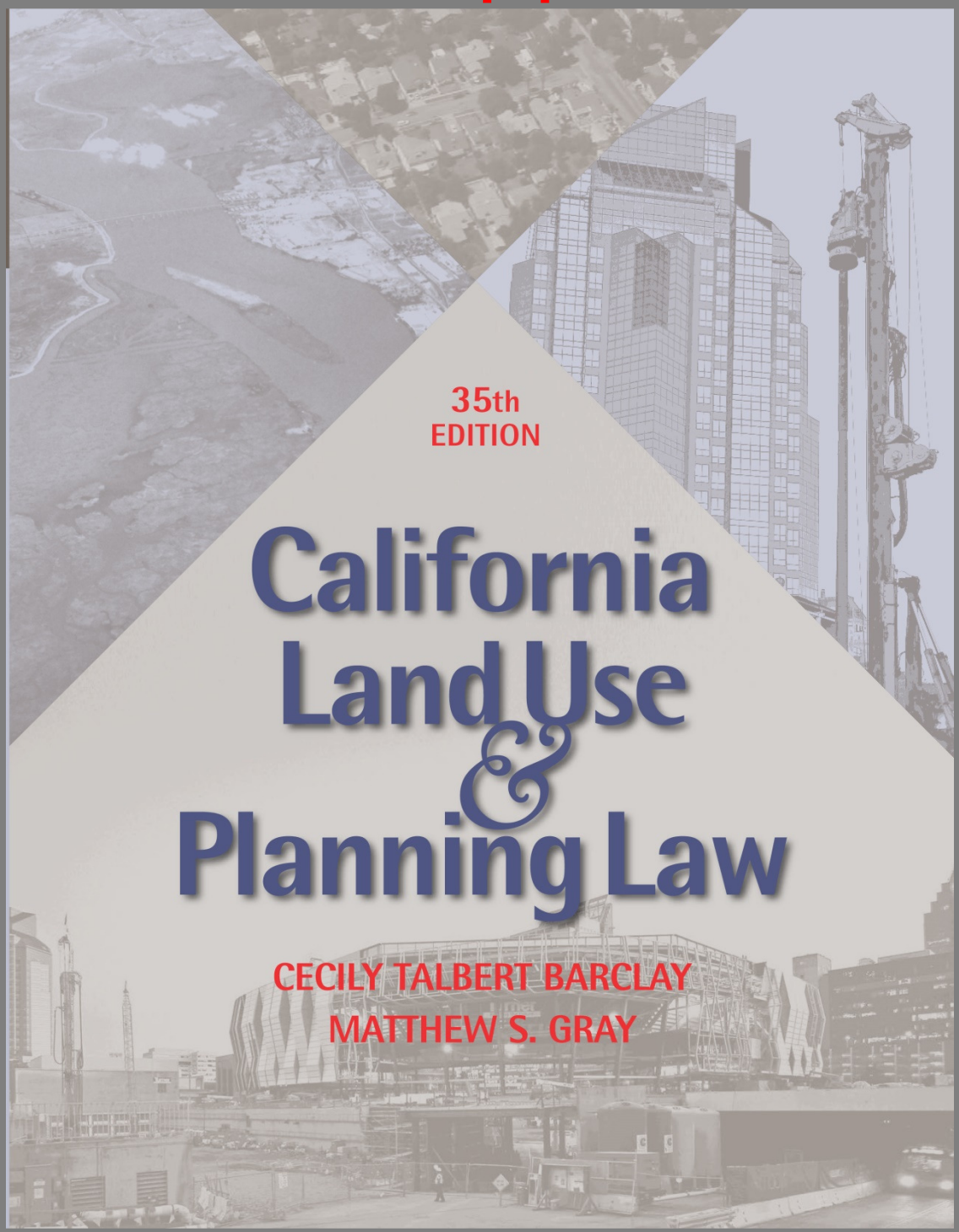
2017 Supplement



Use of this Supplement

Dear Reader:

This Supplement is intended for use in conjunction with Curtin's California Land Use & Planning Law, Thirty-Fifth Edition (2016). In lieu of publishing the Thirty-Sixth Edition in 2017, the authors have prepared a Supplement containing analyses of the most important decisions published in 2016 and 2017 (through March 31st) affecting California land use and planning. Chaptering of the Supplement is consistent with the Thirty-Fifth Edition for ease of reference; however, only those chapters for which we have identified significant case law are included in the Supplement. Readers should anticipate that the most significant 2016 and 2017 cases (including those published after March 31st), legislation, and regulatory developments will be addressed in the Thirty-Sixth Edition to be published in early 2018.

Regards,

Cecily T. Barclay
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CHAPTER 1
Local Land Use Authority

***City of San Francisco Apartment Association v. City and County of San Francisco*, 3 Cal. App. 5th 463 (2016)**

San Francisco Ordinance Restricting the Merger of Rental Units Withdrawn from Rental Market Preempted by Ellis Act

A San Francisco ordinance imposing a 10-year waiting period between withdrawal of a rental unit from the market and merger of the withdrawn unit into one or more other units was facially invalid under the Ellis Act, Gov't Code Section 7060 et seq., because it effectively imposed a penalty on landowners' exercise of an absolute right under the Act to withdraw rental units from the market. The court of appeal held that the 10-year waiting period to merge rental units was fully preempted by the Ellis Act, which provides real property owners the "absolute right to exit the residential rental business." A local law is preempted by state law if it conflicts with the state law through duplication, contradiction, or if the local law enters an area fully occupied by state law. The court determined that the 10-year waiting period, in effect, added another requirement for landowners to satisfy in order to exit the rental business. This requirement, the court found, is preempted by the Ellis Act which permits landlords—through compliance with the Act—to go out of the residential rental business.

***Coyne v. City and County of San Francisco*, 9 Cal. App. 5th 1215 (2017)**

Ellis Act Preempts San Francisco Ordinance Requiring Landlords Exiting Residential Market to Pay Enhanced Relocation Payments

The Ellis Act preempts mandated relocation assistance payments of "the difference between the tenant's current rent and the prevailing rent for a comparable apartment in San Francisco over a two-year period" because such mitigation measure constitutes a prohibitive price for landlords who wish to exit the rental business.

Ordinance 54-14, enacted by the City and County of San Francisco, entitled a tenant to an increased relocation payment in the amount of the difference between the tenant's current rent and the prevailing rent for a comparable apartment in San Francisco over a two-year period and contained provisions allowing property owners to seek relief from the local rent board. The trial court found Ordinance 54-14 to be preempted by the Ellis Act, Gov. Code 7060 et seq., which prohibits a city or county from "compel[ling] the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease."

Following the trial court's invalidation of Ordinance 54-14, the city both appealed and enacted Ordinance 68-15. Ordinance 68-15 revised the invalidated relocation assistance measure by capping a payout of rental payment differential at $50,000 and conditioning receipt of the payout on a tenant's submission of a statement under penalty of perjury that such payment will be used solely for relocation costs. After the trial court invalidated Ordinance 68-15 and the city appealed, the court of appeal consolidated the appeals pursuant to a joint motion made by the parties.

As a preliminary matter, the court of appeal established that a local law must be reviewed under a "prohibitive price" test to evaluate whether the payment requirements in the ordinance are conflict preempted under the Ellis Act. Such test asks whether the challenged ordinance imposes a "prohibitive price" on a landlord's exercise of his or her right under the Ellis Act to withdraw from the residential rental business.

Reviewing the ordinances *de novo* under the "prohibitive price" test, the court concluded the ordinances at issue imposed a "prohibitive price" on a landlord's ability to exit the residential rental business and were thus preempted by the Ellis Act. The court noted that the Ellis Act does not permit a city to permit a landlord's departure on the payment of a ransom, and determined that the obligation of landlords to pay former tenants a payout over two years is a form of ransom.

Although the Ellis Act allows for municipalities to impose mitigation measures on landlords to alleviate “any adverse impact” from displacement, the court noted that such savings clauses are strictly construed, and that “a property owner’s decision to withdraw from the residential market may not be frustrated by burdensome monetary exactions from the owners to fund the city’s policy goals.”

CHAPTER 2
General Plan

Spring Valley Lake Association v. City of Victorville **(Wal-Mart Stores Inc.), 248 Cal. App. 4th 91 (2016)**

General Plan Sustainability Requirements Doom Wal-Mart Project

The court of appeal, finding a variety of legal errors, including failure to comply with a city policy requiring on-site electricity generation "to the maximum extent feasible," overturned the City of Victorville's approvals for a Wal-Mart project.[1]

The court held, *inter alia*, that the project was inconsistent with two sustainability provisions of the city's general plan. The first was a program requiring "all new commercial or industrial development to generate electricity on-site to the maximum extent feasible." The project did not include any on-site electricity generation; the EIR stated that incorporation of rooftop solar systems would make the project economically infeasible absent significant government credits and incentives, which could not be assured. The court held this explanation did not constitute substantial evidence that solar power generation or other alternatives (such as wind power, which the EIR did not discuss) were completely infeasible.

The second general plan requirement was a 15% improvement on 2008 Title 24 standards for all new construction. The EIR showed that the project would "currently" achieve only a 10% improvement, but would comply with new energy efficiency standards at the time of construction, and then would "likely" meet the 15% requirement. The court held that this, too, was inadequate.

The court agreed with the city that a project need not conform perfectly with each and every general plan policy, but applied the rule that a project is inconsistent with a general plan "if it conflicts with a general plan policy that is fundamental, mandatory, and clear." The court held that the city's on-site electricity generation requirement constituted such a policy, and therefore the city's finding that the project was consistent with its general plan was not supported by substantial evidence.

Naraghi Lakes Neighborhood Preservation Association v. City of Modesto **(Berberian Holdings, L.P.), 1 Cal. App. 5th 9 (2016)**

General Plan's Size Ranges for Shopping Centers a "Flexible" Policy, Not a Rigid Mandate

The City of Modesto's General Plan includes a policy providing that certain neighborhoods "should" include a "7-9 acre neighborhood shopping center, containing 60,000 to 100,000 square feet." The court of appeal upheld, against a challenge, that the city's determination that development of an approximately 170,000 square foot shopping center on about 18 acres in one such neighborhood would be consistent with that policy.

The city approved a general plan amendment and rezoning to allow construction of the shopping center. In upholding the city's findings that these actions were consistent with its general plan, the court first stated that the project was compatible with general plan policies aside from its identification of acreage and square footage figures. The court then deferred to the city's interpretation of the latter policy as offering "flexible descriptions to provide a basic model or pattern to guide the future development of the applicable neighborhood," rather than "rigid development mandates."

[1] The court's findings on the CEQA issues are discussed in Chapter 8.

The court found this interpretation supported by the plain language of the general plan, including its use of the permissive word "should" in place of the mandatory "shall." The record also contained substantial evidence, the court determined, that the city consistently applied the acreage and square footage figures flexibly, as it previously had approved shopping centers larger than the stated ranges.

The court's decision reinforces existing case law emphasizing the significant discretion a local agency enjoys when considering whether a proposed development is consistent with its general plan.

***Orange Citizens for Parks and Recreation v. Superior Court*, 2 Cal. 5th 141 (2016)**

California Supreme Court Rejects City's Attempt to "Evade" General Plan Amendment Referendum

The California Supreme Court unanimously denied an effort by the City of Orange to defend its approvals for a residential development project despite an intervening public vote that rejected a general plan amendment the city had passed to advance the project. By later attempting to make an "administrative correction" to its general plan, the Court held, the city improperly sought "to evade the effect of the referendum petition."

To resolve the case, the Court was forced to grapple with the convoluted planning history underlying an open space tract recently approved for development as 39 residential units. In 1973, the city council adopted a specific plan that designated the property as open space, but also passed a resolution upholding the "recommendation of the Planning Commission" to designate the property as open space and low-density housing, not solely as open space. However, conforming revisions were not made to the specific plan. In 2010, the city adopted a new general plan that designated the project site as open space. The 2010 general plan stated that specific plans, including the 1973 plan, must be consistent with general plan land use policies.

The city council later approved the developer's request to amend the general plan to allow housing on the property. Shortly thereafter, project opponents challenged the amendment by referendum. In response, the city "changed course" and argued there was no need to amend the general plan to approve the project because the 1973 resolution adopting the Planning Commission recommendation permitted residential development on the property. The city concluded, accordingly, that a successful referendum of its action amending the general plan would have no effect. The voters went on to reject the general plan amendment, and in ensuing litigation the courts were asked to determine whether an amendment was required to authorize the project.

The Court said it was. The Court determined that the city council conditioned its finding that the housing project was consistent with the general plan on the general plan amendment later rejected by voters. Nevertheless, the Court continued, even if it were to assume the city had found the project consistent with the un-amended 2010 general plan, the Court would not defer to the city's finding. The Court rejected the city's argument that the specific plan had designated the property as open space and low-density housing. The 1973 planning commission recommendation to adopt this designation "never became integrated into the publicly available [specific] plan, let alone the 2010 General Plan." Rather, the Court stated, the 2010 general plan land use element gave the project site "an unambiguous designation" as open space, and the publicly available specific plan designated the property similarly.

Citing case law and this treatise, the Court concluded that the 2010 general plan land use designation had not informed the public that the property would be subject to residential development. The proposed general plan amendment, in contrast, did so, but was rejected by the citizenry. The city was not then permitted to conform its 2010 general plan to the 1973 planning commission recommendation through an "unreasonable" correction.

CHAPTER 4
Zoning

***Avenue 6E Investments, LLC v. City of Yuma, Arizona*, 818 F.3d 493 (9th Cir. 2016)**

Court Finds Plausible Claims of Discrimination from City Denial of Rezoning Application

Plaintiffs sued the City of Yuma under the federal Fair Housing Act, contending that the city's refusal to rezone land to permit higher-density housing amounted to intentional discrimination and created a disparate impact because the denial disproportionately deprived Hispanic residents of housing opportunities. Taking the factual allegations in the complaint as true, the Ninth Circuit Court of Appeals held that the complaint presented plausible claims for relief for disparate treatment under the Act. The court noted that the city council had denied the rezoning request against the advice of its own experts and in the context of what a reasonable jury could interpret as racially charged opposition by residents, who had complained that approval of the rezoning would create a "low-cost, high-crime neighborhood." This was also the only request out of 76 applications for rezoning that the city had denied in the previous three years.

CHAPTER 5
Subdivision Map Act

Spring Valley Lake Association v. City of Victorville **(Wal-Mart Stores Inc.), 248 Cal. App. 4th 91 (2016)**

Court of Appeal Overturns Parcel Map for Failure to Address Findings Requiring Map Denial

The Subdivision Map Act (Gov't Code §§ 66410 et seq.) requires the local agency to deny approval of a tentative map or parcel map if it makes any of seven findings listed in Section 66474(a)-(g). These findings are stated in the negative, e.g., "the proposed map is not consistent with applicable general and specific plans…." Indeed, the Section 66474(a)-(g) findings can be compared to Section 66473.5, which expressly requires the agency to make affirmative findings of a map's consistency with a general plan and any applicable specific plan.

In *Spring Valley Lake Association v. City of Victorville*, the City approved a parcel map for a Wal-Mart project without making findings on the seven topics listed in Section 66474(a)-(g), reasoning that the findings requirement applies only if an agency is denying rather than approving a map. The court disagreed. Citing a 1975 California Attorney General opinion, which had never been overturned by the Legislature, the court held that the city was required to address the seven findings in its approval of the parcel map. Given this decision, subdividers are advised to ensure that local agencies address Section 66474(a)-(g) when adopting findings to approve a parcel map or tentative subdivision map.

CHAPTER 6
California Environmental Quality Act (CEQA)

***North Coast Rivers Alliance v. A.G. Kawamura*, 243 Cal. App. 4th 647 (2015)**

Agency's CEQA Analysis Must Consider the Project's Long-Term Impacts

The California Department of Food and Agriculture (Department of Food and Agriculture) prepared a program EIR for a seven-year program to eradicate the light brown apple moth, an invasive pest. The EIR determined that because an alternative of controlling the moth would not achieve the project objective of eradicating the moth, a control program would not be studied.

After the EIR was completed the United States Department of Agriculture (USDA) advised that the moth infestation had spread to such an extent that eradication was no longer feasible. The Department of Food and Agriculture then approved a seven-year control program, based on the program EIR, finding the control program would use the same methods as were proposed for the eradication program, but to a lesser degree, resulting in lesser impacts.

The cities of Albany, Berkeley, Richmond and San Francisco, together with environmental organizations and anti-spray groups sued, challenging the Department of Food and Agriculture's approval on CEQA grounds. The court of appeal agreed with several of their claims.

Fundamentally, the court found that the Department of Food and Agriculture failed to evaluate the ongoing long-term impacts of the control program, in light of the EIR's concession that a control program "would have to go on forever." Because of these EIR statements, the court rejected the Department of Food and Agriculture's argument that it would be speculative to assume the control program would continue after the initial seven-year period.

The petitioners argued that the Department of Food and Agriculture's approach amounted to unlawful piecemeal review of the first stage of an activity that would continue to operate over an indefinite period of time, but the court did not rule on that ground. It instead identified a CEQA violation due to the Department of Food and Agriculture's reluctance to promise to prepare another EIR in the future. The court acknowledged that CEQA sometimes allows use of an earlier EIR for later activities, making it unnecessary to prepare a further EIR. The court did not consider whether that rule could be applied to the control program, concluding that despite the possibility that a new EIR might be prepared for the continuation of control activities after seven years, the EIR violated CEQA because it did not examine the impacts of those later activities.

The court also held that the EIR failed to address a reasonable range of alternatives. It did not discuss whether the alternatives that were considered—amounting essentially to a menu of potential methods of eradicating the moth and a no project alternative—comprised too narrow a range. In a novel ruling, it concluded that CEQA required study of a specific alternative that might have greater impacts than the proposed project—a never-ending control program.

The court then discussed whether the failure to study this alternative amounted to prejudicial error. To assess prejudice, it impliedly raised a question whether recirculation was required to address the impacts of a control program alternative. It cited case law to the effect that recirculation is only required when new significant information is added after circulation of a Draft EIR. The court concluded that the new information "was clearly significant," because it caused the Department of Food and Agriculture "to change the program."

The court labeled as "supposition," the Department of Food and Agriculture's reasoning that a control program would have lower impacts than an eradication program because it would employ the same measures but to a lesser degree. Noting that the record "supports an opposing inference" because a control program would need to go on forever, the court concluded that the EIR's failure to study a control program left the record devoid of evidence to resolve the dispute. The Court concluded that, as a result, there was no substantial evidence in the Department of Food and Agriculture's record sufficient to support its determination that the new information was not significant.

***Preserve Poway v. City of Poway*, 245 Cal. App. 4th 560 (2016)**

Social and Psychological Impacts of Changes in Community Character Are Outside the Scope of CEQA

A land owner decided to close down a horse farm and build twelve homes in its place, most of which would be on one-acre lots, with enough room for horses, a permissible use under existing zoning. Over objections from members of the community, the city council unanimously approved the proposed development based on a mitigated negative declaration.

Opponents of the development filed suit to challenge the city council's actions, claiming that an EIR was required because the loss of the horse farm would have a significant impact on Poway's horse-friendly "community character:" Children would not be able to continue riding horses and will spend their free time "sitting in front of a computer or video game, or getting into trouble;" riding horses at the farm taught children valuable life lessons, and brought families together; and Poway would lose its "City in the Country" feel. The trial court agreed with these arguments, and ruled against the city.

The city appealed, and the court of appeal upheld the city's actions, holding that the impact of closing the farm on the character of the community is outside of CEQA's scope.

The court observed that to the extent community character has been discussed in CEQA cases, it has been limited to *aesthetic* impacts. However, the court explained, "The community character issue here is not a matter of what is pleasing to the eye; it is a matter of what is pleasing to the psyche." The opponents' claims went beyond aesthetic concerns to include "psychological and social factors giving residents a sense of place and identity, what makes them feel good and at home in Poway."

The court explained that CEQA does not require an analysis of subjective psychological feelings or social impacts, and that the fact that there was a heated public debate about community character does not by itself put the project within CEQA's reach. As the court stated, "CEQA's overriding and primary goal is to protect the physical environment;" the "environment" for purposes of CEQA is the *physical* conditions within the area that will be affected by a proposed project.

The CEQA Guidelines and case law make it clear that a project's social and psychological effects are not to be treated as effects on the environment. Cases decided under NEPA, the court noted, have also rejected claims that a project's social and psychological effects should be treated as environmental impacts. Thus, the opponents' repeated assertions that the horse farm was integral to Poway's community character as the "City in the Country" did not sway the court, because it saw the project's claimed impacts on community character as psychological and social effects.

