AGENDA

• GENERAL OBSERVATIONS re CASES
• U.S. & CALIFORNIA SUPREME COURTS
• FEDERAL & STATE CASES
  • CASES RE: PROCESS, PREEMPTION, PRECLUSION & PROJECT OBJECTIVES
  • FACTS IN CASES RE: WATER
City of Austin, Texas v. Reagan National Advertising
(2022) 142 S.Ct. 1464

- Billboard Advertising Case
- City Sign Ordinance:
  On- / Off-Premises Distinctions
  - Off-Premises: Directional & Advertise Things
  - New Signs Prohibited / Grandfather Clause
  - Allowed Digital On-Premises / Not Off-Premises
- First Amendment Free Speech Challenge / Content-Based Ordinance
- Supreme Court (6-3): Sign Regulations NOT Automatically Content-Based
City of Austin, Texas v. Reagan National Advertising
(continued)

- Sotomayor, J., for the Majority:
  - Relied on Reed v. Town of Gilbert (2015) 576 U.S. 155
  - Defined “Content-based” Regulations under Reed = Topic Discussed or Idea or Message Expressed
  - No Singling Out Topic or Subject Matter
- Thomas, J., for the Dissent:
  - Majority Misinterpreted the Rule from Reed
- Breyer Concurrence / Alito Concurrence & Dissent
- Take Aways: Future First Amendment Sign Cases May Narrowly Define Issue on Review / Here: Less Reliance on Billboards & Commercial Speech Precedent

County of Butte v. Department of Water Resources
(2022) 13 Cal.5th 612, 2022 WL 3023670

- Interplay of Federal Power Act (FPA) & CEQA
- Counties Challenged EIR Prepared by DWR
  - DWR Application for Renewal of Federal License
  - Operation of Hydroelectric Projects (Oroville Facilities in Butte & Plumas Counties)
  - Settlement Agreement Reached by DWR per FPA
- Procedural Summary:
  - Superior Court: Judgment for DWR
  - Third District: Dismissed Appeal – Preemption & Premature Claims
  - Supreme Court: Affirmed in Part / Reversed in Part
County of Butte v. Department of Water Resources (continued)

- FPA Does NOT Categorically Preempt CEQA
  - Part of the State Exercise of Authority Over Its Own Political Subdivision’s License Application
  - No Evidence that FPA Categorically Preempted CEQA re: Local Dams and Hydroelectric Plants
- Counties’ Ability to Challenge Settlement Agreement Preempted by FPA
  - Settlement Established DWR’s license from FERC
  - ALP (Settlement Process) Combined One Process for Multiple Jurisdictions & 5-Year Consultation

- Review of EIR NOT Intruding FERC’s Jurisdiction
  - Some Mitigation Measures May Be Preempted If Conflicted with Settlement Agreement (FPA)
  - EIR May Have Mitigation Outside FERC’s Jurisdiction / Thus, CEQA Challenge Possible
- Concurrence in Part / Dissent in Part (Cantil-Sakauye, C.J., & Corrigan, J.)
  - CEQA fully preempted by FPA
  - Concern with CEQA Undermining FPA’s Objectives
- Take Away: Majority Preserved State Law Applicability Given Facts and Federal Law at Issue
Federal & State Cases
CEQA and CEQA-Related

CSWRCB v. FERC
(9th Cir., Aug. 4, 2022) -- F.4th ---, 2022 WL 3094576

- State Water Board/Organizations – Review of FERC orders re Hydroelectric Project
  - FERC Orders: Board waived CWA Authority to Impose Conditions on Fed. Licenses
  - Purported Coordination b/w Board and Operators
  - Pattern/Practice to Withdraw & Resubmitting
- CWA §401: State Water Quality Certification / CEQA Compliance Required
- D.C. Cir.: Hoopa Valley Tribe v. FERC case
- 9th Cir. Here: Project Applicants, not Board, Delayed CEQA review
**Tiburon Open Space Committee v. County of Marin**
(2022) 78 Cal.App.5th 700

- Challenge to Certification of EIR & Residential Project for 110 Acres on Scenic Mountaintop
- Background Facts and History:
  - Martha Company Owned Largest Undeveloped Parcel in County Near Tiburon on S.F. Bay
  - 1974: County Down-Zoned / Reduced Number of Residences from Min. 300 to Max 34 Units
  - Martha Sued in Fed. Court as Regulatory Taking
  - 1976: Stipulated Judgment / Could Develop No Fewer than 43 Single-family on Min. ½-acre Lots
- Martha Applications to County & Tiburon
  - No Final Decisions for Years / Conducting Studies

