"LAND USE AND CEQA MIDYEAR UPDATE"

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Presented by

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These materials, including links to more in depth articles, can be found on our website: http://blog.aklandlaw.com. Click on the top tab marked "Course Materials".

I. California Environmental Quality Act ("CEQA")

Greenhouse Gases

A. ***Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70.** In the first published case on GHG analysis, the court ruled that the mitigation measures proposed in the EIR for Chevron's Energy and Hydrogen Renewal Project constituted deferred mitigation. The court found that a mitigation measure requiring the city to submit a plan for achieving complete reduction of GHG emissions within one year of project approval constituted a classic case of deferred mitigation. The court cited to numerous cases holding that the reliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goal of full disclosure and informed decision making. http://blog.aklandlaw.com/2010/05/articles/ceqa/898000-metric-tons-of-unmitigated-co2-prime-conditions-for-the-first-appellate-court-decision-on-ceqa-and-climate-change/

B. **Bay Area Air Quality Management District Thresholds of Significance.** On June 2, 2010, the Bay Area Air Quality Management District adopted the first ever numeric thresholds for GHG. The Bay Area Guidelines impose plan-level and project-level guidelines for operations only (as opposed to the construction and operation thresholds proposed for Criteria Air Pollutants). The project-level thresholds of significance for GHG are:

> For land use development projects, compliance with a qualified GHG Reduction Strategy, or annual emissions less than 1,100 metric tons per year of carbon dioxide equivalent or 4.6 metric tons per year carbon dioxide per service population, which includes residents and employees. Land use development projects include residential, commercial, industrial and public land uses and facilities.

C. **CEQA Guidelines for Greenhouse Gases** took effect March 18, 2010. Amendments to the Guidelines apply prospectively only. Guidelines section 15007(b).

Is it a Project?

D. ***City of Santee v. County of San Diego* (2010) 186 Cal.App.4th 55.** An agreement between County and Department of Corrections providing for identification of preferred potential prison sites, in exchange for preference in state financing of local prison facilities, did not trigger CEQA review. http://blog.aklandlaw.com/2010/07/articles/ceqa/appellate-court-post-save-tara-preliminary-exploration-does-not-constitute-project-commitment-for-ceqa/

E. ***Parchester Village Neighborhood Council v. City of Richmond (2010) 182 Cal.App.4th 305.*** A municipal services agreement between the Scotts Valley Band of Pomo Indians of California and the City of Richmond did not constitute a project for the purposes of CEQA. The agreement required the tribe to make payments in exchange for fire, police and public works services and the city to support the tribes' fee-to-trust application submitted to the federal government. The court found the agreement was not a project because the city had no authority

over the fee-to-trust application, casino construction, or public works programs and the potential construction of fire facilities was too speculative to constitute a project. http://blog.aklandlaw.com/2010/03/articles/ceqa/city-gambles-and-wins-on-agreement-with-tribe-over-casino-ceqa-does-not-apply/

F. ***San Diego Navy Broadway Complex Coalition v. City of San Diego*** **(2010) 185 Cal.App.4th 924.** Before getting to the question of whether a supplemental EIR is required, the threshold CEQA question is whether there is a discretionary approval by the governmental agency to justify CEQA review. In this case, petitioner argued that a supplemental EIR was required on the issue of climate change impacts, and the discretionary approval was the agency's required consistency review of construction drawings for certain aesthetic impacts. The court held that the agency's discretionary authority, if it had any at all, was limited to only aesthetics. Because the agency would have no power related to climate change impacts, there was no discretionary action that triggered CEQA. http://blog.aklandlaw.com/2010/06/articles/ceqa/limited-discretion-related-to-aesthetics-did-not-trigger-need-for-supplemental-eir-on-climate-change-impacts/

G. ***Tomlinson v. County of Alameda*** **(2010) 185 Cal.App.4th 1029.** The court considered (1) whether Guidelines section 21177 required appellant to exhaust its administrative remedies, and (2) whether the project at issue qualified as in-fill development for the purposes of the Guidelines section 15332 categorical exemption. The court held that section 21177 exhaustion requirements does not apply to exemption determinations and the infill exemption only applies to projects within the limits of a city.

