CEQA and Land-Use Law Update

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I. CEQA OPINIONS

- Scope of CEQA
- Statutory Exemptions
- Environmental Impact Reports (EIRs)
- Supplemental Review

Scope of CEQA

- *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677

Friends of the Eel River v. North Coast Railroad Authority

- *The California Supreme Court holds that the federal Interstate Commerce Commission Termination Act (ICCTA) did not preempt the requirements of CEQA with respect to the decision of the North Coast Railroad Authority (NCRA) to reinitiate freight rail service on a previously abandoned rail segment along the Eel River*

Friends of the Eel River (cont.)

- As a matter of statutory interpretation, the Court "presume[s] that Congress, in adopting a preemption provision, does not intend to deprive a state of its sovereign authority over its *internal governance* — at least not without a particularly clear statement of intent"

Friends of the Eel River (cont.)

- The Court reads the ICCTA as *not* preempting "*state self-governance* extending over how its own subdivisions would enter [the railroad] business"
  - Just as the ICCTA allows private railroad operators to make voluntary internal business decisions about how to reduce the environmental effects of their operations, so too should states and their subdivisions be able to make similar internal decisions, albeit through laws such as CEQA

Statutory Exemptions

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

Sierra Club v. County of Sonoma

- *First District holds that the issuance of an erosion-control permit to establish a vineyard under the Sonoma County Grading, Drainage and Orchard Site Development Ordinance was a ministerial act and exempt from CEQA*

Sierra Club (cont.)

- Court applied "*functional distinction test*": Action is ministerial when 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

(*Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259)

Sierra Club (cont.)

- Project-specific CEQA analysis showed that provisions in ordinance that may have conferred discretion with other permits did *not* do so in the instant case; such provisions were either
  - factually inapplicable;
  - expressly excluded by commissioner; or
  - involved ongoing vineyard operations, and there was no evidence they were relevant to the issuance of the permit

Sierra Club (cont.)

- Even if applicable provisions could confer discretion, under functional distinction test, potential impacts could not have been mitigated to "any *meaningful degree*"

- County decision making was guided by technical guidance documents and input from the applicant's technical consultants; and commissioner could only chose between options proposed by applicant

ENVIRONMENTAL IMPACT REPORTS

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

California Environmental Protection Agency
AIR RESOURCES BOARD

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

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Cleveland National Forest Found. v. San Diego Assn. of Governments

- *California Supreme Court holds that SANDAG did not abuse its discretion by failing to present in its 2010 EIR for its Regional Transportation Plan (RTP) an analysis of the RTP's consistency with the 2050 greenhouse gas (GHG) emissions reduction goal in Executive Order (EO) S-3-05*
  - The Court cautioned that this level of analysis would not "necessarily be sufficient going forward"

Cleveland v. SANDAG (cont.)

ASSUMPTIONS ON WHICH PARTIES AGREED

- "[T]he EIR should consider the Plan's long-range greenhouse gas emission impacts for the year 2050"
- The EO "lacks the force of a legal mandate binding on SANDAG in the preparation of its EIR"
- The EO's "2050 emissions reduction target is grounded in sound science"
- "[T]he projected increase in greenhouse gas emissions under the Plan from 2020 through 2050 is a significant environmental effect"

Cleveland v. SANDAG (cont.)

COURT'S CONCLUSIONS

- "[T]he EIR does *not* obscure the existence or contextual significance of the Executive Order's 2050 emissions reduction target"
  - "The EIR makes clear that the 2050 target is part of the regulatory setting in which the Plan will operate"
  - "Further, the EIR straightforwardly mentions the 2050 target in the course of explaining why SANDAG chose not to use the target as a measure of significance"

Cleveland v. SANDAG (cont.)

- In a passionate dissent, Justice Cuéllar explained why he found the analysis to be inadequate and expressed concern that the majority ruling would allow other agencies to "shirk their responsibilities" to address the consequences of climate change

POET, LLC et al. v. State Air Resources Board (POET II)

- *Court rejects the "Final Environmental Analysis" (FEA) for the updated Low Carbon Fuel Standards (LCFS) regulations adopted by the Air Resources Board (CARB) in 2015*
  - CARB failed to comply with an earlier court order that found fault with the 2009 FEA CARB had prepared for its 2009 approval of the original LCFS regulations

POET II (cont.)

COURT'S CONCLUSIONS

- The new EA violated CEQA by using a 2014 baseline instead of a baseline reflecting conditions when the project commenced
  - 2014 baseline was not "objectively reasonable" and was prejudicial because it deprived the public of a meaningful opportunity to review the environmental effects of the overall project

POET II (cont.)

