Land Use and CEQA Litigation Update

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Land Use Update

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LAND USE UPDATE

***Cox v. City of Oakland* (2025) 17 Cal.5th 362**

Takeaway: Where lots were separately described in a conveyance (e.g., by lot number or metes and bounds description), but conveyed together and without formal action to subdivide, the lots have not been legally subdivided into separate legal parcels—including by conveyances that predate March 4, 1972 amendments to the Subdivision Map Act that imposed parcel map requirements to divide land into fewer than five parcels.

Facts: Three adjacent lots—lots 16, 17, and 18—were described in legal descriptions on deeds conveying land prior to March 4, 1972. The lots were never formally subdivided from each other or a larger parcel under state or local law. Lot 16 was conveyed separately from lots 17 and 18, but lots 17 and 18 were always conveyed together.

The owner of lots 17 and 18 claimed that the two were separate legal parcels because they were separately described in the documents conveying them. The City of Oakland claimed that lots 17 and 18 constitute one legal parcel because they were never separately conveyed and were never otherwise subdivided.

The Superior Court agreed with the City of Oakland; the Court of Appeal agreed with the owner; the California Supreme Court agreed with the City of Oakland.

Analysis & Holdings:

1. Subdivision Map Act ("SMA") basics:

    a. SMA requires local governmental approval before a property owner can subdivide real property.

    b. The SMA prohibits the sale, lease, or financing of a parcel until an approved subdivision map is recorded.

    c. Prior to March 4, 1972, "[t]he filing of such a map was formerly only required when dividing land into five or more parcels during a one-year period."

    d. Since March 4, 1972, the SMA requires the filing of a "parcel map" to divide land into fewer than five parcels.

    e. However, Government Code section 66412.6(a) allows the "creation" of a parcel to be satisfied by conveyances from a grantor to a grantee at common law, prior to March 4, 1972, if there was no local ordinance in effect that regulated divisions of land creating fewer than five parcels.

2. Previously, the Supreme Court held that an antiquated subdivision map, recorded prior to March 4, 1972 (there, in 1865), did not constitute a legal

subdivision under the SMA, irrespective of accuracy, unless the owner had separately conveyed a lot described on the antiquated map. (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990.)

3. In *Cox*, the Court clarified and confirmed that pre-March 4, 1972 documents referencing separate lots—whether by lot number or metes and bounds—do not create separate legal parcels unless the lot was conveyed separately from adjacent lots prior to March 4, 1972, and there was no local ordinance in effect that regulated divisions of land creating fewer than five parcels.

***Carmichael v. Cafe Sevilla of Riverside, Inc.* (2025) 108 Cal.App.5th 292**

Takeaway: A Conditional Use Permit is not a statute, ordinance, or regulation.

Facts: A nightclub hosted a rap concert featuring performers from rival gangs. Violence broke out during the show, and multiple people were shot. Plaintiffs asserted the nightclub owners were negligent per se by failing to comply with their Conditional Use Permit.

The terms of the Conditional Use Permit required the nightclub to take steps to avoid becoming “detrimental to the public health, welfare or materially injurious to public safety, property or improvements in the vicinity,” and to prevent the property from being “operated or maintained so as to constitute a public nuisance.”

Plaintiffs asserted that by hosting the rap concert, the nightclub violated the terms of its Conditional Use Permit and thereby acted negligently per se. The trial court entered judgment for the nightclub defendants as a matter of law, ruling that “Plaintiffs have failed to establish that a conditional use permit is a statute, ordinance or regulation, which is one of the elements of a negligence per se cause of action.” The Court of Appeal affirmed.

Analysis & Holdings: Hosting the rap concert did not constitute negligence per se because the Conditional Use Permit was not a statute, ordinance or regulation, and was intended to protect the surrounding communities, not the permittee’s patrons.

1. Negligence per se requires violation of a statute, ordinance, or regulation. Plaintiffs argued that the term “statute, ordinance, or regulation [. . .] is interpreted broadly” and should include conditional use permits. The Court ruled that a conditional use permit is not a statute, ordinance, or regulation. Thus, a violation of the conditional use permit did not satisfy a required element of negligence per se.

2. Negligence per se requires that the injuries were “of the precise nature the [statute that was violated] was designed to prevent.” Here, the terms of the Conditional Use Permit were designed to prevent the club from becoming a public nuisance, meaning detrimental to the public health and wellbeing of neighbors and the surrounding community. The purpose of the terms of the

Conditional Use Permit was not to protect nightclub attendees. Thus, plaintiffs could not satisfy a second required element of negligence per se.

***Meinhardt v. City of Sunnyvale* (2024) 16 Cal.5th 643**

Takeaway: The Court established a bright line rule that the filing of a formal judgment is required to trigger the deadline to appeal a decision in an administrative mandate proceeding, and that the filing of a dispositive order on the merits does not start the clock.

Facts: The superior court filed and served a dispositive order denying the petition for writ of administrative mandate. The court subsequently executed and entered the parties' proposed judgment. Petitioner appealed within the statutory time limit if measured from service of notice of entry judgment, but not if measured from the service of notice of the dispositive order on the merits.

The question for the court was whether a document other than the document titled "judgment" can constitute a judgment for the purposes of calculating the statutory deadline to appeal.

Analysis & Holdings: The notice of entry of the judgment triggered the deadline to appeal, not the notice of entry of the order, notwithstanding that the order was a final, dispositive decision on the merits of the case.

1. Previously, the Supreme Court ruled that a dispositive decision on a writ of mandate claim is not appealable if there are other pending causes of action pending in the case. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 732.) After that decision, the courts of appeal were split about whether a dispositive decision on a writ of mandate claim was itself an appealable judgment where there were no other causes of action pending, or whether a formal judgment is required to start the clock.

2. *Meinhardt* creates a bright line rule that a formal judgment is required to trigger the deadline to appeal.

***Thomas v. County of Humboldt* (9th Cir. 2024) 124 F.4th 1179**

Takeaway: Imposing very high fines for zoning code violations may violate the Excessive Fines Clause of the Eighth Amendment of the U.S. Constitution.

Facts: The Humboldt County Code authorized daily fines of $6,000 to $10,000 for violations of local planning and zoning laws that involve the illegal cultivation of cannabis. If the County determined that a violation had occurred, the County would issue a notice of violation ("NOV") with a "description of the specific acts or omissions that gave rise to the violation." For cannabis-related violations, fines began accruing on the date of service of the NOV, and the deadline to appeal the NOV was only 10 days. Even during an appeal, fines continued to accrue, up to a maximum of 90 days.

Plaintiffs alleged that Humboldt County was issuing NOVs based on (1) imprecise images taken from satellites or drones without reasonable suspicion or any further investigation, and (2) the conduct of previous owners, which ceased before Plaintiffs purchased their respective properties. Plaintiffs also alleged that the County's penalty scheme created "immediate costs and immense pressure to settle due to the County's issuance of ruinous fines unsupported by any legitimate governmental interest, its refusal to drop baseless charges, its undue delay in providing hearings, its denial of permits while abatements are pending, and the cost the County imposes to prove one's innocence," all in violation of the Excessive Fines Clause of the Eighth Amendment of the U.S. Constitution.

The case worked its way to the Ninth Circuit after various lower court rulings on procedural matters that avoided addressing the case on the merits.

