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CEQA and Environmental Impact Reports: 2020 Cases, Standards, Mitigation Measures, Exemptions and Lead Agencies

Current Requirements for Project Approval, Environmental Protection and Commercial Development

WEDNESDAY, NOVEMBER 11, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Arielle O. Harris, Shareholder, **Miller Starr Regalia**, Walnut Creek, CA

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Strafford Webinars

CEQA 2020 Case Law Update

November 11, 2020

10:00 a.m. – 11:30 a.m. PST

1:00 p.m. – 2:30 p.m. EST

Panelists

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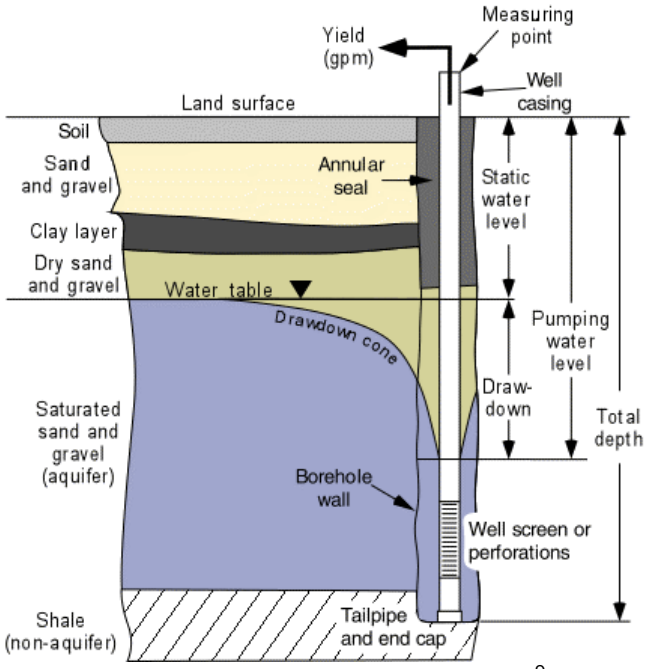
Program Topics

- **Introduction**
- **2020 CEQA Case Law Summary**
  - *Ministerial approvals*
  - *Exemptions*
  - *Tiered CEQA documents*
  - *Mitigation measures*
  - *Statutes of limitation*
  - *Certification of the administrative record*
- **2020 CEQA Legislation & Regulatory Updates**
- **COVID-19 Executive Orders and Judicial Council Emergency Rules**

MINISTERIAL APPROVALS

Protecting Our Water and Envtl. Resources v. County of Stanislaus (2020) 10 Cal.5th 479

- Challenge to County's categorical classification of well construction permits as ministerial approvals where (1) no variance requested and (2) County regulations on unsustainable extraction and export do not apply.
- The CEQA Guidelines encourage agencies to classify ministerial projects on either a categorical or individual basis. (CEQA Guidelines, § 15268(a)(c).)
  - Discretionary – agency exercises subjective judgment or deliberation.
  - Ministerial – agency determines conformity with applicable *fixed standards*. (CEQA Guidelines, § 15357, 15369, 15002.)
- "Touchstone" – does agency have discretion to shape the project in any way?



Protecting Our Water and Envtl. Resources v. County of Stanislaus (2020) 10 Cal.5th 479

- County well ordinance incorporates state well construction standards.
- **Standard 8.A** of the State Department of Water Resources Bulletin.
  - Requires all wells "be located an adequate horizontal distance" from sources of contamination, identifies general distances, but makes clear that additional "variables are involved in determining the 'safe' separation distance'" and that no "set separation distance is adequate" for "all conditions" and the determination "requires detailed evaluation of existing and future site conditions."

Protecting Our Water and Envtl. Resources v. County of Stanislaus (2020) 10 Cal.5th 479

- Court reviewed **de novo**, as argument "rests on County's legal interpretation" of its well ordinance.
- Standard 8.A confers on county health officers "significant discretion . . . to deviate from the general standards."
- Court unpersuaded by argument that all other Standards (8.B, 8.C, and 9) were held to be ministerial and that County has limited options to modify well permit (e.g. adjust location or deny).
- But, Court clarified that issuance of a well permit under the County's ordinance ***is not always a discretionary project.***
- **<u>Holding</u>: Case-by-case determination of whether the discretionary portions of the ordinance apply to a particular project.**

Save Berkeley's Neighborhoods v. Regents of the University of California
(2020) 51 Cal.App.5th 226

- Are enrollment decisions "projects" that trigger CEQA review?
- Petitioners alleged UC made a "series of decisions" resulting in enrollment far beyond projections in Long Range Development Plan (LRDP).