Negative Declarations

H. ***Save the Plastic Bag Coalition v. City of Manhattan Beach*** **(2010) 181 Cal.App.4th 521.** Manhattan Beach adopted Ordinance No. 2115 which prohibited certain retailers and establishments from distributing plastic bags. The city prepared a negative declaration. An association of plastic bag manufacturers brought suit, claiming the ordinance may result in the increased use of paper bags, which in turn would result in significant environmental impacts. The appellate court found the association presented substantial evidence of a fair argument that the ordinance may have a significant environmental impact and therefore an EIR had to be prepared. Petition for Review has been granted on this Case. http://blog.aklandlaw.com/2010/02/articles/ceqa/paper-or-plastic-public-right-exception-allows-plastic-bag-producers-to-challenge-negative-declaration-for-environmental-ordinance/

EIR – Project Description

I. ***Communities for a Better Environment v. City of Richmond*** **(2010) 184 Cal.App.4th 70.** The court concluded the EIR failed CEQA's informational purpose because the project description was inadequate with respect to whether the project would enable the refinery to process heavier crude, and the EIR failed to properly establish and analyze baseline conditions. http://blog.aklandlaw.com/2010/05/articles/ceqa/898000-metric-tons-of-

unmitigated-co2-prime-conditions-for-the-first-appellate-court-decision-on-ceqa-and-climate-change/

EIR - Baseline

J. ***Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310.** The Supreme Court found that CEQA air quality impacts are to be measured against existing physical conditions not existing permitted level of operations for the emitter. http://blog.aklandlaw.com/2010/03/articles/ceqa/baseline-depends-upon-whether-you-have-a-new-or-modified-project-or-existing-project-without-significant-expansion-of-use/

Alternatives

K. ***Jones v. The Regents of the University of California* (2010) 183 Cal.App.4th 818.** The court upheld the EIR for a Long Range Development Plan for Lawrence Berkeley National Laboratory against the challenge that its range of alternatives was insufficient, in part because it did not include an off-site alternative. The court found the range of alternatives was adequate, and an off-site alternative was not necessary because it would not meet the project's primary objective of creating a campus-like setting with existing facilities. http://blog.aklandlaw.com/2010/04/articles/ceqa/regents-ceqa-document-receives-a-passing-grade-opponent-marked-down-for-inadequate-participation/

L. ***Watsonville Pilots Association v. City of Watsonville* (2010) 183 Cal.App.4th 1059.** An EIR for a comprehensive general plan update needed to address a reduced growth alternative. An EIR which examined the no project (no new plan) would not serve the basic project objectives. The other alternatives (same level of growth with limited expansion) provided an insufficient range of alternatives. http://blog.aklandlaw.com/2010/04/articles/planning-zoning-development/citys-new-general-plan-is-not-cleared-for-takeoff-returns-to-base-and-is-grounded-court-sets-aside-watsonville-general-plan-for-non-compliance-with-state-aeronautical-act-and-ceqa-requirements/

M. ***Center for Biological Diversity v. County of San Bernardino* (2010) 184 Cal.App.4th 1342.** County of San Bernardino presented insufficient evidence of economic and technological infeasibility to support its decision to reject a project alternative that could feasibly mitigate the air quality impacts of an open air composting facility by approximately 80 percent. http://blog.aklandlaw.com/2010/06/articles/ceqa/put-a-lid-on-it-eir-for-open-air-human-waste-composting-facility-held-invalid/

Mitigation Measures

N. ***Katzeff v. California Department of Forestry and Fire Protection* (2010) 181 Cal.App.4th 601.** Once mitigation measures are imposed, an agency must state its basis, supported by substantial evidence, for cancelling or nullifying a mitigation measure, even if the later discretionary action is many years after original imposition. http://blog.aklandlaw.com/2010/06/articles/ceqa/the-long-life-of-ceqa-mitigation-measures/

Supplemental/Subsequent EIR

O. ***Patricia Melom v. City of Madera* (2010) 183 Cal.App.4th 41.** A CEQA document is not mandated to address urban decay merely because the project contains a retail supercenter. The holding in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, does not require this analysis for every CEQA document, but like most CEQA issues, is determined based upon the specific facts of each situation. http://blog.aklandlaw.com/2010/03/articles/ceqa/subsequent-eirs-it-is-still-a-matter-of-the-evidence-in-the-record/

Water Supply Analysis

P. ***Center for Biological Diversity v. County of San Bernardino* (2010) 184 Cal.App.4th 1342.** The court held that a SB 610 analysis should have been completed because the project, an open-air composting facility falls within the definition of processing plants. http://blog.aklandlaw.com/2010/06/articles/ceqa/put-a-lid-on-it-eir-for-open-air-human-waste-composting-facility-held-invalid/