Analysis & Holdings: Plaintiffs alleged a plausible claim for relief under the Excessive Fines Clause.

1. The government cannot overstep its authority and impose fines on its citizens without paying heed to the limits posed by the Eighth Amendment.

2. The protections of the Excessive Fines Clause apply to local penalties, fines, and fees. "To determine whether a fine is grossly disproportional to the underlying offense, four factors are considered: (1) the nature and extent of the underlying offense; (2) whether the underlying offense related to other illegal activities; (3) whether other penalties may be imposed for the offense; and (4) the extent of the harm caused by the offense."

3. A two-year statute of limitations applies to Section 1983 claims alleged against California government defendants.

4. Because Plaintiffs timely alleged a plausible claim pursuant to the four-factor test, the Ninth Circuit reversed the District Court's dismissal of Plaintiffs' Eighth Amendment claim and remanded for further proceedings.

***California Resources Production Corporation v. City of Antioch* (2024) 107 Cal.App.5th 481**

Takeaway: It is not a violation of a franchisee's civil rights or the Franchise Act of 1937 for a municipality to decline to extend the term of a franchise agreement by which the franchisee has installed oil, gas, electric, or water pipeline utilities within the city's public right-of-way. In the unpublished portion of the decision, the Court also held that it is not a taking to decline to extend a franchise, unlawful extraterritorial action, or preempted.

Facts: Petitioner owned and operated a pipeline through which it transported natural gas from four gas fields to a transfer station in Contra Costa County. An 8.5-mile segment of the pipeline was located within the City of Antioch's public right-of-way.

In January 1991, the City Council approved an ordinance granting a 25-year franchise for the 8.5-mile segment of the pipeline until February 2016. In February 2016, Petitioner applied for and received a five-year extension, through February 2021. In February 2021, Petitioner applied for a 10-year extension, through February 2031. In September 2021, however, following a public hearing, the City Council voted not to extend the franchise.

Petitioners alleged various cases of action, including a regulatory taking claim, an equal protection claim, a preemption claim, and a claim that the City violated its ministerial duties under the Franchise Act of 1937. In the published portion of the decision, the Court of Appeal affirmed the Superior Court's decisions as to the equal protection and writ of mandate claims. In the unpublished portion of the decision, the Court of Appeal affirmed the Superior Court's decision on the taking, extraterritorial action, and preemption claims.

Analysis & Holdings:

1. A franchise is a privilege conferred to a third party for use of the government's property. Under the Franchise Act of 1937 (Pub. Util. Code §6201 et seq.), a municipality's legislative body may grant a franchise permitting a third party to install oil, gas, electric, or water utilities in the public rights-of-way.

2. Petitioner Failed to Plead an Equal Protection Violation:

    a. Standard: A plaintiff who seeks to plead a "class of one" equal protection claim must make a prima facie showing that it is identical to similarly situated persons in all relevant respects, without distinguishing or mitigating circumstances that would render comparisons inutile. The plaintiff must also show that the government intentionally singled out the plaintiff on an irrational basis.

    b. The equal protection claim failed because Petitioner failed to plead facts showing not the existence of a similarly situated franchisee who was similar to Petitioner in all relevant respects.

3. Petitioner Failed to Plead a Franchise Act Violation:

    a. A city council's decision on whether to grant or extend a franchise is legislative, which is subject to review by petition for traditional mandate under Code of Civil Procedure section 1085.

    b. Section 1985 does not require a public agency to make findings to support its legislative or quasi-legislative decision.

    c. The motivations and thought processes of individual councilmembers are irrelevant to the legality of a legislative or quasi-legislative decision.

d. The Franchise Act required the City Council to “hear and pass upon” public comment, but does not require it to make findings regarding those public comments. “Absent factual allegations to the contrary, the City Council is entitled to a presumption that it determined the merits of the protests before denying the application.” Nor did the Franchise Act require the City Council’s decision to explain its rationale with specificity, so as to show it properly exercised its discretion.

e. Petitioner failed to plead facts to show the City violated a ministerial duty by not making findings or that it acted arbitrarily and irrationally by denying the extension such that it abused its discretion.

4. Unpublished Portion of the Opinion:

   a. The regulatory taking claim failed because there was no property right to be taken. Had the City rescinded the franchise before it expired, the City might have inversely condemned a Petitioner’s property rights. But the franchise had expired, so there was no property right to be taken.

   b. The extraterritoriality claim failed because the City’s denial of the franchise was not a regulation on activities in extraterritorial jurisdictions, but an “incidental impact” of the City’s valid contracting powers.

   c. The preemption claim failed because the City did not take any regulatory action that could be preempted; the denial of the franchise application did not regulate or attempt to regulate natural gas usage or pipeline safety in any manner.

***Santa Clarita Organization for Planning v. County of Los Angeles* (2024) 105 Cal.App.5th 1143**

Takeaway: The 90-day statute of limitations of the Subdivision Map Act (“SMA”) applies to claims that could be brought under the SMA, including some CEQA-related claims, but not to claims that are exclusively CEQA-related.

Facts: Los Angeles County approved a conditional use permit, an oak tree permit, and a vesting tentative tract map for a proposed residential housing development in an unincorporated area of the Santa Clarita Valley. Petitioner filed a suit challenging the approvals on grounds that the approvals violated the SMA and CEQA. Petitioner filed but did not serve the County within 90 days.

The County claimed that the entire suit was barred by the statute of limitations contained in the SMA. Petitioners claimed that their CEQA claims were not subject to the SMA’s statute of limitations, and timely commenced under CEQA’s statute of limitations.

Analysis & Holdings:

1. The SMA's statute of limitations requires a plaintiff to file *and* serve a complaint and summons within 90 days. (Gov. Code § 66499.37.) "The SMA limitations period applies to any action that arises from or involves a controversy under the SMA or challenges a condition imposed as part of an approval of a subdivision or tentative or final map under the SMA, regardless of the form of the action" (e.g., whether petition for writ of mandate or inverse condemnation claim). Thus, to the extent that Petitioners' challenged the reasonableness of conditions of approval that attached to the subdivision map approval, including conditions to mitigate environmental impacts, the claim was barred by Petitioners' failure to serve within 90 days.

2. However, the SMA's statute of limitations does not bar CEQA claims to the extent a petition alleges violations of CEQA that are unique to CEQA and cannot be brought under the SMA, such as procedural violations of CEQA and failure to adequately analyze environmental impacts.

Yes In My Back Yard v. City of Culver City **(2023) 96 Cal.App.5th 1103**

Takeaway: A reduction in the allowable square footage for new homes in single-family residential zones violates the Housing Crisis Act of 2019 (SB 330) (Gov. Code § 66300 et seq.).

Facts: In July 2020, the City of Culver City adopted an ordinance reducing the allowable floor area ratio (FAR) for primary residences in single-family residential zones. The City passed the ordinance in an effort to prevent "mansionization" in residential neighborhoods, for the explicit purpose of reducing the overall square footage of new residences.

Petitioner sought a writ of mandate commanding the City to repeal the ordinance. Petitioner claimed that the ordinance conflicted with provisions of the Housing Crisis Act of 2019 (SB 330) that restrict the authority of most cities to re-designate or rezone parcels to a "less intensive use" or reduce "the intensity of land use" that has been allowed since January 1, 2018, within an existing land use designation or zoning district.

