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Land Use & Natural Resources Case Law Update
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Carson Harbor Village, Ltd. v. City of Carson
239 Cal.App.4th 56

The court of appeal upheld the City of Carson's denial of an application to convert a mobilehome rental park to a subdivision of resident-owned lots. The city's denial of the application was based on its inconsistency with the city's general plan. The court reasoned that substantial evidence supported the city's findings that allowing the conversion would be inconsistent with the open space element of its general plan by placing at risk a state and federally regulated wetlands area located within the mobilehome park.

In 2007, the city denied an application submitted by a mobilehome park owner to convert 420 rental spaces on 70 acres of land (17 of which consist of federal and state regulated wetlands) to a subdivision of individually owned lots. The city based its denial on two grounds: (i) the required tenant survey had been inadequate, and (ii) the application was not consistent with the city's general plan. The mobilehome park owner brought a petition for a writ of mandate to challenge the denial of its application, which the trial court granted. In 2010, the court of appeal overruled the trial court, holding that the subdivision plan was a sham based on the lack of tenant support, and ordered the city to reconsider the application based on a newer tenant survey. However, that prior opinion also held that the city could not reject the application based on its supposed inconsistency with the city's general plan.

In 2011, the city again denied the application based on, among other things, its inconsistency with the city's general plan. Specifically, the city found that the application was inconsistent with the general plan's open space element because the wetlands within the mobilehome park, which constitute the city's only open space, would be at risk of not being maintained as a result of the proposed conversion. The mobilehome park owner again sought a writ of mandate, which the trial court again granted, finding that inconsistency with a local agency's general plan was not a proper ground to deny the application and that, in any event, there was no evidence the proposed conversion was inconsistent with the city's general plan.

On appeal, the city argued that it was entitled to deny the application as inconsistent with the open space element of its general plan. Relying on the California Supreme Court's 2012 opinion in Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles [55 Cal.4th 783], the court of appeal reversed course from its 2010 decision and agreed with the city, holding that for the same policy reasons that the Coastal Act applied to the mobilehome park conversion at issue in Pacific Palisades, the requirements of the open space element of the city's general plan applied to the proposed mobilehome park conversion.

The court of appeal ruled that substantial evidence supported the city's findings that approving the application would put the wetlands at risk of not being properly maintained, which would be inconsistent with the open space element's requirement that the wetlands be preserved as a habitat for plant and animal life. If the application were approved, responsibility for maintaining the wetlands — which included liability for prior contamination and an extensive yearly maintenance requirement — would transfer from the mobilehome park owner to individual lot owners, nearly two-thirds of whom were low income, and would likely be reluctant or unable to take on the administrative and financial liability.

The case emphasizes the notion that when an agency determines on the basis of substantial evidence that a

land use application is inconsistent with its general plan, the agency is required to reject the application.

Alan Fenstermacher

City of Irvine v. County of Orange
238 Cal.App.4th 526

The City of Irvine challenged a supplemental environmental impact report (SEIR) approved by the County of Orange to expand a jail facility from 1,200 to over 7,500 inmates. The trial court denied the city's request for relief and the court of appeal affirmed, concluding that the SEIR was legally adequate.

The court of appeal's decision rested on four main points. First, the court rejected the city's argument that the county needed to prepare a new environmental impact report (EIR) for the jail expansion rather than merely "supplementing" the EIR that the County prepared for a prior iteration of the project in 1996. In particular, the court found (i) the changes in the jail expansion plans were not significant enough to warrant the preparation of an entirely new EIR, and (ii) the off-site changes to surrounding land uses — specifically, the transition from an airport use (which was assumed in the 1996 EIR) to recreational and park uses — would result in a decrease in overall development intensity and therefore would not justify the preparation of a new EIR.

