Land Use and CEQA Litigation Update

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Notes:

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OPINIONS ON ISSUES UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Scope of CEQA

- ***Friends of the Eel River v. North Coast Railroad Authority* (2017) ___Cal.App.5th ___ (No. S222472).**

The California Supreme Court held that the Interstate Commerce Commission Termination Act (ICCTA) does *not* preempt CEQA when a California public agency decides to undertake a new railroad project, even if the state agency later authorizes a private entity to operate the new rail line. The Court therefore concluded that the North Coast Railroad Authority (NCRA) was required to comply with CEQA prior to taking steps to reinitiate rail service on a segment of an interstate rail line that had gone out of operation for many years. The Court declined, however, to enjoin the ongoing operations of the railroad by NWPCo, the private operator. Because these operations had been occurring during the course of the litigation against NCRA, any such injunction would intrude into an area of activity that *is* preempted by the ICCTA, namely, private railroad operations.

The NCRA is a state agency created in 1989 for the purpose of resuming railroad freight service along a previously-abandoned route through Napa and Humboldt Counties. The northern portion of the line runs along the Eel River, while the southern portion, at issue in the case, runs along the Russian River. In 2000, the Legislature authorized funding for NCRA's program, with the express condition of CEQA compliance. NCRA subsequently contracted with NWPCo, a private company, to run the railroad. As part of the lease agreement between the two entities, NWPCo agreed that CEQA compliance by NCRA was a precondition to resumed operation. Accordingly, in 2007, NCRA issued a notice of preparation, and in June 2011, it certified a Final EIR. In July 2011, petitioners sued, challenging the adequacy of the EIR on a number of grounds. Concurrently, NWPCo commenced limited freight service along the Russian River. In 2013, NCRA took the unusual step of rescinding its certification of the Final EIR, asserting in explanation as follows: that ICCTA preempted California environmental laws; that the reinitiation of rail service was not a "project" under CEQA; and that the EIR NCRA had prepared had not been legally required. Although NCRA successfully removed the case to federal court, the case subsequently sent back to state court for a resolution of both the state CEQA claims and NCRA's ICCTA preemption defense. The Court of Appeal sided with NCRA, finding that ICCTA was broadly preemptive of CEQA. The Supreme Court granted review.

Federal preemption is based on the Supremacy Clause of the United States Constitution, which provides that federal law is the supreme law of the land. Preemption can occur expressly, through the plain words of a federal statute, or can be implied, as when a court discerns that Congress intends to occupy an entire field of regulation, or when a court concludes that a state law conflicts with a federal purpose or the means of achieving that purpose. A federal statute can be preemptive on its face or as applied. There is a presumption against preemption, particularly in areas traditionally regulated by the states, which can only be overcome by a clear expression of intent (the *Nixon/Gregory* rule). The market participant doctrine is a related concept and holds that a public agency has all the freedoms and restrictions of a private party when it engages in the

market (provided that the state does not use tools that are unavailable to private actors). The courts presume that Congress did not intend to reach into and preempt such proprietary marketplace arrangements, absent clear evidence of such expansive intent.

The Court began by recognizing that ICCTA *does* preempt state environmental laws, including CEQA, that interfere with private railroad operations authorized by the federal government. ICCTA contains an express preemption clause giving the federal Surface Transportation Board (STB) jurisdiction over railroad transportation (including operation, construction, acquisition, and abandonment). ICCTA's purpose was both unifying (to create national standards) and deregulatory (to minimize state and federal barriers). Although ICCTA is a form of economic regulation, state environmental laws are also economic in nature when they facially, or as applied, dictate where or how a railroad can operate in light of environmental concerns. Such state laws act impermissibly as "environmental preclearance statutes." These legal principles, however, did not extend to the actions of NCRA in this case. Just as a private railroad company may make operational decisions based on internal policies and procedures, and may even modify its operations voluntarily in order to reduce environmental risks and effects, so too may a state, in determining whether to create a new railroad line, subject itself to its own internal requirements aimed at environmental concerns. In the latter context, though, a state operates through laws and regulations, as opposed to purely private policies. When a state acts in such a manner, its laws and regulations are a form of self-governance, and are not regulatory in character. CEQA is an example of such an internal guideline that governs the process by which a state, through its subdivisions, may develop and approve projects that affect the environment. Viewed in this context, CEQA is part of state self-governance, and is not a regulation of private activity.

Although the market participant doctrine does not directly apply, being mainly applicable in Commerce Clause jurisprudence, the doctrine supports by analogy the view that that California was not acting in a regulatory capacity in this case. CEQA is analogous to private company bylaws and guidance to which corporations voluntarily subject themselves. By imposing CEQA requirements on the NCRA, the state was not "regulating" any private entity, but rather was simply requiring that NCRA, as one of its subdivisions, conduct environmental review prior to making a policy decision to recommence the operation of an abandoned rail line. If Congress had intended to preempt the ability of states to govern themselves in such a fashion, any such intention should have been clear and unequivocal. The Court found no such intent in the ICCTA.

The Court's remedy, however, was cognizant of the narrowness of its holding. The Court concluded that, because NWPCo is currently operating the line, the California Judiciary could not enjoin that private entity's operations even if, on remand, the lower state courts found problems with NCRA's CEQA documentation. An injunction under CEQA against NWPCo *would* act as a regulation, by having the state dictate the actions to private railroad operator. Such action would go beyond the state controlling its own operations.

Statutory Exemptions

❖ ***Sierra Club v. County of Sonoma*** **(2017) 11 Cal.5th 11**

The First District Court of Appeal held that issuing an erosion-control permit to establish a vineyard was a ministerial act and exempt from CEQA. Thus, the permit application submitted by Ohlson Ranch was not subject to CEQA review by the County of Sonoma.

As of 2000, Sonoma County requires issuance of an erosion-control permit by the County Agricultural Commissioner for the development or replanting of commercial vineyards. Prior to 2000, no governmental review or permission was required for planting or re-planting a vineyard. In December 2013, the commissioner issued a permit to Ohlson Ranch for a 108-acre vineyard, followed by a notice of exemption indicating that issuance of the permit was ministerial and therefore required no environmental review. (Pub. Resources Code, § 21080, subd. (b)(1).) The Sierra Club and Center for Biological Diversity filed suit challenging the commissioner's determination; the lower court denied the petition.