Analysis & Holdings:

1. The Housing Crisis Act of 2019 (SB 330) unambiguously prohibits cities from reducing the allowed FAR for new residences in single-family residential zones. (Gov. Code § 66300.)

    a. The prohibition on "reducing the intensity of land use" expressly includes "reductions to height, density, *or floor area ratio*."

    b. The legislative history is consistent with the Court's interpretation of the express language of the statute.

2. The ordinance was not exempt from the Housing Crisis Act.

a. Subdivision (j) of Section 66300 exempts “a development policy, standard, or condition that is intended to preserve or facilitate the production of housing for lower[-]income households … or housing types that traditionally serve lower[-]income households, including mobilehome parks, single-room occupancy units, or units subject to any form of rent or price control through a public entity's valid exercise of its police power.”

b. The Court rejected the City’s contention that reduction in the maximum FAR was exempt from the Housing Crisis Act based on the City’s theory that it would facilitate development of more affordable housing and/or accessory dwelling units.

***Casa Mira Homeowners Assn. v. California Coastal Commission* (2024) 107 Cal.App.5th 370**

Takeaway: The term "existing structures" in the context of the California Coastal Act refers to structures that existed before the Act's effective date of January 1, 1977, not structures existing at the time of submission of a coastal development permit.

Facts: Petitioner applied for a coastal development permit to construct a 257-foot seawall to protect a condominium complex, sewer line, apartment building, and a segment of the Coastal Trail in Half Moon Bay from erosion. The California Coastal Commission (“CCC”) denied the permit for the condominiums and sewer line, built in 1984, but approved a 50-foot seawall for the apartment building, built in 1972, but denied a permit to extend the seawall to protect the Coastal Trial, in part based on its determination that moving the Coastal Trail inland was a feasible alternative to armoring.

The San Mateo County Superior Court granted Petitioner’s petition for a writ of mandate, concluding that the term "existing structures" in the Coastal Act referred to structures existing at the time of the seawall application, thus entitling the condominiums and sewer line to protection. The Court also found that the CCC lacked substantial evidence to support its decision not to allow the extension of the seawall to protect the Coastal Trail.

The CCC appealed and argued that “existing structures” means structures that existed before the effective date of the Coastal Act. The Court of Appeal agreed, reversing the Superior Court and upholding the CCC’s denial of a permit for a seawall to protect structures built after 1976. The CCC also argued that substantial evidence supported its decision not to permit the seawall extension to protect the Coastal Trail. The Court of Appeal disagreed, affirming the Superior Court on this issue.

Analysis & Holdings:

1. "Existing structures" in the context of the Coastal Act refers to structures that existed before the Act's effective date of January 1, 1977. Thus, Petitioner was

not entitled to a permit to construct a seawall to protect structures built after 1977, e.g., condominiums and a sewer line.

2. However, substantial evidence did not support the CCC's determination that armoring was not permitted to protect the Coastal Trial.

***Humboldt Alliance for Responsible Planning v. California Coastal Commission* (2024) 107 Cal.App.5th 704**

Takeaway: The California Coastal Commission has a degree of regulatory authority over certain Indian Tribe projects in the Coastal Zone.

Facts: The Cher-Ae Heights Indian Community of Trinidad Rancheria ("Tribe") owns approximately 46.5 acres of land east of the City of Trinidad. The Bureau of Indian Affairs ("BIA") holds the land in trust for the Tribe. The Tribe wanted to build a five-story hotel on the land, next to its existing casino.

In February 2019, the BIA submitted a consistency determination letter to the California Coastal Commission ("CCC"). The BIA determined that the proposed project was consistent with the California Coastal Act and requested that the CCC concur with its determination. After much back and forth, the CCC conditionally concurred with the consistency determination, with the condition that the BIA provide evidence of an adequate water supply before starting construction.

Petitioner filed an administrative mandamus petition challenging the CCC's conditional concurrence. Petitioner argued that the conditional concurrence must be set aside because (1) the CCC used the wrong legal standard in approving the visual aspects of the proposed hotel; (2) the CCC failed to state in sufficient detail the basis for its rejection of its staff's recommendation regarding the hotel's visual impacts; (3) the CCC improperly relied on the environmental justice policy and the doctrine of tribal sovereignty; (4) the CCC misapplied the law in granting a conditional concurrence; and (5) substantial evidence did not support a finding that the hotel will have adequate fire protection services.

Analysis & Holdings: The CCC did not abuse its discretion in issuing a conditional concurrence (except, in the unpublished portion of the opinion, that there was not sufficient evidence in the record to support a finding of adequate fire protection services for the hotel as required by the Coastal Act).

***Ohio House, LLC v. City of Costa Mesa* (9th Cir., Apr. 24, 2025) __ F.4th __, 2024 WL 5668044 (amended opinion issued on denial of rehearing)**

Takeaway: A city does not violate the federal Fair Housing Act or the state Fair Employment and Housing Act by adopting zoning regulations that except sober-living homes from ban on group homes, but impose location and separation requirements.

Facts: The City of Costa Mesa adopted a zoning ordinance that generally prohibited group living arrangements (e.g., boarding houses) within the City. However, the ordinance contains an exception for group homes serving the disabled and sober-living homes serving recovering addicts (a protected disability under federal and state law). The exception allows small homes (serving six or fewer residents) to operate upon approval of a ministerial special use permit and large homes (serving seven or more residents) upon approval of a conditional use permit. The ordinance requires that sober-living homes be located at least 650 feet apart.

Plaintiff, an operator of sober-living homes, was denied a conditional use permit because it could not satisfy the separation requirement. Plaintiff claimed the zoning ordinance violates the federal Fair Housing Act ("FHA") and the California Fair Employment and Housing Act ("FEHA") by impermissibly discriminating against people with disabilities.

Analysis & Holdings:

1. Where a plaintiff makes a prima facie showing of disparate treatment under the FHA or FEHA, the burden shifts to the government to show the differential treatment benefits the protected class.

2. Plaintiff made prima facie showing of disparate treatment.

3. But the City met its burden to show that the zoning regulations *benefitted* disabled persons.

    a. The City provides better opportunities for group and sober-living homes (for the disabled) than for boarding houses generally. Small and large boarding houses are prohibited in residential zones, but small homes serving the disabled may operate in those zones with a special use permit.

    b. Extra benefits can have strings attached, like separation and CUP or other permit requirements, if, on the whole, it works as a net benefit to disabled individuals.

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CEQA Litigation Update
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Cases Reported from September 1, 2024, through March 15, 2025

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City Attorneys Programming
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A. CEQA Compliance Issues

1. Analysis of Wildfire Risk

People ex rel. Bonta v. County of Lake
(2024) 105 Cal.App.5th 1222 (certified for partial publication)

Nutshell

Environmental Impact Report for a luxury resort development in an isolated unincorporated area found invalid for not adequately analyzing wildfire risks, and the county's belated errata that partially acknowledged the problem only served as evidence the court pointed to as to the EIR's insufficiencies.

Holding

The County's FEIR was defective because substantial evidence did not support the conclusion that less than significant impacts existed regarding the community's ability to evacuate during a wildfire and regarding the increased wildfire ignition risk.