Second, the city claimed that the county violated CEQA by providing a 2014 "interim year" traffic analysis, even though the county's financing and construction timelines did not allow for completion of the first phase of the jail expansion until 2018. The court rejected the city's argument, ruling that the 2014 traffic analysis served as a de facto baseline of existing conditions against which 2030 project build-out conditions could be properly assessed. Along those lines, the court observed that CEQA does not "require continuously updated projections of traffic impacts adjusted for any delays in construction in the project or nearby areas."

Third, the court upheld the SEIR's finding that there were no feasible measures to mitigate for the project's loss of 65 acres of agricultural land. The court affirmed the SEIR's rejection of agricultural conservation easements, transfer of development rights, and a "right to farm" ordinance as not being viable or effective means to mitigate the impact. In this regard, the court noted that the cost of land in the county, estimated at approximately $2 million per acre, made commercial agriculture largely cost prohibitive.

Fourth, the court ruled that the county's responses to the city's comments on traffic and the loss of agriculture were adequate. While some of the county's responses seemed flawed, the court nevertheless deferred to the county by finding reasonable inferences could support the responses.

This case underscores the notion that courts will look beyond the form of an EIR in evaluating the adequacy of its contents and will defer to an EIR's conclusions provided that they are supported by substantial evidence.

Note: Rutan attorneys were counsel of record for the city in this case.

Ann Levin

City of San Diego v. Board of Trustees of the California State University
61 Cal.4th 945

In this opinion, the California Supreme Court considered the extent to which the California State University (CSU) is responsible for mitigating off-site traffic impacts caused by CSU's plan to expand its San Diego campus to accommodate more than 10,000 additional students over the next several years.

In an earlier case, City of Marina v. Board of Trustees of California State University (2006) 39 Cal.4th 341, the Supreme Court stated that "a state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." Relying on that language, CSU took the position that it could not lawfully pay for off-campus environmental mitigation without a legislative appropriation for that specific purpose. Because it could not guarantee the Legislature would appropriate funds to mitigate traffic impacts, CSU concluded that mitigation was infeasible, and certified an environmental impact report (EIR) for the expansion project based on a statement of overriding considerations.

In rejecting CSU's action, the Supreme Court stressed that "[m]itigation is the rule," i.e., CEQA requires all public agencies to mitigate or avoid significant environmental impacts, whether on- or off-site, whenever it is feasible to do so. Thus, "while education may be CSU's core function, to avoid or mitigate the environmental effects of its projects is also one of CSU's functions." Accordingly, the power to spend funds on a project "logically embraces the power to ensure that mitigation costs attributable to those projects are included in the projects' budgets."

The Supreme Court further found that the rule proposed by CSU would lead to unreasonable consequences, effectively forcing the Legislature to review state agencies' projects on a case-by-case basis, and unfairly imposing a financial burden on local and regional agencies whenever the Legislature fails to make an earmarked appropriation for mitigating the off-site effects of a particular project.

Finally, the Supreme Court rejected CSU's arguments that certain provisions of the Education Code prevented it from using nonappropriated funds for mitigation, as well as its claim that the Legislature's failure to grant CSU's request for an earmarked appropriation constituted a "formal action" prohibiting CSU from spending any public funds for that purpose. The Court remanded the case for further proceedings, while cautioning CSU to proceed with any new EIR in accordance with CEQA's standards and procedures. The Court further noted that "CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible."

This case reinforces the requirement that the agency approving a project be responsible for mitigating or avoiding the project's environmental impacts, whenever it is feasible to do so, and prevents state agencies from dodging that obligation by asserting that they do not have authority to use project funds for mitigation of off-site impacts. In light of its ruling in this case, the Supreme Court ordered a similar, pending case involving a CEQA challenge to the expansion of CSU-East Bay (City of Hayward v. Trustees of the California State University, Case No. S203939) transferred to the court of appeal with directions to vacate and reconsider its prior decision.

