CP&DR

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Busy CEQA Year for California Supreme Court

BY WILLIAM FULTON

The California Environmental Quality Act has long been driven by the courts more than by the Legislature and 2013 is likely to be a big year in court for EQA. Five pending cases before the California Supreme Court -- and a sixth that might be heard -- could significantly affect how both localities and colleges apply the California Environmental Quality Act.

The cases involve such items as infill exemptions, whether a lack of state funding makes a mitigation infeasible, whether lower fire response times are an environmental impact, and when to use a future environmental baseline.

Infill Exemption: Rendered Meaningless?

Perhaps the most significant is a challenge to categorical exemptions for infill development and small structures that were used by the City of Berkeley in dealing with construction of a large house on an existing single-family home lot. The Court of Appeal ruled against the city, and if the Supreme Court affirms the lower court ruling it could punch a hole in the infill exemption in particular.

The case involved the proposed construction of a large single-family home with a 10-car garage on an existing lot, resulting in a structure of almost 10,000 square feet. The plaintiffs in *Berkeley Hillside Preservation v. City of Berkeley* said that this triggered the "unusual circumstances" exception to the infill exemption. The city noted that there are many other houses of similar size nearby, but the First District Court of Appeal ruled in favor of the plaintiffs. As Cox Castle & Nicholson's Michael Zischke put it, "Under *Berkeley Hillside,* every potentially significant impact is itself an unusual circumstance" -- which, of course, makes the infill exemption meaningless.

State Funding of Mitigation Measures: Infeasible?

The Supreme Court has also granted review in *City of San Diego v. Board of Trustees,* a case in which the Court of Appeal rejected California State University's argument that an off-site traffic mitigation associated with a development project at San Diego State is infeasible because the State Legislature has not appropriated funding for it.

Led by the City of San Diego, several local agencies sued claiming that Cal State needed to look at a variety of funding sources. On appeal, Cal State relied on *City of Marina v. Board of Trustees of California State University,* 39 Cal.4th 341 (2006), in which the California Supreme Court concluded that the power of a state agency to mitigate impacts is "ultimately subject to legislative control" and if the legislature doesn't appropriate the money "the power does not exist." However, the Fourth District Court of Appeal concluded that the Supreme Court's language in the City of Marina case is dictum and therefore not binding.

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insight
WILLIAM FULTON

Infill Projects Sued More Often Under CEQA – But Greenfield Projects Lose More Often

Everybody always loves to complain about the California Environmental Quality Act, but despite all the complaining we don't know much about how effective it really is and how all the CEQA activity adds up.

CEQA has been a favorite whipping boy for decades of Republicans and conservatives, who claim that it's a red-tape machine that makes California uncompetitive compared to neighboring states – even Oregon, which has much stricter state land-use laws. Recently, even Democrats have taken it on with Gov. Jerry Brown saying that reforming it constitutes "The Lord's Work" and extending his predecessor's idea

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inside

REDEVELOPMENT MAY BE DEAD, but it's still making news. As cities around the state are still stinging from the state's decision to deny many of their 240 redevelopment appeals, redevelopment skirmishes still continue -- often about affordable housing projects that cities claim are nearing completion. Here's a sampling:

The City of Santa Ana in Orange County is suing the state Department of Finance over DOF's decision not to permit the city to complete construction on a 41-unit low-income housing project the city claims is 75% completed. Among the organizations that encouraged the city to sue was Habitat for Humanity, which has a contract with the city to build 17 homes.

Meanwhile, Murrieta has sued DOF over two disallowed payments associated with affordable housing. The first payment was a $3.1 million payment from the redevelopment agency to the city – repaying a 2004 advance to help finance affordable housing projects. According to Murrieta, the redevelopment agency paid back the money ahead of time to save interest and clear the books, but DOF rejected it. The second payment, for about $1.2 million, involved funds for the Monte Vista affordable housing project.

Most redevelopment agency lawsuits are coming from cities who lost more money than counties with the elimination of RDAs because counties get a larger piece of the property tax pie. One exception is San Bernardino County, which has sued DOF over apparent disallowal of two payments.

The first is $9-10 million for reconstruction of infrastructure in the Cedar Glen area near Lake Arrowhead. Redevelopment funds were used to rebuild roads and water systems after a devastating fire in 2003. The second is $3-5 million for redevelopment of the industrial area of San Sevaine near Fontana.

Meanwhile, the City of El Cerrito, located in between Richmond and Berkeley, has settled a lawsuit with DOF and will skip a $1.7 million "true-up" payment as a result. The "true-up" payment would have involved paying back funds to cover a variety of costs that were in dispute between El Cerrito and the Contra Costa County auditor. Among these was a $780,000 payment regarding two affordable housing projects that the city paid out of regular tax-increment funds, but that DOF said should be paid out of low- and moderate-income housing funds.

El Cerrito sued and settled with DOF in January. City officials said that the "true-up" payment would have had to come from city reserves – and would have consumed approximately half of those reserves.

Redevelopment may not exist anymore, but that didn't stop Tulare County from suing Porterville over a 1,500-acre expansion to its redevelopment project area in 2010.

The added territory constituted 16% of the city's property and more than doubled the size of the city's redevelopment area. It was to have been in effect for 10 years and would have cost the county $9 million during that time. Of course, redevelopment ended in 2012, cutting the time period of the amended redevelopment short.