Practice/Litigation Tips

- If the Attorney General's office is bothered enough to challenge the adequacy of your EIR, don't expect the court to show the same level of deference you might normally expect (though in this case, notably, the court rejected the vast majority of petitioners' claims).
- Be wary of relying on the use of an "errata" to an EIR that is released *after* the Final EIR is circulated. While such an errata should be okay to address minor issues, it cannot serve as a cure for a draft EIR's failure to adequately address environmental impacts.
- With respect to wildfire risk, do not try to argue that the development proposal is "self-mitigating." Carefully identify what provisions of the development plan are "mitigation measures" and make sure they are documented as such in the mitigation monitoring and reporting plan.

Summary

In a case with a lengthy factual and procedural background, three petitioners – the Center for Biological Diversity ("CBD"), the California Native Plant Society ("CNPS"), and the Attorney General ("AG") – argued that the Final EIR (”FEIR") issued for a large mixed use development on a 16,000 acre site was defective on numerous grounds, including failures to analyze wildfire impacts, GHG emissions, water usage, and project alternatives, among other reasons. The trial court agreed, but only on the basis that the FEIR failed to consider the project's impact on the community's ability to evacuate from wildfire.

The court of appeal reversed the judgment in part, affirmed the judgment in part, and remanded to the trial court to issue a new writ that vacates the County's certification of the FEIR and approval of the project. The Court found the FEIR deficient for the same reason as the trial court, but also for an additional reason – the FEIR failed to adequately disclose and analyze the wildfire ignition risk. The published portion of the opinion discusses the FEIR's analysis of wildfire ignition risk, the FEIR's analysis regarding carbon credits, and the FEIR's analysis regarding off-site water wells.

The Court further took issue with the County's use of an errata to analyze the project's potential to increase wildfire risks. The Court stated that the errata's information came too late in the CEQA process – the information should have been included in the draft EIR. However, the Court also took issue with the substance of the errata's wildfire analysis, such as failing to reasonably describe the additional wildfire risk factors of bring 4,000 new residents to an undeveloped project site compared to existing conditions. The Court expressed frustration that the errata did not quantify the increased wildfire risk:

> "For example, given the general decline in human-caused wildfires, how many such ignitions occur per 1,000 people in a wildland-urban interface, and how much has that rate reduced as wildfire safety and education has increased? And how many wildfires ignite per 1,000,000 miles driven by vehicles with and by vehicles without catalytic converters, and how has the mix of vehicles on public roads affected those statistics over time?" (See *Id.* at 1234; see also fn. 8.)

Regarding the FEIR's analysis relating to carbon credits, the Court found petitioners' contentions meritless because the carbon credit program, although too uncertain to be feasible, was not relied upon by the County to eliminate the project's significant and unavoidable climate impact. In other words, the County is not prohibited from considering potentially beneficial measures that could, but are unlikely to, significantly mitigate the project. Finally, the Court upheld the adequacy of the project's water supply analysis, even though the County did not quantify the amount of groundwater offsite, because the offsite well would only be used "if necessary," and because it could not reasonably forecast such water use and demand.

2. Tribal Consultation

Koi Nation of Northern California v. City of Clearlake
(2025) 2025 WL 814759

Nutshell

Court overturns city's approval of a 4-story hotel development for its failure to adequately consult with a tribe, when it initially invited the tribe's input, but then did not meaningfully respond to the tribe's comments, despite repeated requests from the tribe for further explanation.

Holding

Following an initial consultation meeting with a tribe, the city improperly determined that it had concluded the initial consultation process, and failed to meaningfully respond to the tribe's subsequent comments on the adequacy of the city's mitigated negative declaration. The city's failure to further engage in discussion with the tribe did not adequately comply with the statutory requirement of a “process seeking, discussing and considering carefully the views of others” and “where feasible, seeking agreement.” (Gov. Code § 65352.4.) Rather, under Public Resources Code section 21080.3.2, consultation may only be concluded either when the parties agree to mitigation measures, or when, “acting in good faith and after reasonable effort, [the agency] concludes that mutual agreement cannot be reached.”

Practice/Litigation Tips:

Even if the local agency determines that there are no impacted tribal resources, it should continue to engage in discussions with any interested tribe and fully respond to all questions and comments from an interested tribe, including offering to meet with tribal representatives to discuss any areas of disagreement.

Summary:

This case deals with a project to construct a 4-story hotel. The project’s consultant initiated discussions with the representative of the Koi Nation, Robert Geary, who had informed the consultant that a Koi Nation ancestor had held property near the project site (approximately 0.2 miles away). On February 16, 2022, the City sent the Koi Nation formal notification as required by CEQA (Pub. Res. Code § 21080.3.1) to Geary. On February 23, 2022, Geary responded to the letter and requested formal consultation with the City. On March 9, 2022, the City met with the Koi Nation, during which the Koi Nation had requested the City to undertake certain mitigation measures. There was no further communication between the parties until the City circulated its notice to adopt an MND. Koi Nation objected to the approval of the MND, which the City disagreed (except it modified a mitigation measure to include a requirement to coordinate with the tribe expert if subsurface remains are uncovered) because the City determined that there was no evidence of tribal cultural resources on the project site and the mitigation measures would ensure a less than significant impact. The trial court upheld the City’s approval of the MND because nothing in the administrative record constituted a written request from Koi Nation to invoke the right to consultation on the project under CEQA.

The court of appeal reversed, holding that the February 23, 2022, letter sent to the City supported its assertion that they timely responded, in writing, to the City requesting consultation. The court further found that the March 9, 2022, meeting did not constitute meaningful consultation because the City took the tribe’s requests under submission but never engaged in any further discussion (even after Geary sent follow-up emails), the City did not disclose its reasons for granting one mitigation measure and denying the other two, and the City failed to consider the value and significance of resources to Koi Nation, as required by CEQA. Thus, because there was no discussion about the City's reasoning or conclusions, there was no real opportunity for Koi Nation and the City to seek mutual agreement as CEQA contemplates.

B. CEQA Exemptions

1. The Ever-Popular "Infill" Exemption

Working Families of Monterey County v. King City Planning Commission
(2024) 106 Cal.App.5th 833

Nutshell

Court upholds city's finding that a proposed Grocery Outlet store qualifies for CEQA's Class 32 in-fill exemption, rejecting arguments that this exemption cannot be used in rural communities that are not "urban."

Holding

Substantial evidence supported city's determination that the project site was "substantially surrounded by urban uses," notwithstanding petitioner's argument that King City was too "rural" to be considered "urban."

Practice/Litigation Tips

CEQA's Class 32 in-fill development exemption for "in-fill development projects" (applicable to sites of less than five acres substantially surrounded by urban uses, where the development is consistent with applicable general plan and zoning designations) continues to be an attractive option for complying with CEQA.

