




## Land Use & CEQA Update

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Bill Ihrke / Rutan & Tucker, LLP  
bhrke@rutan.com

**RUTAN**  
RUTAN & TUCKER, LLP

18575 Jamboree Road, 9<sup>th</sup> Floor, Irvine, CA 92612 | 714-641-5100

1

## AGENDA

- GENERAL OBSERVATIONS re CASES
  - U.S. & CALIFORNIA SUPREME COURTS
  - FEDERAL & STATE CASES
    - CASES RE: PROCESS, PREEMPTION, PRECLUSION & PROJECT OBJECTIVES
      - FACTS IN CASES RE: WATER

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2

2

# ***U.S. and CALIFORNIA SUPREME COURT CASES***

3

## ***City of Austin, Texas v. Reagan National Advertising*** (2022) 142 S.Ct. 1464

- Billboard Advertising Case
- City Sign Ordinance:
  - On- / Off-Premises Distinctions
    - Off-Premises: Directional & Advertise Things
    - New Signs Prohibited / Grandfather Clause
    - Allowed Digital On-Premises / Not Off-Premises
- First Amendment Free Speech Challenge / Content-Based Ordinance
- Supreme Court (6-3): Sign Regulations *NOT* Automatically Content-Based

4

***City of Austin, Texas v.  
Reagan National Advertising***  
(continued)

- Sotomayor, J., for the Majority:
  - Relied on *Reed v. Town of Gilbert* (2015) 576 U.S. 155
  - Defined “Content-based” Regulations under *Reed* = Topic Discussed or Idea or Message Expressed
  - No Singling Out Topic or Subject Matter
- Thomas, J., for the Dissent:
  - Majority Misinterpreted the Rule from *Reed*
- Breyer Concurrence / Alito Concurrence & Dissent
- Take Aways: Future First Amendment Sign Cases May Narrowly Define Issue on Review / Here: Less Reliance on Billboards & Commercial Speech Precedent

5

***County of Butte v.  
Department of Water Resources***  
(2022) 13 Cal.5th 612, 2022 WL 3023670

- Interplay of Federal Power Act (FPA) & CEQA
- Counties Challenged EIR Prepared by DWR
  - DWR Application for Renewal of Federal License
  - Operation of Hydroelectric Projects (Oroville Facilities in Butte & Plumas Counties)
  - Settlement Agreement Reached by DWR per FPA
- Procedural Summary:
  - Superior Court: Judgment for DWR
  - Third District: Dismissed Appeal – Preemption & Premature Claims
  - Supreme Court: Affirmed in Part / Reversed in Part

6

***County of Butte v.  
Department of Water Resources***  
(continued)

- FPA Does **NOT** Categorically Preempt CEQA
  - Part of the State Exercise of Authority Over Its Own Political Subdivision's License Application
  - No Evidence that FPA Categorically Preempted CEQA re: Local Dams and Hydroelectric Plants
- Counties' Ability to Challenge Settlement Agreement Preempted by FPA
  - Settlement Established DWR's license from FERC
  - ALP (Settlement Process) Combined One Process for Multiple Jurisdictions & 5-Year Consultation

7

***County of Butte v.  
Department of Water Resources***  
(continued)

- Review of EIR **NOT** Intruding FERC's Jurisdiction
  - Some Mitigation Measures May Be Preempted If Conflicted with Settlement Agreement (FPA)
  - EIR *May* Have Mitigation Outside FERC's Jurisdiction / Thus, CEQA Challenge Possible
- Concurrence in Part / Dissent in Part (Cantil-Sakauye, C.J., & Corrigan, J.)
  - CEQA fully preempted by FPA
  - Concern with CEQA Undermining FPA's Objectives
- Take Away: Majority Preserved State Law Applicability Given Facts and Federal Law at Issue

8

# **Federal & State Cases CEQA and CEQA-Related**

9

## **CSWRCB v. FERC**

(9th Cir., Aug. 4, 2022) -- F.4th ---, 2022 WL 3094576

- State Water Board/Organizations – Review of FERC orders re Hydroelectric Project
  - FERC Orders: Board waived CWA Authority to Impose Conditions on Fed. Licenses
  - Purported Coordination b/w Board and Operators
  - Pattern/Practice to Withdraw & Resubmitting
- CWA §401: State Water Quality Certification / CEQA Compliance Required
- D.C. Cir.: *Hoopa Valley Tribe v. FERC* case
- 9<sup>th</sup> Cir. Here: Project Applicants, not Board, Delayed CEQA review