The court concluded that CEQA did not require the city to study psychological and social impacts upon its community character; if the Legislature had wanted to define the "environment" to include psychological, social or economic impacts on community character, it could have done so, but it did not.

***Union of Medical Marijuana Patients, Inc. v. City of Upland*, 245 Cal. App. 4th 1265 (2016)**

Ordinance Prohibiting Mobile Medical Marijuana Dispensaries Was Not a "Project" Under CEQA

The court of appeal held that a city ordinance prohibiting mobile medical marijuana dispensaries within city boundaries did not constitute a "project" under the California Environmental Quality Act.

In 2007, the City of Upland adopted a zoning ordinance prohibiting any medical marijuana dispensary—whether fixed or mobile—in any zone within the city. The city prepared and adopted a negative declaration under CEQA, which

concluded that the ordinance would have no significant effect on the environment. No one challenged the city's negative declaration.

In 2013, the city adopted an ordinance that specifically prohibited mobile marijuana dispensaries within the city. Based on its findings that mobile dispensaries are associated with increased criminal activity and that 34 mobile dispensaries just outside the city advertised direct delivery of marijuana, the city concluded that there was "a high likelihood that mobile dispensaries will immediately flourish in the city without the adoption of this Ordinance."

The Union of Medical Marijuana Patients, Inc. (UMMP) submitted comments arguing that the 2013 ordinance constituted a "project" under CEQA that would have "foreseeable environmental effects," including "(1) increased travel by residents who would now be forced to travel outside the city to obtain medical marijuana; and (2) increased indoor cultivation activity within the city" which would result in increased utility use and hazardous waste. The city did not respond to these comments, and UMMP filed a petition for writ of mandate challenging the validity of the 2013 ordinance for failure to comply with CEQA.

The court affirmed the trial court's denial of the petition, holding that the 2013 ordinance was not a project subject to CEQA because the ordinance "merely restates the prohibition on mobile dispensaries that was imposed by the 2007 ordinance." The court noted that the ordinance met the first prong for determining whether the ordinance was a project subject to CEQA because "it was an activity directly undertaken by [a] public agency." Nonetheless, the ordinance, as a mere restatement of the previous ordinance, failed the second prong because it was not an activity that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."

The court rejected UMMP's contention that the 2013 ordinance was not a restatement of the 2007 ordinance because the 2007 ordinance was essentially a zoning ordinance adopted to regulate land use, not to regulate activities undertaken with motor vehicles. According to the court, the 2007 ordinance did not regulate land use only, and its codification in the municipal code's zoning title did not so limit the scope of the provision. While the main focus of the 2007 ordinance was on fixed dispensaries, which is a proper zoning function, the court found no impediment to city prohibiting any dispensaries, whether fixed or mobile.

Finally, the court concluded that even if the 2013 ordinance was not a mere restatement, it did not constitute a project for CEQA purposes because '[t]he ostensible environmental impacts UMMP cites" were based on layers of assumptions about what might occur as a result of the ordinance. UMMP offered no evidence to support its argument that residents currently obtaining marijuana from mobile dispensaries "would be forced to travel greater distances" to obtain the medication or that the ordinance would result in indoor cultivation, leading to increased electrical and water consumption, waste plant material and odor, and hazardous waste materials associated with fertilizing and harvesting marijuana plants. These alleged impacts, the court ruled, were too "speculative and unlikely" to be deemed "reasonably foreseeable."

***Center for Biological Diversity v. County of San Bernardino* (Cadiz Inc.), 247 Cal. App. 4th 326 (2016)**

Public/Private Partnerships: New Guidance on Designating the CEQA Lead Agency

The court of appeal has outlined—with a new test—how to determine the CEQA lead agency for a project in which a private entity partners with multiple public agencies.

Cadiz, Inc. partnered with Santa Margarita Water District, San Bernardino County, and Fenner Valley Mutual Water Company—a private, nonprofit entity Cadiz formed—to pump fresh groundwater from an aquifer below Cadiz's Mojave Desert property to customers in nearby counties. The purpose of the project was to conserve groundwater and improve water supplies to California communities. The county and water district entered into an agreement

designating the water district as the lead agency and the county as a responsible agency for environmental review purposes.

Several environmental organizations challenged the project's approval, alleging that the water district was improperly designated as the lead agency. They argued that the county, rather than the water district, should have been the lead agency because the county had general governmental powers to approve or exempt the project from the county's permitting requirements for pumping.

The court held that the water district was properly designated as the lead agency. Where there is more than one public agency involved in a project, the CEQA Guidelines delineate which should be the lead agency. Section 15051(a) of the Guidelines provides that if a public agency will carry out the project, that agency shall be the lead agency even if the project is located in another agency's jurisdiction. Subsection (b) states that if a nongovernmental entity will carry out the project, then the public agency with the greatest responsibility for supervising or approving the project as a whole shall be the lead. Subsection (c) provides that if there is more than one public agency that satisfies (b), then the lead agency shall be the one which acts first on the project. And subsection (d) provides that if more than one public agency has a substantial claim to be the lead agency, they may enter into an agreement designating which will serve as lead.

The court found that while the water district hadn't acted first, it satisfied the other three tests in Guidelines section 15051. Having closely examined the water district's responsibilities in comparison to Cadiz and the county, the court determined that "[t]he final EIR provide[d] sufficient evidentiary support for the designation of [the water district] as the lead agency based on its cooperative partnership with Cadiz in implementing, carrying out, supervising, and approving the Project as a whole."

The court cited, among other things, the water district's responsibilities of obtaining financing; approving design, construction, and project terms; and managing and overseeing the project operation. Although the county had authority over pumping, the court recognized that the project encompassed more than that and that the water district had more authority over the project as a whole. The court also concluded that the agreement the water district and county had entered into properly designated the water district as lead agency because an agency need not have an equal or greater claim to be lead agency, but merely a substantial one in order to be designated by agreement. Additionally, the court noted, the lead agency may benefit from a project as long as it remains able to provide the information necessary for environmental review.

The court also provided guidance—in the form of a new test based on section 15051—for analyzing projects conducted in partnership between a public agency and a nongovernmental entity. It held that, in a public/private partnership, the lead agency may be either "(1) the public agency that is a part of the public/private partnership, or (2) the public agency with the greatest responsibility for supervising or approving the project as a whole." Citing the evidence in the EIR, the court ruled that the water district was properly designated as the lead agency under either prong of the new test.

Delaware Tetra Technologies Inc. v. County of San Bernardino **(Santa Margarita Water District), 247 Cal. App. 4th 352 (2016)**

MOU Allocating Responsibility for Development of Groundwater Management Plan Not a Project under CEQA

The court of appeal held that a memorandum of understanding between a water district, county, property owner, and water company outlining mutual responsibilities for preparing a groundwater management plan governing the installation and operation of groundwater extraction wells was not a "project" requiring review under CEQA. The court based its decision on its conclusion that the memorandum itself did not constitute the groundwater management plan, but rather established a process for completing the plan. The court reasoned that after the groundwater management

plan was completed, the county would retain full discretion to consider the final EIR, approve or disapprove the proposed plan and project, and could require additional mitigation measures or alternatives.

In 2002, the County of San Bernardino approved an ordinance governing the pumping of groundwater within the county. The ordinance required that operators of groundwater wells, unless specifically excluded, obtain a permit and comply with specified standards to maintain the health of aquifers in which pumping occurs. Several years after the ordinance was enacted, a landowner and water company proposed to install a number of groundwater wells, extract groundwater from the wells for fifty years, and transport the water through a pipeline to an aqueduct, from which the water ultimately would be distributed by a water district to end-users.

In 2011, the Santa Margarita Water District (SMWD) released a draft EIR covering the proposed project for public review and comment. The following year, SMWD, San Bernardino County, property owner, and water company negotiated a memorandum of understanding governing the proposed project. In the MOU, the parties agreed that a groundwater management plan, which would include monitoring, and mitigation components, would be developed in conjunction with finalization of the EIR. The county thereafter approved a resolution finding that the MOU satisfied the exclusion provisions of the ordinance, and that a permit for the proposed project therefore would not be required.

Petitioner, a company that alleged its business would be harmed by the proposed project, challenged the resolution, arguing that the county was obliged, but failed, to perform a full review under CEQA before approving the MOU. The trial court disagreed, and upheld the county's actions. The petitioner appealed.

In the published portion of its opinion, the court of appeal affirmed the judgment of the trial court and held that the county was not required to perform an environmental review under CEQA before approving the MOU. The court observed that an agency has no duty to comply with CEQA unless its actions constitute "approval" of a "project." A "project," the court said, exists only if, among other things, an activity "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." The MOU, the court concluded, merely established a framework for completion of the groundwater management plan, and required that the plan ultimately be submitted to the board of supervisors, at which time the county would have full discretion to consider the final EIR, approve or deny the project, or require additional mitigation measures or alternatives necessary to avoid or substantially lessen the environmental impacts of the project. Therefore, the county did not violate CEQA by approving the MOU without undertaking a full environmental review.

In reaching its decision, the court distinguished the cases (beginning with the California Supreme Court's decision in *Save Tara v. City of West Hollywood*) in which the agency took steps which committed it to a definite course of action regarding the project. By contrast, the county's MOU did not hamper its full discretion to approve, deny, or condition the groundwater management plan, or the proposed groundwater pumping project, in the future.

Spring Valley Lake Association v. City of Victorville **(Wal-Mart Stores Inc.), 248 Cal. App. 4th 91 (2016)**

Court Overturns EIR for Inconsistencies and Failure to Recirculate DEIR for Public Comment on Significant New Information

Finding a variety of legal errors, including failure to recirculate a DEIR for further public comment, the court of appeal overturned the City of Victorville's approvals for a Wal-Mart project.[2]

The court found that the EIR's GHG emissions analysis was inadequate because it relied in part on the conclusion that the project would achieve the 15% improvement in energy efficiency required by the city's general plan, whereas the EIR itself stated that the project might not do so.

[2] The court's findings on the project's consistency with the General Plan are discussed in Chapter 2.

The city revised four of the DEIR's analyses in the Final EIR, but determined that the document did not need to be recirculated for further public comment. As to biology and traffic, the court agreed, but it found significant new information regarding air quality and hydrology/water quality that should have led to recirculation. The change in the air quality chapter was the addition of the general plan consistency analysis described above. The court stated that because the analysis did not support the finding that the project was consistent with the general plan requirement, and because the public did not have the opportunity to comment, the EIR should have been recirculated. The hydrology/water quality analysis suffered from a different problem; according to the court, the Final EIR showed a "complete redesign" of the project's stormwater management plan, and 26 pages of EIR text were replaced with 350 pages of technical reports and a conclusion. The court held that these revisions deprived the public of a meaningful opportunity to comment.

***Ukiah Citizens for Safety First v. City of Ukiah*, 248 Cal. App. 4th 256 (2016)**

EIR's Energy Impacts Analysis Fails to Satisfy CEQA's Requirements

The court of appeal concluded that the City of Ukiah's EIR for a proposed Costco failed to satisfy CEQA's requirements for evaluating energy impacts.

The project involved the construction of a new Costco store and gas station. The city certified the EIR and adopted a statement of overriding considerations and adopted legislation to approve the project entitlements several weeks later. Ukiah Citizens for Safety First (Ukiah Citizens) filed a petition for a writ of mandate challenging the EIR and the project approvals on a number of grounds, including that the EIR failed to properly evaluate the project's energy impacts.

Public Resources Code section 21000(b)(3) provides that an EIR must incorporate a statement regarding "mitigation measures proposed to minimize significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy." Section 15126.4(a)(1)(C) of the Guidelines provides that: "energy conservation measures, as well as other appropriate mitigation measures, shall be discussed when relevant." And Appendix F of the Guidelines provides a list of possible energy impacts and potential conservation measures that are intended to assist the lead agency in preparation of an EIR.

In this case, the EIR did not contain a separate discussion of energy impacts, but instead mentioned energy impacts at various points throughout the environmental analysis. For example, the EIR determined that the project could result in a potential increase in electrical and natural gas usage, and it discussed the effects of energy usage with respect to the project's potential impacts on air quality and greenhouse gas emissions. The EIR concluded that the project "would not exceed existing gas and electric supply or result in wasteful, inefficient, or unnecessary consumption of energy." In support of this conclusion, the EIR noted that the project would conform to Building Code energy conservation standards, and that the project's design incorporated several sustainable features.

Ukiah Citizens claimed that the EIR failed to provide sufficient information regarding the project's energy consumption, and generally failed to satisfy Appendix F. The city, Ukiah Citizens contended, was required to calculate the project's energy use attributable to project-generated vehicle trips, and to also calculate the project's energy consumption during construction and operational phases.

The court sided with Ukiah Citizens and found the EIR's energy impacts deficient: The analysis failed to calculate the energy impacts of project-related vehicle trips, and relied on compliance with the building code standards to mitigate the project's construction and operational energy impacts instead of providing a complete evaluation under Appendix F. The court further noted that the city's reliance on mitigation measures designed to reduce greenhouse gas emissions was insufficient with respect to energy impacts.

***Center for Biological Diversity v. Department of Fish and Wildlife*, 1 Cal. App. 5th 452 (2016)**

CEQA Does Not Allow Court of Appeal, on Direct Appeal, to Issue Writ of Mandate and Supervise Its Implementation

On direct appeal, CEQA does not authorize the court of appeal to issue a writ of mandate and supervise the public agency's implementation and compliance with the writ.

The California Supreme Court previously ruled that the EIR did not properly analyze greenhouse gas emissions and biological resources. On remand, the project developer and the Department asked the court of appeal to issue a writ of mandate and supervise the Department's compliance with the writ, because the case had been reassigned to a different superior court judge who had not previously heard the case. The court of appeal rejected their argument and remanded the case to the superior court for further proceedings.

The court interpreted Public Resources Code section 21168.9(a), which provides that "If a court finds, as a result of a trial, hearing, or remand from an appellate court, that any determination, finding, or decision of a public agency has been made without compliance with this division, the court shall enter an order" that includes one of three statutorily prescribed mandates. The developer and the Department argued that this text allows the court of appeal, in a case remanded from the supreme court, to enter its own writ of mandate under CEQA.

In rejecting this claim, the court of appeal determined that it has a limited role under the longstanding rules established in the Code of Civil Procedure: it can affirm, reverse, or modify the judgment that is being appealed, and then it must remit the case to the lower court. The court examined the legislative history and determined: "There is no evidence that the Legislature intended when an environmental impact report's certification was litigated on appeal to alter the established procedures for remitting jurisdiction of the trial court." The court thus concluded that "we do not have the authority to issue our own writ of mandate. Rather, our duty is to decide issues pertinent to the writ of mandate's scope, insofar as possible, and then remit the matter to the trial court." The court made it clear, however, that these limitations do not apply, for example, when an original proceeding is commenced in an appellate court.

The court of appeal explained that the specific remedy to be ordered, including whether to allow certain project activities to proceed, depended on factual issues to be resolved by the trial court.

***Joshua Tree Downtown Business Alliance v. County of San Bernardino*, 1 Cal. App. 5th 677 (2016)**

Opinion Evidence Submitted by Persons Not Qualified to Provide an Expert Opinion Is Insufficient to Establish that a Project May Cause Urban Decay Impacts

The court of appeal upheld the county's mitigated negative declaration over opponents' concerns about the potential for urban decay impacts. In rejecting the opponents' claims, the court carefully analyzed lay testimony regarding purported urban decay effects and concluded that none of the purported predictions about urban decay amounted to substantial evidence under CEQA.

The proposed project, a 9,100 square-foot store, required a conditional use permit from the county. The county prepared an initial study and adopted a mitigated negative declaration for the project, determining an EIR was not required.

The project opponents challenged the county's determination, claiming it failed to adequately analyze urban decay impacts and that a fair argument could be made, based on the evidence before the county, that significant urban decay impacts would occur, necessitating an EIR.

The court upheld the county's mitigated negative declaration, finding that there was no substantial evidence in the administrative record that would support a fair argument that the project might lead to significant urban decay impacts. It based that finding on an exacting analysis of the record, including the testimony presented to the county

on the issue. The court emphasized that opinion evidence, without an adequate foundation in the record, does not constitute substantial evidence for purposes of CEQA. The court specifically discounted the testimony of a resident lawyer/business owner regarding potential economic impacts of the project, concluding that she was not qualified to opine on whether the project would cause urban decay. Further, without any relevant studies or surveys, the conclusory remarks regarding economic impacts were speculative. The court also noted that the courts defer to agencies on disputed issues of credibility.

Separately, the court considered and rejected the opponents' claim that the county failed to conduct an adequate investigation of potential urban decay effects. The fact that the initial study did not contain a thorough analysis of urban decay effects was insufficient to invalidate the county's negative declaration, the court ruled, because an initial study and negative declaration need not disclose all the evidence supporting the agency's findings. The county had considered urban decay and concluded that there was no evidence the project would have a negative economic effect that would cause urban decay.

***Communities for a Better Environment v. Bay Area Air Quality Management District*, 1 Cal. App. 5th 715 (2016)**

Failure to Discover an Agency's Approval of an Exempt Project Does Not Extend the Time to File CEQA Lawsuit

The court of appeal ruled that the accrual of a claim that a public agency exemption determination violated CEQA is not postponed by the plaintiff's failure to discover the violation.

Communities for a Better Environment (CBE) brought an action against the Bay Area Air Quality Management District (BAAQMD) challenging BAAQMD's determination that its approval of a permit authorizing a rail-to truck transloading facility to switch from loading ethanol to crude oil was exempt from CEQA.

In July 2013, BAAQMD had found its approval was an exempt ministerial action, but did not file a Notice of Exemption. Two months later, the transloading facility began transloading crude oil. Over the next few months, BAAQMD modified several conditions of the permit and ultimately issued another permit incorporating the modifications. CBE subsequently filed its lawsuit against BAAQMD.

During the trial court proceedings, BAAQMD argued that CBE's petition was time-barred because it was filed more than 180 days after the issuance of the first permit, the time to file suit specified by statute when no Notice of Exemption is filed. CBE responded that a "discovery rule" should apply, which would mean that the limitations period did not begin to run until CBE first became aware of the operational change in January 2014. The trial court rejected CBE's claim and dismissed the case as time-barred because it was filed more than 180 days after BAAQMD's decision to approve the project.

The court agreed, holding that a discovery rule cannot be applied to postpone the running of CEQA's statutory limitations periods because the specified time periods are dates on which the public is deemed to have *constructive notice* of a potential CEQA violation.

The court distinguished the situation from a case decided by the California Supreme Court three decades ago, and a more recent court of appeal case, in which the plaintiffs successfully argued a challenge was not time-barred because substantial changes had been made to the project after the initial approval. The court observed that in both cases the courts determined "that an action accrues on the date a plaintiff knew or reasonably should have known of the project only if no statutory triggering date has occurred." CBE, however, "offered no theory" demonstrating that the applicable triggering date in the statute did not occur.

The court held that CBE's contention that the discovery rule could delay the statutory triggering date ran counter to the general principle that CEQA's statutes of limitation specify dates a plaintiff is deemed to have constructive notice

of a potential CEQA violation. A plaintiff's lack of actual notice of the violation is irrelevant. Accordingly, the court upheld the trial court's dismissal of CBE's petition.

***Walters v. City of Redondo Beach*, 1 Cal. App. 5th 809 (2016)**

Unusual Circumstances Exception to Categorical Exemptions Not Applicable to a Car Wash Located in a Commercial Zone

The court of appeal considered a challenge to the city's use of the categorical exemption for small facilities in approving a use permit for a car wash and coffee shop. The court upheld the city's use of the exemption, finding that the project fell within the terms of the exemption and that the unusual circumstances exception to the categorical exemptions did not apply.

The proposed car wash and coffee shop together totaled roughly 4,000 square feet on a 25,000 square-foot lot, located in a commercial zone. The lot previously served as the site for a car wash and snack bar, which operated until June 2001. The property fell into disrepair and in 2011, the property was found to be a blight on the area and the existing structure was demolished.

A few years later, the owner sought a conditional use permit for a new car wash and coffee shop on the property. The city granted the conditional use permit and found it categorically exempt under Guidelines section 15303, the categorical exemption for small facilities. The neighboring property owners challenged the city's CEQA determination and issuance of the conditional use permit.

The categorical exemption for small facilities applies to "construction and location of limited numbers of new, small facilities or structures" and the installation of small new equipment and facilities in small structures. Examples cited in section 15303 include a store, motel, office, restaurant or similar structure not exceeding 2,500 square feet in floor area. The listed examples also include up to four such commercial buildings, not exceeding 10,000 square feet in floor area, on sites in an urban area.

