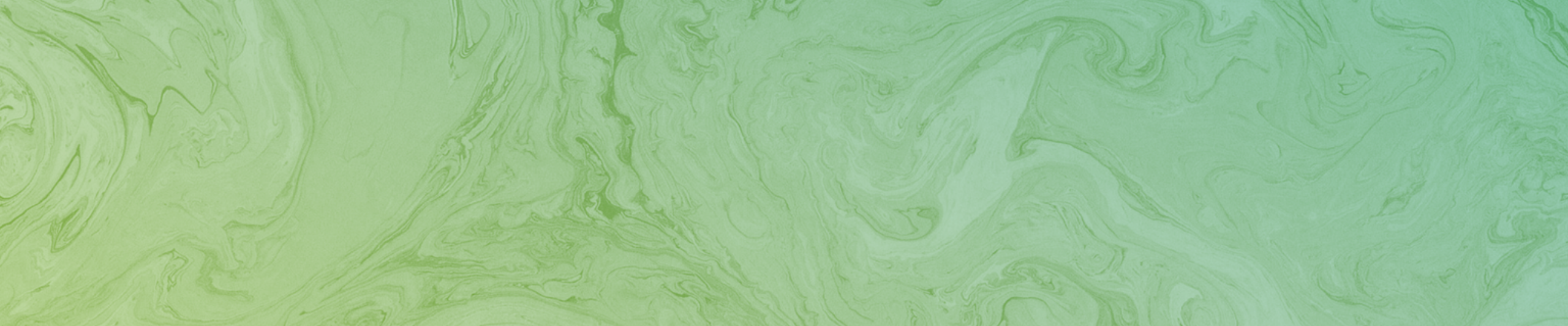


The top half of the slide features a background of marbled paper with swirling patterns in shades of green and yellow. Below this, the main title is set against a solid green background.

CEQA LITIGATION UPDATE

Christie Crowl

Jarvis Fay LLP

California League of Cities

Fall Conference

October 16, 2024

2024 Published CEQA Cases

- April 2024 through September 2024
- Slower second half of the year for CEQA cases (6 cases in the last 6 months instead of 14 in the preceding 6 months)
- No significant changes in law

***Save the Capitol, Save the Trees v.
Department of General Services
(2024) 101 Cal.App.5th 1237***



CEQA/Writ Practice Refresher:

In a CEQA action, Pub. Res. Code section 21168.9(b) allows the trial court to retain jurisdiction **until the agency has complied with CEQA.**

Background:

- State Department of General Services (DGS) project involved demo of an existing Capitol annex building and construction of a new visitor center and parking garage.
- Project would address the following issues:
 - ADA accessibility
 - Hazardous materials removal (asbestos, lead, mold)
 - Lack of space for legislative staff
 - Antiquated mechanical, electric and plumbing systems
 - Inefficient and cumbersome spaces for the public
 - Retrofitting to modern safety and building codes

Petitioner challenged the adequacy of the project's EIR and the Court agreed, issuing a writ of mandate directing DGS to revise and recirculate deficient portions of the EIR including the project description, historic resources and aesthetics chapters, and alternatives analysis.



DGS Procedural Approach to Writ Return:

- DGS partially decertified the EIR, vacated project approvals as required by the writ, certified a Revised EIR, and reapproved the project without the visitor center.
- Trial court discharged the writ on its face without making a determination as to the adequacy of the Revised EIR.

Petitioner's Procedural Approach on Appeal:

- Petitioner argued that the Revised EIR did not adequately analyze all project components in the revised project description.
- Petitioner filed an action challenging the writ return (i.e. *not* a separate writ action).

Holding:

- The Court of Appeal held that certification of the Revised EIR was “not enough” to discharge the writ since “there has not yet been an adjudication as to the adequacy” of the Revised EIR.
- When a writ directs an agency to take a specific action and the writ return states that the court’s mandate has been carried out, a petitioner may challenge the writ return (citing Pub. Res. Code section 21168.9(b)).