10

## ***Tiburon Open Space Committee v. County of Marin***

(2022) 78 Cal.App.5th 700

- Challenge to Certification of EIR & Residential Project for 110 Acres on Scenic Mountaintop
- Background Facts and History:
  - Martha Company Owned Largest Undeveloped Parcel in County Near Tiburon on S.F. Bay
  - 1974: County Down-Zoned / Reduced Number of Residences from Min. 300 to Max 34 Units
  - Martha Sued in Fed. Court as Regulatory Taking
  - 1976: Stipulated Judgment / Could Develop No Fewer than 43 Single-family on Min. ½-acre Lots
- Martha Applications to County & Tiburon
  - No Final Decisions for Years / Conducting Studies

11

## ***Tiburon Open Space Committee v. County of Marin***

(continued)

- Additional Background and History:
  - 2005: County Sued in Fed. Court for Relief from Stipulated Judgment
  - Environmental Laws Changed in 30 Years
  - Argued Now Clear = County Cannot Contract Away Discretion Land Use Authority w/out CEQA Review
  - Local Property Owners Argued = 1976 Judgment Violated Due Process Rights to Notice & Hearing
  - District Court Dismissed All Claims
  - 2007: Subsequent Stip. Judgment = County Must Approve 43 Homesites / No Mitigation That Makes 43 Homesite-Development Infeasible

12

## ***Tiburon Open Space Committee v. County of Marin***

(continued)

- No County Decision until 2017 Certified EIR
- Property Owner & Private Committee Filed Writ
- Trial Court Denied Writ / First District Affirmed
- Federal Preemption/CEQA Abdication Issues:
  - County's Compliance with CEQA *Not* Abdicated by Federal Stipulated Judgments
  - One Project with Attending Circumstances
  - County Required To, & Did, Explain Impacts of Project as Subject to Judgments
  - Project Description *Not* Inadequate Even With Reduced Scope of CEQA Discretion

13

## ***Tiburon Open Space Committee v. County of Marin***

(continued)

- Alternatives to Project Issues:
  - County Rejection of 32-Unit Alternative Was Legal and No Abuse of Discretion
  - Inconsistent with Fed. Stipulated Judgments
- Issues re Mitigation Findings:
  - Traffic: Adequately Disclosed and Analyzed
  - BMPs for Ca. Red-Legged Frog Not Improper Deferred Mitigation
  - Water Tank & Fire Flow Analysis Sufficient
  - Temporary Construction Access & Safety Mitigation OK
- Take Aways: No Abdication of CEQA When Project Legally Limited by Federal Stip. Judgments
- First District Unfavorable to Local Agency Opposition

14

***We Advocate Through Environmental  
Review v. County of Siskiyou***

(2022) 78 Cal.App.5th 683

***We Advocate Through Environmental  
Review v. City of Mount Shasta***

(2022) 78 Cal.App.5th 629

- Companion Cases in Third District
- Both Reversed/Remanded on CEQA Grounds
- Permit Approvals for Water Bottling Facility (County) and Wastewater Permit (City)
- County – Lead Agency for Certified EIR

15

***We Advocate Through Environmental  
Review (W.A.T.E.R) Cases***

(continued)

- CEQA Issues (County Case):
  - Project Description & Objectives Too Narrow
  - Project Alternatives Analysis Deficient
  - EIR Recirculation Required for GHG Impacts
  - Noise Impacts Consistent with County & City Plans
  - Unpublished: Caretaker Residence at Facility
- CEQA Issues (City Case):
  - Omission 2 Letters from A.R. = No Prejudicial Error
  - City Review of County EIR / Violated CEQA Requirements for Responsible Agency
  - No Written Findings re: Mitigation for Wastewater

16



## ***Save the Hill Group v. City of Livermore***

(2022) 76 Cal.App.5th 1092

- Residents Group Challenged Housing Project (Garaventa Hills) Certified Reissued Final EIR
- Trial Court Denied Writ = Failure to Exhaust
- First District Reversed & Remanded
- Exhaustion Issue:
  - Group Challenged Decision on Feasibility of No Project Alternative
  - City Fairly Apprised This Was an Issue
- First District Proceeded to Review the Merits

17

## ***Save the Hill Group v. City of Livermore***

(continued)

- No Project Alternative Analysis
  - Evidence Supports Information Withheld Supported No Project Alternative (Basis for Reversal)
  - Availability of Funding for Conservation
  - Two Settlement Agreements with City as Party
    - Dougherty Valley Settlement Agreement
    - Altamont Landfill Settlement Agreement
- Wetland Habitat Analysis
  - Impact to Vernal Pool Fairy Shrimp
  - Evidence Supported Mitigation Measures Approved