The project opponents contended that car washes are not covered by the exemption, and the type of equipment used at a car wash (blowers, vacuums, air nozzles) made the exemption inapplicable. The court disagreed, finding that car washes are similar to stores, motels, offices and restaurants in that they are commercial businesses that serve consumers, require parking for customers, contain equipment, and are often located near residential areas. The court also rejected the notion that equipment used at car washes was "substantially different" from the types of equipment associated with stores, motels, offices, or restaurants.

The opponents also argued that Guidelines section 15303 does not apply to a single commercial building larger than 2,500 square feet, even in an urbanized area. But the court again disagreed, affirming an earlier case interpreting the exemption which held that the exemption applies to the construction of one to four buildings, so long as the total floor area of the buildings does not exceed 10,000 square feet.

The project opponents also contended that the unusual circumstances exception precluded the city from relying on the exemption. The court applied the test laid out in the California Supreme Court's opinion in *Berkeley Hillside Preservation v. City of Berkeley*. Under this test, there are two alternatives to show unusual circumstances.

Under the first alternative, a challenger must prove both unusual circumstances and that a significant environmental impact might occur due to those circumstances. The court found there was nothing particularly unusual about the car wash. There were many other car washes in the surrounding area, a car wash had been located on the site for nearly 40 years, and the presence of large air blowers and outdoor activity was not qualitatively different from facilities such as fast food restaurants, convenience stores or motels found in the area.

Under the second alternative, a challenger can show unusual circumstances by demonstrating that the project "*will* have a significant environment effect." The court determined the appellants fell short of demonstrating this, emphasizing that it is not enough for petitioners to merely present a fair argument that a significant environmental impact may occur; they must show that there is no evidence in the record sufficient to support the city's determination no significant impacts will occur.

***Friends of the Willow Glen Trestle v. City of San Jose*, 2 Cal. App. 5th 457 (2016)**

Clarifying an Agency's Discretion to Determine Historical Significance for Purposes of CEQA

The court of appeal ruled that San José's determination that a railroad trestle bridge was not a historic resource was to be evaluated under the substantial evidence standard of review. It rejected the argument that the fair argument standard should apply, even though San José made its determination in the context of a mitigated negative declaration.

San José proposed to demolish a wooden trestle bridge that had been constructed in 1922, and replace it with a steel truss bridge. The city evaluated the historical significance of the trestle bridge in an initial study based on a review of information that had been developed for an earlier project. Those earlier documents concluded that the trestle was typical of its kind, that bridge components had likely been replaced in the preceding decades, and that the trestle bridge was not historically significant. The initial study for the bridge concluded that, even though the trestle was "locally important," it was not historically significant.

Project opponents submitted a report claiming the trestle was "an important historical icon" and concluding that it qualified for listing in the California Register of Historic Resources. The city disagreed, and ratified the initial study's analysis by adopting a mitigated negative declaration.

The project opponents sued. They claimed the city's determination was invalid because the record contained a fair argument that the bridge project may have a significant effect on historic resources. The trial court agreed and ordered the city to prepare an EIR. The issue on appeal was whether the city's decision should be reviewed under the fair argument standard or the substantial evidence standard.

The court relied on the language of section 20184.1 of CEQA, which identifies criteria under which a resource is deemed or presumed to be historically significant. It noted that the statute allows an agency to determine that resources presumed to be historic (such as resources listed on a local register) are not historically significant when it finds "the preponderance of evidence" supports that conclusion. Logically, if it makes such a finding, that finding must be upheld if it is supported by substantial evidence. The court then reasoned that the same standard must apply to determinations made under the final sentence in section 20184.1, which applies to resources that are *not* presumed historic. "Since the standard of judicial review for a presumptively historical resource is substantial evidence rather than fair argument, it cannot be that the Legislature intended for the standard of judicial review for a lead agency's decision under the final sentence of section 21084.1 to be fair argument rather than substantial evidence."

The court also addressed other court decisions on the issue. It ruled that those cases were not dispositive, as they did not explicitly consider the appropriate standard of review of a determination of whether a resource is historically significant. More importantly, the court rejected its 2004 decision in *Architectural Heritage Assn. v. County of Monterey*, 122 Cal. App. 4th 1095 (2004)—the case which triggered a long-running controversy about the issue—stating that "our decision in *Monterey* did not accurately state the appropriate standard of judicial review that applies in this case."

***California Building Industry Association v. Bay Area Air Quality Management District*, 2 Cal. App. 5th 1067 (2016)**

Bay Area Air Quality Management District's CEQA Guidelines on Pollution Impacts to Project Occupants and Users Are Invalid

The significance thresholds for exposure of receptors to harmful air pollution in the BAAQMD CEQA Guidelines cannot provide the basis for requiring an EIR or mitigation measures, when used to measure the impact of existing air pollution on future occupants or users of a project. As a result, BAAQMD's CEQA Guidelines are invalid to the extent they indicate that lead agencies should ordinarily apply the receptor thresholds to evaluate the effects of existing environmental conditions on a proposed project's occupants or users.

The lawsuit was filed by the California Building Industry Association (CBIA) seeking to overturn BAAQMD's significance thresholds for exposure of receptors in a new project to existing toxic air contaminants and particulates. CBIA's primary concern was that by increasing the burdens of CEQA compliance, the thresholds would hamper development of infill housing. Arguing that CEQA is limited to a project's impacts on the environment, and does not extend to the environment's impacts on a project, CBIA claimed that BAAQMD's receptor thresholds were inconsistent with CEQA to the extent they treat the impacts of existing air pollution on occupants or users of a new projects as an environmental impact.

In a decision issued in late 2015, the California Supreme Court ruled that an analysis of the effects of existing environmental conditions on a project's occupants or users is ordinarily not required under CEQA, but that CEQA does require an analysis of how a project might exacerbate existing environmental hazards. The Court sent the case back to the court of appeal, instructing it to consider the validity of BAAQMD's significance thresholds in light of these principles.

<u>The Court of Appeal's Opinion</u>

The opinion issued by the court of appeal after the case was sent back to it contains four important rulings on use of BAAQMD's receptor thresholds.

First, a lead agency may not require an EIR or mitigation measures for the sole reason that future project occupants or users will be exposed to health risks from a nearby source of harmful air pollution

BAAQMD conceded that the purpose of the challenged receptor thresholds is to give public agencies reviewing a project under CEQA a basis for determining whether future occupants or users will be exposed to unacceptable health risks due to emissions from nearby pollution sources. That purpose, the court concluded, cannot be squared with the rule that CEQA does not generally require an agency to consider the effects of existing environmental conditions on a proposed project's future users or occupants.

Second, public agencies may elect to evaluate the effect of existing environmental conditions on future occupants or users of their own projects

The Supreme Court had noted in its opinion that CEQA does not bar a public agency from considering the effect of existing conditions on a project it proposes to undertake itself. Accordingly, the court ruled that an agency may elect to use BAAQMD's receptor thresholds as guidance in assessing the effect of emissions on occupants or users of its own projects.

Thirdly, BAAQMD's receptor thresholds may be applied to determine whether a proposed project would worsen existing environmental conditions

CEQA's focus is on the changes a proposed project will make to the physical environment. As a result, when a project might worsen existing environmental conditions, BAAQMD's receptor thresholds may appropriately be used to

assess the impacts on project occupants or users to the extent the impacts stem from changes the project will make to the environment.

Fourth, BAAQMD's receptor thresholds may be used to analyze impacts on a project's occupants or users where such an analysis is required by statute

Several provisions of CEQA require an analysis of the health effects of existing environmental conditions on a project's occupants or users in specific situations. These statutes include school siting and construction projects and exemptions from CEQA for various categories of housing development projects. Because these statutes mandate an analysis of the impacts of air pollution on the project's occupants or users, the receptor thresholds may permissibly be used for that purpose.

Conclusion

The court rejected BAAQMD's argument that its guidelines were merely advisory, finding that "they suggest a routine analysis of whether new receptors will be exposed to specific amounts of toxic air contaminants" Having ruled that it would be improper for a lead agency to use BAAQMD's receptor thresholds to require an EIR, mitigation measures, or other CEQA review when such a use is not authorized, it concluded the guidelines should be invalidated in part. The court accordingly instructed the trial court to issue an order invalidating those portions of BAAQMD's guidelines that suggest lead agencies should apply the receptor thresholds, "to routinely assess the effect of existing environmental conditions on future users or occupants of a project."

***Citizens for Ceres v. City of Ceres* (Wal-Mart Stores, Inc.), 3 Cal. App. 5th 237 (2016)**

Developers May Recover the Cost of Reimbursing a Local Agency for the Preparation of a CEQA Administrative Record

The court of appeal clarified that a developer may recover costs of the preparation of the record, distinguishing the limitations placed on recovery of such costs applied by the court in *Hayward Area Planning Association v. City of Hayward*, 128 Cal. App. 4th 176 (2005).

The project at issue is a shopping center with approximately 300,000 square feet of retail space located in Ceres. Wal-Mart bought the project during its development, and intended to construct a new Wal-Mart SuperCenter, which would replace an existing Wal-Mart in Ceres. The city issued a notice of preparation to prepare an EIR in September 2007. The draft EIR was released for public comment in 2010, and issued a final EIR in 2011. The city approved the project in 2011, which triggered five years of litigation.

The petitioners asserted that the CEQA review of the project was deficient on several grounds, including: (1) insufficient mitigation measures to reduce the urban decay impact of the project; (2) lack of sufficient analysis of the project's impacts on landfill and recycling facilities; (3) lack of adequate information about the project's air pollution impacts and potential effects on human health; and (4) lack of substantial evidence supporting the statement of overriding considerations.

After prevailing in the trial court, Wal-Mart filed a memorandum of costs seeking recover of the $48,889.71 of costs incurred by the city for preparation of the administrative record. The city incurred these costs by directing the record's preparation to its own outside counsel. Pursuant to an agreement between the city and Wal-Mart's successor in interest, Wal-Mart was required to reimburse the city for costs of litigation. The project opponent challenged the Wal-Mart's memorandum of costs, arguing that only the lead agency may recover such costs under California Public Resources Code section 21167.6.

On appeal, the court held that section 21167.6 allows a developer to recover costs of the preparation of the administrative record under certain circumstances. In doing so, the court distinguished *Hayward Area Planning*

Association, which held that section 21167.6(b)(1) and (2) bar a real party in interest from recovering the cost of preparing the administrative record when a petitioner had requested a lead agency to prepare the record and had not consented to the involvement of the real party in interest's involvement in the administrative record's preparation.

The court reasoned that the underlying premise of *Hayward Area Planning Association* was that section 21167.6 allows a party to recover the costs of preparing the administrative record when such record is prepared by (1) the agency, (2) the plaintiff, or (3) by another method agreed upon by the agency and the plaintiff. Here, the administrative record was prepared by the agency. As such, an award to the developer for the costs associated with an agency-prepared record was consistent with *Hayward Area Planning Association* and the intent of section 21167.6. The court found that nothing in the language of CEQA limited who could recover the costs of preparing an administrative record as long as the record was prepared properly under section 21167.6.

***Friends of the College of San Mateo Gardens v. San Mateo County Community College District*, 1 Cal. App. 5th 937 (2016)**

Courts Must Defer to Agency Determination on Whether a Changed Project Is a New Project

The California Supreme Court resolved the vexing question of whether a change to a project that previously has been studied under CEQA constitutes a new project necessitating a new environmental review, or a modification that can be evaluated under CEQA's subsequent review provisions allowing reliance on earlier CEQA documents.

The Court held the question turns on whether the prior document retains relevance—meaning at least some of the environmental impacts of the modified project were considered in the original document. If so, the agency then determines whether the project changes will require major revisions to the original CEQA document due to new, previously unconsidered significant environmental effects.

The case before the Court involved a master plan approved by a community college district. The plan contemplated nearly $1 billion in new construction and building renovations at the community college district's three campuses. At the College of San Mateo, the community college district planned to demolish certain buildings and renovate others. The community college district approved the plan after adopting a mitigated negative declaration, finding that implementation of the plan would have no significant unmitigated effects.

Five years later, the community college district decided to demolish one building complex that it previously had planned to renovate and to renovate some buildings that it previously had planned to demolish. The community college district prepared an addendum to the prior mitigated negative declaration to document its analysis showing the project changes did not necessitate a subsequent CEQA document. Under CEQA, an agency may prepare an addendum to a prior EIR or negative declaration when some modifications to the prior document are needed, but none of the conditions described in CEQA Guidelines section 15162 calling for preparation of a subsequent EIR or negative declaration have occurred.

The plaintiff challenged the community college district's approvals and claimed the changes to the master plan amounted to a new project, requiring a new round of CEQA compliance commencing with a new initial study and precluding the community college district from relying on its earlier mitigated negative declaration. Both the trial court and the court of appeal agreed, finding the newly proposed building demolition was a new project.

In overruling the lower courts, the California Supreme Court explained: "When an agency proposes changes to a previously approved project, CEQA does not authorize courts to invalidate the agency's action based solely on their own abstract evaluation of whether the agency's proposal is a new project, rather than a modified version of an old one." To the contrary, the agency's environmental review obligations "depend on the effect of the proposed changes on the decision making process, rather than on any abstract characterization of the project as 'new' or 'old.'"

The Court's decision resolves a disagreement among the appellate courts. In 2006, the Third District Court of Appeal invalidated an agency's approval of a modification to a project that previously had been approved based on a negative declaration. *Save Our Neighborhood v. Lishman,* 140 Cal. App. 4th 1288 (2006). The original project and the revised project involved a similar mix of uses, but there were some significant differences in the proposed plans and the project proponent had changed. The court found the key issue, to be decided as a question of law, was whether the proposal constituted a new project, and it rejected the agency's decision to treat the proposal as a project modification.

By contrast, in 2007, the Second District Court of Appeal upheld an agency's decision to rely on a prior EIR for revisions to a project that included reductions in some components, elimination of other components and an overall increase in the project size. *Mani Brothers Real Estate Group v. City of Los Angeles,* 153 Cal. App. 4th 1385 (2007). The *Mani Brothers* court distinguished *Lishman* since that case involved a negative declaration but also reasoned that *Lishman*'s "new project" test inappropriately bypassed CEQA regulations and "undermined the deference due to the agency."

The Court sided with *Mani Brothers*. It found a decision to proceed under CEQA's subsequent review provisions must necessarily rest on a determination—whether implicit or explicit—that the original environmental document retains some informational value. That question does not turn on whether the project is new or old in the abstract, or on the identity of the project proponent or on other matters unrelated to environmental consequences. If the original document retains some information value despite the proposed changes, the agency proceeds to determine whether a subsequent or supplemental environmental document is required. The Court made it clear that the determination whether the original document retains relevance is a factual question for the agency to decide.

The plaintiff also offered an alternative theory that CEQA's subsequent review provisions do not apply to a project originally approved based on a negative declaration, rather than a full EIR, because negative declarations are not mentioned in the CEQA statute. The Court rejected that argument, finding that the Resources Agency's decision to add negative declarations to the subsequent review provisions in CEQA Guidelines section 15162 did not conflict with the statute and reasonably filled a gap in the law. The Court reasoned that both negative declarations and EIRs are entitled to a presumption of finality once they are adopted.

***East Sacramento Partnership for a Livable City v. City of Sacramento*, 5 Cal. App. 5th 281 (2016)**

Court of Appeal Finds Local Agency's EIR Analysis of Traffic Impacts Based on General Plan Traffic Mobility Element Unsupported by Substantial Evidence

The City of Sacramento certified an EIR for a 328-unit residential project located in East Sacramento and approved the project. A neighborhood group, East Sacramento Partnership for a Livable City (ESPLC), challenged the EIR contending, among other things, that the project description was defective; the EIR failed to analyze health risks to project occupants; and the EIR failed to account for significant traffic impacts. The trial court ruled for the city on all claims, but the court of appeal found that the EIR's analysis of traffic impacts was fatally flawed because it relied on general plan traffic policies as thresholds of significance without supporting evidence.

ESPLC asserted that the EIR was deficient because it did not include various proposed roadway improvements as part of the project. The court ruled that the key improvement ESPLC complained about, a tunnel that would be used only for access to and from the project, was not a component part of the project because it was not a reasonably foreseeable consequence of project approval. Other access was available for the project, the tunnel was not a necessary part of the project, and the project was not conditioned on construction of the tunnel. In addition, the evidence showed that construction of the tunnel was not foreseeable, because it was currently infeasible for financial and other reasons.

ESPLC contended that the EIR failed to evaluate significant health risks posed to future project residents due to existing toxic air contaminants and methane migration in the area. Based on the California Supreme Court's decision in *California Building Industry Association v. Bay Area Air Quality Management District*, the court held that the city was not required to analyze the impact of such existing environmental conditions on a project's future users or residents. It also rejected ESPLC's argument that an exception should apply on the theory the project would exacerbate existing bad air quality, traffic and other environmental conditions, as unsupported by any evidence.

The EIR's analysis of traffic impacts used the level of service method, measured on an A to F scale. The court first ruled against ESPLC on its claim the EIR was deficient because it did not analyze traffic on road segments, but instead focused on intersections. The court found evidence in the administrative record that roadway capacity was governed by intersections was sufficient to support the EIR's methodology.

The court found a problem, however, with the EIR's use of policies on acceptable levels of traffic contained in the mobility element of the city's general plan as the standard of significance for intersection impacts. Those policies permit LOS E and F conditions in certain locations. In a ruling that a number of observers have questioned, the court held that compliance with a general plan policy, standing alone, is insufficient to show an impact is insignificant where it may be "fairly argued" that the project will generate significant environmental effects. The EIR was deficient, according to the court, because it did not contain an explanation why the congested conditions that would result from increases in traffic would not be significant, other than its reliance on the mobility element of the general plan. Stating that the general plan standing alone "does not constitute substantial evidence that there is no significant impact," the court found the EIR inadequate because it did not identify other evidence to support use of the plan standards as thresholds of significance. Notably, the city had found LOS E and F conditions to be significant adverse impacts at other intersections within the city.

***Mission Bay Alliance v. Office of Community Investment and Infrastructure*, 6 Cal. App. 5th 160 (2016)**

Court of Appeal Upholds Supplemental EIR that Includes Quantitative Greenhouse Gas Impacts Analysis

The Golden State Warriors' new Mission Bay Arena is an 18,500-seat venue that will host over 200 events per year, and includes two 11-story office and retail buildings, as well as parking and open space. In April 2015, Governor Brown certified the project as an "environmental leadership development project," which qualified it for expedited schedules for environmental review and litigation. San Francisco's Office of Community Investment and Infrastructure (OCII), acting as lead agency, prepared the EIR for the project as a supplemental EIR which was based on a program EIR adopted for the Mission Bay area in 1998.

MBA filed suit to challenge the project approvals, and appealed after the superior court rejected its claims. In a lengthy opinion, the court of appeal upheld the lower court's decision. MBA's primary claims under CEQA were that the supplemental EIR was incomplete because it omitted several impact issues that had been considered in the underlying program EIR, and that the supplemental EIR's analysis of a number of other issues was inadequate.

A program EIR can serve as the basis for "tiered" CEQA review where the program EIR covers a large project or program addressing general and environmental matters, and supplemental EIRs are prepared for subsequent projects requiring additional analysis. When determining the scope of the supplemental EIR, the agency examines the program EIR to determine what issues have been covered in the program EIR and what additional environmental analysis is necessary.

In the initial study it prepared for this analysis, OCII determined that further study of several impacts would not be needed: land use, biological resources, hazardous materials, and recreational uses. MBA, however, argued that further study of these issues was required based on evidence it believed would support a "fair argument" that significant impacts not covered by the program EIR would occur. But, as the court explained, where the question is whether further environmental review is necessary following a program EIR, the substantial evidence standard, not

the fair argument standard, applies to a court's review of the agency's determinations. The court found OCII's determinations that no new significant impacts relating to land use, biological resources, hazardous materials, and recreation would occur were supported by substantial evidence and therefore must be upheld.

MBA alleged that the SEIR's analysis of transportation impacts, noise, wind, greenhouse gas emissions, and toxic air emissions were all inadequate. The court disagreed, and found that the city had properly analyzed these issues and implemented suitable mitigation measures.

The court's ruling on the SEIR's analysis of greenhouse gas emissions is particularly noteworthy. The SEIR's significance standard for greenhouse gas emissions was based on compliance with San Francisco's strategy for reducing greenhouse gas emissions. San Francisco's greenhouse gas strategy, adopted in 2010, is based on the CEQA Guidelines and BAAQMD's interpretation of those Guidelines. The strategy contains emission reduction targets and 42 specific regulations for reducing emissions from new projects. BAAQMD had determined the strategy measures met or exceeded BAAQMD's own recommendations.

