining on federal lands and that they were required only to follow a simple notification procedure, rather than having to file a formal permit application for federal review and approval.

Another en banc decision followed in 2014, where the Ninth Circuit relied on Karuk to make clear that consultation is required whenever a federal agency retains "some discretion" to take action to benefit a protected species. *Natural Resources Defense Council v. Jewell*, 749 F.3d 776 (9th Cir. 2014). The court explained: "Whether an agency must consult does not turn on the *degree* of discretion that the agency exercises regarding the action in question, but on whether the agency has any discretion to act in a manner beneficial to a protected species or its habitat." *Id.* at 784 (court's emphasis.)

The *NRDC v. Jewell* case involved the Bureau of Reclamation's decision to renew a series of water supply contracts in connection with the Central Valley Project. In 2012, a three-judge panel of the court ruled that there was no agency action triggering ESA consultation. The panel reasoned that the Bureau was obligated to renew the contracts and to supply water to the contractors, who had senior water rights that predated the Bureau's involvement with the CVP. But the court granted en banc review and reversed the panel's decision, holding that the Bureau's preexisting obligations did not "strip the Bureau of all discretion" to benefit protected species. For example, the court reasoned, the Bureau could negotiate mitigation conditions as part of the renewed contracts, even assuming that the agency was substantially constrained in determining whether and how to renew the contracts. Together with the *Karuk* case, the *NRDC v. Jewell* case supports a broad reading of the definition of "agency action" under the ESA.

But in *Sierra Club v. Bureau of Land Management*, 786 F.3d 1219 (9th Cir. 2015), the court ruled that Section 7 consultation was not required for a private wind energy project, based on the finding that the federal agency did not have "any discretionary involvement or control." Although the Bureau approved a roadway through federal land that could be used to access the wind project, the court found that the roadway was not necessary for the project, since there were alternative access routes available through private lands. The court further reasoned that the roadway had "independent utility" irrespective of the wind project, since the roadway could be used for other purposes and would have other benefits. Based on these findings, the court concluded that the wind project did not depend on the roadway and would not be caused by the roadway, and that the Bureau's approval of the roadway did not give it any authority or discretion over the wind project to trigger consultation for that project. Moreover, the court emphasized that no consultation was needed for the roadway itself, since there were no protected species that would be affected by the roadway. This case stands as an important counterbalance to the decisions in *Karuk* and *NRDC v. Jewell*.

2. CONSIDERATION OF ECONOMIC IMPACTS WHEN DESIGNATING CRITICAL HABITAT

When determining whether or not to list a species as threatened or endangered under the ESA, the negative economic consequences of the listing are irrelevant and may not be considered. Economic impacts, however, must be considered as part of the designation of a listed species' critical habitat. 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.19. Based on the consideration of these impacts, the FWS (or NMFS) may exclude an area from a critical habitat designation if it determines that the benefits of the exclusion outweigh the benefits of including the area within the designation (although no exclusion is allowed if it will result in the extinction of the species). *Id.*

Put another way, excluding an area from a critical habitat designation based on economic impacts requires a balancing of the benefits of the exclusion (primarily the economic benefits to landowners and developers in the area) against the benefits of inclusion (primarily the conservation benefits of

designating the area as critical habitat). But as illustrated by a recent Ninth Circuit decision, the reverse is not true: when deciding not to grant such an exclusion, the FWS (or NMFS) does not need to balance the benefits of inclusion against the benefits of exclusion. *Building Industry Assn. of the Bay Area v. U.S. Dept. of Commerce*, 792 F.3d 1027 (9th Cir. 2015).

This case involved a challenge to NMFS' decision not to exclude certain areas from its critical habitat designation for the southern distinct population segment of the green sturgeon. In rejecting this challenge, the court quoted the text of the ESA to emphasize two points. First, when making a critical habitat designation, the statute requires only that NMFS "take into consideration" the economic and other impacts of the designation; second, NMFS "may" – but is not *required to* – exclude an area from the designation if it determines that the benefits of exclusion outweigh the benefits of inclusion. 16 U.S.C. § 1533(b)(2). According to the court, this language means that, when deciding not to grant an exclusion, NMFS need only consider the economic impacts and does not need to use any particular balancing or methodology in doing so. Further, once a court determines that the economic impacts of the designation have been adequately considered, the decision not to grant an exclusion is purely discretionary and therefore is not judicially reviewable.

At least within the Ninth Circuit (which includes California), this ruling sets a low bar for the review of economic impact and makes it increasingly difficult for landowners and developers to challenge the economic aspects of critical habitat designations.

3. INJUNCTIVE RELIEF FOR ENDANGERED SPECIES ACT VIOLATIONS

As a general matter, a plaintiff seeking injunctive relief from a court, such as a judicial order halting construction of a project, must satisfy a four-part test by showing that (1) it has suffered an irreparable injury; (2) monetary remedies are inadequate to compensate for the injury; (3) the balance of hardships between the parties supports the injunction; and (4) the public interest would not be disserved by the injunction. Within the Ninth Circuit, the courts have long presumed that the first factor is met when the plaintiff shows that a procedural violation of the ESA has occurred, without requiring a showing of actual irreparable harm. But the Ninth Circuit eliminated this presumption in *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015), such that plaintiffs seeking injunctive relief under the ESA must now show irreparable harm.

