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UPDATE ON LAND USE AND CEQA CASES

(Cases Reported Between May 2004 and August 13, 2004)

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Annual Conference
September 17, 2004

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CHAPTER X – LAND USE

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City of Littleton, Colorado v. Z. J. Gifts D-4, L.L.C. (June 7, 2004)
__U.S. __, 124 S.Ct. 2219

Facts: Littleton adopted an adult business licensing ordinance. An applicant must provide certain information regarding the proposed business, and the ordinance identified specific circumstances under which the city is required to deny a license. The ordinance sets forth a time limit within which city officials must make a decision on applications, and provides that a decision may be appealed to the state courts pursuant to a rule of civil procedure. The respondent opened an adult bookstore in a location not zoned for adult businesses and did not apply for a license. Instead, the respondent brought a facial challenge to the ordinance. The federal district court rejected the claim. The Tenth Circuit Court of Appeals reversed, ruling that Colorado law did not assure prompt judicial review.

Holding: The U.S. Supreme Court reversed, finding that Littleton's ordinance satisfies the First Amendment requirement for prompt judicial review. In this regard, the Colorado statute provides sufficient safeguards to avoid delay-related First Amendment harm. Whether the courts actually do so can be addressed on a case-by-case basis rather than a facial challenge. Also, the Supreme Court observed that the licensing scheme in Littleton's ordinance applied reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials proposed for display. (See Debra Corbett's discussion of this case in her General Municipal Litigation Update and the issue whether it is distinct from the *Baby Tam* line of cases.)

Delta Wetlands Properties v. County of San Joaquin (July 29, 2004)
2004 Daily Journal D.A.R. 9344 (certified for partial publication)

Facts: The county adopted a zoning ordinance limiting the location of reservoirs of 500 acres or more to agricultural zones. Reservoirs under state jurisdiction pursuant to the Water Code were exempted. The ordinance requires a conditional use permit for locating a reservoir in an allowable zone. The plaintiff proposed to use its property in the Delta area to store and subsequently sell surface water acquired during periods of high runoff. The project would result in the flooding of two islands in the Delta with water appropriated pursuant to a permit issued by the State Water Resources Control Board (SWRCB). The plaintiff did not obtain a CUP. Instead, the plaintiff brought a facial challenge to the ordinance on multiple grounds: (1) the ordinance either conflicts with Government Code section 53091 (providing limited intergovernmental land use immunity) or is preempted by implication; (2) the ordinance illegally discriminates against the plaintiff's project; (3) the county failed to consider competing regional interests; and (4) the county failed to comply with CEQA. The trial court denied the writ of mandate. The plaintiff appealed.

Holding: The court of appeal affirmed. An ordinance regulating the location of reservoirs lies within the

ordinary police powers of a local agency, and will not be set aside unless it conflicts with state law. The plaintiff argued that the county's ordinance directly conflicts with the provision of Government Code section 53091 that local zoning ordinances "shall not apply to the location or construction of facilities for the production, generation, storage or transmission of water." Considering the quoted language in context and the objective sought to be achieved by the Legislature, the court of appeal carefully and extensively reviewed the legislative history of the statute. The court of appeal concluded that the exemption from local zoning regulation was not intended to include water facilities constructed by private parties. The plaintiff's back-up argument – that the county's ordinance is impliedly preempted – was rejected as well. While the Water Code contains a comprehensive regulatory scheme for the appropriation of water, the permitting jurisdiction of the SWRCB is not exclusive. The authority to regulate appropriation is not coextensive with the authority to regulate the construction and location of a project which is made possible by such appropriation. Here, both state law (the Johnston-Baker-Andal-Boatwright Delta Protection Act of 1992) and the terms of the SWRCB permit recognize the county's land use authority.

As to the claim of illegal discrimination, the plaintiff cited a line of cases for the proposition that a local agency may not enforce changes in zoning regulations adopted after a permit application is made if the sole purpose of the amendments was to frustrate the particular project. However, there was no evidence that only plaintiff's project was targeted by the ordinance. The ordinance applied to the entire county and contemplated other similar proposed uses in the future. "The evil sought to be remedied will often not come to the attention of authorities until a use is proposed or a permit application is made." There were legitimate land use concerns: loss of agricultural lands, damage to adjacent roads, and the need to mitigate these impacts. Finally, it is uncertain whether the ordinance would even apply to the plaintiff's project because the project could be designed to fall within state jurisdiction, which would exempt the project from the ordinance.

In unpublished portions of the opinion, the court of appeal held: (1) the plaintiff failed to demonstrate that the ordinance would have regional impacts beyond the county; and (2) with respect to CEQA, the plaintiff was beneficially interested so as to confer standing, the initial study was not deficient, there was no substantial evidence to support a fair argument that the ordinance would have a significant effect on the environment (thus, a negative declaration was appropriate), and there was no improper deferral of environmental review.