Takeaway/Practice Tip:

- Carefully consider writ language!
- Do what the writ has directed the city to do in order to discharge it.
- Upon writ issuance, consider confirming and clarifying the terms with the court to avoid future confusion.

Make UC a Good Neighbor v. Regents of University of California

(2024) 16 Cal.5th 43



People's Park



Background:

- Berkeley's UC Regents adopted the 2021 Long Range Development Plan which anticipated construction of approximately 11,700 housing units or “beds” that would accommodate around 14,000 new residents (students, faculty, and staff).
- The 2021 LRDP also estimated that approximately 8,000 more would be added to the UC population by 2036 which would not be provided with university housing.
- Petitioner challenged the EIR for the project which analyzed both the potential programmatic environmental impacts associated with implementing the LRDP and the potential site-specific environmental impacts for two housing developments, one to be located in People's Park in the City of Berkeley.

TIMELINE:

(1) First District Holding:

EIR violated CEQA because it did not adequately analyze (1) noise impacts on surrounding neighborhoods (“social noise” impacts), or (2) sufficient alternative locations for the project.



(2) Supreme Court Review:

The Supreme Court granted the Regents’ request for review on the above issues.

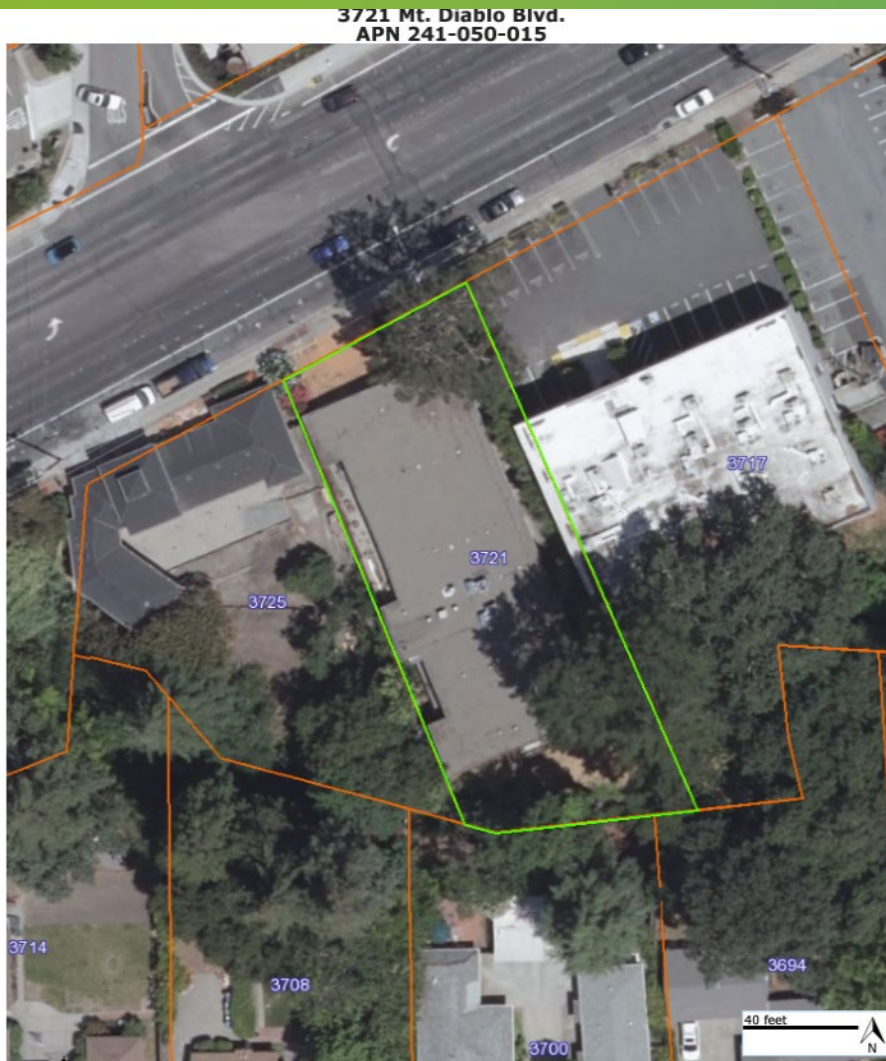
(3) AB 1307:

- Added language to CEQA stating: “For purposes of [CEQA], for residential projects, the effects of noise generated by project occupants and their guests on human beings is not a significant effect on the environment.” (Pub. Res. Code § 21085.)
- Also noted that “institutions of public higher education shall not be required, in an environmental impact report prepared for a residential or mixed-use housing project, to consider alternatives to the location...of the project” if the site was less than five acres surrounded by urban uses and had been evaluated in an EIR for the most recent LRDP. (Pub. Res. Code § 21085.2(b).)

Takeaway/Practice Tip:

- Lobbying works!
- Please note that it took a state agency (the UC Regents) to effectuate this particular change. Our cities – particularly smaller ones – may not always be positioned to obtain legislative relief.





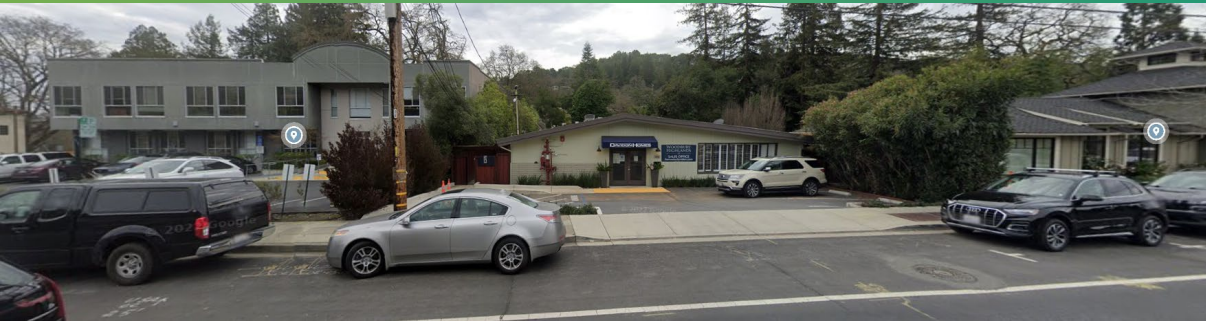
Nassiri v. City of Lafayette (2024) 103 Cal.App.5th 910

CEQA Infill Exemption Refresher:

Pub. Res. Code Section 15332 exempts projects that **(a)** are consistent with the general plan and zoning designations and regulations; **(b)** are within city limits on a project site of no more than five acres substantially surrounded by urban uses; **(c)** are on a site with no habitats for endangered, rare or threatened species; **(d)** would not result in any significant effects relating to traffic, noise, air quality, or water quality; and **(e)** can be adequately served by utilities and public services.

Background:

- Project involved demolition of a vacant building and construction of a 12-unit condo complex.
- After Planning Commission, Design Review, and City Council hearings, the City Council approved the Project and determined that the Project was exempt from CEQA under Guidelines section 15332.



Litigation:

- Neighbor (adjacent office building owner) retained an expert who submitted comments throughout the hearing process to argue that the project was not exempt due to presence of special status species.
- The City concluded that neighbor had not provided substantial evidence to support his claim.
- Trial court denied the writ petition.
- Court of Appeal affirmed the trial court's decision, finding that City demonstrated substantial evidence to support infill exemption.

Takeaway/Practice Tip:

- Always confirm that the administrative record contains substantive responses to retained experts.
- The court will defer to the city's determinations as long as they are based on substantial evidence.