Presumably, Tulare County is seeking a financial settlement over tax-increment funds collected between June 2010, when the expansion occurred, and February 2012, when redevelopment ended.

Meanwhile, redevelopment woes in the City of Hercules are dragging on.

Recently *CP&DR* reported that Controller John Chiang found some $50 million in improprieties in redevelopment agency activities, including a $3 million contract to a consulting firm controlled by the former city manager, Nelson Oliva, whom the city has now sued.

Now, it seems, Hercules doesn't even know who owes its former redevelopment agency money. The city claims that Hercules Fitness owes the former redevelopment agency back rent – even the city cannot say for sure how much it is – but the owner of Hercules Fitness claims that back rent should have been rolled into a deal in which the redevelopment agency was to sell him a building for $3 million.

Hercules officials apparently can't figure out what's going on because the deal was a verbal agreement between the Hercules Fitness owner and Oliva ■

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legal digest

Rip Van Winkle Scalia Wakes Up in *Koontz*

If the oral argument is any indication, the U.S. Supreme Court is likely to rule against a landowner in Florida who filed a takings lawsuit against an Orlando-area water district – turning what appeared to be an easy victory for property rights advocates into a loss.

At least, *Koontz v. St. Johns River Water Management District,* No. 11-1447 looked like an easy victory before the oral argument. Now it appears that Justice Antonin Scalia – author of the important *Nollan v. California Coastal Commission* ruling a quarter-century ago – will swing the court against the property owners and toward a more cautious takings approach.

The St. John's case basically rests on the question of whether a property owner's refusal to provide offsite mitigation in exchange for a permit is a taking. The pundits all though this was a slam-dunk for the property owner. But they forgot about Scalia – and what he said in the Nollan case.

The facts of the case will be pretty familiar to anybody who follows California land-use regulation and wetlands regulation in particular. Property owner Cory Koontz bought a piece of land along the East-West Expressway east of Orlando in 1972, then lost part of it via eminent domain for an extension of the highway in 1987. Koontz was left with 14.2 acres of land, of which 12.8 acres is located in the Riparian Habitat Protection Zone (RHPZ) of the Econlockhatchee River Hydrological Basin and therefore subject to regulation by the water district.

In 1994, Koontz sought approval to develop 3.7 acres of the property, of which 3.4 acres were wetlands and 0.3 acres were uplands. This was the portion of the property closest to highway. The water district agreed to permit this development so long as Koontz dedicated the remaining 10.5 acres to a conservation area and engaged in a variety of offsite mitigation efforts, including replacing culverts and plugging drainage canals several miles away. As an alternative, the water district said Koontz could reduce his project to one acre and dedicate the rest to the conservation district. Koontz rejected the offsite mitigation and the alternative and the water district denied his permits.

The trial court and intermediate appellate court ruled for Koontz, applying to so-called *Nollan/Dolan* test, which states that exactions are permissible if there is a "rational nexus" (*Nollan*) and "rough proportionality" between impact and exaction (*Dollan*). These cases are too old to be in the *CP&DR* online database, but you can read a good description of the doctrine in the analysis written on the Del Monte Dunes decision in 1999.

The Florida Supreme Court ruled that the lower courts shouldn't have applied the *Nollan/Dolan* doctrine and reversed. The water district then appealed. Koontz died in the meantime but his son, along with property rights groups such as the Pacific Legal Foundation, have kept the lawsuit going.

As previously stated, going into the oral argument, all the pundits seemed to think that Koontz was going to win. No less an authority on California land-use law than Richard Frank, the retired deputy attorney general and former top aide to Bill Lockyear, took for granted that Scalia would side with the the landowner and predicted that Anthony Kennedy would be the swing vote. Just before the oral argument he wrote: "The hard facts of this case favor developer Koontz more than they do the Florida state regulators whose permit denial he has challenged. I think it's more likely than not that Koontz

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and his Pacific Legal Foundation lawyers will prevail in this case."

But that's not how Scalia sounded at the oral argument on January 15. Indeed, the veteran conservative justice – who has sounded more political than scholarly in many recent writings – fell back to the settled positions of the 1980s and '90s, when the Supreme Court concluded that a taking occurs only when all other options have been exhausted. Clearly, in this case, he believed they had not been. Here's an account of the oral argument from Scotusblog's Lyle Denniston.

But, as Justice Scalia repeatedly pointed out, [Nollan and Dolan] apply only when the government's conditions have actually taken something away from the landowner, forcing some kind of forfeiture in return for a development permit. When the Water District in Florida denied a permit to Koontz to redevelop some three-plus acres, because he would not agree to a demand that he finance some wetlands protection elsewhere in Florida, "no property was taken," Scalia said. Koontz had claimed that there was a "taking" but Scalia bluntly asked: "Taking what?" It was a phrase Scalia would use over and over again, with slight variations.

So, there you go: A taking can occur. But only if something is actually taken, not if the landowner doesn't want to give what the government asks for. This may be a surprise looking at the Scalia of 2012, but it's no surprise if you remember the Scalia of 1987. In *Nollan*, the Coastal Commission argued that the public was entitled access to the beach and the two-story Nollan home blocked that access, thus requiring mitigation. The Coastal Commission argued that requiring an easement across dry land was appropriate.

The pundits all thought this was a slam-dunk for the property owner. But they forgot about Scalia – and what he said in the *Nollan* case.