World Wide Video of Washington, Inc. v. City of Spokane (May 27, 2004; amended July 12, 2004)
2004 Daily Journal D.A.R. 8411

Facts: The city adopted regulations concerning the location of adult-oriented retail businesses. Among other restrictions, adult businesses could not open within prescribed distances from other specified land uses, such as schools and churches. A one-year amortization period was provided for existing adult businesses to either relocate or change the nature of their operations. The district court stated that the ordinance is content-neutral on its face, and the intermediate scrutiny standard was applied. The district court granted summary judgment in favor of the city, upholding the validity of the ordinance. The plaintiff appealed.

Holding: The Ninth Circuit Court of Appeals affirmed. The issue on appeal was limited to whether the ordinance was narrowly tailored to serve a substantial governmental interest. The city had asserted that the regulations decreased the adverse secondary effects of the adult businesses. Over 1,500 pages of evidence concerning such impacts had been presented. The city also demonstrated there were sufficient sites available to which the business could relocate. By providing the opportunity for adult businesses to relocate, the ordinance

demonstrated that the city was indeed targeting the secondary effects rather than the expressive activity itself.

Part 4. Subdivisions

Part 5. Housing

Dieckmeyer v. Redevelopment Agency of the City of Huntington Beach (May 21, 2004)
118 Cal.App.4th 1136

Brief Holding: A city administered an affordable housing program under which it makes loans to income-qualified individuals and families. The plaintiff purchased a condominium, assisted by a loan from the city, and executed a promissory note, secured by a second deed of trust, in favor of the city. The second deed of trust purported to secure the performance of all agreements contained in the loan agreement between the plaintiff and the city, and the affordable housing agreement recorded as CC&Rs against the property. Later, the plaintiff expressed her intention to prepay the loan amount. The court of appeal held that the city was not entitled to require that the plaintiff execute a new deed of trust to secure future performance of the CC&Rs and payment of a so-called "equity share" in the condo. The court of appeal also held that an "increased income" exception in the CC&Rs did not operate to release the plaintiff from the obligation that the condo be preserved as affordable housing for the 30-year term of the restrictions. Instead, with respect to the obligations unrelated to payment of the loan, the city's interests could be protected by a refusal to reconvey the deed of trust that secured both the loan repayment and performance of other aspects of the affordability covenant.

Tom v. City and County of San Francisco (July 18, 2004)
120 Cal.App.4th 674

Brief Holding: Concerned with the conversion of rental housing to owner-occupied housing, the county adopted an ordinance prohibiting the use of tenants-in-common agreements that provide each tenant with an exclusive right of occupancy to a particular dwelling unit within a multi-unit building. Certain homeowners, tenants, and landlords desiring to occupy or convert rental properties to owner-occupancy using this device sought a writ of mandate to overturn the ordinance. The trial court invalidated the ordinance, concluding that it violates the plaintiffs' constitutional rights of privacy and equal protection, and is preempted by the Ellis Act (Civ. Code § 7060 *et seq.*). The court of appeal affirmed as to the unconstitutionality of the ordinance as a privacy violation, and determined it unnecessary to address the other issues.

Note from Michael Colantuono: This result seems consistent with *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, which struck down, also on privacy grounds, an ordinance restricting the number of unrelated persons who might occupy a single-family residence.

Part 6. Growth Management

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Part 8. Exactions: Fees and Dedications

Serra Canyon Company, Ltd. v. California Coastal Commission (July 13, 2004)
120 Cal.App.4th 663

Facts: In 1981, the Coastal Commission granted a permit to expand a mobilehome park. The permit was conditioned on the recordation of an irrevocable offer to dedicate certain land for public recreational use. The permit condition was not challenged, and the offer to dedicate was recorded in 1983. The plaintiff acquired the property in 1992. The Coastal Commission transferred its rights regarding the dedication offer to the California Coastal Conservancy (Conservancy), which accepted the offer in 2002. The plaintiff filed a lawsuit, claiming the dedication condition was void as involuntary and unconstitutional. Alternatively, the plaintiff argued that just compensation was required. The trial court sustained demurrers without leave to amend. The plaintiff appealed.

Holding: The court of appeal affirmed, concluding the challenge to be time-barred. To the extent that the plaintiff was attacking the condition of permit approval, the time for doing so commenced in 1981. (There is a 60-day limitations period under the Coastal Act.) The more recent actions of the Commission in preparation for acceptance of the offer to dedicate were just a clerical formality. As to the inverse condemnation claim, it too is barred. The prior owner did not timely demand or seek compensation by pursuing all available procedures and remedies. None of the more recent events revived the otherwise expired limitations period. Finally, the court of appeal rejected the plaintiff's contention, raised for the first time in its reply brief, that *Nollan* operates retroactively.