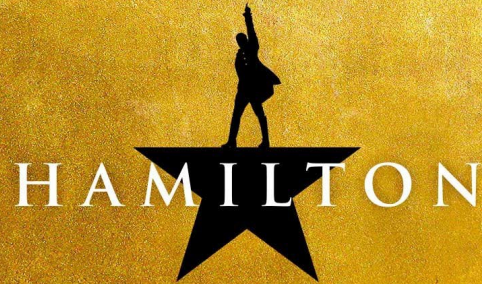


***Westside Los Angeles Neighbors Network v. City of
Los Angeles
(2024) 104 Cal.App.5th 223***

CEQA Refresher:

- PRC section 21151(c): “If a nonelected decisionmaking body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to this division, that certification, approval, or determination may be appealed to the agency's elected decisionmaking body, if any.”
- CEQA Guidelines section 15352: a project approval is the public agency’s decision that “commits [it] to a definite course of action in regard to a project.”

THE ROOM WHERE IT HAPPENS



Background:

Short version: City certified an EIR for its Westside Mobility Plan (which included several components, including a Fee Program Update) and also determined that the Fee Program Update component of the Plan was exempt from CEQA. Trial court denied writ petition alleging Planning Commission could not certify the EIR.

Holding:

- Court of Appeal affirmed the trial court decision and held that Planning Commission was a “decision-making body” under CEQA.
- The Planning Commission had the authority to adopt the Streetscape Plan and commit to a “definite course of action,” so it was authorized to certify the EIR and “approve” the overall project despite the additional discretionary approval needed by the City Council to adopt the Fee Program Updates

Practice Tip:

In certain circumstances, a Planning Commission may be a “decision-making body” that can approve a project and certify an EIR. But note that many cities have local rules and regulations that would prohibit this practice.