In *Cottonwood*, the Ninth Circuit affirmed the district court's finding that the U.S. Forest Service violated the ESA. Specifically, the Forest Service failed to reinitiate consultation on its guidelines for issuing multi-use permits on federal lands in the Northern Rocky Mountains after the FWS revised its critical habitat designation for the Canada lynx to include parts of these lands. As a result of this violation, the Forest Service was directed to consult with FWS over the impacts to the Canada lynx resulting from the use of these lands.

Relying on thirty years of Ninth Circuit precedents under the ESA, the plaintiffs argued that because of this procedural violation, there was no need to show irreparable harm to obtain an injunction preventing Forest Service approval of uses that could affect the lynx until the consultation process was completed. In rejecting this argument, the Ninth Circuit concluded that the longstanding presumption of harm under the ESA did not comport with two recent Supreme Court cases on injunctions in the context of the National Environmental Policy Act. *Cottonwood*, 789 F.3d at 1089, citing Winter v. Natural Resources Defense Council, 555 U.S. 7 (2008); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010).

Based on this authority, the court ruled that the presumption no longer applies and that a plaintiff seeking an injunction under the ESA must present evidence showing irreparable harm.

The court remanded the case to the district court to provide the plaintiffs with an opportunity to make the requisite showing. Whatever the ultimate result is in the case, the Ninth Circuit's decision clearly raises the bar for plaintiffs seeking injunctive relief under the ESA.

B. FEDERAL REGULATIONS ON INCIDENTAL TAKE STATEMENTS

In 2014, several important regulations were proposed to address the process and criteria for designating critical habitat and for defining what constitutes an "adverse modification" of critical habitat. These proposed regulations are still under consideration and have not yet been finalized.

In 2015, the FWS and NMFS did finalize a joint regulation under the ESA that addresses two important issues associated with Incidental Take Statements. 80 Fed. Reg. 26832 (May 11, 2015). First, the regulation expressly allows for the use of a "surrogate" in an ITS when a precise numeric take limit is not practical. While there is a clear preference under the ESA for numeric take limits, the courts have recognized that numeric limits may not always be possible. The new regulation codifies the circumstances under which an ITS may use a surrogate.

A surrogate defines the amount of permissible "take" in terms of a similarly affected species or habitat or more general effects on ecological conditions, instead of specifying a numeric take limit for the species at issue. Under the regulation, use of a surrogate is allowed if the ITS "describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded."

Second, the regulation addresses the situation where a "programmatic action" by a federal agency triggers the duty to consult and the preparation of a biological opinion, but where the action merely provides the framework for future projects that may result in a take of a listed species. The regulation allows for the deferral of the ITS in such a situation, provided that the future projects are subject to further consultation and the programmatic action is not reasonably certain to result in a take prior to that consultation. This regulation is particularly important for broad federal agency planning efforts, such as land use plans issued by the Bureau of Land Management and the U.S. Forest Service to guide the development and use of federal lands.

C. "FULLY PROTECTED" SPECIES UNDER CALIFORNIA LAW:

Like the federal ESA, the California Endangered Species Act authorizes the issuance of Incidental Take Permits for development projects that may result in a take of listed species. Cal. Fish & Game Code § 2081(b). But unlike the federal ESA, there is a special category of 37 "fully protected" species under California law for which an ITS may not be issued. See Cal. Fish & Game Code §§ 3511 (birds), 4700 (mammals), 5050 (reptiles and amphibians) and 5515 (fish).

In *Center for Biological Diversity v. California Dept. of Fish & Wildlife*, 62 Cal. 4th 204 (2015), the California Supreme Court strictly interpreted these statutory provisions to prohibit the relocation of a fully protected fish species, even though the Department of Fish & Wildlife had approved of the

relocation to minimize harm to the species that would result from a large development project. The Court reasoned that the relocation of the fish fell within the definition of "take" (which includes actions to "catch" or "capture" the species) and that there was no applicable exception to the prohibition against such a take of a fully protected species. While trapping and transplantation of endangered and threatened species is specifically allowed under the California Endangered Species Act as a conservation measure, the Court emphasized that heightened prohibitions apply to species that are designated under California law as "fully protected." The case illustrates the difficulties for landowners and developers when dealing with fully protected species under California law.

III. PROTECTED BIRDS

A. MIGRATORY BIRD TREATY ACT

The Migratory Bird Treaty Act (16 U.S.C. §§ 703-712) protects hundreds of species of migratory birds, many of which are common and abundant, such as sparrows, pigeons and hummingbirds. The MBTA makes it illegal to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill, [or] possess" any migratory bird "or any part, nest, or egg of any such bird." The MBTA was enacted in 1918, when many bird species were threatened by the commercial trade of birds and feathers. Initially, the MBTA was interpreted to prohibit only intentional takes, such as hunting or capturing. However, in more recent times a few courts have expanded the law to apply to unintentional takes that are incidental to otherwise lawful development activities. The result is a split among the circuit courts, with the Second and Tenth Circuits taking the position that the MBTA prohibits incidental as well as intentional takes,[2] and the Fifth, Eighth and Ninth Circuits taking the more narrow position that only intentional takes are prohibited.[3] The issue is particularly important, given the broad scope of the MBTA's take prohibition and the stiff civil and criminal penalties that can result from a violation.