Summary

At issue in this case is a CEQA challenge to a Grocery Outlet store, which the King City City Council determined to be subject to the Class 32 categorical exemption outlined in CEQA Guideline Section 15332. CEQA Guideline Section 15332 states that "Class 32 consists of projects characterized as ***in-fill development*** meeting the conditions described in this section … [including] (b) [t]he proposed development occurs within city limits on a project site of no more than five acres ***substantially surrounded by urban uses***." Plaintiffs argued that the Class 32 exemption did not apply to the project because, among other reasons, the terms "in-fill development" and "substantially surrounded by urban uses" are undefined, and thus those terms must be interpreted by CEQA definitions of "in-fill site," "urbanized area," and "qualified urban uses," as those terms are defined by Public Resources Code sections 21061.3, 21071, and 21072. Thus, according to plaintiffs, because King City is not an "urbanized area" within the meaning of the statute because its population is too small, it cannot be an "in-fill site."

The Court rejected plaintiff's arguments. To the extent that the terms in CEQA Guideline Section 15332 are ambiguous, the Court first looked at the intent of the Natural Resources Agency in issuing CEQA Guideline Section 15332, which it discerned was to encourage urban development and prevent sprawl. The Court could not find an intent to limit the Class 32 exemption to just large cities or to install a population requirement. The Court also noted that "'[w]here different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning." The Court thus concluded that the project met the requirements for the exemption.

West Adams Heritage Association v. City of Los Angeles
(2024) 106 Cal.App.5th 395 (certified for partial publication)

Nutshell

Court reverses city's reliance on the Class 32 in-fill exemption for a 102-unit university housing project for failing to make an express finding that the project is consistent with the city's redevelopment plan, while also rejecting petitioners' arguments that it was not so consistent, based on a recently adopted city ordinance mandating that the redevelopment plan supersede the local zoning.

Holding

The court held that the Class 32 in-fill exemption is not inapplicable simply because the project would generate residential noise, but remanded the case to the city to expressly determine if the project is consistent with the redevelopment plan, a finding the court holds must be made before concluding that the Class 32 exemption applies (without addressing extensive contrary caselaw holding that such supporting findings are not required).

Practice/Litigation Tips

- When relying upon the Class 32 in-fill exemption, make sure to adopt express findings as to each of its criteria (even though the CEQA Guidelines do not appear to explicitly require such supporting findings and there are several published decisions—ignored by this court—that hold that such findings are not required).
- Perhaps some appellate courts simply do not like being reversed by the Supreme Court. This court appears to strain to come up with a rather absurd reason to still reverse the city's project approval, after the Supreme Court remanded the case back to it for reconsideration.

Summary

At issue in this case is a 2.8-acre housing development close to the USC campus. The project involves seven different residential buildings that collectively would contain 102 apartment units and include such amenities as outdoor lounges and cooking areas. The Zoning Administrator approved the project, finding that the Class 32 exemption applied, and granted a CUP and zoning bonus, but denied the site plan review because the project as proposed was not compatible with surrounding uses. The Planning Commission ultimately approved the project after revised site plans were submitted that addressed the Zoning Administrator's concerns, and the City Council denied the project opponents' appeal. The project opponents then filed the lawsuit, alleging that the Class 32 exemption was improper because the project would generate residential substantial noise and result in significant effects relating to noise.

The trial court denied the writ petition, but the court of appeal reversed, holding that the Zoning Administrator's noise findings prevented the use of the Class 32 exemption. The California Supreme Court then granted review, vacated the decision, and asked the court of appeal to reconsider the case in light of AB 1307 and its decision in *Make UC a Good Neighbor v. Regents of University of California* (2024) 16 Cal.5th 43 (*Make UC II*). AB 1307 enacted Public Resources Code Section 21085, which explicitly states that when evaluating "residential projects" under CEQA, "the effects of noise generated by project occupants and their guests on human beings is not a significant effect on the environment." And the *Make UC II* decision applied Public Resources Code Section 21085 to hold that an EIR for a student housing project was not deficient for its failure to consider the environmental impact of noise generated by residents.

Upon review in this case, the court of appeal concluded that residential noise could not form a basis for finding the Class 32 exemption inapplicable. The project opponents attempted to distinguish *Make UC II* on the basis that that decision concerned "social noise" (noise generated by human voices during social interactions) whereas the case at hand involved "amplified" noise from music devices. The court rejected this argument, reasoning that the legislature intended AB 1307 to apply to devices "playing music" and not just to noise generated from social noise, that the legislative history shows that they considered but rejected such an approach, and that such a holding would undercut one of the main purposes of the bill. However, the court remanded the case to the City to determine whether the project is consistent with the redevelopment plan, a finding that the court held it must make before it may grant the Class 32 exemption.

2. Other Exemptions

Sunflower Alliance v. Department of Conservation
(2024) 105 Cal.App.5th 771
review granted by California Supreme Court

Nutshell

The conversion of an oil well (which pumped oil and water out of the aquifer) into an injection well (which will pump wastewater from adjacent wells back into the same aquifer) qualifies for CEQA's "Class 1" categorical exemption involving "negligible or no expansion of existing or former use" of an "existing facility."

Holding

- The Class 1 categorical CEQA exemption applicable to "existing structures" may be applied even if the project proposes to make a materially different use of those structure (here, injection of water rather than pumping out of water), so long as the lead agency finds (based on substantial evidence) that the environmental risks are negligible.

Practice/Litigation Tips

- Courts may be willing to accept a "practical" view of the scope of categorical exemptions, and more specifically, may be willing to allow the "existing facilities" exemption to be invoked for projects that propose materially different uses of existing structures, so long as the resulting environmental impact is minimal.
- But stay tuned, as the Supreme Court has accepted review of this case, specifically as to whether "the term 'negligible' in [CEQA's] Class 1 existing facilities exemption … pertain to a negligible change in use or to a change that presents a negligible risk of environmental harm."

Summary

The California Department of Conservation's Division of Geologic Energy Management ("CalGEM") regulates California's underground injection program, a program that injects polluted water used in the oil extraction process back into the aquifer from which it came. Federal and state law requires that water can only be injected back into aquifers that will never be used as a drinking water source.

Here, Reabold (the real party) applied to CalGEM to convert a former oil well into a Class II injection well. This oil well was located more than 4,000 feet deep into the surface and converting it into an injection well would require minimal work and present no concern of contaminating drinking water (since the wastewater from adjacent pumping operations would be injected back into the same aquifer from which it was extracted). Additionally, the injection well would save at least 10 vehicle trips per week that are currently used to dispose of polluted water. CalGEM reviewed the application and approved it as CEQA exempt pursuant to the Class 1 categorial exemption of the CEQA Guidelines. The Plaintiff filed suit challenging the use of the categorial exemption, and the trial court granted the writ petition because injection is a "significantly different use" than oil extraction.

On appeal, the court reversed. The court agreed with CalGEM that the change in use regarding well conversion was minor (transforming the use from oil extraction to water injection). While the court noted that no cases were directly on point, the court focused on CEQA Guideline Section 15301 regarding Class 1 categorical exemptions, which exempts a negligible expansion of use. The court reasoned that "when a modified project is put to a new use, the change in use is unimportant, as far as CEQA goes, if the risk of environmental harm from the new use is negligible." (*Id.* at 784.) The court thus concluded that the term "negligible" referred to a minor/inconsequential risk of environmental harm, even if the project results in a change of use. The court went on to conclude that the project at issue only involved minor modifications – it involved no changes to existing roads, or surrounding vegetation, and it did not involve significant modifications of the well. Additionally, the court concluded that the change in use is negligible because the water will be geologically confined to the aquifer. Finally, the court concluded that the evidence in the record supported CalGEM's determination.