Save Berkeley's Neighborhoods v. Regents of the University of California (2020) 51 Cal.App.5th 226

- Trial court sustained demurrer, finding that "'informal, discretionary decisions' to increase student enrollment beyond that anticipated in the [development plan]" did not constitute "project changes" necessitating CEQA review.

- Definition of LRDP as "a physical development and land use plan to meet academic and institutional objectives for a particular campus or medical center of public higher education."

TIERED CEQA DOCUMENTS

Willow Glen Trestle Conservancy v. City of San Jose (2020) 49 Cal.App.5th 127

- Trial court denied petition for writ of mandate challenging MND for project to demolish Willow Glen railroad trestle.

Willow Glen Trestle Conservancy v. City of San Jose (2020) 49 Cal.App.5th 127

- City needed to renew streambed alteration agreement under California Fish & Game Code section 1602.
- Petitioners alleged supplemental review was required.
- Trial court found renewal of SAA was not a new discretionary approval.
- Court of appeal affirmed.

Subsequent and Supplemental Review PRC§ 21166, CEQA Guidelines § 15162

When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless:

(1) Substantial changes are proposed in the project which require major revisions due to new significant effects or a substantial increase in the severity of previously identified significant effects;

(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions due to new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

(3) New information of substantial importance, which was not known or knowable at the time the previous document was approved, shows:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or

(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt it.

Subsequent and Supplemental Review PRC § 21166, CEQA Guidelines § 15162

- (c) Once a project has been approved, the lead agency's role in project approval is completed, unless further discretionary approval on that project is required. Information appearing after an approval does not require reopening of that approval. If after the project is approved, any of the conditions described in subdivision (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any.
- Court found that renewal of SAA was not "discretionary approval on [the] project" under 15162(c) that justified supplemental review – agency was simply implementing the approved project.
- Agency's own project versus private project?

Martis Camp Community Association v. County of Placer (2020) 53 Cal.App.5th 569

- Dispute between residents of two neighborhoods in Northstar over emergency access road.
- Martis residents were using it to access the resort, so Retreat residents asked County to abandon public easement
- County did so, relying on addendum to Martis EIR.
- Trial court denied writ, appellate court reversed.
- County used the wrong EIR!

NEGATIVE DECLARATIONS

Save the Agoura Cornell Knoll v. Cty of Agoura Hills (2020) 46 Cal.App.5th 665

- City adopted an MND and approved a mixed-use development project on undeveloped hillside that is covered with oak trees, 3 rare, threatened, or endangered plant species, and a prehistoric archaeological site with Native American artifacts
- Trial Court granted petition and overturned approval.
- Court of Appeal agreed, ruling that the MND met be set aside for improperly deferring mitigation for impacts to Tribal Cultural Resources and Biological Resources.

Save the Agoura Cornell Knoll v. Cty of Agoura Hills (2020) 46 Cal.App.5th 665

- Court found that measures to avoid impacts to Tribal Cultural Resources inadequate because they were not designed to ensure the avoidance of prehistoric archaeological site CA-LAN-1352.
  - MND did not set forth any analysis of whether CA-LAN-1352 could be avoided, and, a critical step to determining whether avoidance of the site was feasible, did not define the boundaries of CA-LAN-1352.
  - Substantial evidence in the Record supported a fair argument that avoidance of the site was not feasible based on expert opinion in the Record.
- Court found that measure providing for a Phase III data recovery program constituted improperly deferred mitigation.
  - While the measure provided for the future preparation of a technical report that included a mitigation monitoring and reporting plan, the MND did not "explain how the undefined monitoring and reporting plan would mitigate the potentially significant effects on the site's cultural resources, nor does it specify any criteria for evaluating the efficacy of that plan."

Save the Agoura Cornell Knoll v. Cty of Agoura Hills (2020) 46 Cal.App.5th 665

- Mitigation was inadequate to the extent premised on outdated surveys.
- Mitigation requiring an ecologist to conduct surveys for listed species before grading improperly deferred mitigation as "there was no showing that it was infeasible for the City to perform these surveys prior to project approval so that the MND could provide an accurate assessment of the sensitive plant populations that may be impacted."
- Mitigation for restoration was inadequate where there was substantial evidence that restoration would not effectively mitigate impacts.