18

## ***Save the Hill Group v. City of Livermore*** (continued)

- Hydrology Analysis
  - Impact to Springtown Alkali Sink
  - Environmentally Sensitive Landform Downstream
  - Expert Evidence Supported City's Decision
  - No Significant Impact
- Non-Compliance with Settlement Agreements
  - Raised by Group on Appeal for First Time
  - City's Alleged Noncompliance
  - Lacked Standing as Group is Non-party
  - Ruled Against Group on this Issue
- Take Away: Disclose & Analyze Information re: Available Conservation Funding from Settlements

## ***Department of Water Resources*** ***Environmental Impact Cases*** (2022) 79 Cal.App.5th 556

- Multiple Agencies (including Cities) & Organizations Appealed Dismissals of CCP §1021.5 Attorney's Fees Motions
- Factual and Procedural Background:
  - Water Project / Diversion from Sacramento Delta
  - Plaintiffs Challenged DWR's EIR Certification & Project Approval for 2 Fresh Water Tunnels
  - Plaintiffs Also Opposed DWR's Validation Action for Debt Financing of Project
  - Plaintiffs' Relief Specifically Sought = Decertify EIR & Suspend Project

## **Department of Water Resources Environmental Impact Cases** (continued)

- DWR Decertified EIR & Rescinded Project / Trial Court then Dismissed All Pending Actions
- Trial Court Decision on §1021.5 Motions
  - Lawsuits were “a” Factor, Not “the” Factor for DWR Reversal of Project Approval and Decertifying EIR
  - Governor Announced No Support for 2 Tunnel Project
  - Directed DWR for 1 Tunnel Conveyance
  - External, Superseding Cause for DWR Action
  - Dismissed Motions

21

## **Department of Water Resources Environmental Impact Cases** (continued)

- Third District Reversed & Remanded Agreed with Most Trial Court Rulings, but...
  - Reversible Error = Governor’s Policy Directive as External, Superseding Cause
  - Evidence Lawsuit May Have Influenced Governor
  - Reversible Error = Assuming DWR Would Rescind Project & Decertify EIR with Governor’s Directive
  - Notable Fact: DWR Attorney Advised DWR Could Issue a Subsequent or Supplemental EIR as Alternative
- **Take Away:** Case Is Double-edged Sword: Attorney’s Fees Possible but State’s (Public Agency’s) Public Statements Harmed Defenses of §1021.5 Motions

22

## ***Committee for Sound Water and Land Development v. City of Seaside***

(2022) 79 Cal.App.5th 389

- Nonprofit Challenge to Certified EIR & Project for Fort Ord Military Base Reuse
- City Demur = Sham Pleading & Laches
- RPI Demur = Limitations & Mootness
- Trial Court Sustained / Sixth District Affirmed (RPI)
- Issues:
  - Judicial Council's COVID CEQA Limitations Extensions
  - Fort Ord Reuse Auth. Dissolution
- Take Away: Published Opinion for CEQA COVID Extensions & Affirming "Unusually Short" Periods

23

## ***Federal & State Cases Land Use and Land Use-Related***

24

## ***Seider as Trustee of Seider Family Trust v. City of Malibu***

(9th Cir., June 1, 2022, No. 21-55293) -- F.4th ---, 2022  
WL 1769793

- **Constitutional Challenge to City's Local Implementation Plan (LIP) Per Coastal Act**
  - Forbids Signs Identifying Boundary for Tidelines & Private Property, and Criteria Applied
  - Requiring Applicant Agree to Indemnify City
- **District Court:**
  - Dismissed Sign-Related Claims for Failure to Join Coastal Commission as Necessary Party
  - Dismissed Indemnification Claims as Not Ripe

25

## ***Seider as Trustee of Seider Family Trust v. City of Malibu*** (continued)

- **9<sup>th</sup> Cir. Affirmed in Part / Reversed in Part:**
  - Memorandum Opinion from Panel
  - Affirmed Dismissal of Indemnity Claims
  - Remanded for Necessary Party Claims / Coastal Commission Required to be Joined by District Court (Fed. Rule Civ. Proc. 19(A))
  - Commission Has Primary Permitting Authority
- **Dissenting Opinion:**
  - Remand to Address if City Had Original Permitting Authority per LIP

26

## ***Keen v. City of Manhattan Beach***

(2022) 77 Cal.App.5th 14

- Case re: Short-Term Rentals (STRs) & Zone Code Amendments for City in Coastal Zone
- Trial Court Enjoined Ban on STRs Pending Approval by Coastal Commission
- Second District Affirmed:
  - Residential Zone Ordinances Always Permitted Short- and Long-term Rentals
  - Ban on STRs = Amendment to Local Coastal Program (LCP) = Coastal Comm. Approval Needed
  - STRs ≠ “hotels, motels, and time-share facilities”
  - No Judicial Notice of Decades-old “hotel” Definition

