League of California Cities Annual Conference & Expo

CEQA and Land Use Litigation Update

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Published CEQA Decisions

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Scope of CEQA

1) *Delaware Tetra Technologies, Inc. v. County of San Bernardino*

2) *California Building Industry Association v. Bay Area Air Quality Management District*

Delaware Tetra Technologies, Inc. v. County of San Bernardino (2016) 247 Cal.App.4th 352

- First of six challenges to public/private Cadiz Project:
  - Install wells and pump groundwater from Mojave Desert
  - 50,000 afy over 50-year term
  - Subject to County's DGMO and later GMP
  - MOU set expectations for final GMP under DGMO

- Fourth Appellate District upheld MOU:
  - MOU not "approval of a project" as it did not foreclose alternatives/mitigation or otherwise commit to Project;
  - MOU a framework for completing GMP and not "binding."

CBIA v. BAAQMD (2016) 2 Cal.App.5th 485

- Challenge to BAAQMD's significance thresholds for TACs and "reverse-CEQA" analysis;
  - Supreme Court remanded to appeals court question of whether thresholds must be invalidated;

- First Appellate District held:
  - Thresholds invalid to extent they mandate assessment of surrounding environment's impact on future inhabitants;
  - Not required to invalidate thresholds for legitimate uses.

Exemptions

1) *Walters v. City of Redondo Beach*

Walters v. City of Redondo Beach (2016) 1 Cal.App.5th 809

- Review of Class 3 categorical exemption (small facilities or structures) applied to car wash and coffee shop:
  - De novo standard for interpretation of exemption, whereas substantial evidence on review of application of exemption;
  - Equipment not substantially different from that associated with commercial uses and thus fit under exemption;
  - Car wash did not present "unusual circumstances" and no significant impacts involving noise or traffic.

Negative Declarations

1) *Joshua Tree Downtown Business Alliance v. County of San Bernardino*

2) *Friends of the Willow Glen Trestle v. City of San Jose*

Joshua Tree Downtown Business Alliance v. County of San Bernardino (2016) 1 Cal.App.5th 677

- Review of MND for 9,100 sq. ft. retail store, Dollar General:
  - Local business alliance filed suit, raising urban decay;
  - Trial court granted writ, relying on layperson testimony.

- Fourth District upheld MND:
  - Urban decay a matter of special expertise—lay testimony with no factual basis insufficient;
  - General plan consistency claim rejected; those claims subject to "abuse of discretion" standard (not fair argument).

Friends of the Willow Glen Trestle v. City of San Jose (2016) 2 Cal.App.5th 457

- Challenge to City's demolition of Railroad Trestle on MND;
  - Petitioner clamed and trail court found that because Trestle might be historical, an EIR was required under fair argument standard.

- Sixth District reversed:
  - Consistent with Guideline 15064.5(a)(3) and *Valley Advocates*, fair argument standard does not govern historicity determination;
  - Historicity subject to "preponderance of the evidence" standard (PRC § 21084.1).

Environmental Impact Reports

1) *Center for Biological Diversity v. County of San Bernardino*
2) *Spring Valley Lake Association v. City of Victorville*
3) *Ukiah Citizens for Safety First v. City of Ukiah*
4) *Bay Area Citizens v. Association of Bay Area Governments*
5) *Bay Area Clean Environment, Inc. v. Santa Clara County*

Center for Biological Diversity v. County of San Bernardino (2016) 247 Cal.App.4th 326

- Challenge to Cadiz Groundwater Project EIR and lead agency designation for public/private partnership;
- Water District was proper lead agency under Guideline 15051:
  - As part of partnership, district was carrying out project;
  - District had greatest responsibility for project as a whole;
  - MOU property designated district, which had a "substantial claim."
- EIR's project description was not inaccurate, misleading, or unstable about duration or conservation purpose of project.

Spring Valley Lake Association v. City of Victorville (2016) 248 Cal.App.4th 91

- Overturned EIR for commercial retail development:
  - No substantial evidence that project would meet GP policy incorporating energy efficiency standard (15% over Title 24);
  - No substantial evidence to show consistency with GP requirement for on-site electricity generation to maximum extent feasible; and
  - Revisions to air quality analysis and redesign of stormwater plan required recirculation.
- Violated Subdivision Map Act for failure to make all *affirmative* findings under Section 66474 in approving parcel map.

