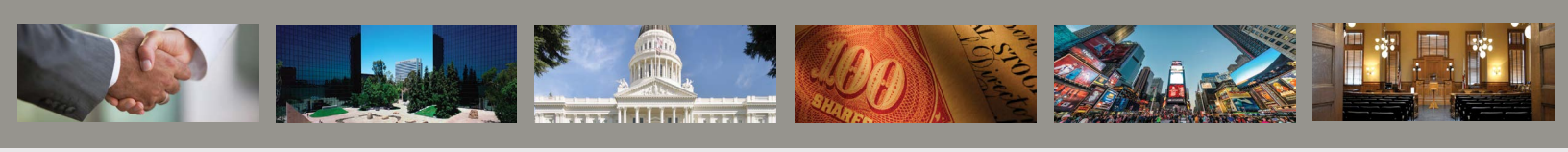

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Land Use & Natural Resources Case Law Update
Second Quarter 2015

Edited By: Phil Kohn and Matt Francois

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Water

Banning Ranch Conservancy v. City of Newport Beach

236 Cal.App.4th 1341

This case involved the City of Newport Beach's approval of a mixed-use development project on land located within the coastal zone. Banning Ranch Conservancy (the "Conservancy") sued and alleged that: (i) the city did not proceed in accordance with its general plan in approving the project and (ii) the project's environmental impact report (EIR) was inadequate under the California Environmental Quality Act (CEQA) because the city did not identify environmentally sensitive habitat areas (ESHA). Under the Coastal Act, such areas are to be protected against any significant disruption of their habitat values, and only uses dependent on those resources are to be allowed in those areas. The court of appeal denied the petition for writ of mandate ruling that the city did not violate its general plan or CEQA in regard to habitat designations.

In 2005, the city obtained Coastal Commission approval of its coastal land use plan. The court noted that while the city would ordinarily be obligated to identify ESHA in its land use plan, the city's land use plan explicitly excluded the project site from its scope. The Coastal Commission retains jurisdiction over coastal development permits in any such deferred certification area. The Coastal Commission also retained permitting jurisdiction over other parts of the city because the city had not yet submitted or received approval of an implementation plan by the Coastal Commission. The EIR prepared by the city for the project analyzed impacts to biological resources but expressly deferred designation of ESHA on the project site to the Coastal Commission as part of its subsequent permitting process.

The city's general plan included a policy requiring the city to "coordinat[e]" and "[w]ork with appropriate state and federal agencies to identify wetlands and habitats to be preserved and/or restored and those on which development will be permitted." Prior to approving the project, the city notified the Coastal Commission and received comments from Commission staff on the project's draft EIR. The Commission staff requested that the city make the ESHA determination in the EIR and allow Commission staff biologists the opportunity to review ESHA designations prior to the EIR finalization. The city declined, reasoning that the ESHA determination would be made by the Coastal Commission and was unnecessary for purposes of the EIR.

The Conservancy petitioned for a writ of mandate on the grounds that the city: (1) failed to coordinate and work with other agencies (including the Coastal Commission) to identify habitats for preservation, restoration, or development prior to project approval as required by its general plan and (2) similarly violated CEQA by not making ESHA determinations in the project EIR.

The trial court agreed with the Conservancy and found that the city violated its general plan by failing to adequately coordinate with the Coastal Commission on habitat issues before its approval of the project. However, the trial court rejected the claim that the city violated CEQA by failing to explicitly identify ESHA in the EIR.

The court of appeal reversed as to the claim that the city violated its general plan and upheld the decision that the EIR was not required to identify ESHA. The court found (via a thorough analysis of the text in the general plan) that the general plan requirement that the city "coordinat[e]" and "[w]ork with" appropriate state and federal agencies to identify wetlands and habitats to be preserved did not proscribe rigid timelines for when the city had to accomplish this task. Because the project applicant needed to obtain a coastal

development permit from the Coastal Commission, the city could still satisfy this general plan requirement during the ensuing permitting process. The court contrasted this policy with the general plan policy at issue in California Native Plant Society v. City of Rancho Cordova (2009) 172 Cal.App.4th 603, which imposed a mandatory obligation on the agency to coordinate with state and federal agencies on mitigation for special status species prior to project approval.

As for the CEQA claim, the court of appeal held that that a determination of ESHA was for the Coastal Commission to make given that the project was located in a deferred certification area. The court noted that the EIR was thorough and complete in its environmental analysis, flagged potential inconsistencies with the Coastal Act, and explicitly stated that the Coastal Commission would determine whether ESHA would be affected by the project. The court thus concluded that the EIR "did not have to prognosticate as to the likelihood of ESHA determinations" that would be decided by the Coastal Commission during the coastal development permit approval process.

This case provides helpful guidance on the deference given to an agency's determination of a project's consistency with its general plan. It also illustrates that at least for projects in deferred certification areas (and possibly other areas where the Coastal Commission retains permitting jurisdiction), an EIR need not speculate as to ESHA determinations to be made in the future by the Commission.