Peter Howell

Defend Our Waterfront v. State Lands Commission
240 Cal.App.4th 570

This case addresses two primary issues relating to the California Environmental Quality Act (CEQA): (i) how the requirement for exhausting administrative remedies is impacted by a public agency's failure to provide adequate public notice of a proposed CEQA determination, and (ii) the scope of CEQA's statutory exemption for "settlements of title and boundary problems" under Public Resources Code section 21080.11.

This case centers on a proposed waterfront project in San Francisco, known as the "8 Washington Street Project," consisting of condominiums, restaurants and retail establishments, among other uses. The property that the developers sought to use for the project included, among other land, a small parcel — known as "Seawall Lot 351" — that previously consisted of submerged tidelands, and, at the time of the case, was owned by the City and County of San Francisco and used as a surface parking lot. As "public trust" land, the parcel could only be used for certain purposes benefiting the public.

To remove the restrictions imposed on the parcel by the public trust doctrine, the city and the project developer proposed to enter into a "land exchange agreement" with the California State Lands Commission ("SLC"), under which the public trust designation would be removed from Seawall Lot 351, and the designation would be placed on a different parcel to be owned and held by the city. In August 2012, the SLC held a public hearing at which it approved the proposed agreement. As part of that approval, the SLC found the matter to be exempt from CEQA pursuant to Public Resources Code section 21080.11, which states that CEQA shall not apply to "settlements of title and boundary problems by the State Lands Commission and to exchanges or leases in connection with those settlements." The public notice of the SLC meeting, however, did not mention CEQA, or state that the SLC proposed to find the agreement exempt from CEQA.

In a mandate proceeding challenging the SLC's approval of the agreement, the petitioner (Defend Our Waterfront) asserted that the statutory exemption under section 21080.11 did not apply to the SLC's determination because the agreement did not involve the "settlement" of a "dispute," but rather an amicable agreement between contracting parties. The SLC disputed this narrow reading of the exemption, and also asserted that the petitioner failed to exhaust its administrative remedies pursuant to Public Resources Code section 21177. The SLC appealed after the petitioner prevailed at the trial court.

The court of appeal affirmed the trial court's judgment. On the exhaustion issue, it agreed with the determination of the trial court that the exhaustion doctrine did not apply because the SLC did not give adequate public notice of its CEQA determination pursuant to Government Code section 11125(a). That provision states that notice of a meeting of a State body, such as the SLC, shall be "made available on the Internet at least 10 days in advance of the meeting." Meanwhile, Public Resources Code section 21177(e), which governs the exhaustion doctrine in CEQA cases, states that its requirements do not apply "if the public agency failed to give the notice required by law." Because the public hearing notice for the SLC meeting did not indicate that the SLC would consider the exemption issue (in fact, it did not mention CEQA at all), the court of appeal held that public notice of the CEQA determination was inadequate, and that section 21177's exhaustion requirements therefore did not apply.

Notably, the court of appeal reached its holding only after walking through the elements of the exhaustion doctrine under section 21177, and finding them all to be met, with the exception of one ambiguous provision (subdivision (c)), which the court said might have required one of the petitioner's members to have raised

in light of the fact that the petitioner was formed after the SLC had approved the agreement. Rather than resolve this ambiguity, however, the court held that the exhaustion doctrine did not apply due to the lack of adequate public notice.

On the issue of the statutory exemption, the court of appeal observed that the purpose of the exemption was to promote the State's legitimate interest in settling land disputes. As such, it held that the language of Public Resources Code section 21080.11 — particularly its use of the terms "settlement" and "problems" — meant its application was limited to the settlement of a title or boundary "dispute." Because the court found that the agreement was not related to such a settlement, and that it was instead approved solely to remove impediments to development of the project, it held that the exemption did not apply. Notably, in reaching this conclusion, the court did not analyze whether the approval of the agreement qualified as a "project" under CEQA, which the court assumed, stating that the SLC had made a similar assumption in finding the matter statutorily exempt.