Ukiah Citizens for Safety First v. City of Ukiah (2016) 248 Cal.App.4th 256

- Challenge to EIR for 148,000-sq. ft. retail facility:
  - During pendency of suit, City prepared Addendum to address energy impacts and *Calif. Clean Energy Comm. v. City of Woodland*;
  - Energy impacts analysis required under PRC § 21100(b)(3), Guideline 15126.4, and Appendix F.
- First District invalidated EIR's energy impacts analysis:
  - No separate analysis;
  - No energy use calculations for vehicle trips or construction;
  - Addendum could not cure inadequate EIR.

Bay Area Citizens v. Association of Bay Area Governments (2016) 248 Cal.App.4th 966

- Challenge to EIR for Plan Bay Area, a Sustainable Communities Strategy developed by MTC and ABAG under SB 375:
  - SB 375 requires MPOs to adopt plants to meet state and regional ghg-reduction targets.
- First District rejected claims concerning project objectives, baseline, and alternatives that all centered on ability to meet targets without need for "draconian" land-use regime:
  - Regional plans are in addition to statewide mandates;
  - Claims nothing more than attack on wisdom of Plan.

Bay Area Clean Environment, Inc. v. Santa Clara County (2016) __ Cal.App.5th __

- Review of amended Reclamation Plan and EIR for 3,510-acre limestone and aggregate mine – CEQA and SMARA claims.

- Sixth District upheld EIR and amended Reclamation Plan:
  - No "piecemealing" where proposal for future pit was withdrawn and would not change nature or scope of amended Plan;
  - Need not adopt overriding considerations where impact to red-legged frog deemed less than significant;
  - Biologist's email clarifying frog's absence deemed part of record.

Subsequent Review

1) *Coastal Hills Rural Preservation v. County of Sonoma*

2) *Friends of the College of San Mateo Gardens v. San Mateo County Community College District**

Coastal Hills Rural Preservation v. County of Sonoma (2016) __ Cal.App.5th __

- Challenge to Subsequent MND for expansion of Buddhist retreat center, affirming storage uses and raising occupancy:
  - Original entitlements and changes approved with MNDs;
  - Petitioner argued "new project" subject to "fair argument."

- Upheld changes as falling within scope of original project:
  - Determination subject to substantial evidence review;
  - No improper deferral of analysis in condition of approval requiring applicant to install infrastructure to be recommended by Fire Marshall.

Friends of the College of San Mateo Gardens v. San Mateo Co. Community College Dist. (2016) __ Cal.4th __

- Challenge to changes to college campus master plan adopted based on an addendum:
  - Original master plan adopted based on MND;
  - Building/garden originally slated for preservation, now demolition.

- First District followed *Lishman* and ruled that:
  - Courts must first determine whether changes really constitute "new project," which is determination subject to de novo review
  - Demolition was inconsistent with plan and thus a "new project."

Friends of the College of San Mateo Gardens v. San Mateo Co. Community College Dist. (2016) __ Cal.4th __

- Supreme Court held:
  1) No "new project" test—agency's subsequent review obligations depend on "effect" and not "abstract" characterizations;
  2) Whether project change qualifies under Sections 21166/15162 is entitled to substantial evidence review;
  3) If Sections 21166/15162 apply, subject to "substantial evidence" that "substantial changes . . . require major revisions"—it would be "absurd" to restart entire process;
  4) Guideline 15162 is "valid gap-filling measure" governing changes to projects originally approved by MND.

Litigation Procedures

1) *Center for Biological Diversity v. California Department of Fish & Wildlife*

2) *Communities for a Better Environment v. Bay Area Air Quality Management District*

3) *Citizens for Ceres v. City of Ceres**

Center for Biological Diversity v. California Department of Fish & Wildlife (2016) 1 Cal.App.5th 452

- Supreme Court ruled against CDFW and remanded to Second Appellate District to address exhaustion, climate change, and other issues left unresolved (e.g., water quality).

- On remand, Second District published only procedural part:
  - Absent specific legislation, appellate districts have no jurisdiction to issue and supervise writs of mandate;
  - That power is reserved to trail courts on remittitur.

Communities for a Better Environment v. Bay Area Air Quality Management District (2016) 1 Cal.App.5th 715

- Challenge to rail-to-truck facility for transloading crude oil:
  - July 2013 – Ministerial approval of ATC for Bakken crude;
  - October/December 2013 – Modified conditions;
  - February 2014 – Approval of PTOs, with the modified conditions;
  - March 2014 – CBE files suit.
- First District held lawsuit barred by statute of limitations:
  - No "discovery rule" in CEQA—must file within period specified for each triggering event (notice, approval, or commencement);
  - Only if no triggering event may courts extend limitations period to "knew or reasonably should have known" (*Costa Mesa*).