Center for Biological Diversity v. County of San Benito

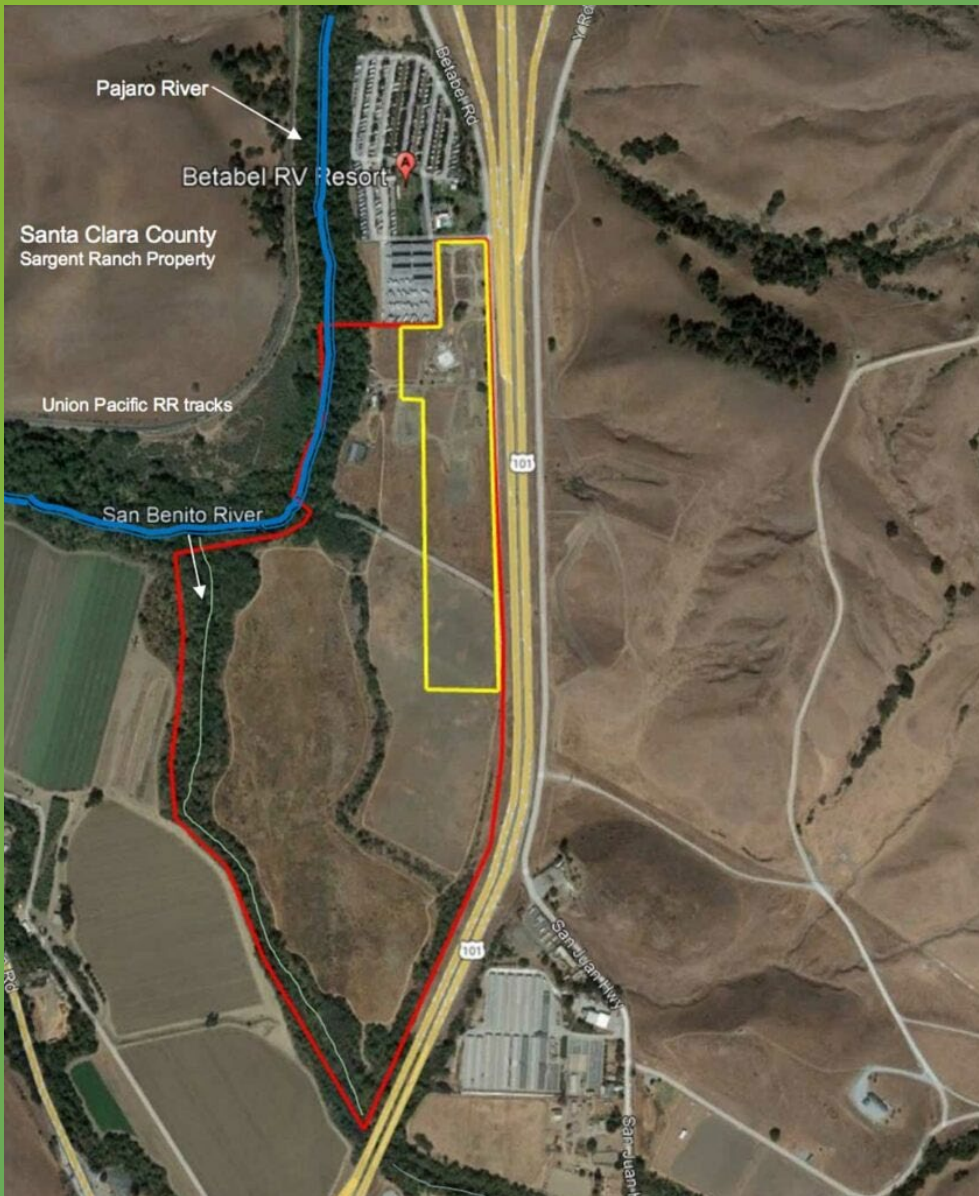
(2024) 104 Cal.App.5th 22

CEQA Refresher:

- Under Pub. Res. Code section 21152, the local agency shall file a notice of determination (NOD) within **five working days** after approving or determining to carry out a project.
- Under Pub. Res. Code section 21167(c), any challenge to an EIR must be commenced within **30 days** of the NOD filing.

Background:

- Planning Commission certified an EIR and approved a 26-acre mixed-use roadside development project on October 12, 2022, then filed NOD on October 14, 2022.
- Mutsun Tribe and Center for Biological Diversity appealed the decision to the Board of Supervisors which upheld the PC action on November 8, 2022.
- County filed a second NOD on November 10, 2022.



Project includes: gas station, convenience store, restaurant, amusement buildings and exhibits, motel, banquet hall, outdoor pool and movie screen, and outdoor event center.

Trial Court

- Tribe and CBD filed separate writ petitions alleging EIR deficiencies on December 9, 2022.
- Real Parties and County filed a demurrer stating that the petitions were time-barred under Pub. Res. Code section 21167(c) because they were filed more than 30 days after the first NOD was filed on October 14, 2022.
- Trial court agreed with the Real Parties and County.

Court of Appeal:

- Reversed trial court's decision.
- Held that CEQA requires the local agency to file a NOD "within five working days after the approval or determination becomes final." (Pub. Res. Code § 21152(a).)
- Since the County Code set forth an appeal process, the project approval was not final until the Board of Supervisors made its decision on the appeal on November 8, 2022, and thus the second NOD started the statute of limitations.

Practice Tip:

As always, file NODs (and NOEs) early and often!

***Upland Community First v. City of Upland*
(2024) --- Cal.Rptr.3d ----2024 WL
4182599**

THRESHOLDS



Background:

- City of Upland approved a Mitigated Negative Declaration for a 201,096 square-foot “warehouse/parcel delivery service building” project to be located on 50.25 acres near a local airport.
- City used two quantitative thresholds of significance for measuring the project's cumulative impacts on GHG emissions: (1) a threshold of 10,000 metric tons of carbon dioxide equivalent per year (MTCO₂ e/yr.), and (2) a lower threshold of 3,000 MTCO₂ e/yr. in a supplemental GHG analysis prepared in response to comments on the draft MND.