In the recent Fifth Circuit case, *U.S. v. CITGO*, an oil company was convicted for violations of the MBTA based on bird deaths that that occurred when the birds landed in uncovered equalization tanks storing wastewater from the oil refining process. In reversing the conviction, the Fifth Circuit looked to the narrow common law origins of the MBTA's take prohibition and distinguished this prohibition from the ESA's broader take provisions, which expressly cover actions that indirectly harm protected species.

In addition to its textual and legal analysis, the Fifth Circuit highlighted the policy concern that the potential scope of liability under a broad interpretation of the MBTA's take prohibition is "hard to overstate." The court observed that communication towers, cars and domesticated cats kill millions of birds per year, and a broad reading of the law would cover all "owners of big windows, communication towers, wind turbines, solar energy farms, cats, and even church steeples," subjecting these parties to risk of criminal liability for incidental and unintentional effects. According to the court, these "absurd results" bolstered its "confidence that Congress intended to incorporate the common-law definition of 'take' in the MBTA."

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[2] *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978); *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 686 (10th Cir. 2010).

[3] [3] *Newton County Wildlife Assn. v. U.S. Dept. of Agriculture*, 113 F.3d 110, 114-15 (8th Cir. 1997); *Seattle Audubon Society v. Evans*, 952 F. 2d 297, 303 (9th Cir. 1991); *United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).

The scope of the MBTA's take prohibition has become a key issue in the energy industry in particular. Federal prosecutors have obtained convictions and settlements in various cases against energy companies for violations of the MBTA. Project opponents have also attempted to use the MBTA to challenge approvals of energy projects. Resolving the uncertainty over the scope of the MBTA is becoming increasingly important as the law has become an obstacle to the development of clean energy projects needed to achieve federal and state greenhouse gas emission goals. Resolution of this issue could become even more important considering the U.S. Department of Justice's recent directive to hold more individuals accountable for illegal corporate conduct.

In those areas of the country where the broad view of the law's scope prevails, one significant problem is that there currently is no program in place for the FWS to authorize incidental takes of migratory birds. To address this gap, in May 2015, the FWS announced that it is preparing a programmatic environmental impact statement that will evaluate various systematic approaches to regulate the incidental take of more than 1,000 species of migratory birds under the MBTA. 80 Fed. Reg. 30,032 (May 26, 2015).

The FWS identified four approaches that it believes, either singularly or in combination, could minimize impacts to and reduce the incidental take of migratory birds.

- First, the FWS is considering industry-specific regulations that would establish general conditional authorizations for incidental takes. The authorizations would identify applicable protection and mitigation standards drawn from current guidance and the agency's review of prior industry projects. The FWS has identified the following industries as particularly suited to this approach: oil, gas, and wastewater disposal pits; methane or other gas burner pipes; communication towers; and electric transmission and distribution lines. It is possible that the FWS would include other industries as well, such as wind energy.

- Second, the FWS is considering regulations that would allow it to issue individual incidental take permits for activities not covered under a general conditional authorization. These permits would be appropriate for complex projects or projects lacking information on potential adverse effects. The FWS is considering whether applications for individual take permits could be combined with other environmental reviews and permit applications to minimize administrative burdens.

- Third, the FWS is considering regulations allowing it to authorize the incidental take of migratory birds by other federal agencies that commit to adopt appropriate mitigation measures. This commitment would be formalized through memoranda of understanding. Such an approach could provide an efficient regulatory avenue to authorize the incidental take by third parties regulated by a federal agency that has entered into an MOU.

- Finally, the FWS is considering development of voluntary guidance that builds on its prior experience working with industry groups to identify best management practices or technologies to avoid or minimize avian mortality from specific hazards. This approach would not formally authorize incidental take, but in determining whether to pursue enforcement in a given case, the FWS would consider the party's degree of compliance with the voluntary guidance.

The rulemaking proposal reflects the FWS's increased attention to the incidental take of migratory birds. This initiative could provide much-needed legal clarity to affected industry sectors, but could also impose significant regulatory burdens both industrywide and at the project level.

B. THE BALD AND GOLDEN EAGLE PROTECTION ACT

The Bald and Golden Eagle Protection Act (16 U.S.C. §§ 668-668c) imposes criminal and civil penalties for a "take" of bald or golden eagles without a permit. "Take" is defined to include "wound, kill, capture, trap, collect, molest or disturb." Regulations under the Eagle Act allow the FWS to issue permits for incidental takes. Under the "5-Year Rule" adopted in 2009, incidental take permits were limited to a duration of five years. The applicant could seek renewal at the end of the five-year period, but that would trigger a new review and public participation process.

In December 2013, the FWS adopted a new "30-Year Rule" to extend the life of incidental take permits under the Eagle Act from 5 to 30 years. The purpose of the rule was to facilitate the development, permitting and financing of wind energy projects, which had increased substantially in recent years. The FWS did not conduct an environmental review of the new rule under the National Environmental Policy Act, on the ground that it was exempt from NEPA because it was merely administrative in nature and any resulting environmental effects were too speculative to analyze.