Save the Agoura Cornell Knoll v. Cty of Agoura Hills (2020) 46 Cal.App.5th 665

- MND improperly deferred formulation of mitigation by failing to include specific performance criteria. Measure mandating a 200-foot minimum setback to avoid sensitive plants unless "avoidance would not be feasible" or "maintenance plan is implemented" was inadequate where there were no feasibility standards or way to evaluate efficacy of in-lieu maintenance plan.
- "Relocation" mitigation was inadequate with evidence species could not survive transplant.
- Mitigation for replacement planting of oak trees inadequate as (1) project would cause a loss of water to replacement trees; and (2) no mitigation to address the loss of water. Also inadequate because prior efforts at restoration had failed, and in-lieu fee program did not specify fees or number of trees to be planted offsite," nor identify those sites.

Coalition for an Equitable Westlake/ Macarthur Park v. City of Los Angeles (2020) 47 Cal.App.5th 368

- Challenge to City's approvals of mixed-use project.
- Chronology of approvals:
  - VTTM and MND approved. NOD filed March 2, 2017.
  - Plaintiffs never filed administrative appeal or CEQA suit.
  - Months later City issues other approvals for Project, finding that no supplemental review needed.
  - Plaintiffs appeal, City denies appeals on Jan 31. March 2, 2018, Plaintiffs file suit challenging MND.
- Plaintiffs argued that the NOD was not facially valid-but all arguments were aimed at claims concerning authority of Department to approve—none of which were relevant to the validity of the NOD.
- **Holding**: Plaintiffs cannot "go behind the agency's declaration" in a facially valid NOD or NOE stating that the agency "*has* approved the project."

Environmental Impact Reports

Citizens for a Responsible Caltrans Decision v. Dept. of Transportation
(2020) 46 Cal.App.5th 1103

- EIR for 2 freeway ramps connecting I-5 and SR 56 (North Coastal Corridor Project)
  - EIR stated that, after circulation, Caltrans would file an NOD if it approved the Project.
  - Before the public comment period, Caltrans approved the Project and filed an NOE.
  - The NOE stated that the Project was statutorily exempt per Streets and Highways Code § 103.
  - Petition filed after the 35-day statute of limitations expired; Trial Court dismissed Petition.
- Court held § 103 exempted the Coastal Commission from certain CEQA provisions, but did not exempt Caltrans from preparing an EIR for the Project.
  - If Legislature intended to provide Caltrans with a CEQA exemption, it could have done so.
- Assuming all facts plead were true, Court found a reasonable inference that Caltrans knew of its position that the Project was exempt from CEQA, but, nevertheless, made misrepresentations to the public that it would approve the Project only after circulating the EIR and filing an NOD.
- Because Petitioner was unaware of Caltrans' true intent and relied upon Caltrans' misleading statements, Caltrans was equitably estopped from relying on the 35-day statute of limitations.

Citizens for a Responsible Caltrans Decision v. Dept. of Transportation
(2020) 46 Cal.App.5th 1103

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  - If Legislature intended to provide Caltrans with a CEQA exemption, it could have done so.
- Assuming all facts plead were true, Court found a reasonable inference that Caltrans knew of its position that the Project was exempt from CEQA, but, nevertheless, made misrepresentations to the public that it would approve the Project only after circulating the EIR and filing an NOD.
- Because Petitioner was unaware of Caltrans' true intent and relied upon Caltrans' misleading statements, Caltrans was equitably estopped from relying on the 35-day statute of limitations.

Citizens for Positive Growth & Preservation v. City of Sacramento (2020) 43 Cal.App.5th 609

- Challenger contended that the EIR certified for the adoption of the City's General Plan violated CEQA based on claims regarding its traffic and alternatives' analysis.
- Court held that, pursuant to PRC § 21099(b)(2), the General Plan's impacts on level of service (LOS) could not constitute a significant environmental impact, thus rendering the challenge moot.
  - Specifically, it held that, because the challenge was brought after CEQA Guideline section 15064.3 was adopted (in December of 2018), rather than any time after July 1, 2020 - when CEQA Guideline section 15064.3 states that local agencies must start using a Vehicle Miles Traveled-based traffic model in CEQA documents, the challenger could not pursue claims regarding the EIR's analysis of LOS impacts.
- The Court upheld the EIR's "no project" alternative analysis finding that the City properly rejected it for failing to further some of the City's project objectives, resulted in greater impacts, and would not avoid any significant impacts associated with the General Plan.