The Court of Appeal upheld the lower court's decision by applying the "functional distinction" test from *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259. Per *Friends of Westwood,* an action is ministerial under CEQA when the agency does not have the power to deny or condition the permit, or otherwise modify the project, in ways which can mitigate the environmental impacts that would be identified in an EIR. Petitioners' key argument—that the ordinance's terms were "general enough to confer discretion" to the County—did not persuade the Court. In reaching this decision, the Court emphasized that CEQA analysis is project-specific and should focus on the particular provisions of an ordinance that govern the particular proposed project at issue. A project might fall solely under ministerial provisions of a complex, multi-part ordinance, and not implicate at all other provisions that might give an agency discretionary authority. Here, many of the terms and conditions in the ordinance that may have conferred discretion to the County did not apply to the Ohlson Ranch permit application because they were either (i) factually inapplicable; (ii) expressly excluded from consideration by the commissioner with regard to this project; or (iii) involved ongoing vineyard operations, and there was no evidence in the record to suggest that they played any role in issuing the permit.

Second, even where some of the applicable provisions could have conferred discretion on the Commissioner, under the functional distinction test, the County could not have modified the project or "mitigate[d] potential environmental impacts to any meaningful degree." Rather, County decision-making was guided by nearly 50 pages of technical guidance documents. A required wetland setback conferred discretion only to the extent that the distance of the setback would be determined by the biologist's report, but did not allow the agency to modify the biologist's recommendations. A requirement to divert storm water to the nearest "practicable" disposal location was similarly ministerial, in that the permit application provided a means of water diversion, and petitioner failed to establish that other diversion methods were even available. If other methods had been available, the ordinance may have granted discretion to the commissioner to select an option or otherwise mitigate impacts. Petitioners' reliance on a provision to incorporate natural drainage features "whenever possible" was flawed for the same

reasons, as petitioners failed to identify the types of features present on the site and the commissioner's ability to choose the least environmentally significant option.

Third, the Court declined to hold that issuing a permit, an otherwise ministerial act, becomes discretionary because the applicant "offers" to mitigate potential impacts. If the ordinance does not require mitigation measures, then the Commissioner has no authority to condition granting the permit application on them. Similarly, the Commissioner's request for corrections and clarifications on the permit application did not demonstrate discretion, but rather was a simple request for information in order to complete an otherwise non-discretionary act. These corrections and clarifications were not significant enough to have alleviated "adverse environmental consequences."

Environmental Impact Reports

- ***Cleveland National Forest Foundation v. San Diego Association of Governments*** **(2017) 3 Cal.5th 497**

In a 6/1 split, the California Supreme Court held that the San Diego Association of Governments (SANDAG) did not abuse its discretion by failing to present, in its 2010 regional transportation plan (RTP) EIR, an analysis of the RTP's consistency with 2050 greenhouse gas (GHG) emissions reduction goals set forth in Executive Order (EO) S-3-05. The Court reasoned that, despite the lack of an express analysis of that issue, SANDAG had adequately informed the public, using information available at the time, of the RTP's inconsistencies with overall long-term state climate goals. The Court cautioned, however, that SANDAG's approach would not "necessarily be sufficient going forward."

In 2011, SANDAG issued its RTP pursuant to Government Code section 65020, subdivision (b), as a 40-year blueprint for a regional transportation system. As required by Senate Bill 375 (SB 375), the RTP included a "sustainable communities strategy" (SCS) informed by a regional GHG emissions budget, as determined by the Air Resources Board. (See Gov. Code, § 65080, subd. (b)(2).) The RTP was accompanied by an EIR that employed three thresholds of significance to assess GHG impacts. Compared to existing (2010) conditions, the EIR found the Plan's GHG-related impacts to be "not significant" in 2020 but significant in both 2035 and 2050. The EIR also analyzed GHG emissions against statutory goals for the years 2020 and 2035, but did not compare emissions against the long-term (2050) goal set forth in EO S-3-5 (80 percent below 1990 levels by 2050). In response to comments that were critical of the GHG analysis, SANDAG maintained it had no obligation to analyze projected GHG emissions against the goals of the EO. Several groups filed suits challenging EIR and Attorney General later joined petitioners. The lower court found the EIR inadequate and issued a writ of mandate. The Court of Appeal affirmed, holding that, among other flaws, the EIR violated CEQA by failing to measure GHG impacts against the 2050 GHG emissions target set forth in the EO.

Despite SANDAG's inclusion of this consistency analysis in its 2015 RTP update, which had been prepared in response to the Court of Appeal opinion, the Supreme Court undertook this "important question of law" because of its likelihood to recur with future RTPs and their successor plans. In making its decision, the Court balanced the need for an EIR to include sufficient detail (*Laurel Heights Improvement Assn. v. Regent of the University of California*

(1988) 47 Cal.3d 376) with an agency's discretion to evaluate environmental impacts in a reasonably feasible manner (CEQA Guidelines, §§ 15151, 15204, subd. (a)). Cleveland et al. argued that the EIR inadequately described the RTP's GHG emission impacts in that it obscured the issue and misled the public by not placing emission in a "meaningful context."

First, the Court responded by emphasizing that labeling an effect significant does not "excuse" a failure to "reasonably describe the nature and magnitude of the adverse effect." Second, the Court found problematic SANDAG's "conclusory" statement that its role in achieving statewide reduction targets is "likely small." Although individual projects in and of themselves are "unlikely" to contribute significantly to statewide GHG emissions, their emissions can be "cumulatively considerable" and therefore must be discussed in the context of statewide reduction goals. (Pub. Resources Code § 21083, subd. (b)(2); Guidelines § 15064, Subd. (h)(1).) Third, the Court maintained that a lead agency's discretion must be based on science and factual data regardless of legal requirements for any specific threshold of significance.