Patrick Donegan

California Building Industry Association v. City of San Jose
61 Cal.4th 435

On June 15, 2015, the California Supreme Court issued its decision in California Building Industry Association v. City of San Jose, addressing the legal standards to be used in determining the constitutionality of ordinances imposing mandatory "inclusionary housing" requirements on new development. The court ruled that the San Jose ordinance (the "Ordinance"), in contrast to some other inclusionary ordinances, did not require that developers dedicate property or property interests as a condition of development approval and thus did not impose an "exaction" subjecting the Ordinance to heightened scrutiny under Nollan v. California Coastal Commission (1987) 483 U.S. 825 and Dolan v. City of Tigard (1994) 512 U.S. 374. Reasoning that the Ordinance did not require a developer to pay a fee but instead merely placed a limit on the use of its property, the court also ruled that the Ordinance was not subject to the level of scrutiny it found applicable to legislatively imposed fees in San Remo Hotel v. City & County of San Francisco (2002) 27 Cal.4th 643, 671 ("such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development."). The Supreme Court thus affirmed the court of appeal's decision to remand the case to the trial court for review under the more deferential standard of review applicable to most ordinary land use regulations which focuses on whether the land use regulation is reasonably related to a legitimate public interest.

The City of San Jose had adopted a "Citywide Inclusionary Housing Ordinance" in January 2010, which generally required that any new residential development involving more than 20 units provide at least 15% of the new units for sale to city-qualified buyers at city-determined prices which were to be tied to differing levels of median household income. Prior to adopting the Ordinance, the city revised it to make it inapplicable to new rental housing developments, in view of the 2009 appellate court decision in Palmer/Sixth Street v. City of Los Angeles (2009) 175 Cal.App.4th 1396 finding state preemption of local restrictions on new housing rentals. However, the city expressly declined to prepare any "nexus" analysis or other evidentiary showing that building new market-rate homes caused or exacerbated the city's existing need for affordable housing.

Shortly after the Ordinance was adopted, the California Building Industry Association (CBIA) filed litigation challenging the constitutionality of the ordinance on its face, on the grounds that it imposed exactions as conditions of development approval in violation of the "unconstitutional conditions" doctrine expressed in U.S. Supreme Court decisions like Nollan and Dolan. The trial court repeatedly asked the city to provide some limiting principle as to how much might be demanded if it were not required to demonstrate a nexus to justify the Ordinance's requirements. Because the city did not adequately respond to the trial court's concerns in this regard, the trial court declared the Ordinance to be invalid and enjoined the city from implementing the Ordinance unless and until it produced a valid nexus study.

The Sixth Appellate District reversed the trial court's decision in 2013, holding that the trial judge had demanded too much from the city. The appellate court held that the San Jose Ordinance was like an ordinary land use regulation, and as such, merely needed to meet the deferential standard applied to police power regulations, i.e., such regulations must bear a "real and substantial relationship to the public welfare." The California Supreme Court, in turn, granted review of the appellate court's decision.

Shortly after granting review of the San Jose case, the Supreme Court decided Sterling Park v. City of Palo Alto (2013) 57 Cal.4th 1193. In Sterling Park, the court unanimously held that Palo Alto's below market rate affordable housing ordinance did impose exactions on developers, at least for purposes of the "pay under protest"

provisions of the Mitigation Fee Act (Gov. Code, §§ 66020 and 66021). The Mitigation Fee Act requires that a reasonable relationship exist between an impact fee and the development on which it is imposed. The court rejected Palo Alto's argument that its affordable housing requirements were like ordinary land use regulations rather than exactions. One distinguishing factor between the Palo Alto ordinance and the San Jose Ordinance is that the Palo Alto ordinance required developers to grant the city a recordable option to purchase the designated affordable housing units to assure their restricted status.

The new decision finds that the San Jose Ordinance, unlike the "below market rate" housing ordinance in Palo Alto, did "not require a developer to convey or dedicate to the city a property interest [or money in lieu thereof] as a condition of development, and therefore is not an exaction for purposes of the unconstitutional conditions doctrine . . . ." Since the court did not consider the San Jose Ordinance to impose "exactions" of property or money on developers, it agreed with the court of appeal that the trial court had erred by requiring the city to demonstrate a reasonable relationship or nexus between the approval of new residential development and the city's claimed need for more affordable housing units or funding.

The lengthy majority opinion in San Jose explained, limited, or distinguished many appellate decisions involving review of development fees and exactions in the years since the U.S. Supreme Court decided Nollan and Dolan. It also distinguished the U.S. Supreme Court's 2013 decision in Koontz v. St. John's River Water Mgt. Authority (2013) 570 U.S. __ [186 L.Ed.2d 697], which held that the Nollan/Dolan standard of review should apply to all "monetary exactions." The San Jose opinion commented that Koontz was "at least somewhat ambiguous" as to the scope of its holding, noted several other ambiguities it deemed unresolved by Koontz, and observed that Koontz "did not purport to decide whether the Nollan/Dolan test is applicable to legislatively prescribed monetary permit conditions."