The Scalia of 1987 was perfectly willing to acknowledge that the Coastal Commission could have exacted property from the Nollan family when they added a second story to their beach house outside Ventura. He just concluded that requiring an easement across the dry sand in front of the house was not the right exaction. Indeed, he wrote in the majority opinion: "The condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere."

That Scalia – the Scalia of 1987 – did not contest the government's right to impose an exaction if the situation called for it. That Scalia has apparently awakened in the *Koontz* case like Rip Van Winkle, and the property rights movement will have to live with the consequences ■

Banning Ranch EIR Upheld by Appellate Court

By Katherine Hart
Abbott & Kinderman

The Fourth District Court of Appeal has upheld the City of Newport Beach's environmental impact report for the Banning Ranch development, rejecting a challenge by a local conservancy which asserted piecemeal environmental review and the adequacy of the impacts of a park the city is building adjacent to Banning Ranch. The court of appeal affirmed the trial court's judgment and denial of the writ.

Like so many other CEQA cases issued in 2012, this one contained numerous CEQA issues. This case is yet another reminder of (1) how fact-based many CEQA issues have become, and (2) the benefits of the standard of review in preparing an EIR: experts can argue all they want, but so long as there is substantial evidence in the record supporting the agency's impact conclusions, a court will uphold the agency's determinations.

In 2006, the City adopted its 2025 General Plan. It also happened to purchase approximately 19 acres of undeveloped land at issue in this case and proposed as Sunset Ridge Park. Banning Ranch is a 400-acre piece of property, which abuts the proposed park parcel. While Banning Ranch was only in the City's sphere of influence in 2006, the City's General Plan noted that the property could be acquired for open space purposes or could be developed for a mixed-used residential village with a majority of the property being preserved as open space.

In early 2009, the City issued a notice of preparation (NOP) to annex the Banning Ranch property and for a proposed development on the Banning Ranch property consisting of up to 1,375 residential units, 75,000 square feet of commercial uses, and 75 overnight resort accommodations. The NOP noted that the City's proposed Sunset Ridge Park would abut the development and that access to the Banning Ranch site would be provided through the park. Shortly thereafter, the City issued its NOP for the Sunset Ridge Park project. The park NOP indicated that the access road for the Banning Ranch project would be constructed on approximately 5 acres of the 19-acre park site, and that the City would be constructing a signal at the intersection of proposed access road and West Coast Highway.

The City issued a draft EIR for its park project in October 2009. The draft EIR analyzed the park's access road as well as the proposed signal on the West Coast Highway. During the City's public review period, plaintiffs submitted comments arguing that the City was piecemealing the project because it did not include the impacts of the Banning Ranch project. Plaintiffs also argued that the draft EIR failed to assess the park's growth-inducing impacts, and impacts on biological resources such as wetlands and the gnatcatcher. The City Council prepared the final EIR for the park project and certified it on March 23, 2010. It also approved an access agreement between it and the Banning Ranch developer at the same meeting.

The Banning Ranch Conservancy filed a petition for writ of mandate in April 2010, which the trial court denied in May 2011.

The Conservancy argued that the City's EIR improperly described the Sunset Ridge Park project to include only the park and the access road. In particular, the Conservancy claimed that the project description should have included the Banning Ranch project, and the failure to do so constituted piecemeal review of a project.

The court of appeal looked to the piecemealing test set forth by the California Supreme Court in the landmark case of *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376 (*Laurel Heights*) [holding the University wrongly piecemealed the environmental review of the relocation of its pharmacy school]:

> *We hold that an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.*

The test is fact-based and thus, "the fact of each case will determine whether and to what extent an EIR must analyze future expansion or other action." The court of appeal noted the difficulty in determining when a future expansion or other action becomes "reasonably foreseeable" and proceeded to provide a detailed analysis of various piecemealing cases over the past 30 years. In sum, the court of appeal outlined that there is improper piecemealing when the purpose of the reviewed project is to be the first step toward future development or when the reviewed project legally compels or presumes completion of another action/project. It then contrasted those situations with when two or more projects are properly separately environmentally reviewed – when the projects have different proponents, served different purposes, or can be implemented independently.

Ultimately, the court of appeal held that the City's park project was not improperly piecemealed. Specifically, the court reasoned that while the Banning Ranch project was reasonably foreseeable and could impact the scope and nature of the park project (meeting the first part of the *Laurel Heights* test), the Banning Ranch project was not a reasonably foreseeable consequence of the City's park project because the park's access road was only one small step toward the Banning Ranch project and the park was not being built to induce the Banning Ranch development. The court further reasoned that the park and the Banning Ranch projects had two distinct project proponents, that both projects served different purposes – the park providing recreational opportunities for existing residents and the Banning Ranch development a new neighborhood, that the City would and could build the park with or without the Banning Ranch development, and finally, that the City's general plan called for the construction of the access road through Banning Ranch regardless of whether the property was slated for open space preservation or development.

Traffic Issues

On traffic, the plaintiff contended the cumulative traffic analysis in the City's park EIR failed to consider any traffic impacts from the Banning Ranch development. The appellate court disagreed holding that the

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City's final EIR outlined that the park access road was consistent with the general plan and that the general plan EIR had assumed worst-case scenarios (including development on the Banning Ranch property) and analyzed the traffic impacts from the proposed access road as well as the intersection with the West Coast Highway.