The Court disagreed, however, with the contention that the EIR obscured the relevant statutory framework or statewide goals, although the Court conceded that SANDAG could have presented the information in "clearer or more graphic" ways. Overall, the Court found that, to the extent that members of the public wanted to see a consistency analysis, the relevant information was "not difficult" to obtain. The Court stressed that inclusion of this information in responses to comments instead of the EIR itself "is not an infirmity" because it would be expected that members of the public "interested in the contents of an EIR will not neglect this section." The Court also acknowledged the parties' understanding that an EO does not carry the "force of a legal mandate" binding on SANDAG, but did not itself address this issue in any detail. Nor did the Court prescribe this specific outcome for other agencies, but instead repeatedly asserted the "narrowness" of its ruling and that planning agencies must ensure their analysis keeps up with "evolving scientific knowledge and state regulatory schemes." In reversing the Court of Appeal's judgment, the Court ruled only that the 2011 analysis of RTP GHGs emissions did not render the EIR inadequate; it declined to express opinion on other issues determined by the Court of Appeal, such as other deficiencies in the EIR and the writ of mandate setting aside the EIR's certification.

In a comprehensive dissent that included a detailed discussion of the legislative framework and history of California legislation addressing climate change and CEQA's purpose to provide "long-term protection of the environment," Justice Cuéllar challenged SANDAG's "good faith reasoned analysis" by its perceived obscuration of important GHG information within the EIR. Justice Cuéllar points to the "relative clarity of statewide statutory goals" as reasoning why SANDAG "does not have the discretion to downplay" the GHG consequences of its RTP. Further, he expressed concern that the majority's ruling will allow other regional planning agencies to "shirk their responsibilities."

❖ ***POET, LLC et al. v. State Air Resources Board* (2017) 12 Cal.App.5th 52 ("*POET II*")**

The Fifth District held that the California Air Resources Board (CARB) failed to comply with the terms of the writ of mandate issued by the same court in *POET, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th 681 ("*POET I*"). The Court invalidated the lower court's discharge of the writ, modified the existing writ, and ordered CARB to correct its defective CEQA Environmental Analysis, and asserted that CARB had not acted in "good faith in its selection of improper baseline."

CARB promulgated low carbon fuel standards (LCFS) in 2009 as required by the 2006 California Global Warming Solutions Act ("AB 32"). In its promulgation process, CARB prepared an Environmental Analysis (EA), the functional equivalent of an EIR, pursuant to CEQA. The 2009 LCFS and EA were the subject of litigation in *POET I*, where the Fifth District found that the EA violated CEQA by impermissibly deferring analysis of the nitrous oxide (NOx) emissions from the combustion of biodiesel fuels that would be used to help meet the LCFS. The appellate court, however, took the acknowledged "unusual" step of allowing the 2009 regulations to remain in effect pending satisfaction of a writ of mandate. In 2015, in response to the Court's ruling in *POET I*, CARB produced an updated Environmental Analysis, updated LCFS regulations (2015 regulations), and alternative diesel fuel regulations (ADF regulations). The new EA analyzed the project using a 2014 baseline and determined that the regulations would not have significant impacts related to NOx emissions. On the return to the writ, the lower court agreed with CARB and discharged the 2014 writ. This appeal followed.

First, the Court applied the abuse of discretion standard and concluded that CARB continued to violate CEQA and the 2014 writ by selecting a 2014 project baseline. The Court explained that a normal existing-conditions baseline reflects conditions when the project commences, and impact analysis must include all related project activities. In addition, a regulatory scheme is a "project" under CEQA and includes all associated enactment, implementation, and enforcement activities. Here, the original regulations, 2015 regulations, and ADF regulations were related activities making up a single project because they concerned the same subject matter, had a shared objective, covered the same geographic area, and were temporally connected.

Second, the Court determined that by using a 2014 baseline the new EA failed to consider how the original regulations, which remained in effect during and after *POET I*, encouraged and increased the use of biodiesel fuel and its effect on NOx emissions. According to the Court, selecting such a limited baseline was not even "objectively reasonable" from the point of view of an attorney familiar with CEQA. In addition, the Court found that the flawed CEQA analysis was prejudicial because it deprived the public of a meaningful opportunity to review the effect of the agency's actions on the environment.

On remand, the Court instructed CARB to review its project baseline and select a "normal" baseline consistent with its analysis—not a baseline date of 2010 or after. While the Court declined to set a specific baseline date, it implied that it could even have begun in calendar year 2006, consistent with then-Governor Schwarzenegger's 2007 mandate to the agency to review fuel GHG emissions. The parties agreed that the ADF regulations were both severable and independently enforceable from the 2015 regulations. The Court found that the 2015

regulations were also severable from the remainder of the LCFS regulations because, though more effective in their entirety, the remaining regulations would be complete and retain utility. Ultimately though, as in *POET I*, the Court concluded that, on balance, suspending the regulations would cause more environmental harm than allowing them to remain in place.

In its reversal of the order discharging the writ, the Court ordered the lower court to modify the writ to compel CARB to amend its analysis of NOx emissions and freeze the existing regulations as they relate to diesel fuel and its substitutes. In addition, the Court ordered the lower court to retain jurisdiction and to require CARB to "proceed diligently, reasonably and in subjective good faith." Finally, the Court ordered that if CARB fails to proceed in this manner, the lower court shall immediately vacate the portion of the writ preserving the existing regulations, and may impose additional sanctions.

Supplemental Review

- ***Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (2017) 11 Cal.App.5th 596**

The First District held that substantial evidence supported a "fair argument" that the demolition of a building and garden complex within a community college campus might have a new significant aesthetic effect not previously addressed in the mitigated negative declaration (MND) previously approved for a campus-wide renovation plan. The Court therefore invalidated the respondent community college district's addendum to that earlier MND, as prepared for the renovation plan changes necessitating the demolition.

