Land Use and CEQA Litigation Update

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CEQA AND LAND USE LAW UPDATE: August 2017 – March 2018

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Sacramento, California

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TABLE OF CONTENTS Page

CASE INDEX

I. OPINIONS ON ISSUES UNDER CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Scope of CEQA

❖ ***Bridges v. Mt. San Jacinto Community College District*** **(2017) 14 Cal.App.5th 104.**

The Fourth Appellate District held that CEQA did not apply to a Community College District's decision to enter into a conditional purchase agreement for an 80-acre piece of unimproved rural property. The court found that the agreement did not constrain the District's discretion to fully comply with CEQA before committing to the purchase.

In 2014, the Mt. San Jacinto Community College District entered into a purchase agreement to buy an 80-acre plot of land from the Riverside County Regional Park & Open-Space District in order to build new campus facilities near the Interstate 15 corridor in southwest Riverside County. The agreement conditioned the opening of escrow on both parties' compliance with CEQA, and held that the parties were not bound by the agreement unless and until the CEQA process was complete and there was no more possibility of any legal challenges. The college district's board considered and approved the agreement at a public meeting, the agenda for which listed a motion to approve the purchase agreement as an open agenda item and invited the public to comment. There were no public comments on the item. Three months later, the college approved a resolution to place a bond measure on the ballot to pay for several new improvements to the college, including a "new campus along the I-15 corridor to serve additional students." The bond measure did not commit the college to any particular project and qualified that some of them may be delayed or not completed due to cost and funding issues. Immediately upon voter approval of the bond measure, two residents near the potential new campus site sued the college and the regional park districts, seeking orders directing the college to set aside the purchase agreement and to adopt local CEQA implementing guidelines. The trial court dismissed the suit, finding the first cause of action unnecessary because CEQA requires an EIR before the purchase is final, but not before executing the agreement, and because the purchase agreement expressly required an EIR to initiate escrow for the purchase. The trial court also found the college exempt from adopting local implementing procedures because it used the same guidelines that Riverside County and the California Community College Chancellor's Office have adopted. The regional park district argued the case should be dismissed because of the petitioners' failure to exhaust administrative remedies by objecting to the purchase agreement first, but the trial court declined to address the exhaustion issue in light of its rulings on the applicability of CEQA. Petitioners appealed.

The court of appeal first considered the exhaustion defense reasserted by the regional park district on appeal. Appellants alleged the college did not give proper notice of the meeting at which the Board approved the agreement and therefore they were excused from objecting to the purchase agreement. The court noted that CEQA provides an exception to the exhaustion

requirement where "there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law." (Pub. Resources Code, § 21177, subd. (e).) But the court further explained that notice in this context can be constructive; it need not be actual. The relevant notice in these circumstances was the 72-hour publicly posted notice required by the Brown Act. (Gov. Code, § 54954.2, subd. (a).) The record contained the agenda for the college district board's meeting listing the purchase agreement as an action item and inviting the public to comment, but no proof that the agenda was properly posted under the Brown Act. The court noted it was the appellants' burden to demonstrate that the no-notice exception applied to them and they could only allege, but not prove, that the college did not properly notice the meeting. In the absence of any evidence that the college failed to meet the deadline under the Brown Act, the court followed the presumption required under Evidence Code section 664 that an "official duty has been regularly performed." Applying that presumption, the court concluded that the appellants could not show CEQA's exhaustion exception for lack of notice applied to them and therefore they were barred from raising their objection in a CEQA suit.

The court further considered the merits of the appellants' CEQA claims, despite the exhaustion bar. Appellants argued it was not enough for the college to commit to completing an EIR before escrow on the land purchase opened; they argued an EIR was required before approval of the purchase agreement. The court disagreed, relying in these circumstances on the criteria described by the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 128 and the exception in CEQA Guidelines section 15004, subdivision (b), allowing agencies to designate a "preferred site" for a land acquisition agreement and conditional future use dependent on CEQA compliance. The court found nothing in the purchase agreement or other record documents that committed the college to any type of construction plan or definite course of development and no funds had been committed to the project; the college retained its full discretion to consider alternatives under CEQA.

The court also rejected the appellants' contention that the college violated CEQA by failing to adopt local implementing guidelines as required by Public Resources Code section 21082. Noting that school districts are exempt from this requirement if they utilize the guidelines of another public agency whose boundaries are coterminous with or entirely encompass the school district (CEQA Guidelines, § 15022, subd. (b)), the court found the college's "utilization," not formal adoption, of the same guidelines adopted by Riverside County and the state Chancellor's Office (the CEQA Guidelines), was all that was required under these circumstances.

Categorical Exemptions

- ***Respect Life South San Francisco v. City of South San Francisco*** **(2017) 15 Cal.App.5th 449**

The First Appellate District found that the potential for protests against a health clinic does not constitute substantial evidence of impacts under "unusual circumstances" exception to categorical exemptions. In the absence of an explicit determination by the lead

agency that no unusual circumstances existed, the court applied the less-deferential fair argument standard, but still concluded no fair argument of potentially significant impacts had been made.

The City of South San Francisco approved a conditional use permit for the conversion of an existing office building to a medical clinic to be used by Planned Parenthood, finding the project was categorically exempt from CEQA under the Class 1 (existing facilities), Class 3 (conversion of small structures) and Class 32 (infill) exemptions. The City made no explicit determinations about the application of the potential exceptions to categorical exemptions (CEQA Guidelines, § 15300.2), including the "unusual-circumstances" exception. An unincorporated association, Respect Life South San Francisco, and other petitioners sued. The trial court denied the petition. Respect Life appealed.

Respect Life argued that the permit was not exempt from CEQA because the unusual-circumstances exception applied to the project, theorizing that protests against Planned Parenthood's services would ensue, causing environmental impacts including traffic, parking, and public health and safety concerns. After noting that it was Respect Life's burden to establish that the exception applied, the court explained that different standards of review govern an agency's determination of the applicability of the exception and a court's review of that determination, citing the California Supreme Court's decision in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086 ("*Berkeley Hillside*"). For the standard governing the City, the *Berkeley Hillside* court explained that a party seeking to establish that the unusual-circumstances exception applies to a project must show two elements: (1) "that the project has some feature that distinguishes it from others in the exempt class, such as size or location" and (2) that there is "a reasonable possibility of a significant effect due to that unusual circumstance." (*Id.* at p. 1115.) Thus, there must be both unusual circumstances and a potentially significant effect.

For the standard governing the court's review of the city's determination, the court explained that, under *Berkeley Hillside*, when an agency *explicitly* determines whether the unusual-circumstance exception applies, a court reviews that determination under the abuse of discretion standard in Public Resources Code section 21168.5. (*Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1114.) The agency's determination of whether there are "unusual circumstances" is a factual inquiry and thus reviewed under section 21168.5's substantial evidence prong. But the agency's finding as to whether such unusual circumstances give rise to a reasonable possibility of a significant environmental effect is reviewed under the fair argument standard. (*Ibid*.)

But the court announced that where an agency only makes an *implied* determination that the unusual-circumstance exception is inapplicable, the court's review is constrained and ultimately less deferential. Without an explicit agency determination, the court concluded, it cannot say with certainty whether the agency found that there were no unusual circumstances, or whether the agency found there were, but that the record did not contain substantial evidence supporting a fair argument of a reasonable possibility of a significant environmental effect. To affirm an implied determination that the unusual-circumstances exception is inapplicable, the court assumed that the agency found the project involved unusual circumstances then concluded that the record contained no substantial evidence to support either a finding that any unusual

circumstances exist, or a fair argument that any purported unusual circumstances identified by the petitioner will have a significant effect on the environment.

Applying these assumptions, the court concluded that Respect Life failed to identify any substantial evidence of a potential significant environmental effect to support a fair argument. There was evidence that protests were likely, but no evidence that the number of protestors would be large, particularly disruptive, or that any resulting increase in traffic, sidewalk use, noise or business disruptions would be consequential.

The decision adds two important points to the already substantial body of case law interpreting and applying the "unusual-circumstances" exception. First, the case reinforces the general principle in CEQA discouraging impact conclusions founded on mere speculation. "We decline to hold, as Respect Life would apparently have us do, that the possibility of 'foreseeable First Amendment activity' establishes the applicability of the unusual-circumstances exception because the activity might lead to unsubstantiated and ill-defined indirect or secondary environmental effects." The second, perhaps more notable takeaway for agencies applying categorical exemptions is to make explicit determinations regarding the applicability of the exceptions in CEQA Guidelines section 15300.2, especially the unusual-circumstances exception. Failure to do so could result in the court's application of the less-deferential "fair argument" standard of review to the project's administrative record.

❖ ***Protect Telegraph Hill v. City and County of San Francisco*** **(2017) 16 Cal.App.5th 261**

The First Appellate District upheld San Francisco's reliance on the Class 1 and Class 3 categorical exemptions for the restoration of an existing small cottage and the construction of three new residential units and parking. The court found that the agency's determination that there were no unusual circumstances was supported by substantial evidence showing that steep slopes were not uncommon in San Francisco. The court also rejected the petitioner's claims that the project would impair views from Telegraph Hill, applying the relatively new section in CEQA providing that aesthetic impacts of certain residential urban infill projects within a transit priority area shall not be considered significant impacts on the environment.