Growth-Inducing Impacts

Plaintiff also asserted that the park EIR improperly concluded the park project would have no growth-inducing impacts. The appellate court again disagreed with plaintiff and held that the EIR's growth-inducing analysis was sufficient. The court reasoned that the Banning Ranch project was proposed first, thus, the park project could not induce it. The court also noted that the park had an independent purpose of providing recreational facilities to serve existing residents, the park's access road was previously contemplated by the City's 2025 general plan, the road's impact on growth only removed one obstacle to the Banning Ranch project, and the Banning Ranch was undergoing separate environmental review.

Biological Impacts

Plaintiff argued that the City's draft EIR analysis for cumulative biological impacts was inadequate because it failed to mention the Banning Ranch project all together. However, the appellate court held that the City's final EIR reasonably and practically addressed cumulative impacts on biological resources by indicating that the Banning Ranch project was assumed in the draft EIR's cumulative biological resources analysis because it (like the park property) was included in the Natural Communities Conservation Plan, which by its very nature and purpose evaluated and mitigated for potential cumulative impacts resulting from multiple projects in the plan area.

Plaintiff also alleged that the City failed to assess impacts on the California gnatcatcher and failed to adequately mitigate that impact. But, the appellate court noted that the draft EIR outlined the impacts to the gnatcatcher's habitat and concluded the impact on the gnatcatcher would be significant. However, the impact was mitigated to a less than significant level with mitigation measures that prohibited the removal of scrub during breeding and nesting season, and setting aside two acres of brush for every one acre lost. The court also rejected plaintiff's argument that the entire 19-acre site was critical habitat simply because it was designated as such by the US Fish & Wildlife Service. The court found that because the City's biologist's determination that there was only 0.68 acres of non-degraded habitat was supported by substantial evidence, and that's all that is required by CEQA. Additionally, the court held that the mitigation measures were sufficient, stating that "mitigation need not account for every square foot of impacted habitat to be adequate," and mitigation could be implemented over time.

Consistency With Coastal Act

The final issue addressed by the court of appeal was whether the EIR properly analyzed the park project's consistency with the Coastal Act. The plaintiff asserted that the EIR wrongly concluded the park project was consistent with the Act's protection of environmentally sensitive habitat areas (ESHAs) and wetlands. Again, the appellate court disagreed on both counts. First, the court noted that the EIR properly identified relevant Coastal Act policies, the local coastal plan did not identify the project site as an ESHA, but had the potential to be designated and required mitigation for those areas. That was all that was required. Next, the court looked at whether the wetlands analysis was sufficient. In determining it was, the court noted that the EIR specifically concluded that no wetlands defined by the Act were located on the park site, and that the City's biological technical report supported the EIR's conclusions, emphasizing that whether an opposite conclusion would have been equally or more reasonable was irrelevant – a court does not reweigh the evidence to determine which argument is better; it simply looks to see whether the conclusion is supported by substantial evidence in the record ■

Banning Ranch Conservancy v. City of Newport Beach (December 12, 2012) ___ Cal.App.4th ___; 2010 Cal. App. LEXIS 1259.

Validation Lawsuit Doesn't Always Immunize Plaintiff From Attack

BY WILLIAM W. ABBOTT
ABBOTT & KINDERMANN

In many situations, the settlement of a lawsuit is a flexible tool to resolve disagreements between parties and allow the participants to move on with their lives. A settlement with a public agency invokes slightly different considerations then a matter resolved exclusively through private parties. As previously noted in *Trancas Property Owners Association v. City of Malibu* (2006) 138 Cal.App.4th 172 [http://www.cp-dr.com/node/340] , a public agency cannot rely upon a settlement agreement to bypass a required land use approval step.

Now, a new case from Los Angeles reaffirms this idea. The validation statutes do not immunize a settlement agreement with a city which exempts the plaintiff from compliance from land use regulations from collateral attack by a competitor that the underlying settlement agreement is an ultra vires act. The principles of Avco remain true against contracting away the police power.

The City of Los Angeles, like many other cities and counties, actively regulates offsite billboard displays. These regulations included an interim ordinance adopted in the year 2000, as well as formal amendments to the City code in 2002. The 2002 amendments authorized the City to charge an annual inspection fee for billboards. Vista Media Group, Inc., a billboard owner, brought a reverse validation action challenging the amendments. Other parties intervened in the litigation also seeking to challenge the ordinance. Vista eventually settled with the City. The settlement agreement operated to exempt Vista from many of the ordinance limitations, and allowed Vista to modernize its existing signs (eventually including conversions to digital display).

Vista sought incorporation of the settlement into the judgment, the latter effort opposed by intevenors on the grounds that the settlement agreement was an ultra vires act. The trial court eventually issued a judgment based upon the Vista settlement, and the City and intervening real parties eventually settled separately as well. A new lawsuit by a competitor, Summit Media Inc. was filed, challenging the Vista settlement agreement. The trial court in the later action found the settlement agreement to be an *ultra vires* act, but declined to order all of the digital conversion permits issued based upon the settlement be revoked or set aside. Both sides appealed.

