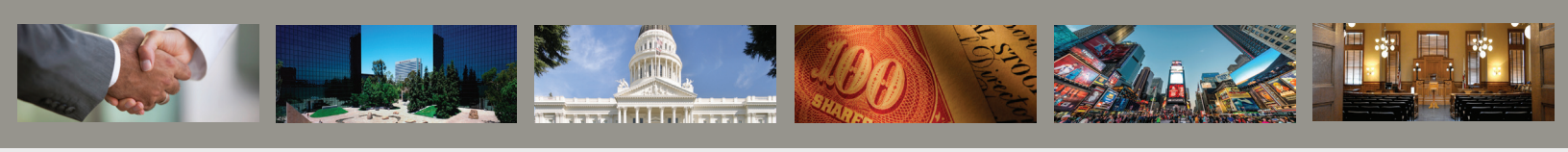

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Land Use & Natural Resources Case Law Update
Fourth Quarter 2016

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East Sacramento Partnerships for a Livable City v. City of Sacramento
5 Cal.App.5th 281

This case involves whether a lead agency can rely solely upon general plan provisions that allow congestion in certain areas to find that such congestion is not a significant environmental impact. The Third District Court of Appeal held that the fact that a project complies with a general plan standard or policy, in and of itself, is not substantial evidence that the project will not have a significant impact on the environmental resource to which the standard or policy relates.

The environmental impact report (EIR) for a 336-unit residential infill development was challenged by a neighborhood community group on numerous grounds. The project was also challenged as being inconsistent with the city's general plan. The trial court rejected all of the challenges and upheld the EIR. The court of appeal struck down the EIR on one ground, relating to the assessment of traffic impacts, and rejected the rest of the challenges.

The petitioner challenged the project description on several grounds. It objected that there was no reference to the required development agreement until it was added to the final EIR. It objected to the project changes that increased the unit count by eight homes and added a multifamily component that expanded the scope of the needed rezoning. The draft EIR also did not disclose that a variance was required for driveways that were four feet narrower than the city's code allowed. The court rejected these challenges due to the petitioner's failure to show that any of these deficiencies prejudiced the decisionmakers or the public.

The court also rejected various "piecemealing" arguments. The items at issue were found by the court either to not have been approved by the council or to be minor from an environmental standpoint.

The court also rejected the petitioner's claims that the EIR was inadequate because it failed to address health risks to the future residents of the project. The sources of those risks were the adjacent freeway and railroad tracks, and a former landfill that had the potential for off-site subsurface methane gas migration. Based upon the decision in *California Building Industry Assn. v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369, wherein the California Supreme Court confirmed that CEQA does not generally require an EIR to analyze the existing effects of the environment on future residents of a project, the court rejected the health risk arguments because the petitioner had failed to show that the project would exacerbate those risks. While the petitioner had argued that additional vehicle trips from residents and visitors would worsen already bad air quality, the court found that these were vague claims without evidentiary support. The court also noted that because this was an infill project, its location would likely result in reduced trips compared to the project being developed in a more suburban area.

The petitioner challenged several aspects of the EIR's traffic analysis. The court rejected all but one. The petitioner claimed that the EIR was defective because it only assessed roadway intersections and omitted analysis of freeway and roadway segments. The court upheld the omission of freeway analysis based upon the streamlining permitted under Public Resources Code section 21159.28. The court also upheld the EIR's focus on intersections rather than segments based upon the rationale that the capacity of roadways is governed by intersections.

The challenge to the traffic mitigation measures was likewise rejected. The court upheld the "fair share" mitigation for cumulative impacts, even though the city apparently had no formal fee program. Instead, the city described its "program" as collecting the fair share payment from this specific project, placing it in a special fund, and using it to fund improvements at the required location. This does seem inconsistent with other cases that have held that fair-share contributions to a mitigation fund are adequate mitigation only if they "are part of a reasonable plan of actual mitigation that the relevant agency commits itself to implementing." (Anderson First Coalition v. City of Anderson (2005) 130 Cal.App.4th 1173, 1187.)