The court viewed the San Jose Ordinance as a price control regulation, i.e., that the city merely regulated the "use" of property for housing so long as the developer provided at least 15% of the new homes for sale at controlled prices. The court found nothing wrong with such price controls, so long as they were not "confiscatory," and even went so far as to suggest that a city could adopt an ordinance restricting the sales prices of all home sales in the community, not just new homes needing development permits. See 61 Cal.4th at 465:

> As we have explained, an ordinance that places nonconfiscatory price controls on the sale of residential units and does not amount to a regulatory taking would not constitute a taking of property without just compensation even if the price controls were applied to a property owner who had not sought a land use permit.

Since such a price control regulation could, arguably, be adopted as a city-wide ordinance and applied to all home sales, the court reasoned that there is nothing wrong with a city adopting a price control ordinance that only regulates the prices of some of the new homes to be developed in the city.

The majority opinion, by the Chief Justice, was joined by five of the court's justices. Justice Chin wrote a separate concurring opinion, explaining that he agreed with the outcome, but on narrower grounds. Justice Chin cautioned that an ordinance which required the developer to provide subsidized (i.e., below cost) housing "would present an entirely different situation." He found that the San Jose Ordinance did not, at least on its face, require the developer to provide subsidized housing because did it not prohibit a developer from

building the required affordable units more cheaply and to different interior standards than the market-rate units. Justice Chin further observed that the public interest in providing affordable housing is an interest of the community at large, and that the community as a whole, not merely some segment of the community, "should bear the burden of furthering this interest." Justice Werdegar signed the majority opinion but also wrote a separate concurrence in which she commented on "the current status and meaning of the reasonable relationship constitutional standard" of review described in San Remo Hotel. Justice Werdegar commented that the majority opinion "appropriately refrains from addressing in detail issues that are not before us here."

While the court's decision in San Jose addresses the standard of review applicable to a facial challenge to the adoption of an affordable housing ordinance, it leaves many questions unanswered. For instance, of what significance, if any, is the Mitigation Fee Act in enacting or challenging development requirements to provide or fund affordable housing? Do different standards govern conditions of approval imposed for purposes of mitigation as opposed to other public welfare purposes? What constitutes a confiscatory price control and under what circumstances would such a price control be deemed a regulatory taking? What implications does the court's ruling have on the standard of review for other conditions imposed on development projects? Rutan attorneys will continue to monitor these and other issues in this dynamic and evolving area of law so as to advise its public and private sector clients on strategies to achieve their policy/business goals and objectives.

Rutan attorneys were counsel of record to CBIA in this case.

Matt Francois

Conway v. State Water Resources Control Board

235 Cal.App.4th 671

This case answers various esoteric questions about lake pollution, such as "What is a lake?" and "Can a lake pollute itself?"

Under the federal Clean Water Act (33 U.S.C. § 1251 et seq.), and California's statutory scheme for implementing it, the Porter-Cologne Water Quality Control Act (Cal. Water Code, § 13000 et seq.), every regional water quality control board is required to adopt a water quality control plan, or "basin plan," for the polluted water bodies within its jurisdiction. Among other things, a basin plan establishes each water body's "total maximum daily loads" (TMDLs) — the maximum amount of pollutants a particular water body can receive from each source.

This case involved McGrath Lake, a body of water polluted by various pesticides and polychlorinated byphenyls (PCBs) from surrounding agricultural uses. In an amendment to its basis plan for the area, the Los Angeles Regional Water Quality Control Board set TMDLs for, among others, the lake bed sediment, which had absorbed many pollutants over the years and would occasionally release those pollutants back into the water through a process known as "desorption." Under the amendment, the TMDL for the lake bed sediment was measured by the amount of pollutants in the sediment itself. The amendment set a deadline of 14 years to achieve the TMDL for the sediment.

The owners of property surrounding the lake (who could be held accountable if the amendment's goals were not met) filed a petition for writ of mandate challenging the TMDL for the lake bed, arguing that the regional board could not define a TMDL in terms of the amount of pollutants in a lake's sediment. They first contended that a TMDL could only be defined in terms of the amount of pollutants that are "introduced" into a lake's "receiving waters" (40 C.F.R. 130.2(e)), and the sediment of a lake bed is not part of its "receiving waters." Second, they claimed that if the sediment was considered part of the lake's "receiving waters," then the sediment could not be a source of pollution for those waters, because a lake cannot pollute itself.

Citing the broad authority of regional boards to determine the "appropriate measure" for TMDLs (40 C.F.R. § 130.2(i)), and the deference that courts are to give to an agency's interpretations of its own regulations, the court of appeal rejected these challenges. According to the court, it was reasonable for the regional board to determine both (1) that lake bed sediment is part of the lake itself, and (2) that the sediment can nevertheless be a source of pollution for the lake's waters.