Golden Door Properties, LLC v. County of San Diego
(2020) 50 Cal.App.5th 467

- Addressed validity of GHG offset credits to mitigate for GHG impacts

Climate Change – State GHG Reduction Goals

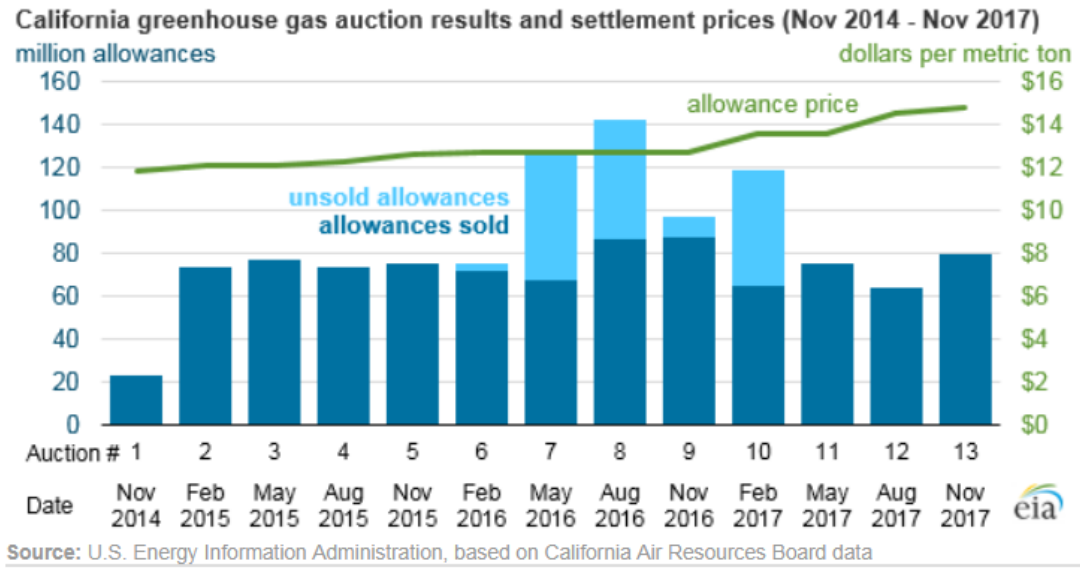
- 2020 – Reduce GHG emissions to 1990 levels
  - Global Warming Solutions Act of 2006 (AB32)
  - 2008 CARB Scoping Plan – 29% reduction)
- 2030 - 2015:
  [40% below 1990 levels by 2030]
  - Executive Order B-30-15
  - 2016 SB 32 –40% below 1990 levels by 2030
  - 2017: Revised Scoping Plan
- 2050 – 80% below 1990 levels
  - Executive Order S-3-05 [80% below 1990 levels by 2050]

Center for Biological Diversity v. California Department of Fish & Wildlife
(2015) 62 Cal.4th 204

Called into question "business as usual" (BAU) significance threshold

Golden Door Properties v County of San Diego (2018) 27 Cal.App.5th 892 (Golden Door I)

- Court found efficiency metric (per capita) as a GHG threshold not supported by substantial evidence.
- After courts invalidated BAU and efficiency metric, many agencies turned to "net zero" threshold.
- How do you get to net zero?
  Offsets.



Golden Door Properties, LLC v. County of San Diego
(2020) 50 Cal.App.5th 467

- Undermined use of carbon offset credits to mitigate GHG impacts.
- Court did not find use of credits per se invalid.
- GHG offsets "must be real, additional, quantifiable, permanent, verifiable, and enforceable."
(Cal. Code Regs., tit. 17, § 95802, subd. (a).)
- So, what now?

King & Gardiner Farms, LLC v. County of Kern (2020) 45 Cal.App.5th 814

- Kern County certified in EIR and approved ordinance streamlining the permitting process for new oil and gas wells. The Board of Supervisors adopted a statement of overriding considerations, finding that the Ordinance's benefits outweighed its significant and unavoidable environmental impacts.
- Trial Court held that EIR violated CEQA regarding impacts on rangelands and from paving as an air pollutants mitigation measure.
- Petitioners appealed, claiming violations of CEQA.