In 2006, the San Mateo Community College District adopted a facilities master plan that proposed "nearly $1 billion in new construction and facilities renovation at the District's three college campuses." To comply with CEQA with respect to its vision for the College of San Mateo campus, the District prepared and published an MND before the Board of Directors approved a campus-wide renovation plan in 2007. In 2011, as a result of funding difficulties associated with a proposal to retain an on-campus garden area, the District abandoned that effort and instead added one building to its demolition list while taking two other buildings off the list. The changes would require the removal of several trees and other landscape features in the garden area. The District prepared an addendum to its earlier MND. The District Board then approved the modified project despite vocal criticism by certain members of the public, including students and faculty members. Petitioner filed suit challenging the approval, after which the District rescinded its actions, revised its addendum with bolstered analysis, and re-approved the project. Petitioners dropped their original suit but subsequently filed a new petition for mandate seeking an order directing the District to set aside its reapproval and to prepare an EIR.

The lower court granted petitioner's request for a writ and concluded that the proposed campus renovation plan changes constituted a "new project" that required brand new CEQA review – as opposed to more limited "supplemental review." The District appealed, but the Court of Appeal affirmed in an unpublished decision, citing an earlier Third District Court of Appeal decision entitled, *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288 ("*Lishman*"). That latter decision took a narrow view of the universe of agency actions subject to

supplemental review. The District then sought and obtained review in the California Supreme Court on the ground that the reasoning set forth in *Lishman* was wrong. The high court agreed, wrote an opinion rejecting *Lishman*, and remanded the matter to the Court of Appeal for further proceedings. In doing so, the Court advocated judicial deference with respect to agency decisions to continue to rely on previously-prepared EIRs, but announced a new, much less deferential (and some would say confusing) approach to judicial review of agency decisions to continue to rely on previously-prepared MNDs or negative declarations (NDs). (*Friends of the College of San Mateo Gardens v. San Mateo Community College District et al.* (2016) 1 Cal.5th 937.)

On remand, the Court of Appeal applied the substantial evidence standard to find that the District's original MND continued to be relevant to the demolition of the garden area. Thus, the District had correctly concluded that it was legitimately operating within the world of supplemental review. The Court went on, however, to apply the fair argument standard to the question of whether the proposed demolition might cause new significant environmental effects. In doing so, the Court rejected the District's interpretation of that portion of the Supreme Court's decision involving judicial review of agency actions relying on addenda to MNDs and NDs. The District had argued that the applicable standard was more subtle and complex than the more straightforward "fair argument" standard that applies outside the context of supplemental environmental review. The District advocated substantial deference with respect to agency determinations on the subjects of the continuing vitality and relevance of a prior MND or ND, and whether project changes would truly result in any "new" environmental effects. The Court of Appeal disagreed:

> [W]here, as here, an agency originally prepares a negative declaration, we must assess whether there is "substantial evidence that the changes to a project for which a negative declaration was previously approved might have a significant environmental impact not previously considered in connection with the project as originally approved." [Citation.] If there is such evidence, we cannot uphold the agency's determination that no major revisions were required. It is of no consequence whether the District believed that the prior MND remained "wholly relevant" or whether the District independently identified a new potentially significant environmental impact.

Applying this standard, the Court found a "fair argument." Individuals familiar with the garden area described it as "beautiful" and called such things as a "sanctuary," the "single surviving semi-natural asylum" on the campus, and "the only place left on campus where students, faculty, and staff can go to get away from the concrete and rigid plots of monoculture plantings that have taken over the campus." The Court mentioned a redwood tree that students described as "tall and majestic" and "irreplaceable." Although the tree would be preserved, the demolition "may cause future health or structural problems" for it, and "steps must be taken to protect the tree to reduce future problems." This evidence was enough to make reliance on an addendum improper, though the Court stopped short of ordering the preparation of an EIR.

- ***Friends of Outlet Creek v. Mendocino County Air Quality Management District*** **(2017) 11 Cal.App.5th 1235**

This decision is one in a series of environmental and administrative challenges arising from approvals for an asphalt production facility in Mendocino County.

Here, **the First District Court of Appeal held that an air quality management district, acting as a CEQA responsible agency in approving an Authority to Construct (ATC) permit, may be sued under CEQA, and such suit a must be brought as an administrative mandamus proceeding under Code of Civil Procedure section 1094.5.**

In 2014, the applicant initiated with Mendocino County the process for resuming aggregate and asphalt production at an existing aggregate operation after years of reduced and, ultimately, halted operations due to market conditions. The site had been used for aggregate and asphalt production under County land use approvals originally granted in 1972. In 2002, the County prepared and adopted a mitigated negative declaration (MND) for a 10-year use permit for the site. At the time, the General Plan and zoning designations for the site were "rangeland." The County "strongly encouraged" the owner to seek a General Plan amendment and rezone before the use permit expired in 2012. In 2009, the County updated its General Plan and certified an EIR to, among other things, change the land use designation at the site from "rangeland" to "industrial." In 2010, the County rezoned the site to conform to the updated land use designations. No legal challenges were brought against the County's actions at that time.

In response to the applicant's request to resume aggregate and asphalt production, the County Board of Supervisors issued a March 2015 resolution declaring that the resumption of asphalt production was neither a new, nor a changed, industrial use, and therefore it was allowed under the previously-issued permit. The County issued a notice of exemption and plaintiffs filed suit challenging the County's determination. Applicant then applied to Mendocino County Air Quality Management District for an ATC, which the District issued in June of 2015 based on the County's previous actions as the CEQA lead agency. Petitioners filed an administrative appeal to the District, which was denied. Petitioners then filed the suit at issue herein, alleging that the District failed to comply with CEQA because it did not conduct a separate environmental analysis, and alleging the District did not follow its own regulations. The District and applicant filed demurrers asserting that Petitioners cannot sue the District directly under CEQA, and instead can only sue under Health and Safety Code section 40864. The lower court sustained the demurrers.

In its decision overturning the trial court's decision and concluding that the District could be sued under CEQA, the Court of Appeal cited several cases, including those specific to "individual permit decisions." The Court seemingly relied on *Orange County Air Pollution Control Dist. v. Public Utilities Com.* (1971) 4 Cal.3d 945 to determine that an administrative mandamus action under Code of Civil Procedure section 1094.5 is appropriate in the instant case. The Court rejected the contention that Health and Safety Code section 40864 is the "only" statute that "can be invoked in challenging an action by an air quality management district, whether it be quasi-legislative or quasi-adjudicative in nature." Indeed, CEQA case law is replete with major precedents in which air districts were respondents. (See, e.g., *California Building Industry Assn.*

v. Bay Area Air Quality Management Dist. (2015) 62 Cal.4th 369, 378, 380; *American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 458; *Western States Petroleum Assn. v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012, 1017–1018; *Alliance of Small Emitters/Metals Industry v. South Coast Air Quality Management Dist.* (1997) 60 Cal.App.4th 55, 60.) The Court also observed that the District's own regulations clearly contemplated that, depending on the situation, the District could be required to act as either a lead agency or a responsible agency under CEQA.