While the SEIR assessed compliance with the greenhouse gas strategy, it did not include a quantitative analysis of the stadium's projected greenhouse gas emissions. MBA asserted that CEQA requires that emissions be quantified, but the court disagreed, holding that the project's compliance with San Francisco's greenhouse gas strategy was sufficient to conclude that the project's emissions would not have a significant environmental impact. While quantification of greenhouse gas emissions is one available way to assess the impacts of greenhouse gas emissions, in its recent decision in *Center for Biological Diversity v. California Department of Fish and Wildlife* (Newhall Land and Farming Company), 62 Cal. 4th 204 (2015), the California Supreme Court also identified other "potential pathways" for complying with CEQA, including adherence to a regulatory program with a performance-based methodology for reducing greenhouse gas emissions. Further, under CEQA Guidelines section 15183.5(b), an agency may determine that a project's greenhouse gas emissions will not have a cumulatively considerable effect if it will comply with a preexisting mitigation program. Because the project would satisfy the requirements of San Francisco's greenhouse gas strategy—a program crafted in accordance with CEQA Guidelines and approved by BAAQMD—the court upheld the SEIR's finding that the project's greenhouse gas emissions would not be significant.

The court's opinion makes it clear that a lead agency's determinations that impacts of a later project have already been covered by the program EIR will not be second-guessed by a court as long as those determinations are supported in the record. The opinion also demonstrates that where a local agency has developed a comprehensive greenhouse gas emission reduction plan, a quantitative analysis of greenhouse gas emissions is not always required, and an analysis showing compliance with such a plan should be sufficient under CEQA.

***San Diegans for Open Government v. City of San Diego*, 4 Cal. App. 5th 637 (2016)**

An Agency Is Not Required to Allow an Appeal to Its Elected Decision-Making Body of a Determination that Supplemental Environmental Review Is Not Required for a Modified Project

The court of appeal held that when an agency's non-elected decisionmaking body determines that additional environmental review for a project modification is not required, CEQA does not provide a right to appeal that determination to the agency's elected decisionmaking body.

The case involved a proposed 242-acre development with residential, retail, commercial, and industrial uses in the Kearny Mesa area of San Diego. In 1997, the San Diego city council certified an EIR for a master plan for the project. In 2000, the city council adopted an addendum to the EIR after the developer proposed including residential units. In 2002, the city council amended its progress guide and general plan to allow up additional residential units, and adopted a mitigated negative declaration. In 2012, the city issued a development permit for the project, which incorporated the mitigation requirements in the EIR, Addendum, and MND.

The following year, the developer applied to the city for approval of design modifications. Through a process known as substantial conformance review (SCR), the city staff determined that no additional environmental review was necessary because the proposed changes were in substantial conformance with the previously approved project.

The plaintiffs, who opposed the project, appealed the city staff's decision to the planning commission, and the planning commission denied their appeal. The plaintiffs then attempted to appeal to the city council. The city council refused to hear their appeal, explaining that there was no right to appeal the decisions of the city staff and the planning commission to the city council.

CEQA provides that when a lead agency's nonelected decisionmaking body determines that a project is not subject to CEQA, that decision may be appealed to the agency's elected decisionmaking body. The plaintiffs argued that the SCR determination by city staff and the planning commission was a determination that the project was not subject to CEQA.

The court disagreed. The court distinguished the SCR determination that additional environmental reviews were not necessary from a determination that the project was not subject to CEQA. The court explained that a lead agency determines whether a project is subject to CEQA prior to preparing an EIR. The city had previously determined that the project was subject to CEQA when it prepared the EIR, Addendum, and MND. The SCR decision did not alter that prior determination, and, in fact, confirmed that the project remained subject to the mitigation measures in those documents.

***The Committee for Re-Evaluation of the T-Line Loop v. San Francisco Municipal Transportation Agency*, 6 Cal. App. 5th 1237 (2016)**

Court of Appeal Upholds Local Agency's Plans for Public Transit Improvements as Within the Scope of Previously Certified EIR

The San Francisco Municipal Transportation Agency approved a contract to install a short length of light rail line needed to complete a partially constructed loop around a single city block. When it approved the contract, the city relied on an EIR certified in 1998 for plans to add a light rail line connecting the southeastern portion of San Francisco to the rest of the city. Completion of the loop at the end of the line would allow trains on the line to turn around to provide service for special events and peak travel periods.

The Committee for Re-Evaluation of the T-Line Loop ("T-Line Loop Committee") filed suit, claiming the city violated CEQA by failing to undertake a new CEQA review instead of relying on the 1998 EIR, which the T-Line Loop Committee claimed did not include an analysis of the loop portion of the line, and did not account for changes in circumstances since the EIR was completed. The trial court ruled against the T-Line Loop Committee, finding the city had complied with CEQA. The court of appeal agreed with the trial court, and upheld the city's determinations.

The court first ruled that the party challenging an agency's determination that it can rely on a previously certified EIR has the burden to prove that the agency's decision to do so was not supported by substantial evidence. Citing the supreme court's recent decision in *Friends of the College of San Mateo Gardens*, 1 Cal. 5th 937 (2016), the court explained that the question whether a previously prepared environmental document "remains relevant" is largely a factual question for the agency to decide, and a reviewing court's task is limited to deciding whether the agency's decision is based upon substantial evidence.

The T-Line Loop Committee argued that the loop project was not reviewed in the 1998 EIR and the city's determination it was should be resolved under the "fair argument" standard—a standard which would require that the city's decision be set aside if there is any evidence in the record that would support a fair argument the loop project was not covered in the EIR. The court rejected that argument, and found there was ample evidence in the EIR and

elsewhere in the record that the loop was analyzed as a component of the light rail line extension described in the EIR.

The court also rejected the T-Line Loop Committee's argument that even if the loop was discussed in the EIR, the analysis of its impacts was not sufficiently detailed to comply with CEQA. As the court explained, an EIR is conclusively presumed valid unless a timely lawsuit is filed to challenge it. No suit had been filed to contest the validity of the 1998 EIR, and as a result, the T-Line Loop Committee's claims that the EIR's analysis was deficient were time-barred.

The court next addressed the T-Line Loop Committee's assertion that a new EIR was required because the loop project would have significant impacts that were not examined in the prior EIR. The T-Line Loop Committee again argued the court should apply the fair argument test and overturn the city's decision if there is evidence in the administrative record that the project might have a new significant impact on the environment. The court again disagreed, ruling that the T-Line Loop Committee had the burden to prove that there was no evidence that would support the city's decision that a further EIR was not required. The court found that the 1998 EIR provided a project-level analysis that evaluated both impacts and alternatives, and provided a detailed examination of site-specific considerations including planning, construction and operation. It also found that statements in planning department reports, and other evidence in the record, supported the city's determination that no significant changes to the loop project were proposed, and that there were no substantial changes in the area that would lead to new or more severe significant impacts of the project.

The T-Line Loop Committee's contention that the city failed to follow proper procedures in determining that no further CEQA analysis was needed also failed. The court found no procedural flaws, noting that CEQA does not specify a particular procedure an agency must follow or require a public hearing when it makes a decision that a new EIR is not required.

***Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal.5th (2017)**

Lead Agencies Cannot Defer Environmentally Sensitive Habitat Areas Analysis to the Coastal Commission

A local agency's environmental impact report must identify any areas on a project site that might qualify as "Environmentally Sensitive Habitat Areas" (ESHA) under the California Coastal Act, and must account for those areas in the EIR's analysis of project alternatives and mitigation measures. Even where the Coastal Commission, and not the local agency, will make the final ESHA identifications, and only the Coastal Commission can issue a coastal development permit, the CEQA lead agency must address ESHA questions and cannot defer those questions to a subsequent Coastal Commission permitting process.

CEQA requires lead agencies to integrate, to the maximum extent feasible, their CEQA review with planning and environmental review procedures required by other laws. In addition, CEQA requires lead agencies to consider related environmental regulations and matters of regional significance when weighing project alternatives. Citing these provisions, the California Supreme Court concluded that the City of Newport Beach erred in declining to attempt to identify ESHA on the 400-acre Banning Ranch project site, where some ESHA were already known to exist.

Although the city had no authority to designate ESHA on the property, the Court explained that the city was not required to make "legal" ESHA determinations in its EIR. Instead, the city was required to "discuss potential ESHA and their ramifications for mitigation measures and alternatives when there is credible evidence that ESHA might be present on a project site."

The Court also rejected the argument that the city's attempt to analyze ESHA impacts would be speculative. Precision was not required, the Court said, adding that the city had routinely evaluated ESHA impacts for other locations that, unlike the Banning Ranch site, were covered by the city's coastal land use plan.

The fact that the Coastal Commission would later consider ESHA during its permitting process did not help the city's position because "[t]he City's approach, if generally adopted, would permit lead agencies to perform truncated and siloed environmental review, leaving it to other responsible agencies to address related concerns seriatim."

The Court noted that an agency's failure to integrate its CEQA review with other environmental review procedures "to the maximum extent feasible" would not always call for reversal of a project approval. Here, however, the Court concluded that the city's omission resulted in inadequate evaluation of project alternatives and mitigation measures; suppression of information highly relevant to the Coastal Commission's permitting function; and failure to provide the public with a full understanding of the environmental issues raised by the project proposal. Accordingly, the Court determined that reversal was required.

***Aptos Council v. County of Santa Cruz*, 10 Cal. App. 5th 266 (2017)**

Court Rejects Piecemealing Argument for Ordinances Passed to Encourage Downtown Development

Santa Cruz County adopted three pro-development ordinances as part of an effort to reform the county's land use regulations. The court of appeal found that the land use regulations could be implemented separately and operated independently and were not a reasonably foreseeable "consequence" of each other. The ordinances therefore could not constitute a single project for which the performance of separate environmental reviews would constitute improper piecemealing.

Specifically, the county adopted three ordinances related to minor zoning exceptions, hotels, and signs. The minor exceptions ordinance authorized administrative approval of "minor exceptions" to zoning standards, including a 5% height increase. The county found no significant impacts and approved a negative declaration.

The sign ordinance allowed administrative approval of sign exceptions with public notice which the county found was categorically exempt from CEQA.

Finally, the hotel ordinance removed a requirement that hotels have 1,100 square feet of developable area per room, removes a three-story height limit, and reduces the required parking from 1.1 spaces per room to 1.0 space per room. The county also adopted a negative declaration for this ordinance.

Aptos Council, a community group, challenged the approval of the ordinances. It argued that the county improperly engaged in piecemealing, the sign ordinance was not exempt, and environmental review of the hotel ordinance should have considered future developments. The trial court rejected these claims and denied the petition.

On appeal, the court's analysis focused on two issues: whether the three ordinances constituted a single projected for which the county engaged in piecemealing and whether the negative declaration for the hotel ordinance was proper.

On the issue of piecemealing, the court rejected Aptos Council's claim that the three ordinances, as part of a county wide land use reform, constituted a single project that had been piecemealed. No piecemealing occurs when, under *Banning Ranch*, "projects have different proponents, serve different purposes, or can be implemented independently."

The court emphasized that whether different projects needed to be reviewed together depended on whether some of the projects were a "reasonably foreseeable consequence." Changing certain zoning regulations—such as changing the number of parking spaces per hotel room—was not a reasonably foreseeable consequence of other regulatory changes such as authorizing administrative approval of minor zoning exceptions. Instead, the court found that the "regulatory reforms operate independently of each other and can be implemented separately."

The court also rejected Aptos Council's claim that regulatory reform constituted a single purpose. Although different reforms could constitute a single project in some cases, here the court found that "modernizing the County Code is vague" and "was not the type of tangible 'objective' that had been found to be the basis of a CEQA project."

The court rejected the argument that the county's stated purpose for the hotel ordinance—to facilitate growth—made future developments "reasonably foreseeable." Increased hotel development was speculative, as no future development had been proposed and of the 34 parcels available for hotels, 20 were developed.

The court also found that Aptos Council failed to show there was a fair argument that significant environmental effects could result from the ordinance. Aptos Council did not cite to any evidence in the record to indicate the ordinance would be growth-inducing or that new developments were reasonably foreseeable.

CHAPTER 7
Federal and State Wetland Regulation

Executive Order on Clean Water Act Rule Defining "Waters of the United States"

Since the Supreme Court issued its fractured decision in *Rapanos v. United States*, 547 U.S. 715 (2006), there has been substantial uncertainty over what constitutes a "water of the United States" that is subject to the permitting requirements of the federal Clean Water Act. In June 2015, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) jointly published final regulations to define this key term, with the aim of resolving this longstanding uncertainty. 80 Fed. Reg. 37,054 (June 29, 2015). But various lawsuits were filed claiming that the regulations reflected an impermissible expansion of federal authority. As part of the ongoing litigation, the 2015 regulations were stayed.

An Executive Order was issued in February 2017 directing the EPA and the Corps to reconsider the 2015 regulations and to adopt a more restrictive view of federal jurisdiction under the Clean Water Act which may render the litigation moot. *See* Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule (Feb. 28, 2017). Until the regulatory process is completed, there likely will remain a great deal of uncertainty over the Clean Water Act's scope. And once the process is completed, there likely will be prolonged litigation to challenge any new rules that are adopted. For the time being, as has been the case for the last decade, the determination of federal jurisdiction under the Clean Water Act likely will proceed on a highly fact-specific case-by-case basis, without clear or definitive rules to guide landowners and developers.

***United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S.Ct. 1807 (2016)**

U.S. Supreme Court Rules that Clean Water Act Jurisdictional Determinations Are Reviewable in Court

The U.S. Supreme Court ruled that an approved jurisdictional determination (JD) issued by the U.S. Army Corps of Engineers under the Clean Water Act is a final agency action subject to judicial review resolving an existing circuit split on the issue.

An JD is an official determination by the Corps (or in some cases, the Environmental Protection Agency) that identifies whether water features on a particular piece of property are covered by the Clean Water Act's permitting requirements. Some courts had held that an approved JD was not a final agency action subject to judicial review. These courts reasoned that an approved JD merely put the landowner on notice that a Clean Water Act permit would be required if he or she chose to fill the jurisdictional waters on the property.

But in the *Hawkes* case, the U.S. Court of Appeals for the Eighth Circuit reached the opposite conclusion, deciding that an approved JD has a "powerful coercive effect" and should be subject to "immediate judicial review."

The Supreme Court unanimously upheld the Eighth Circuit's decision and ruled that an approved JD is judicially reviewable. The case involved a 530-acre property in Minnesota where three peat mining companies sought review of an approved JD that they believed represented an overly expansive view of federal permitting jurisdiction.

The Supreme Court began by noting that "it is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does." The Supreme Court observed that the time and costs for obtaining a Clean Water Act permit can be significant. Moreover, there are substantial civil and criminal penalties for filling a jurisdictional water without a permit.

The Supreme Court next outlined the two conditions that must be satisfied for an agency action to be final and thus judicially reviewable under the federal Administrative Procedure Act. The action must: (1) "mark the consummation of

the agency's decisionmaking process" and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow."

With respect to the first condition, the Corps conceded that a jurisdictional determination marks the consummation of the agency's decisionmaking on the question of whether a property contains jurisdictional waters. Thus, the Court's analysis focused on the second condition and whether an approved jurisdictional determination also gives rise to "direct and appreciable legal consequences."

In addressing this issue, the Court found that both a negative approved JD (which determines that there are no jurisdictional waters on a particular piece of property) and an affirmative approved JD (which finds that there are jurisdictional waters) have real and meaningful consequences. A negative JD binds the government for five years and prevents it from requiring a permit or seeking penalties. Conversely, an affirmative JD represents the government's definitive denial of the legal safe harbor that a negative JD would afford.

The Court also emphasized that there was no adequate alternative to judicial review. The Court explained that having to wait for a final permit decision was an inadequate remedy for the landowner, since the permit process is often "arduous, expensive, and long." Proceeding without a permit and waiting for an enforcement action reflected an even more problematic remedy according to the Court. This approach would compel the landowners to expose themselves to civil penalties of up to $37,500 for each day that a jurisdictional water body remained illegally filled.

Moreover, the Court rejected the Corps' argument that seeking review in an enforcement action or at the end of the permitting process would be the only avenues for review if the Corps had not adopted the practice of issuing standalone jurisdictional determinations, which is not required by the Clean Water Act.

The Court's decision provides landowners and developers with an avenue to challenge an approved JD. Such a challenge presumably would make it clear whether or not a permit is required, without having to go through a long permit process or risky enforcement proceeding.

***Mingo Logan Coal Co. v. Environmental Protection Agency*, 829 F.3d 710 (D.C. Cir. 2016)**

The D.C. Circuit Confirms that the EPA Has Broad "Veto" Authority over Corps Wetlands Permits

The D.C. Circuit affirmed the broad authority of the EPA to "veto" Corps approval of a permit under section 404 of the Clean Water Act to fill wetlands and other waters of the United States.

In 2007, the Corps issued a permit under section 404 of the Clean Water Act that authorized a large coal mining operation in West Virginia, which would result in the filling of jurisdictional streams with soil and rock. Four years after the permit was issued, the EPA exercised its veto authority under section 404(c) of the Clean Water Act and effectively "withdrew" the permit with respect to two of the authorized mining sites. Section 404(c) authorizes the EPA to prohibit the filling of wetlands, streams or other "waters of the U.S." if it finds that there would be an "unacceptable adverse effect" on the aquatic environment.

The permittee sued, arguing that the EPA could not properly exercise its veto authority under section 404(c) after the Corps already had issued a permit. The D.C. Circuit rejected this claim, finding no such temporal restriction on the EPA's veto power. See *Mingo Logan Coal Co. v. Environmental Protection Agency*, 714 F.3d 608 (D.C. Cir. 2013).

The court remanded the case to the district court to consider whether the EPA's permit withdrawal in this case was based on the appropriate factors. The district court upheld the EPA's action and the D.C. Circuit affirmed.

The court first held that the permittee waived the claim that the EPA improperly failed to consider the economic impacts its decision, because the permittee did not adequately raise this challenge during the administrative process and the ensuing litigation.

The court next held that in making its decision, the EPA properly could consider water quality effects downstream of the mining operations. The court also ruled that the EPA was not bound by the determination by the state of West Virginia, which adopts and implements its own state water quality standards under the Clean Water Act, that the filling of streams would not cause water quality problems downstream. Rather, the EPA has independent authority to consider water quality effects as part of its decision on whether or not to veto a section 404 fill permit. Further, the court emphasized that downstream water quality was just one of the EPA's concerns in vetoing the permit in this case; the EPA also based its decision on the adverse impacts to fish and wildlife.

Finally, the court found that the EPA adequately explained the basis for its permit veto in light of the new studies and information that became available after the Corps' initial permit approval. As the court explained, the EPA made it clear as part of its veto decision that "the game had changed" due to additional data and information that were not available at the time the permit was issued, including peer-reviewed studies of the ecology in the region and a growing scientific concern over the adverse effects caused by this type of mining operation.

The *Mingo Logan* decision highlights that the EPA retains substantial discretion and authority over Corps-issued Clean Water Act permits and that a landowner faces a decidedly uphill in challenging an EPA permit veto.

State Water Resources Control Board, Preliminary Draft: Procedures for Discharges of Dredged or Fill Material to Waters of the State (June 17, 2016)

The California State Water Resources Control Board Adopts Draft Statewide Procedures for Projects Involving Discharges of Dredged or Fill Material

The California State Water Resources Control Board ("State Water Board") has adopted draft procedures that would govern projects in California involving the discharge of dredged or fill material. The proposed procedures consist of the following three components: (1) a definition of what constitutes a "wetland" under state law; (2) a set of procedures for the state law delineation of wetlands; and (3) a set of procedures governing the submittal of a permit application to the applicable Regional Water Quality Control Board.

In proposing the procedures, the State Water Board emphasized the following points:

First, there is a need to strengthen the protections for those water bodies that are no longer protected under the Clean Water Act due to U.S. Supreme Court decisions. The State and Regional Water Boards historically relied on the protections afforded to wetlands under the federal permit process. But as the U.S. Supreme Court has narrowed the reach of the Clean Water Act, the State and Regional Boards have increasingly exercised their independent state law authority under the Porter-Cologne Water Quality Control Act to "fill the gap" in regulation.

Second, there is a need to address the inconsistency across the Regional Water Boards in the requirements for discharges of dredged or fill material into waters of the state, including wetlands. There is no single accepted definition of wetlands at the state level, and the Regional Water Boards may have different requirements and levels of analysis for dredge and fill projects. The State Water Board's proposal is intended to provide uniform statewide standards.