***Save Our Capitol! v. Department of General Services* (2024) 105 Cal.App.5th 828**

<u>Nutshell</u>

After losing a series of earlier battles in court over the adequacy of its CEQA compliance for major renovations to the California State Capitol, the State ultimately won the war by legislatively adopting a special statutory CEQA exemption for itself.

<u>Holding</u>

The Capital Renovation Project was exempted by the Legislature passing AB 174 (2024) and thus CEQA no longer applied. This change in the law compelled the court to reject the challenges to the legal adequacy of the EIR previously certified by the state agency.

<u>Practice/Litigation Tips</u>

- If you don't like the law, change it!
    - Fine print caveat: This practice tip may only be used by the State Legislature :/
- The case may be helpful authority as to how courts in mandamus proceedings must apply the current statutory law as it exists at the time of the decision. When facing circumstances in litigation where there is new, helpful statutory law, try to frame the issue in this manner. I have seen courts try to disregard recent statutory amendments as not controlling as to how it wants to interpret the law as it existed when the challenged decision was made.

<u>Summary</u>:

This is the third published CEQA decision involving the Capitol Renovation project. In the first case, the court of appeal reversed in part the trial court judgment rejected challenges to the EIR regarding the Capitol Renovation Project because it found the EIR flawed regarding the project description, analysis of impacts to historical resources and aesthetics, and because its alternatives analysis was deficient. (See *Save Our Capitol! v. Department of General Services* (2023) 87 Cal.App.5th 655.) In the second decision, the court of appeal found that the trial court needed to find the revised EIR consistent with the first decision before discharging the writ. (*Save the Capitol, Save the Trees v. Department of General Services* (2024) 101 Cal.App.5th 1237.)

The Court here found that SB 174, which specifically exempted the Capitol Renovation Project from CEQA, mooted the CEQA issue. SB 174 states that all work associated with the Capitol Annex Project "shall be exempt from" CEQA's requirements and that SB 174 "shall take effect immediately." (*Id.* at 833.) Even though SB 174 became effective after the appeal was filed, the court held that SB 174 was the current law and applied to this case.

C. CEQA Litigation Procedural Issues

Yolo Land and Water Defense v. County of Yolo
(2024) 105 Cal.App.5th 710 (certified for partial publication)

Nutshell

Court awarded a respondent agency a minor amount of costs (less than $4,000) it incurred in assembling documents to provide to the petitioners who had elected to prepare the administrative record, rejecting arguments that petitioners' election barred recovery of any record preparation costs.

Holding

Even when a CEQA petitioner elects to prepare the administrative record, the respondent agency may still be able to recover reasonable costs it incurs in producing documents to petitioner for preparation of the record, including staff, secretarial, and consultant time. These costs may be in excess of costs others authorized under the Public Records Act.

Practice/Litigation Tips

- Petitioners who elect to prepare the administrative record in a CEQA action may serve the respondent agency with a Public Records Act request to obtain the necessary documents. While the PRA does not authorize charges for staff time, the agency might nonetheless be able to recover such additional costs if it ultimately prevails in the litigation. So it may be a good practice to keep track of such costs to better enable the agency to recover them later.

Summary:

Petitioners challenged the County's EIR for a mining project, claiming that the EIR was inadequate for several reasons. In the unpublished portion of the opinion, the court affirmed the trial court's denial of the writ petition on the merits, concluding that the EIR was proper.

In the published portion of the opinion, the court concludes that it was proper for the County to be awarded the modest amount of costs it incurred ($3,813.45) in assembling documents for petitioners to use in preparing the administrative record. Petitioners argued that the County could not recover costs because they had elected to prepare the record pursuant to Public Resources Code Section 21167.6(b)(2).

Public Resources Code Section 21167.6(b)(2) authorizes a writ petitioner to elect to prepare the administrative record instead of asking the public agency to prepare it. However, Petitioners asked the County to produce documents, which it did (the final administrative record was 29,745 pages). And the public agency must certify the accuracy of the administrative record within the time period described by Section 21167.6(b)(1). "That appellants elected to prepare the record under section 21167.6, subdivision (b)(2) did not mean the County had no costs associated with preparation of the administrative record, and it did not preclude an award of record preparation costs to the County." (*Id.* at 715.) And because Section 21167.6 does not provide that a public agency prevailing in a CEQA action may not recover reasonable costs associated with the preparation of the administrative record that were actually incurred, the court concluded that Plaintiffs must pay the County's reasonable costs.

Santa Clarita Organization for Planning the Environment v. County of Los Angeles **(2024) 105 Cal.App.5th 1143**

Nutshell

A petitioner filing a CEQA action to challenge the approval of a subdivision map does not need to comply with the Subdivision Map Act's special requirement to serve a summons within 90 days of the challenged decision, to the extent that it is alleging CEQA claims that are independent of the SMA, ***and*** that are not actually incorporated into conditions of approval that are reflected in the map itself.

Holding

The Court reversed and remanded the trial court judgment granting a motion for judgment on the pleadings, holding that the Subdivision Map Act's 90-day limitations period under Government Code Section 66499.37 for actually serving a summons does not apply to all actions concerning a subdivision, but only actions that could have been brought under the SMA.

Litigation/Practice Tips

Normally, a summons is not required in a mandamus proceeding (unless the mandamus claim is joined with a complaint for declaratory, injunctive, or other relief). But the Subdivision Map Act has a special requirement (probably the result of a legislative drafting error made decades ago) to serve a summons, which can be a trap for an unwary petitioner. Even if they file a CEQA challenge within the applicable short 30-day limitations period, and even if they actually serve the petition itself shortly thereafter, they may overlook the need to serve a "summons." So, if your agency has been served with such a CEQA lawsuit challenging a subdivision map approval, but not a summons, consider not making any "appearances" until after the 90 days is up (since, if you "appear," it might argue that the need for summons has been waived). But, even if the summons is not timely served, this decision still allows certain types of CEQA challenges to be asserted.

Summary

This case deals with the intersection of the Subdivision Map Act ("SMA") and CEQA. A challenge was brought for a Project involving a subdivision of land for single family homes, public facilities, and open spaces. County staff determined that an MND was the proper document, as the mitigation measures would ensure that the Project would not have a significant effect on the environment. The Santa Clarita Organization for Planning the Environment ("SCOPE") filed a petition for writ of mandate, alleging that the County failed to analyze/disclose/mitigate many of the Project's significant environmental impacts, as well as five procedural CEQA violations. However, the project applicant filed a motion for judgment on the pleadings because SCOPE failed to serve a summons within 90 days of the County's approval of the vesting tentative tract map as mandated by Government Code Section 66499.37 (hereafter, "Section 66499.37"). The trial court granted the motion for judgment on the pleadings, without leave to amend. The court of appeals reversed and remanded the case to the trial court as to the CEQA cause of action.

Section 66499.37 provides:

> "Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected within 90 days after the date of the decision. Thereafter all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the decision or of the proceedings, acts, or determinations. The proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain, forcible entry, and unlawful detainer proceedings." (emphasis added.)