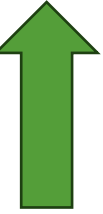
Trial Court:

- Citizen group sued City and claimed that claimed the project violated CEQA because a fair argument could be made that the project would have significant greenhouse gas (GHG) emissions impacts as well as impacts related to traffic and air quality.
- They argued that the lower threshold was appropriate for the project because it was a mixed-used commercial/industrial project with primary mobile-source GHG emissions.
- The trial court ordered the City to set aside its resolutions approving the MND and the Project, solely “for the purpose of addressing the sufficiency of evidence supporting the City's threshold of significance for GHG emissions under CEQA.”

LOW THRESHOLD?



HIGH THRESHOLD?

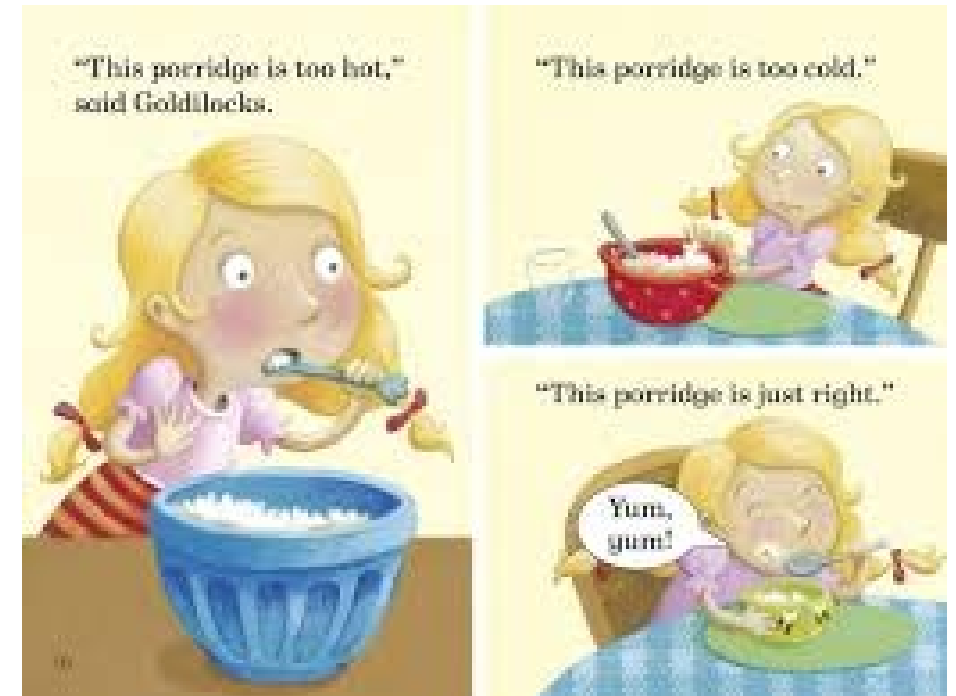


Court of Appeal:

- The Court of Appeal held that substantial evidence supported the City's finding that the Project would not have significant impacts on GHG emissions.
- Substantial evidence supported the City's use of the 3,000 threshold for measuring the significance of the project's impacts on GHG emissions, and demonstrated that the Project's GHG emissions would be below the 3,000 threshold.
- Finally, the court concluded that due to this evidence, it would not reach the question of the Project's compliance with the 10,000 threshold.

Practice Tips:

- Thorough responses to MND comments and bolstering the MND record can help the document withstand scrutiny.
- A threshold can survive the Goldilocks dilemma as long as it is supported by substantial evidence.
- Beware that this case was focused on the MND's thresholds of significance rather than actual impacts; remain skeptical of using MNDs when a scoped EIR might be the more "bulletproof" CEQA document option.



A thin, vertical green line runs along the left edge of the slide.