Third, the current regulations have not been adequate to prevent losses in the quantity and quality of wetlands in California. To address this issue, the State Water Board's proposal would both extend the coverage of regulatory protections to waters that do not fall under the federal Clean Water Act and strengthen the substance of the protections.

As of March 31, 2017, the State Water Board has not finalized its proposal and there could be important changes in the details during the ongoing administrative process. Importantly, however, as this initiative demonstrates, a decline in federal jurisdiction under the Clean Water Act does not mean a decline in regulation in California. To the contrary, the state's response to reduced federal jurisdiction has been to exercise its state law authority more aggressively,

both with respect to which water bodies should be regulated and how strict the regulatory standards should be. Thus, one can reasonably expect that if the new federal Clean Water Act regulations are overturned, withdrawn or curtailed for whatever reason, the State Water Board will adopt even more robust protections governing dredge and fill projects in California.

CHAPTER 8
Endangered Species Protections

***Alaska Oil and Gas Association v. Jewell*, 815 F.3d 544 (9th Cir. 2016)**

An Area Need not Currently Contain Members of a Listed Species to Be Included Within the Critical Habitat Designation for that Species

The Ninth Circuit held that critical habitat designations under the Endangered Species Act (ESA) should focus on the geographical areas that contain the physical and biological features that are essential for the species' future success and recovery, even if the species does not currently occupy those areas.

Background

In 2008, the U.S. Fish & Wildlife Service (FWS) listed the polar bear as a threatened species under the ESA. Once a species is listed, the ESA requires the FWS to designate the habitat that is critical to the conservation of the species. In 2010, FWS designated approximately 187,000 square miles in Alaska as critical habitat for the polar bear, an area larger than the state of California. Nearly 96% of the designated area is sea ice; the remainder consists of a five-mile band of terrestrial denning sites and barrier islands, including a one-mile radius around those islands.

The state of Alaska, Native corporations and villages, and oil and gas associations sued to challenge the critical habitat designation. The district court vacated the designation, finding that the area of terrestrial and barrier island habitat was unjustifiably large and that FWS violated the ESA's procedural requirements by failing to respond adequately to the state of Alaska's comments during the administrative process.

The Ninth Circuit's Decision

A unanimous panel of the Ninth Circuit reversed the district court's ruling and reinstated the critical habitat designation.

In making the designation, FWS identified terrestrial denning habitat as a necessary element for the polar bear's conservation, and it included in the designation those areas with the characteristics that make for good denning sites (such as steep, stable slopes; access between the den and coast; proximity to sea ice in the fall; and freedom from human disturbance). FWS similarly included within the designation barrier islands that were suitable for a variety of important uses by the bear, including denning, feeding, resting, and migrating along the coast.

The district court faulted FWS for not showing specifically what areas the bears actually used and occupied to support the critical habitat designation. But the Ninth Circuit found that the district court imposed a level of specificity the ESA does not require. The court emphasized that the ESA "is concerned with protecting the future of the species, not merely the preservation of existing bears." Thus, "the district court erroneously focused on the areas existing polar bears have been shown to utilize rather than the features necessary for future species protection." The Ninth Circuit found that FWS's critical habitat designation appropriately looked to the physical and biological elements that were required for the sustained preservation of the bear population, "even if there is no available evidence documenting current activity."

The Ninth Circuit also emphasized that while the ESA requires using the best scientific data that is available, it does not require the best scientific data that is possible. According to the court, the record showed that FWS used an appropriate mapping methodology, which was developed jointly with the United States Geological Survey, in light of the significant limitations and uncertainties in the available scientific data.

Further, the Ninth Circuit held that it is appropriate to consider future climate change, such as receding sea ice, when designating critical habitat. As the decision pointed out, the courts have recognized that climate change is a relevant factor when a species is listed; it likewise is relevant when designating critical habitat.

Lastly, the court upheld FWS's reasoning for excluding certain human structures and activities from the designation, like the city of Barrow, while including others, like the industrialized area of Deadhorse. According to the court, the record showed routine polar bear activity and denning near Deadhorse and that despite some human activity, polar bears could still move through Deadhorse to access den sites.

As for the alleged procedural violation, the Ninth Circuit found that FWS adequately explained why it did not incorporate the state of Alaska's comments into its critical habitat designation. Section 4(i) of the ESA (16 U.S.C. § 1533(i)) requires written justification when FWS adopts a rule (such as a critical habitat designation) that is not consistent with comments provided by an affected state. The court dismissed a number of technical objections to FWS's response to Alaska's comments, and it emphasized section 4(i) "does not guarantee that the State will be satisfied."

This decision highlights that a critical habitat designation is designed to ensure the species' future success and recovery, not merely the survival of existing members of the species. Therefore, according to the Ninth Circuit, the habitat designation should not be limited to the existing population of the species currently uses. The decision establishes important precedent (at least within the Ninth Circuit) on the factors to be considered when designating critical habitat.

***Alaska Oil and Gas Association v. Pritzker*, 840 F.3d 671 (9th Cir. 2016)**

ESA Allows for Use of Long-term Climate Change Projections in the Listing of a Species

The Ninth Circuit upheld the listing of two seal populations in Alaska as threatened based on future climate projections by the National Marine Fisheries Service (NMFS).

Background

Using its long-term climate change projections, NMFS determined that the loss of sea ice over shallow waters in the arctic would make the two seal populations endangered by the year 2095. Based on this determination, NMFS adopted a rule that listed the two populations as threatened under the Endangered Species Act. As phrased by the court, the case turned on the following issue: "When NMFS determines that a species that is not presently endangered will lose its habitat due to climate change by the end of the century, may NMFS list that species as threatened under the Endangered Species Act?"

The Ninth Circuit's Decision

Based on the facts in the administrative record, the court answered in the affirmative. The court started its analysis by emphasizing that "we must defer to the agency's interpretation of complex scientific data as long as the agency provides a reasonable explanation for adopting its approach and discloses the limitations of that approach." Applying this deferential standard of review, the court found that NMFS's projections of future climatic conditions were "reasonable, scientifically sound, and supported by evidence." The court noted that a majority of independent peer reviewers agreed that NMFS's long-term projections were based on the best scientific data available.

The court next rejected the claim that NMFS's use of longer-term climate projections impermissibly diverged from its previous practice of setting 2050 as the relevant endpoint for climate change analyses. The court found that NMFS reasonably changed its approach in response to new research and that it adequately explained the basis for doing so.

The court also rejected the claim that NMFS failed to provide a sufficient evidentiary basis for the relationship between habitat loss and the seal's survival. This claim centered on the lack of quantitative data for even the current state of the seal populations. Citing its earlier decision in *Alaska Oil & Gas Assn. v. Jewell*, the court explained that the ESA did not require NMFS to wait to make the listing until it had such quantitative data, which currently is

unavailable. In a related vein, the court also ruled that NMFS was not required to estimate an "extinction date" or "extinction threshold" to justify the finding that a species is likely to become endangered within the foreseeable future.

Taken in conjunction with the court's decision in *Alaska Oil & Gas Assn. v. Jewell*, the court's ruling reflects the growing role played by climate change in decision-making under the ESA. These two decisions also illustrate the deference shown by the Ninth Circuit to the federal agencies when applying the ESA requirement to use the best available scientific data, including where the agencies make predictions about long-term future conditions in the face of significant uncertainties and limitations in the information that is currently available.

***Central Coast Forest Association v. Fish and Game Commission*, 2 Cal. 5th 594 (2017)**

California Supreme Court Rules That Plaintiffs May Use a Delisting Petition Under the CESA to Challenge an Endangered Species Listing Based On New Evidence

The California Supreme Court recently reversed the court of appeal and ruled that under the California Endangered Species Act (CESA), plaintiffs may use a delisting petition, supported by new evidence, to challenge a prior decision by the California Fish and Game Commission to list an endangered species—even in the absence of changes that occur after the listing of the species. The decision recognizes that the Fish and Game Commission listing decisions should reflect evolving scientific understanding.

Background

The CESA directs the Fish and Game Commission to establish a list of endangered species and a list of threatened species, and to add or remove species from either list if it finds that such an action is warranted based on sufficient scientific information. (Cal. Fish & Game Code § 2070.) Under Section 2071, any "interested person may petition the [C]ommission to add a species to, or to remove a species from" the lists. A multi-step process exists under the statute for processing these petitions.

In 1995, the Fish and Game Commission added coho salmon in streams south of San Francisco to the endangered species list. In 2004, it added coho salmon from San Francisco north to Punta Gorda as endangered species.

Plaintiffs Central Coast Forest Association and Big Creek Lumbar Company petitioned the Fish and Game Commission to delist just coho salmon south of San Francisco from the register of endangered species. Plaintiffs claimed that because the fish were artificially introduced into that area and had since been hatchery maintained, they were not "native" within the CESA's meaning and therefore did not qualify for listing. The Fish and Game Commission rejected the petition, and the plaintiffs sought writ relief in the superior court. The superior court granted relief, finding that the record did not contain substantial evidence to support the Commission's decision.

The court of appeal did not reach the merits of the plaintiffs' arguments. Instead, it reversed the trial court's decision and held that the plaintiffs' petition failed on procedural grounds: The petition attacked the Fish and Game Commission's final listing decisions in 1995 and 2004 as having no basis, and, according to the court of appeal, "a petition to delist a species may not be employed to challenge a final determination of the Commission."

The California Supreme Court's Decision

The California Supreme Court reversed the court of appeal, following the Fish and Game Commission's concession that the court of appeal erred. The Supreme Court determined that "no provision of CESA directly establishes that the Commission may not base a decision to delist on new evidence showing that the listed species does not qualify for listing."

The Supreme Court noted that the CESA contains three different mechanisms for revisiting listing decisions: (1) "an interested person may petition the [C]ommission to . . . remove a species from" the list of endangered species (§ 2071); (2) "[t]he [D]epartment may, in the absence of a petition from an interested party, recommend to the

[C]ommission that it remove a species from" the list (§ 2072.7); and (3) "[t]he [D]epartment shall review species listed as an endangered species every five years to determine if the conditions that led to the original listing are still present" (§ 2077, subd. (a)). In particular, the third provision states, "Notwithstanding any other provision of this section, the [C]ommission or the [D]epartment may review a species at any time based upon a petition or upon other data available to the [D]epartment and the [C]ommission." (§ 2077, subd. (d), emphasis added.)

The Supreme Court concluded that these provisions supported the plaintiffs' assertion that using a delisting petition to challenge a listing decision based on new evidence is consistent with the CESA. By contrast, the court of appeal, in concluding that a delisting petition is an improper vehicle for challenging an "original listing" decision of the Fish and Game Commission, relied not on the statute itself, but on the Fish and Game Commission's delisting regulation. The Supreme Court analyzed the regulation and determined it was not "intended to preclude delisting where new evidence shows that the species never qualified as endangered, and to permit consideration only of 'events that occur after the listing of the species."

The Supreme Court therefore reversed the court of appeal and remanded the matter back to the court of appeal to consider the petition's merits, including (1) whether the term "native species" in the definition of "endangered species" (§ 2062) means "native to the area" in which the species is listed, as plaintiffs assert, or "indigenous to California," as the Fish and Game Commission claims; and (2) under what circumstances, if any, CESA permits the Fish and Game Commission to delist only a portion of the listed species—here, coho salmon south of San Francisco.

***Center for Biological Diversity v. Bureau of Land Management*, 833 F.3d 1136 (9th Cir. 2016)**

ESA Requirement for Incidental Take Statement Applies Only to Listed Animal Species, Not to Listed Plants

The Ninth Circuit held that the ESA requirement that a Biological Opinion include an Incidental Take Statement applies only to listed animal species, and not to listed plants.

The Bureau of Land Management (BLM) approved a Recreation Area Management Plan allowing for increased off-road vehicle use in the Imperial Sand Dunes in Southern California. To evaluate the resulting impacts on a threatened plant species (Peirson's milkvetch), BLM prepared a Biological Opinion, which recognized that individual plants could be killed or injured but found no jeopardy to the species. The Biological Opinion did not include an incidental take statement to specify how many plants were allowed to be taken.

Center for Biological Diversity argued that this omission violated section 7 of the ESA. This provision states that an incidental take statement is required when a Biological Opinion makes a no jeopardy finding but determines that members of the listed species likely will be taken.

The court read the requirements of section 7 of the ESA in conjunction with the provisions of section 9, which prohibit the take of listed animal species but not listed plants. Based on the text of section 9, the court reasoned that there is no such thing as a "take" of a plant under the ESA, and that as a result any requirement under section 7 to issue an incidental take statement likewise did not apply to plants.

In cases where a project may affect a listed plant species, a Biological Opinion may be required under section 7 of the ESA to evaluate whether the project would jeopardize the species' continued existence and whether conservation measures are required to avoid jeopardy. But the Ninth Circuit's decision clarifies that any such Biological Opinion need not include an incidental take statement, since this requirement applies only to animal species.

***Defenders of Wildlife v. Jewell*, 815 F.3d 1 (D.C. Cir. 2016)**

ESA Allows for Consideration of Voluntary Conservation Plans in Deciding Whether to List a Species

The D.C. Circuit ruled that the U.S. Fish & Wildlife Service, in deciding to withdraw its previous proposal to list the dune sagebrush lizard as endangered, did not improperly consider a conservation plan adopted by the state of Texas.

Between the time FWS initially proposed listing the lizard and the time it decided to withdraw that proposal, FWS received updated information about conservation efforts for the lizard in Texas and New Mexico. Based on this information, FWS concluded that current and future threats to the lizard were not of sufficient imminence, intensity or magnitude to indicate that the lizard was in danger of extinction or likely to become endangered within the foreseeable future.

The updated information utilized by FWS included a conservation plan adopted by the state of Texas that relied on landowners entering into voluntary agreements to take certain conservation actions. This plan aimed to direct development away from lizard habitat and to provide mitigation for impacts on the lizard. The plaintiffs claimed that the plan was insufficiently certain to be implemented and effective, but the district court rejected this claim.

The court affirmed FWS's withdrawal of its previously proposed listing of the lizard. The court emphasized that FWS properly followed its *Policy for Evaluation of Conservation Efforts when Making Listing Decisions*, 68 Fed. Reg. 15,100 (Mar. 28 2003), which specifically envisions the consideration of voluntarily adopted conservation plans.

The court next found that the administrative record supported the FWS's findings that the measures in the Texas plan were sufficiently certain to be implemented and to be effective. The court characterized the plaintiffs' objections as narrow, fact-specific disputes and it refused to second-guess the experience and expertise of the federal agency. "The Texas plan may not be foolproof," the court acknowledged, but FWS thoroughly evaluated the scope and effect of the plan and explained the grounds for its conclusions based on its experience and expertise. According to the court, this was sufficient to comply with the ESA.

The decision highlights that voluntarily adopted conservation plans and agreements can play a critical role in the decision on whether or not to list a species as threatened or endangered. The ruling also highlights the deference that courts typically afford to the determinations of federal agencies with respect to the regulatory programs those agencies are charged with implementing.

***Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016)**

Windfarm Complied with ESA Requirement that an Incidental Take Permit Mitigate Impacts to Listed Species to the Maximum Extent Practicable

The D.C. Circuit held that the mitigation measures included in an incidental take permit issued by FWS for a windfarm project in Ohio to minimize the impacts on the endangered Indiana bat complied with the ESA.

The project was designed based on a conservation plan that contained several measures to protect the bat, including moving the project away from known bat habitat to already-developed lands and imposing restrictions on project operations. The FWS issued an incidental take permit for the project based on the measures in the conservation plan.

In addition to a challenge under the National Environmental Policy Act, the plaintiffs alleged that the FWS violated section 10 of the ESA, which requires that any incidental take permit include measures that will, to the maximum extent practicable, minimize and mitigate the impacts to the listed species.

While the court ruled that the FWS's evaluation of alternatives failed to comply with NEPA, it found no violation of the ESA. First, the court found that the requirements of section 10 are designed to protect against impacts to the species'

population as a whole, "rather than a discrete number of individual members of the species." The court noted that this view was supported by the record and was consistent with the FWS' longstanding reading of the agency's 1996 handbook on incidental take permits. Here, while the project would result in the take of individual bats, it would not have a significant impact on the species overall.

Applying this standard, the court rejected the claim that the project should have taken further steps to reduce impacts to individual bats. In other words, the ESA requirement to minimize and mitigate impacts to the maximum extent practicable did not equate with a requirement to reduce the amount of the take of individual bats to the lowest number that is practicable. Rather, the record showed that the impacts to the bat population were sufficiently offset as a whole to comply with the ESA.

The decision refrained from adopting an overly strict view of what is required to meet the directive in section 10 of the ESA that an incidental take permit contain measures that will minimize and mitigate impacts to listed species to the maximum extent practicable. Instead, the decision adopted a more reasonable view that accords with the FWS's longstanding interpretation of its rules and policies.

***New Critical Habitat Regulations*, 81 Fed. Reg. 7214, 7226, 7414 (Feb. 11, 2016)**

New Critical Habitat Regulations May Make ESA Implementation and Approvals More Costly and Time-Consuming

In February 2016, FWS and NMFS (collectively, the Services) jointly published final regulations and a final policy addressing critical habitat under the Endangered Species Act. *See* 81 Fed. Reg. 7214, 7226, 7414 (Feb. 11, 2016). If allowed to stand, the final rules and policy would broadly impact many aspects of ESA implementation and could make ESA approvals and authorizations more costly and time-consuming. Various states joined in a lawsuit to challenge the validity of the new regulations and also have formally asked the White House to rescind the rules. As a result, at present, the future of implementing the ESA's critical habitat requirements is anything but clear.

"Destruction or Adverse Modification"

The first regulation amends the definition of "destruction or adverse modification" under Section 7(a)(2) of the ESA to mean: "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species *or that preclude or significantly delay development of such features*." *See* 81 Fed. Reg. 7214 (Feb. 11, 2016) (emphasis added).

The Services' stated purpose of the amendment is to formalize agency guidance issued after the Fifth and Ninth Circuits invalidated an earlier version of the definition. *See Sierra Club v. U.S. Fish & Wildlife Service*, 245 F.3d 434 (5th Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004). The Services have stated that the revised definition clarifies their intent yet "does not alter the overall meaning of the proposed definition." In practice, however, the revised definition now permits a finding of destruction or adverse modification even in areas that do not contain physical or biological features essential to the conservation of a species. The final rule thus broadens the definition "to encompass all potential types of alterations if they reduce the value of the habitat for conservation."

Moreover, the final rules do not allow adequate consideration of the "net effects" of conservation activities outside of the area of designated critical habitat, stating that such activities "should not be considered when evaluating effects to critical habitat." The absence of an appropriate "net effects" analysis could serve as a disincentive to voluntary mitigation efforts.

Critical Habitat Designations

The second regulation amends the definitions, procedures and criteria for designating critical habitat under Section 4 of the ESA. *See* 81 Fed. Reg. 7414 (Feb. 11, 2016). The most noteworthy—and the most controversial—definitional changes are the addition of two new definitions for "geographical area occupied by the species" and "physical or biological features." As defined, "geographical area occupied by the species" is broad and can include areas that are "used only periodically or temporarily by a listed species during some portion of its life history." Similarly, the term "physical or biological features" is broadly defined to include "habitat characteristics that support ephemeral or dynamic habitat conditions." These definitions allow for marginal habitat to be included within critical habitat designations.

The regulation also provides that, "to the maximum extent prudent and determinable," the Services will finalize critical habitat designations concurrently with the issuance of proposed and final listing rules. The regulation states that only in "rare circumstances" will a designation of critical habitat not be prudent or determinable.

Despite the agencies' claim that the amended rules "do not substantially change the manner in which critical habitat is designated," in fact the new regulations represent a complete overhaul of the designation procedures and criteria. The changes are likely to significantly broaden designations of critical habitat.

Exclusions from Critical Habitat

Finally, the Services issued a non-binding policy to address the agencies' process for identifying exclusions from critical habitat under Section 4(b)(2) of the ESA. *See* 81 Fed. Reg. 7226 (Feb. 11, 2016). The policy explains that exclusion decisions are discretionary, that areas covered by conservation plans or agreements will be considered but not necessarily excluded, and that the focus of exclusions will be on non-federal lands.

The Services state that the purpose of the policy is to "provide greater predictability and transparency regarding how the Services generally consider exclusions under section 4(b)(2)." In practice, however, the lack of clear guidance on when exclusions will apply could result in inconsistent applications of the policy and confusion among the regulated community. Specifically, the absence of clear criteria for the exclusion of areas covered by conservation agreements with assurances, safe harbor agreements, habitat conservation plans or other initiatives may discourage these initiatives, or at least make them more costly and time-consuming.

