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## Land Use & Natural Resources Case Law Update First Quarter 2017

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**Aptos Council v. County of Santa Cruz et al.**

10 Cal.App.5th 266

This case provides a comprehensive analysis of two CEQA subjects: whether a “project” has been improperly piecemealed, and whether a negative declaration adequately takes into account the impacts of future development.

The County of Santa Cruz (the “County”) adopted three ordinances, at separate times in 2014, that amended portions of the Planning and Zoning Regulations of the County Code. The first ordinance (the “Minor Exceptions Ordinance”) extended the geographic area in which variances characterized as “minor exceptions” to zoning site standards could be administratively approved without a public hearing. This was adopted with an addendum to a prior negative declaration that was approved when a previous minor exceptions ordinance was approved. The second ordinance (the “Hotel Ordinance”) altered certain height, density, and parking requirements for hotels in commercial districts and was accompanied by a negative declaration. The third ordinance (the “Sign Ordinance”) established an administrative process for approving minor exceptions to the County’s existing sign ordinance and was adopted with a notice of exemption that relied on several exemptions. Around the same time the County was considering these three ordinances, the planning department was contemplating bringing forward several other ordinances to amend the County’s planning and zoning regulations.

In response to approval of the three ordinances, Aptos Council filed a petition for a writ of mandate, arguing that the Sign Ordinance was not exempt from CEQA review, the negative declaration for the Hotel Ordinance should have taken into consideration future developments, and the County had engaged in unlawful piecemeal review of the environmental impacts of the three ordinances. The trial court denied the petition and Aptos Council appealed.

The court of appeal first analyzed the issue of piecemeal review. Discussing the applicable legal standards, the court recognized that a CEQA “project” is “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment” and refers to “the whole of an action.” Citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, the court noted that an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. There is no piecemealing, however, when “projects have different proponents, serve different purposes, or can be implemented independently.”

The court could not find that passage of any of the ordinances was a reasonably foreseeable consequence of approval of any of the other ordinances. The court came to this conclusion



because it believed that the three ordinances “operate independently of each other and can be implemented separately” and “serve different purposes.” While Aptos Council argued that the adoption of the three ordinances was part of the County’s objective of “overhauling the County’s zoning regulations” and thus should be considered a single project, the court disagreed and stated that this was not the type of tangible “objective” that has been found to be the basis of a CEQA project.

Aptos Council also argued the negative declaration prepared for the Hotel Ordinance was inadequate because it failed to consider the inevitable future developments the ordinance would permit. The court noted that a public agency must prepare an EIR whenever substantial evidence supports a fair argument that a proposed project “may have a significant effect on the environment.” While the court was concerned with whether the negative declaration and corresponding initial study should have taken into account the impacts of future development, the court reviewed an extensive line of cases dealing with “fair argument” determinations to guide its analysis.

Here, while there was evidence that the County had adopted the Hotel Ordinance to stimulate development of hotels, there was nothing in the record to indicate that increased development was reasonably foreseeable. Nonetheless, the court found that the County did consider the potential impacts of future development in its negative declaration, but found that such impacts were speculative at this stage, even noting that the County contacted the owners of the two most prominent vacant lots to ascertain their plans. Lastly, the court agreed with the County that Aptos Council’s claims that a significant environmental effect may result from the Hotel Ordinance only amounted to speculation about potential environmental impacts and such speculation cannot amount to substantial evidence.

This opinion provides a very helpful analysis of case law and the relevant principles for determining when a project has been improperly piecemealed. Ultimately, there must be some amount of foreseeability of actions to sustain a piecemealing challenge. In addition, a negative declaration will not be held inadequate for failing to engage in speculative analysis of impacts that are not reasonably foreseeable, provided that the lead agency has undertaken a reasonable investigation.

[Ajit Thind](#)



### **Banning Ranch Conservancy v. City of Newport Beach**

2 Cal.5th 918

This case involves the interplay between CEQA and the California Coastal Act. The Coastal Act requires that environmentally sensitive habitat areas (ESHA)—defined as “any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem”—be protected, and sharply restricts development that would impact such areas.

In 2009, the City of Newport Beach (“City”) circulated a notice of preparation indicating it was preparing an environmental impact report (EIR) for a proposed mixed-use development project (the “Project”). In response, it received a number of comments urging that the EIR needed to identify ESHA within the Project site. Nonetheless, while the draft EIR included a detailed biological analysis of Project impacts, it did not identify potential ESHA or discuss the subject in any substantive detail. Instead, it noted that the Project would require a permit from the Coastal Commission, which would be responsible for determining whether the Project site contained ESHA.

The City subsequently received many comments complaining about the draft EIR’s failure to analyze ESHA. These included comments from Coastal Commission staff suggesting that it was “important that the EIR process incorporate a determination of probable ESHA areas and their required buffers before land use areas and development footprints are established.” In its response to comments, the City again explained that the Coastal Commission was the agency responsible for determining ESHA under the Coastal Act, noted the project would require a coastal development permit, and maintained it had satisfied its CEQA obligations by analyzing the project’s impacts on the physical environment, including impacts on biological resources such as sensitive species.