The court of appeal distinguished the U.S. Supreme Court's recent ruling in *Palazzolo v. Rhode Island* (2001) 533 U.S. 606 as follows: "The case is factually distinguishable from *Palazzolo* . . ., which does not address a landowner's waiver of state remedies following an adverse, final land use decision. The land use regulations challenged in *Palazzolo* had the potential to later effect a regulatory taking, once a specific proposal from a new owner was rejected. Here, [the prior owner] acquiesced in the state's imposition of a condition, and accepted the benefit of the permit to which the condition attached." (Citation omitted.)

Note from Michael Colantuono: Continued litigation on the meaning of *Palazzolo* is likely. (See *Travis v. County of Santa Cruz* below.)

Part 9. Environmental Regulations (see Chapter XI)

Part 10. Permits to Build

Congregation Etz Chaim v. City of Los Angeles (June 16, 2004)
371 F.3d 1122

Facts: The plaintiff desired to renovate and use an existing home as a place of religious worship. Many years of federal litigation ensued. The plaintiff and the city eventually entered into a settlement agreement with the district court retaining jurisdiction over the matter. The plaintiff subsequently submitted plans for the improvement and expansion of the residence. The city's building and safety department issued a permit for the requested work after having reviewed the plans for several months. One week later, however, the city issued a stop work order and notified the plaintiff that the permit would be revoked because it was issued in violation of

applicable codes, including regulations governing the size of the building. The plaintiff sued to enforce the settlement agreement, and the district court granted the plaintiff's motion. The city appealed.

Holding: The Ninth Circuit Court of Appeal affirmed. After having studied the plaintiff's plans for an extended period, the city presumably had approved them with full knowledge of the settlement agreement. The plaintiff had performed substantial work and incurred liabilities in reliance on the issued permit in the form of permit fees and demolition (but not construction) costs. The lengthy and extensive review of the plans, culminating in the issuance of a permit, represented that the plans were in accordance with the terms of the settlement agreement. There is no allegation or evidence that the plaintiff engaged in fraud or acted in bad faith. As such, the city was held to be estopped from revoking the building permit that it issued. The city then argued that the settlement agreement was violated because the building plans had not been submitted to a specific individual in the planning department. The court found that submission only to the city, not a particular individual, was required.

A vigorous dissent correctly points out that the doctrine of equitable estoppel does not apply because the building permit was invalid at the time of its issuance due to nonconformity with the municipal code.

Note from Michael Colantuono: Moreover, by allowing permit fees and demolition costs to be the basis of a vested right, the Ninth Circuit has misconstrued California's vested right rule, which requires substantial expenditures of hard costs for actual construction. (E.g., *Avco Community Developers v. South Coast Regional Commission* (1976) 17 Cal.3d 785.) Under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, Ninth Circuit rulings on questions of California law do not bind California courts. However, the Ninth Circuit's constructions of California law do, of course, bind federal trial courts until overtaken by further developments in California law.

Part 11. Regional Planning Issues

Zack v. Marin Emergency Radio Authority (April 14, 2004)
118 Cal.App.4th 617 (certified for partial publication) (rev. den.)

Facts: The Marin Emergency Radio Authority (MERA) is a joint powers agency (JPA) consisting of 25 public agency members – including a county, cities, water district, transit district, community services district, and community college district. MERA was established to create a public safety and emergency radio system, together with the planning and construction of necessary facilities. MERA undertook eminent domain proceedings to acquire a site for the installation of certain facilities located within the boundaries of Tiburon, one of the member cities. Several citizens sought a writ of mandate to compel MERA to cease its condemnation activities and to comply with Tiburon's land use regulations (general plan and zoning) applicable to construction of the proposed facilities. The trial court granted the writ, and MERA appealed.

Holding: The court of appeal reversed. The Marks-Roos bond pooling provisions of the joint powers statutory scheme do not overcome the need to find a common power among the member agencies, for which there is a presumption running in favor of the exercise of a disputed power. The challenging party has the burden of proof. MERA's planning powers, and the associated power to fund and construct the emergency radio system, derive from the common power of its local agency members. Each member agency of MERA possessed either express or implied legal authority to construct or operate the system in protection of the people and resources

they represent. A joint powers agreement must designate one of the member agencies by which to determine the procedures applicable to the actions of the JPA. Inasmuch as the county was the contracting power designated by the joint powers agreement, the manner in which MERA proceeded to construct and operate the system was subject only to the restrictions applicable to the county. Thus, because the county was not subject to Tiburon's land use regulations (pursuant to Gov. Code § 53090), neither was MERA.