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**Tiburon Open Space Committee v. County of Marin**
(continued)

- Additional Background and History:
  - 2005: County Sued in Fed. Court for Relief from Stipulated Judgment
  - Environmental Laws Changed in 30 Years
  - Argued Now Clear = County Cannot Contract Away Discretion Land Use Authority w/out CEQA Review
  - Local Property Owners Argued = 1976 Judgment Violated Due Process Rights to Notice & Hearing
  - District Court Dismissed All Claims
  - 2007: Subsequent Stip. Judgment = County Must Approve 43 Homesites / No Mitigation That Makes 43 Homesite-Development Infeasible
Tiburon Open Space Committee v. County of Marin
(continued)

• No County Decision until 2017 Certified EIR
• Property Owner & Private Committee Filed Writ
• Trial Court Denied Writ / First District Affirmed
• Federal Preemption/CEQA Abdication Issues:
  • County’s Compliance with CEQA *Not* Abdicated by Federal Stipulated Judgments
  • One Project with Attending Circumstances
  • County Required To, & Did, Explain Impacts of Project as Subject to Judgments
  • Project Description *Not* Inadequate Even With Reduced Scope of CEQA Discretion

Tiburon Open Space Committee v. County of Marin
(continued)

• Alternatives to Project Issues:
  • County Rejection of 32-Unit Alternative Was Legal and No Abuse of Discretion
  • Inconsistent with Fed. Stipulated Judgments

• Issues re Mitigation Findings:
  • Traffic: Adequately Disclosed and Analyzed
  • BMPs for Ca. Red-Legged Frog Not Improper Deferred Mitigation
  • Water Tank & Fire Flow Analysis Sufficient
  • Temporary Construction Access & Safety Mitigation OK

• Take Aways: No Abdication of CEQA When Project Legally Limited by Federal Stip. Judgments
• First District Unfavorable to Local Agency Opposition
We Advocate Through Environmental Review v. County of Siskiyou
(2022) 78 Cal.App.5th 683

We Advocate Through Environmental Review v. City of Mount Shasta
(2022) 78 Cal.App.5th 629

• Companion Cases in Third District
• Both Reversed/Remanded on CEQA Grounds
• Permit Approvals for Water Bottling Facility (County) and Wastewater Permit (City)
• County – Lead Agency for Certified EIR

We Advocate Through Environmental Review (W.A.T.E.R) Cases (continued)

• CEQA Issues (County Case):
  • Project Description & Objectives Too Narrow
  • Project Alternatives Analysis Deficient
  • EIR Recirculation Required for GHG Impacts
  • Noise Impacts Consistent with County & City Plans
  • Unpublished: Caretaker Residence at Facility

• CEQA Issues (City Case):
  • Omission 2 Letters from A.R. = No Prejudicial Error
  • City Review of County EIR / Violated CEQA Requirements for Responsible Agency
  • No Written Findings re: Mitigation for Wastewater
Save the Hill Group v. City of Livermore
(2022) 76 Cal.App.5th 1092

- Residents Group Challenged Housing Project (Garaventa Hills) Certified Reissued Final EIR
- Trial Court Denied Writ = Failure to Exhaust
- First District Reversed & Remanded
- Exhaustion Issue:
  - Group Challenged Decision on Feasibility of No Project Alternative
  - City Fairly Apprised This Was an Issue
- First District Proceeded to Review the Merits

Save the Hill Group v. City of Livermore
(continued)

- No Project Alternative Analysis
  - Evidence Supports Information Withheld Supported No Project Alternative (Basis for Reversal)
  - Availability of Funding for Conservation
  - Two Settlement Agreements with City as Party
    - Dougherty Valley Settlement Agreement
    - Altamont Landfill Settlement Agreement
- Wetland Habitat Analysis
  - Impact to Vernal Pool Fairy Shrimp
  - Evidence Supported Mitigation Measures Approved
Save the Hill Group v. City of Livermore  
(continued)

- Hydrology Analysis
  - Impact to Springtown Alkali Sink
  - Environmentally Sensitive Landform Downstream
  - Expert Evidence Supported City’s Decision
  - No Significant Impact
- Non-Compliance with Settlement Agreements
  - Raised by Group on Appeal for First Time
  - City’s Alleged Noncompliance
  - Lacked Standing as Group is Non-party
  - Ruled Against Group on this Issue
- Take Away: Disclose & Analyze Information re: Available Conservation Funding from Settlements