If allowed to stand, the final rules and policy would represent a significant change in the implementation of the processes and criteria for critical habitat designations and adverse modification findings. Although one of the stated purposes of the final rules and policy is to clarify these issues and provide greater predictability and transparency, the final rules and policy may in fact result in new issues and areas of controversy. The likely effect is increased and broader critical habitat designations—an expectation that even the Services acknowledge and correlate with the impacts of global climate change on species habitat and range.

CHAPTER 10
Vested Rights and Ability to Bind City by Contract

***Stewart Enterprises, Inc. v. City of Oakland*, 248 Cal. App. 4th 410 (2016)**

City's Attempt to Use Emergency Ordinance to Scuttle Unpopular Project Violates Developer's Vested Right

Stewart Enterprises involved a proposed crematorium in Oakland. After obtaining administrative zoning clearance for the proposed use, the developer bought the property and applied for a building permit. Five days after the building permit issued—and due to public opposition to the crematorium—the city council adopted an emergency ordinance requiring a use permit for any new crematorium activity in the city.

The emergency ordinance was written to apply to "any building or structure for which rights to proceed with said building or structure have not yet vested pursuant to the provisions of State law." Thus, the ordinance focused on vesting under the so-called "judicial" vested rights doctrine, which provides that a permit-based right does not "vest" until the developer has performed substantial work and incurred substantial liabilities in good-faith reliance on the permit. Having approved the emergency ordinance, the city notified the developer it could not proceed with the crematorium without first obtaining a use permit.

After the developer's administrative appeals failed, it filed suit, claiming among other things, that the emergency ordinance impaired its vested right to go ahead with the crematorium. That claim was not based on the "judicial" vested rights doctrine, however, but on the city's own permit-vesting ordinance, which provided, in part, that when a subsisting building permit has been lawfully issued "neither the original adoption of the zoning regulations nor of any subsequent rezoning or other amendment thereto shall prohibit the construction, or other development or change, or use authorized by said permit."

The trial court sided with the developer, finding that the city's permit-vesting ordinance precluded application of the emergency ordinance to require a use permit.

On appeal, the court of appeal evaluated three issues: (1) whether the developer had a vested right under the city's permit-vesting ordinance; (2) if so, whether the emergency ordinance impaired that right; and (3) if the developer had a vested right that was impaired, whether the impairment was justified based on the need to protect public health and welfare.

The court quickly determined that the developer had a vested right under the city's permit-vesting ordinance, since the ordinance precluded application of subsequently-enacted zoning regulations where application of the regulations would prohibit construction authorized under a given permit.

Next, the court found that application of the emergency ordinance would impair the developer's vested right based on the simple fact that it prevented construction of the crematorium under the building permit. The court was unpersuaded by the city's claim that the vested right was not impaired because the developer had the option of pursuing a use permit. The possibility the developer could regain the right to build the crematorium if it obtained a use permit does not, the court noted, change the fact that "a project can be 'prohibited' even if the fulfillment of certain contingencies might at some later date reauthorize it."

Lastly, the court considered the city's claim that impairment of the vested right was necessary in order to protect public health and welfare. While the courts have recognized that vested rights may be impaired when necessary to address a "menace to public health and safety or a public nuisance," such a finding must be supported by substantial evidence. The court found that letters of opposition to the crematorium and general comments expressing concern about the crematorium's potential effects on public health were insufficient to make the required showing. Although it declined to establish a bright line rule, the court indicated that to justify impairment of a vested right, the record would likely need to include "actual" evidence that the use poses an unmitigated risk to public health.

CHAPTER 11
Regulatory Takings

***Boxer v. City of Beverly Hills*, 246 Cal. App. 4th 1212 (2016)**

Loss of View Is Not a Taking

The mere loss of homeowners' unobstructed view, without any physical intrusion onto their properties, is not a compensable taking.

In 1989, the City of Beverly Hills planted 31 coastal redwood trees in a park. In 2005, nearby homeowners complained to the city that the growing trees had begun to block previously unobstructed views. They claimed the city had failed to trim and maintain the trees as intended and that further growth would entirely block the views from their property as well as exacerbate an existing fire hazard. The trees were not located on the homeowners' properties, nor did the homeowners allege any physical intrusion, occupation or invasion of, or physical damage to their properties.

The homeowners brought an inverse condemnation suit against the city seeking damages and injunctive relief based on impairment of the views from their backyards. Without a physical intrusion onto their properties, the homeowners relied on a theory of "intangible intrusion," arguing that "because a property owner's loss of view is an aspect of compensable damage in eminent domain cases, the impairment of their views [was] a harm sufficient to support their inverse condemnation claims."

The court of appeal rejected as "simply wrong" the argument that damage to the value of plaintiffs' properties, such as from an impaired viewshed, establishes a compensable taking. The mere existence of a diminution in the value of the plaintiff's property does not establish a compensable taking—it is an element of the measure of just compensation when such taking or damaging is otherwise proved.

The court also rejected the homeowners' contention that impairment of a view alone can constitute a taking. The court was unpersuaded by several cases addressing compensation for a loss of view because those cases also involved a physical taking of the claimant's property. Several California cases discuss a "right" to visibility, but impairment of this right by government action was always "tethered to a compensable claim of impaired physical access." The plaintiffs failed to identify authority for the proposition that a reduction in visibility, per se, required the payment of compensation. Intangible intrusions onto property, such as a reduction in view, may give rise to an inverse condemnation claim only where there is some *burden* on the property that is direct, substantial, and peculiar to the property itself.

The court undertook a lengthy discussion of *Regency Outdoor Advertising, Inc. v. City of Los Angeles,* 39 Cal. 4th 507 (2006), a case in which an advertising company leasing property along a Los Angeles boulevard claimed that palm trees planted by the city along the median reduced the visibility of its billboards. The California Supreme Court rejected the company's inverse condemnation claim, holding that "impairment to visibility does not, in and of itself, constitute a taking of, or compensable damage to, the property in question." Impairment of a "visibility right" might warrant compensation, but the company had no such right. The Supreme Court noted it would be especially difficult to establish a visibility right as against trees planted on city property, because planting trees could be viewed as an application of land use regulations and police power, including "the government's well-established prerogative to plant trees on its own property."

In *Boxer,* the homeowners attempted to distinguish *Regency* as concerning "a view *of* property, rather than a view *from* property" (emphasis in original). The court found this distinction to be of little consequence in light of the well-established principle of California law that a "landowner does not have a right to an unobstructed view over adjoining property." As in *Regency,* the court declined to find the homeowners had a "visibility right," stating that while private parties or a legislative body could create a right to an unobstructed view, the courts would not imply such a right.

CHAPTER 12
Exactions: Dedications and Development Fees

***Building Industry Association of the Bay Area v. City of San Ramon*, 4 Cal. App. 5th 62 (2016)**

Citywide Community Facilities District to Fund Additional Municipal Services Is Valid under the Mello-Roos Act

A Mello-Roos tax on new residential development to finance a wide variety of governmental services was a valid special tax.

An analysis performed by the City of San Ramon showed that the cost of providing services to new residential development exceeded the revenue generated by the development. The city accordingly conditioned its approval of a new development project on the developer providing a funding mechanism to cover the difference. The developer petitioned the city to create a taxing district under the Mello-Roos Community Facilities Act of 1982 to finance police, park and recreational facilities, open space facilities, landscaping facilities, street and street lighting facilities, flood and storm protection facilities and storm water treatment facilities. The city formed a Mello-Roos district comprised of the developer's property and a "future annexation area" that was essentially coextensive with the city limits. The city also authorized, and the developer as landowner voted to approve, a special tax to fund services for its project.

The Building Industry Association of the Bay Area filed suit challenging the validity of the tax. It argued that the tax did not provide for "additional services" as required by the statute, but merely used a different mechanism to fund services the city was already providing. It also contended that because the tax funded such a broad array of governmental services, it was effectively a general tax to fund municipal services, and was therefore improper because the district, as a "special purpose district" under Proposition 218, had no power to levy general taxes.

The court of appeal upheld the tax, finding it in compliance with the requirements of the Mello-Roos Act. Government. Code §53313(g) provides that a special tax approved by a landowner vote may only finance services "to the extent that they are in addition to those provided in the territory of the district before the district was created [and] shall not supplant services already available within that territory when the district was created." The court found that the tax in question satisfied this requirement because services that met an increased demand would necessarily be "in addition to" the services previously provided. Contrary to the Association's argument, they did not "supplant" the services previously available because they added to rather than replacing those services.

The court found that other provisions of the Mello-Roos Act supported this conclusion. Section 53311.5 states that the purpose of the Act is to finance facilities and services in developing areas and areas undergoing rehabilitation, which were the very situations likely to lead to increased demand for the services authorized under the Act. The court also pointed to Section 53326(b), which references the financing of services needed "to meet increased demands placed upon local agencies as the result of development or rehabilitation occurring in the district." Services financed by the San Ramon tax, the court concluded, fell squarely within the "additional services" referenced in the Act.

The court also concluded that the tax was a special (and not a general) tax because it was imposed to fund specified facilities and services, all of which were expressly authorized under the Mello-Roos Act. As such, because the tax was adopted in compliance with the Mello-Roos Act, it met the requirements of the California Constitution.

***616 Croft Ave. LLC v. City of West Hollywood*, 3 Cal. App. 5th 621 (2016)**

City Does Not Have Burden of Showing Reasonableness of Housing Fees

A city does not have the burden of proving that in-lieu fees imposed as part of an inclusionary housing program were reasonably related to development impacts.

The City of West Hollywood requires developers of for-sale residential projects with 10 or fewer units either to sell a portion of the newly constructed units at below-market rates or, alternatively, to pay an in-lieu fee designed to fund construction of an equivalent number of affordable units. The city conditioned approval of a developer's condominium project on payment of in-lieu fees. The developer paid the required fees under protest and filed suit.

Citing extensively from *California Building Industry Association v. City of San Jose*, 61 Cal. 4th 435 (2015), a case in which the California Supreme Court held that inclusionary housing requirements are legally permissible as long as they are reasonably related to the public welfare, the court of appeal rejected the developer's claim that the city had the burden of proving the fees were "reasonably related" to the deleterious impact of the development. The court extended the holding in *California Building Industry Association*, which addressed a requirement that developers set aside a certain number of affordable units, to apply equally to in-lieu fees that developers could pay. The court held that the validity of in-lieu fees, as an alternative to an on-site inclusionary housing requirement, does not depend on whether the fees collected from a developer are reasonably related to that development's impact on a city's affordable housing need. Rather, like an on-site requirement, in-lieu fees only must be reasonably related to the overall availability of affordable housing, and the challenger must show the fee schedule was invalid, an effort the developer here did not undertake.

CHAPTER 13
Initiative and Referendum

***County of Kern v. T.C.E.F., Inc.*, 246 Cal. App. 4th 301 (2016)**

County Board of Supervisors May Not Take Actions That Implement Essential Feature of a Referended Ordinance

When a referendum petition is presented against an ordinance and the board of supervisors decides to "entirely repeal the ordinance" rather than present it to the voters, the board must revoke the challenged ordinance in its entirety and may not take additional action that has the practical effect of implementing the essential feature of the ordinance.

In 2009, the Kern County Board of Supervisors enacted a zoning ordinance that effectively allowed medical marijuana dispensaries in commercial zoning districts. In 2011, the board enacted a new zoning ordinance, the Dispensary Ban Ordinance, which banned all medical marijuana dispensaries throughout the county's jurisdiction. Opponents circulated a referendum petition, and obtained the requisite signatures. The board responded by repealing the entire chapter of the zoning ordinance that included both the Dispensary Ban Ordinance and the 2009 ordinance allowing dispensaries in commercial zoning districts. The result was that dispensaries were not allowed in any zoning district anywhere in the county.

Elections Code section 9145 requires that when a county board of supervisors is presented with a qualified referendum petition, it must either "entirely repeal the ordinance against which a [referendum] petition is filed" or submit the ordinance to a vote. The court of appeal agreed with Kern County that this language did not necessarily require the county to return all circumstances to the status quo that existed before the Dispensary Ban Ordinance was enacted, and that the county had discretion to take other actions besides repealing the referended ordinance. However, this discretion is limited by the overriding principle that these actions may not have the practical effect of implementing the core element of the challenged ordinance.

The court first noted that the election laws applicable to cities prohibit a city council, after a successful referendum, from enacting an ordinance in all essential features like the repealed ordinance. It explained that "this legal standard does not require a return to the status quo ante in every particular, allows for some changes, but significantly limits the authority of a city council to make changes that address the subject matter of the protested ordinance."

The court then applied this rule to counties, interpreting the phrase "entirely repeal the ordinance" as precluding additional actions that would implement the essential feature of a referended ordinance. "In other words, additional action by a board of supervisors violates section 9145 if it fails to return to the status quo ante on the essential feature of the protested ordinance." The court observed that the focus should be on the practical effect of the board's action, "because substance, not form, is the proper test for determining the real character of conduct or a transaction."

The court found that by revoking the entire zoning chapter, the county had also repealed the 2009 ordinance that authorized dispensaries in commercial zones. The effect was to ban all dispensaries, which was essentially the same outcome that would have occurred had the Dispensary Ban Ordinance gone into effect unchallenged. The court was not persuaded by the county's arguments that dispensaries might be allowed under a zoning administrator's determination that a dispensary use was similar to a permitted use, or that a dispensary might be allowed with a use permit. The court found that the "avenues around the prohibition are too tenuous and have yet to be successfully traveled." It was also influenced by the fact that the county was pursuing this litigation, demonstrating "the County's current policy choice towards dispensaries." The court concluded that the repeal of the entire chapter would have implemented the essential feature of the Dispensary Ban Ordinance by (1) establishing a general rule that dispensaries were unauthorized and (2) giving the county control over whether any dispensary would be treated as an exception to that general rule. As such, the board's action violated the election law.

***Brookside Investments, Ltd. v. City of El Monte*, 5 Cal. App. 5th 540 (2016)**

City Council Can Sponsor Ballot Measure to Repeal Prior Initiative that Restricts Council Action

Elections Code section 9222, which allows a city council to propose a ballot measure that repeals or amends a prior initiative, does not unconstitutionally interfere with the voters' reserved power of initiative, even when the prior initiative restricts council action.

In 1988, the El Monte City Council enacted a mobile home rent control ordinance. Two years later, city voters approved an initiative that repealed the rent control ordinance. That initiative also prohibited the council from passing any ordinance relating to the subject of mobile home park rents, and barred the expenditure of tax revenues in connection with any such ordinance. Several years later, the city council proposed a ballot measure to repeal the initiative. City voters approved the repeal measure, and the city council then enacted new rent control ordinances. Brookside Investment, Ltd., a mobile home park owner, sued to invalidate the council-sponsored ballot measure, asserting that Elections Code section 9222 could not constitutionally be applied to allow the city council's measure repealing the prior initiative. The court of appeal disagreed.

The court first rejected Brookside's argument that section 9222 unconstitutionally interferes with the voters' right of initiative. The court acknowledged that the California Constitution expressly allows the State Legislature to propose ballot measures that repeal or amend prior initiatives, and that it does not contain a similar provision expressly authorizing local governments to do the same. It held, however, that an express constitutional authorization was not necessary. Since 1911, the California Constitution has given the Legislature the power to adopt procedures governing use of the local initiative power, and statutory measures allowing city councils to propose ballot measures that amend or repeal prior initiatives existed both before and after those constitutional provisions were enacted. "In sum, far from withholding the power of local legislative bodies to independently propose ballot measures affecting voter-approved initiative ordinances, the 1911 constitutional amendments gave the Legislature the authority to establish procedures allowing such action."

Brookside next argued that the voters have a constitutional right to enact an initiative that validly precludes a council from proposing a hostile ballot measure. It argued that section 9222 could not constitutionally be interpreted to restrict that right. The court was not persuaded. It noted that section 9222, which permits local voters to consider both voter-sponsored and city council-sponsored measures, including proposed ordinances affecting previously approved initiatives, "does not clearly narrow or impair the right of initiative guaranteed in the state Constitution. In either case, amendment or repeal would be accomplished by popular vote."

The court concluded, however, that it did not need to decide whether an initiative that purported to preclude a city council from later proposing a hostile ballot measure would impermissibly conflict with section 9222. The El Monte initiative did no such thing. The court interpreted the language of the El Monte initiative to prohibit only the city council's adoption of its own mobile home rent ordinance without a vote of the people, not a council-sponsored ballot measure.

Finally, the court held that the city did not violate the prohibition in the voters' initiative against the expenditure of tax revenues in connection with an ordinance relating to mobile home park rents. Because the initiative did not preclude the city council from placing its measure on the ballot, the council did not violate the initiative's prohibition against expenditures by incurring the costs typically associated with placing a measure on the ballot.

***Wilson v. County of Napa*, 9 Cal. App. 5th 178 (2017)**

Initiative Petition Must Include Full Text of Proposed Initiative

An initiative petition that fails to include the full text of the proposed initiative violates Elections Code section 9101 and is invalid.

Proponents filed an initiative petition with the Napa County registrar entitled "Water, Forest and Oak Woodland Protection Initiative of 2016." The petition was 18 pages long and consisted of 10 sections. Among the sections was a provision that would be added to the Napa County Code to establish an "Oak Removal Permit Program." The new code section would require a permit for the removal of certain oak trees. The permit application would have to include a remediation plan that "at a minimum" is in compliance with the best management practices set forth in an appendix to the Napa County Voluntary Oak Woodland Management Plan. The initiative petition did not contain the referenced appendix or provide its relevant text. After seeking advice from counsel for the county, the registrar rejected the petition on the grounds that it did not comply with Elections Code section 9101, which requires an initiative petition to include the full and complete text of everything that will be enacted if the voters approve it.

The court of appeal held that the petition was defective because the initiative's incorporation by reference of the management plan was not merely a cross-reference to an existing law, but rather the conversion of what were voluntary or recommended management practices into mandatory and legally binding obligations. The omission of the management practices that would be compelled, therefore, frustrated the purpose of the full text requirement, which is to "provide sufficient information so that voters can intelligently evaluate whether to sign the initiative petition and avoid confusion." While the general rule requires substantial compliance with the Elections Code and technical deficiencies will not invalidate a petition, substantial compliance is not sufficient where the defect frustrates the purpose of the full text requirement. Here, the court held, the obligation of permit applicants to comply with management practices that were not spelled out in the petition or attached to it frustrated the purpose of the full text requirement.

CHAPTER 14
Local Agency Formation Commissions (LAFCOs): Local Agency Boundary Changes

***City of Selma v. Fresno County Local Agency Formation* (City of Kingsburg), 1 Cal. App. 5th 573 (2016)**

Failure to Comply With Time Limitation on Public Hearing for Annexation Proceedings Does Not Void Annexation

The time limitation for a public hearing on a proposed annexation is directory, rather than mandatory, and a city council's failure to comply with the time limitation will not void an annexation.

The City of Kingsburg proposed to annex 430 acres of Fresno County. The public hearing for the proposed annexation was originally noticed for April 10, 2013, but was continued until July 17, more than four months later. The neighboring city of Selma challenged the continuance as a violation of the Reorganization Act's 70-day limitation for a LAFCO to continue a public hearing on a proposed annexation. The Act specifically provides, in Government Code section 56666(a), that a "hearing may be continued from time to time but not to exceed 70 days from the date specified in the original notice."

Although the court of appeal held that Kingsburg violated section 56666(a), it also held that the 70-day time limitation was directory and not mandatory. Government Code section 56106 (emphasis added) provides that "[a]ny provisions in this division governing the time within which [the LAFCO] is to act shall in all instances, except for notice requirements and the requirements of [sections 56658(h) and 56895(b)], *be deemed directory, rather than mandatory*." The court explained that a statute is directory when it is obligatory but failure to comply "will not have the effect of invalidating the governmental action."

The court interpreted section 56106 to state a three-pronged rule for determining whether a provision of the Reorganization Act is mandatory: (1) the provision must govern "the time within which [the LAFCO] is to act;" (2) the provision must not be a "notice requirement;" and (3) the provision must not be a requirement of section 56658(h) or section 56895(b). If a provision satisfies all three prongs, then it is directory.

The court found that section 56666(a) unambiguously satisfied the rule. A continuance of a public hearing beyond 70 days, therefore, does not invalidate a LAFCo's determinations. Although the court acknowledged that its interpretation "renders the 70-day limit relatively toothless," it emphasized that a directory requirement is still obligatory.