Note from Michael Colantuono: This case is significant for two reasons: First, it makes clear the importance of the agency designated in a JPA agreement pursuant to Government section 6509, which requires the JPA to designate one member to provide the body of procedural law that will govern the JPA entity. Because MERA's JPA designated the county as the 6509 entity and because counties are exempt from city zoning, MERA was exempt from Tiburon's zoning. Second, it makes clear that entry into a JPA agreement can amount to delegation of land use power if the JPA agreement is not expressly to the contrary. Thus, the case is a cautionary tale for city attorneys charged with review of proposed joint powers agreements for cooperative projects involving their cities.

Opinion of the California Attorney General, No. 03-805 (July 22, 2004)
2004 Daily Journal D.A.R. 9081

Brief Holding: An airport land use commission may not exempt a city or county specific plan from compliance with the commission's more stringent compatibility standards for land use, development density, and development intensity in the vicinity of a public use airport.

Part 12. California Coastal Act

Part 13. Tidelands, Beaches and Streams

Part 14. Challenges to Land Use Decisions

Cashman v. City of Cotati (July 15, 2004)
374 F.3d 887

Brief Holding: The city's mobilehome rent control law regulated annual rent increases and established vacancy control to prevent the charging of new base rents or increasing existing rents for a mobilehome space upon in-place transfer of the coach to another tenant. Certain park owners challenged the ordinance as a regulatory taking. The district court initially granted, and then vacated, summary judgment in favor of the park owners. A trial was conducted, and judgment was entered for the city. The Ninth Circuit Court of Appeals reversed and remanded with instructions to reinstate the original judgment in favor of the park owners. The vacancy control regulation, on its face, does not adequately prevent the capture of a premium. Nor does it substantially advance a governmental interest in creating or maintaining affordable housing. It appears that, to be valid, a rent control scheme should regulate the selling prices of coaches or provide the park owner with the ability to recover any premium amount from the selling tenant. Ordinances adopted more than a year before a civil rights legal challenge should be protected from a facial challenge.

Note from Michael Colantuono: This case is reminiscent of Ninth Circuit rulings overturned by the U.S. Supreme Court in *Yee v. City of Escondido* (1992) 503 U.S. 519, which rejected effort to apply to

regulatory takings cases the stricter scrutiny applicable to takings cases alleging physical invasion of private property, not merely diminution in value by economic regulation.

Travis v. County of Santa Cruz (July 29, 2004)
2004 Daily Journal D.A.R. 9280

Facts: The county adopted a zoning ordinance to restrict the establishment of second residential units. Two sets of property owners brought suit to enjoin enforcement of the ordinance and to remove permit conditions imposed pursuant to the ordinance. The disputed conditions related to occupancy and rent restrictions. The trial court denied the writ petition, principally on the ground that the claims (both facial and as-applied) were untimely; although one as-applied claim was found timely but not meritorious. The plaintiffs appealed. The court of appeal affirmed solely on the statute of limitations ground, viewing all of the claims as facial in nature because the plaintiffs did not allege the ordinance was applied differently to their properties than to others or that the ordinance had a disparate fiscal effect on them compared to other property owners. The plaintiffs' petition for review was granted.

Holding: The California Supreme Court affirmed in part and reversed in part. The Supreme Court affirmed as both facial challenges and as to one of the as-applied challenges, and reversed as to the other as-applied challenge. The 6-1 opinion provides an extensive analysis of the 90-day limitations period set forth in Government Code section 65009. With respect to the facial challenges, the plaintiffs contended their attack was not on a decision to "adopt or amend" the ordinance, but rather was on a failure to repeal or amend the ordinance and its continued enforcement because of a conflict with the subsequently enacted Costa-Hawkins Rental Housing Act (Civ. Code §§ 1954.50-1954.535 [generally preempting certain dwelling units from local rent control laws and instituting vacancy decontrol for other units covered by such laws]) and other state laws. Therefore, according to the plaintiffs, the 3-year limitations period in Code of Civil Procedure section 338 was applicable. While the Supreme Court agreed that an action seeking declaratory and injunctive relief based on preemption by later-enacted state statutes is subject to the 3-year limit, the plaintiffs' action still was filed too late. The Supreme Court rejected the plaintiffs' arguments of continuous accrual (by subsequent applications of the ordinance) and the applicability of the 5-year limitations period for inverse condemnation claims (which pertains only to physical takings, not regulatory takings in the absence of physical invasions or impairment of title). Nor was the ordinance automatically unenforceable and null and void as a result of later preemption.

With respect to the as-applied challenges, the issue was whether the petition for writ of mandate was commenced within 90 days of the final administrative action imposing conditions on the permit. One claim was not brought until 11 months after the permit approval, and thus was time-barred. The other claim was commenced within 90 days, and thus was timely, even though the challenge to the condition was predicated on the invalidity of the ordinance. The Supreme Court cited *Palazzolo v. Rhode Island* (2001) 533 U.S. 606 in support of the principle that a property owner should be able to challenge a preempted or unconstitutional zoning ordinance in an action prevent its enforcement within 90 days of its application.