QUESTIONS?

The background features a dark blue gradient with faint, light blue geometric patterns. These include several concentric circles of varying sizes, some with dashed outlines and arrows indicating a clockwise direction. A large circular scale with degree markings (40, 150, 160, 170, 180, 190, 210, 220, 230, 240, 250, 260) is visible on the left side, intersected by a diagonal dotted line.

LAND USE LITIGATION UPDATE, FALL 2024

JOHN M. LUEBBERKE

OF COUNSEL

HERUM CRABTREE SUNTAG

SHEETZ V. COUNTY OF EL DORADO

The Court held that exactions approved legislatively (generally applicable impact fees) are subject to the rigorous Nollan and Dolan standard.

SACKETT V. EPA

The Supreme Court narrowed federal jurisdiction over “waters of the United States.” However because state jurisdiction remains broad, it remains to be seen what practical changes (if any) the ruling will have in California.

REGENTS V. SUPERIOR COURT (PARNASSUS NEIGHBORHOOD COALITION)

The Regents retained their exemption from local zoning regulations despite their being a substantial proprietary element to a large new hospital project.

MOVE EDEN HOUSING V. CITY OF LIVERMORE

A referendum will lie to challenge a legislative act, even when it is only part of a more comprehensive set of actions that might include some approvals of an administrative character.

FIX THE CITY, INC. V. CITY OF LOS ANGELES

A legal challenge filed against one legislative action will not relate back to include a subsequent legislative action even though the two actions share a common factual basis. Compliance with the applicable statute of limitations must be shown as to each legislative act being challenged.

AIDS HEALTHCARE FOUNDATION V. BONTA

Under SB 10 local governments can override density caps established through local initiative in order to further the production of fair housing.

MOJAVE PISTACHIO, LLC V. SUPERIOR COURT

The “pay first litigate later” rule applies to suits challenging fees charged under SGMA.

DISCOVERY BUILDERS V. CITY OF OAKLAND

Absent a valid Development Agreement, it still may be possible to impose new development impact fees regardless of lesser agreements to the contrary.

.

SNOWBALL WEST INVESTMENTS V. CITY OF LOS ANGELES

In applying Government Code § 65589.5(j)(4), a city's exercise of discretion in defining what zoning designations are "consistent" with the density expectations presented in the General Plan will be respected, even when the result is development only being permitted at a density far below the maximum provided for in the General Plan.

YES IN MY BACK YARD V. CITY OF CULVER CITY

The Housing Crisis Act of 2019 [Gov't Code § 66300, et seq.] will be interpreted broadly and in accord with its stated terms such that new regulations that have the effect of reducing a city's "housing capacity" below that which was possible on January 1, 2018 will not be permissible.

RIDDICK V. CITY OF MALIBU

When a city's interpretation of a provision of its code is contrary to the applicable unambiguous plain language, a court need not defer to the city's interpretation.

PLANNING AND CONSERVATION LEAGUE V. DEPARTMENT OF WATER RESOURCES

The Court of Appeal rejected the petitioners' claims that amendments extending certain State Water Project contracts to 2085 violated the Delta Reform Act or the Public Trust Doctrine.

CAVE LANDING LLC V. CALIFORNIA COASTAL COMMISSION

The court upheld the authority of the California Coastal Commission to decide “de novo”, appeals of coastal development permits.

MARTINEZ V. CITY OF CLOVIS

- 1) HCD determinations are generally given deference, but not when the determinations are unexplained and are not supported by evidence in the record.
- 2) Violations of the duty to affirmatively further fair housing are enforceable by ordinary writ of mandate procedures.

SAN PABLO AVE. GOLDEN GATE IMPROVEMENT ASS'N V. CITY OF OAKLAND

When more than one local code section may appear to apply to a challenge to a staff zoning decision, the procedure (including time limits) will be dictated by the one most directly applicable.

QUESTIONS?