But in August 2015, the U.S. District Court for the Northern District of California struck down the 30-Year Rule, finding there was insufficient evidence in the administrative record to support the government's determination that the new rule was exempt from NEPA. *Shearwater v. Ashe*, 2015 WL 4747881 (N.D. Cal. Aug. 11, 2015). The court was particularly troubled by the decreased level of public participation under the new rule. In particular, public review for the issuance of a permit might occur only once in 30 years under the new rule, as compared to once every 5 years under the prior rule. The court also was troubled by the internal disagreement within the FWS over the new rule, as evidenced by the administrative record, which included a statement by the program manager for the new rule that it was a "no-brainer" that a NEPA analysis was needed. Other agency personnel likewise expressed concern over the risks of increasing the maximum permit duration from 5 to 30 years absent NEPA review.

The court concluded that while promoting renewable energy projects may be a "worthy goal, it is no substitute for the agency's obligations to comply with NEPA and to conduct a studied review and response to concerns about the environmental implications of major agency action." The case is now on appeal before the Ninth Circuit (No. 15-17022).

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FAST Act Will Speed Up Major Infrastructure Projects

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Congress enacted the Surface Transportation Reauthorization and Reform Act of 2015, also known as the Fixing America's Surface Transportation Act (the FAST Act) on Dec. 4, 2015. A part of the FAST Act, Title XLI — Federal Permitting Improvement, is particularly significant because it seeks to streamline the multi-agency decision-making process for federal approval of major infrastructure projects. In particular, the provisions of Title XLI establish a Federal Permitting Improvement Council, require federal agencies to coordinate their reviews of covered projects, set performance schedules for project approvals, limit judicial review of final decisions on project permits and shorten the statute of limitations for project opponents to file legal challenges.

The following is a summary of the key provisions of Title XLI.

Covered Projects

A "covered project" is defined as any construction activity in the United States that requires authorization or environmental review by a federal agency involving renewable or conventional energy production, electricity transmission, surface transportation, aviation, ports and waterways, water resource projects, broadband, pipelines, manufacturing or any other sector as determined by the Federal Permitting Improvement Council and that meets the following criteria:

1. It is subject to the National Environmental Policy Act (NEPA);

2. It is likely to require a total investment of more than $200 million; and

3. It does not qualify for abbreviated authorization or environmental review processes under any applicable law.

OR

4. It involves a project the size and complexity of which make it likely to benefit from enhanced oversight and coordination, including a project likely to require authorization or environmental review from more than two federal agencies or the preparation of an environmental impact statement under NEPA. FAST Act, Section 41001(6)(A).

The definition of covered projects specifically excludes highway or transportation projects and water resources development projects subject to section 2045 of Water Resources Development Act of 2007 (33 U.S.C. 2348), as these two categories of projects already have coordinated environmental review under other statutes. FAST Act, Section 41001(6)(D).

Federal Permitting Improvement Council

Title XLI of the FAST Act establishes the Federal Permitting Improvement Council made up of members from each permitting and reviewing agency, to be chaired by an executive director appointed by the president. The executive director is instructed to do *all* of the following:

1. Establish an inventory of covered projects that are pending environmental review or authorization by the head of any federal agency.

2. Categorize the projects in the inventory based on sector and project type.

3. For each category, identify the types of environmental reviews and authorizations most commonly involved.

4. Add a covered project to the inventory after receiving a notice of the initiation of a proposed covered project by a project sponsor.

5. Designate a facilitating agency for each category of covered projects and publish a list of such agencies. FAST Act, Section 41002(c)(1)(A).

Agency Review to be Completed Within 180 Days

The executive director is further instructed to develop recommended performance schedules for agency approvals. Each performance schedule is to specify that any decision by an agency on an environmental review or authorization be issued no later than 180 days after all information needed to complete the review or authorization is in the possession of the agency. FAST Act, Section 41002(c)(1).

Infrastructure Permitting Dashboard

The executive director is to maintain an online database known as the Permitting Dashboard to track the

status of federal environmental reviews and authorizations for covered projects and shall make a specific entry for each project on the dashboard. FAST Act, Section 41003.

Facilitating or Lead Agency

Under the provisions of Title XLI, a facilitating or lead agency must develop a Coordinated Project Plan to synchronize public and agency participation in the federal environmental review and approval process for a covered project and to facilitate the completion of this process. The Coordinated Project Plan must also establish a permitting timetable that includes deadlines for action by federal permitting agencies, although the Executive Director of the Steering Committee may extend the deadlines. FAST Act, Section 41003.

Incorporation by Reference of State Permitting Documents

Title XLI of the FAST Act additionally directs the lead agency, upon the request of a project sponsor, to adopt the analysis and documentation prepared for a covered project under state laws and procedures as the documentation (or part of the documentation) required to complete the federal environmental review. FAST Act, Section 41005

Limitations on Judicial Review

Title XLI also sets limits on judicial review of federal approvals of covered projects. First, any court challenge must be filed within two years after the date of publication in the Federal Register of the final approval decision, unless a shorter period is specified in federal law. FAST Act, Section 41007.

Second, judicial review under NEPA is barred unless the lawsuit is filed by a party that submitted a comment during the environmental review process. In addition, the specific claims that are alleged must have been sufficiently detailed during the environmental review process, so as to put the federal agency on notice of the issue, unless the agency did not provide a reasonable opportunity for comment. FAST Act, Section 41007(a)(1)(B).