The property at issue is a 7,517-square-foot lot on the south side of Telegraph Hill bordering the Filbert Street steps in San Francisco. The lot was unimproved except for a small uninhabitable 1906 cottage at the rear of the property. At one time, the property had five buildings on it, but four were demolished in about 1997. The proposed project was a new three-unit condominium fronting on Telegraph Hill Boulevard, the restoration of an existing small cottage at the back of the property, and three off-street parking spaces. The city planning department determined that the renovation of the cottage was categorically exempt from CEQA under the Class 1 exemption (CEQA Guidelines, § 15301, subd. (d)), and construction of the new building was exempt under the Class 3 exemption as a residential structure totaling no more than four dwelling units (CEQA Guidelines, § 15303, subd. (b)). The planning commission approved a conditional use authorization with some conditions on construction activity. A neighborhood

group appealed both decisions to the San Francisco Board of Supervisors. The board approved the exemption and the conditional use authorization, with additional conditions on the construction activity. Protect Telegraph Hill filed a petition for writ of mandate, arguing that the city's findings relating to the exemptions and approval of the conditional use authorization were unsupported by the evidence, the city failed to consider the entire project, and unusual circumstances and the inclusion of mitigation measures made the reliance on categorical exemptions improper. The trial court denied the petition, and the petitioner appealed.

On appeal, the petitioner argued that granting the exemptions was unlawful because the conditions of approval imposed by the city were intended to mitigate environmental impacts from the project's construction, indicating that the project would have significant impacts and thus could not be exempt from CEQA. The petitioner also argued that the project description was inadequate to determine whether the project was truly exempt and that the unusual circumstances exception applied.

The court concluded that while some of the conditions of approval addressed traffic and pedestrian safety, they were attached to the approval of the conditional use authorization, and not the exemptions. The exemptions were initially approved by the planning department without qualification, while the conditional use authorization was originally approved by the planning commission with certain conditions. The petitioner had to appeal both decisions separately to the Board of Supervisors, which voted separately on each decision, attaching further conditions to the conditional use authorization only. The court also found that there was no substantial evidence in the record suggesting that the project would have significant effects on traffic and pedestrian safety. The court stated that the appellant's "expressions of concern" in the record were not substantial evidence. The court also rejected attacks on the project description, finding that the included description complied with the requirements in the San Francisco Administrative Code and there was no evidence in the record suggesting the description was deficient.

Turning to the unusual circumstances exception, the court applied the two-part test announced by the California Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086. The city's conclusion that the unusual circumstances exception was not met is reviewed for substantial evidence. But, if there are unusual circumstances, the court considers whether there is a fair argument that there is a reasonable possibility that the project will have a significant effect.

The petitioner argued that the location of the project on Telegraph Hill was itself an unusual circumstance. But the court found that the city's determination that there were no unusual circumstances was supported by substantial evidence. While Telegraph Hill is described in the design element of the general plan, the project conformed to the zoning requirements for that area and was similar in proportion to the immediately adjacent buildings. The petitioner also argued that the area was heavily traveled because of its proximity to the Coit Tower landmark, but the court agreed with the city that large traffic and pedestrian volumes was "more commonplace than unusual" in San Francisco.

Next, the petitioner argued that the project would impair views of the downtown skyline from the public stairway. The court rejected this argument in part by applying new Public Resources Code section 21099, subdivision (d), which applies to residential urban infill projects

in transit priority areas, and requires that aesthetic impacts "shall not be considered significant impacts on the environment." Additionally, the city considered the project's impact on views from Coit Tower and Pioneer Park and concluded it would not have an adverse effect. The petitioner also argued that the 30% slope of the lot was an unusual circumstance. The court again agreed with the city that the slope was not unusual for San Francisco and found that the city's engineering report provided substantial evidence supporting its decision. The petitioner also submitted an engineering report that provided conflicting evidence, but that report did not negate the substantial evidence supporting the city's conclusion.

Lastly, the petitioner argued that the conditional use authorization finding was unsupported because of the project's potential to obscure views of the downtown skyline. The court held that even if there were some conflict with one policy in the general plan, the policies were not strictly construed and the project was consistent with other policies and the Urban Design Element for Telegraph Hill. Ultimately, the court found that the record supported the conclusion that the character of Telegraph Hill would be unchanged, and denied the petition.

❖ ***Aptos Residents Association v. County of Santa Cruz*** **(2018) 20 Cal.App.5th 1039**

The Sixth Appellate District upheld a county's reliance on the Class 3 categorical exemption for approval of a microcell transmitter project involving the installation of 13 antennas on existing utility poles in a rural residential area, and found that cumulative impact, location, and "unusual circumstances" exceptions did not apply.

The county zoning administrator considered 11 applications for the installation of 13 microcell transmitters in the Day Valley Aptos area finding that the project fell within the Class 3 categorical exemption that applies to small structures and that no exceptions to the exemption applied. Petitioner appealed to the planning commission, which denied the appeal—and the county board declined to take jurisdiction over the appeal. Petitioner challenged the project alleging that the county had improperly segmented the project and that the exceptions applied to the project thereby defeating the county's use of the Class 3 categorical exemption. Petitioner also alleged that the county board had abused its discretion in declining to take jurisdiction of petitioner's appeal.

With respect to "piecemealing," the court held that the county had not improperly segmented the project. The applicant's filing of separate permit applications and the county's issuance of a separate permit and exemption for each project were not evidence of piecemealing. The court found that throughout the administrative proceedings, the county had considered the entire group of microcell units to be one project. It stated that "[t]he nature of the paperwork required for approval of the project is immaterial."

Next, the court held that the board had not abused its discretion in finding that new evidence submitted by petitioner about a possible future AT&T project was not significant new evidence relevant to its decision. The petitioner had submitted a declaration from petitioner's attorney stating that county staff had been contacted by AT&T about a cell transmitter project in

the same area. The court found that the evidence was too vague to support a finding that a possible AT&T project would be of "the same type in the same place."

The court then held that the location exception to the exemption did not apply. The court rejected petitioner's argument that the Residential Agricultural zoning classification designated the area "an environmental resource of hazardous or critical concern" because nothing in the statement of the purpose for that zoning district indicated as much.

Finally, the court found that the unusual circumstances exception also did not apply because petitioner produced no evidence that it is unusual for small structures to be used to provide utility extensions in a rural area or in an area zoned Residential Agricultural.

❖ ***Don't Cell Our Parks v. City of San Diego*** **(2018) ___ Cal.App.5th ___ (Mar. 15, 2018; D071863)**

The Fourth Appellate District upheld San Diego's reliance on the Class 3 categorical exemption for approval of a project involving the installation of a wireless telecommunications tower in a dedicated park, finding that the project did not constitute a changed use or purpose for the park that would require voter approval under the city's charter. The court further held that the wireless tower, disguised as a tree, fell within the scope of facilities contemplated in the Class 3 exemption, and that the location and unusual circumstances exceptions did not apply.

In June 2014, Verizon applied to construct a wireless telecommunications facility on the outskirts of Ridgewood Neighborhood Park, a dedicated park in the community of Rancho Peñasquitos and adjacent to the Los Peñasquitos Canyon Preserve in the City of San Diego. The project consists of a 35-foot-tall faux eucalyptus tree and a 220-square-foot landscaped equipment enclosure with a trellis roof and a chain link lid, to be installed in an existing stand of tall trees. The record showed there was a substantial gap in cell service coverage in the area and that the park was the only property within the intended coverage area that was not an open space preserve or developed with residential uses.

The City determined the project qualified for the Class 3 categorical exemption from CEQA, for construction and location of "new, small facilities or structures" and "installation of small new equipment and facilities in small structures." The petitioner group appealed the City's CEQA exemption determination to the City Council, which denied the appeal and unanimously determined the project was exempt from CEQA.

The petitioner argued in its petition for writ of mandate and complaint for declaratory and injunctive relief that placing a wireless facility in the park was not a permissible park or recreational use under City Charter section 55, which provides that real property formally dedicated in perpetuity "for park, recreation or cemetery purposes" shall not be used for any uses but those without such changed use or purpose having been authorized or ratified by two-thirds of the City voters. The petitioner also argued that the project did not qualify for the Class 3 exemption. The trial court denied the petition and ruled in favor of the respondents, and the petitioner appealed.

The court of appeal first interpreted City Charter section 55, applying the legal principles requiring the court to give effect to the plain meaning of the language of the section. The section gives the city manager "control and management of parks" and "recreation activities held on . . . parks." It also allows the city council "by ordinance [to] adopt regulations for the proper use and protection of said park property." The next paragraph of the charter restricts the City's control and management authority by providing that dedicated parks "shall not be used for any but park, recreation or cemetery purposes" without a vote of two-thirds of the City's voters (the "changed use restriction"). The court determined that deciding whether, as here, an addition to a dedicated park constitutes a "changed use" necessarily falls within the City's control and management authority.

The court examined the record to determine whether it supported a conclusion that the wireless facility does not change the use or purpose of the park. The court noted that the 8.5-acre park contained basketball courts surrounded by a 12-foot fence, circuit training stations, a play structure and picnic tables bounded by a cement path. The court further noted that the wireless equipment would be installed in an existing stand of trees and would be designed to blend into the existing environment. Furthermore, the court acknowledged evidence supporting a conclusion that the project would benefit park visitors by providing enhanced cell coverage, especially for 911 calls.