King & Gardiner Farms, LLC v. County of Kern (2020) 45 Cal.App.5th 814

- In the published portions of the decision it held:

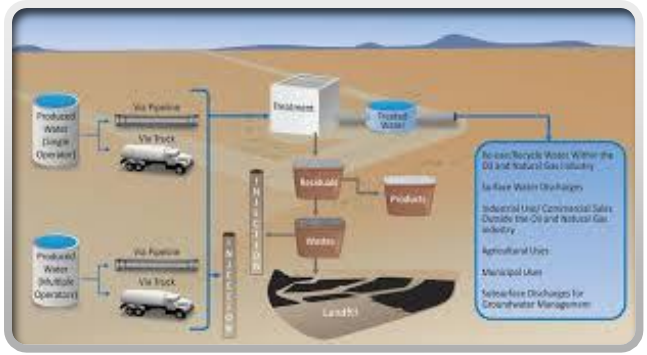
  Mitigation measures re: significant impacts to water supplies. impermissibly deferred formulation of the measures or delayed the actual implementation; the EIR's discussion of effectiveness of the mitigation measures was inadequate;

  Finding that conversion of agricultural land would be mitigated to a less-than-significant level was not supported by substantial evidence because, among other things, the mitigation measures allowed for conservation easements, which do not constitute actual mitigation;

  County inappropriately applied a single threshold for determining the significance of noise impacts.

King & Gardiner Farms, LLC v. County of Kern (2020) 45 Cal.App.5th 814

- Ordinance would have SU impact by depleting the County's water supplies.
- Mitigation provided that, to the extent feasible, applicants for permits must increase/maximize re-use of produced water. Court found that was only a generalized goal with no performance standards. Were it to uphold the measure, lead agencies could state that applicants must reduce impacts "to the extent feasible."
- Mitigation required that the 5 biggest oil industry users to develop/implement a plan to reduce water use by 2020. Court held this measure lacked specific performance standards, did not commit the County abide by the Plan, assigned implementation to unidentified 3rd parties who might not agree or act in good faith, and allowed permits to be issued (prior to 2020) and thus <u>without</u> being subject to the Plan.



King & Gardiner Farms, LLC v. County of Kern (2020) 45 Cal.App.5th 814

- Ordinance would have SU impact by depleting the County's water supplies.

  Mitigation specified that "[i]n the County's required participation for the formulation of a Groundwater Sustainability Agency [pursuant to the SGMA], the Applicant shall work with the County to integrate into [GSP] for the Tulare Lake-Kern Basin, best practices from the oil and gas industry to encourage the re-use of produced water from oil and gas activities." It set a re-use "goal" of 30,000 acre-feet per year. Court overturned because the GSP need only be adopted by January 31, 2020—4 years after the Ordinance was approved. Further, the goal was not an enforceable commitment.

  Measures were of unknown effectiveness. Statements of Overriding Consideration must "(1) describe the mitigation measures that are available (i.e., currently feasible) and (2) identify and explain the uncertainty in effectiveness of those measures" is mandated by the rule that an EIR must alert the public and decision-makers of the significant problems a project would create and must discuss currently feasible mitigation.

King & Gardiner Farms, LLC v. County of Kern (2020) 45 Cal.App.5th 814

- Ordinance would have significant impacts related conversion of agricultural land. EIR found that mitigation would reduce the impact to a less than significant level.
- Court invalidated measure authorizing the use of agricultural conservation easements at a 1:1 ratio because the easements do not create new agricultural land, thus the easements do not actually offset impacts on agriculture.

King & Gardiner Farms, LLC v. County of Kern (2020) 45 Cal.App.5th 814

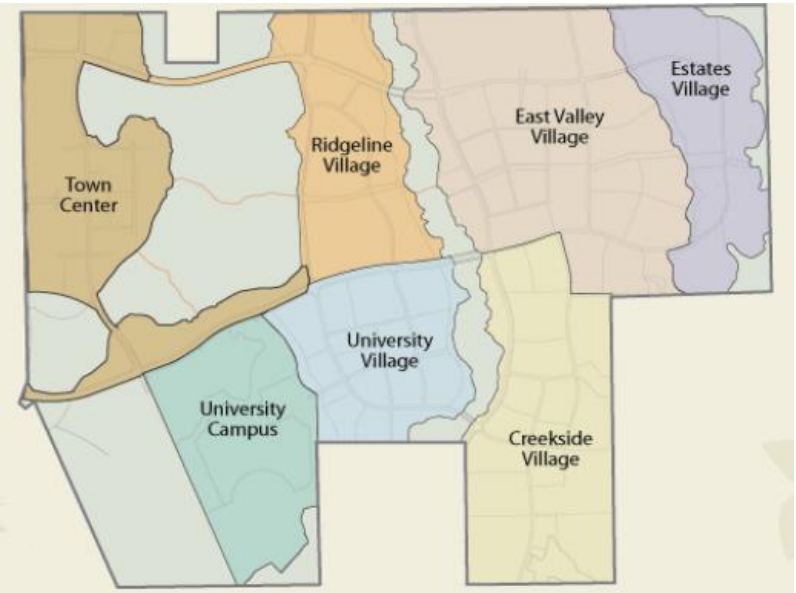
- Court invalidated measure allowing for the purchase of conservation credits from an established agricultural mitigation bank, as there was no evidence in the Record that such banks existed, no substantial evidence that this would actually mitigate impacts.
- Court found County failed to adequately respond to comments suggesting it adopt require the clustering of wells so fewer acres of agricultural lands were converted. The response did not address the feasibility of requiring well clustering, thus failing to comply with CEQA Guidelines §15088(b), which requires a "reasoned analysis" in response to comments raising "significant environmental issues."