Citizens for Ceres v. City of Ceres (2016) __ Cal.App.5th __

- Challenge to EIR for Wal-Mart Supercenter denied and real party sought recovery of record costs ($48,889.71):
  - City prepared record but obtained reimbursement from Wal-Mart;
  - Trial court denied recovery of costs based on *Hayward Area Planning v. City of Hayward*.

- Fifth District reversed, finding that where record is prepared in a statutorily approved method—here, by the lead agency--the prevailing party recovers costs, including real party in interest.

Published Land Use Decisions

1) *Stewart Enterprises, Inc. v. City of Oakland*
2) *Naraghi Lakes Neighborhood Preservation Association v. City of Modesto*
3) *City of Selma v. Fresno County LAFCO*
4) *The Kind and Compassionate v. City of Long Beach*
5) *T-Mobile West LLC v. City and County of San Francisco**
6) *616 Croft Ave., LLC v. City of West Hollywood**

Stewart Enterprises, Inc. v. City of Oakland (2016) 248 Cal.App.4th 410

- First District invalidated City's denial of CUP for crematoria under emergency ordinance where Plaintiff had a building permit:
  - Emergency ordinance adopted after building permit issued;
  - Plaintiff applied for CUP, but was denied;
  - Under City's permit-vesting ordinance, Plaintiff acquired vested right when it secured building permit;
  - Emergency ordinance impaired vested right because it prohibited construction.

Naraghi Lakes Neighborhood Preservation Association v. City of Modesto (2016) 1 Cal.App.5th 9

- Challenge to 170,000 sq. ft. shopping center under Planning and Zoning law and CEQA (unpublished).

- Court held Project consistent with Neighborhood Plan Prototype under GP and Zoning:
  - Presumption of "regularity" and review "highly deferential";
  - Policy favoring 60,000 – 100,000 sq. ft. of retail not mandatory;
  - 170,000 sq. ft. retail "reasonably consistent" and part of a "consistent practice" in other neighborhoods.

City of Selma v. Fresno County LAFCO (2016) 1 Cal.App.5th 573

- LAFCO annexation of 430 acres into City of Kingsburg:
  - City of Selma asserted that hearing could not be continued beyond 70-day limit in Gov. Code § 56666(a).

- Fifth District held that 70-limit is directory, not mandatory:
  - Failure to adhere to procedural step did not invalidate action;
  - 70-day limit constituted a scheduling, rather than a noticing requirement.

The Kind and Compassionate v. City of Long Beach (2016) 2 Cal.App.5th 116

- Second District denied challenge to Ordinance banning medical marijuana dispensaries:
  - No "right" to access, and thus Ordinance did not discriminate against persons with disabilities (patients/users) under state/federal anti-discrimination laws;
  - Medical Marijuana Program Act did not preempt city zoning;
  - Enforcing ordinance by issuing threats did not interfere under the Bane Act with any state or federal law granting rights to lease property to marijuana collectives.

T-Mobile West LLC v. City and County of San Francisco (2016) __ Cal.App.5th __

- Review of San Francisco Ordinance requiring site-specific permits for installation of Personal Wireless Services Facilities:
  - Plaintiff argued preemption under PUC §§ 7901 and 7901.1 (reasonable "time, place, and manner" controls in public ROW).
- First District upheld portions of Ordinance authorizing consideration of aesthetics:
  - State law does not automatically divest local police powers;
  - Restrictions on right not limited to disturbance of public use of ROW or navigable waters (as limits the right to install under Code).

616 Croft Ave., LLC v. City of West Hollywood (2016) __ Cal.App.5th __

- For 11-unit condominium, challenge to $581,651.15 in fees for affordable housing, parks, wastewater, and traffic mitigation:
  - Developer paid under protest and sought return under Mitigation Fee Act (Gov. Code, §§ 66000–66025) and *Nollan/Dolan*.

- Second District upheld the fees:
  - Under *CBIA v. San Jose*, in-lieu fee not an "exaction";
  - Challenger has burden of proving that in-lieu fee not "reasonably related" to policy of promoting affordable housing under general welfare.

CEQA and Land Use Cases Pending in the California Supreme Court

Pending CEQA Cases

1) *Sierra Club v. County of Fresno*

2) *Friends of the Eel River v. North Coast Railroad Authority*

3) *Cleveland National Forest Foundation v. SANDAG*

4) *Banning Ranch Conservancy v. City of Newport Beach*

Pending Land Use Cases

1) *Orange Citizens for Parks and Recreation v. Superior Court**

2) *Lynch v. California Coastal Commission*