On the CEQA issues, the petitioner argued that the project did not fit within the meaning or use of the Class 3 exemption as a matter of law, that the unusual circumstances exception applied, and that the placement of the project in a dedicated park precluded the use of the categorical exemption because such a location is of critical concern. The court rejected all of the petitioner's CEQA arguments.

The court concluded that while none of the examples listed in the Class 3 exemption expressly contemplated the type of equipment in the project at hand, the project was much smaller than the examples listed in the exemption—single family residence, store, motel, office or restaurant, and as such, as a matter of law it was a "new small facility or structure" within the scope of the exemption.

The court also rejected the argument that the project would have significant impacts under the unusual circumstances exception, relying on evidence in the record showing there were at least 37 similar facilities in other dedicated parks. Further, the project was designed and located so as not to interfere with park and recreation uses, it would not impact any special status species, and it would not cause a significant adverse change to aesthetics. Finally, the court found no evidence that the park was a location "designated" as an "environmental resource of hazardous or critical concern" by any federal, state or local agency, and thus, the lack of such designation defeated the application of the location exception in CEQA Guidelines section 15300.2, subdivision (a).

Negative Declarations

❖ *Clews Land and Livestock v. City of San Diego* (2017) 19 Cal.App.5th 161

The Fourth District Court of Appeal upheld the trial court's decision denying a challenge to the City of San Diego's approval of construction of a secondary school and adoption of a mitigated negative declaration. Notwithstanding the court's conclusion that the petitioner had failed to properly exhaust its administrative remedies, the court found that the record did not support a fair argument that the project could have potentially significant impacts relating to fire hazards, traffic and transportation, noise, recreation, and historical resources.

The City of San Diego adopted an MND and approved a project to build the 5,340-square-foot Cal Coast Academy, a for-profit secondary school, on property adjacent to the plaintiffs' (Clews Land and Livestock, LLC, et al. ["Clews"]) commercial horse ranch and equestrian facility. Clews filed a petition for writ of mandate and complaint alleging the project would cause significant environmental impacts relating to fire hazards, traffic and transportation, noise, recreation, and historical resources. Clews also argued that CEQA required recirculation of the MND, that the project was inconsistent with the applicable community land use plan, and that the City did not follow historical resource provisions of the San Diego Municipal Code. The trial court determined that Clews had failed to exhaust its administrative remedies, and ruled in favor of the City on the merits. Clews appealed and the Court of Appeal upheld the trial court's determinations.

The court first held that Clews failed to exhaust its administrative remedies. The San Diego Municipal Code appeal process provides for two separate procedures—one for appeal of a hearing officer's decision to the Planning Commission, and one for appeal of an environmental determination to the City Council. Because Clews filed only an appeal of the hearing officer's decision, the court determined that Clews failed to exhaust its administrative remedies with respect to adoption of the MND. Clews argued that the City's bifurcated appeal process violated CEQA, but the court found the process was valid. Clews also argued that the City had not provided proper notice of the appeal procedures under Public Resources Code section 21177, subdivision (a), thereby excusing Clews' failure to appeal the environmental determination. The court explained, however, that section 21177 did not apply because Clews' failure to appeal was not a failure to raise a noncompliance issue under that section. Where, like here, a public agency has accurately provided notice of a public hearing, but it misstates the applicable procedures to appeal the decision made at that hearing, the only available remedy is to prevent the public agency from invoking an administrative exhaustion defense through equitable estoppel. Clews had pursued a claim for equitable estoppel in the trial court and was unsuccessful, and Clews did not challenge that determination with the Court of Appeal. Therefore, the court found, Clews' failure to exhaust could not be excused on an equitable estoppel basis.

Notwithstanding its determination that Clews failed to exhaust its administrative remedies, the court also considered the merits of Clews' claims. The court determined that Clews did not make a showing that substantial evidence supported a fair argument that the project may

have a significant effect on the environment. In making its determination, the court emphasized that the project is "relatively modest" and located on already-developed land.

Clews argued that the City was required to prepare an EIR due to potentially significant impacts on fire hazards, traffic and transportation, noise, recreation, and historical resources. The court rejected each of Clews' arguments. In part, the court was unpersuaded by Clews' expert's comments because they were "general" and did not have a specific nexus with the project, they focused on the effects of the environment on the students and faculty at the school rather than on the effects of the school on the environment, and they were conclusory and speculative. In addition, quoting *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 684, the court noted that "dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence." The court also found that a possibility that noise from the project would impact the adjacent business's operations was insufficient to require an EIR under CEQA. The court explained that the question is not whether the project would affect particular persons, but whether the project would affect the environment in general. In addition, the court explained that the fact that a project may affect another business's economic viability is not an effect that must be analyzed under CEQA unless the project may result in a change in the physical environment, such as by causing urban decay.

Clews argued that by adding a shuttle bus plan and describing the school's intent to close on red flag fire warning days *after* circulation of the MND, the City substantially revised the MND and was required to recirculate the draft prior to certification. The court rejected these contentions, explaining that the added plans were purely voluntary, and thus could not constitute mitigation measures. In addition, the court explained, Clews did not show that the plans were added to the project to reduce *significant* effects on the environment. According to the court, all revisions to the MND were clarifying and amplifying in nature and did not make substantial revisions to the project, and therefore, did not warrant recirculation.

Clews argued that City did not follow its historical resource regulations and guidelines. The court explained that the City relied on an exemption contained within the regulations, but Clews did not address the substance of that exemption, nor did Clews show that the City was actually required to apply the specific procedures contained in the regulations. Instead, Clews simply critiqued the City's reliance on the exemption as a post hoc rationalization; the court found this was not enough to meet Clews' burden to show failure on the part of the City.

Clews argued that the project conflicted with the Carmel Valley Neighborhood 8 Precise Plan because the plan designates the site as open space. Clews' argument was two-fold. First, Clews argued the site could not be developed because of the plan's open space designation. Second, Clews argued the plan's designation was in conflict with the multifamily residential zoning at the project site.

With respect to the plan's open space designation, the court held that Clews failed to meet its burden to show that the City's consistency finding was an abuse of discretion. The court explained that the standard is whether no reasonable person could have reached the conclusion made by the City. In making its determination, the City relied on the fact that the property was already developed—the school would be sited at the location of a previously-capped swimming

pool, and the project would not impact or be developed on undisturbed open space. The court found that the City's determination was reasonable, and that Clews did not address the City's reasoning or explain how the City abused its discretion. With respect to the site's zoning, the court explained that consistency of the zoning ordinance with the plan was not at issue—instead, the issue was whether the *project* is consistent with the Precise Plan's open space designation.

❖ ***Covina Residents for Responsible Development v. City of Covina*** **(2018) ___ Cal.App.5th ____ (Feb. 28, 2018, published Mar. 22, 2018; B279590)**

The Second Appellate District upheld the adoption of a tiered mitigated negative declaration for the approval of a 68-unit mixed use project, affirming that parking impacts are statutorily exempt from consideration for a transit-oriented infill project. The court also rejected the petitioner's arguments under the Subdivision Map Act, sustaining the city's findings that the tentative map was consistent with the applicable specific plan, including with respect to compliance with the plan's parking standards.

In 2000, the city adopted a general plan and certified a program EIR for it. Four years later, the city adopted the Town Center Specific Plan and certified a second-tier EIR, which identified the facilitation of infill development and redevelopment of deteriorated properties, particularly for housing, and reducing vehicle trips, as primary objectives for the specific plan area. In 2012, a developer proposed the redevelopment of a 3.4-acre site within the specific plan area, comprised of an entire block of parcels located a quarter-mile from the Covina Metrolink station and served by a major bus line. The paved, deteriorating site was previously used by a car dealership and surrounded by developed residential and commercial uses. Over the next two years, the developer worked with city staff, the planning commission and city council to repeatedly redesign a mixed use project that could satisfy the city's concerns about the amount of parking proposed on and around the site. The city council ultimately adopted a mitigated negative declaration for the project, tiered from the second-tier EIR certified for the applicable specific plan.

The site's former and adjacent property owner objected to the project, repeatedly commenting on the project's failure to provide adequate parking. Late in the process, attorney Cory Briggs appeared on behalf of the competing property owner and the eventual petitioner group, alleging that the council had failed to provide the public with an opportunity to review last-minute revisions to the project, and alleging violations of the Brown Act provisions pertaining to closed sessions. The Council voted unanimously to approve the project, adopt the MND and make the required findings for approval of a subdivision tentative tract map.

The petition for writ of mandate alleged three causes of action: a CEQA claim that the city should have prepared an EIR and improperly tiered the MND from the specific plan EIR; a claim that the city had violated the Subdivision Map Act by failing to make the necessary findings for approval of the project; and a claim that the city had violated due process by failing to allow a meaningful opportunity to respond to last-minute revisions in the project. The CEQA claim centered on the project's allegedly inadequate parking. The trial court denied the petition finding: no fair argument to support the claim that a parking shortage would result in any

environmental impacts; any parking impacts were exempt from environmental review under Public Resources Code section 21099; the city properly tiered its review from the specific plan EIR; the city did not violate the Subdivision Map Act; and the record did not indicate anyone had been prevented from speaking at the final council meeting.