II. CIVIL PROCEDURE

❖ ***Grist Creek Aggregates, LLC v. Superior Court* (2017) 12 Cal.App.5th 979**

The First District Court of Appeal held that a county air district board's tie vote on petitioner's administrative appeal of an asphalt production facility's construction permit effectively resulted in the appeal's denial. Thus, the denial was rendered subject to judicial review.

In November 2015, the Mendocino County Air Quality Management District issued an authority to construct permit (ATC) to the applicant (petitioner) to build a facility for aggregate and asphalt production (heating and blending rubber). Friends of Outlet Creek, petitioner in related suits, appealed the ATC decision to the District's Hearing Board. After recusal of one of the Board's members, the remaining four members were locked in a tie vote. Because it was unable to reach a decision, the Board determined not to hold any further hearings on the appeal. Thus, the ATC remained in place. Friends of Outlet Creek filed suit, alleging that the District and the Hearing Board violated the California Environmental Quality Act (CEQA) in not conducting environmental review for the ATC and violated the District's own regulations (see *Friends of Outlet Creek* case described above). The Hearing Board demurred on the ground that, because the tie vote was tantamount to no action, there was no agency decision for the court to review. Petitioner also demurred, arguing that Friends of Outlet Creek could not sue directly under CEQA and had failed to exhaust its administrative remedies. The lower court sustained the Board's demurrer with leave to amend and overruled petitioner's demurrer, both on the basis that the tie vote was not a Board "decision," and therefore, there was nothing for the court to review. In the interim, the Board added a fifth member. The lower court noted this fact, but failed to order that the new Board rehear the ATC permit appeal. Petitioner filed a petition for writ of mandate to require the lower court to vacate all of its demurrer rulings.

First, the Court noted that the lower court's decision was internally inconsistent. The Board was under no obligation to hold another hearing on the appeal, and in fact indicated that they would not do so. Coupled with the lower court's conclusion that the tie vote meant that Friends of Outlet Creek did not have a cause of action, it was unclear how the lower court envisioned that Friend's writ petition could be cured by amendment. Second, as the purpose and meaning of a tie vote, the Court explained there are two criteria necessary for the Board to reach a decision: a quorum of voting members; and a majority decision by those voting members. The Board had a quorum (four voting members out of five), but the participating members failed to reach a majority decision. It did not follow from this result, the Court explained, that there was nothing for a lower court to review, since the gravamen of Friends of Outlet Creek's petition was a challenge to the District's underlying approval of the ATC and the Board's failure to revoke it.

Third, the Court emphasized that the meaning of the votes in administrative proceedings must be viewed in context. The lower court erroneously oversimplified precedent in its finding that a tie vote of an administrative action agency always results in no action. A deeper analysis of the relevant case law demonstrated that a tie vote can mean that petitioner is entitled to a different remedy—a return to status quo ante, a new hearing, or setting aside the agency decision—not that the agency has not acted. Viewing the tie vote in context, the Board's action here was the equivalent of allowing the ATC to stand, which was deemed effectively a decision not to revoke it. Thus, that decision was ripe for judicial review under the prejudicial abuse of discretion standard of Code of Civil Procedure section 1094.5.

❖ ***The Urban Wildlands Group, Inc. v. City of Los Angeles*** **(2017) 10 Cal.App.5th 993**

The Second District held that the mandatory relief provisions of Code of Civil Procedure section 473, subdivision (b), do not apply where counsel for petitioner fails to lodge the administrative record in a CEQA proceeding and receives a judgment denying the petition for writ of mandate.

In 2014, petitioner alleged the City of Los Angeles improperly exempted from environmental review a project approving the use of light emitting diode replacement lights. Despite agreeing by stipulation, counsel for petitioner did not lodge the record with the lower court prior to trial. After a hearing on the merits of the matter, the lower court ruled that because petitioner had failed to lodge the administrative record, the petitioner could not support its arguments. Judgment therefore was entered in the respondent agency's favor. Subsequently, petitioner filed a motion for discretionary and mandatory relief pursuant to Code of Civil Procedure section 473, subdivision (b). The lower court denied petitioner's motion for discretionary relief, ruling that counsel's failure to lodge the administrative record did not rise to the level of "excusable neglect." Nevertheless, the lower court granted petitioner mandatory relief, finding that counsel's error had deprived petitioner of its day in court.

In its ruling, the Court of Appeal disagreed, holding that Code of Civil Procedure section 473, subdivision (b), does not apply where, as here, there has been a trial on the merits. Thus, the counsel's error had not served to deny petitioner its day in court. Rather, the error resulted in a failure to present sufficient evidence to support petitioner's claims. The mandatory relief provisions in subdivision therefore did not apply. The Court reinstated the lower court's original judgment denying the petition and complaint, and allowed the City recovery of appellate costs from petitioner.

❖ ***Association of Irritated Residents v. Department of Conservation*** **(2017) 11 Cal.App.5th 1202**

The Fifth District held that *res judicata* (or claim preclusion) does not apply where the prior judgment at issue was not a judgment on the merits but was based on mootness. Thus, petitioners' CEQA action in this case may proceed.

In 2011 and 2012, the California Department of Conservation, Division of Oil, Gas and Geothermal Resources (DOGGR) issued multiple oil and gas well permits to Aera Energy, LLC.