Justice Brown, in a concurring and dissenting opinion, argued for a broader reading of *Palazzolo*, suggesting that no statute of limitations should be applied to action to invalidate the ordinance or property restrictions imposed pursuant to the ordinance. The majority opinion observes that this position "goes much further than plaintiffs themselves."

Ventura Mobilehome Communities Owners Assn. v. City of San Buenaventura (June 10, 2004)
371 F.3d 1046

Brief Holding: The city's mobilehome rent control law allows for increases in space rent, not more than once per year, upon approval by a rent review board. A subsequent amendment was adopted establishing vacancy controls that banned park owners from requiring lease provisions from new tenants waiving rent controls. Park owners challenged the amendment as a regulatory taking because it prevented them from charging market rents for new tenants, and because it created a premium for existing renters by enhancing the value of the mobilehomes. The Ninth Circuit Court of Appeals affirmed the district court's dismissal of the action as not ripe for adjudication. While the park owners engaged in extensive negotiations, and even mediation, with the city, they did not avail themselves of state law procedures and remedies, and thus could not show denial of just compensation.

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Miscellaneous

Citizens for Improved Sorrento Access, Inc. v. City of San Diego (May 14, 2004)
118 Cal.App.4th 808 (certified for partial publication) (rev. den.)

Brief Holding: A city has broad discretion to close a portion of a public street to vehicular traffic when it determines that the road is no longer necessary for present or future traffic. (The street was closed to permit construction of a nearby highway, and remained open for pedestrian and bicycle traffic.) Whether a street is "unnecessary" or "no longer needed" (as those phrases are used in the Streets & Highway Code and the Vehicle Code) does not take into account the concepts of use or demand. The city's determination is subject to review under Code of Civil Procedure section 1085, and judicial review is highly deferential.

Maldonado v. Harris (June 4, 2004)
370 F.3d 945

Brief Holding: The plaintiff, an owner of billboards along a highway, challenged the state Outdoor Advertising Act. His civil rights claims were dismissed by the district court on various grounds. The Ninth Circuit Court of Appeals reversed. The plaintiff's challenges were not barred by either the compulsory cross-complaint statute or common law claim preclusion principles. Also, the plaintiff's claims are ripe for review and are not barred by the statute of limitations. The case is remanded for a hearing on the merits.

Squaw Valley Development Co. v. Goldberg (July 20, 2004)
2004 Daily Journal D.A.R. 8778

Brief Holding: The owners and operators of a ski resort filed a civil rights action against employees of a Regional Water Quality Control Board, alleging that the employees subjected them to selective and over-zealous regulatory oversight in violation of their rights to equal protection and substantive due process. The district court granted summary judgment in favor of the employees on the ground of qualified immunity. The Ninth Circuit Court of Appeals reversed as to the equal protection claim against one of the employees, and affirmed the remainder of the district court's ruling. Qualified immunity was not available to the one employee

due to a triable issue of material fact whether he was motivated by personal animus. Note: The case may have some implications for code enforcement activities.

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CHAPTER XI – PROTECTING THE ENVIRONMENT

Part 1. Introduction

Part 2. California Environmental Quality Act (CEQA)

City of Morgan Hill v. Bay Area Air Quality Management District (May 14, 2004)
118 Cal.App.4th 861

Facts: The Bay Area AQMD issued a Prevention of Significant Deterioration (PSD) permit for the construction of a natural gas-fired power plant. (Issuance of the permit reflects that the project meets federal Clean Air Act standards.) The project proponent previously had obtained a certificate from the California Energy Resources Conservation and Development Commission (Commission). The city filed a petition for writ of mandate, contending that the district failed to comply with CEQA. The City claimed that the district should have prepared an EIR or equivalent environmental documentation. The trial court sustained demurrers to the petition on the ground that it did not have subject matter jurisdiction.

Holding: The court of appeal affirmed. The issuance of the PSD permit is federal in nature, notwithstanding a delegation agreement between the U.S. EPA and the district. Thus, the permit is not covered by CEQA. The Governor had issued an executive order requiring the use of the Commission's final staff assessment as an EIR would be used. The court of appeal ruled that the order repealed the otherwise applicable State CEQA Guidelines as well as the district's CEQA regulations.

Defend the Bay v. City of Irvine (June 29, 2004)
119 Cal.App.4th 1261

Facts: The city certified a program environmental impact report in connection with plans to develop over 7,000 acres near a former military base for mixed uses. The proposed project would yield 12,350 housing units and 17,667 jobs, resulting in a jobs-to-housing ratio of 1.44. This was considered a negative impact inasmuch as the city already has more jobs than housing. (The ratio was 3.29 in 2000.) The petitioner challenged the EIR, and the sufficiency of the evidence to support conclusions regarding impacts of the proposed project. The trial court denied the petition for writ, and the petitioner appealed.