The challengers' other arguments were also rejected. First, they asserted that the amendment violated California Water Code section 13360—which prohibits regional boards from requiring the use of particular remediation methods—because the only means of complying with the amendment was to dredge the lake bed. The court of appeal rejected this argument because (1) the amendment did not expressly require dredging, even if that was the amendment's practical effect, and (2) in any event, section 13360 did not apply because the amendment was not a "waste discharge requirement or other order," to which the statute applied.

Second, the challengers asserted that the amendment did not comply with the California Environmental Quality Act (CEQA) because it failed to analyze the environmental impacts of dredging, which the challengers again asserted was the only means of meeting the plan's goals.

In rejecting this argument, the court of appeal noted that the basin plan amendment was merely an "informational document" focused on overall policies, and "[did] not by itself prohibit any conduct or require any action." Thus, according to the court, the amendment only required a "first tier," plan-level environmental analysis. The court went on to state that a full analysis of the chosen remediation method would be made in a second-tier, project-level CEQA document, noting that analysis of the yet to be selected remediation method at the plan level would have been premature.

Mark Austin

Golden State Water Company v. Casitas Municipal Water District

235 Cal.App.4th 1246 (petition for review pending before California Supreme Court)

The court of appeal has held that a public agency may utilize the Mello-Roos Community Facilities Act of 1982 (Mello-Roos Act, Government Code section 53311 et seq.) to finance the condemnation, not merely the voluntary acquisition, of property. The court of appeal further held that as part of such an acquisition, a public agency may use Mello-Roos funds to pay for incidental intangible assets and related acquisition costs such as appraisal and attorney fees.

The Golden State Water Company (Golden State), a private water company, provides retail water service to most of the residents of the City of Ojai. Golden State's water rates are more than twice as high as the rates charged by the Casitas Municipal Water District (Casitas), the public agency that serves the surrounding area. After several failed attempts to redress their grievances with the California Public Utilities Commission, residents of Ojai approached Casitas and asked it to acquire Golden State and replace Golden State as their service provider. Casitas eventually formed a Community Facilities District (CFD) pursuant to the Mello-Roos Act to authorize the acquisition of Golden State's Ojai water utility; and at a subsequent bond election, 87% of the persons voting approved the imposition of CFD special taxes on the properties within Golden State's service area and the sale of up to $60 million in CFD bonds to finance the acquisition of Golden State.

Golden State filed a validation action under the Code of Civil Procedure to challenge Casitas' acquisition plan, raising two primary issues. First, Golden State focused on a provision in the Mello-Roos Act that authorizes a CFD to "finance the purchase . . . of any real or other tangible property with an estimated useful life of five years or longer . . .." Golden State argued the word "purchase" excludes an acquisition by eminent domain and, because eminent domain powers must be expressly granted by statute and the Mello-Roos Act does not expressly authorize an acquisition by eminent domain, that power cannot be found to exist. Second, Golden State argued that the Mello-Roos Act's focus on the acquisition of "tangible property with an estimated useful life of five years or longer" precludes use of the Act to finance the acquisition of intangible assets such as water rights, business goodwill and the like, and similarly prohibits the use of CFD funding to pay incidental costs incurred for appraisers, attorneys, etc.

The trial court rejected each of Golden State's contentions, and the court of appeal affirmed.

With respect to Golden State's challenge to the use of Mello-Roos financing of a condemnation action, Casitas has express statutory authority to condemn property and, therefore, the court found the cases cited by Golden State to be distinguishable. The court further found that the word "purchase" "is broad enough to include within its meaning [acquisition by] any means other than by descent." In any event, the Mello-Roos Act uses the terms "purchase" and "acquisition" interchangeably and reflects no legislative intent to limit property acquisitions to only voluntary ones. Finally, because the Mello-Roos Act must be liberally construed in order to effectuate its purposes, the court determined that Golden State's narrow interpretation of the term "purchase" would defeat, not promote, the purposes of the Act in providing a practical means of financing the acquisition of property and construction of public facilities.

With respect to Golden State's argument that Mello-Roos funding precludes the acquisition of intangible property or litigation expenses, the court noted that the Mello-Roos Act expressly authorizes a CFD to pay legal fees and to incur other "costs and estimated costs incidental to, or connected with, the accomplishment

of the purpose for which the proposed debt is to be incurred." Water rights, business goodwill and other intangible assets all qualify as incidental costs, the court found.

Jeff Oderman

Rutan attorneys were counsel of record to Casitas in this case.

Honchariw v. County of Stanislaus
___ Cal.App.4th ____

This case underscores the importance of timely asserting claims when challenging a local agency's land use decision on the theory of inverse condemnation – that is, the decision constitutes a taking of private property without the payment of just compensation as constitutionally required. The plaintiff believed he was able "to postpone bringing a complaint for just compensation until after he successfully challenged the local government's decision in a mandamus proceeding." He was wrong under the facts of the case.