DOGGR had deemed the permits to be either exempt from CEQA or covered under prior NDs. Several environmental organizations filed suit in Alameda County for declaratory and injunctive relief (aka, the "Alameda Action"). Invoking concerns about the environmental effects of hydraulic fracturing ("fracking"), the organizations alleged that DOGGR had a "pattern practice" of bypassing CEQA when issuing well permits. In 2013, while the Alameda Action was pending, Governor Brown signed into law Senate Bill No. 4 (Stats 2013, ch. 313, §§ 3–5, 7), which took effect January 1, 2014. Among other things, SB 4 enacted new statutory provisions requiring environmental review for "well stimulation treatments" that, as of July 1, 2015, would be required for hydraulic fracturing and other methods of "well stimulation." After SB 4 became law, DOGGR filed a motion to dismiss the Alameda Action on the ground that "issues raised in the complaint were rendered moot by the passage of [SB No. 4]." DOGGR urged that any alleged "pattern and practice" of forgoing CEQA analysis must come to an end as "a result of the Legislature's passage of [SB No. 4]." Citing mootness, the court agreed and granted the motion.

Petitioners filed a petition for writ of mandate in Kern County in 2014 for 214 other well permits, alleging grounds similar to those in the Alameda Action—that each DOGGR permit action is required to comply with CEQA prior to approval. Both parties demurred and the lower court, invoking the outcome in the Alameda Action, sustained DOGGR's demurrer on the ground of *res judicata* with leave to amend and overruled all other grounds asserted for demurrers. Petitioners filed an amended petition for writ of mandate in the lower court seeking to plead additional facts to, among other things, counter the ruling on *res judicata*, including the argument that the Alameda Action was not a ruling on the merits. DOGGR again demurred on the same grounds as before and the case was dismissed based on the prior demurrer ruling.

In a *de novo* review, the Court found that *res judicata* was not applicable because, of the three elements required for its application, the first one—that the "prior preceding is final and on the merits"—was not met. Because the Alameda Action was based on mootness and not the merits, subsequent claims are not precluded. The Court further clarified that "a judgment entered on the grounds of mootness and/or lack of ripeness is the issues is likewise *not* on the merits." By using several case examples and referencing the Alameda court's sufficient clarity that its ruling "was on the grounds of mootness and lack of ripeness," the Court reversed the lower court's ruling and remanded with instructions to overrule DOGGR's *res judicata* demurrer. The Court also ruled on DOGGR's supplemental motion to dismiss on grounds of collateral estoppel based on a similar case (*Sierra Club v. California Department of Conservation, et al*. (Kern County Superior Court, Case No. BCV-15-101300-RST)). Collateral estoppel was not applicable because of "factually different circumstances" and a lack of privity.

III. LAND USE OPINIONS

Takings – U.S. Supreme Court

- ***Murr v. Wisconsin* (2017) 137 S.Ct. 1933**

In a 5/3 split (Justice Kennedy delivering the opinion and Justice Gorsuch abstaining), **the U.S. Supreme Court held that the enforcement of a county ordinance in Wisconsin requiring the merging of contiguous, privately owned lots into one as a precondition of sale**

did not effect a regulatory taking in this case. In reaching this result, the Court treated the two original lots as a single parcel for the purposes of its takings inquiry.

The Murr family purchased two adjacent lots in St. Croix County, Wisconsin, in 1960, approximating 0.98 acre total, maintaining each lot under separate ownership. In 1994 and 1995, the Murr parents transferred the lots jointly to their children. Upon joint ownership, the two lots were merged by operation of law pursuant to St. Croix County's Code of Ordinances, Land Use and Development, subchapter III.V, Lower St. Croix Riverway Overlay District, section 17.36, I.4.a, which prohibits the individual development or sale of adjacent lots under common ownership in Lower St. Croix Riverway Overlay District unless one of the individual lots is at least one acre. The ordinance was enacted pursuant to the Wild and Scenic Rivers Act of 1972 and the State rules promulgated in response to "guarantee the protection of the wild, scenic and recreational qualities of the river."

In 2004, in an attempt to sell the vacant lot (but maintain the other lot upon which a family cabin exists), the Murrs applied for a variance to the ordinance, which can be allowed in order to avoid "unnecessary hardship." However, the St. Croix County Board of Adjustment denied their variance application. The Murrs sued the State of Wisconsin and St. Croix County, arguing that, because they could not sell either one of the two original lots separately, the ordinance caused an uncompensated taking of their property and deprived them of "all, or practically all" of the use of one of the two lots. Using the balancing test promulgated by *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, the County Circuit Court granted summary judgment against the Murrs and in favor of the defendants, holding that, considering both parcels as a whole, the Murrs had not been deprived of the "economical value of their property." The Court of Appeals of Wisconsin affirmed and held that the County regulations "did not effect a taking."

In its own analysis, the United States Supreme Court first quoted the takings clause of the Fifth Amendment and described the Court's regulatory takings jurisprudence, which had applied that Amendment to the States through the Fourteenth Amendment. The Court explained that "flexibility" is the "central dynamic" when balancing individual property rights against governmental interests reflecting pursuit of the public good. In general, there are two types of regulatory takings: categorical takings whereby landowners are denied "all economically beneficial or productive use of land"; and takings identified based on the case-specific application of complex factors, such as "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Here, the Court plowed new ground in further explicating the factors to consider in assessing "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." These factors "include [1] the treatment of the land under state and local law; [2] the physical characteristics of the land; and [3] the prospective value of the regulated land." Notably, the test adopted by the Court "*considers* state law but in addition weighs whether the state enactments at issue accord with other indicia of reasonable expectations about property." (Italics added.) For that reason, the Court rejected an approach that would have defined the parcel relevant to a takings analysis solely by reference to any applicable state law definition. After balancing these factors on its own, the Court ultimately concluded that the merger provision of the Wisconsin ordinance was a

"legitimate exercise of governmental power," that it had been correctly applied, and that petitioners "have not suffered a taking."

In dissent, Justice Roberts stated his preference for a more "traditional approach" bright-line rule whereby courts would rely on state law definitions of property.