27

## ***Reznitskiy v. County of Marin***

(2022) 79 Cal.App.5th 1016

- HAA Case: Builders of Single-family Residence Challenged County Denial of Project
  - Plaintiffs Applied for Single-family home w/ ADU
  - Originally Over 5,000sq.ft. / Reduced under 4,000
- Procedure:
  - Planning Div. Approved with Reduced sq.ft.
  - Admin. Appeal to Planning Comm. = Denied Project
  - Board of Sups. = Affirmed Plan. Comm. / Denied Project
- First District / Matter of First Impression
- “Housing Development Project” under HAA
- *Group* of Housing Units / NOT Single-Family Home

28

## ***AIDS Healthcare Foundation v. City of Los Angeles***

(2022) 78 Cal.App.5th 167

- Writ to Set Aside Mixed-Use Project Approval
- Alleged Noncompliance w/ 15% Set Aside
  - Low- and Moderate-income “Inclusionary” Requirement from Community Redevelopment Law
  - Both in Hollywood Redevelop. Plan and CRL
- Writ Denied / Second District Affirmed
- CRL Rendered Inoperative w/ Dissolution
  - H&S Code §§33131(a) & 33670(a), (b)=Inoperative
  - Even Assuming RDA Plan Still Valid, 15% Set Aside Requirement in the Aggregate / Not Each Project



18575 Jamboree Road, 9<sup>th</sup> Floor, Irvine, CA 92612 | 714-641-5100

29

29

## ***City of Coronado v. San Diego Association of Governments***

(2022) 80 Cal.App.5th 21

- Cities challenged SANDAG’s Decisions on Admin. Appeal under the RHNA Process
  - Legislature Enacted RHNA Procedure
  - Regional COGs Allocate Housing Needs
- Cities Challenged SANDAG’s “Weighted Vote”
  - Jurisdictions Cast Votes based on Populations
  - Not “one jurisdiction-one vote”
  - SANDAG Acted “Quasi-Judicial Capacity” / Use of Weighted Voting Violated Procedural Due Process
- Demurrer Sustained / Affirmed on Appeal
- *City of Irvine* case = Judicial Review Precluded



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30

30

## ***Parkford Owners for a Better Community v. Windeshausen***

(2022) 81 Cal.App.5th 216

- Community Organization Challenged County's Issuance of Business License for Self-storage Facility
- Claims Involved CEQA and Statute of Limitations Issues
- Lower Court Stayed Case Pending Appeal on Related Building Permit Challenge (CEQA & Planning/Zoning Law)
  - Appeal There Dismissed as Moot – Building Permit Ministerial
  - Completion of Self-storage Prior to Entry of Judgment Rendered that Case Moot
  - Trial Court then Granted Motion for Judgment on Pleadings based on *Res Judicata*
- Third District Here: Reversed and Remanded
- Prior Appeal Decision Not a Final Judgment “On The Merits” for Purposes of Issue and Claim Preclusion
- Prior Case Decided Solely on Mootness / No *Res Judicata*

31

## ***Federal Cases Federal Environmental Review Laws***

32



## **California River Watch v. City of Vacaville**

(9th Cir. 2022) 39 F.4th 624

- RCRA Case
- Alleged City Generate/Transport Chromium Thru Potable Water System
  - 1972 to 1982, Companies Operated Wood Treatment Facilities in Community Next to City
  - Waste Products Contained Chromium
- Summary Judgment Granted / 9<sup>th</sup> Cir. Affirmed
- No Direct Connection-City Movement of Chromium and City Waste Disposal Process
- No “Transporting” under RCRA
- Concurrence: Absurdity Canon Should Be Applied

33

## **Environmental Defense Center v. Bureau of Ocean Management**

(9th Cir. 2022) 36 F.4th 850

- Organizations/State/Coastal Commission Sued Federal Bureaus on Multiple Claims
- Fundamental Issue: Fed. Gov. Authority for Offshore “Fracking”
- (1) Final Agency Action Under the APA
- (2) Ripeness of Procedural Challenge
- (3) Nat. Environmental Policy Act (NEPA)
- (4) Endangered Species Act (ESA)
- (5) Coastal Zone Management Act (CZMA)

34

## ***San Francisco Herring Association v. U.S. Department of the Interior***

(9th Cir. 2022) 33 F.4th 1146

- Association Sued U.S. Interior Department & National Park Service Park Service
- Challenged Park Service's Authority to Prohibit Commercial Herring Fishing in Golden Gate National Recreation Area
- Procedurally: Multiple Appeals
- At Issue: Scope of Park Service Authority under 1916 Organic Act in Navigable Waters
- 9<sup>th</sup> Cir. Here: Park Service Has Authority

35

# ***Questions?***

36