King & Gardiner Farms, LLC v. County of Kern (2020) 45 Cal.App.5th 814

- County used a quantitative threshold of 65 dBA DNL to assess noise impacts.
- Court held this threshold violated CEQA because it did not measure the increase in noise levels over ambient levels.
  - Comments on the EIR, as well as County's own noise report, suggested using an increase of 5 dBA to determine whether the increase in noise above ambient levels constituted a significant impact.
  - County argued that it was entitled to substantial deference in selecting the significance thresholds. Court agreed but held that the County's use of an absolute noise threshold for evaluating all ambient noise impacts violated CEQA because it did not provide a "complete picture" of the noise impacts that may result from implementation of the ordinance.

Envtl. Council of Sacramento v. County of Sacramento (2020) 45 Cal.App.5th 1020

- EIR for master planned community (Cordova Hills) comprised of residential and commercial uses and including a university.
- Petitioners claimed inadequate project description, inadequate environmental impact analysis, and failure to adopt feasible mitigation measures.
- At base – lawsuit claimed university would not actually be built, and thus EIR deficient for failure to evaluate Project without one.



Envtl. Council of Sacramento v. County of Sacramento (2020) 45 Cal.App.5th 1020

- Project consists of special planning areas (SPAs). In describing the proposed university SPA, the EIR stated that a specific university had not been identified for the site, but included detailed concept plans.
- Original development application identified University of Sacramento as tenant, but they withdrew from the Project.
- Under DA, if no university built within 30 years, the land transfers to the County. Within 30-year timeframe the property owner cannot change the land use for the university site, and escrow account required with $6 million set aside.

Envtl. Council of Sacramento v. County of Sacramento (2020) 45 Cal.App.5th 1020

- Citing the 1988 *Laurel Heights* decision, the court reiterated that project description in EIR "should address environmental effects of future action, if there is credible and substantial evidence that: **(1)** it is a reasonably foreseeable consequence of the project, and **(2)** the future action will likely change the scope/nature of the project and its environmental effects.
- Court noted provisions in DA discussed above, multiple incentives to encourage a university tenant (including $87 million in commitments), as well as record evidence showing numerous statements by educational figures and public officials about the need for the university and the project site's ideal location. **EIR was not required to address speculative claim that university would not be built.**

Envtl. Council of Sacramento v. County of Sacramento (2020) 45 Cal.App.5th 1020

Air Quality, Climate Change, and Traffic: Petitioners argued that the EIR misrepresented oxides of nitrogen (NOx) and reactive organic gas (ROG) emissions (criterial pollutants), climate change, and traffic impacts, because the EIR did not evaluate these impacts under the scenario of no university being built.

- EIR concluded impacts associated with NOx and ROG would be significant and unavoidable, even with reducing emissions by 35%. Mitigation Measure AQ-2 provides that the Cordova Hills SPA shall not increase ozone precursor emissions beyond the 35% reduction unless there is an approved change to the Management Plan. Thus, if the university is not built, the changes to the SPA cannot increase NOx or ROG absent approval.
- Similarly, Mitigation Measure CC-1 provides that any future Project changes will not increase greenhouse gas emissions above 5.80 metric ton per capital amount.
- As to traffic, evidence demonstrated that—contrary to petitioner's claim—traffic would not be "worse case scenario" without university use and would instead likely decrease.

Envtl. Council of Sacramento v. County of Sacramento (2020) 45 Cal.App.5th 1020

- Finally, petitioners argued that the County was presented with a project phasing mitigation measure and did not adopt it.
- Petitioners presented no evidence that phasing mitigation measure was in fact feasible, and therefore forfeited the argument.

Holden v. City of San Diego (2019) 43 Cal.App.5th 404

- Challenge to City's finding that residential development was exempt from CEQA as infill development under Guidelines 15332 (Class 32). Project consisted of demolition of 2 SFH and construction of 7 detached condominium units on 0.517-acre site with steep slopes.
- Class 32 requires that the Project be consistent with the General Plan.
- GP Policy LU-C.4 required project to meet community plan density requirement of 30-44 du/ac (16-23 units for project site).
- Petitioners argued project was inconsistent because it did not meet the density requirements and thus Class 32 should not apply.

