

LEAGUE OF CALIFORNIA CITIES

CEQA AND LAND-USE UPDATE: OCTOBER 2016 - MAY 2017

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May 3, 2017

CEQA OPINIONS

CEQA Exemption for Ministerial Permit

Sierra Club v. County of Sonoma (2017) - Cal.App.5th - [slip op. dated April 21, 2017]

- County approval of “erosion control plan” for proposed vineyard was ministerial and therefore exempt from CEQA.
- “The relevant question in evaluating whether the approval of a particular project was discretionary is not whether the regulations granted the local agency some discretion in the abstract, but whether the regulations granted the agency discretion regarding the particular project.”
- Here, although the ECP ordinance did provide the County some discretion to impose conditions, most of those provisions did not apply to the vineyard at issue.

Scope of “Project”; Negative Declarations

Aptos Council v. County of Santa Cruz (2017) - Cal.App.5th - [slip op. dated March 30, 2017]

- County did not engage in “piece-meal” environmental review in adopting three ordinances amending different parts of its zoning ordinance.
- Negative declaration prepared in connection with the ordinance amending development standards for hotels was adequate because whether the ordinance would alter development patterns was speculative.

Environmental Impact Reports

East Sacramento Partnerships for a Livable City v. City of Sacramento
(2016) 5 Cal.App.5th 281



East Sacramento Partnerships for a Livable City v. City of Sacramento
(2016) 5 Cal.App.5th 281 (continued)

- EIR for an infill project was inadequate because it relied on General Plan level-of-service standards to conclude the project's traffic impacts on intersections within the city core would be insignificant. Traffic analysis otherwise upheld.
- EIR did not need to analyze health impacts on residents from proximity to freeways and landfill.
- Finding of General Plan consistency upheld in light of judicial deference.

Mission Bay Alliance v. Office of Community Investment and Infrastructure (2016) 6 Cal.App.5th 160



***Mission Bay Alliance v. Office of Community Investment and Infrastructure* (2016) 6 Cal.App.5th 160 (continued)**

- EIR for Golden State Warriors arena upheld under “fast-track” litigation rules for projects certified by Governor Brown under AB 900.
- Successor to redevelopment agency properly relied on 1998 program EIR to scope out certain topics from further analysis.
- Transportation analysis upheld; ruling in *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645 narrowed.
- GHG analysis upheld; agency could rely on citywide climate action plan to streamline analysis.

Residents Against Specific Plan 380 v. County of Riverside (2017) 9 Cal.App.5th 941

- EIR prepared for a master plan community upheld.
- Revisions to plan occurring after EIR certification did not trigger duty to recirculate Draft EIR.
- Petitioner did not show prejudice from alleged problems with NOD.
- Analysis of mixed-use area upheld, even if not every conceivable permitted use was analyzed.
- EIR adequately considered suggested mitigation for construction air quality, noise and energy use.

***Banning Ranch Conservancy v. City of Newport Beach (2017) - Cal.5th -
[slip op. dated March 30, 2017]***



Banning Ranch Conservancy v. City of Newport Beach (2017) - Cal.5th - [slip op. dated March 30, 2017] (continued)

- Supreme Court ruled that an EIR prepared for a development project located in the coastal zone was deficient because it did not flag areas on the property that would likely be found by the Coastal Commission to constitute “environmentally sensitive habitat areas” (ESHA) under the Coastal Act, and therefore did not consider mitigation measures and alternatives designed to reduce impacts on those areas.
- Error was prejudicial.
- Court did not reach General Plan consistency claim.

Supplemental Review

***San Diegans for Open Government v. City of San Diego* (2016) 6 Cal.App.5th 995**

- CEQA did not require the city to provide an appeal to the city council of the planning department's "substantial conformance review" of modifications to an approved planned development permit.

Remedies

POET LLC v. State Air Resources Board (2017) - Cal.App.5th - [slip op. dated April 10, 2017]



***POET LLC v. State Air Resources Board* (2017) - Cal.App.5th - [slip op. dated April 10, 2017] (continued)**

- In *POET LLC v. State Air Resources Board* (2013) 218 Cal.App.4th 681, Court held that CARB did not comply with CEQA prior to adopting low-carbon fuel standards as part of the State's implementation of AB 32.
- CARB's attempt to comply with writ was flawed because it measured NOx emissions against "baseline" as of 2014, rather than against 2009 when regulation was originally proposed.
- Court again allows LCFS regulations to remain in place while error is fixed.