The California Supreme Court disagreed. In reversing a court of appeal opinion in the City’s favor, the Supreme Court pointed to a number of provisions in CEQA and the CEQA Guidelines that require the CEQA process to be integrated with other planning and environmental review procedures. In particular, it noted that the CEQA Guidelines “specifically call for consideration of related regulatory regimes, like the Coastal Act, when discussing project alternatives.” Thus, while the Supreme Court agreed that the Coastal Commission was ultimately responsible for making findings regarding ESHA, it found that the City was required to discuss potential ESHA, and “make a good faith attempt to analyze project alternatives and mitigation measures in light of applicable Coastal Act requirements.”

The Supreme Court further held the City’s error was prejudicial, explaining the omission deprived the public of a full understanding of the environmental issues raised by the project, resulted in an inadequate evaluation of project alternatives and mitigation measures, and suppressed information relevant to the Coastal Commission’s permitting function.

The obvious lesson from this case is that any EIR prepared to evaluate a project within the coastal zone should identify potential ESHA and analyze the project's potential impacts on that ESHA, including by evaluating alternatives and mitigation measures to avoid such impacts. More broadly, comments requesting that an EIR consider requirements contained in other environmental statutes or regulations should not be ignored. Even if another agency is legally responsible for enforcing such regulations, CEQA requires the lead agency to take a "comprehensive view" and consider such requirements in its own analysis.

[Peter Howell](#)

**City of San Jose v. Superior Court**

2 Cal.5th 608

In a significant change to how the California Public Records Act (the “Act”) has been historically construed, the California Supreme Court has held that electronic messages (e.g., emails and text messages) on personal devices and personal accounts are subject to disclosure under the Act if they are related to substantive public business.

The Act creates “a presumptive right of access to any record created or maintained by a public agency that relates in any way to the business of the public agency,” which must be disclosed unless an exception applies.

Under this definition, the court held that even though electronic messages stored on personal devices and personal accounts are not owned or maintained by a public agency in a traditional sense, because they are prepared by a public employee, they qualify as public records if they relate to public business. In fact, even though the messages on personal accounts may only be in the possession of a single employee rather than the agency itself, under a broad interpretation of the Act the court held that messages on personal accounts are nonetheless “retained by” the public agency.

The key issue moving forward will be determining whether or not a personal electronic message is sufficiently related to public business, which the court admits “will not always be clear.” In the court’s example, an email to a spouse complaining that a coworker “is an idiot” would likely not be a public record, but an email to a superior reporting a coworker’s poor work would be. To make this determination, courts must examine several factors, including “the content itself; the context in, or purpose for which, it was written; the audience to whom it was directed; and whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment.” Ultimately, a writing must be substantively related to the conduct of public business to be subject to the Act.

In response to concerns about public employees’ privacy, the court reasons that such concerns “can and should be addressed on a case-by-case basis,” and are not sufficient to stop all searches of private devices and accounts. The court also includes some guidance about how public agencies should conduct searches of private devices/accounts, indicating the scope of an agency’s search for public records “need only be reasonably calculated to locate responsive documents.”

In light of this ruling, public agencies should examine their existing policies, and consider a policy that prohibits employees from using personal electronic devices or personal email accounts for work-related communications. Such a policy would avoid the challenging practical issues involved in examining personal text messages/emails, and determining if they qualify as

sufficiently related to substantive public business under the foregoing factors on a “case-by-case” basis.

[Alan Fenstermacher](#)



**The Committee For Re-Evaluation of the T-Line Loop v. San Francisco Municipal Transportation Agency**

6 Cal.App.5th 1237

This case involved the application of Public Resources Code section 21166 (subsequent CEQA review) to the award of a contract for 900 feet of light rail line needed to complete a partially constructed loop around a city block in the “Dogpatch” neighborhood of San Francisco. The award was made in 2014, and was based upon an environmental impact report (EIR) that was certified 16 years earlier. The petitioner contended that the loop itself was not part of the project originally assessed in the 1998 EIR. In addition, the petitioner claimed that the circumstances in the neighborhood had changed substantially in the intervening 16 years and that those changes could result in new or increased impacts.

With regard to the first issue, the court noted that consistent with *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, the decision of whether the loop was part of the original project or an entirely new project was properly assessed under the substantial evidence test. The court found that substantial evidence reflected that the loop was assessed in the Final EIR (FEIR) and identified as part of the “Initial Operating Segment.” The court rejected the petitioner’s argument that even if it was mentioned in the prior assessment, the document did not provide “CEQA-compliant analysis” of the loop. The court found that any such claim was time-barred and the analysis was presumed to be valid.