Holden v. City of San Diego (2019) 43 Cal.App.5th 404

- City Council found that "[t]he Project with the proposed lower density of seven detached dwelling units and hillside stilt structure construction is a suitable balance of providing an urban infill on environmentally sensitive steep hillsides and the retention and regeneration of the highly vegetated canyon."
- Deference on GP Consistency:
  - Project need not "rigidly conform to the general plan," it is enough that it is *"compatible with* the objectives, policies, general land uses, and programs . . ."
  - Courts give "great deference to public agency's finding of consistency with its own general plan." Will overturn only if "no reasonable person could have reached the same conclusion."
- **Held:** City's extensive findings demonstrate that it considered and balanced the conflicting provisions of the General Plan, Community Plan, and steep hillside development guidelines—and its findings were supported by substantial evidence. Thus, City's application of Class 32 exemption was supported.

Holden v. City of San Diego (2019) 43 Cal.App.5th 404

- Court also rejected Petitioners arguments that: (1) Community Plan could not vary from, or modify, the density designations and recommendations in the General Plan; and (2) that the Project required a General Plan Amendment in order to develop with a lesser density than that recommended in General Plan.
  - Density "recommendations" in General Plan ***were not*** "absolute mandates setting forth rigid density ranges."
- Finally, the Court held that Petitioner waived his arguments concerning the City's compliance with Government Code section 65863 (requiring additional findings where a city/county reduces residential density on a parcel), because he raised the argument "only in a footnote in his opening brief and without any substantive legal analysis."

Procedural/Other

Golden Door Properties, LLC v. Superior Court of San Diego County (4th District 2020) (Golden Door III)

- During CEQA review, are agencies legally required to keep documents that will constitute the administrative record of proceedings if litigation is filed?
- Scope of administrative record
  - Public Resources Code section 21167.6(e)
  - Anything that "touches" the project
- Implications in discovery?

Evans Hotels LLC v. Unite Here Local 30

- Evans Hotels alleges that when it refused to enter into agreements to use only union contractors, the unions filed CEQA lawsuits.
- Evans Hotels is pursuing a lawsuit in U.S. District Court alleging, in part, violation of RICO statutes with regard to the CEQA lawsuits.
  - They claim that unions challenged projects for negative effects on the environment, but, in private, offered to drop their challenge if developers agreed to hire only unionized construction workers.
- A similar lawsuit is underway in *The Icon at Panorama, LLC v. Southwest Regional Council of Carpenters, LiUNA Local 300, et al*.

Pending Supreme Court Review

County of Butte v. Dept. of Water Resources

- DWR applied to the Federal Energy Regulatory Commission (FERC) to extend its federal license under the Federal Power Act (FPA) to operate the Oroville Dam as a hydroelectric dam. DWR prepared a programmatic EIR, Plaintiffs challenged it.
- **Third Appellate District held:** FPA occupies the field of licensing a hydroelectric dam and bars review in state courts of matters subject to review by FERC (one exception-state's stricter water quality standards).

Petition for review:

(1) To what extent does the FPA preempt application of CEQA when the state is acting on its own behalf and exercising its discretion in deciding to pursue licensing for a hydroelectric dam project?

(2) Does the FPA preempt state court challenges to an EIR prepared in order to comply with the federal water quality certification under the CWA?

2020 Legislation / Regulatory Updates

Senate Bill 288 (Wiener)

- **Amends Public Resources Code § 21080.20**, which exempts bicycle transportation plans for urbanized areas (restriping, bicycle parking and storage, intersection signal timing, signage) – the bill extends the statutory exemption for nine (9) years, until January 1, 2030.
- Repeals previous requirements for lead agencies to prepare a traffic and safety impact assessment and mitigate traffic impacts and bicycle and pedestrian safety impacts.
- Adds Public Resources Code § 21080.25, with nine (9) new statutory exemptions, as well as an extensive list of definitions and conditions to a lead agency's use of the exemptions.