LAND-USE OPINIONS

Zoning and Schools

San Jose Unified School Dist. v. Santa Clara Office of Education (2017) 7 Cal.App.5th 967

- Government Code section 53094 did not authorize a county Board of Education to override local zoning with respect to the use of property for a proposed charter school.

Outdoor Advertising Act and Local Discretion

D'Egidio v. City of Santa Clarita (2016) 4 Cal.App.5th 515



***D'Egidio v. City of Santa Clarita* (2016) 4 Cal.App.5th 515 (continued)**

- Outdoor Advertising Act did not preempt local regulation of billboards.
- Cities and counties therefore have discretion to adopt billboard regulations that are more stringent than the Act.

Planning and Zoning Law

***Orange Citizens for Parks and Recreation v. Superior Court* (2016) 2 Cal.5th 141**

- Supreme Court ruled a city abused its discretion in finding a project to be consistent with its general plan, where the face of the plan showed a different land-use designation for the subject property.
- Court rejected attempts to point to a decades-old “recommendation” to amend the plan, where that recommendation, although seemingly approved by the council at the time, never found its way into the plan itself.

Brown Act; constitutionality of land-use initiative

Hernandez v. Town of Apple Valley (2017) 7 Cal.App.5th 194



Hernandez v. Town of Apple Valley (2017) 7 Cal.App.5th 194 (continued)

- City violated the Brown Act by approving a memorandum of understanding in which Walmart committed to pick up the cost of a special election, because neither the agenda nor its accompanying packet mentioned the MOU.
- Land-use initiative did not violate California Constitution article II, section 12, because the initiative assigned powers and duties not to “Walmart,” but to the property’s “owner” and the project’s “developer.”

Coastal Act and Density Bonus Statutes

Kalnel Gardens, LLC v. City of Los Angeles (2016) 3 Cal.App.5th 927



***Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927
(continued)**

- City had discretion to deny a project in the coastal zone as inconsistent with Coastal Act policies, notwithstanding the fact that the project qualified for density bonuses and waivers of height and set-back restrictions due to the inclusion of affordable housing.
- Housing Accountability Act (HAA), the Mello Act and the Density Bonus Act did not override the agency's discretion to deny a project under the Coastal Act.

CALIFORNIA SUPREME COURT

Depublication Ordered

***Bay Area Clean Environment, Inc. v. Santa Clara County (2016) 2
Cal.App.5th 1197***

- Sixth District had found that the county complied with SMARA and CEQA in approving a reclamation plan for an existing quarry. Petition for review denied. Ordered depublished December 14, 2016.

***Coastal Hills Rural Preservation v. County of Sonoma* (2016) 2
Cal.App.5th 1234**

- First District had held that the “substantial evidence” test applied to its review of a subsequent mitigated negative declaration that supplemented a previously adopted mitigated negative declaration. On November 22, 2016, the Supreme Court issued the following memorandum opinion:

The petition for review is granted. The matter is transferred to the Court of Appeal, First Appellate District, Division One, for reconsideration in light of *Friends of the College of San Mateo Gardens v. San Mateo County Community College District et al.* (2016) 1 Cal.5th 937, 957-959, footnote 6 [] and [CEQA Guidelines] section 15384. The request for an order directing depublication of the opinion in the above entitled appeal is granted.

Opinions Issued

- *Orange Citizens for Parks and Recreation v. Superior Court* (2016) 2 Cal.5th 141
- *Banning Ranch Conservancy v. City of Newport Beach* (2017) - Cal.5th -



Petition for Review Granted

Union of Medical Marijuana Patients, Inc. v. City of San Diego (No. S238563)



Union of Medical Marijuana Patients, Inc. v. City of San Diego (No. S238563) (continued)

Review granted on January 11, 2017. Court of Appeal opinion at 4 Cal.App.5th 103.