Third, when deciding whether to grant preliminary injunctive relief against a federal agency that issued a project approval or against a project sponsor, the court is directed to consider the potential effects on public health, safety and the environment, and the potential for significant negative effects on jobs resulting from an order or injunction, without presuming that these negative effects are reparable. FAST Act, Section 41007(b).

Issuance of Regulations Establishing Fees

Specified agencies are authorized to issue regulations establishing a fee structure for reimbursing the United States for reasonable costs incurred as part of the environmental review and approval process for covered projects. These fees are to be deposited into an Environmental Review Improvement Fund for use by the executive director of the Federal Permitting Improvement Council (and by agencies with the approval of the executive director) to administer, implement and enforce the provisions of Title XLI. FAST Act, Section 41009.

Implications of Title XLI

The enactment of these provisions signals to federal agencies that Congress wants to see large-scale

infrastructure projects approved and developed quickly. Implementation ideally will increase regulatory certainty in federal agency permitting. The designation of one facilitating agency, and the express direction to incorporate state environmental documents in the federal permitting process, should reduce the inefficiencies of applying for a permit through multiple agencies, often with competing interests and objectives. The 180-day deadline for final action reinforces the urgency of efficient permitting. Requiring courts to consider the negative effects of project delays on jobs, as well as the negative effects from delays on public health, safety and the environment, should reduce the likelihood of preliminary injunctions halting the development of covered projects during litigation. Nonetheless, the procedures established by Title XLI, such as development of performance schedules and agency coordination through establishment of the Federal Permitting Improvement Council, will take some time to roll out, so the full benefits may not be apparent for several years.

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Biographies

LOUISE C. ADAMSON | PARTNER | SAN FRANCISCO, CA

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Louise Adamson is a partner with the firm's Real Estate & Land Use practice. She focuses her practice on real estate, land use and development, including the acquisition and disposition, leasing, financing, entitlement, development, and construction of properties located throughout the United States, together with related business and corporate matters including entity structure and formation and tax deferred exchanges.

Louise has represented clients on a wide variety of projects including urban and suburban office buildings, commercial campuses, retail warehouse development, shopping centers, renewable energy projects, industrial and manufacturing facilities, data centers, subdivisions, residential care facilities, mixed-use developments, schools, vineyards, high-end residential, resorts and golf courses. Associated with these projects, she has conducted due diligence and title reviews, successfully secured land use entitlements, coordinated CEQA compliance, prepared reciprocal easement and CC&R agreements, and negotiated complex development, disposition and exclusive negotiation agreements.

Louise was one of the first attorneys in the United States to be certified as a Leadership in Energy and Environmental Design Accredited Professional (LEED®-AP) by the U.S. Green Building Council. She has an in-depth understanding of sustainable building practices and the experience necessary to assist clients with rapidly evolving issues including building certification, government regulation, and related tax and financial incentives. Notably, Louise developed a first-of-its-kind green leasing program for a global technology company which not only integrates sustainable building practices but also tracks the LEED rating system through each stage of the lease negotiation process so that the lease itself facilitates LEED certification for the tenant space. Louise is also a member of the City of Orinda Planning Commission. She served as the Commission's chairman from 2010 to 2013.

CECILY T. BARCLAY | PARTNER | SAN FRANCISCO, CA

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Cecily Barclay focuses her practice on land use and entitlements, real estate acquisition and development and local government law. She regularly assists landowners, developers and public agencies throughout Northern California in all aspects of acquisition, entitlement and development of land, including land use application processing, drafting and negotiating purchase and sale agreements, negotiating and securing the approval of development agreements, general plan amendments, specific plans, planned development zoning, annexations, initiatives and referenda, and tentative and final subdivision maps. She also advises clients on riparian and appropriative water rights, including in connection with vineyard and agricultural properties.

In addition to processing entitlements for large mixed-use master planned communities, as well as for reuse of former military facilities and other infill development sites, Cecily also has significant experience negotiating school fee mitigation agreements, preparing conservation easements to mitigate for loss of biological resources, drafting affordable housing programs, Williamson Act contracts and related issues pertaining to agricultural properties; and assisting local agencies in drafting ordinances relating to updating general plans and housing elements, planned development zoning, specific plans, mitigation fees, affordable housing and growth management.

Cecily is the author of *Curtin's California Land Use and Planning Law*, a well-known publication which definitively summarizes the major provisions of California's land use and planning laws. Cecily recently co-authored *Development by Agreement*, an ABA publication providing a national analysis of laws and practices concerning various forms of development agreements. She regularly speaks and writes on topics involving land use and local government law, including programs and articles for the American Bar Association, American Planning Association, California Continuing Education of the Bar, League of California Cities, University of California Extension programs, Urban Land Institute, and other state and national associations and conferences. Cecily's practice also focuses on how agencies and developers must comply with state housing laws, particularly anti-NIMBY (Not In My Back Yard) and density bonus laws. Cecily is also the president of two nonprofit affordable housing corporations in Oakland and has served for several years on the ABA, state and local government Section's Publications Oversight Board.

ANNE BEAUMONT | COUNSEL | SAN DIEGO, CA

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Anne Beaumont is a counsel with the firm's Environment, Energy & Resources practice. She has extensive experience representing clients in environmental, regulatory and litigation matters involving natural resources, tribal issues, telecommunications, land use and the siting and defense of large-scale infrastructure and energy projects.