Senate Bill 288 (Wiener)

New Statutory Exemption:

(1) pedestrian and bicycle facilities projects (including, but not limited to, bicycle parking, bicycle sharing facilities, and bikeways, as defined);

(2) projects to improve customer information and wayfinding for transit riders, bicyclists, or pedestrians;

(3) transit prioritization projects (including, but not limited to, signal coordination and timing and phasing modifications, ramp meters, and dedicated transit and very high occupancy vehicle lanes);

(4) projects to designate peak-hours or fulltime bus-only lanes on highways with existing or near-term planned public transit service;

(5) projects to institute or increase new bus rapid transit, bus or light-rail service on existing public or highway rights-of-way;

(6) transit agency projects to construct or maintain infrastructure to charge or refuel zero-emission transit buses, as specified;

(7) maintenance, repair, relocation, replacement, or removal of any utility infrastructure associated with the exempt projects;

(8) projects that are solely combinations of components of the exempt projects; and

(9) city or county projects to reduce minimum parking requirements.

Senate Bill 288

- Section 21080.25's exemptions **sunset on January 1, 2023.** The exemptions are subject to **numerous conditions** (with the exception of city and county projects to reduce minimum parking requirements):
  - public agency must be the lead agency and be carrying out its own project;
  - the project must be in an urbanized area;
  - the project must be located on or within an existing public right-of-way;
  - the project must not add physical infrastructure increasing new automobile capacity (with minor exceptions) or add auxiliary lanes;
  - and the project must not require demolition of affordable housing units.
- **Projects exceeding $100 million** must be incorporated in a regional transportation plan, sustainable communities strategy, general plan, or other plan that has undergone programmatic-level CEQA review within 10 years of project approval and subject to additional requirements related to mitigation, hearings, and additional analysis.
- **Labor Requirements:** If using the new exemptions (except for minimum parking requirements reduction), the lead agency must certify that the project will be completed by a skilled and trained workforce or work must be under a project labor agreement.
- **NOE filing is mandatory.**

SB 743 (2013) Implementation

- **SB 743 (adopted 2013)** directed the Office of Planning and Research to adopt new guidelines for assessing transportation impacts in a manner that is consistent with the state's goals of reducing GHGs, and that no longer focuses on traffic congestion.
- **2018 – New CEQA Guideline 15064.3** was adopted, specifying vehicle miles traveled (VMT) as "the most appropriate measure of transportation impacts."
- On **July 1, 2020**, provisions of **Section 15064.3 became mandatory**. Now all CEQA lead agencies must analyze a project's transportation impacts using VMT.
- Many of California's largest cities already adopted VMT standards (San Jose, San Francisco, Los Angeles, Oakland, Pasadena). Many jurisdictions will continue to require LOS analysis — not for CEQA purposes, but because their general plans or other policies require LOS analysis.

Executive Order N-79-20 (Zero Emission Vehicles)

On September 23, 2020, in the midst of one of California's worst years on record for wildfires—Governor Newsom signed Executive Order N-79-20.

- **100 percent** of in-state sales of **new passenger cars and trucks** will be zero-emission by **2035**.
- 100 percent of **medium- and heavy-duty vehicles** in the State be zero-emission by **2045** for all operations **where feasible** and by 2035 for drayage trucks.
- 100 percent zero-emission **off-road vehicles and equipment** by **2035 where feasible**.
- Directs the Air Resources Board to develop regulations to increase zero-emissions vehicles in order meet the three targets. Requires multiple state agencies to jointly develop a "Zero-Emissions Vehicle Market Development Strategy" by January 31, 2021, with updates every 3 years.

Executive Order N-79-20 (Zero Emission Vehicles)

- Provides that state would work "to end the issuance of new hydraulic fracturing permits by 2024."
- The EO also requires state agencies, in consultation with other state, local and federal agencies, to:
  - "expedite regulatory processes to repurpose and transition upstream and downstream oil production facilities, while supporting community participation, labor standards, and protection of public health, safety and the environment";
  - provide "recommendations and actions . . . to manage and expedite the responsible closure and remediation of former oil extraction sites"; and
  - develop "science-based health and safety" rules that protect communities during the closures of oil extraction activities.

COVID-19 Executive Orders

Executive Orders N-54-20 & 80-20

- April 22, 2020: Executive Order ("EO") **N-54-20** suspended some—but not all—of the public filing, posting, notice, and public access requirements contained in CEQA and the CEQA Guidelines.
- September 23, 2020: **EO N-80-20** extended the CEQA provisions of EO N-54-20 until such time as EO N-80-20 is "modified or rescinded, or until the State of Emergency is terminated, whichever occurs sooner."
- **EO N-54-20**'s suspension of timeframe for Tribal consultation under AB 52 has lapsed, and EO N-80-20 did not extend it.
- **Note**: Emergency Rule 9 of the California Rules of Court, which tolled CEQA statutes of limitations through August 3, 2020 has now expired and has not been extended or otherwise modified.

Questions?

Thank You

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