Department of Water Resources  
Environmental Impact Cases  
(2022) 79 Cal.App.5th 556

- Multiple Agencies (including Cities) & Organizations Appealed Dismissals of CCP §1021.5 Attorney’s Fees Motions
- Factual and Procedural Background:
  - Water Project / Diversion from Sacramento Delta
  - Plaintiffs Challenged DWR’s EIR Certification & Project Approval for 2 Fresh Water Tunnels
  - Plaintiffs Also Opposed DWR’s Validation Action for Debt Financing of Project
  - Plaintiffs’ Relief Specifically Sought = Decertify EIR & Suspend Project
Department of Water Resources
Environmental Impact Cases
(continued)

• DWR Decertified EIR & Rescinded Project / Trial Court then Dismissed All Pending Actions
• Trial Court Decision on §1021.5 Motions
  • Lawsuits were “a” Factor, Not “the” Factor for DWR Reversal of Project Approval and Decertifying EIR
  • Governor Announced No Support for 2 Tunnel Project
  • Directed DWR for 1 Tunnel Conveyance
  • External, Superseding Cause for DWR Action
  • Dismissed Motions

Department of Water Resources
Environmental Impact Cases
(continued)

• Third District Reversed & Remanded Agreed with Most Trial Court Rulings, but...
  • Reversible Error = Governor’s Policy Directive as External, Superseding Cause
  • Evidence Lawsuit May Have Influenced Governor
  • Reversible Error = Assuming DWR Would Rescind Project & Decertify EIR with Governor’s Directive
  • Notable Fact: DWR Attorney Advised DWR Could Issue a Subsequent or Supplemental EIR as Alternative

  • Take Away: Case Is Double-edged Sword: Attorney’s Fees Possible but State’s (Public Agency’s) Public Statements Harmed Defenses of §1021.5 Motions
Committee for Sound Water and Land Development v. City of Seaside  
(2022) 79 Cal.App.5th 389

- Nonprofit Challenge to Certified EIR & Project for Fort Ord Military Base Reuse
- City Demur = Sham Pleading & Laches
- RPI Demur = Limitations & Mootness
- Trial Court Sustained / Sixth District Affirmed (RPI)

Issues:
- Judicial Council’s COVID CEQA Limitations Extensions
- Fort Ord Reuse Auth. Dissolution

Take Away: Published Opinion for CEQA COVID Extensions & Affirming “Unusually Short” Periods

Federal & State Cases
Land Use and Land Use-Related
Seider as Trustee of Seider Family Trust v. City of Malibu

(9th Cir., June 1, 2022, No. 21-55293) -- F.4th ---, 2022 WL 1769793

- Constitutional Challenge to City’s Local Implementation Plan (LIP) Per Coastal Act
  - Forbids Signs Identifying Boundary for Tidelines & Private Property, and Criteria Applied
  - Requiring Applicant Agree to Indemnify City

- District Court:
  - Dismissed Sign-Related Claims for Failure to Join Coastal Commission as Necessary Party
  - Dismissed Indemnification Claims as Not Ripe

Seider as Trustee of Seider Family Trust v. City of Malibu

(continued)

- 9th Cir. Affirmed in Part / Reversed in Part:
  - Memorandum Opinion from Panel
  - Affirmed Dismissal of Indemnity Claims
  - Remanded for Necessary Party Claims / Coastal Commission Required to be Joined by District Court (Fed. Rule Civ. Proc. 19(A))
  - Commission Has Primary Permitting Authority

- Dissenting Opinion:
  - Remand to Address if City Had Original Permitting Authority per LIP
**Keen v. City of Manhattan Beach**  
(2022) 77 Cal.App.5th 14

- Case re: Short-Term Rentals (STRs) & Zone Code Amendments for City in Coastal Zone
- Trial Court Enjoined Ban on STRs Pending Approval by Coastal Commission
- Second District Affirmed:
  - Residential Zone Ordinances Always Permitted Short- and Long-term Rentals
  - Ban on STRs = Amendment to Local Coastal Program (LCP) = Coastal Comm. Approval Needed
  - STRs ≠ “hotels, motels, and time-share facilities”
  - No Judicial Notice of Decades-old “hotel” Definition