The court also found that substantial evidence supported the city’s decision to not require further environmental review. It cited two memoranda that the planning department had prepared stating that the loop was covered by the original EIR and that no further review was needed. The memoranda noted the changes that had occurred in the neighborhood since the FEIR was certified, including the proposed arena for the Golden State Warriors. The court also considered a 2013 environmental assessment prepared by the Federal Transit Association under the National Environmental Policy Act in connection with its grant of federal monies for the project. That assessment found no new significant effects arising from the completion and operation of the loop.

This case underscores the difficulty facing project opponents attempting to assert that a project’s environmental effects were not covered by a prior EIR.

Note: The publication status of this case was changed from unpublished to published on December 22, 2016. A petition for review was denied on March 15, 2017. Rutan attorneys were counsel of record for The Committee for Re-Evaluation of the T-Loop.

[Kathy Jenson](#)



**Residents Against Specific Plan 380 v. County of Riverside**

9 Cal.App.5th 941

At issue in this case was the County of Riverside's approval of a general plan amendment, a change of zone, and a specific plan ("Specific Plan 380") relating to the proposed development of an approximately 200-acre largely unimproved site as a master planned community.

In 2011, the county released a draft environmental impact report (EIR) that analyzed a version of Specific Plan 380 which proposed separating the site into eight planning areas and included an analysis of the project's potentially significant environmental impacts and proposed measures to mitigate the impacts. The report concluded that other than air quality and noise, all significant impacts would be reduced to a level of insignificance with implementation of mitigation measures. The county received a number of written comments about additional mitigation measures.

The county published a final EIR in 2012. Like the draft EIR, the final EIR concluded that emissions from project construction would exceed regional criteria pollutant thresholds, that such emissions would remain significant even after mitigation, and that noise impacts would likewise be significant and unmitigatable. The final EIR also included written responses to the draft EIR comments.

At the initial county planning commission hearing, the matter was continued to allow for revisions to be made to the proposed project. It was subsequently determined that the changes did not require recirculation of the EIR because they did not alter the project's impacts. At the next hearing, the planning commission voted to recommend that the board of supervisors approve the project as modified.

The board of supervisors took up the revised Specific Plan 380 and related components of the proposed development. A day before the meeting and more than a year after the comment period for the draft EIR concluded, Residents Against Specific Plan 380 ("Residents") submitted comments critical of the EIR. At the hearing, additional modifications to the specific plan were suggested and implemented. The purpose and effect of the changes (that did not increase the number of residential units or square footage of commercial development) was to move denser development away from the periphery of the project site located adjacent to low-density residential areas. The county's environmental planning consultant analyzed the changes and again concluded that the EIR did not need to be recirculated.

The board of supervisors then voted to tentatively certify the final EIR, approve Specific Plan 380, and other zoning changes associated with the project. At a later meeting, the board gave final approval to those matters. On the same day, the planning department filed a notice of determination with the county clerk, reciting that the project would have significant effects on

the environment and that an EIR was available; however, the notice included an out-of-date project description.

Residents filed a petition for a writ of mandate, alleging that the county failed to comply with the procedural and substantive requirements of CEQA. The trial court denied the petition, finding in favor of the county and the developer, and Residents appealed. The court of appeal upheld the trial court's holding, finding that the administrative record demonstrated that the county did not commit any legal error and that there was substantial evidence in the administrative record to support the county's factual determinations.

The court rejected Residents' characterization that the county improperly approved the final EIR, finding that the board of supervisors only gave tentative approval of the EIR and Specific Plan 380 in December 2012. The court also found that the board properly adopted findings, a statement of overriding considerations, and a mitigation plan concurrent with its certification of the EIR and approval of the project in November 2013.

The court of appeal also found that while the notice of determination contained an incorrect description of the project, the notice substantially complied with the informational requirements of CEQA. Importantly, Petitioner was unable to show that the errors were prejudicial to them, as they filed their challenge before the statute of limitations had run.

Additionally, the court held that the decision not to recirculate the EIR was supported by substantial evidence in the record. The differences between the plan described in the EIR and Specific Plan 380 as approved resulted in the same environmental footprint. Moreover, the county's expert consultants reviewed the changes to Specific Plan 380 and determined that recirculation of the EIR was unnecessary.

The court of appeal also held that the EIR adequately analyzed the impacts of uses in a mixed-use area of the project. Although the EIR analyzed the traffic, noise, and air quality impacts based on a development of a retirement community, which would not necessarily be built by the developer, the county was not required to conduct analyses based on other potential developments. The EIR stated that if the developer decided not to build a retirement community, it could do so only if its proposed use did not create additional environmental impacts based on review by the county.

Finally, the court held that the EIR adequately considered specific suggestions for mitigating air quality and noise impacts, even though it did not adopt the suggestions. The planning department had determined that the proposed measures were infeasible. Furthermore, the court rejected Petitioner's contention that the county failed to address its comments because a lead agency is only required to respond in writing to comments submitted during the official review and comment period.



The opinion in this case reiterates several important substantive and procedural requirements of the California Environmental Quality Act as well as illustrates the deferential standard of review exercised by appellate courts when applying the substantial evidence test.

[Thai Phan](#)