Planning and Zoning

❖ ***Lynch v. California Coastal Commission*** **(2017) 3 Cal.5th 470**

In a unanimous opinion**, the California Supreme Court held that homeowners forfeited any objections to seawall construction permit conditions by proceeding with construction of the seawall after they had filed an administrative mandamus petition objecting to such conditions.**

After winter storm damage to their bluff-top properties, petitioners sought a permit from the California Coastal Commission to demolish old structures and build a new seawall and repair their beach access stairway. They were granted the permit subject to several mitigation conditions, two of which they objected to (prohibition of stairway reconstruction and a 20-year permit expiration). Although the homeowners filed a petition for administrative mandate seeking relief from these conditions, they nevertheless proceeded with construction of the seawall. A year later, the Commission moved for a court judgment on the mandate petition, arguing that petitioners had waived their objections by constructing the project. The trial court denied the petition. Petitioners then moved for judgment on constitutional grounds, asserting that the Commission exceeded its authority because the measures did not mitigate the impacts of their particular project. This time, the trial court agreed and issued a writ directing the Commission to remove the challenged measures. The Court of Appeal reversed in a split decision, with the majority contending that petitioners had waived their claims and that "in any event, both conditions were valid."

The Supreme Court agreed with the Commission and cited a myriad of case law to invoke the established rule that, just as "the benefits of a permit run with the land, so too do its restrictions." To preserve their claims, petitioners should have delayed construction and filed a petition for a writ of mandate. Petitioners argued that the construction of the seawall was essential "to protect their homes," and that they should not have had to "await the outcome of litigation before taking action." The Court disagreed and noted that with this logic, petitioners were asking for the creation of a new exception to an established rule, which, as they explained, is not authorized by the Legislature and would "swallow the general rule." The Court also refused to sever mitigation conditions from the act of construction, noting that if the Commission had agreed to waive one or more of the conditions, the Commission could have required the homeowners to modify the project design to better suit the objectives of the conditions. The Court noted that the landowners could have obtained an emergency permit to "address imminent dangers" if they believed such dangers to exist.

❖ ***Kutzke v. City of San Diego*** **(2017) 11 Cal.App.5th 1034**

The Fourth District held that evidence on the record was sufficient to support the City of San Diego's finding that a proposed subdivision was inconsistent with the applicable community plan and that it would be detrimental to public health, safety, and welfare. The Court also upheld the City's conclusion that its mitigated negative declaration (MND) for the project was inadequate with regard to geology and public safety. The Court thus upheld the City's decision to deem the MND inadequate and deny project approval.

Petitioners applied to the City to subdivide two hillside lots and to build three residences on 1.45 acres of hilltop property of the La Playa neighborhood in the Point Loma peninsula. Existing structures, some dating to 1929, would have been razed and replaced with new houses. All new residences would have shared a private, steep driveway. Initially, the project was approved by the planning commission based on an initial study (IS) and MND that found only one potentially significant impact (to paleontological resources during grading). The commission's decision was counter to the local community planning board's recommendation to deny the project based on safety concerns and was appealed by concerned citizens. After a public hearing, the City Council reversed the approval and found that the MND "was inadequate." Petitioners filed a complaint in lower court alleging various causes of action (violation of civil rights, inverse condemnation, mandamus, and nuisance). The court reversed the City Council's decision on the grounds of "insufficient evidence."

In upholding the City Council's decision deeming the MND inadequate and denying project approval, the Court emphasized that the applicable standard of review was deferential to the City, and was limited to determining whether the City's findings were "supported by substantial evidence." Thus, the petitioner could only prevail if she could demonstrate that no reasonable municipality could have reached the same decision as the City Council. Under this standard of review, the Court determined that substantial evidence existed in the record to support the City Council's finding that impacts to land use, geology, and public safety would be detrimental and inadequately mitigated. Flaws and omissions in the project's geotechnical report cast doubt on the report's conclusion that homes could be built safely on the steep sandstone hillside. Furthermore, the slope of the shared driveway would not permit access by fire trucks and, potentially, other emergency response vehicles. Proposed mitigation measures (sprinkler systems and standpipes) were found to be inadequate to mitigate all of these risks.

Regarding the project's consistency with the community plan, the City Council properly considered the opinions of neighbors, who stated that the project's dense development with minimal setbacks was incompatible with the large lot, single-family residential character of the area. Finally, the project was legitimately rejected under City ordinances, which provide for deviations from the development regulations for qualified sustainable building projects only if those deviations result in a more desirable project. Here the deviations requested (i.e., smaller setbacks, no frontage, and higher walls) would not make the project more desirable.

❖ ***Park at Cross Creek, LLC v. City of Malibu*** **(2017) 12 Cal.App.5th 1196**

In response to claims against a voter-enacted initiative known as Measure R, the Second District held that the measure was an improper exercise of the local reserved

legislative power and illegally restricted transferability of conditional use permits (CUPs) in a manner that discriminated against chain retail establishments. Further, the invalid portions of the measure cannot be severed in a manner leaving any valid portions in effect.

Passed by voters in 2014, Measure R was intended to limit large developments and "formula retail establishments." It required the Malibu City Council to prepare a specific plan for every proposed commercial or mixed-use development exceeding 20,000 square feet, along with a report with full notice, a public hearing, and subsequent voter approval. The measure also restricted development of retail establishments that possess 10 or more other retail establishments anywhere in the world and maintain certain features consistent with chain stores. These limits would have applied to new chain stores and to existing ones that would relocate, expand, or increase their service area. Measure R also required these chain stores to obtain a non-transferrable CUP.

Petitioners own a property in Malibu where a 38,424 square-foot development was proposed. They filed a petition for a peremptory writ of mandate to have Measure R "declared facially invalid" on grounds that it subjected administrative acts to voters, created an illegal kind of CUP, and violated their due process rights. The lower court agreed with petitioners, declared Measure R invalid, and enjoined Malibu from enforcing it. Measure R proponents were denied a stay pending appeal by the lower court but granted one by the appellate court upon their petition for writ of supersedeas.

In a *de novo* review, the Court of Appeal was careful to afford "extraordinarily broad deference" to the power of the referendum by constraining its review to only the "text of the measure itself." In finding Measure R to be invalid, however, the Court agreed with the City's argument that, by directing the City to have to prepare specific plans and hold elections in circumstances in which they otherwise would not be required, the measure impermissibly negated the City's administrative discretion and was itself tantamount to an "adjudicative act." "The problem," the Court said, "is Measure R requires details to be in specific plans that are voter-approved but sets no substantive policy or standards for those plans." Proper legislative actions set policy in some manner, as opposed to merely proscribing procedures. The requirements to prepare specific plans and submit them to the voters also "limits Malibu's governing body from carrying out its duties pursuant to its police power."