Engaging in a lengthy discussion of section 21099, the court of appeal found that the statute exempted the alleged parking impacts of the project from environmental review. The court reached this result notwithstanding the fact that this statute was not in effect when the city prepared its environmental review and therefore the city did not rely on it when it adopted the MND and approved the project. The court distinguished previous decisions dealing with parking impacts and pre-dating the enactment of section 21099, finding that the Legislature endorsed the approach of the First District in *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, which held that the project's location near a transit hub justified the EIR's conclusion that parking shortfalls relative to demand are not in and of themselves impacts in an urban context. Rather, the court noted, CEQA only requires the agency to consider the secondary environmental impacts resulting from any parking deficits, such as air quality, noise and other issues associated with transportation. Here, the petitioner failed to submit any evidence of secondary impacts associated with the alleged parking shortfall, focusing instead on competitive impacts to downtown businesses.

The court also considered but rejected the petitioner's argument that the city's tiering from the specific plan EIR was flawed as to the MND's analysis of traffic impacts, because that argument was centered on the claim that the project's parking impacts were not adequately analyzed. The court noted that the project as ultimately approved actually complied with the applicable parking requirements, and in any event, the petitioner had failed to identify any deficiencies or omissions in the project-specific trip analysis the city performed for the project.

Lastly, the court rejected the petitioner's claim that the tentative map was inconsistent with the specific plan, again because the claim was centered on the alleged parking deficiency, which the court had determined was not an impact and found that the project complied with the applicable requirements anyway.

Environmental Impact Reports

- ***Washoe Meadows Community v. Department of Parks and Recreation*** **(2017) 17 Cal.App.5th 277**

The First District Court of Appeal upheld the trial court's decision directing the Department of Parks and Recreation and the State Park and Recreation Commission to set aside project approvals where the draft EIR analyzed five alternative projects in detail, but did not identify one "preferred" alternative during the EIR process.

In 1984, the Department of Parks and Recreation acquired 777 acres of land in the Lake Tahoe Basin—608 acres of the property were designated as Washoe Meadows State Park and the remainder contained an existing golf course. Studies conducted in the early 2000s indicated that

the layout of the golf course was contributing to sediment running into Lake Tahoe, which contributed to deterioration of habitat and water quality in the lake.

In 2010, the Department circulated a draft EIR to address the concerns about the golf course. The draft EIR analyzed five alternatives in equal detail, with the stated purpose of "improv[ing] geomorphic processes, ecological functions, and habitat values of the Upper Truckee River within the study area, helping to reduce the river's discharge of nutrients and sediment that diminish Lake Tahoe's clarity while providing access to public recreation opportunities …." The draft EIR did not identify one preferred alternative. In the final EIR, the Department identified the preferred alternative as a refined version of the original alternative 2, which provided for river restoration and reconfiguration of the golf course. In 2012, the Department certified the EIR and approved the preferred alternative.

Framing the issue as a question of law, the court found that the draft EIR did not "provide the public with an accurate, stable and finite description of the project," because it did not identify a preferred alternative. The court found that by describing a range of possible projects, the Department had presented the public with "a moving target," which required the public to comment on all of the alternatives rather than just one project. The court determined that this presented an undue burden on the public.

The court compared the draft EIR to *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, where the court found an EIR insufficient because the project description described a much smaller project than was analyzed in other sections of the EIR. The court in *Washoe Meadows* found that rather than providing inconsistent descriptions like in *County of Inyo*, the draft EIR had not described a project at all. Thus, the court directed the Department to set aside the project approvals.

❖ ***Los Angeles Conservancy v. City of West Hollywood*** **(2017) 18 Cal.App.5th 1031**

The Second Appellate District upheld the trial court's denial of a petition for writ of mandate, finding that the EIR's treatment of alternatives was sufficient and that the city adequately responded to comments. The court afforded substantial deference to the city's determination that the petitioner's preferred alternative was infeasible based on its inability to meet the city's policy goals and vision for the site's redevelopment.

In 2014, the city certified an EIR for a mixed–use development in the Melrose Triangle section of West Hollywood. The project was the product of city incentives to redevelop the area in order to create a unified site design with open space, pedestrian access, and an iconic "gateway" building to welcome visitors and promote economic development. The EIR concluded that a significant and unavoidable impact would result from the demolition of a building eligible for listing as a California historic resource.

One alternative would have preserved the building in its entirety, by reducing and redesigning the project. The preservation alternative was ultimately rejected as infeasible because it was inconsistent with project objectives, and would eliminate or disrupt the project's critical design elements.

After circulating the draft EIR, the project's architects developed a site design which incorporated the building's façade and mandated this design as a condition of approval. Furthermore, a subsequent fire destroyed 25 percent of the building, but left the façade intact. The final EIR and conditions were approved in 2014. Petitioners immediately filed suit.

In the court below, petitioner argued that the EIR's analysis of the preservation alternative was inadequate, the city did not respond to public comments, and that the city's finding that the alternative was infeasible was not supported by substantial evidence. The respondents prevailed on all claims and petitioner appealed.

Finding for respondents, the court reiterated the *Laurel Heights* standard that an analysis of alternatives does not require perfection, only that the EIR provide sufficient information to support a reasonable range of alternatives. The court rejected petitioner's contention that the EIR was required to include a conceptual drawing of the preservation alternative. Furthermore, the EIR's statement that preservation of the building would preclude construction of other parts of the project was self-explanatory and did not require additional analysis. The EIR's use of estimates to calculate how the preservation alternative would reduce the project's footprint did not create ambiguities that would confuse the public. Such imprecision is simply inherent in the use of estimates.

The court also found that the city's responses to the three comments cited by the petitioner were made in good faith and demonstrated reasoned analysis. The court reiterated that a response is not insufficient when it cross-references relevant sections of the draft EIR, and that the level of detail required in a response can vary. Here, the West Hollywood Preservation Alliance and the President of the Art Deco Society of Los Angeles opined in comments that the building could be preserved while achieving the project's objectives. The city adequately responded to these comments by referencing, and expanding upon, the EIR's analysis of the preservation alternative, where this option was considered. The last comment was of a general nature, so the city's brief, general response was appropriate.

Finally, the court found sufficient evidence to support the city's finding that the preservation alternative was infeasible. An alternative is infeasible when it cannot meet project objectives or when policy considerations render it impractical or undesirable. An agency's determination of infeasibility is presumed correct and entitled to deference, if supported by substantial evidence in the record. The court found that the city's conclusion that the alternative was infeasible was supported by substantial evidence in the record. Development plans, photographs, and testimony from senior planning staff supported the city's conclusion that retaining the building and reducing the project would not fulfill the project objectives of creating a unified site design, promoting pedestrian uses, and encouraging regional economic development. That another conclusion could have been reached did not render the city's decision flawed.

A consistent theme underlying the court's decision was the city's clear goal of revitalizing the entire site, in order to create a functional and attractive gateway for West Hollywood. Critical to the project's success was removing the specific building that the petitioner sought to preserve. The court appeared reluctant to overcome such a strong mandate by flyspecking the EIR's analysis of this acknowledged significant impact.

❖ ***Placerville Historic Preservation League v. Judicial Council of California*** **(2017) 16 Cal.App.5th 187**

The First Appellate District upholding the San Francisco County Superior Court's denial of a petition for writ of mandate challenging the Judicial Council of California's decision to certify a Final EIR and approve the New Placerville Courthouse Project. The court found that the record supported the Judicial Council's conclusion that it was not reasonably foreseeable that the closure of the existing courthouse would cause urban decay in downtown Placerville.

El Dorado County's court facilities are currently divided between the Main Street Courthouse, a historic building in downtown Placerville, and the County administrative complex. The Judicial Council proposed to consolidate all court activities in a new three-story building to be built on undeveloped land adjacent to the County jail, less than two miles away from the existing Main Street Courthouse.

In October 2014, the Judicial Council published a draft EIR for the proposed new courthouse. The draft EIR acknowledged that retiring the downtown courthouse could have an impact on downtown Placerville. The EIR also recognized that the Judicial Council was required address neighborhood deterioration as a significant environmental effect under CEQA if urban decay was a reasonably foreseeable impact of the project. The draft EIR defined "urban decay" as "physical deterioration of properties or structures that is so prevalent, substantial, and lasting a significant period of time that it impairs the proper utilization of the properties and structures, and the health, safety, and welfare of the surrounding community." The draft EIR concluded that urban decay, so defined, was not a reasonably foreseeable consequence of the new courthouse project.

Comments received both during and after the public review period on the draft EIR voiced the concern that closing the historic Main Street Courthouse could negatively affect businesses in downtown Placerville. In response to such concerns, the Judicial Council reiterated the draft EIR's conclusion that the project was not likely to lead to urban decay. In support of this conclusion, the Judicial Council observed that it was working with both the city and county to develop a re-use strategy for the building that would support the downtown businesses and local residences. The Judicial Council also cited evidence of the City and County's efforts to find a new use for the historic courthouse building.

Following the Judicial Council's certification of the final EIR, the Placerville Historic Preservation League (League) filed a petition for writ of mandate, which the trial court denied. The Court of Appeal affirmed.

On appeal, the League argued that the Judicial Council erred in concluding that urban decay is not a reasonably foreseeable indirect effect of relocating the courthouse activities from downtown Placerville to their new location. The court held that substantial evidence in the record supported the Judicial Council's conclusion that the type of physical deterioration contemplated in the term "urban decay" is not reasonably foreseeable. The court explained that there is no presumption that urban decay would result from the project. To the contrary, as defined by

CEQA—which focuses on the physical environment—urban decay "is a relatively extreme economic condition." Evidence in the record, including comments submitted by the public, suggested that downtown Placerville was an economically stable area, and could withstand business closures without falling into urban decay.