The City and Vista posited five grounds as a basis to reverse the trial court's invalidation of the settlement agreement, all of which were rejected by the court of appeal. First, the court of appeal concluded that the validation statute did not operate to foreclose challenge. The court concluded that the settlement agreement embraced matters that went beyond the scope and purpose of the validation statutes -- a conclusion, by the way, that should give agencies pause in over reliance on the validation statute as an all encompassing get-out-of-jail card. Second, while collateral attacks on judgments are largely precluded, the court concluded that those limitations did not apply on grounds including that the later plaintiffs were not parties to the original judgment.

Next, although the City and the original settling party argued that Summit failed to exhaust administrative remedies, the court rejected the contention, concluding that (a) the principle did not apply to contracts, (b) there was no identifiably process by which a party could contest the agreement and (c) it would have been a futile act as the outcome was pre-ordained. Next, the appellate court cited the leading case on preclusion of contracting away the police power (*Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal. 3d 785, 800 as well as the later *Trancas* decision) to conclude that the settlement agreement was *ultra vires.*

The appellate court concluded by holding that the trial court properly invalidated the agreement. Then, drinking again deep from the legal well and citing *Pettitt v. City of Fresno* (1973) 34 Cal.App. 3d 813, 819 and *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496-497 (cases which strictly limit estoppel defenses in public matters), the appellate court then reversed the trial court on the scope of the remedy, and directed that the digital conversion permits be issued on the grounds appellants only sought to invalidate the settlement agreement ■

Summit Media LLC v. City of Los Angeles (December 10, 2012, B220198) ___Cal. App.4th ___.

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The court said Cal State should look to a variety of other possible funding sources for the money.

Are Lower Response Times An Environmental Impact?

One of the biggest debates around CEQA is whether its breadth reaches to impact on public services such as traffic, schools, and public safety. On the one hand, traffic is a well-established part of CEQA analysis; on the other hand, it's also well established that the impact of development on schools is not an environmental impact unless it forces the construction of new schools which, in themselves, have an environmental impact.

That leaves public safety. In *City of Hayward v. Board of Trustees of California State University* -- another dispute between a city and Cal State -- Hayward challenged Cal State's environmental impact report for the long-term master plan for Cal State East Bay. The EIR identified the impact on public services and noted that the campus expansion would require the construction of a new fire station and the hiring of 11 new firefighters. However, the EIR concluded that the fire station's impacts would be less than significant because it would be built in an infill location, as would most of the expansion.

Hayward sued, claiming that Cal State should have mitigated the cost impact of the additional firefighters. Relying on *Goleta Union School District v. Regents,* 37 Cal.App.4th 1025 (1995), the First District ruled against the city.

"Although there is undoubtedly a cost involved in the provision of additional emergency services, there is no authority upholding the city's view that CEQA shifts financial responsibility for the provision of adequate fire and emergency response services to the project sponsor. The city has a constitutional obligation to provide adequate fire protection services."

The court also upheld a traffic mitigation plan against Hayward's argument that the plan impermissibly punted on the mitigation. The Supreme Court has granted review but has deferred briefing until after the San Diego State case is determined.

Can A Lead Agency Use A Future Baseline?

Last spring, the Second District Court of Appeal ruled against a group of residents in the West Los Angeles neighborhood of Cheviot Hills who had challenged the use of a future environmental baseline in the environmental impact report for the Expo Line. The ruling muddied the waters on the whole future baseline question so the Supreme Court will soon hear the case.

The Expo Line construction authority's reasoning was that it made no sense to measure the project's environmental impacts against a current environmental baseline when a project won't be constructed for several years. In *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority,* the Second District ruled that *Sunnyvale West Neighborhood Association v. City of Sunnyvale,* 190 Cal.App.4th 1351 (2010), in which the Sixth District Court of Appeal ruled that Sunnyvale should not have used a future baseline to estimate traffic mitigations.

The Second District also said that the California Supreme Court's ruling in *Communities for a Better Environment v. South Coast AQMD,* 48 Cal.4th 310 (2010), did not apply in this case. In that case, the Supreme Court rejected the idea that because Conoco already had regulatory permission to emit a certain amount of pollutants, it could use a theoretical future baseline that assumed the permitted pollutant level had been reached.

> **"Under *Berkeley Hillside*, every potentially significant impact is itself an unusual circumstance" -- which, of course, makes the infill exemption meaningless.**

Is All GIS Data Public?

Here's one that is not a CEQA case, but, Zischke says, may be of interest to CEQA practitioners: When is a GIS database a "public record" subject to release at no cost under the Public Records Act and when is it a "computer mapping system" exempt from that law because it is software and, therefore, for which a government agency can charge a fee. CEQA analyses are often based on GIS analysis.

In the case of *Sierra Club v. Superior Court,* the Sierra Club made a public records request for Orange County's GIS database, which included polygon boundaries for every parcel linked to names and addresses of parcel owners. Like many counties, Orange County has historically charged a fee for this information as a way to recoup cost, though it offered to provide the Sierra Club with a PDF version for free. The appellate court ruled that the GIS database was a computer mapping system exempt from the Public Records Act, meaning the county could charge a fee.

Petition for Review Pending: Can An Initiative Be Adopted Without A Vote -- And Without CEQA Review?

In December, *CP&DR* reported on a Fifth District Court of Appeal ruling that a voter initiative and CEQA that appeared to create a conflict between districts. That case is pending before the Supreme Court and review could be granted soon.