Holding: The court of appeal affirmed. The EIR concluded that the jobs/housing ratio resulting from the proposed project would have a substantial, but not adverse, effect on housing supply. There was substantial evidence to support this conclusion, including an analysis of cumulative impacts arising from different development alternatives. The proposed project would improve the city's overall jobs/housing ratio. While reasonable minds might differ as to the city's conclusions, there is evidentiary support for its determination. ("[We will not] arrogate to ourselves a policy decision which is properly the mandate of the City.") The court

of appeal found substantial evidence to support the EIR's conclusion that it is not feasible to mitigate the impact of developing 3,100 acres of agricultural land, either on-site or off-site. The petitioner's objections to the evaluation again represent a policy disagreement rather than a lack of evidentiary support. There was no improper "burying" of information in the EIR or improper inclusion of new material in the final EIR with respect to impacts on agricultural resources. disagreement. Finally, the EIR's analysis of impacts on biological resources was adequate and supported by substantial evidence. There was no improper deferral of mitigation.

As an aside, the parties had stipulated to dismiss the appeal after oral argument because the petitioners and the project proponent had entered into a settlement agreement. (The city was not a party to the settlement.) The court of appeal was miffed that the parties refused to disclose the terms of the settlement. Stating that it therefore was unable to determine whether an important matter of public interest (*i.e.*, the jobs/housing ratio) was likely to recur, the court of appeal declined to dismiss the appeal as moot.

Maintain Our Desert Environment v. Town of Apple Valley (July 2, 2004)
120 Cal.App.4th 396

Facts: The town approved a development project on 300 acres, including a 1.2 million square-foot "distribution center." An environmental impact report was prepared and certified for the project. A citizens group filed a petition for a writ of mandate, challenging the adequacy of the EIR and an accompanying statement of overriding considerations. The petition also sought to set aside various planning and zoning approvals and entitlements, all based on the alleged failure to comply with CEQA. The petitioner contended, among other things, that the EIR is legally defective because it did not disclose that the end user of the project would be Wal-Mart. Some of the other claims related to the adequacy of mitigation measures, the assessment of cumulative and growth-inducing impacts, and the analysis of alternatives. The trial court denied the petition, and an appeal was taken.

Holding: The court of appeal affirmed. Preliminarily, the court ruled that the petitioner, which was formed after the town's decision, had standing to seek a writ. Its members exhausted their administrative remedies by objecting to the project during the town's proceedings. Neither the town's notices regarding the EIR nor the EIR itself were deficient because of the failure to identify Wal-Mart as the end user of the project. As to the EIR, a "brief" description of the proposed project and its location is all that is required. A compact summary without elaboration or detail is sufficient. Further, the EIR's project description is not required to reveal the end user of the project. CEQA does not require a tenant-specific review; and in many instances, projects are developed before an end user is identified. "So long as the project is approved, CEQA has no concern about who uses it." Otherwise, new environmental documentation could be required upon the sale of property or a change in tenancy. The EIR's analysis of traffic, land use, noise, biological, and air quality impacts was adequate. Several of the remaining CEQA issues were barred because they were not raised during the administrative proceedings.

Mira Mar Mobile Community v. City of Oceanside (July 13, 2004)
119 Cal.App.4th 477

Facts: The city approved a 96-unit condominium project within a downtown redevelopment project area. The owners of a mobilehome park adjacent to the project site alleged that the certified environmental impact report did not identify feasible project alternatives, did not properly analyze the impacts of the project on their

property, did not sufficiently mitigate adverse biological effects, and contained inadequate findings. The trial court denied the petition, and the petitioners appealed.

Holding: The court of appeal affirmed. The EIR analyzed a range of alternatives, four in total, including two reduced density projects and the "no project" scenario. The low density alternatives were rejected as infeasible because they failed to provide high-density housing consistent with existing planning goals. Although the alternatives achieved other objectives, it is not required that alternatives satisfy ***all*** project objectives; they need only meet most of them. The discussion of alternatives was not perfect, but was reasonable and allowed decision-makers and the public to make an informed evaluation of the project. It was not necessary for the EIR to analyze alternative project locations where adequate on-sites alternatives are discussed. The petitioners claimed that the assessment of the project's impact on their property was defective because it did not account for loss of ocean views, access to sunshine, and ocean breezes enjoyed by their residents. CEQA looks to effects on the environmental of persons in general, not whether a project will affect particular persons. Also, there is no inherent right of landowners to access to air, light, and view over adjoining property. Although aesthetic issues, such as public or private views, are properly studied in an EIR, the lead agency has discretion in determining whether to classify impacts as significant depending on the nature of the effect. The EIR adequately mitigated the significant biological effects of the project by requiring preservation, restoration, and creation of coastal sage scrub areas. Finally, the city's findings were adequate.