- CARB activities, including the 2009 LCFS, must be treated as a single integrated project CEQA because they constitute a regulatory scheme and are related activities
- Use of the 2014 baseline obscured the negative effects of increased NOx emissions from the first few years of the 2009 LCFS
- On remand, CARB must select a different "existing conditions" baseline consistent with court's analysis
  - 2010 would be the latest possible date

SUPPLEMENTAL REVIEW

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

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

- *In a case on remand from the California Supreme Court, the Court of Appeal disallows a community college district's reliance on an addendum to a prior mitigated negative declaration (MND) for modifications to an approved campus renovation plan involving the loss of an on-campus garden area*

BACKGROUND

- In September 2016, the California Supreme Court issued its decision in *Friends of the College of San Mateo Gardens v. San Mateo Community College District et al.* (2016) 1 Cal.5th 937
  - The Court rejects the "new project" test set forth in *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, but announces new rules governing supplemental review based on prior negative declarations

Friends of the College of San Mateo Gardens (cont.)

- "[W]hen a project is initially approved by negative declaration, a 'major revision' to the initial negative declaration will necessarily be required if the proposed modification *may* produce a significant environmental effect that had not previously been studied"

Friends of the College of San Mateo Gardens (cont.)

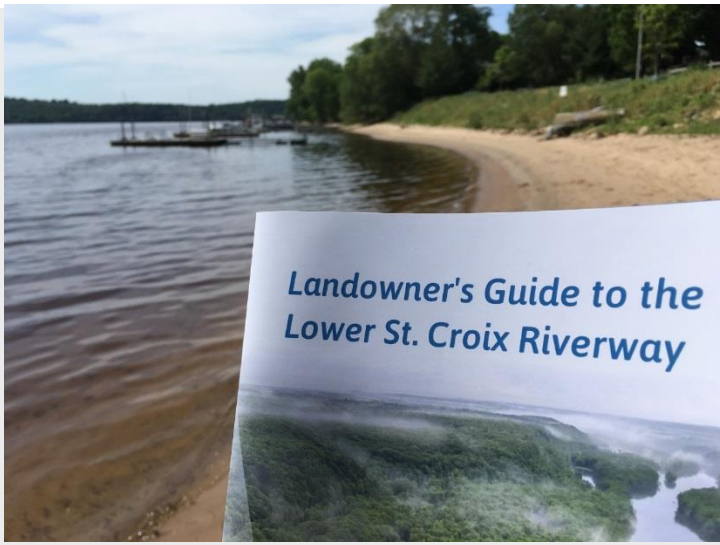
COURT OF APPEAL DECISION ON REMAND

- The District was correct that it was operating under CEQA's supplemental review provisions, but erred in relying on an addendum to an MND
  - "[T]here is substantial evidence to support a fair argument that project changes might have a significant effect on the environment"
  - But Court declines to order an EIR, holding out possibility of subsequent negative declaration through the use of mitigation

II. LAND USE OPINIONS

Takings

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



Challenges to Permit Conditions

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

Murr v. Wisconsin

- *In a decision split 5 to 3 (with Gorsuch abstaining), the Supreme Court, through Justice Kennedy, held:*
  - *(1) a Wisconsin ordinance requiring the merger of contiguous, privately owned lots into one as a precondition to sale was a "legitimate exercise of governmental power" in this case;*
  - *(2) here, treating the original lots in question "as a single parcel is legitimate for the purposes" of a takings inquiry; and*
  - *(3) no regulatory taking occurred in this case*

Murr v. Wisconsin (cont.)

- The Court announced factors for assessing, for purposes of a possible *Penn Central* taking, "whether reasonable expectations about property ownership would [objectively and reasonably] lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts":
  - treatment of land under state and local law;
  - physical characteristics of land (including environmental sensitivities); and
  - prospective value of regulated land

Murr v. Wisconsin (cont.)

- Under this new test, the Court "*considers* state law but in addition weighs whether the state enactments at issue accord with other indicia of reasonable expectations about property"
- The Court thus rejected an approach that would have defined the parcel relevant to a takings analysis solely by reference to any applicable state law definition

Lynch v. California Coastal Commission

- *The California Supreme Court holds that homeowners forfeited their objections to seawall construction permit conditions by proceeding with the construction of the seawall while their administrative mandate petition was being litigated*

Lynch (cont.)

COURT'S CONCLUSIONS

- Court agreed with the Coastal Commission because of the well-established rule that, just as "the benefits of a permit run with the land, so too do its restrictions"
- Petitioners should have delayed construction until after the litigation was resolved
- If more immediate construction was necessary for safety reasons, the Petitioners could have applied for an emergency permit

Lynch (cont.)

- The Court rejected Petitioners' proposed "emergency exception" to the general rule that a landowner cannot take advantage of a permit by acting on it while simultaneously challenging it in court
  - Such an exception could "swallow the general rule" and is not authorized by the Legislature
- Under the traditional approach, Petitioners could have asked the Commission to take alternative steps to address the concerns created by the measures to which the Petitioners objected