This case underscores the importance of an agency including information regarding any proposed CEQA action in its public hearing notices and ensuring that a project fits within the scope of any relied upon CEQA exemption.

Mark Austin

Save Our Schools v. Barstow Unified School District Board of Education
240 Cal.App.4th 128

The Barstow Unified School District Board of Education ("District") approved the closing of two of its elementary schools and the transfer of the schools' students to other "receptor" schools. The District determined that the closures and transfers were exempt from environmental review under the California Environmental Quality Act (CEQA), finding they fell within the categorical exemption for "minor additions" to schools (Pub. Res. Code § 21080.18 and CEQA Guidelines § 15314). Section 15314 provides that school closures and student transfers resulting in "minor additions to existing schools" are categorically exempt from CEQA "where the addition does not increase original student capacity" of any receptor school "by more than 25% or ten classrooms, whichever is less."

Save Our Schools ("SOS"), a citizens group, petitioned the trial court for a writ setting aside the District's action. The trial court denied the petition and SOS appealed, contending that the closures and transfers were not exempt from CEQA because (i) insufficient evidence supported the District's determination that the closures and transfers were exempt pursuant to CEQA Guidelines section 15314, and (ii) if the closures were exempt, the "cumulative impacts" and the "unusual circumstance" exceptions to CEQA's categorical exemptions applied. The court of appeal reversed and remanded the case to the trial court.

The court of appeal held that the administrative record contained insufficient evidence to support the exemption determination. More specifically, while the record showed the current enrollments figures for the receptor schools, it did not contain any information reflecting their enrollment capacity before the transfers were made. This omission made it impossible for the District to properly determine that the closures and transfers would not increase the total student enrollment of any of the receptor schools beyond the levels allowed under the minor additions exemption.

Additionally, the District had represented that the transferring students could attend any receptor school of their choice. In so doing, the District appeared to assume that there was more than sufficient enrollment capacity at the receptor schools, whether individually or as a whole, to absorb the transfers. However, the evidence in the record showed that if all transferring students chose to attend a particular receptor school, the actual enrollment at that school would more than double.

Finally, the court of appeal rejected the District's attempt to rely on another categorical exemption applicable to "[o]rganizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment." (CEQA Guidelines § 15378(b)(5).) As the District conceded, however, an increase in student enrollment may have a significant impact if the increase exceeds the threshold in CEQA Guidelines section 15314. Thus, the District lacked sufficient information to justify the newly invoked exemption.

The court of appeal directed the trial court to issue a writ (i) voiding the District's action, and (ii) requiring the District to reconsider its determination that the closures and transfers were exempt from CEQA, noting the District may consider additional evidence not before it when it made the original determination.

This case underscores the importance for an agency that determines a project to be exempt from CEQA to ensure that the activity at issue actually comports with all of the elements necessary to justify the exemption.

Emily Webb

Simonelli v. City of Carmel-By-The-Sea
___Cal.App.4th ___

In this case, the petitioner filed a petition for administrative mandamus challenging the approval of a development permit by the City of Carmel-By-The-Sea. But the petitioner did not name the project developer as a party to the action. The city demurred to the lawsuit, arguing that the petitioner failed to join an indispensable party. That failure, according to the city, could not be cured since the 90-day limitations period provided in Code of Civil Procedure section 1094.6 already lapsed. The trial court sustained the demurrer without leave to amend.

The city then moved for a judgment of dismissal. The petitioner opposed the motion, asserting that the developer was not an indispensable party and that, even if it was such a party, the limitations period had not expired because it did not apply to a decision to grant a permit. The trial court granted the city's motion and entered judgment.

The petitioner timely appealed, contending that the developer was not an indispensable party because a condition required the developer to indemnify the city against any legal challenges to the permit, thereby ensuring the city would adequately protect the developer's interests. The court of appeal rejected this argument, noting that while the condition required the developer to pay the city's legal fees, it did not give the developer the power to control the city's defense. The city thus could have decided either not to defend the suit or to conduct the suit in a manner adverse to the developer. Because the developer's interests would clearly be prejudiced if the effort to invalidate the developer's permit was granted, the developer was indeed an indispensable party.