Infrastructure Development and Natural Resources

Anne represents utilities, energy developers, and others in the development of cutting-edge energy and infrastructure projects. She has been involved in landmark transmission line and renewable energy projects in California and the Southwest. Anne regularly represents clients before federal and state agencies, including the California Public Utilities Commission, Bureau of Land Management, U.S. Forest Service, U.S. Fish and Wildlife Service, California Department of Fish and Wildlife, National Park Service, California State and Regional Water Boards and U.S. Army Corps of Engineers.

Anne advises clients on compliance with federal and state environmental statutes, including the National Environmental Policy Act (NEPA), California Environmental Quality Act (CEQA), federal and California Endangered Species Acts (ESA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),Clean Water Act, Migratory Bird Treaty Act (MBTA), Federal Aviation Act, and Bald and Golden Eagle Protection Act.

Administrative Proceedings and Enforcement Actions

Anne has extensive knowledge in administrative proceedings (including evidentiary and rule-making proceedings) and enforcement actions. These proceedings often relate to large-scale infrastructure project applications before state and federal agencies, complex telecommunications proceedings before the California Public Utilities Commission and enforcement actions brought by federal and state agencies. In these administrative proceedings, Anne frequently works closely with expert witnesses, conducts discovery and prepares witness examinations, briefings and comments.

Complex Civil Litigation and Appeals

Anne also has substantial experience in complex civil litigation and appeals, representing clients in both state and federal court. Her litigation matters cover a wide range of topics, including environmental issues, natural resources, telecommunications, tribal matters and employment law. Her appellate experience includes challenges to federal and state approvals of infrastructure and energy projects and appeals from the California Public Utilities Commission.

Pro Bono

Anne maintains an active pro bono practice, representing clients in immigration court hearings and appeals regarding asylum and cancellation of removal. Her pro bono experience includes first-chairing a number of complicated immigration issues, including those raising issues of first impression. In addition to immigration matters, Anne's pro bono work includes counseling nonprofits on a wide range of legal issues, including regulations governing nonprofit fundraising and National Park Service regulations.

MARC R. BRUNER | PARTNER | SAN FRANCISCO, CA

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Marc Bruner represents governmental entities and private companies in a wide variety of environmental matters. He regularly works with clients in resolving complex compliance issues under the federal Clean Water Act, the California Porter-Cologne Water Quality Control Act, the federal and California Endangered Species Acts, the National Environmental Policy Act, the California Environmental Quality Act, the California Integrated Waste Management Act, and the panoply of California laws and regulations governing water supply, air quality, coastal development, development along the banks of streams and rivers, historic resources, and the management and disposal of solid and hazardous wastes.

Marc is particularly well-versed in the rules and regulations governing the management of industrial, municipal and construction stormwater and the treatment and discharge of process wastewater under federal NPDES permits and state law waste discharge requirements. He is very familiar with the recent developments in this rapidly emerging area of the law, and with the regulations and proceedings of the State Water Resources Control Board and the California Regional Water Quality Control Boards. He has advised companies and local governments on a broad range of stormwater and wastewater compliance issues.

Marc has a keen understanding of the differences between the federal and state law requirements as well as the areas of overlap and the opportunities and best practices for coordination. Marc also understands the strategic and practical considerations involved in negotiating compliance issues with the federal and state regulators.

Marc is co-author of the chapters covering wetlands and endangered species in *Curtin's California Land Use and Planning Law*, a leading treatise routinely relied upon by landowners, developers and local governments throughout the state. He speaks regularly on environmental and land use topics, including CEQA, NEPA, water quality, wetlands and endangered species and water supply requirements for new developments.

MATTHEW S. GRAY | PARTNER | SAN FRANCISCO, CA

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Matthew Gray focuses his practice on land use entitlement processing, environmental compliance, and real estate transactions. He represents a range of local agencies, real estate developers and landowners in all stages of the land use entitlement and development process. He assists clients in negotiating and securing approval of development agreements, general plan amendments, specific plans, zoning, subdivision approvals, and annexation of property into cities and special districts; regularly appears before planning commissions and city councils; and advises clients on compliance with the California Environmental Quality Act and other federal and state regulatory programs during the development process. Matt also has experience negotiating affordable housing agreements, complex mitigation fee agreements and conservation easements; forming land-based financing mechanisms, including Mello-Roos Districts; securing cancellation or termination of Williamson Act contracts on agricultural lands; advising clients on issues relating to water supply; and using the initiative and referendum process in the land use planning context. Matt negotiates purchase and sale agreements; site development agreements; CC&R's and easement agreements; and related transactional documents in connection with mixed-use, commercial, and residential development projects.

Matt litigates land use matters in the state and federal courts, having defended clients in challenges under the California Environmental Quality Act, the Planning & Zoning Law, the Subdivision Map Act, the National Environmental Policy Act, the Federal Land Policy and Management Act, the National Historic Preservation Act, as well as local zoning ordinances, conditions of approval and general plans. He also regularly defends landowners in eminent domain litigation.