The most significant portion of the case relates to the court's rejection of the city's threshold of significance for traffic impacts. The city relied upon general plan traffic policies to find that Level of Service (LOS) E and LOS F conditions on certain city streets were not significant impacts for CEQA purposes. The city's mobility element allowed flexible LOS standards in certain core areas of the city. For example, it stated that LOS F conditions are acceptable during peak hours. It also stated that LOS F conditions may be acceptable to achieve other goals. Based upon this flexibility, the EIR concluded that the project's impacts were less than significant. The court rejected this approach, noting that compliance with regulatory requirements does not automatically vitiate significant environmental impacts. The court rejected the city's argument that case law concluding that regulatory compliance alone is insufficient to find an environmental impact less than significant only related to the question of whether an EIR should be prepared in the first instance. The court concluded that EIR should not have assumed that compliance with a general plan automatically reduced the impact to less than significant.

The EIR noted that the project caused the LOS to drop at certain core area intersections from LOS C to LOS E and from LOS A to LOS D. It also noted that cumulative conditions at certain locations would be at LOS F. As noted above, based upon the general plan flexibility in this core area, these impacts were found to be less than significant, even though the EIR acknowledged that similar impacts outside the core area were significant and required mitigation. The city argued that it had discretion to set thresholds based upon "community values." The court noted that community values do not necessarily measure environmental impacts.

The petitioner also challenged the project as being inconsistent with certain policies of the general plan. The court found that each of the challenges was either moot as result of a subsequent general plan amendment or insufficient because the petitioner had not demonstrated that no reasonable person could have reached the conclusion that the project was consistent with the general plan.

This case underscores the need to exercise caution in relying on thresholds that do not necessarily relate to, or adequately measure, the significance of environmental impacts.

Kathy Jenson

Japanese Village, LLC v. Federal Transit Administration
843 F.3d 445

In December, the U.S. Court of Appeals for the Ninth Circuit affirmed the entry of summary judgment in favor of the Federal Transit Administration (FTA) in a challenge under the National Environmental Policy Act (NEPA) to the proposed construction of a 1.9-mile underground light rail line in downtown Los Angeles. Japanese Village and Bonaventure Hotel, owners of property near the proposed underground rail line project, argued that the environmental impact statement (EIS) prepared for the project did not adequately analyze construction and operational noise and vibration, subsidence risk, and parking impacts, among other issues.

The EIS concluded that construction of the rail line would result in temporary noise and vibration impacts, but found that these impacts would be reduced to a less than significant level with implementation of mitigation measures to temporarily relocate residents and businesses during construction of the rail line if construction noise and vibrations reached certain levels.

Japanese Village claimed that the temporary relocation of residents and businesses constituted an inadequate mitigation measure. The Ninth Circuit rejected this argument. "Ultimately, we need not decide whether relocation can ever be a valid mitigation measure under NEPA because NEPA does not require that mitigation measures completely compensate for the adverse environmental effects." The court clarified that "compensation" for environmental impacts under NEPA includes "compensating for the impact by replacing or providing substitute resources or environments." The court found that temporary relocation of residents and businesses to be proper compensation for the project's temporary construction noise and vibration impacts. The court also recognized that the FTA agreed to implement additional mitigation measures that were requested by the plaintiffs, which the Court considered to be above and beyond NEPA requirements.

The plaintiffs further argued that the FTA improperly failed to take a "hard look" at the project's impacts. The Ninth Circuit held that contrary to this claim, the FTA did in fact take a "hard look" at the project's potential environmental impacts. For example, the parking analysis in the EIS disclosed that the FTA conducted a preliminary parking survey and planned to conduct a future annual parking capacity study during construction to ensure parking supply was sufficient for the demand created by the project. In the analysis of geotechnical impacts, the FTA required a mitigation measure to conduct a future survey of structures to assess geotechnical conditions and implement appropriate measures. The court found these measures to meet the NEPA standard that mitigation measures must be discussed with "sufficient detail to ensure that environmental consequences have been fairly evaluated." As stated by the court recently in *Protect Our Communities Foundation v. Jewell* 825 F.3d 571 (9th Cir. 2016), a mere assertion by an agency that a future mitigation measure will be crafted or implemented does not suffice and constitutes improper mitigation deferral. However, a future plan that includes monitoring and inspection can complement other mitigation measures to enhance the quality of mitigation for a project. The court noted that "NEPA imposes no substantive requirement that mitigation measures actually be taken."

This case provides helpful guidance on NEPA's "hard look" standard and underscores that agencies may require future studies in an EIS as long as those studies contain sufficient detail and are not simply a nonspecific promise to craft future mitigation measures.