Native American Sacred Site and Environmental Protection Assn. v. City of San Juan Capistrano (July 22, 2004)
2004 Daily Journal D.A.R. 8947

Facts: More than 15% of the city's registered voters signed the petition for a special election on an initiative measure to amend a city's general plan and to rezone property to allow for the development and operation of a private Catholic high school. After the petition was submitted, the city and the measure proponents negotiated and entered into an "implementation agreement," ostensibly to mitigate certain conditions. The city council then adopted the initiative and the implementation agreement without environmental review pursuant to CEQA. The plaintiffs filed suit to challenge the city's decision on CEQA grounds, among others. The trial court issued a writ of mandate, holding that the Elections Code only allowed the city to adopt the petition "without alteration," and that the implementation agreement was a discretionary action subject to CEQA. The city council subsequently set aside the prior action and adopted the initiative exactly as presented in the petition. The plaintiffs sued again, once more claiming that CEQA was violated. The trial court sustained demurrers without leave to amend.

Holding: The court of appeal affirmed. CEQA exempts initiatives, but not measures placed on the ballot by the legislative body pursuant to Elections Code section 9222 or comparable charter city authority. (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165.) CEQA also exempts ministerial projects. The Elections Code provides that, upon submittal of a certified petition, the city council must adopt the proposed ordinance, or call a special election, or order the preparation of report and then either adopt the ordinance or order an election. The plaintiffs contended that the city council's adoption of the initiative was no longer a ministerial act exempt from CEQA because it was passed several months after it was first submitted to the city and beyond the time frames specified by the Elections Code for acting on an initiative petition. Under such circumstances, according to the plaintiffs, adoption of the initiative became a discretionary act subject to CEQA. The court of appeal disagreed, reiterating the importance of the initiative power. The lapse of time

owing to the first lawsuit, and the repeal of the approval of the implementation agreement, did not alter the city council's ministerial duty to adopt the initiative.

Part 3. Water Supplies and Supply Planning

Part 4. Water Quality

WaterKeepers Northern California v. AG Industrial Manufacturing Inc. (July 16, 2004)
2004 Daily Journal D.A.R. 8670

Brief Holding: The plaintiffs, a nonprofit environmental protection organization and its director, brought an action for violations of the federal Clean Water Act against a manufacturer. The federal district court dismissed the action for lack of jurisdiction on the ground that the plaintiffs' intent-to-sue letter did not provide sufficient notice of their claims. The district court denied the defendants' motion for attorneys' fees. The Ninth Circuit Court of Appeals reversed the dismissal in part and affirmed in part the denial of attorneys' fees. The plaintiffs' intent-to-sue letter provided adequate detail regarding the principal violation alleged (storm water pollution of a river), the sources and practices leading to the discharge, possible solutions for the problem, specific permit standards and requirements, and dates of violations. The same is true regarding the claims as to certain nonstorm water discharges, and various prevention, monitoring and reporting requirements. However, there was not sufficient detail concerning an industrial process water claim. The action was remanded to the district court for a determination on the merits.

Part 5. Air Quality

Department of Transportation v. Public Citizen (June 7, 2004)
__ U.S. __, 124 S.Ct. 2204

Brief Holding: The U.S. Supreme Court held that the Federal Motor Carrier Safety Administration is not required under the Clean Air Act or the National Environmental Policy Act to evaluate the environmental effects of Mexican trucks crossing the border because the agency lacks discretion to prevent such cross-border operations.

Note from Michael Colantuono: This case has implications for attainment of federal air quality standards, and hence for federal transportation funding, by California air quality management agencies due to the relatively high tail-pipe emissions of Mexican trucks.

Vigil v. Leavitt (May 10, 2004)
366 F.3d 1025

Brief Holding: Various residents directly petitioned the Ninth Circuit Court of Appeal for review of a final rule of the U.S. EPA that approved the state implementation plan for airborne particulate matter in metropolitan Phoenix. Claiming that EPA's action conflicts with the Clean Air Act, the plaintiffs alleged that the general permit rule for controlling agricultural emissions did not require all feasible measures, including controls that currently are in place in the South Coast region of California. They also alleged that the approved plan did not require Arizona to mandate the use of California Air Resources Board fuel standards for diesel emissions control purposes. The Ninth Circuit Court of Appeals granted the petition and remanded the matter to EPA for

further consideration whether the rejection of CARB diesel as an emissions control measure satisfies the Clean Air Act's requirements for "best available control measures" and "most stringent measures."