In *Jobs & Small Business Alliance Tuolomne v. Superior Court,* Cal.Appl.4th 1006 (2012), the City of Sonora was considering a pending Wal-Mart application -- complete with EIR -- when Wal-Mart filed signatures for an initiative to create a change in the land-use regulations that dispensed with need for discretionary review for the project. Rather than placing the measure before the voters, the Sonora City Council adopted it -- as is their privilege under elections law -- and did not conduct a CEQA analysis on the change, as some previous case law suggests. The Fifth District ruled that this was impermissible and a CEQA analysis was required.

However, in 2004, the Fourth District Court of Appeal ruled in another case, *Native American Environmental Protection Assn. v. City of San Juan Capistrano,* 120 Cap.App.4th 961, that legislative bodies do not have the discretion to conduct a CEQA review on an initiative they adopt rather than put before the voters. Thus, it would appear that a direct conflict between districts has been created ■

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of giving certain projects a free pass from litigation. Sen. Mike Rubio - (D-Shafter), has proposed a ban on lawsuits if a project complies with the standards contained in underlying environmental laws – and he is now the chair of the Senate Committee on Environmental Quality. (See From the Blogs, Page 12)

These last two ideas get at the basic fear about CEQA: It's not so much that doing an environmental review is a big deal (though sometimes it is), but, rather, the idea that you might be dragged into a litigation quagmire without knowing how much time and money it will take to emerge. CEQA's defenders often argue that lawsuits are rare; indeed, fewer than 1% of all CEQA actions are litigated. While true, this statement is kind of beside the point. What matters is not *whether* you get sued but the *fear* of getting sued – or the fear of what might happen if you do.

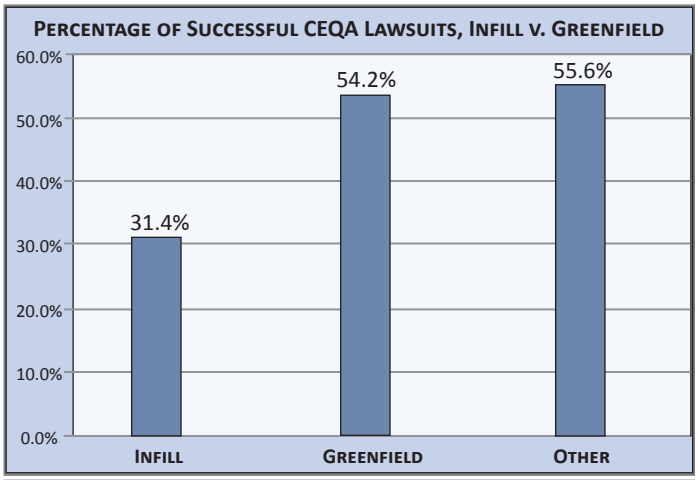
That's why the recent spate of research by CEQA law firms has been so interesting. For the first time in a long time they shed light on the question of what actually happens when CEQA lawsuits are filed.

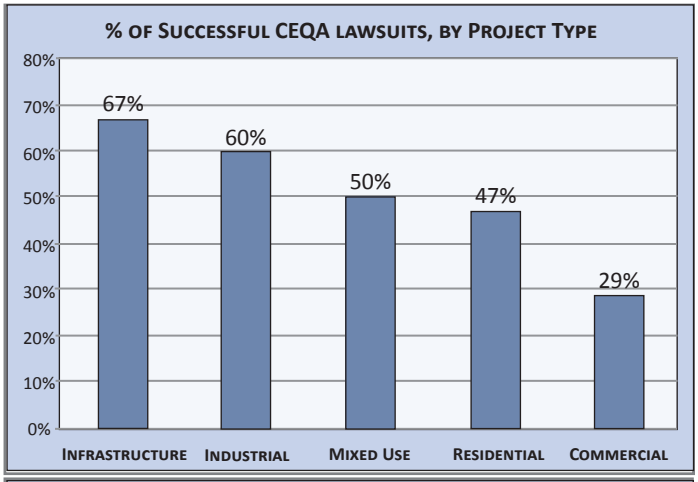
In 2011, Clem Shute – one of the granddaddies of CEQA litigation -- noted that over a 40-year period, courts had found CEQA EIRs inadequate more than 40% of the time, compared to 0% -- yes, zero – for NEPA compliance by federal agencies. Considering that the two laws were drafted at the same time by the same people with the same intent, that tells you something about how they have evolved over the last 40 years.

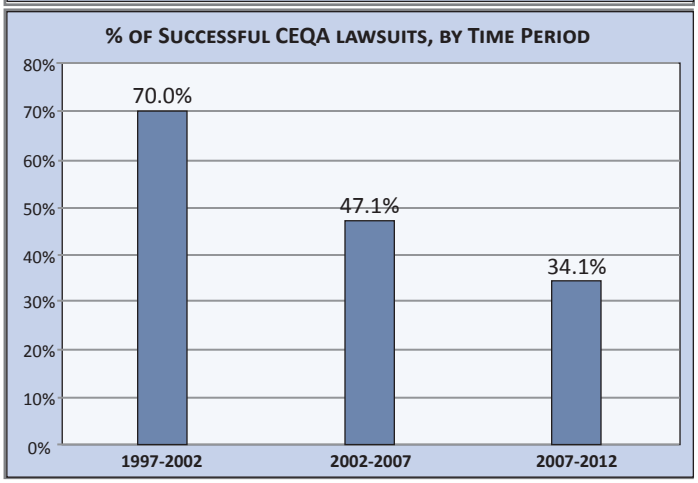
More recently, the Thomas Law Group – the firm of veteran CEQA lawyer Tina Thomas – found that EIRs were successfully challenged about half the time, while Negative Declarations were successfully challenged 60% of the time. A recent study by Holland & Knight using the same database found that 52% of Categorical Exemptions were struck down in court as well.