Morgan Gallagher

Mission Bay Alliance v. Office of Community Investment and Infrastructure
6 Cal.App.5th 160

In this most recent application of the expedited environmental review and litigation processes provided for certain specially-designated "environmental leadership" projects (mainly sports facilities) under recent amendments to the California Environmental Quality Act (CEQA), the First District Court of Appeal speedily affirmed the trial court's rejection of several challenges to a large mixed-use project, including a new arena proposed to house the Golden State Warriors basketball team and two 11-story office buildings. The project approvals were challenged on grounds of CEQA noncompliance as well as claims that the project did not conform to the applicable zoning requirements. The court of appeal affirmed the trial court, and concluded that San Francisco's analysis of the potential environmental impacts of the project was sufficient, even while noting that "in some instances the defendants' analysis of potential environmental impacts might have been expanded." The court further concluded that that there was substantial evidence in the record to support the city's finding that the project would be consistent with the applicable zoning and that it did not exceed the square footage allowed by the zoning for retail establishments.

The project as reviewed by the court is proposed for an 11-acre site in the "Mission Bay" area of San Francisco, and would include a new 488,000 square foot "multipurpose event center" with 18,500 arena seats (but with off-street parking for fewer than 1,000 cars), plus two 11-story office and retail buildings and 3.2 acres of open space. The formerly industrial Mission Bay area was designated for redevelopment in 1990 and an environmental impact report (EIR) was certified for that redevelopment plan. A new plan was subsequently prepared, however, which envisioned the area as the focus of a new biotech/medical/pharmaceutical community to be anchored by a new University of California San Francisco (UCSF) medical school and hospital facilities. In 1998, the City certified a new final supplemental EIR (1998 FSEIR) for that plan, which was characterized as a "program EIR." The court of appeal noted that "an arena is not mentioned in the 1998 FSEIR." In April 2015, the Governor certified the project as an "environmental leadership development project" subject to streamlined CEQA review and litigation, as described in Public Resources Code section 21178 *et seq.*

The city's Office of Community Investment and Infrastructure (as successor to its Redevelopment Agency) circulated a new draft supplemental EIR (SEIR) for the arena project in June 2015, "tiered to the 1998 FSEIR," and certified a new final SEIR in November 2015. The city's Board of Supervisors rejected an appeal challenging the 2015 FSEIR and approved the project in December 2015. Two separate legal challenges were filed, consolidated, and tried on an expedited schedule, following which the trial court rejected all of the challenges and denied both writ petitions in July 2016. An appeal immediately followed, and was also expedited.

Applying a substantial evidence standard of review, the court of appeal first rejected the petitioner's claims that the 2015 FSEIR had improperly failed to address several potential impacts of the project, including land use impacts, biological resources, hazardous materials, and impacts on existing recreational areas, which had been excluded from scope of the 2015 FSEIR based on the City's 2015 initial study. Specifically in regard to land use impacts, the court upheld the assertion of the initial study that the event center's entertainment use could be deemed similar to the nighttime entertainment uses analyzed in the 1998 FSEIR, even though "the size and intensity of the event center use was not previously analyzed." The 2015 initial study had also concluded that although the project and other anticipated development "would represent a change in land use character" in the area, "the combined effect would not be adverse." The court rejected challenges to that conclusion, as "essentially a policy disagreement with [the city's] determination that an event center will enhance the neighborhood."

The court next rejected the petitioner's challenges to the sufficiency of the analysis in the 2015 FSEIR as to those impacts that were included and addressed in that study. In response to concerns about likely "traffic grid-lock" on the streets adjacent to the UCSF hospital, the project had been defined to include a transportation management plan to help mitigate those impacts. Despite that plan, the FSEIR had concluded that traffic and transit impacts would be significant and unavoidable, and the City had adopted a statement of overriding considerations, which was not challenged. The court rejected arguments that the FSEIR improperly treated the transportation management plan as a component of the project, rather than as a mitigation measure, reasoning that characterization of the plan as part of the project did not interfere with the identification of significant traffic-related impacts or measures to mitigate those impacts.

The court also rejected challenges to the FSEIR's reliance on mitigation measures intended to address recognized impacts on regional transit services. The FSEIR required the Warriors to "work with" the regional transit agencies "to provide" the additional services recognized as necessary due to the project. The court held that such a requirement to "work with" public agencies did not improperly defer mitigation nor was the FSEIR required to identify a specific funding source to pay for the increased transit service made necessary by the project.