Matt has worked on a wide variety of significant land use projects throughout California, including large urban redevelopment projects, military base reuse projects, mixed-use waterfront developments, renewable energy and related infrastructure projects, regional shopping centers, and master-planned residential communities.

Matt teaches an Annual Land Use Law Review and Update course at University of California Davis Extension. He has also taught Planning Law and Legal Process at University of California Berkeley Extension. He regularly lectures on the Subdivision Map Act through California Continuing Education of the Bar (CEB) and before local municipal engineers' associations.

He is an active member of San Francisco Planning and Urban Research (SPUR). He has served on the board of directors of the AIDS Legal Referral Panel and as chair of the Amicus Committee of Bay Area Lawyers for Individual Freedom.

JULIE JONES | PARTNER | SAN FRANCISCO, CA

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Julie focuses on environmental and land use counseling and litigation for complex development projects. She resolves issues that arise under the California Environmental Quality Act, the National Environmental Policy Act, the Clean Water Act, federal and state species protection statutes, and a range of other local, state and federal statutes and common law doctrines that affect land use. An experienced litigator in California and federal courts, Julie defends projects and uses this experience to help clients obtain the approvals they need while minimizing litigation risk.

Julie's strategic problem solving has assisted private and public entities in permitting major university, traditional and renewable energy, water supply, marine terminal and master planned community projects. Recent accomplishments include:

- Securing approvals for faculty and below-market-rate housing developments in Palo Alto under the terms of a complex development agreement. In spite of controversy regarding traffic , no litigation was filed and the projects are under construction.
- Assisting Stanford University in obtaining approval of a 1.5-million-square-foot office, research and development and medical clinic project in Redwood City. The project involved complex traffic, air quality and greenhouse gas issues. No litigation was filed.
- Leading a litigation team in, and arguing, the successful defense of a Planned Parenthood clinic against a campaign attempting to use CEQA to challenge permits for new clinics.
- Conducting land use and environmental due diligence – including CEQA, NEPA, endangered species, Federal Land Policy and Management Act and local land use issues – for proposed acquisitions of utility-scale solar projects.

Litigation successes include overcoming challenges to a university/county agreement for trails, a transportation sales tax ballot measure, a city/county agreement for urban services, a transportation authority's light rail extension, and a university development and roadway project. Julie also represented a port in the successful defense of major expansion and dredging projects against NEPA and Endangered Species Act claims.

Julie is the author of the sustainable development chapter of *Curtin's California Land Use and Planning Law* and has co-authored the treatise's chapters on federal and state wetland regulation and endangered species protections. She is also a regular contributor to the California Land Use and Development Law Report, and lectures on CEQA and NEPA for clients, professionals and industry associations.

ALAN MURPHY | COUNSEL | SAN FRANCISCO, CA

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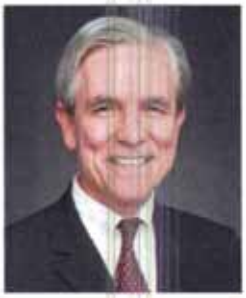
Alan Murphy focuses his practice on land use and development matters, including associated environmental review. He secures and defends land use entitlements and counsels clients in preparing development applications, during the approval process and in the due diligence period. Alan has significant experience with local general plans, specific plans, zoning codes, conditional uses, variances, the Subdivision Map Act, development agreements, impact fees, the California Environmental Quality Act (CEQA), the National Environmental Policy Act (NEPA) and San Francisco's discretionary review process.

In his practice, Alan strives to identify innovative solutions to complex and politically sensitive development challenges. He routinely interacts with public agency staff and regularly appears on behalf of clients before city councils and boards of supervisors, planning commissions and local appellate boards. He also defends against land use and environmental litigation, and he represents property owners in zoning enforcement actions.

Alan's clients have included developers, landowners, financial and educational institutions, energy companies and public agencies. His experience includes representing clients in securing entitlements to redevelop over 500,000 square feet of office and R&D uses in both Foster City and Mountain View; advocating before various San Francisco decision-making bodies for proposals to establish new residential units; processing a proposal for a 200-acre rural residential development and a 1,950-acre wildlife preserve in Santa Clara County; and representing an air district in litigation challenging rule amendments. Alan also has worked on a citizens' initiative to amend a city's general plan, specific plan, zoning and other ordinances to accommodate a major development project.

As an accredited LEED Green Associate, Alan can assist clients in complying with U.S. Green Building Council certification requirements. He serves on the Urban Land Institute San Francisco's Sustainable Development Committee.

Alan routinely provides pro bono legal services to those in need. He has worked with an environmental nonprofit organization on an extensive analysis of legal authorities governing ocean ecosystems and resources. He also has screened requests for clemency from federal prisoners, worked on an application for asylum and drafted part of a U.S. Supreme Court amicus brief on behalf of Catholic nuns.



GEOFFREY L. ROBINSON | PARTNER | SAN FRANCISCO, CA

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Geoff Robinson focuses his practice on land use, development and real estate litigation. He represents clients in civil and administrative proceedings involving planning and zoning laws, CEQA, development fees and exactions, and public facilities financing. He is an authority on writs of mandate in the trial court and is co-author of the treatise California Administrative Mandamus (CEB, Third Edition - 2012) and other publications on civil writ practice. He also has substantial experience in the area of development mitigation and has litigated numerous cases involving challenges to development exactions, mitigation requirements and public financing districts. He has also handled a broad range of water law matters, including a ground water basin rights adjudication, and appellate litigation involving the validity of a water supply assessment and an Urban Water Management Plan.