Q. ***Watsonville Pilots Association v. City of Watsonville* (2010) 183 Cal.App.4th 1059.** A water supply analysis as part of a general plan update does not have to identify the actual source of water supply. Rather, it must analyze the likely impacts. http://blog.aklandlaw.com/2010/04/articles/planning-zoning-development/citys-new-general-plan-is-not-cleared-for-takeoff-returns-to-base-and-is-grounded-court-sets-aside-watsonville-general-plan-for-non-compliance-with-state-aeronautical-act-and-ceqa-requirements/

EIR Equivalents

R. ***San Joaquin River Exchange Contractors v. State Water Resources Control Board* (2010) 183 Cal.App.4th 1110.** Final staff report prepared by Central Valley Regional Water Quality Control Board Staff for basin plan amendments qualifies for an EIR-equivalent document because basin planning is a certified regulatory program under CEQA. http://blog.aklandlaw.com/2010/06/articles/ceqa/basin-plan-amendments-addressing-impairments-for-salt-boron-and-dissolved-oxygen-are-valid/

Fees for CEQA Appeals

S. ***Friends of Glendora v. City of Glendora* (2010) 182 Cal.App.4th 573.** Local agencies may impose a fee for the filing of an appeal of a CEQA decision so long as that fee is reasonable. http://blog.aklandlaw.com/2010/03/articles/ceqa/yes-local-appeal-fees-apply-to-ceqa-appeals/

Litigation

T. ***Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32.** In a decision filed on February 11, 2009, the Supreme Court held that the filing of a notice of determination triggers a 30-day statute of limitations for all CEQA challenges to the decision announced in the notice regardless of the nature of the CEQA violation.

http://blog.aklandlaw.com/2010/02/articles/ceqa/nods-provide-bulletproof-protection-30-days-after-posting/

U. ***Stockton Citizens for Sensible Planning v. City of Stockton*** **(2010) 48 Cal.4th 481.** The Supreme Court found the City's determination that a project was exempt from CEQA must be challenged within the 35-day statute of limitations if a facially valid Notice of Exemption was filed, even if the determination of exemption was erroneous. http://blog.aklandlaw.com/2010/04/articles/ceqa/no-fooling-a-facially-valid-noe-triggers-a-35day-statute-of-limitations/

Exhaustion

V. ***Jones v. The Regents of the University of California*** **(2010) 183 Cal.App.4th 818.** Project opponents' general identification of water quality impacts was insufficient to preserve for trial the more specific complaint that the project failed to attain water quality benchmarks. Project opponents also failed to exhaust their administrative remedies on the GHG issue because it had the opportunity to bring the issue to the lead agency's attention prior to certification of the EIR, but did not do so. http://blog.aklandlaw.com/2010/04/articles/ceqa/regents-ceqa-document-receives-a-passing-grade-opponent-marked-down-for-inadequate-participation/

W. ***Center for Biological Diversity v. County of San Bernardino*** **(2010) 184 Cal.App.4th 1342.** Petitioner exhausted its administrative remedies to challenge the water supply assessment even though it did not specifically mention the SB 610 analysis. http://blog.aklandlaw.com/2010/06/articles/ceqa/put-a-lid-on-it-eir-for-open-air-human-waste-composting-facility-held-invalid/

II. Planning, Zoning and Development

A. ***Watsonville Pilots Association v. City of Watsonville, et al.*** **(2010) 183 Cal.App.4th 1059.** A water analysis as part of a general plan update does not have to identify a firm source of water supply; rather it must analyze the likely impacts. http://blog.aklandlaw.com/2010/04/articles/planning-zoning-development/citys-new-general-plan-is-not-cleared-for-takeoff-returns-to-base-and-is-grounded-court-sets-aside-watsonville-general-plan-for-non-compliance-with-state-aeronautical-act-and-ceqa-requirements/

B. **Looking in the Rear View Mirror: The Open Space Element**

C. ***Musa Madain v. City of Stanton*** **(2010) Cal.App LEXIS 957.** An application for an adult bookstore was denied based upon a pending application for a sensitive use (church). Where the applicant has presented evidence in the administrative hearing that his application was improperly managed by city staff, the result of which was to permit a later application for a sensitive use to acquire processing priority and protection under the City's ordinances, the City Council needs to make findings regarding the allegation. http://blog.aklandlaw.com/2010/07/articles/planning-zoning-development/racing-to-the-starting-line-competing-permit-applications-and-first-amendment-activities/

III. Subdivision Map Act ("SMA")

A. ***Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032.** The procedures for vacating roads and easements under the Subdivision Map Act (Government Code section 66434) is an alternative to vacation under the Streets and Highways Code (Streets and Highways section 8300 et seq.) Absent a specific requirement for separate notices, a local agency may utilize a single notice to meet noticing requirements for land use approvals and related actions.