- Is the enactment of a zoning ordinance categorically a “project” within the meaning of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)?
- Is the enactment of a zoning ordinance allowing the operation of medical marijuana cooperatives in certain areas the type of activity that may cause a reasonably foreseeable indirect physical change to the environment?

***United Auburn Indian Community of Auburn Rancheria v. Brown* (No. S238544)**

Review granted on January 25, 2017. Court of Appeal opinion at 4 Cal.App.5th 36.

- May the Governor concur in a decision by the Secretary of the Interior to take off-reservation land in trust for purposes of tribal gaming without legislative authorization or ratification, or does such an action violate the separation of powers provisions of the state Constitution?

T-Mobile West LLC v. City and County of San Francisco (No. S238001)

Review granted on December 21, 2016. Court of Appeal opinion at 3 Cal.App.5th 334.

- Is a local ordinance regulating wireless telephone equipment on aesthetic grounds preempted by Public Utilities Code section 7901, which grants telephone companies a franchise to place their equipment in the public right of way provided they do not “incommode the public use of the road or highway or interrupt the navigation of the waters”?
- Is such an ordinance, which applies only to wireless equipment and not to the equipment of other utilities, prohibited by Public Utilities Code section 7901.1, which permits municipalities to “exercise reasonable control as to the time, place and manner in which roads, highways, and waterways are accessed” but requires that such control “be applied to all entities in an equivalent manner”?

Petition for Review Granted - Previously Reported But Still Pending

Cleveland National Forest Foundation v. San Diego Assn. of Governments
(No. S223603)

Review granted on March 11, 2015. Argument occurring tomorrow. Court of Appeal opinion at 231 Cal.App.4th 1056.

- Must the environmental impact report for a regional transportation plan include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S-3-05, so as to comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)?

Friends of the Eel River v. North Coast Railroad Authority (No. S222472)



Friends of the Eel River v. North Coast Railroad Authority (No. S222472)
(continued)

Review granted December 10, 2014. Argument occurring today. Court of Appeal opinion at 230 Cal.App.4th 85.

- Does the Interstate Commerce Commission Termination Act [ICCTA] (49 U.S.C. § 10101 et seq.) preempt the application of the California Environmental Quality Act [CEQA] (Pub. Res. Code, § 21050 et seq.) to a state agency's proprietary acts with respect to a state-owned and funded rail line or is CEQA not preempted in such circumstances under the market participant doctrine (see *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314)?
- Does the ICCTA preempt a state agency's voluntary commitments to comply with CEQA as a condition of receiving state funds for a state-owned rail line and/or leasing state-owned property?

***Sierra Club v. County of Fresno* (No. S219783)**

Review granted October 1, 2014. No oral argument letter sent. Court of Appeal opinion at 226 Cal.App.4th 704.

- This case presents issues concerning the standard and scope of judicial review under the California Environmental Quality Act. (CEQA; Pub. Resources Code, § 21000 et seq.)

A BROADER LOOK AT THE SUPREME COURT

Make-up of the California Supreme Court

Name of Justice	Year Appointed	Appointing Governor	Year Retired	Replaced By
Kennard	1989	Deukmejian	2014	Kruger
Baxter	1991	Wilson	2014	Cuéllar
George (C.J.)	1991	Wilson	2011	Cantil-Sakauye
Werdegarr	1994	Wilson	August 2017	???
Chin	1996	Wilson		
Brown	1996	Wilson	2005	Corrigan
Moreno	2001	Davis	2011	Liu
Corrigan	2006	Schwarzenegger		
Cantil-Sakauye (C.J.)	2011	Schwarzenegger		
Liu	2011	Brown		
Cuéllar	2015	Brown		
Kruger	2015	Brown		

- At present, four Justices appointed by Republican Governors, three Justices appointed by Democratic Governors.
- When Justice Werdegarr steps down in August 2017, Governor Brown will have an opportunity to appoint a fourth justice.
- Era of dominance by Justices appointed by Republican Governors coming to a close.