**Reznitskiy v. County of Marin**  
(2022) 79 Cal.App.5th 1016

- HAA Case: Builders of Single-family Residence Challenged County Denial of Project
  - Plaintiffs Applied for Single-family home w/ ADU
  - Originally Over 5,000sq.ft. / Reduced under 4,000
- Procedure:
  - Planning Div. Approved with Reduced sq.ft.
  - Admin. Appeal to Planning Comm. = Denied Project
  - Board of Sups. = Affirmed Plan. Comm. / Denied Project
- First District / Matter of First Impression
  - “Housing Development Project” under HAA
  - *Group* of Housing Units / NOT Single-Family Home
AIDS Healthcare Foundation v. City of Los Angeles
(2022) 78 Cal.App.5th 167

- Writ to Set Aside Mixed-Use Project Approval
- Alleged Noncompliance w/ 15% Set Aside
  - Low- and Moderate-income “Inclusionary” Requirement from Community Redevelopment Law
  - Both in Hollywood Redevelop. Plan and CRL
- Writ Denied / Second District Affirmed
- CRL Rendered Inoperative w/ Dissolution
  - H&S Code §§33131(a) & 33670(a), (b)=Inoperative
  - Even Assuming RDA Plan Still Valid, 15% Set Aside Requirement in the Aggregate / Not Each Project

City of Coronado v. San Diego Association of Governments
(2022) 80 Cal.App.5th 21

- Cities challenged SANDAG’s Decisions on Admin. Appeal under the RHNA Process
  - Legislature Enacted RHNA Procedure
  - Regional COGs Allocate Housing Needs
- Cities Challenged SANDAG’s “Weighted Vote”
  - Jurisdictions Cast Votes based on Populations
  - Not “one jurisdiction-one vote”
  - SANDAG Acted “Quasi-Judicial Capacity” / Use of Weighted Voting Violated Procedural Due Process
- Demurrer Sustained / Affirmed on Appeal
- City of Irvine case = Judicial Review Precluded
Parkford Owners for a Better Community v. Windeshausen
(2022) 81 Cal.App.5th 216

- Community Organization Challenged County's Issuance of Business License for Self-storage Facility
- Claims Involved CEQA and Statute of Limitations Issues
- Lower Court Stayed Case Pending Appeal on Related Building Permit Challenge (CEQA & Planning/Zoning Law)
  - Appeal There Dismissed as Moot – Building Permit Ministerial
  - Completion of Self-storage Prior to Entry of Judgment Rendered that Case Moot
  - Trial Court then Granted Motion for Judgment on Pleadings based on Res Judicata
- Third District Here: Reversed and Remanded
- Prior Appeal Decision Not a Final Judgment “On The Merits” for Purposes of Issue and Claim Preclusion
- Prior Case Decided Solely on Mootness / No Res Judicata

Federal Cases Federal Environmental Review Laws
California River Watch v. City of Vacaville
(9th Cir. 2022) 39 F.4th 624

• RCRA Case
• Alleged City Generate/Transport Chromium Thru Potable Water System
  • 1972 to 1982, Companies Operated Wood Treatment Facilities in Community Next to City
  • Waste Products Contained Chromium
• Summary Judgment Granted / 9th Cir. Affirmed
• No Direct Connection-City Movement of Chromium and City Waste Disposal Process
• No “Transporting” under RCRA
• Concurrence: Absurdity Canon Should Be Applied

Environmental Defense Center v. Bureau of Ocean Management
(9th Cir. 2022) 36 F.4th 850

• Organizations/State/Coastal Commission Sued Federal Bureaus on Multiple Claims
• Fundamental Issue: Fed. Gov. Authority for Offshore “Fracking”
  • (1) Final Agency Action Under the APA
  • (2) Ripeness of Procedural Challenge
  • (3) Nat. Environmental Policy Act (NEPA)
  • (4) Endangered Species Act (ESA)
  • (5) Coastal Zone Management Act (CZMA)
San Francisco Herring Association v. U.S. Department of the Interior
(9th Cir. 2022) 33 F.4th 1146

- Association Sued U.S. Interior Department & National Park Service Park Service
- Challenged Park Service’s Authority to Prohibit Commercial Herring Fishing in Golden Gate National Recreation Area
- Procedurally: Multiple Appeals
- At Issue: Scope of Park Service Authority under 1916 Organic Act in Navigable Waters
- 9th Cir. Here: Park Service Has Authority

Questions?