In 2009, the County of Stanislaus disapproved the plaintiff's subdivision application. The plaintiff timely sought a writ of mandate to overturn the county's decision and succeeded when the court determined that the county had failed to make appropriate findings. (Honchariw v. County of Stanislaus (2011) 200 Cal. App.4th 1066.) The matter was sent back to the county for further proceedings, and on May 22, 2012, the county approved the project.

In December of 2012, the plaintiff filed a complaint against the county, alleging a temporary taking of his property for which he was entitled to monetary damages. The county demurred on the ground that the complaint was time-barred due to the 90-day statute of limitations in the Subdivision Map Act (Government Code section 66499.37).

The trial court sustained the demurrer and dismissed the case, and the plaintiff appealed. Relying on the ruling of the California Supreme Court in Hensler v. City of Glendale (1994) 8 Cal.4th 1, the court of appeal upheld the dismissal of the plaintiff's inverse condemnation claim on the basis that it was untimely.

The plaintiff argued for the application of an exception to the 90-day statute of limitations that was identified in the Hensler opinion. The exception speaks to the ability of a property owner to pursue an inverse condemnation action after successfully challenging the land use decision in a mandamus proceeding.

The court of appeal rejected the plaintiff's argument because in order to qualify for the exception identified in Hensler, a property owner's initial mandamus action must result in a judgment establishing that there had been a compensable taking of the land. In the case at hand, the plaintiff's mandamus action did not even allege that an unconstitutional taking had occurred. Therefore, the Hensler exception did not apply in this situation to allow the plaintiff to postpone bringing an inverse condemnation action. The plaintiff's interests would have been better served by joining an inverse condemnation claim with the initial petition for writ of mandate.

Shawna McKee

Jefferson Street Ventures, LLC v. City of Indio
236 Cal.App.4th 1175

The court of appeal ruled that conditions of approval imposed by a city on a shopping center project, which prohibited development of over one-third of the property for the purpose of reserving the land for a potential future interchange improvement, were unlawful as an uncompensated taking of property, and invalid.

In 2005, the property owner applied to the city for approval of a 250,000 square foot shopping center on a 27 acre site located adjacent to the interchange of Interstate 10 (I-10) and Jefferson Street. The I-10/Jefferson Street interchange was one of several interchanges slated for reconstruction and enlargement by federal, state, and local agencies. The reconstruction would require acquisition of private property for right-of-way, including a portion of the applicant's property. Acquisition of right-of-way would not occur, however, until the environmental review for the interchange project was complete, which began in 2001 and was still pending in 2007 when the project was approved.

Concerned that development of the full site as proposed could increase future condemnation costs for the interchange, city staff recommended that the city decision-makers approve development only on a portion of the site so as to leave sufficient acreage for the city-preferred interchange alternative (Alternative 1). City staff indicated that the city would reimburse the property owner for the cost of the land if it ultimately condemned the land for the interchange, but the city would not commit to reimburse the property owner if the interchange project did not go forward. The city council ultimately approved the project subject to conditions that the project plan be revised to relocate building envelopes outside of the area deemed necessary to implement Alternative 1 and to reserve an approximate 2-acre temporary no-build area in the southeastern portion of the site for a temporary off-ramp. The property owner sued alleging that the city had improperly conditioned approval of the project on 11 of the 27 acres remaining undeveloped and had not paid just compensation for that land.

The trial court stayed the inverse condemnation cause of action until after trial of the property owner's mandamus cause of action. The trial court denied the writ reasoning that the city acted properly in planning for a major infrastructure improvement and did not depress the value of the property or coerce the property owner to accept a particular price for the land. The trial court subsequently granted the city's motion for judgment on the pleadings on the inverse condemnation cause of action on the basis that the denial of the writ constituted a finding that the city's action did not constitute a taking.

The court of appeal reversed the trial court's denial of the developer's petition for writ of mandate, finding that the city conditions precluding development of the Alternative 1 acreage and the temporary no-build area constituted an uncompensated taking of that property. The court noted that the project fully satisfied all of the city's requirements for development of the property and that there was nothing to suggest that the project caused or contributed to the need for the interchange project. In reaching its conclusion, the court relied on prior appellate court decisions, including People ex rel. Dept. of Transportation v. Diversified Properties (1993) 14 Cal.App.4th 429, in which the court ruled that there had been a de facto taking of property by a city's restriction of development on approximately one-fourth of the acreage proposed for a shopping center to reserve the land for future freeway right-of-way as requested by the state. In the case at hand, the court of appeal observed that the City of Indio likewise conditioned project approval upon land remaining

undeveloped to preserve that acreage for future acquisition for public use. The court also noted the conditions here were "imposed to bank the otherwise developable property so that it could potentially be condemned at some unknown time in the future in an undeveloped (and consequently, less costly) condition." The court distinguished the city's actions here from ordinary, and non-compensable, planning: "Once the state's expressed desire to acquire the plaintiff's property in the future resulted in the denial of land use approvals, a taking occurred."