The court further rejected challenges to the threshold of significance used by FSEIR to evaluate noise impacts, as well as challenges related to wind, greenhouse gas, and toxic air contaminants.

Finally, the court upheld the city's determination that the arena would conform to the applicable "retail" zoning regulations. The petitioner argued that the arena, as a whole, exceeded the square footage limitations of the zoning regulations, but the court accepted the city's position that the arena was not entirely devoted to retail uses, and that spaces for spectator seating, locker rooms, restaurants, meeting rooms and offices did not count against retail space.

Similar to prior cases, the court here disposed of a challenge to a designated environmental leadership project in a relatively deferential and speedy manner. It also underscores that while an agency must commit to implementing a reasonable plan of actual mitigation, it need not identify a guaranteed source of funding in order for such a plan to constitute adequate mitigation under CEQA.

On January 17, 2017, the California Supreme Court denied Mission Bay Alliance's petition for review.

David Lanferman

Orange Citizens for Parks and Recreation v. Superior Court
2 Cal.5th 141

In this case, the California Supreme Court invalidated a determination by the City of Orange that a residential project on approximately 50-acres of property in the Orange Park Acres area (the "Project") was consistent with the city's 2010 general plan. Although the general plan appeared to designate the subject property as open space, the city argued that this designation was modified by a series of resolutions from the 1970's that had allowed for low-density residential. In rejecting this position, the Supreme Court noted that (a) the low-density residential designation was never incorporated into the publicly available documents, and (b) regardless, the designation was superseded by later general plan amendments designating the subject property as open space.

The full history of the pertinent general plan determinations is somewhat convoluted. In 1973, the city prepared a draft specific plan for Orange Park Acres, known as the "OPA Plan." Although the draft plan designated the subject property for an open space and/or golf use, the planning commission recommended that the site instead be designated as "Other Open Space and Low Density (1 acre)." In December of 1973, the city council passed a resolution upholding this recommendation and adopting the OPA Plan as "the herein described General Plan for the Orange Park Acres area . . . ." In addition, in 1977, the city council passed a resolution that (a) amended the city's then-operative general plan to allow for low-density residential in Orange Park Acres, and (b) removed the word "Specific" from the OPA Plan.

For unknown reasons, however, none of the directives contained in the city council's 1970's resolutions were incorporated into the OPA Plan or the city's general plan land-use map. Thus, continuing through the time of the proposed Project in the 2000's, the publicly available version of the OPA Plan and the city's general plan land-use map continued to designate the subject property as open space. Making matters worse, since the 1970's, the city amended its general plan on two occasions—in 1989 and 2010—in a manner that further ignored the 1970's resolutions. The 1989 amendment designated the subject property as "Open Space/Golf," and the 2010 amendment designated the site as "Open Space." In addition, the 2010 amendment referred to the OPA Plan as a "specific plan," and stated that all specific plans "must be consistent with the policies" in the general plan's land use element.

In light of this history, when the city approved the Project in June of 2011, it adopted a general plan amendment in conjunction with that approval, which expressly incorporated the low-density residential component of the 1970's resolutions. Shortly thereafter, however, this 2011 amendment was invalidated by the city's voters via a referendum election.

Following that invalidation, the city took the position (in a lawsuit challenging the Project) that the Project was nevertheless consistent with the 2010 general plan based on the 1970's resolutions. According to the city, the OPA Plan, as modified by these resolutions, had been a part of the city's general plan since they were adopted. The trial court ruled in favor of the City and developer, and the Fourth District Court of Appeal affirmed.

The Supreme Court, however, reversed the lower courts' rulings on several grounds. First, the directives from the 1970's resolutions were never incorporated into the publicly available land use documents, which continued to designate the subject property as open space. Second, regardless, the 1970's resolutions were superseded by the city's adoption of a new general plan in 2010, which had designated the subject property for

exclusive use as open space in its policy map. Third, the city itself had initially believed it needed to amend its 2010 general plan to allow for the Project, and it only advanced its argument based on the 1970's resolutions after its amendment was invalidated via the referendum election.

In reaching this conclusion, the Court rejected the city's reliance on the case of *Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles* (1986) 177 Cal.App.3d 300. Las Virgenes involved a general plan expressly stating that its land use map did not provide the specific designation for every parcel, and directing interested parties to other documents to determine those designations. The Court distinguished those facts from the 2010 general plan involved in Orange Citizens, which, although referencing the OPA Plan, identified that plan as subservient to the general plan's express designation of "open space" for the subject property.