Part 6. Solid Waste and Hazardous Waste

City of Lodi v. Randtron (May 5, 2004)
118 Cal.App.4th 337

Brief Holding: Lodi adopted an ordinance entitled the "Comprehensive Municipal Environmental Response and Liability Ordinance" (note from Michael Colantuono: "or MERLO, pronounced like the wine grape grown in large quantities in the city and its vicinity" – like I could come up with something like that), which authorized the investigation and remediation of contamination of soil and groundwater under standards that differed from those of CERCLA and state law. In accordance with MERLO, the city issued an administrative order directing a corporation to abate an environmental nuisance on its property and to reimburse the city for costs incurred in connection with cleanup activities. The trial court granted summary judgment in favor of the city and issued an injunction directing the corporation to comply with the administrative order. The court of appeal reversed. MERLO is preempted by the Carpenter-Presley-Tanner Hazardous Substance Account Act (Health & Safety Code § 25300 *et seq*.) with respect to response actions on contaminated sites listed pursuant to the Act. Although the city could initiate and carry out the cleanup of a listed site upon notice to the Department of Toxic Substances and the Department's approval of a response action, the city was not authorized to administratively order a responsible party to take remedial action.

Another note from Michael C.: This case is one of a welter of appeals arising from a controversial program funded by a loan to the city by the Lehman Brothers investment house at 25% interest and with a provision for participation by the Wall Street firm in any recovery by the city.

Safe Air for Everyone v. Meyer (July 1, 2004)
373 F.3d 1035

Brief Holding: Straw and stubble residue from the harvesting of Kentucky bluegrass is burned on open fields. An environmental group sued growers, alleging that the practice violates the Resource Conservation and Recovery Act (RCRA) with respect to the treatment of solid and hazardous waste. The Ninth Circuit Court of Appeals held that the residue cannot be characterized as "solid waste" under RCRA. The residue is not discarded or abandoned; rather, it is reused and recycled in a manner that benefits future crops.

Valley Vista Services Inc. v. City of Monterey Park (May 17, 2004)
118 Cal.App.4th 881

Brief Holding: The city experienced difficulty in achieving the requirement under the Waste Management Act of 1989 (AB 939) to divert half of its trash from landfills. It then determined to grant an exclusive waste disposal franchise. A statutory 5-year termination notice was issued to the franchisee's competitor. In response to the competitor's continuing to solicit new customers during the phase-out period, the city adopted an ordinance prohibiting such solicitations, limiting haulers with grandfathered rights to servicing their existing accounts. The competitor challenged the ordinance as unconstitutional and as preempted by state law. The court of appeal affirmed the trial court's judgment in favor of the city. The ordinance is not preempted by or in

conflict with the provisions of the Waste Management Act, which is silent on the subject. The city has a valid interest in regulating activity that would undermine the purpose of the Act by "pecking away" at the franchisee's newly-awarded customer base.

Part 7. Endangered Species

Cold Mountain v. Garber (July 14, 2004; amended August 9, 2004)
2004 Daily Journal D.A.R. 9762

Brief Holding: The Montana Department of Livestock adopted an interim plan for bison management and obtained a special use permit to operate a testing facility. An environmental organization claimed that the terms of the permit had been violated insofar as the facility allegedly resulted in a take of protected bald eagles under the Endangered Species Act. More particularly, it was alleged that the noise of helicopters led to a reproductive failure of the eagles. However, there were no scientific studies presented to support the claims. The Ninth Circuit Court of Appeals affirmed summary judgment in favor of the defendants.

Gifford Pinchot Task Force v. United States Fish & Wildlife Service (August 6, 2004)
2004 Daily Journal D.A.R. 9715

Brief Holding: The Fish & Wildlife Service (FWS) listed the northern spotted owl as a threatened species in accordance with the federal Endangered Species Act (ESA). The federal government later adopted the Northwest Forest Plan to manage the owl's habitat. Rather than dealing with the impacts of particular actions, the plan deferred such analysis to future biological opinions prepared for specific projects. Environmental groups challenged subsequently prepared opinions for proposed timber sales, the removal of habitat, and incidental take permits with respect to the owls. The Ninth Circuit Court of Appeals concluded that the FWS improperly limited the definition of "destruction or adverse modification" of the designated critical habitat because the definition focused on the habitat needed for survival rather than the habitat needed for recovery. The Ninth Circuit affirmed the "jeopardy analysis" conducted by the FWS.

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Miscellaneous

Westlands Water District v. U.S. Department of the Interior (July 13, 2004)
2004 Daily Journal DAR 8465

Brief Holding: For many years, most of Trinity River's water was diverted into the Sacramento River basin. Congress mandated that some of the water be returned in order to revive certain fish populations. Various municipal water agencies and power districts challenged a plan to redirect Trinity River water, alleging that procedural requirements of the National Environmental Policy Act and the Endangered Species Act were violated. The Ninth Circuit Court of Appeals reversed the federal district court's conclusion that the scope of the environmental impact statement and the range of alternatives considered were unreasonable. Nevertheless, the Ninth Circuit affirmed the district court's ruling that certain of the mitigation measures, insisted upon by the Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), must be invalidated because the opinions of the FWS and the NMFS on which they were based exceeded the statutory authority of those agencies.