CEQA / Land-Use Opinions Issued by Supreme Court (2006 - 2017)

[green shading denotes decisions issued by the Court as currently constituted]

* Asterisk = nuanced outcome

Opinion	Topic	Who “won”?	Author	Concur	Dissent
<i>City of Marina v. Board of Trustees of California State University</i> (2006) 39 Cal.4th 341	Duty to mitigate under CEQA	Petitioner	Werdegar	Chin	
<i>Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova</i> (2007) 40 Cal.4th 412	Water supply analysis in EIR for large development project	Petitioner	Werdegar		Baxter
<i>Muzzy Ranch Co. v. Solano County Airport Land Use Commission</i> (2007) 41 Cal.4th 372	Definition of “project”; common-sense exemption	Respondent *	Werdegar		
<i>Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection</i> (2008) 43 Ca1.4th 936	Geographic scope of analysis; responses to comments	Respondent	Werdegar		
<i>In re: Bay Delta etc.</i> (2008) 43 Cal.4th 1143	Program EIR	Respondent	Kennard		
<i>Environmental Protection and Information Center v. California Dep’t of Forestry and Fire Protection</i> (2008) 44 Cal.4th 459	Forest Practices Act; CEQA findings; take permits	Forest Practices Act: Petitioner; CEQA: Respondent	Moreno		

<i>Save Tara v. City of West Hollywood</i> (2008) 45 Cal.4th 116	Definition of “project”	Petitioner	Werdegar		
<i>Sunset Sky Ranch Pilots Assn. v. County of Sacramento</i> (2009) 47 Cal.4th 902	Project denial	Respondent	Corrigan		
<i>Committee for Green Foothills v. Santa Clara County Board of Supervisors</i> (2010) 48 Cal.4th 32	Notice of determination - statute of limitations	Respondent	Corrigan		
<i>Communities for a Better Environment v. South Coast Air Quality Management Dist.</i> (2010) 48 Cal.4th 310	Negative declaration; baseline	Petitioner	Werdegar		
<i>Stockton Citizens for Sensible Planning v. City of Stockton</i> (2010) 48 Cal.4th 481	Notice of exemption - statute of limitations	Respondent	Baxter		
<i>Save the Plastic Bag Coalition v. City of Manhattan Beach</i> (2011) 52 Cal.4th 155	Negative declaration; standing	Respondent (neg. declaration); petitioner (standing)	Corrigan		
<i>Tomlinson v. County of Alameda</i> (2012) 54 Cal.4th 281	Exhaustion of remedies	Respondent	Kennard		
<i>Neighbors for Smart Rail v. Exposition Metro Line Construction Authority</i> (2013) 57 Cal.4th 439	EIR; baseline	Respondent *	Werdegar	Baxter Cantil-Sakauye Chin	Liu
<i>Tuolumne Jobs & Small Business Alliance v. Superior Court</i> (2014) 59 Cal.4th 1029	CEQA and land-use initiatives	Respondent	Corrigan		

<i>Berkeley Hillside Preservation v. City of Berkeley</i> (2015) 60 Cal.4th 1086	Exceptions to categorical exemptions	Respondent	Chin		Liu Werdegar
<i>City of San Diego v. Board of Trustees of the California State University</i> (2015) 61 Cal.4th 945	Duty to mitigate under CEQA	Petitioner	Werdegar		
<i>Center for Biological Diversity v. Department of Fish and Wildlife</i> (2015) 62 Cal.4th 204 (<i>Newhall Ranch</i>)	GHG emissions under CEQA; “take” of fully protected species	Petitioner	Werdegar		Corrigan Chin
<i>California Building Industry Assn. v. Bay Area Air Quality Management Dist.</i> (2015) 62 Cal.4th 369	“Reverse CEQA”	Petitioner *	Cuellar		
<i>Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.</i> (2016) 1 Cal.5th 937	Supplemental review	Respondent *	Kruger		
<i>Orange Citizens for Parks and Recreation v. Superior Court</i> (2016) 2 Cal.5th 141	General Plan consistency and referenda	Petitioner	Liu		
<i>Banning Ranch Conservancy v. City of Newport Beach</i> (2017) - Cal.5th - [slip op. dated March 30, 2017]	EIR adequacy	Petitioner	Corrigan		

Some Observations

- Input/accountability versus predictability/efficiency
- Fractured outcomes → (tenuous?) unanimity
- Retirement of Justice Werdegarr