In view of its holding that the conditions imposed by the city in approving the (limited) development plan effected "an uncompensated de facto taking of the Alternative 1 acreage and the temporary no-build area," the court of appeal ruled that the trial court erred in denying the developer's petition for a writ of mandate.

The court of appeal rejected the city's argument that there was no taking of the property because a large portion of the land could still be put to an economically viable use. Relying on a prior, related case (Twain Harte Associates, Ltd. v. County of Tuolumne (1990) 217 Cal.App.3d 71), the court noted that the city had divided the property into discrete segments, and by prohibiting development on the Alternative 1 acreage and the temporary no-build area, the property owner had been denied all economically beneficial use of that land. The court also rejected the argument that the case had become moot by the county's commencement of a direct condemnation action against the property owner for the interchange improvement project. The court reasoned that the condemnation action could be abandoned and stated that it was not clear that the county's action encompassed all of the Alternative 1 acreage. To avoid the potential for duplicative recovery, however, the court ordered this case consolidated with the county condemnation case on remand.

The case affirms the principle that property owners are entitled to compensation for a regulatory taking of their land, and exemplifies a situation where land use regulations may be deemed to "go too far" resulting in a compensable "taking." It also underscores the tenuous "chicken and egg" scenario public agencies can find themselves in when considering specific development proposals or applications for projects involving land that may potentially be needed for future public improvement projects.

David Lanferman

Keep Our Mountains Quiet v. County of Santa Clara
236 Cal.App.4th 714

This case stemmed from a property owner's desire to use a portion of her 14-acre property in the Santa Cruz Mountains for a limited number of weddings and other special events throughout the year, with typical attendance being between 150 and 300 guests. County ordinances required a discretionary use permit for such activities. Despite having not initially done so, the property owner applied for, and the county processed, a use permit to allow 28 special events per year with up to 100 guests at each event.

Following the preparation of an initial study under CEQA, multiple public hearings and numerous public comments regarding potential noise and traffic impacts (including by the petitioners), the county adopted a mitigated negative declaration for the project and granted the requested use permit. The conditions of project approval included, among others, that (1) speakers be oriented away from neighboring residences; (2) noise be monitored by a county-retained noise consultant; (3) a noise complaint telephone number be provided and posted; and (4) an annual report be produced by the county's planning office assessing compliance with the conditions for at least the first year. A group of unhappy residents living near the subject property sought a petition for writ of mandate, claiming that the county violated CEQA by failing to prepare an environmental impact report (EIR) for the project. The trial court agreed with the petitioners and awarded them a portion of the attorneys' fees they later requested under Code of Civil Procedure section 1021.5.

The court of appeal was faced with the question of whether the trial court had correctly concluded that there was substantial evidence in the record supporting a fair argument that the project may have significant impacts, thus necessitating preparation of an EIR. In affirming the trial court's decision in full, the appellate court detailed the evidence that, collectively, supported a fair argument of noise and traffic impacts. With respect to noise, the court explained that compliance with local noise ordinances does not necessarily preclude a finding of a fair argument of significant noise impacts. It cited testimony in the administrative record that even with the speakers pointed away from nearby residences, neighbors could hear pounding music during a wedding where a DJ was used (other evidence showed that live music would be even louder) and that they could hear crowd noise as well. The court found this evidence, combined with evidence of potential impacts of noise on wildlife in a nearby preserve, was substantial enough to constitute the requisite fair argument for preparation of an EIR. Similarly, with respect to traffic, evidence that the project would, at times, double traffic volumes on a narrow, windy, substandard road that had a history of accidents, was held to be substantial enough to require further analysis of potential traffic impacts in an EIR. For these reasons, the court of appeal upheld the trial court's invalidation of the county's approvals and ordered the county to prepare an EIR.

This case serves as an important reminder that less deference will be shown to an agency's adoption of a negative declaration or mitigated negative declaration as a result of the court's application of the fair argument standard of review (in contrast with the substantial evidence standard of review).

Michelle Molko

Paulek v. Western Riverside County Regional Conservation Authority

___ Cal.App.4th ___

A multiple species habitat conservation plan was adopted for western Riverside County to maintain biological diversity in open space areas, while allowing future economic growth. The plan created conservation areas totaling 500,000 acres of land. The owner of a 200-acre parcel requested the approval of the Western Riverside County Regional Conservation Authority (Authority) to remove the conservation designation from the parcel and reassign the designation to two other properties that totaled approximately 1,064 acres. The Authority granted the request and determined that the action was not a project under the California Environmental Quality Act (CEQA). The Authority also determined that even if the action was a project, it qualified for a Class 7 exemption (CEQA Guidelines § 15307) because natural resources would be maintained or protected as a result of the reassigned designation of lands. The Authority also relied on a Class 8 exemption (CEQA Guidelines § 15308), which covers actions of regulatory agencies to maintain, restore, enhance or protect the environment.