In addition, the Court also rejected the city's argument that, by focusing on its failure to incorporate the directives of the 1970's resolutions into the publicly available land use documents, the city was effectively being "bound by a clerical error." Instead, the Court noted that the city was bound by its failure to clearly designate the subject property for low-density residential uses in its 2010 general plan.

This case provides an example of the relatively rare instance where an agency's interpretation of its general plan was overturned on the ground that no reasonable person could have reached that conclusion.

Mark Austin

Property Reserve, Inc. v. Superior Court
6 Cal.App.5th 1007

Last year, the California Supreme Court issued a blockbuster eminent domain decision in P*roperty Reserve, Inc. v Superior Court* (2016) 1 Cal.5th 151. In that case, landowners challenged the constitutionality of California's statutory procedure allowing for pre-condemnation entry to do surveys, environmental and geological testing, and the like, on the ground that the statutory procedure did not provide for just compensation to be determined by a jury before an entry occurred that could amount to a taking or actual damage. The California Supreme Court upheld the statutory pre-condemnation entry procedure, but judicially reformed the procedure to provide for a jury trial after the entry, if the owner pursued an action for actual damages or interference with possession.

This sequel case was decided by the Third District Court of Appeal after the matter was remanded by the California Supreme Court. It addresses two further claims by the landowners: (1) whether the owners had a right to pursue formal discovery before the trial court heard their challenges to the public entity's petition to enter their property, and (2) whether the public entity was required to name lessees and easement holders as "indispensable parties" to the proceeding when it petitions the court to grant an order to allow entry onto the private property.

The discovery issue is important because the pre-condemnation entry procedure is designed to be an expedited procedure to allow the public entity to conduct its various studies before a decision is made whether to go forward with a project or to choose a given property as the location for a portion of the project. Discovery, including written interrogatories, document productions, and depositions, can be very time consuming as well as expensive, defeating the underlying purpose of creating an expedited procedure. Separate from this policy consideration, the Department of Water Resources (DWR) argued that the prejudgment entry procedure was a "special proceeding" created by statute and that discovery rules are not applicable to "special proceedings."

The court of appeal disagreed with the DWR and determined that the pre-condemnation entry proceedings are eminent domain proceedings, so discovery rules do apply, and they would apply even if a pre-condemnation entry petition were merely a special proceeding. Thus, the court made it clear that a court hearing must occur before entry is allowed, and discovery could be pursued on the issues to be addressed at the hearing, which include the purpose of the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and for interference with the owner's possession and use. The court also noted that a trial court could, in its sole discretion, limit discovery upon motion of a party.

The issue whether lessees and easement holders have to be named as "indispensable parties" to a pre-condemnation entry application is also important because doing so will, in many cases, greatly complicate the proceedings. For example, leases may be unrecorded and public entities often do not know if there are lessees on various properties, let alone whether the lessee has a right in the area of entry. Ascertaining such matters before applying for what should be an expedited entry to perform environmental testing, or surveys, again runs counter to the purposes of the expedited procedure. Furthermore, naming them would make all lessees and easement holders involuntary named parties to a court proceeding, forcing them to incur costs and possible attorneys' fees to determine how to respond. The DWR argued that because "indispensable parties" are parties to an action in which a judgment will be entered, and because no judgment will ever be entered in

such a proceeding. The counter argument is that lessees and easement holders may be damaged by a pre-condemnation entry, so they should be named parties and given the right to be heard as a party.

The court of appeal sidestepped the indispensable party issue by determining that the issue was moot, but the court's reasoning may provide meaningful guidance to future courts. It found the issue to be moot because even though lessees and easement holders were not named as parties to the proceeding, the trial court had required the DWR to serve all of them with written notices of the proposed entry and any of them could have appeared in the proceeding to object to the terms of the proposed pre-condemnation entry.

This case reminds eminent domain practitioners that a public entity cannot assume that gaining pre-condemnation entry will be easy or fast. The decision makes it clear that a hearing must occur and that the property owner will have a right to pursue discovery, which may cause significant delays in obtaining entry and may significantly increase attorneys' fees. Public entities should begin the process of obtaining pre-condemnation entry earlier, if it is feasible to do so. However, it is not necessary to go to court at all to gain entry onto private property for surveys and pre-condemnation testing if the activities are not of the type that will cause "actual damage" and will not substantially interfere with the possession or use of the property. (An unpublished opinion recently held that there is no right to compensation for a pre-condemnation entry based merely upon the fact that a right to use is obtained, "actual damage" or interference with possession/use of the property is required, unlike a temporary construction easement in a condemnation case.)