CHAPTER 15
Affordable Housing

***616 Croft Ave. LLC v. City of West Hollywood*, 3 Cal. App. 5th 621 (2016)**

City Does Not Have Burden of Showing Reasonableness of Housing Fees

A city does not have the burden of proving that in-lieu fees imposed as part of an inclusionary housing program are reasonably related to development impacts.

The City of West Hollywood requires developers of for-sale residential projects with 10 or fewer units either to sell a portion of the newly constructed units at below-market rates or, alternatively, to pay an in-lieu fee designed to fund construction of an equivalent number of affordable units. The city conditioned approval of a developer's condominium project on payment of in-lieu fees. The developer paid the required fees under protest and filed suit.

Citing extensively from *California Building Industry Association v. City of San Jose*, 61 Cal. 4th 435 (2015), a case in which the California Supreme Court held that inclusionary housing requirements are legally permissible as long as they are reasonably related to the public welfare, the court of appeal rejected the developer's claim that the city had the burden of proving the fees were "reasonably related" to the deleterious impact of the development. The court extended the holding in *California Building Industry Association*, which addressed a requirement that developers set aside a certain number of affordable units, to apply equally to in-lieu fees that developers could pay. The court held that the validity of in-lieu fees, as an alternative to an on-site inclusionary housing requirement, does not depend on whether the fees collected from a developer are reasonably related to that development's impact on a city's affordable housing need. Rather, like an on-site requirement, in-lieu fees only must be reasonably related to the overall availability of affordable housing, and the challenger must show the fee schedule was invalid, an effort the developer here did not undertake.

***Kalnel Gardens, LLC v. City of Los Angeles*, 3 Cal. App. 5th 927 (2016)**

California Coastal Act Trumps Statutes Awarding Density and Height Increase Bonuses

Statutes awarding housing density and height increase bonuses do not take precedence over the California Coastal Act.

Kalnel Gardens, LLC, proposed to build a 15-unit housing complex. Two of the units were designated for very-low-income households. Based on the inclusion of the very-low-income units, City of Los Angeles planning officials approved the project with density bonuses under the Housing Accountability Act, the Density Bonus Act, and the Mello Act, which, together with other zoning concessions, allowed the project to exceed local density, height, and setback restrictions. In addition to these concessions, city planning officials adopted a mitigated negative declaration under CEQA. The city's advisory agency approved the project's vesting tentative tract map, and the city zoning administrator approved a coastal development permit under the Coastal Act.

Neighbors appealed the planning approvals to the West Los Angeles Area Planning Commission, claiming, among other things, that the project violated the Coastal Act because its height, density, setbacks, and other physical and visual characteristics were out of character with the existing neighborhood. The commission declined to consider issues related to the density bonus (which it found to be outside its purview), and focused instead on the city's discretionary power to issue coastal development permits under the Coastal Act. The commission found that the project did not conform to the Coastal Act because its size, height, bulk, mass, and scale were incompatible with, and harmful to, the surrounding neighborhood, and because the setbacks were too small. Kalnel appealed the commission's decision to the city council, which denied the appeal and adopted the commission's findings. Kalnel

then brought an administrative mandate action against the city alleging that it had violated the Housing Accountability Act, the Density Bonus Act, and the Mello Act.

The court of appeal upheld the city council's action, holding that density bonus statutes are subordinate to the Coastal Act. Citing the Density Bonus Act, which is designed to address the shortage of affordable housing in California, but expressly provides that "[n]othing in this section shall be construed to supersede or in any way alter or lessen the effect or application of the [Coastal Act]," the court held that "it could not be clearer that the Density Bonus Act does not supersede the Coastal Act or in any way alter or lessen its effect."

The Mello Act, which establishes minimum requirements for affordable housing within the coastal zone, does not include a similarly clear statement, but the court noted that if the legislature had intended the Mello Act to supersede the Coastal Act, it would have said so. Further, the court explained, the Coastal Act is a comprehensive scheme to govern land use planning for the state's entire coastal zone: The Coastal Act requires the design of new developments to protect scenic views and to be "visually compatible with the character of the surrounding areas," and provides that it shall be "liberally construed to accomplish its purposes and objectives." In addition, interpretive guidance provided by the Legislature under the Public Resources Code states that conflicts should be resolved in a manner which, on balance, is the most protective of significant coastal resources. These provisions, the court said, make it clear that the Coastal Act must take precedence over the Mello Act. A contrary interpretation, it reasoned, would permit Mello Act housing even if it blocked coastal access, intruded into environmentally sensitive areas, or were visually incompatible with existing uses. The Mello Act's affordable housing requirements, the court held, apply to a project within the coastal zone only so long as the project conforms to the Coastal Act's overall protective provisions.

CHAPTER 16
Sustainable Development

***Bay Area Citizens v. Association of Bay Area Governments*, 248 Cal. App. 4th 966 (2016)**

Sustainable Communities Strategies Need Not Take Account of Statewide GHG Reduction Mandates

A sustainable communities strategy does not need to take account of the effects of statewide greenhouse gas reduction mandates.

The Sustainable Communities and Climate Protection Act of 2008 (SB 375) is one of several major statutes California has enacted in its efforts to reduce GHG emissions. SB 375 generally requires each of the state's metropolitan planning organizations to adopt a "sustainable communities strategy" demonstrating how specified land use changes and transportation strategies would enable the region to meet GHG reduction targets set specifically for that region by the California Air Resources Board.

The Association of Bay Area Governments and the Metropolitan Planning Commission constitute the Metropolitan Planning Organization (MPO) for the San Francisco Bay Area. The MPO adopted its first sustainable communities strategy, Plan Bay Area, in 2013. Lawsuits ensued, some alleging that Plan Bay Area did too little to reduce GHG emissions and some, like Bay Area Citizens', alleging that the plan called for draconian and unnecessary land use changes.

Bay Area Citizens alleged that SB 375 expressly required MPOs to "take into account" GHG emission reductions that will be achieved through statewide vehicle emission standards, low carbon fuel standards, and other mandates, and that once these statewide mandates were factored into the mix, no land use changes were needed for the Bay Area to achieve the state's GHG emissions goals. Therefore, Citizens argued, the MPO violated CEQA by describing the project only in terms of GHG reductions that could be achieved through regional land use and transportation policy changes, and by declining to analyze alternatives that did not include such policy changes.

After reviewing the language of SB 375, its legislative history, and its interpretation by the Air Resources Board, the court of appeal rejected Citizens' claims. The court noted that under SB 375, the board, in setting GHG reduction targets for each MPO, took the statewide mandates into account, and that each MPO was obligated, in its sustainable communities strategy, to identify land use and transportation planning changes that would achieve additional GHG reductions.

Fundamentally, the court observed, Citizens' argument was "that the Legislature, via SB 375, launched a major new climate protection initiative requiring regional agencies to develop regional land use and transportation strategies through an elaborate planning process that in the end would be superfluous because the agencies could meet the Board's regional emissions reduction targets simply by invoking reductions already expected from pre-existing statewide mandates." This, the court said, "makes no sense."

***Friends of the Hastain Trail v. Coldwater Development LLC*, 1 Cal. App. 5th 1013 (2016)**

Public Use Did Not Result in Implied Dedication of Public Easement Across Trails

The public's use of two fire roads running across private property during the period between 1967 and 1972 did not constitute an implied dedication of land for public use.

The subject of this litigation was two parallel fire roads in a mountainous area built in the early part of the 20th century by the Beverly Hills and Los Angeles fire departments. The first road had been built along a high ridgeline, but in the 1940s the road was abandoned and replaced by a parallel road at a lower elevation to facilitate access and mitigate

erosion. After its abandonment, some hikers continued to use the ridgeline road, which became known as the “Peak Trail.” The lower road that replaced the abandoned ridgeline road was also used by hikers, bicyclists, equestrians, and dog walkers, and became known by users as the Hastain Trail.

In 2011, developers intended to build large homes on parcels through which the fire roads passed, a project that would require relocating portions of the lower Hastain fire road. Friends of the Hastain Trail filed suit to quiet title to a public recreational trail easement through the defendant developers’ property. The group alleged that the trails had been impliedly dedicated to the public as a result of more than 50 years of public use, including five years of open and continuous use immediately prior to March 1972 (the “prescriptive period”). The March 1972 date was crucial because in 1972, the Legislature enacted a statute prohibiting such implied dedications of public land through public use.

The court of appeal held that any use of the Hastain Trail during the prescriptive period could not give actual or constructive notice to defendants of such use because the fire road was not their property. Rather, “it was a public easement *on* their property, and once granted, the scope of a public easement cannot be materially changed without notice.” Furthermore, the easement was temporary. The fire roads had been constructed for the purpose of aiding firefighting in the area with the intent that they would be abandoned if no longer needed or moved to accommodate development in the area. Thus, while the owners of the property could have foreseen the public’s use of the fire roads for hiking, they could not have foreseen that such use could result in an implied dedication of a permanent easement.

Any increase in the burden on the servient tenement through prescriptive creation of the easement must be the result of “normal development, reasonably foretold, and consistent with the pattern formed by the adverse use by which the prescriptive easement was created.” By contrast, “[p]ermissible use by the public of an easement the public already owns would not foretell a drastically expanded use, inconsistent with the pattern under which the easement was created, much less that the servient tenement would itself be in danger of permanent, unconditional public dedication, as occurred here.”

The court could not apply the same analysis to the Peak Trail because the underlying fire road was abandoned in the 1940s and any public rights to it were extinguished long before the prescriptive period. Accordingly, the court addressed whether the Peak Trail had been impliedly dedicated to the public through long and continued adverse use that could not be construed as a mere license or neighborly accommodation. In reviewing the record, the court found that substantial evidence did not support such a conclusion: “[U]nder even the most generous view of the evidence, public use of the Peak Trail was miniscule.” In reviewing the evidence, the court found references to limited use on Sundays by a single individual. The court also rejected the notion that the public’s use of the Peak Trail was substantial because “it had not become overgrown, which it would if unused.” The court rejected the argument in the absence of any evidence suggesting how much or what type of use was necessary to keep the trail from becoming overgrown.

CHAPTER 17
Rights of the Regulated

***Opinion of Kamala D. Harris*, Atty. Gen. Op. No. 14-1203, 99 Ops. Cal. Atty. Gen. 11 (2016)**

Legislative Body May Still Hold Meeting if Technical Difficulties Prevent Posting of Agenda Online Before Meeting

The Brown Act is not necessarily violated when technical difficulties prevent a local agency legislative body from posting a meeting agenda on its website before the meeting, as long as it has otherwise substantially complied with the agenda-posting requirements, the Attorney General concluded.

The Brown Act requires the legislative bodies of local agencies to post an agenda 72 hours before the meeting "on the local agency's Internet website, if the local agency has one." If this requirement is not complied with, any actions taken at the meeting are null and void.

The Attorney General issued an opinion in which she concluded that the Brown Act is not violated when technical difficulties (for example, power outages, cyberattacks, or other third-party interference) prevent an agenda from being posted online within 72 hours of a meeting. The Attorney General reasoned that the strictest interpretation of the law "would effectively penalize local agencies for maintaining websites" because they would be at risk of having to cancel meetings for technical difficulties out of their control, "resulting in practical problems for both the agencies and the public." The Attorney General concluded that as long as the Brown Act's agenda-posting requirements are otherwise substantially complied with, a legislative body may still hold its meeting even if technical difficulties prevented online posting of the agenda for a continuous 72 hours before the meeting.

***Center for Local Government Accountability v. City of San Diego*, 247 Cal. App. 4th 1146 (2016)**

Preconditions to Filing Brown Act Complaint Apply Only to Past Actions, Not Ongoing or Threatened Violations

Statutory preconditions to filing a Brown Act complaint apply only to lawsuits alleging past violations, not litigation over ongoing or threatened future violations.

Section 54954.3(a) of the Brown Act requires the agenda of every regular meeting of a local legislative body to include an opportunity for members of the public to address the legislative body—referred to as the nonagenda public comment period.

The San Diego city council provided only one nonagenda public comment period for its two-day regular weekly meetings on Mondays and Tuesdays. The Center for Local Government Accountability alleged that this practice violated the Brown Act, claiming that the city should provide a nonagenda public comment period on each day of its two-day regular weekly meetings. After the Center filed its lawsuit, the city council changed its meeting procedures to have a nonagenda public comment period on both days. The trial court dismissed the Center's complaint, and the Center appealed.

The city had argued that the case was not ripe for adjudication because the Center failed to comply with certain statutory preconditions before filing its complaint. The court of appeal first had to decide whether those preconditions applied only to litigation alleging past Brown Act violations, or also to litigation alleging ongoing or threatened future violations. Examining the plain language and legislative history of the Brown Act, the court concluded that the preconditions applied only to litigation to determine the Brown Act's applicability to past actions.

The court next had to determine whether the alleged violation (the city's practice of providing for one nonagenda public comment period over the course of its two-day regular weekly meetings) constituted a past action or an ongoing or threatened future action. The court determined that the city's practice constituted an ongoing or threatened future action, not a past action—because it was not a one-time event and it was related to present or future actions. Thus, the Center was not required to comply with the statutory preconditions before commencing the litigation.

The final issue before the court was whether the city's post-litigation adoption of a new ordinance providing for a nonagenda public comment period on each day of its two-day regular weekly meetings mooted the litigation. Generally, such voluntary cessation of allegedly wrongful conduct would render an action moot unless there is a reasonable expectation the allegedly wrongful conduct will resume. However, the court concluded that because the city refused to concede that its former practice violated the Brown Act, there was a reasonable possibility the Center could amend its complaint to state a viable claim for declaratory relief.

The court therefore held that the trial court erred in dismissing the complaint. It reversed and remanded the matter for further proceedings.

***San Diegans for Open Government v. City of Oceanside*, 4 Cal. App. 5th 637 (2016)**

Agenda Complies with Brown Act If it Gives Fair Notice of What City Council Will Consider at Meeting

A local agency substantially complies with the Brown Act if its published agenda prior to a meeting gives the public "fair notice of the essential nature" of what the agency will consider at its meeting.

The case arose after the City of Oceanside agreed to sell property to a developer to build a 360-room luxury hotel. Under the terms of the agreement, the city would pay the developer more than $11 million from transient occupancy taxes generated by the hotel after it opened. The city council approved the agreement and a report that provided detailed information about the subsidy in 2014. The agenda for the city council meeting stated that the city council would consider approving an agreement "to guarantee development and use of the property as a full service resort," an agreement to share transient occupancy tax generated by the project, and a report documenting the amount and public purpose of the subsidy.

After the city council approved the agreement, San Diegans for Open Government filed this lawsuit, claiming, among other things, that the agenda item description violated the Brown Act. The Brown Act requires that at least 72 hours prior to a regular meeting, a local agency must post an agenda with "a brief general description of each item of business to be transacted or discussed at the meeting."

The court of appeal held that the city council had not violated the Brown Act. The court explained that a local agency satisfies the Brown Act if it substantially complies with the law's requirements. The "brief general description" must give the public "fair notice of the essential nature" of what the agency will consider at its meeting.

The court held that the city council's agenda "expressly gave the public notice that it would be considering a fairly substantial development of publicly owned property as a luxury hotel" and that the project would involve a subsidy by the city. Thus, the court concluded, the city council had substantially complied with the agenda requirement of the Brown Act.

***Hernandez v. Town of Apple Valley* (Walmart Stores Inc.), 7 Cal. App. 5th 194 (2017)**

Invalidation of Initiative Election Is Proper Remedy for Brown Act Violation Related to Election Funding

A town council's Brown Act violation related to a developer's offer to pay for a special election on an initiative renders the subsequent election null and void.

Project proponents submitted an initiative petition that proposed to amend or adopt a specific plan to provide for retail development that would include a Walmart store in the Town of Apple Valley. Town staff placed an item on the agenda for an upcoming town council hearing regarding the "Wal-Mart Initiative Measure." The council voted to place the measure on the ballot and call a special election. However, at that same hearing, the council also considered and acted on a Memorandum of Understanding (MOU) that was not mentioned on the agenda. The MOU allowed the town to accept a gift from Walmart to pay for the special election. A citizen, Gabriel Hernandez, notified the town of his claim that this action violated the Brown Act, but the town declined to cure. Hernandez then sued. The voters subsequently approved the initiative measure.

The court of appeal ruled that the council action taken on the MOU violated the Brown Act. Therefore, the court held, the town's action of putting the initiative on the ballot was null and void, because "it is conceivable [the funding] was a major factor in the decision to send the matter to the electorate." As a result, the court invalidated the special election at which voters approved the initiative measure.

The court also addressed the validity of the contents of the initiative, since the town would likely again consider the Walmart initiative. Article II, section 12 of the California Constitution provides that "No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that names any individual or any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect." The Walmart initiative did not expressly name Walmart, but it referenced the obligations of "developer" and defined "developer" as "any individual or other entity proposing any development within the Specific Plan area."

Hernandez argued that "everyone knew that Walmart would benefit from the Initiative." The court agreed that Walmart, as developer, would be responsible for the acts in the initiative. The court recognized, however, that if Walmart sold the property, or decided not to develop, it would have no rights under the initiative. Accordingly, the initiative did not assign power to Walmart per se, but only to any developer of the property. Moreover, Hernandez's argument would lead to the absurd conclusion that *any* land-use initiative would be invalidated, since an initiative opponent would need to establish only that a specific company intended to develop the property or owned the property to invalidate it. The court concluded that the initiative's imposition of obligations on "developer" did not constitute a violation of the constitutional prohibition against benefitting a private corporation.

***City of San Jose v. Superior Court* (Smith), 2 Cal. 5th 608 (2017)**

Public Employees' Personal E-mail and Text Messages May Be Subject to Disclosure under the Public Records Act

Information relevant to public business contained in emails or text messages stored on private electronic devices of government officials is subject to disclosure under the California Public Records Act (PRA).

The PRA establishes a presumptive right of access to any records created or maintained by government agencies that relate to the public's business. Every such record must be disclosed unless a statutory exception is shown. The PRA sets out a variety of exemptions, many of which are designed to protect individual privacy, and also includes a catchall provision exempting disclosure if "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure." The PRA was adopted in 1968, long before the Legislature could have envisioned that public agencies would communicate via cell phones and e-mail.

A member of the public (Smith) submitted a PRA request to the City of San Jose for emails and text messages "sent or received on private electronic devices used by" the mayor, members of the city council, and their staffs. The city maintained that communications sent or received by a public official on a personal account (e.g., a cell phone or e-mail account) are private, not public, records and hence are not subject to disclosure under the PRA.

The California Supreme Court ruled unanimously that the requested records were subject to disclosure under the PRA. At the outset, the Court rejected the blanket notion that records generated or retained on personal accounts are not subject to the PRA. Citing both the constitutional policy favoring broad access to records involving the public's business and the clear legislative intent of the PRA, the Court held that the right to inspect public records cannot be thwarted simply because such records are not created or maintained on a governmental account. However, the Court carefully characterized the decision as involving only the "narrow" legal issue of whether writings concerning public business are beyond the scope of the PRA "merely because they were sent or received using a nongovernmental account."

The Court recognized the difficulty in determining whether particular e-mails or text messages from non-governmental accounts are sufficiently related to the public's business to fall within the scope of the PRA. For example, the Court noted that "depending on context, an email to a spouse complaining 'my coworker is an idiot' would likely not be a public record," but an "an email to a superior reporting the coworker's mismanagement of an agency project might well be." The Court eschewed adoption of a general rule, stating that these communications should be examined in light of 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."

In addition to these factors, the Court advised that communications that include "no more than incidental mentions of agency business generally will not constitute public records." The Court was wary of the effect of its decision on the privacy of public officials and staff, and emphasized that the PRA's exemptions from disclosure would apply to any writings from personal accounts, and that purely private information not otherwise subject to disclosure can be redacted.

***City of Los Angeles v. Superior Court* (Anderson-Barker), 9 Cal. App. 5th 272 (2017)**

In Public Records Act Cases, Discovery Is Available on Whether a Public Agency Is Required to Disclose Certain Records

Discovery is available in a PRA proceeding under the Civil Discovery Act to answer the specific question of whether a public agency is required to disclose certain records pursuant to the PRA.

The PRA permits the public to seek judicial relief when a public agency refuses to disclose records. If a court determines that certain records are being improperly withheld from the public, then the court must order the public agency to disclose said records or to show cause as to why disclosure is not required.

The Civil Discovery Act applies to civil actions and special proceedings of a civil nature. Special proceedings are proceedings created by statute, whereas civil actions are actions at law or a suit in equity. And unless a statutory exemption precludes discovery in a special proceeding, courts have held that discovery is available in such proceedings.