The plaintiff objected to the land swap and petitioned for a writ of mandate to overturn the Authority's CEQA determination. The trial court found that the removal of the conservation overlay from the 200-acre parcel was a CEQA project, although it was subject to the Class 7 exemption. The plaintiff appealed.

The court of appeal upheld the trial court's finding that the transfer of conservation designations was a project under CEQA because it "has the potential for causing ultimate physical changes in the environment." With regard to application of the Class 7 exemption, the court held that there was a fair argument the reassignment of development restrictions could have a significant effect on the environment because the parcel that was originally protected by the conservation designation would no longer be protected, and the physical changes that would occur were not considered.

The court of appeal also rejected the Authority's invocation of the Class 8 exemption. In doing so, the court described evidence indicating that the 200-acre parcel and neighboring properties may be significantly affected by the exchange. In addition, the court concluded that the common sense exemption (CEQA Guidelines section 15061(b)(3)) could not apply because "it cannot be concluded there is no possibility that there will be no effects from the decision to remove [the conservation overlay from one property]."

Ultimately, the court of appeal directed the trial court to require the Authority to vacate and set aside its decision approving the removal and reassignment of the conservation designation and to rescind the CEQA exemption determination. If the Authority wishes to proceed with the proposed land swap, it must prepare an appropriate CEQA document to guide its action.

Ajit Thind

Reed v. Town of Gilbert
576 U.S. ___

Decades of case law demonstrates that differentiating based on content when regulating speech is an almost certain death knell. The line between content-based and content-neutral regulations, however, has often been hazy, made complicated by an array of inconsistent and irreconcilable court decisions across the country. Some of the obscurity has just been cleared by the United States Supreme Court with its June 18, 2015 decision in Reed v. Town of Gilbert, 576 U. S. ____, which strikes down a city sign ordinance that applied differing regulations to different categories of non-commercial signs — categories formulated based on a sign's subject matter. The court's decision necessitates a close and careful review and possible revision of existing local sign ordinances so as to avoid what some justices believe to be an inevitable invalidation of one ordinance after another.

Reed arose out of the regulation of signs by the Town of Gilbert, Arizona. The Town's sign regulations separated out various categories of non-commercial signs, including political signs, ideological signs, temporary directional signs and several others, and subjected each to different rules related to size, number, display duration limitations, etc. For example, while political signs could be up to between 16 and 32 square feet in size (depending on whether located on residential or nonresidential property) and displayed beginning 60 days prior to an election, temporary directional signs related to an event could be no larger than 6 square feet and their display was limited in duration to 12 hours prior to the event to which they related.

The plaintiffs, a local church and its pastor, desired to advertise the time and location of their Sunday church services that take place in schools and other non-fixed locations in or near the Town. After being cited for violating the duration limitations set forth in the Town's ordinance, the plaintiffs sued the Town claiming that because the differing rules regulated based on the content of signs, they were subject to the virtually insurmountable "strict scrutiny" test and unconstitutional.

After a decision by the federal district court in favor of the Town, the Ninth Circuit Court of Appeals upheld the sign ordinance. In a 2-1 decision, the majority of the appellate panel concluded that the distinctions in the ordinance were content-neutral because the court believed that they were based on objective factors unrelated to the substance of the sign (such as the identity of a speaker or event), there was no distinction between similar types of speakers or events, and there was no indication the Town had adopted the regulations because of disagreement with a particular message. With a strongly worded dissent in hand, the plaintiffs sought review by the United States Supreme Court, which was granted.

By a unanimous decision of the Supreme Court — albeit in outcome and not in reasoning — the Town's ordinance was held to be an unconstitutional content-based regulation of speech. Justice Thomas, who wrote the majority opinion with which six Justices joined, explained that case law precedent has established two categories of regulations that will be deemed content-based: (1) regulations that "on their face" draw distinctions based on the topic discussed (i.e., subject matter) or the idea or message expressed (i.e., viewpoint); and (2) regulations that cannot be justified without reference to the content of speech or that were adopted because of disagreement with the message being conveyed. The Town's ordinance fell into the first category due to the way in which it grouped signs — ideological, political, etc. In rejecting the Ninth Circuit's reasoning, the Supreme Court clarified that lack of animus or a benign motive cannot save an ordinance that is content-based on its face. Notably, even two of the Justices who expressed strong disagreement with the

bright-line content-based "test" used in the majority opinion did not hesitate to conclude that the Town's ordinance "[did] not pass . . . even the laugh test."