Now, according to a new analysis by Holland & Knight – this one analyzing 95 challenges to environmental impact reports between 1997 and 2012 – finds that almost 60% of lawsuits challenge environmental review projects in infill locations as opposed to greenfield locations. Mixed-use projects and infrastructure projects were challenged more frequently than any other type of project. Most of the EIRs were challenged on the basis of water supply, traffic, or air quality.

The study by veteran CEQA hands Jennifer Hernandez and Daniel Golub also concluded that about 70% of the plaintiffs in these cases were local organizations, most frequently environmental or homeowner groups. About two-thirds of the projects were private development projects, while a third were public projects.







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Infill projects, mixed-use projects, and public infrastructure get challenged on their EIRs more than other projects. This is exactly the kind of conclusion that lends fuel to the argument made by smart growthers – and, increasingly, the Brown Administration as well – that CEQA gets in the way of responsible urban development. But how do things turn out in the end?

To find out, *CP&DR's* Courtney Oustad did further analysis of the Holland & Knight database of 95 cases and found some interesting results. (Holland & Knight published its database online, enabling our further analysis, and for this we are grateful.) Here are some highlights.

- EIRs on infill projects may be challenged more often, but EIRs on greenfield projects actually get struck down more often. Yes, 59% of the legal challenges against projects that could be characterized as either infill or greenfield were against infill projects. But only 31% of the infill challenges were successful, while 69% were not. For greenfield projects, 55% of the challenges were successful, while 45% were not.
- Yes, EIRs on mixed-use projects were among those most likely to be challenged. But, as with infill, the success rate of these challenges was not the highest. Half of all challenges to EIRs on mixed-use projects succeeded. For residential projects, the number was about the same. Perhaps of greatest concern is public infrastruture projects. Two-thirds of EIR challenges against these projects succeeded.
- Legal challenges against public projects were more successful than legal challenges against private projects, though the difference was small (50% to 44%).
- Local plaintiffs were more likely to succeed than non-local plaintiffs, though again the difference was small (49% to 41%).
- The success rate for legal challenges has been dropping steadily since 1997 – from 70% in the 1997-2002 period to only 34% in the 2007-2012 period.

It's important to note that this is a small sample of lawsuits involving a particular kind of lawsuits – challenges to EIRs only. Yet these are exactly the kinds of high-profile challenges that serve as the foundation of the debate over CEQA. EIRs themselves are extremely expensive and time-consuming to produce. An EIR lawsuit can be a sprawling affair and the fact of the matter is that many judges are reluctant to let an enormous EIR go scot-free through the litigation process. But what conclusions can we draw from these findings?

First, the original CEQA vision of empowering neighborhood groups – and even nurturing their creation – is alive and well. Most EIR lawsuits are filed by citizen groups. This was a bit of a surprise to me since I tend to think of CEQA litigation as the main mechanism by which government agencies gain leverage over each other in the project approval process. But the citizens are still driving the litigation bus – just as CEQA intended.

Second, many citizen groups are using CEQA as a mere stalling tactic against infill projects. A lot of the infill challenges came from citizen groups; and most of them were unsuccessful. Citizen groups often file a sure loser in order to gain emotional satisfaction – zealots like to fall on their swords – but the shrewder ones recognize that even tying up a project in court is going to give them leverage and discourage future infill projects.

Third, the inclination of statewide politicians to limit litigation opportunities against large infrastructure projects is understandable. These projects are often larger and more complicated than private development projects, so it's understandable that they may be more vulnerable to EIR lawsuits. At the same time, infrastructure projects are often trumpeted as essential to the state's economic competitiveness and tying them up could put California behind the eight-ball. (No wonder some people in the Brown Administration want to do an all-out CEQA exemption for high-speed rail.) But here's an interesting fact: Most of the successful infrastructure challenges had to do with water projects. Clearly, the state has to figure out a much cleaner way to deal with real and prospective water shortages than tying big infrastructure projects up in EIR litigation after they have been approved.

Let's hope all this analysis informs the pending CEQA reform debate in Sacramento by highlighting where the real sticking points are. Like it or not, CEQA does give citizen groups a powerful tool to block or slow down projects. It is used frequently – but mostly unsuccessfully – to try to stall infill projects, providing evidence to support the Brown Administration's inclination to move toward separate processes and perhaps even separate laws for greenfield and infill projects. And finally, infrastructure projects do get hung up – but not the ones you might think, and not for the reasons you might think.

CEQA's definitely got a useful role to play in California planning and development. But it's probably a good idea to think not only about a more streamlined role, but a more targeted one as well, focused not just on the CEQA process, but the outcomes the state hopes CEQA will bring about ■

L.A. Considers Using Post-Redevelopment Funds for Economic Development

A couple of months ago, we reported on four post-redevelopment models emerging in California based on a presentation by Paul Silvern of HR&A: Alhambra, Oakland, San Diego, and Los Angeles. Now Silvern and his colleagues at HR&A -- along with ICF and Renata Zimril -- have proposed a whole new post-redevelopment economic development structure for Los Angeles.