Geoff has been an active participant in pro bono efforts, representing individuals, nonprofits and public agencies before state and federal courts, including several matters in the California Supreme Court. He is the recipient of the California State Bar President's Pro Bono Award.

Geoff served as law clerk to Judge Thomas J. MacBride of the U.S. District Court for the Eastern District of California and as extern to Judge Joseph T. Sneed of the U.S. Court of Appeals for the Ninth Circuit.

BARBARA J. SCHUSSMAN | PARTNER | SAN FRANCISCO, CA

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Barbara Schussman, a partner in the firm's Environment, Energy & Resources practice, focuses on securing federal, state and local agency approvals needed to develop a wide range of private and public projects, including water supply and storage projects, university campuses, hospitals, research and development facilities, oil refineries, maritime port and airport expansions, industrial scale solar facilities, and numerous industrial, commercial, housing and mixed use developments.

Barbara counsels clients regarding compliance with the California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA), legislative and quasi-adjudicatory approvals required under the California Planning and Zoning Law, and permits and approvals required by other land use and environmental regulations, including the Clean Air Act, Clean Water Act, federal and state Endangered Species Acts, California Coastal Act and the Subdivision Map Act. She also is an experienced litigator, and has defended approvals and environmental permits in both the state and federal courts, including the California Supreme Court.

She is the author of the CEQA chapter of *Curtin's California Land Use and Planning Law*. She also teaches and lectures on CEQA and NEPA compliance and litigation issues for a variety of organizations.

Barbara's recent successes include:

- CEQA and CEQA+ compliance and permitting for a public project to recycle agricultural and other sources of wastewater for groundwater injection and reuse as drinking water in Monterey County.
- New zoning, conditional use permit, development agreement and CEQA compliance for Stanford Hospital and Lucile Packard Children's Hospital's $5 billion hospital replacement and expansion project in Palo Alto.
- Defense of CEQA and Clean Air Act challenges to Chevron's Richmond Refinery modernization project.
- County and BLM approvals for a 445-megawatt photovoltaic solar project in Riverside County, and defense of CEQA litigation filed by the Colorado River Indian Tribes.
- Harbor Commission, Army Corps of Engineers and Coastal Act approvals and CEQA and NEPA compliance for two major marine terminal projects at the Port of Los Angeles;
- Defense of Coastal Act, Clean Air Act and CEQA challenges to rulemaking actions by the South Coast Air Quality Management District.
- CEQA and NEPA compliance and approvals for expansion of a drinking water reservoir in Contra Costa County and new Delta water supply diversion intake.
- Published appellate decision holding that an individual development project can be fully approved through the initiative process.

LAURA GODFREY ZAGAR | PARTNER | SAN DIEGO, CA

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Laura Godfrey Zagar focuses her practice on multijurisdictional, complex energy and infrastructure projects as well as complex environmental litigation. Laura has played a prominent part in several innovative energy and infrastructure projects, including transmission lines, renewable energy, and water projects.

Energy and Infrastructure Development

Laura represents utilities, energy developers and others before federal, state and local agencies on a wide range of energy and infrastructure projects. Her experience includes numerous major transmission lines, as well as renewable generation (including solar, wind, and biomass), conventional generation, telecommunications, and water projects. Laura has extensive knowledge in proceedings before the California Public Utilities Commission (CPUC) and other state commissions, as well as the transmission planning process as conducted by the California Independent System Operator (CAISO). Laura counsels clients on the implications of California's Global Warming Solutions Act of 2006 (AB 32) and California's Renewables Portfolio Standard (RPS).

Natural Resources

Laura is highly experienced with federal, state and local authorities with jurisdiction over natural resources or infrastructure projects. She represents clients on natural resource issues before regulatory bodies such as the Bureau of Land Management, the U.S. Forest Service, the U.S. Fish and Wildlife Service, the California Fish and Wildlife Service, and California's State Water Resources Control Board and the Regional Water Quality Control Boards. Laura provides clients with counseling on a wide array of environmental statutes. Areas of focus include the National Environmental Policy Act (NEPA), the California Environmental Quality Act (CEQA), federal and California Endangered Species Acts (ESA), Clean Air Act, Clean Water Act, California's Porter-Cologne Act, Federal Aviation Act, and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Laura also advises clients on statutes and regulations governing the use of federal lands, including the Federal Land Policy and Management Act (FLPMA) and the National Forest Management Act (NFMA). With her in-depth knowledge of the panoply of federal and state statutes governing energy and infrastructure projects, Laura effectively guides her clients through the complex approval process.

Litigation and Administrative Proceedings

Laura is an experienced litigator in both federal and state court, with substantial experience in complex and appellate litigation. She represents clients in litigation related to approvals of energy and infrastructure projects, and also has extensive experience in environmental and toxic tort litigation. Laura has extensive proficiency with appeals of California Public Utilities Commission decisions. Laura works closely with numerous environmental, energy, and engineering experts in both administrative and court proceedings on a wide range of topics including natural resources, biology, engineering, cultural resources, transmission planning, geology, energy modeling, toxicology, fate and transport, and remediation.