The Court also rejected Measure R's provisions restricting the transfer of CUPs to properties already owned by the same chain. "A CUP is not a personal interest. It does not attach to the permittee; rather, a CUP creates a right that runs with the land. [Citations.] Otherwise, a condition regulates the person rather than the land, improperly turning a CUP into an 'ad hominem privilege rather than a decision regulating the use of property.' [Citations.] A condition which relates solely to the individual or applicant for the CUP does not relate to the property's use and zoning. [Citation.]"

Finally, the Court resolved the severability issue by applying the test of whether "the electorate's attention was sufficiently focused" on the valid parts to be severed, so that, had they been considered as such, the valid parts would have been adopted separately. Evidence on the record led the Court to "fail to see" that the electorate would have passed Measure R without the invalid provisions.

❖ ***City of Morgan Hill v. Bushey*** **(2017) 12 Cal.App.5th 34**

The Sixth District held that voters could use the referendum system ("the power of the electors to approve or reject statutes or parts of statutes") to reject a city zoning ordinance at issue.

After changing a vacant parcel's general plan designation change from "Industrial" to "Commercial," the City of Morgan Hill approved an ordinance in 2015 to change the parcel's zoning from "ML-Light Industrial" to "CG-General Commercial." This action brought the zoning into conformity with the general plan and allowed development of a hotel on the site. Petitioners challenged the ordinance through a timely referendum petition, which the City certified as sufficient. Shortly thereafter, however, the City "discontinued processing" the referendum, stating that it would have the practical effect of reestablishing industrial zoning in conflict with the industrial general plan designation. In 2016, the City switched course again and passed a resolution calling for a special election to submit the referendum to voters. At the same time, however, the City simultaneously authorized the filing of a court action to have the referendum "nullified as legally invalid and removed from the ballot." The lower court granted the City's petition on the grounds of general plan inconsistency.

The City argued that referendum power cannot be used to reject the ordinance because the City's discretion is preempted by Government Code section 65860, subdivision (a), which mandates that zoning must be consistent with a general plan. The Court countered, however, that section 65860 only prevents the City from enacting inconsistent zoning; it does not preclude it from using its discretion to rezone, generally. The Court explained that the referendum does not seek to enact zoning, but only to reject the City's discretionary choice of zoning for a particular parcel, of which "a number of available consistent zonings" could apply. The Court remanded with instructions for the trial court to enter a new order denying the City's petition.

Implied Dedication of Private Land for Public Use

❖ ***Scher v. Burke*** **(2017) 3 Cal.5th 136**

In a unanimous opinion, **the California Supreme Court held that Civil Code section 1009, subdivision (b), barred both recreational and non-recreational uses of private noncoastal property from "ripening" into implied dedications for public use absent an express irrevocable offer of dedication from a granting landowner; and the Court interpreted the statute to extend to roadways used for nonrecreational purposes, as well as for recreational purposes.** (See Civ. Code, § 1009, sub. (b).)

In order to more conveniently access their own property, Petitioners sued neighbors who had blocked their own private roadways with gates. Petitioners intended to secure access to these neighbors' private roadways. Petitioners argued with evidence on the record that the neighbors' predecessors had agreed to designate "the routes as public roadways." Respondents countered by arguing that Civil Code section 1009, subdivision (b), precluded such implied dedication. The lower court agreed with petitioners, concluding that section 1009 did not preclude this implied dedication in the instant case because the land at issue was not coastal property, and "and

because 'section 1009 does not restrict the implied dedication of public roads for nonrecreational uses.'" The Court of Appeal reversed and interpreted section 1009 to bar all uses, not just recreational uses, from "implied public dedication." The court then remand the matter to the lower court with instructions to enter a declaratory judgment for respondents. The California Supreme Court granted review.

The high court began by describing the common law history of the concept of implied dedications of property, which had allowed the ripening of interests in property by users even absent express offers of dedication. The Court then mentioned the scholarly criticisms of this approach, which seemed to penalize property owners for generously allowing their neighbors to cross their properties. The Court described Civil Code section 1009, enacted in 1971, as a legislative response to such criticism and as a way to overrule the common law approach. The legislation clearly requires express offers of dedication, but the breadth of the prohibition against implied dedications was at issue. After conducting an extensive statutory analysis, the Court concluded that section 1009 applies to noncoastal properties as well as coastal properties, and to non-recreational uses of roadways as well as purely recreational uses.

Designation of Historic Resources

❖ ***Young v. City of Coronado*** **(2017) 10 Cal.App.5th 408**

The Fourth District held that the Coronado Historic Resources Commission's resolution designating a cottage property as an historic resource was supported by findings on the record with sufficient evidence to sustain those findings.

In 2013, in an effort to demolish a residential cottage constructed in 1924, petitioners filed with the City of Coronado an application for removal of the property's historical designation. They desired to have the cottage deemed non-historic. After a public hearing and contrary to the wishes of the property owners, the Coronado Historic Resources Commission concluded that "the subject property qualified for historic designation." Petitioners appealed this decision to the City Council, which voted to uphold the Commission's determination, thus precluding the property owners' desire to raze the house. In 2014, petitioners filed for writ of administrative mandate to void the City's decisions. The lower court denied the writ on grounds that the City's findings were supported by "substantial evidence on the administrative record."

Petitioners appealed on both substantive and procedural grounds, asserting that the City did not have substantial evidence for its findings, which did not meet the standards required by *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506. The Court of Appeal disagreed, however. In upholding the City's determination that "the subject property has value for future study of this period of architecture," the court was persuaded by substantial evidence on the record such as a staff report declaring that the dwelling "possesses the distinctive characteristics of the Spanish Bungalow style" and by the lack of exterior alterations to the structure. Further, the administrative record showed that the City had complied with its Historic Designation Criteria Guidelines despite the staff report not having mentioned the guidelines by name.