The court concluded that Section 66499.37 applies to claims that either (1) arise from or involve a controversy under the SMA; (2) ***could have been brought under the SMA***; or (3) overlap with an SMA claim. According to the court, SCOPE's action is not barred by Section 66499.37 because some of their CEQA claims (like lack of adequate notice of an MND, failure to adequately analyze/disclose project impacts, etc.) ***could not have been brought under the SMA***, as those claims are unique to CEQA.

The Court reasoned that the legislative history of Section 66499.37 reflects an intent to apply the 90-day limitations period to actions brought ***under the SMA***, not to all actions concerning a subdivision. The court then discussed the relevant caselaw, concluding that these cases (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, *Friends of Riverside's Hills v. City of Riverside* (2008) 168 Cal.App.4th 743, and *Legacy Group v. City of Wasco* (2003) 106 Cal.App.4th 1305) support the holding that a CEQA claim is barred under Section 66499.37 if it could have been brought under the SMA. The court also distinguished the *AIDS Healthcare Foundation v. City of Los Angeles* (2022) 86 Cal.App.5th 322 decision, which analyzes the analogous 90-day limitations period in Government Code Section 65009, because that case was not a CEQA case.

D. Cases Involving "Abusive CEQA Litigation" (i.e. CEQA claims being asserted for economic or other "non-environmental" reasons)

Relevant Group, LLC v. Nourmand
(9th Cir. 2024) 116 F.4th 917

Nutshell

Court rejects RICO claim by a hotel developer claiming that a competing hotel owner was unlawfully trying to extort funds from it by filing a series of CEQA lawsuits against its various projects.

Holding

- Hotel owner had a First Amendment right (under the *Noerr-Pennington* doctrine) to file a series of CEQA actions against a developer of multiple hotels and could not be sued for alleged RICO violations regardless of evidence of improper motive.

Practice/Litigation Tips

- Sorry Charlie, the answer is still no, you almost never can counter-sue a CEQA petitioner, unless you can demonstrate that the CEQA action is completely baseless.
- It would be slightly easier to prevail in a state court "malicious prosecution" action to challenge a frivolous CEQA lawsuit. (See *Jenkins v. Brandt-Hawley* (2022) 86 Cal.App.5th 1357)

Summary:

"You know the drill. It will take a check to make this go away."

The owner of the Hollywood Athletic Club objected to a series of four hotel projects that were being processed by the City of Los Angeles, and filed CEQA lawsuits against three of them. Each hotel had been owned by plaintiff Relevant Group, LLC (or one of its subsidiaries). Two of the lawsuits were ultimately settled, while one resulted in an adverse judgment that overturned the City's approval and required more CEQA compliance.

Frustrated with what it perceived as extortion, the developer filed a RICO (Racketeer Influenced and Corrupt Organizations Act) action in federal court. Initially, the action survived two dismissal motions and a motion for summary judgment, but then was re-assigned to a different federal judge, who reconsidered summary judgment and eventually ordered the case dismissed. While acknowledging that a judge generally should not overrule a prior decision of another judge in the same case, the judge was "firmly convinced that the prior order is erroneous and, if upheld, would endanger core constitutional rights." (This might be more challenging to do in state court.)

The Ninth Circuit affirmed, applying the *Noerr-Pennington* doctrine, which "is a rule of statutory construction that requires courts to construe statutes to avoid burdening conduct that implicates the protections of the Petition Clause of the First Amendment." (*United States v. Koziol* (9th Cir. 2021) 993 F.3d 1160, 1171.) Under this doctrine, "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct. (*Sosa v. DIRECTTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 929.) The exception to this doctrine is if the lawsuit is a "sham" that is "objectively meritless," and if the defendant's motive in bringing it is unlawful.

Here, the 9th Circuit found that the defendant's CEQA lawsuits were not objectively meritless (especially since petitioner prevailed in one of them), and thus did not need to reach the question of whether petitioner's motive in bringing them was improper. The court noted (unhelpfully) that if a plaintiff "is concerned about the CEQA process being abused (as many persons and entities have claimed has occurred since its enactment), its recourse is to bring this to the attention of the state legislator and the governor, not to try to squash the process altogether in federal court."

Gooden v. County of Los Angeles
(2024) 106 Cal.App.5th 1 (certified for partial publication)

<u>Nutshell</u>

Court upheld a Los Angeles County's decision to ban new vineyards as part of its area plan for the Santa Monica Mountains, despite that proposed ban not being disclosed in the draft EIR, which originally contemplated allowing such uses subject to heavy regulation.

<u>Holding</u>:

The court upheld the trial court's judgment affirming the county's certification of a FEIR that banned new vineyard development, a change that was not discussed in the FEIR, because such a change did not make the project description unstable.

<u>Practice/Litigation Tips</u>:

- This case is a helpful example of courts rejecting CEQA challenges by industry groups whose goals are contrary to CEQA's core objectives of protecting the environment.
- The decision articulates a refined test for determining when a modified project requires recirculation or requires CEQA review to start from scratch: does the deviation between the project description and the ultimately approved project "alter the 'nature of the project' or any of its 'main features'"?

<u>Summary</u>

This case involved an update to the North Area Plan and the Community Standards District in Los Angeles County, comprising of the Santa Monica Mountains. The Board of Supervisors approved a project, described as an update "to provide greater protection of biological habitats, align [North Area] Plan and [Community Standards District] policies and standards with the [Local Coastal Program], support the rural and semi-rural character of the [North Area], and bring the land use policies for the North Area into compliance with the General Plan." The project would replace zoning provisions in the County Code and rezone hundreds of parcels but would not lead to any physical development. The DEIR addressed, among other things, viticulture by reducing the threshold for grape growing to qualify as a "vineyard" subject to the 2015 vineyard ordinance stringent development requirements and added standards for integrated pest control management. While public comments argued that the County should ban new vineyards, neither the DEIR nor the FEIR addressed a proposed ban on new vineyards. The Board then certified the FEIR but made one change – it approved a ban on all new vineyards.

The Malibu Coast Vintners and Grape Growers Alliance filed a petition for writ of mandate, arguing, among other things, that the ban on new vineyards violated CEQA's requirements that the project have an accurate and stable project description and that the report be recirculated when significant new information was added. The trial court denied the writ petition, and the court of appeal affirmed its judgment.

The Court discussed settled CEQA principles that, on one hand, support that project descriptions must be accurate, stable, and finite and discuss the nature of the project and its main features, while also acknowledging that public agencies may change projects in response to feedback and should not be required to recirculate an EIR after every such change, which could "freeze" projects and "handcuff decisionmakers." "In threading the needle between ensuring that a project's description is accurate, stable and finite while also not robbing public agencies of the flexibility needed to tailor projects in response to feedback" (*id.* at 17), the court then described three scenarios where a project description may be inadequate:

1) When the environmental impact report does not actually describe the "project" at all.
2) When the environmental impact report's description of the nature of the project or its main elements is too amorphous.
3) When the environmental impact report's description of the nature of the project or its main elements is self-contradictory or inconsistent with later articulations.