Here, the court determined that PRA proceedings are special proceedings created by statute and that the PRA is silent on discovery or the Civil Discovery Act. Accordingly, the court held, discovery is available in a PRA proceeding to determine whether a public agency is required to disclose certain records. The court also rejected arguments that PRA proceedings require the judge and not the record requester to lead the inquiry into further evidence. The court reaffirmed case law holding that if a special proceeding is silent as to the availability of discovery, then discovery is available under the Civil Discovery Act.

The court also held that courts can still limit the scope and breadth of discovery in PRA proceedings, as discovery may lead to the disclosure of records that a public agency is claiming PRA does not require the disclosure of. In determining whether to grant discovery, "the trial court has discretion to consider whether the petitioner has made an adequate showing that the discovery is likely to aid in the resolution of the particular issues presented in the proceeding." In limiting the scope of discovery, courts must consider if the discovery will help resolve whether a public agency has a duty to disclose, if a plaintiff has made a sufficient showing that records have been improperly withheld, and whether disclosure may result in the improper disclosure of records.

CHAPTER 19
Land Use Litigation

***Ardon v. City of Los Angeles*, 62 Cal. 4th 1176 (2016)**

Inadvertent Disclosure of Documents under the Public Records Act Does Not Waive the Attorney-Client Privilege

A public agency's inadvertent disclosure of a document in response to a Public Records Act request does not waive the attorney-client privilege.https://www.californialandusedevelopmentlaw.com/wp-content/uploads/sites/7/2016/03/Ardon-v-City-of-Los-Angeles-Ca-Supr.-Ct..docx

An attorney representing the plaintiff in a pending class action against the City of Los Angeles served the city with a request for documents under the Public Records Act (PRA) (Government Code section 6250 *et seq.*). In response, an assistant city administrative officer provided the attorney with approximately 53 documents, among which were three memos containing attorney-client communications. After discovering this, the city notified plaintiff's counsel that the privileged documents had been produced inadvertently, and requested their return. After plaintiff's counsel refused, the city filed a motion to compel return of the documents, which was denied by the trial court.

The California Supreme Court held that inadvertent disclosure of privileged documents in response to a PRA request did not result in a waiver under section 6254.5 of the PRA. Government Code section 6254.5 provides that "[n]otwithstanding any other provisions of law, whenever a state or local agency discloses a public record which is otherwise exempt from this chapter to any member of the public, this disclosure shall constitute a waiver of the exemptions" specified in the PRA. Examining this language, the court found that the word "disclosure" was ambiguous as to whether inadvertent disclosures were included, and therefore turned to the legislative history for guidance. It determined that the purpose of the bill was to address intentional disclosures and to prohibit agencies from selectively disclosing privileged documents to particular persons or entities while withholding them from the general public. The court concluded that the bill did not contemplate inadvertent disclosure, and that the central purposes of the statute—to preclude selective disclosures—would not be advanced by applying the waiver provisions to accidental disclosures. The court reasoned that when "a release is inadvertent, no 'selection' occurs because the agency has not exercised a choice in making the release. Accordingly, an inadvertent release does not involve an attempt to assert the exemption as to some, but not all, members of the public, the problem section 6254.5 was intended to address."

The court also observed that construing section 6254.5 to exclude inadvertent disclosures of attorney-client or work product material was consistent with the construction of similar waiver provisions in the litigation context. Evidence Code section 912(a) provides that the attorney-client privilege "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." Case law has construed Evidence Code section 912 restrictively, holding that "waiver" under that provision does not include inadvertent disclosure of privileged information as a result of human error in responding to discovery requests. The court concluded that, in light of the fact that human error is at least as likely to occur in the process of responding to a PRA request as to a discovery request, there was no reason why inadvertent disclosures should be treated differently in the former situation than in the latter.

The court cautioned that its determination that inadvertent release of exempt documents does not waive the exemption under the PRA "must not be construed as an invitation for agencies to recast, at their option, any past disclosures as inadvertent so that a privilege can be reasserted subsequently." The court observed that its holding applied only "to truly inadvertent disclosures and must not be abused to permit the type of selective disclosure section 6254.5 prohibits." It added that an agency's own characterization of its intent was not dispositive, and that disputes over the issue of inadvertence under the PRA would be resolved by courts, just as they were under the Evidence Code.

***Communities for a Better Environment v. Bay Area Air Quality Management District* (Kinder Morgan Material Services, LLC) 1 Cal. App. 5th 715 (2016)**

Failure to Discover an Agency's Approval of an Exempt Project Does Not Extend Time to File CEQA Lawsuit

The accrual of a claim that a public agency exemption determination violated CEQA is not postponed by the plaintiff's failure to discover the violation.

In July 2013, the Bay Area Air Quality Management District (BAAQMD) determined that its approval of a permit authorizing a rail-to truck transloading facility to switch from loading ethanol to crude oil was a ministerial action exempt from CEQA, but did not file a Notice of Exemption. Two months later, the transloading facility began transloading crude oil. Over the next few months, BAAQMD modified several conditions of the permit and ultimately issued another permit incorporating the modifications. Communities for a Better Environment (CBE) subsequently filed its lawsuit against BAAQMD.

The court of appeal held that CBE's petition was time-barred because it was filed more than 180 days after the issuance of the first permit, the time to file suit specified by statute when no Notice of Exemption is filed. CBE had argued that a "discovery rule" should apply, which would mean that the limitations period did not begin to run until CBE first became aware of the operational change in January 2014. The court, however, held that a discovery rule cannot be applied to postpone the running of the CEQA's statutory limitations periods because the specified time periods are dates on which the public is deemed to have *constructive notice* of a potential CEQA violation.

The court distinguished the situation from a case decided by the California Supreme Court three decades ago, and a recent court of appeal case, in which the plaintiffs successfully argued a challenge was not time-barred because substantial changes had been made to the project after the initial approval. The court of appeal observed that in both cases the courts determined "that an action accrues on the date a plaintiff knew or reasonably should have known of the project only if no statutory triggering date has occurred." CBE, however, "offered no theory" demonstrating that the applicable triggering date in the statute did not occur.

The court of appeal held that CBE's contention that the discovery rule could delay the statutory triggering date ran counter to the general principle that CEQA's statutes of limitation specify dates a plaintiff is deemed to have constructive notice of a potential CEQA violation. A plaintiff's lack of actual notice of the violation is irrelevant. Accordingly, the court of appeal upheld the trial court's dismissal of CBE's petition.

***No Toxic Air, Inc. v. Lehigh Southwest Cement Company*, 1 Cal. App. 5th 1136 (2016)**

Prevailing Party in Mandamus Action May Recover Fees of Attorneys and Paralegals in Preparing Administrative Record

The prevailing party in a mandamus action may recover fees of attorneys and paralegals for preparing the administrative record.

No Toxic Air brought an administrative mandamus action challenging Santa Clara County's grant of legal nonconforming status to Lehigh's quarry business. The trial court denied the writ of mandate and awarded costs to Lehigh as the prevailing party. However, the trial court denied Lehigh's request for recovery of the costs of attorneys and paralegals in preparing the administrative record, finding no appellate authority to support recovery of such costs.

Code of Civil Procedure section 1094.5(a) provides that "[i]f the expense of preparing all of any part of the record has been borne by the prevailing party, the expense shall be taxable as costs."

Observing that another appellate court had recently held that labor costs of attorneys and paralegals in preparing the administrative record were recoverable in a CEQA case, the court of appeal found no reason to apply a different rule

in a non-CEQA mandamus case. The court held that labor costs for attorneys and paralegals to prepare the administrative record are recoverable as expenses in mandamus cases.

***Cruz v. City of Culver City*, 2 Cal. App. 5th 239 (2016)**

Neighbors' Personal Stake in Preserving Local Parking Regulations Precluded Finding of Public Interest

Neighbors who were suing to maintain existing neighborhood parking regulations were pursuing their own personal interests and did not qualify for the public interest exception from the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. Because their Brown Act claim had no merit, it was properly dismissed as an anti-SLAPP suit.

Learning that the city council of Culver City was considering a church's request to change neighborhood parking restrictions, neighbors sued claiming the council's action violated the Brown Act because the process had been initiated during the public comment period rather than as a noticed agenda item. In response to the city's motion to dismiss the action under the anti-SLAPP statute, plaintiffs argued they were subject to the public interest exception from the statute because their action concerned a matter affecting the public interest.

The court held that the city council's discussion at the hearing and its decision to place the parking item on a future agenda were activities arising from free speech, making the anti-SLAPP law applicable. The court also rejected plaintiffs' claim that they were subject to the public interest exception to the anti-SLAPP statute. The public interest exception applies only to actions brought solely in the public interest, and plaintiffs' action did not qualify because "[k]eeping the parking restrictions at status quo would directly benefit plaintiffs . . . [who] sought personal relief in the form of a halt to any attempts by the church to undo the long-standing parking restrictions."

Because the anti-SLAPP statute applied, plaintiffs had the burden of showing it was probable they would prevail on the merits. They failed to satisfy this burden. The Brown Act allows a council to discuss and take action on non-agenda items in three circumstances: (1) the council may briefly respond to statements or questions from persons exercising their right to publicly testify at a hearing; (2) the council may ask a question for clarification, make a brief announcement, or make a brief report on its own activities; and (3) the council may ask staff to provide factual information, report back at a later time, or place an item on a future agenda. The city council's discussion and decision fell within all three exceptions. Accordingly, there was no Brown Act violation, and the plaintiffs' action was properly dismissed under the anti-SLAPP statute.

***City of Montebello v. Vasquez*, 1 Cal. 5th 409 (2016)**

Public Official's Votes Are Protected by Anti-SLAPP Statute

A public official's votes are acts in furtherance of constitutionally protected rights of petition and free speech, and are within the scope of the anti-SLAPP statute.

The City of Montebello sued three former councilmembers, claiming they violated Government Code section 1090—which prohibits public officials from being financially interested in contracts made by them in their official capacity—by voting for a waste hauling contract with a company that had given them campaign contributions. The councilmembers moved to strike the complaint under the anti-SLAPP statute, claiming that they were exercising their constitutional right of free speech in connection with issues of public interest related to their official duties. The city argued that its action was exempt from the anti-SLAPP statute because it fell within the public enforcement exemption and that voting by public officials is not protected under the First Amendment.

The public enforcement exemption in the anti-SLAPP statute covers "any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor." The California Supreme Court held that the public enforcement exception should be interpreted narrowly

and that it did not apply to the instant case. "The City's action was not brought in the name of the People by the city attorney's office, acting as a public prosecutor. Instead, with private counsel and in its own name, the City seeks to set aside a contract and obtain disgorgement of campaign contributions."

The Court also held that the city's cause of action arose from actions by the councilmembers in furtherance of their constitutionally protected rights. The Court acknowledged that the U.S. Supreme Court had held that voting by elected officials was not protected under the First Amendment. The California Supreme Court reasoned, however, that the anti-SLAPP statute applied not just to constitutionally protected acts, but more broadly to acts taken *in furtherance of* First Amendment rights. Moreover, the Court explained, "courts determining whether a cause of action arises from protected activity are not required to wrestle with difficult questions of constitutional law, including distinctions between federal and state protection of free expression. . . . Requiring the moving party to make a constitutional case in support of every anti-SLAPP motion would be inconsistent with the Legislature's desire to establish an efficient screening mechanism for disposing of SLAPP's quickly and at minimal expense to taxpayers and litigants." The Court concluded that the councilmembers' votes were acts in furtherance of their constitutionally protected rights of petition and free speech. Accordingly, the city's cause of action arose from constitutionally protected activity.

***La Mirada Avenue Neighborhood Association of Hollywood v. City of Los Angeles*, 2 Cal. App. 5th 586 (2016)**

When a Litigant Is Responsible for Making a Case Moot, Court of Appeal Should Dismiss Appeal Rather Than Remand

When a losing party's deliberate action makes a case moot on appeal, the proper remedy is to dismiss the appeal, rather than to reverse the judgment and direct the superior court to dismiss the case.

The City of Los Angeles granted exceptions from a specific plan's height restrictions and other requirements to allow Target to construct a new store. Citizens groups filed petitions for writ of mandate to challenge the city's decision. The superior court ruled that the city had improperly granted some of the exceptions and invalidated the approvals based on those exceptions. While Target appealed the decision, the city amended the specific plan in a way that would allow the proposed development without having to grant any exceptions.

The court of appeal held that the case was moot because it could not grant any effective relief. Ordinarily, the court explained, when subsequent legislative action renders an entire controversy moot and dismissal of the appeal would have the effect of affirming the underlying judgment without having reached the merits, the reviewing court should reverse the judgment and order the superior court to dismiss the proceedings. However, because the controversy became moot by the deliberate action of Target, which had lost the case in superior court, the court held that the proper remedy would be to dismiss the appeal. This remedy would maintain the collateral consequences of the superior court's judgment and allow the superior court to determine, in the first instance, how to modify the judgment.

***California-American Water Co. v. Marina Coast Water District*, 2 Cal. App. 5th 748 (2016)**

Statute of Limitations for Validation Action Does Not Apply to Public Agency

A complaint seeking to have contracts declared void for conflict of interest was timely filed under statute of limitations for claims under Government Code section 1090, because the statute of limitations for validation actions does not apply to public agencies.

Marina Coast Water District entered into contracts with the California-American Water District and the Monterey County Water Resources Agency to pursue a regional desalinization project. A member of Monterey's board was a paid consultant for RMC Water and Environment, which was selected by the parties to manage the desalinization

project. He was eventually convicted of a felony for violating Government Code section 1090, which bars public officers or employees from being "financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."

California-American brought suit, asking for a judicial declaration that the contracts were void under section 1090 due to the conflict of interest. Monterey cross-complained, also seeking a declaration that the contracts were void. Marina also cross-complained, seeking a declaration barring any challenges to the contracts. Marina claimed the complaints had to be brought as validation actions under Code of Civil Procedure section 860, and that they were time-barred by the 60-day statute applicable to validation actions.

The court of appeal assumed, without deciding, that the contracts were subject to certain sections of Monterey County Water Resources Agency's enabling act, which required that a suit to challenge "any contract entered into by the agency" was subject to a 60-day statute of limitations and that the claim be brought under the validation statutes. However, the court ruled that the 60-day limitations period did not apply, for several reasons.

First, the court found that the 60-day statute would contravene the rule that a more-recent and more-specific statute (Section 1092) controlled over the more general validation provisions.

Second, the court found that the 60-day statute "would be hard to square with the stated purpose of Government Code section 1090, which is to recognize that a contract made by a public officer or employee who has a financial interest in it is 'void from its inception.'" The court explained, "We are skeptical of the proposition that the Legislature intended for parties to a contract to be categorically barred from seeking to have the contract declared void under Government Code section 1090 simply because the officer or employee's financial interest was not discovered within 60 days of the contract's approval."

Third, the court thought it was questionable whether a claim based on section 1090 is a type of action subject to validation statutes. "The validation statutes do not apply just because a claim or action seeks to challenge—and thereby, in the colloquial sense, to 'invalidate'—an agency's action. Suits under Government Code section 1090 may be pursued only by a party to the contract seeking to void it, whereas validation actions are *in rem* proceedings meant to quickly test the validity of contracts so that public agencies know whether they may proceed under them."

However, the court did not find it necessary to resolve the question whether 1090 claims are subject to validation procedures in general, because the validation statutes, and Code of Civil Procedure section 869 in particular, provide that the time specified for a validation action applies to all contests "except by the public agency." Section 869 also provides that the availability of a validation proceeding shall not be construed to preclude the use by a public agency "of mandamus or any other remedy to determine the validity of any thing or matter."

Accordingly, public agencies are given three options for validating their actions: pursuing a validation action, doing nothing and allowing the passage of the statute of limitations to bar claims by interested parties, "or waiting past the statutory time limits that apply to interested persons."

The court explained that allowing the validation statute of limitations to pass did not result in a validation judgment that is forever binding and conclusive; public agencies retained the right after the statute passed to bring claims. The court also recognized a public agency's ability to use section 869 to invalidate, as well as validate, its actions.

Finally, the court affirmed a judgment finding that section 1090 had been violated for most of the contracts. The convicted board member was financially interested because RMC increased his pay while he was working at making the contracts and gain their approval. The fact that his contract with RMC ended before the agency contracts were finally approved was not dispositive. The trial court's finding that he stood to benefit financially from the contracts so long as the project continued moving forward was supported in the record. A trial court judgment declaring four of the five contracts void was affirmed.

***Los Angeles County Board of Supervisors v. Superior Court* (ACLU of Southern California), 2 Cal. 5th 282 (2016)**

Attorney Invoices Are Not Categorically Exempt from Disclosure under Public Records Act

Attorney invoices submitted to public agencies are not categorically exempt from disclosure under the PRA. While public agencies may withhold from disclosure information in attorney invoices that relates to legal work and advice in ongoing matters, agencies may have to disclose information in invoices regarding work on closed matters if the information does not reveal confidential legal advice or strategy.

The ACLU of Southern California and a local citizen submitted PRA requests to the Los Angeles County board of supervisors and the office of the county counsel for invoices from outside law firms for work related to nine lawsuits alleging excessive force against jail inmates. The county produced invoices for three lawsuits that were no longer pending, with attorney-client privilege and work product redacted, but the county refused to produce invoices for the six lawsuits that were ongoing. The county claimed that the invoices for work performed by outside counsel in pending litigation were exempt from disclosure.

The county relied on two provisions of the PRA: (1) Government Code section 6254(k), which exempts from disclosure records subject to the attorney-client privilege; and (2) Government Code section 6255(a), a catchall provision that allows a public agency to withhold a record if the public interest favors nondisclosure. In this case, the California Supreme Court considered only the scope of the exemption in section 6254(k) under the attorney-client privilege.

In holding that invoices from outside counsel are not categorically exempt from disclosure under the PRA, the Court emphasized that the attorney-client privilege protects "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence . . . and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." Based on this definition, the Court reasoned that "the privilege does not apply to every single communication transmitted confidentially between lawyer and client. Rather, the heartland of the privilege protects those communications that bear some relationship to the attorney's provision of legal consultation." Applying this reasoning to legal invoices, the Court explained that "while invoices may convey some very general information about the process through which a client obtains legal advice, their purpose is to ensure proper payment for services rendered," not to deliver legal advice.

The court then made a distinction between invoices in active and closed matters. For active matters, the attorney-client privilege "encompasses everything in an invoice," since disclosing even the mere amount of the fees could reveal the timing and magnitude of the public agency's investigative efforts as well as the litigation strategy.

But, the Court emphasized, the same reasoning does not apply to legal matters that "concluded long ago." With respect to these matters, the question is whether the information subject to disclosure would reveal anything about the substance of the legal consultation and strategy. In other words, the scope of the privilege "turns on content and purpose," not the *form* of the attorney-client communication. Thus, invoices for past matters may be subject to disclosure, although the agency may redact information that reveals confidential legal advice.

***Colyear v. Rolling Hills Community Association of Ranch Palos Verdes*, 9 Cal. App. 5th 119 (2017)**

Filing an Application with a Homeowners' Association Can Be an Exercise of Constitutional Right of Petition

A person who files an application with a homeowners' association and is then sued based on that application may succeed on an anti-SLAPP motion in response.

Defendant and homeowner Liu submitted an application to his homeowners' association (HOA) to invoke the HOA's dispute resolution process against a neighbor who refused to trim trees blocking his view. In response, a different

neighbor, Colyear, sued Liu and the HOA, alleging that two of the offending trees were actually on his property, that the relevant tree-trimming covenant encumbered his property, and that Liu and the HOA were wrongfully clouding title to his property. Liu withdrew his application and filed a special motion to strike Colyear's claims under the anti-SLAPP statute, which the trial court granted.

The court of appeal found that Liu's application was made in furtherance of the exercise of the constitutional right of petition in connection with an issue of public interest under California's anti-SLAPP statute. The court rejected Colyear's claim that Liu's application simply involved a private tree-trimming dispute between two neighbors. It found that an "issue of public interest" was present here because there was an ongoing controversy, dispute, or discussion regarding the applicability of tree-trimming covenants to lots not expressly burdened by such covenants and the HOA's authority to enforce such covenants. Noting that a number of hearings, letters, and challenges to the board's policy had been made over several years, the court found that Liu's application constituted a statement made in connection with an issue of public interest within the meaning of the anti-SLAPP statute. The court determined that the second requirement of an anti-SLAPP motion—that the plaintiff is unable to demonstrate a probability of prevailing against the defendant—was also met because Liu withdrew his application before any action on it was taken. Thus, the court of appeal determined that the trial court had properly granted the motion and dismissed the suit.