The League also characterized the likelihood of the re-use of the historic courthouse building as an "'unenforceable and illusory"' commitment. The court explained, however, that the lack of a binding requirement for the re-use of the building does not undermine the EIR's reasoning. Specifically, the issue before the Judicial Council was whether urban decay was a reasonably foreseeable effect of the project, not whether its occurrence was a certainty. It would be the best interest of the City of Placerville and the County of El Dorado to re-use the historic courthouse building, suggesting that the building was likely to be put to a new use. While the re-use was by no means guaranteed, it was reasonably likely. Therefore, the Judicial Council did not err in relying on the possibility of re-using the building as one basis for concluding that urban decay was not reasonably foreseeable.

The League also argued that the administrative record contained evidence, in the form of comments submitted by local residents and businesses, of the impact of moving the courtroom activities outside of downtown Placerville. The court held that although these letters and comments provided credible grounds to conclude that relocating the courthouse activities would constitute a hardship for some local businesses, it was not substantial evidence to support the conclusion that such economic effects would lead to substantial physical deterioration of the downtown.

The League further argued that the Judicial Council should have prepared an economic study evaluating the effects of removing the courthouse functions from downtown. The court disagreed, noting that in "any endeavor of this type, financial resources are limited, and the lead agency has the discretion to direct resources toward the most pressing concerns." Just because a financial impact study might have been helpful does not make it necessary.

❖ ***Visalia Retail, L.P. v. City of Visalia*** **(2018) 20 Cal.App.5th 1**

The Fifth Appellate District upheld the City of Visalia's certification of an Environmental Impact Report (EIR) for its general plan update, finding that although the EIR did not analyze the potential for urban decay, the record contained no substantial evidence that a land use policy restricting the size of commercial tenants in a neighborhood commercial area would result in urban decay. The court also found that the general plan was not internally inconsistent and that the City had not violated the relevant Planning and Zoning Law notice provisions.

The City prepared an EIR for an update to its general plan, which included updating the land use policy at issue. Under that policy, commercial tenants in neighborhood commercial areas may not be larger than 40,000 square feet. Petitioners argued that the size restriction would cause significant physical impacts in the form of urban decay, and therefore the EIR was inadequate for failing to address those impacts. In support of their argument, Petitioners

submitted a report prepared by a real estate broker, which opined that the 40,000 square-foot cap would cause grocers to refuse to locate in the neighborhood commercial centers, which would cause vacancies and would then, in turn, result in urban decay.

The court rejected this argument finding that the report did not provide the requisite basis for petitioners' challenge because its analysis of causation was speculative and the potential economic consequences does not mean that urban decay would result. The court distinguished *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, where it had held that the EIR in that case was fatally defective for failing to analyze the individual and cumulative potential to indirectly cause urban decay resulting from the development of two shopping centers. But there, the court emphasized, the analysis of urban decay is required when there is evidence suggesting that the economic and social effects caused by development could result in urban decay. Here, the court found no such evidence in the record.

The court also found that the size restriction was not inconsistent with the general plan's stated goal of encouraging infill development. Finally, the court held that the City did not violate the 10-day notice requirement set forth in Planning and Zoning Law by failing to re-notice additional meetings on the general plan amendment.

- ***Association of Irritated Residents v. Kern County Bd. of Supervisors*** **(2017) 17 Cal.App.5th 708**

In a partially published decision, the Fifth Appellate District upheld an EIR's treatment of project baseline and greenhouse gas emissions, but determined that the county erred in relying on federal preemption to avoid analyzing and mitigating impacts under CEQA from off-site rail activities for an oil refinery modification project.

The project involved modifications proposed by Alon USA to an existing petroleum refinery northwest of the City of Bakersfield. The refinery had undergone several ownership changes since 1932, with Alon USA purchasing it from Flying J and its subsidiary during the latter's 2008 bankruptcy proceedings. Alon USA sought to expand existing rail, transfer and storage facilities, including the construction of a double rail loop connected to the BNSF railway. The expanded train facilities would allow the transport of crude oil from the Bakken formation in North Dakota to the refinery for processing. The Association of Irritated Residents, Center for Biological Diversity, and Sierra Club filed suit after the County certified an EIR and approved the project.

First, the court dealt with plaintiffs' arguments about the use of year 2007 as the baseline for air pollution emissions instead of using year 2013 – the year that the County published the notice of preparation. In discussing *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 457 ("*Neighbors*"), the court established that it was interpreting *Neighbors* to only require heightened scrutiny of baselines that use hypothetical future conditions and not of those that use data from past, fluctuating conditions. Based on this interpretation, the court found no error in the County's use of data from year 2007 because substantial evidence supported this deviation from the "normal" baseline. The court concluded that it was reasonable

to include an operating refinery in the baseline because: (a) existing permits and entitlements allow for the processing of up to 70,000 barrels per day; (b) Flying J's bankruptcy filing in 2008 only temporarily halted processing of hydrocarbons; (c) refinery operations have been subject to prior CEQA review; and (d) the processing of crude oil could begin again without the currently proposed project. The court then turned to whether the County's choice of year 2007 was supported by substantial evidence, and found that it was because 2007 was the last full year of refinery operations, and was not some hypothetical, maximum authorized amount. The court even included its own calculations of the average barrels per day for the period of 2001 through 2008 to show that the year-2007 figure of 60,389 barrels-per-day was less than the average of 60,994 barrels-per-day.

Second, the court addressed GHG emissions arguments. The court started by analyzing under the de novo review standard a question of first impression: can the volume of a project's estimated GHG emissions be decreased to reflect the use of allowances and offset credits under the state's cap-and-trade program? The court concluded that this use of the cap-and-trade program did not violate CEQA because Section 15064.4, subd. (b)(3), effectively directed the County to consider the project's compliance with the state's cap-and-trade program as a "regulation[] or requirement[] adopted to implement a statewide . . . plan for the reduction of mitigation of greenhouse gas emissions." And the court concluded that the project's compliance with the cap-and-trade program could be part of the substantial evidence supporting a finding of less-than-significant impacts from GHG emissions even though surrender of allowances would not result in the project emitting fewer GHG molecules than if the allowance had not been surrendered. The court explained that the cap-and-trade program is designed so that the "limited allocation and use of allowances means they are not available for use elsewhere" in the state.

In the final published section, the court dealt with federal preemption and off-site rail impacts. Claiming that the Interstate Commerce Commission Termination Act of 1995 (ICCTA) preempted CEQA review, the County had excluded analysis of some of the impacts from off-site main line rail operations that will deliver crude oil to the refinery. The court disagreed. Interpreting the California Supreme Court's direction in *Friends of Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 722, the court of appeal concluded that the development of information pursuant to CEQA is not categorically preempted but may be preempted on an as-applied basis. Then, as an alternative to that broad legal conclusion, the court considered whether categorical preemption applied to the specific circumstances in this case. It concluded that no categorical preemption applied because analysis of indirect environmental effects "would impose no permitting or preclearance by a state or local agency upon the delivery of crude oil to the project site by a rail carrier," and "would not control or influence matters directly regulated under federal law." The court also concluded that there was no as-applied preemption because the environmental analysis of off-site rail activities "would not prevent, burden, or interfere with BNSF Railway's operation." Finally, the court directed the County on remand to use the tests stated in this opinion to determine whether particular mitigation measures may be preempted by the ICCTA.

❖ ***City of Long Beach v. City of Los Angeles*** **(2018) 17 Cal.App.5th 277**

The First Appellate District upheld an EIR's project description and analysis of indirect impacts and GHG emissions for the Southern California International Gateway intermodal cargo project, but ruled that the EIR's analysis was deficient on the issue of air quality impacts, including cumulative impacts. The court also ruled that the Attorney General was not required to comply with CEQA's exhaustion requirement before intervening on behalf of the petitioner.

The project would construct a "near-dock" railyard within five miles of the Port to Los Angeles, to receive intermodal cargo (the Southern California International Gateway project or SCIG facility). Intermodal cargo is cargo that is transferred in an intact shipping container directly from a port to railyard. Once complete, 95% of this cargo, which is currently processed at the real parties' Hobart Yard facility will be transferred to the SCIG facility. Petitioners alleged multiple deficiencies in the EIR, including the project description, and its analysis of indirect impacts to Hobart Yard, cumulative impacts to air quality, and GHG emissions. After filing suit, the attorney general intervened on behalf of petitioners. After the trial court found for petitioners on all issues, this appeal followed. Additionally, appellant respondents alleged that the attorney general, who had not participated in the EIR process, failed to exhaust as to his identify and issues, and thus those claims were barred.

First, after taking judicial notice of the legislative history of CEQA's exhaustion requirements, the court ruled that the attorney general was not required to exhaust as to identity or issues, and that the statutory language was not ambiguous. The unqualified exhaustion exemption for the attorney general is consistent with attorney general's unique authority to protect California's environment and people.

Second, reversing the court below, the court found that the project description was not confusing or misleading. Contrary to petitioner's assertion that a complete project description should have included the project's effect on Hobart Yard, the project description included all activity that was subject to discretionary review. The court distinguished it from other cases, where the project description was contradicted by facts contained in the EIR.