The decision in Reed will surely have far-reaching implications. Regulations like those of the Town of Gilbert are common. Local governments must carefully review and, if warranted, revise their non-commercial sign regulations, including any exemptions, so as to avoid the imposition of different standards on different categories of signs if the categories are based on the subject-matter or the viewpoint expressed on the signs. Although a seemingly difficult task, notwithstanding the decision in Reed, there remain tools by which local public agencies may continue to protect public safety and preserve community aesthetics. For example, content-neutral distinctions (e.g., residential vs. nonresidential, lighted vs. unlighted, on-premises vs. off-premises, permanent vs. temporary) may be employed to establish categories to which divergent regulations may be applied. Even in that realm, however, care must be taken because, although not subject to the most stringent constitutional standards, such regulations must nevertheless pass constitutional muster.

Michelle Molko

Save Our Heritage Organisation v. City of San Diego

237 Cal.App.4th 163

This case involved a challenge to the city's approval of a site development permit for a project designed to restore a portion of San Diego's Balboa Park to pedestrian-only use. Among other things, the project included the construction of a new bypass bridge connected to the historic Cabrillo Bridge, as well as development of a new paid parking structure.

The primary challenge related to findings necessary under the city's municipal code for the site development permit. Because the project involved the substantial alteration of a designated historical resource, the city was required to find that denial of the project would result in there being "no reasonable beneficial use" of the property involved. The petitioner argued this finding could not be made, because the existing use of the property could continue. In rejecting that argument, the court emphasized that the city had significant "discretion to make a qualitative determination of whether an existing use of the property, even if deemed beneficial, is also a reasonable use of that property under all of the facts and circumstances applicable to the particular property in question." In light of evidence of traffic and safety concerns, the court found the city was justified in finding the existing use to be "unreasonable."

The court also rejected a challenge to the city's finding that the project would not adversely affect applicable land use plans notwithstanding the city's acknowledgment that the project would be inconsistent with certain policies of the general plan. Again emphasizing the city's discretion to construe and apply its own plans, the court found that the mere fact the project conflicted with some policies did "not preclude City from finding the Project as a whole was consistent with the objectives, policies, general land uses, and programs specified in the applicable plans." The court upheld the city's determination that the project was consistent with its general plan, specifically including policies pertaining to: creating a pedestrian-oriented environment, reducing automobile and pedestrian conflicts, improving public access, and restoring areas for cultural activities and special events.

Finally, the court rejected a claim that an 1870 statute requiring the park to be held "for the use and purposes of a free and public park" prevented a paid parking structure within the park, finding that to the extent the 1870 statute placed limits on the city's power, those limits were superseded by the Legislature's subsequent approval of the city's charter.

This case thus reinforces the broad discretion that public agencies have in determining whether a project is consistent with their own land use plans and in weighing competing plan policies. As stated by the court: "[W]e must give the decision substantial deference, presume it to be correct, and resolve reasonable doubts in favor of the administrative findings."

Peter Howell

Walnut Acres Neighborhood Association v. City of Los Angeles

235 Cal.App.4th 1303

A property owner and developer sought to build an approximately 50,000 square foot eldercare facility comprised of 60 rooms in the Woodland Hills area of the City of Los Angeles. The project, located in a residential zone, exceeded the maximum floor area ratio and density allowed in the applicable zoning district. Under the controlling zoning regulations, a maximum 12,600 square foot facility with 16 beds could be constructed. Similar to other agency ordinances, the city's zoning ordinance allows for the granting of variances from controlling zoning regulations, but only upon a finding that the "the strict application of the provisions of the zoning ordinance would result in practical difficulties or unnecessary hardships inconsistent with the general purposes and intent of the zoning regulations." A similar finding must be made in order for the city to approve an eldercare facility.

The city's zoning administrator approved the project, finding that strict application of the regulations would result in unnecessary hardships, most notably because the operator would be unable to achieve the "economy of scale" deemed necessary in light of the support services required for the facility. The city council ultimately adopted the zoning administrator's findings. Neighboring homeowners filed a petition for a writ of mandate challenging the approval. The trial court found the city's findings pertaining to financial hardship and the need for senior housing were not supported by substantial evidence and ordered the city to reverse its decision approving the project. The court of appeal affirmed the trial court ruling in regard to the financial hardship finding.

The court of appeal assumed that financial hardship could constitute an unnecessary hardship, but found that there was no substantial evidence of financial/unnecessary hardship in this case. The court specifically noted that "[t]here was no evidence that a facility with 16 rooms could not be profitable" and that there was no information from which it could be determined that the profit derived from such a project would be so low as to amount to an unnecessary hardship. Along those lines, the court reasoned that "[i]f the property can be put to effective use, consistent with its existing zoning . . . without the deviation sought, it is not significant that the variance[] . . . would make the applicant's property more valuable, or that [it] would enable him to recover a greater income . . .." Conversely, citing the municipal code and other record evidence, the court of appeal did find that there was substantial evidence to support the city's finding pertaining to the need for more eldercare facilities.

This case underscores the need to carefully document findings pertaining to financial hardship or infeasibility for variance determinations in land use cases.

Travis Van Ligten