IV. Rent Control/Ellis Act

A. ***Embassy LLC v. City of Santa Monica* (2010) 185 Cal.App.4th 771.** A property owner seeking to remove 19 rental units under the authority of the Ellis Act (Government Code section 7060 et seq.) stated a claim to compel the City to process a request to allow it to remove the units, notwithstanding an earlier settlement agreement which included a waiver of rights under the Ellis Act. The court of appeals reversed a trial court decision which granted the City's demurrer, based upon estoppel and statute of limitations. The settlement agreement did not come within the Ellis Act exception for agreements including public agency financial contribution to the development project.

V. Attorneys Fees

A. ***Karuk Tribe of Northern California v. California Regional Water Quality Control Board North Coast Region* (2010) 183 Cal.App.4th 330.** Petitioners, who file a writ seeking state enforcement of water quality reporting laws against FERC licensed facilities, fail to meet the test for an award of fees under Code of Civil Procedure section 1021.5 when the only result is a remand to the agency for further clarification as to why it believed federal pre-emption applied.

VI. Impact Fees; Exactions

A. ***Homebuilders Association of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554.** Impact fees can be based upon a standard base calculation (service level divided by population), as compared to specific facilities. A fire fee, the proceeds of which were to reimburse the City for existing facilities in an already developed area, lacked nexus and was set aside. http://blog.aklandlaw.com/2010/06/articles/exactions-impact-fees-service-charges/court-affirms-range-of-city-impact-fees-based-upon-a-general-description-of-facilities-puts-out-the-flame-for-fire-impact-fees/

VII. Article 34

A. ***City of Cerritos v. Cerritos Taxpayers Association* (2010) 183 Cal.App.4th 1417.** Redevelopment funds could be used to underwrite infrastructure and land acquisition for a non residential project as leverage for a senior's project and still meet the redevelopment law requirements on having expenditure. A sale/lease back with a City organized non-profit, qualified as a private party under redevelopment law and therefore was not subject to Article 34 voter approval. http://blog.aklandlaw.com/2010/05/articles/local-government/article-xxxiv-voter-

requirements-inapplicable-to-senior-housing-project-owned-by-a-city-formed-nonprofit-public-benefit-corporation/

VIII. Takings

A. ***PR/JSM Rivara LLC v. Community Redevelopment Agency of the City of Los Angeles* (2010) 180 Cal.App.4th 1475.** Adoption of design guidelines to implement a redevelopment plan did not result in a compensable takings. http://blog.aklandlaw.com/2010/01/articles/redevelopment-1/too-late-challenge-at-the-time-of-project-implementation-is-not-timely/

B. ***Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* (2010) U.S. LEXIS 4971 (June 17, 2010).** In a divided ruling, the United States Supreme Court held that a property owner had failed to establish the existence of protected property rights under Florida law to stop a beach replenishment project, and as a result, the Court need not determine whether or not a ruling by the Florida Supreme Court constituted a physical taking affecting ocean front property owners.

IX. Proposition 218

A. ***Beutz v. County of Riverside* (2010) 184 Cal.App.4th 1516.** An agency proposing to impose an assessment bears the burden of justifying the allocation and amount of the assessment. These determinations have to be made based upon substantial, competent evidence. Assessments which are absolutely uniform are suspect in the absence of competent evidence. When segregating special from general benefits for an assessment for park maintenance, the assessing agency can base the allocation upon a parks master plan, and not just the maintenance activity. A park maintenance assessment needed to determine the relative use between the public generally and the property owners upon whom the assessments were levied, and as amongst those properties assessed, further determine the relative benefit between properties located closer to parks compared to those further away. http://blog.aklandlaw.com/2010/07/articles/local-government/when-all-else-fails-blame-the-engineers/

X. Resources

A. Land Use and CEQA Newsletter - http://blog.aklandlaw.com

B. Real Estate Resources - http://www.dirtlawyer.com/

C. Environmental Law - http://www.ceres.org

D. CEQA - http://ceres.ca.gov/ceqa/

E. FindLaw - http://www.findlaw.com/

F. Celsoc - http://www.celsoc.org/

G. Solano Press Books – http://www.solano.com

H. Attorney General - http://ag.ca.gov/opinions/

I. Attorney General - http://ag.ca.gov/globalwarming/ceqa/generalplans.php