The court also upheld the EIR's analysis of indirect impacts to Hobart Yard. The freed-up capacity at Hobart Yard as a result of the project will not give rise to indirect environmental impacts that the EIR was required to analyze. These increases will occur whether or not the SCIG facility is built, and substantial evidence supports the EIR's finding that Hobart Yard can absorb these increases until 2035. These are not unsupported assumptions, but reasoned predictions by experts upon which the city was entitled to rely.

In an extensive discussion, the court struck down the EIR's analysis of direct and indirect impacts to air quality. While the composite model methodology utilized in the EIR was not misleading, the analysis was incomplete. The project may decrease emissions overall, but could increase the concentration of emissions in the project area, and this impact was not analyzed. Without an understanding of the effects of these concentrated emissions, the public and decision-makers could not intelligently balance competing concerns before adopting a statement of

overriding considerations, nor could the EIR effectively craft mitigation measures and alternatives. Similarly, the EIR's analysis of cumulative impacts to air quality was also deficient. The court also took issue with the range of composite modeling provided, which only included a single modeling run, for a 50 year time horizon. While declining to specify how many models would be adequate, the court stated that a "reasonable selection of benchmark years, may be acceptable."

Finally, the court upheld the EIR's analysis of GHG emissions, finding that it comported with *Newhall Ranch.* As in *Newhall Ranch,* this EIR utilized a "business-as-usual model" (BAU). The court declined the petitioner's invitation to rule that, as a matter of law, if a project will result in an increase in GHG emissions, it does not comply with AB 32 and related statutes. The BAU model was permissibly applied here, because it was utilized not to demonstrated that the project was consistent with state mandates to reduce emissions by 29% from BAU, but rather, to inform the public that while emissions will exceed baselines levels, resulting in a significant impact, the project is consistent with state and local policies that encourage the adoption of the more efficient use of fossil fuels in transportation. The use of BAU is particularly apt here, as the purpose of the project is to decrease the length of truck trips from 25 miles from the port to under five miles, with attendant decreases in tailpipe GHG emissions.

- ***Cleveland National Forest Foundation v. San Diego Association of Governments*** **(2017) 17 Cal.App.5th 413 (remand decision)**

The Fourth Appellate District invalidated the 2011 Program EIR for SANDAG's 2050 Regional Transportation Plan/Sustainable Communities Strategy after remand from the Supreme Court's decision regarding the EIR's GHG thresholds of significance. The court found multiple flaws in the EIR's GHG and air quality mitigation, alternatives analysis, baseline information on toxic air contaminants, correlation of air quality effects to health effects, and impacts on agricultural lands.

SANDAG certified a programmatic EIR for its 2050 Regional Transportation Plan/Sustainable Communities Strategy in 2011. Petitioners challenged that EIR, alleging multiple deficiencies under CEQA, including the EIR's analysis of greenhouse gas (GHG) impacts, mitigation measures, alternatives, and impacts to air quality and agricultural land. The Court of Appeal held that the EIR failed to comply with CEQA in all identified respects. The Supreme Court granted review on the sole issue of whether SANDAG was required to use the GHG emission reduction goals in Governor Schwarzenegger's Executive Order S-3-05 as a threshold of significance. Finding for SANDAG, the Court left all other issues to be resolved on remand.

First, the Court of Appeal ruled that the case was not moot, although the 2011 EIR had been superseded by a new EIR certified in 2015, because the 2011 version had never been decertified and thus could be relied upon. The court also found that petitioners did not forfeit arguments from their original cross-appeal by not seeking a ruling on them. And, even if failing

to raise the arguments was a basis for forfeiture, the rule is not automatic, and the court has discretion to resolve important legal issues, including compliance with CEQA.

Second, the court reiterated the Supreme Court's holding, that SANDAG's choice of GHG thresholds of significance was adequate for this EIR, but may not be sufficient going forward. Turning to SANDAG's selection of GHG mitigation measures, the court found that SANDAG's analysis was not supported by substantial evidence, because the measures selected were either ineffective ("assuring little to no concrete steps toward emissions reductions") or infeasible and thus "illusory."

Third, also under the substantial evidence standard of review, the court determined that the EIR failed to describe a reasonable range of alternatives that would plan for the region's transportation needs, while lessening the plan's impacts to climate change. The EIR was deficient because none of the alternatives would have reduced regional vehicles miles traveled (VMT). This deficiency was particularly inexplicable given that SANDAG's Climate Action Strategy expressly calls for VMT reduction. The measures, policies, and strategies in the Climate Action Strategy could have formed an acceptable basis for identifying project alternatives in this EIR.

Fourth, the EIR's description of the environmental baseline, description of adverse health impacts, and analysis of mitigation measures for air quality, improperly deferred analysis from the programmatic EIR to later environmental review, and were not based on substantial evidence. Despite acknowledging potential impacts from particulate matter and toxic air contaminants on sensitive receptors (children, the elderly, and certain communities), the EIR did not provide a "reasoned estimate" of pollutant levels or the location and population of sensitive receptors. The EIR's discussion of the project's adverse health impacts was impermissibly generalized. The court explained that a programmatic EIR improperly defers mitigation measures when it does not formulate them or fails to specify the performance criteria to be met in the later environmental review. Because this issue was at least partially moot given the court's conclusions regarding defects in the EIR's air quality analysis, the court simply concurred with the petitioners' contention that all but one of EIR's mitigation measures had been improperly deferred.

The court made two rulings regarding impacts to agricultural land. In finding for the petitioners, the court held that SANDAG impermissibly relied on a methodology with "known data gaps" to describe the agricultural baseline, as the database did not contain records of agricultural parcels of less than 10 acres nor was there any record of agricultural land that was taken out of production in the last twenty years. This resulted in unreliable estimates of both the baseline and impacts. However, under de novo review, the court found that the petitioners had failed to exhaust their remedies as to impacts on small farms and the EIR's assumption that land converted to rural residential zoning would remain farmland. While the petitioners' comment letter generally discussed impacts to agriculture, it was not sufficiently specific so as to "fairly apprise" SANDAG of their concerns.

Justice Benke made a detailed dissent. Under Benke's view, the superseded 2011 EIR is "most likely moot" and in any event, that determination should have been left to the trial court on

remand. This conclusion is strengthened, when, as here, the remaining issues concern factual contentions. As a court of review, their record is insufficient to resolve those issues.

CEQA Litigation

- ***Center for Biological Diversity v. California Department of Fish & Wildlife*** **(2017) 17 Cal.App.5th 1245**

On remand from the California Supreme Court, the Second Appellate District upheld the lower court's judgment and order on remand held that (1) a trial court has the authority to partially decertify an EIR under CEQA following a trial, hearing, or remand; (2) a trial court has the power to leave an agency's project approvals in place after partially decertifying an EIR; and (3) the trial court acted within its discretion in declining to set aside all project approvals after court suspended project activity pending correction of partially-decertified EIR. The court upheld the trial court's judgment mandating (1) the partial decertification of the Final EIR for the Newhall Ranch project and (2) the suspension of only two out of six project approvals.

This was the second appeal of the EIR for the Newhall Ranch development project. It follows the Supreme Court's decision in *Center for Biological Diversity v. California Department of Fish & Wildlife* (2015) 62 Cal.4th 204, where the Court determined that the EIR's analysis of GHG emissions improperly relied on a "business-as-usual" model and that mitigation adopted for the stickleback fish (catch and relocate) was itself a prohibited taking under the California Fish and Game Code. Subsequently, the Second District affirmed in part and reversed in part its original decision. The appellate court remanded the matter to the trial court, with instructions to issue an order consistent with the Supreme Court's opinion, but otherwise granting the trial court discretion to resolve all outstanding matters under Public Resources Code section 21168.9.

After additional briefing and a hearing, the trial court issued a limited writ. The writ decertified those sections of the EIR concerning GHG emissions and mitigation measures for the stickleback; enjoined all project activity, including construction; and suspended two of the six project approvals. This appeal followed.

In the unpublished portion of the opinion, the court found that the writ was not a separate appealable post-judgment order or injunction, and therefore the court had jurisdiction to hear the appeal under Code of Civil Procedure section 904.1.

The court reviewed the lower court's interpretation of section 21168.9 de novo. The court determined that the trial court did not abuse its discretion in partially decertifying the EIR, as section 21168.9 expressly permits decertification of an EIR "in whole or in part." The court also held that after partial decertification, it is permissible to leave in place project approvals that do not relate to the affected section of the EIR. This is consistent with the statute's implicit mandate that project activities that do not violate CEQA must be permitted to go forward.

The court found that the trial court did not abuse its discretion in issuing the limited writ. The lower court adequately supported its findings and demonstrated that project activities were severable, that severance would not prejudice compliance with CEQA, and that the remaining activities complied with CEQA. The court noted that prejudice with CEQA compliance is particularly unlikely here, given the court's injunction against further construction.

Finally, the court rejected petitioners' contention that the writ, issued under CEQA, does not provide an adequate remedy for California Fish and Game Code violations. While acknowledging that section 21168.9 is part of CEQA, the streambed alteration agreement, which remains in place, already prohibits the taking of sticklebacks. Furthermore, the injunction barring project construction provides a suitable remedy for this violation.

❖ ***CREED-21 v. City of Wildomar*** **(2017) 18 Cal.App.5th 690**

The Fourth District Court of Appeal held that civil discovery may properly be conducted on the issue of a plaintiff's standing in a CEQA writ proceeding, and a terminating sanction may properly be imposed where the plaintiff attempts to thwart such discovery by refusing to comply with trial court orders.