In addition, because this case leaves open the issue whether lessees or easement holders must be named as indispensable parties to a pre-condemnation entry petition, public entities will have to weigh whether they want to fight this battle or "bite the bullet" and plan to name all such interest holders when they petition for pre-condemnation entry. At a minimum, they should be prepared to provide written notice of the petition proceeding to lessees and easement holders.

Mike Rubin

San Diegans for Open Government v. City of San Diego
6 Cal.App.5th 995

This case deals with the question whether one is entitled under the California Environmental Quality Act (CEQA) or local ordinances to an administrative appeal to the city council of a planning commission's determination to uphold a staff "substantial conformance review" (SCR) decision for a proposed project modification. The court replied in the negative.

A bit of factual history is important. In 1997, the San Diego City Council approved a master plan and related permits to allow for the development of a high-density, mixed-used retail, commercial, and industrial business park. The city council also adopted an environmental impact report (EIR), which contemplated that subsequent city actions to implement the development plans did not require additional environmental documentation unless otherwise required by CEQA.

In 2000, the city council amended the project to include up to almost 1,000 dwelling units. The city council adopted an addendum to the EIR (the "Addendum") upon a determination that the additional dwelling units would not result in new significant environmental impacts. In 2002, the number of approved dwellings was increased to over 1,500 units pursuant to a mitigated negative declaration (MND). In 2012, a developer was allowed to build several hundred of the residential units and construct additional buildings and structures subject to a planned development permit and an environmental mitigation monitoring reporting program. The approved permit stated that any proposed changes in parking would require an SCR and encompassed the MMRP requirements of the EIR, the Addendum, and the MND.

In 2013, the developer (Sunroad) applied for SCR of proposed design changes to the approved project; mainly, the installation of a podium level pedestrian bridge, the elimination of one level of parking, a reduction in the number of bicycle spaces, an increase in the building height from 83 to 88 feet, and a change in the mix of units. Various city departments reviewed the proposed changes and found they conformed with existing environmental mitigation conditions.

Plaintiff San Diegans for Open Government and others timely appealed the staff's SCR decision to the planning commission as provided by the city code. The planning commission held a noticed public hearing and voted to deny the appeal, thereby upholding the SCR decision. The plaintiff attempted to appeal the planning commission's action to the city council, which declined to consider the matter on the basis it was not appealable.

The plaintiffs sued, claiming that CEQA and local ordinance provided them with an appeal to the city council. The trial court denied the relief sought, and the plaintiffs appealed.

The Fourth District Court of Appeal rejected the plaintiffs' position. Public Resources Code section 21151(c) declares in part that an appeal to the local agency's elected decisionmaking body is available if a nonelected decisionmaking body of the agency certifies an EIR, approves a negative declaration or MND, or determines a project is exempt from CEQA. The court held that this provision did not apply to the case at hand because neither the city staff nor the planning commission took actions during the SCR process that would have triggered an appeal to the city council. No determination was made that the modified project was not subject to CEQA or otherwise exempt. The SCR decision did not alter the city council's prior determinations that the project was subject to CEQA and the mitigation measures contained in the EIR, the Addendum, and the MND. The city code provides that any person may appeal an environmental determination not made by the city council to the city

council. The court also found this provision to be inapplicable. The city code defined environmental determination as a decision by a non-elected city decisionmaker to certify an EIR, approve a negative declaration or MND, or determine a project is exempt from CEQA. Because the SCR decision merely found that that the modified project plans conformed to previously approved development permit conditions and requirements, it did not constitute an "environmental determination" under the city code.

Thus, the plaintiffs had no basis under CEQA or local ordinances to pursue an appeal to the city council of the SCR decision.

This case underscores the importance of carefully reviewing and understanding the procedural requirements associated with the processing of projects under CEQA and local regulations, including the opportunities for administrative appeals.

Thai Viet Phan

Teixeira v. County of Alameda
822 F.3d 1047

We reported last year on this Ninth Circuit Court of Appeals decision in which the three-judge panel held that an ordinance imposing restrictions on locations of gun stores is subject to strict scrutiny. The county asserted that the ordinance should be subject to a lower standard of judicial review. The Ninth Circuit has since determined to rehear the case en banc. (An en banc panel is composed of the Chief Judge and ten randomly selected judges.) Oral argument is tentatively set for the week of March 20, 2017.