In a surprising and potentially far-reaching ruling, the court of appeal then held that the 90-day statute of limitations set forth in Code of Civil Procedure section 1094.6 did not preclude an amendment of the petition to name the developer as a party because that limitations period applies only to cases involving the denial of a permit. Because this limitations period is widely believed to apply equally to an approval or a denial of a quasi-adjudicative land use decision, a request for depublication or a petition for review to the California Supreme Court may be pursued. As the California Environmental Quality Act and the Subdivision Map Act each have their own statutes of limitations (Public Resources Code section 21167 and Government Code section 66499.37, respectively), the ruling should have no bearing on the limitation periods applicable to challenges based on claims arising from those regulations.

In sum, the court of appeal determined that a permit applicant is an indispensable party to a third-party challenge to a city's decision to grant that permit, and held that the 90-day limitations period provided in Code of Civil Procedure section 1094.6, as to permits, applies only to their denial and not their approval.

Michael Driscoll

Walker v. City of San Clemente
239 Cal.App.4th 1350

The Mitigation Fee Act (the "Act"), codified as Government Code section 66000 et seq., authorizes a local agency to impose fees on specific development projects to defray the cost of new or additional public facilities that are needed to serve those developments. The Act establishes requirements to ensure local agencies use these fees timely to pay for public facilities that serve those very developments rather than divert the fees for general revenue purposes. One such requirement is that the local agency must make findings every five years to justify its continued retention of any fees it has collected but not yet spent. If the agency does not make these five-year findings, the Act states that the agency is to refund the unused fees to the current owners of the affected properties on a prorated basis.

In 1989, the City of San Clemente established a Beach Parking Impact Fee, anticipating that substantial residential development proposed for the city's inland areas would significantly increase the demand for public parking at the city's beaches. Between 1989 and 2009, the city collected nearly $10 million in Beach Parking Impact Fees and accrued interest. During that same period, the City spent less than $350,000 to purchase a vacant parcel. The plaintiffs filed a lawsuit to compel the city to refund the unused portion of the Beach Parking Impact Fund (the "Fund"). The plaintiffs alleged, among other arguments, that the five-year findings that the City made in 2009 failed to satisfy the Act's requirements. The trial court ordered a refund of the balance of the Fund and the city appealed.

The court of appeal reviewed the city's 2009 five-year findings and found that they failed to discuss the relationship between the nearly $10 million balance in the Fund and the purpose for which the fee was established. The court of appeal also found that the city failed to (i) identify the sources and funds anticipated to complete financing for incomplete beach parking improvements that were identified when the Beach Parking Impact Fee was established, and (ii) designate the approximate dates when it anticipates receiving that funding. The court of appeal noted that every five years, the city must reexamine the need for the unexpended Fund to finance beach parking improvements that purportedly were required by the new development in the city's noncoastal zone. While the city argued that the trial court should have remanded the matter to the city to correct its findings, the court of appeal held that the clear language of the Act required a refund, without remand, due to the deficiencies of the findings.

The plaintiffs also appealed from several trial court rulings that were decided in the city's favor, and the court of appeal upheld those rulings. First, the court of appeal agreed that the trial court properly applied a four-year statute of limitations to the challenge to the city's 2004 five-year findings. Second, the court of appeal found that the city's deficient findings did not require it to sell the vacant lot it had purchased. The court of appeal also agreed that the city could charge administrative overhead costs associated with the Beach Parking Impact Fee. Finally, the court of appeal held that the plaintiffs failed to establish the City improperly commingled the collected fees with other city revenues.

The city has petitioned the California Supreme Court for review of the court of appeal's decision.

Note: Rutan attorneys were counsel of record for the city in this case.

Ajit Thind