In April 2015, a non-profit, social advocacy organization named Creed-21, represented by the Briggs Law Corporation ("Briggs"), filed a petition for writ of mandate under CEQA and the Planning and Zoning Law challenging the City of Wildomar's approval of a Walmart retail center. Creed-21's petition alleged that one of its members lived in or near the city. The city asserted in its answer that Creed-21 lacked standing. The trial court set a merits briefing schedule under which the city's and Walmart's joint opposition brief was initially due in January 2016, although, as will be seen, this date apparently "slipped" somewhat as a result of procedural disputes and maneuvers.

To try to obtain evidence to support the "lack of standing" affirmative defense, Walmart noticed the deposition of Creed-21's person most qualified (PMQ) to testify on standing issues for September 2015, in Costa Mesa. Creed-21 objected to the date, asserted that discovery was categorically not allowed in a mandamus action, and stated without much explanation that the deposition location was 75 miles from the PMQ's residence. Creed-21 did not respond to Walmart's further meet-and-confer attempts. Walmart noticed another deposition for the next month, and Creed-21 responded less than a week before the scheduled date, objecting on the same grounds and refusing to produce the PMQ for deposition. Creed-21 further asserted its membership was irrelevant, and that its corporate standing could be verified with the Secretary of State, and it recommended letting the trial court decide the issue.

As Creed-21 suggested, Walmart moved to compel Creed-21 to produce its PMQ, submitting a recent hearing transcript from another trial court action in which Creed-21 was also represented by Briggs. There, Creed-21's president, Richard Lawrence, testified that: there was only one other officer of Creed-21, he had no idea how many members the group had, Briggs prepared all of the group's tax returns, the group shared an address with Briggs' Upland office, that the group had no money, assets, or employees, and that Briggs "fronted" the money for the group's lawsuits and paid any fees it owed. Armed with this information and other "alter ego"

evidence that Creed-21 was just a front for Briggs, Walmart wanted to further explore the standing issue through civil discovery.

Walmart's motion was scheduled to be heard on January 5, 2016. Creed-21's attorney failed to give proper notice of its intent to appear, however, and was not allowed to argue. The court adopted its tentative ruling ordering Creed-21 to produce its PMQ and all requested documents within 10 days, and to pay Walmart $3,000 in attorneys' fees and costs. One week later, Creed-21 sought relief based on its attorney's ignorance of the relevant local rule on giving notice of intent to appear, alleging that if allowed to argue it would have argued discovery was inappropriate. Creed-21 further alleged for the first time that its PMQ was Richard Lawrence, who it claimed lived 90 miles away, and presented a declaration from a Ms. Jiminez, declaring that she and other Creed-21 members lived and worked in Wildomar. The trial court denied the motion for relief after a February 1, 2016 hearing and directed that the PMQ deposition go forward on February 8. Creed-21 filed a writ petition requesting that the Court of Appeal vacate the trial court's order and deny or narrow Walmart's discovery, but the appellate court denied all relief before the deposition date.

Meanwhile, Creed-21 also filed an ex parte application with the trial court on February 3 seeking to continue the PMQ deposition date to February 24 on the basis that Briggs' parent recently underwent major surgery and Briggs would need three weeks off work to care for his parent as the sole caregiver. In opposition, Walmart noted that Creed-21 was seeking to extend the deposition past the date that defendants' opposition brief on the merits was due, thereby depriving the defendants of using any helpful information from the deposition unless briefing were also delayed. Walmart further argued that Briggs failed to explain why his associate attorney who had appeared at every other hearing could not defend the deposition, and he failed to explain why a temporary caregiver could not assist Briggs with his parent during a one-day deposition.

The trial court denied the requested continuance, but Creed-21 still failed to produce its PMQ on February 8, so the defendants filed their opposition brief without being able to complete the discovery that Walmart had noticed. They argued that Creed-21's petition should be denied for these procedural obstructions as well as on the merits, and that the petitioner was only a shell corporation with no money, bank account, or assets that existed solely for its alter ego Briggs to recover fees from litigating against deep-pocketed defendants.

Walmart moved for issue and monetary sanctions against Creed-21 for its violations of the trial court's discovery orders compelling it to produce the PMQ for deposition on the standing issue. The trial court granted the motion, finding defendants had attempted to work with Creed-21, but that Creed-21 did not attempt to resolve the issues in good faith. Rather, Creed-21 continued to raise the same unmeritorious issues, make inadequate showings in its requests for relief, and disobey the Court's orders, including failing to pay the $3,000 in monetary sanctions to Walmart. The trial court expressed frustration: "Nothing has worked. Multiple orders have been made. Sanctions have been imposed. Nothing except further delay in the proceedings. And I don't think at this point in light of the history, the defense should have to choose between getting the deposition and delaying the hearing on the merits." Accordingly, while it did not issue additional monetary sanctions, it "issued an issue sanction against Creed-21 that it lacked

standing in the action," which was the same as a terminating sanction, and again ordered Creed-21 to pay the previously imposed $3,000 monetary sanctions.

On appeal, Creed-21 argued that the "severe issue sanction" imposed by the trial court "should only be granted against a litigant who persists in outright refusal to comply with discovery obligations," and that its action should not have been dismissed absent "a showing of bad faith, which was not supported by the evidence." Creed-21 argued that its counsel's "family emergency" excused its noncompliance and asserted that it tried to cooperate in the discovery process to the extent it was able.

The Court of Appeal had no trouble affirming the trial court's judgment of dismissal under the "abuse of discretion" standard of review. Code of Civil Procedure section 2023.030 authorizes monetary, issue, evidence or terminating sanctions against anyone misusing the discovery process, and issue, evidence or terminating sanctions for a party's or party-affiliated deponent's failure to obey an order compelling attendance, testimony and production. (Code Civ. Proc., § 2025.450, subd. (d).) The courts have explained that the discovery statutes employ an "incremental approach to discovery sanctions," starting with monetary sanctions and ending with termination, under which the sanction should be "appropriate to the dereliction" and not exceed that required to protect the party entitled to but denied discovery. Imposition of this ultimate sanction is justified where the totality of circumstances show a willful violation, preceded by a history of abuse, and where lesser sanctions would not produce compliance.

Under the abuse of discretion standard of review, an appellate court resolves all evidentiary conflicts most favorably to the trial court's ruling, reversing only when the "order was arbitrary, capricious or whimsical." Under these rules, the court found that Creed-21 failed to carry its burden to affirmatively demonstrate error by the court below. The entire record supported the "issue sanction, granted by the trial court based on the group's consistent refusal to comply with court orders on discovery," and after lesser monetary sanctions and orders did not result in compliance. The imposition of the terminating sanction was not arbitrary or capricious. The court held that Creed-21's citation to case law preceding the Civil Discovery Act of 1986 as requiring "bad faith" conduct to justify "outright dismissal" was misplaced, as only post-1986 cases are relevant to the analysis.

II. LAND-USE OPINIONS

Planning and Zoning Law

❖ ***Kennedy Commission v. City of Huntington Beach*** **(2017) 16 Cal.App.5th 841**

The Fourth District held that a charter city is exempt from the statutory requirement that its specific plans and zoning ordinances be consistent with its general plan absent an express, unequivocal statement of intent in the city charter to adopt the consistency requirement. The appellate court reversed the lower court, finding for defendants on the first cause of action under state housing element, zoning, and planning laws. The court of appeal

allowed plaintiffs leave to refile their third to sixth causes of actions, which had been dismissed without prejudice in the court below.

The California Department of Housing and Community Development (HCD) determines each region's Regional Housing Need Allocation (RHNA), including each region's share of lower income housing. HCD then determines if the housing element of a general plan is compliant and reflects the agency's share of the RHNA. HCD approved Huntington Beach's general plan housing element in 2013. At the time, the majority of lower income housing was zoned for the Beach Edinger Corridor Specific Plan area (BECSP). Residents complained about the rapid pace of development in this area. In response, in 2015, the city amended the BECSP, cutting the amount of housing in this area by half. This resulted in a 350-unit shortfall of lower income housing for Huntington Beach. The city then sought to amend the housing element of the general plan to provide for lower-income housing in other areas of the city.

Plaintiffs, a fair housing advocacy organization and two lower-income Huntington Beach renters, filed a writ of mandate with six causes of action. The first cause of action arose under state housing element law, for adopting a specific plan that was inconsistent with an approved general plan. The second cause of action alleged a failure to implement the general plan. The third and fourth causes of action were based on Article XI, section 7 of the California Constitution, alleging that the amended BECSP was preempted by state law. The fifth and sixth causes of action alleged housing discrimination, for adverse impacts to racial and ethnic minorities.

In an expedited trial, the trial court found that the amended BECSP violated state housing law because it no longer complied with the general plan (plaintiffs' first cause of action). The trial court found that under Government Code section 65454, a municipality may not amend a specific plan unless the amendment is consistent with the general plan. The court found the city in violation of this provision when it amended the specific plan without *first* amending the housing element to find other areas where lower income housing could be built. Under this holding, the BECSP amendment was void when passed and could not be enforced. The third through sixth causes of action were dismissed without prejudice. The second cause of action was not pursued on appeal.