Unsurprisingly, the recently released HR&A report -- commissioned by L.A.'s chief administrative officer and chief legislative analyst -- calls for the creation of a consolidated Economic Development Department. But if the proposal is adopted by the city, it would represent revolutionary change for a city that has long been characterized by a large, sluggish bureaucracy that has difficulty being nimble enough to compete on economic development.

Perhaps most interesting is how HR&A proposes to fund the new operation: With the money the city now receives in its general fund because redevelopment was killed. One oft-overlooked point about the end of redevelopment is that it created a "windfall," if one might call it that, for city general funds. Redevelopment agencies typically received somewhere between 60% and 100% of property tax increment from inside redevelopment project areas. Now that the money is distributed to taxing agencies just like all other property tax money, cities are getting about 15% of it into their general funds.

For the City of Los Angeles, that's about $20 million a year.

Most cities will no doubt vacuum up this new revenue and use it to keep the police department whole or pave more streets. But a few cities -- and apparently Los Angeles is among them -- are viewing these funds as possible seed money for a new, post-redevelopment economic development effort.

HR&A's report also calls on the city to:

-- Reposition economic development as a high-priority citywide effort that isn't so bogged down in the politics of city council offices or the regulatory churning of the city bureaucracy.

-- Create the position of deputy mayor for economic development.

-- Spin off a citywide economic development nonprofit that will have more flexibility to do deals than the city government.

-- Manage the city's real estate assets more strategically, either to generate revenue or maximize their value in creating new economic activity.

HR&A looked at lessons learned from eight recognized leaders in economic development, including two in California -- San Diego and San Francisco.

No other city in California is Los Angeles, of course. But the HR&A report provides some interesting fodder for the ongoing discussion in local circles around the state about how to maintain a viable economic development effort in the post-redevelopment era.

– WILLIAM FULTON | JANUARY 7, 2013

Is Jerry Saying, You'll Get Your Redevelopment When I Get All My Money?

Edit Outline Track
By William Fulton on 18 January 2013 - 4:40pm
California California Redevelopment

All last year, local government nerds throughout California -- this one included -- assumed that Jerry Brown would sign a bill to bring back redevelopment if one landed on his desk. So we were all shocked -- shocked! -- when he vetoed every substantive bill the Legislature gave him. (You can read about my surprise here). And based on the comments of some people at the UCLA land use conference on Friday, some of us are still shocked.
But maybe we shouldn't have been. Maybe it's pretty simple.

Here's what San Gabriel City Manager said on Friday: "The governor will not sign a bill until he has clawed back every single penny from the successor agencies that he thinks he can get."

Looked at through this lens, I have to admit, it all makes sense. DOF is squeezing cities for all the former redevelopment funds it can possibly get, and the beancounters there are not done. The budget looks good, but Brown is not the kind of guy to let up once he sets his sights on something. And what leverage does he have? The veto pen.

I've floated a lot of theories about this. He's still mad at the cities and wants to punish them. He doesn't want anybody to think he's going to let the old redevelopment system be resurrected in any way, shape or form, so he's waiting for the body to get cold.
But maybe Steve's right: He's holding redevelopment revival hostage until he gets all his money.
So simple.

– WILLIAM FULTON | JANUARY 18, 2013

Deal: CEQA Streamlining for Ballona Wetlands?

Here's a deal for you:

Enviros agree to a variety of reforms to the California Environmental Quality Act -- especially constraints on the ability to sue, including possibly limiting standing and prohibiting lawsuits if the umbrella state or federal environmental law has been complied with.

In return, developers agree to ditch the conclusion of *Ballona Wetlands Land Trust v. City of Los Angeles*, in which the California Supreme Court ruled that natural environmental conditions such as sea-level rise are not subject to CEQA analysis -- for example, in examination of a beachfront project that could be affected by rising waters.

Crazy? Maybe. But it's a deal that prominent CEQA lawyer Michael Zischke of Cox, Castle & Nicholson says could be on the table in Sacramento.

Ballona Wetlands is driving environmentalists crazy because it means they can't use CEQA to deal with sea-level rise. Speaking at Friday's UCLA Land Use Law and Planning Conference in Los Angeles, Zischke said it's a deal that developers might actually take -- largely because, he says, they won't be giving up much. "My view is that Ballona is not that helpful [for developers] because you probably want to look at sea-level rise anyway and put it on the record" in order to reduce the risk of litigation and loss in the courtroom, he said.

Meanwhile, even though the California legislature is more Democratic than ever as a result of last fall's election, that doesn't mean CEQA is sacrosanct. On another panel, lobbyist Tony Rice, who represents many local governments, noted that Sen. Michael Rubio - (D-Shafter), has now been installed as chair of the Senate Committee on Environmental Quality. Rubio made a last-ditch effort for CEQA reform in August, only to back off when Senate leader Darrell Steinberg took him to the woodshed.

Rice also mentioned that Rubio's arrival at CEQ coincided with staff changes on the committee. Although he didn't mention any names, longtime CEQ staffer Randy Pestor -- viewed as the legislative staff's leading defender of CEQA -- recently retired.

– WILLIAM FULTON | JANUARY 18, 2013 ■