Summarizing these scenarios and the cases underlying them, the court concluded that the instability of a project description can arise "(1) from inadequacies in the environmental impact reports" or "(2) from subsequent action by the public agency that deviates sufficiently from the project described in the reports that the deviation retroactively renders those reports' description(s) uncertain and hence unstable[.]" (*Id.* at 19.) The court then discusses the requirements for recirculation before announcing / describing a "three-tiered system" when adopting a modified project:

> "First, the modification can be so fundamentally significant that it calls into question—and hence destabilizes—the description of the project itself, thereby warranting a reboot of the CEQA review process. Second, the modification can be not so significant as to destabilize the project's description, but significant enough to constitute 'significant new information,' thereby warranting recirculation for

> further public comment on the new information. Third and lastly, the modification can be insignificant, in which case no further action need be taken." (*Id.* at 22-23.)

Because Gooden abandoned their argument that the Board's action warrants recirculation, the question before the court was whether the County's action rendered the project description unstable. The Court held that it was not, in part because agriculture was a small component of the project, and the switch from heavily regulating vineyards to banning all new vineyards does not "alter the 'nature of the project' or any of its 'main features.'" (*Id.* at 23.) Although the change is significant to those who want to start new vineyards, it is not enough to destabilize a project description. The court warned that if such a change was "sufficient to destabilize a project's description, then any and every deviation from a prior project description would be grounds for hitting the reset button under CEQA; as noted above, that is not the law." (*Id.* at 24.)

California Natural Gas Vehicle Coalition v. State Air Resources Board **(2024) 105 Cal.App.5th 304**

Nutshell

Challenge brought by pro-natural gas industry group to regulations by the State Air Resources Board designed to promote "zero-emission vehicles" (i.e. electric cars) without also allowing for natural gas vehicles. Court generally rejected arguments that the EIR was inadequate for not considering natural gas vehicles as an alternative.

Holdings

- CARB's rejection of a "Low-NOx Alternative" as not meeting CARB's project objectives supported by substantial evidence.
- CARB considered a reasonable range of alternatives, consisting of the "no project" alternative and two additional variants.
- CARB did err in not responding to public comments suggesting a Low-NOx credit as a mitigation measure, but this was harmless error because substantial evidence supported CARB's determination that the Low-NOx credit was against the fundamental purpose of the project.

Practice/Litigation Tips

- This case is a good example of a court applying a very deferential standard of review to a challenge to an EIR's discussion of alternatives. But that likely was the function of the quintessentially legislative actions being taken by CARB here (statewide rule-making). As a practical matter, courts will sometimes apply less deference to local agencies, especially when approving specific development projects (even though they claim to be applying the same standard of review across the board).
- This case can also be cited as an example of courts finding "harmless error," here in the context of a failure to adequately respond to a public comment.

Summary

The California Air Resources Board ("CARB") challenged regulation, as adopted in 2021, requires 2.5% of new vehicle sales to be zero-emission vehicles ("ZEVs") by 2023 and 15% of vehicles to be ZEVs by 2030. CARB rejected the use of low-NOx technologies (or a Low NOx vehicle carbon credit) as an alternative in its initial statement of reasons for the Regulation because it was already the subject of other regulations and allegedly would not achieve GHG or sufficient particulate matter (PM) reductions from exhaust and brake wear, and would not advance adoption of heavy-duty ZEV technologies.

The Coalition's main argument was that CARB violated CEQA because CARB did not properly consider the Low-NOx credit as an alternative to the project or as a mitigation measure. The Coalition also argued that CARB failed to properly respond to comments discussing the Low-NOx credit as an option. However, the Court affirmed the trial court's decision denying the Coalition's writ petition.

First, the Court held that CARB's decision to reject the Low-NOx credit as an alternative was supported by substantial evidence because the alternative did not meet, and actually contradicted, the Regulation's fundamental purpose of moving toward ZEVs. For this reason, the Court held that CARB had considered a reasonable range of alternatives, even if it rejected the low-NOx option, because "[a]s a logical matter, an alternative that does not meet the fundamental purpose of the proposed project cannot attain most of that project's basic objectives and therefore provides no relative indication that the actual alternatives considered were insufficient." (*Id*. at 325.) The Court then held that the Board was not required to discuss the Low-NOx option as a mitigation measure because it was infeasible from a policy perspective, as it would disrupt the goal toward encouraging full move to ZEV. And while the court found that CARB violated CEQA by failing to respond to comments in the record identifying the low-NOx credit as a mitigation option, the court held that this was a harmless error because CARB's "failure is most in line with the example of omitting information that was so patently irrelevant that no person could suppose the failure was prejudicial." (*Id.* at 333.)

Western States Petroleum Association v. California Air Resources Board
(2025) 108 Cal.App.5th 938

Nutshell

Court rejects CEQA and other challenges brought by industry group seeking to challenge California Air Resources Board (CARB) regulations limiting toxic emissions from tankers and other vessels while at berth in California ports or terminals.

Holding

CARB's environmental assessment of the future potential impacts resulting from possible actions that will be taken to comply with the regulation adequately disclosed, at a programmatic level, the future safety and other impacts, and it did not need to include a "project-specific" level of analysis for future permittees.

Practice/Litigation Tips

This case is another example of the broad deference courts will show to regulatory bodies (especially at the state level) when they legislatively adopt rules intended to protect the environment.

Summary

This action challenges a California Air Resources Board ("CARB") regulation, entitled "Control Measure for Ocean-Going Vessels At Berth" (the "Regulation"), which limits emissions from tankers and other ocean-going vessels while docked or anchored in California. Petitioners argued the Regulation violated CEQA because it failed to adequately analyze and mitigate (1) environmental impacts, specifically safety hazards, associated with the Regulation's compliance methods, and (2) the cumulative impacts of the Regulation on the environment.

The Court disagreed, holding that the Regulation did not violate CEQA. The Court reasoned that CARB's tiered approach to the environmental analysis undertaken for the Regulation was appropriate under CEQA. CARB understood that the Regulation contemplated and relied on three different tiers of environmental analysis: the environmental analysis for the 2016 State Implementation Plan ("SIP EA"), the environmental analysis ("EA") for the Regulation, and the future, site-specific, environmental analysis to meet the Regulation's standards. Because the Regulation EA was "programmatic", CARB correctly determined that a general level of detail was appropriate, as the decisions by the regulated entities (in this case, the Ports) regarding compliance options and other variables are unknown. Thus, in holding that the Regulation EA adequately analyzed and addressed concerns regarding environmental impacts, safety hazards, and mitigation, the Court reasoned that CARB understood it lacked the specificity for site-specific impacts, it appropriately flagged certain issues at a programmatic level, and deferred specific analysis to a future project review under CEQA.

Further, the Court held that CARB conducted sufficient cumulative impact analysis in the Regulation EA. CARB properly relied on the summary of projects from the SIP EA, incorporating by reference that document's cumulative impact analysis into the Regulation EA. Further, it rejected Petitioners challenge to the "summary of projections" methodology, holding that substantial evidence in the record supports CARB's reliance on this approach. And the Court held that CARB had no obligation to break down the possible cumulative impacts of specific measures at specific ports because, among other reasons, the legislature specifically determined that no "project-level analysis" was required for this specific category of environmental projects that qualified for expedited review. (Citing Pub. Res. Code § 21159(d) and CEQA Guidelines § 15187(e).) Finally, the court determined that the cumulative impact analysis was not deficient for failing to address the fact that the Regulation accelerated the timelines for the emissions standards because Petitioners failed to prove that CARB's determination lacked substantial evidence.