For the first time on appeal, the city raised the defense that as a charter city, Huntington Beach was exempt from the requirements under Government Code sections 65860 and 65454 that zoning ordinances and specific plans be consistent with the general plan. Charter cities with less than two million residents are exempt from these requirements, per Government Code 65803 (zoning) and 65700 (local planning). An exception to this exemption is when the charter city expressly states, in either its charter or by ordinance, that it intends to adopt the consistency requirement, which Huntington Beach alleged that it had not done. Therefore, the city argued, while it was required to provide for its share of lower income housing as determined by the RHNA, it was permitted to amend the general plan to be compliant. To support this argument, the city requested judicial notice of the city's charter and population, providing the factual basis for the city's charter city exemption.

As a threshold matter, the court of appeal exercised its discretion to take judicial notice of documents that were not before the trial court, that are of substantial consequence in the

determination of the action. The court chose to exercise its discretion here, because the trial court had not restricted the issues in its expedited hearing. Although this was not a justification for defendants' failure to raise the issue below, this decision afforded the defendants some latitude in this regard.

On the merits, the court found that the city met the requirements for the charter city exemption, and that the exception to this exemption was inapplicable. First, the court found that the consistency requirement was not adopted by the city in its charter. The court then examined the city's zoning ordinance concerning specific plans and determined that the city did not intend to adopt a consistency requirement there, either. In making this determination, the court heavily relied on its decision in *Garat v. City of Riverside* (1991) 2 Cal.App.4th 259. In *Garat*, Riverside, also a charter city, enacted two voter initiatives which changed the zoning to favor agricultural uses in specified areas, creating an inconsistency with the general plan.

In *Garat*, the court rejected the argument that the adoption of *any* specific plans, even if they were intended to be consistent with the general plan, creates either a presumption that *all* specific plans in the general plan area must also be consistent, or that a city has generally adopted the consistency requirement in its land use planning.

More importantly, *Garat* established that Government Code section 67000 exempts charter cities from local planning requirements, in virtually the same way that section 65803 exempts charter cities from the provisions requiring consistency with specific plans, and these exemptions are strictly construed.

Turning to Huntington Beach's zoning ordinance, the city did not explicitly state that any specific plan that was not consistent with the general plan was void. The ordinance did use language concerning consistency, but fell short of expressly adopting the language of Government Code section 65454. The court explained that to adopt the consistency requirement, a zoning ordinance must state that "[n]o specific plan may be adopted or amended" unless it is consistent with the general plan, or else it is void. Without this statement, plaintiffs' attempt to imbue a consistency requirement in the zoning ordinance must fail, as it did in *Garat.*

The court also rejected plaintiffs' argument that even if the charter city exemption applied, the amended BECSP should be considered void, as violating state law. Even if the court were to accept that the BECSP violated state law, the court explained that the remedy would not be to render the BECSP void. Rather, the proper remedy would be to grant the city time to amend its housing element. The court noted that the city was already implementing this remedy. The amendment process could proceed, while leaving the amended BECSP in force.

The court noted that while one may question the wisdom of creating the charter city exemption for certain aspects of land use planning, this was clearly the legislative intent.

The ruling is notable for several reasons. It set a high bar for plaintiffs in the Fourth District who are seeking to establish that a charter city has adopted specific plan consistency requirements, absent express adoption of the language of Government Code section 65454. Additionally, the city's victory may be pyrrhic. As the city conceded, and the court concurred, the general plan's housing element will ultimately require amendment to provide the city's

designated share of the RHNA. While the city achieved its goal of slowing down the pace of development, plaintiffs might refile and potentially prevail on their claims of housing discrimination, incurring liability for the city. Finally, although the court did decide to exercise its discretion and take judicial notice of the city's charter, if it had not, the court would have had no basis for finding merit in the city's defense under the charter city exemption. Municipalities would do well to note if they are a charter city, and be prepared to argue that defense where applicable in the very first instance.

❖ ***Save Lafayette v. City of Lafayette*** **(2018) 20 Cal.App.5th 657**

The First District held that a city had mandatory duty to submit a citizen referendum to public vote. The court concluded that a certified voter referendum must be placed on the ballot, and rejected the city's argument that doing so would conflict with Planning and Zoning Law.

In August 2015, the City of Lafayette adopted a resolution amending the general plan to re-designate the subject parcel from administrative professional office (APO) to low-density single-family residential (R-20). After the general plan amendment became effective, the city approved an ordinance codifying the zoning change. The updated zoning would allow for the development of 44 single-family homes, as proposed by a developer. Subsequently, the appellants timely certified a referendum seeking to repeal the ordinance, or alternatively, have the ordinance submitted to a public vote. The city refused to place it on the ballot. The city maintained that it had discretion to do so, because the referendum was de facto invalid. The city reasoned that if passed, the referendum would result in an inconsistency between the general plan (R-20 zoning) and the municipal code (which would revert it to APO). Under the Government Code, a zoning ordinance that conflicts with the general plan is invalid. The appellants filed a petition for writ of mandate to compel the city to place the referendum on the ballot. After finding for the city, this appeal followed.

In finding for the appellants, the court relied on the Sixth District's recent decision under similar facts in *City of Morgan Hill v. Bushey* (2017) 12 Cal.App.5th 34 (**review granted Aug. 23, 2017** [see Section III below]). Key to the *Bushey* court's decision was the difference between a referendum and an initiative. An initiative is the power of electorate to propose new laws. In contrast, a referendum grants the electorate the power to approve or reject existing laws. A referendum which vacates an ordinance, like the one at issue here, maintains the status quo. If the voters approve the referendum, then the city must adopt alternative zoning which is consistent with the general plan. If the voters reject the referendum, then no inconsistency is created.

Furthermore, the city does not have discretion to unilaterally keep a properly certified referendum off of the ballot. When presented with the certified referendum, the city's options were to repeal the zoning ordinance, place the referendum on the ballot and suspend the ordinance, or after placing the referendum on the ballot, file a writ of mandate to have the referendum removed. When a local agency inappropriately refuses to place a referendum on the ballot, this refusal, although improper, may be retroactively validated by the court. Here, the city should have placed the referendum on the ballot, then filed a writ of mandate. Nevertheless, for

reasons stated, the court did not validate the city's decision. The issue of the appellant's attorneys' fees was remanded to the trial court.

III. PENDING CALIFORNIA SUPREME COURT CEQA AND LAND-USE CASES

There are four CEQA and land-use cases pending at the California Supreme Court. The cases, listed newest to oldest, and the Court's summaries are as follows:

City of Morgan Hill V. Bushey (River Park Hospitality), S243042. (H043426, 12 Cal.App.5th 34.) The issue to be briefed and argued is: Can the electorate use the referendum process to challenge a municipality's zoning designation for an area, which was changed to conform to the municipality's amended general plan, when the result of the referendum-if successful-would leave intact the existing zoning designation that does not conform to the amended general plan?

Union of Medical Marijuana Patients, Inc. v. City of San Diego, S238563. (D068185; 4 Cal.App.5th 103; San Diego County Superior Court.) Petition for review after the Court of Appeal affirmed the judgment in an action for administrative mandate. This case presents the following issues: (1) 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.)? (2) 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?

T-Mobile West LLC v. City and County of San Francisco, S238001. (A144252; 3 Cal.App.5th 334, mod. 3 Cal.App.5th 999c; San Francisco County Superior Court.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. This case presents the following issues: (1) 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"? (2) 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"?

Sierra Club v. County of Fresno, S219783. (F066798, 226 Cal.App.4th 704; Fresno County Superior Court.) Petition for review after the court of appeal reversed the judgment of the trial court in an action for writ of administrative mandate. 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.)

IV. CEQA GUIDELINES UPDATE

On November 27, 2017, the Governor's Office of Planning and Research transmitted a set of proposed amendments to the CEQA Guidelines to the Natural Resources Agency. This is the first comprehensive update to the Guidelines since the late 1990s. The proposed package contains changes or additions involving nearly thirty different sections of the CEQA Guidelines, addressing nearly every step of the environmental review process. In addition to the regular updates required by Public Resources Code section 21083, this package also includes new provisions required by recent legislation, including SB 743, which required OPR to develop new methodology for addressing transportation impacts. Among these provisions is new Guideline section 15064.3, which proposes "vehicle miles traveled" as the most appropriate measure of a project's transportation impacts in light of the goals of Senate Bill 743. Once that section is adopted, automobile delay (often called "level of service") will no longer be considered an environmental impact under CEQA, particularly in the context of land use projects.

Other examples of proposed changes include:

- Updated exemptions for residential and mixed-use developments near transit and redeveloping vacant buildings;
- Clarifications for the use of existing environmental documents to cover later projects;
- New provisions to address energy efficiency and the availability of water supplies;
- Simplified requirements for responding to comments; and
- Modified provisions to reflect recent CEQA cases addressing baseline, mitigation requirements and greenhouse gas emissions.

The Natural Resources Agency will conduct a formal administrative rulemaking process on the CEQA Guidelines. That rulemaking process will entail additional public review, and may lead to further revisions. The Natural Resources Agency published its Notice of Proposed Rulemaking at the end of January 2018, and conducted public hearings to take public comments on the amendments in mid-March. The process is expected to conclude before the end of 2018. The updated CEQA Guidelines will apply prospectively only, and would not affect projects that have already commenced environmental review. Additionally, while a public agency could immediately apply the proposed new Guidelines section regarding the evaluation of transportation impacts (proposed Guidelines section 15064.3), statewide application of that new section would not be required until January 1, 2020.