Union of Medical Marijuana Patients, Inc. v. City of San Diego
4 Cal.App.5th 103

In this opinion, the Fourth District Court of Appeal addressed a split in authority of whether certain activities are categorically considered a "project" under the California Environmental Quality Act (CEQA). The court rejected the notion that an ordinance regulating the establishment and location of medical marijuana consumer cooperatives (the "Ordinance") constituted a project categorically or based on alleged ensuing environmental impacts.

Here, the City of San Diego adopted the Ordinance, which allowed cooperatives as a conditionally permitted use throughout the city provided that there were no more than four cooperatives in each of the nine city council districts, and that they met other location restrictions, *i.e.*, not being within a certain distance of certain uses. Due to these restrictions, a maximum of 30 cooperatives were be allowed in the city. In adopting this Ordinance, the city did not conduct any analysis under CEQA because it determined that the action was not a project under CEQA, as it would not have the potential for resulting in either a "direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment."

The petitioner in this case, Union of Medical Marijuana Patients, Inc. ("UMMP"), filed a petition for writ of mandate, alleging that the city failed to comply with CEQA in enacting the Ordinance without having first conducted environmental review. The trial court denied UMMP's petition, holding that the adoption of the Ordinance was not a project subject to CEQA review. On appeal, UMMP's raised two arguments: (1) enactment of the Ordinance constitutes a project as a matter of law because it is a type of zoning ordinance, even without a determination that it may cause a physical change in the environment; and (2) enactment of the Ordinance constituted a project based on the underlying facts. The court rejected both claims.

First, the court noted that Public Resources Code section 21080(a), which provides examples of the types of projects that are subject to CEQA review, is ambiguous. That section states that CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps . . .." Some courts have ruled that at least some of the activities listed in section 21080(a), such as the approval of a tentative subdivision map, constitute a CEQA "project" as a matter of law. The court of appeal here rejected that notion, reasoning that section 21080(a) provides "an illustration of '[a]n activity directly undertaken by any public agency' as set forth in section 21065" and that a specified activity does not constitute a CEQA project "unless it *also* meets the second requirement in section 21065, namely that it 'may cause either a direct physical change in the environment, or a reasonably foreseeable indirect change in the environment.'" The court thus ruled that the city's enactment of the Ordinance did not constitute a "CEQA project" as a matter of law.

Having failed in its "bright-line" argument, UMMP argued the enactment of the Ordinance nonetheless constituted a project because it may cause a reasonably foreseeable indirect physical change in the environment. UMMP identified three categories of possible physical changes to the environment that were reasonably foreseeable: (1) increased travel, resulting in air pollution and traffic, (2) increased indoor cultivation of marijuana, leading to negative environmental impacts, and (3) increased building development, also resulting in impacts to the environment. After reviewing the three alleged impacts, the court rejected this argument as well.

In regard to the first two impacts, UMMP argued that there would be increased traffic and at-home cultivation based on the assumption that the Ordinance would make it more difficult for patients to access medical marijuana. However, the court found no support in the "administrative record, or in logic, for that assumption." If anything, the court reasoned, the Ordinance increased the availability of legally attainable marijuana, which was previously only supplied through illegal cooperatives within the City. Additionally, UMMP argued that the new cooperatives would have to be located somewhere, and that would necessarily result in new construction impacts. In rejecting this argument, the court found that it was "purely speculative to assume that the establishment of the cooperatives permitted under the Ordinance will require any new buildings to be constructed, as cooperatives could simply choose to locate in available commercial space in an existing building." Furthermore, based on that uncertainty, the court noted that it would be premature to perform the CEQA analysis now, based on the "mere possibility" of new construction.

This case lays bare a split in authority, regarding the meaning of Public Resources Code section 21080(a). Should an agency be considering one of the actions listed in that section, it should be aware of this split in authority. While not every listed action may be a "project" meriting CEQA review, in making this determination, the agency should nonetheless thoroughly determine whether the proposed action may cause either a direct or reasonably foreseeable indirect physical change in the environment.

On January 11, 2017, the California Supreme Court granted a petition for review to hear this case, which hopefully will resolve the current split in authority.

Travis Van Ligten