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Top events to watch from 2007

1. CEQA Alternatives

Save Round Valley Alliance v. County of Inyo **(2007) 157 Cal.App.4th 1437**

In this case, the developer proposed a rural large-lot subdivision located on 74 acres on the road to the trailhead to Mount Whitney in Inyo County ("County"). The lots, used for single family homes, would be a minimum of 2.5 acres in size. The proposed use of the property was consistent with the County General Plan and the zoning code. Further, the subdivision would be governed by CC&Rs restricting the use of the lots. The County determined that an Environmental Impact Report ("EIR") was necessary for the project and the EIR concluded that there would be substantial adverse effects on the scenic vistas. The Planning Commission certified the EIR, adopted a statement of overriding considerations and approved the project. A local citizens' group called Save Round Valley Alliance ("SRVA") appealed the Planning Commission's approval, and following a public hearing, the Board of Supervisors denied the appeal, certified the EIR, and approved the project. SRVA petitioned for a writ of mandate, which was denied by the Inyo County Superior Court. SRVA appealed.

In the EIR, the project was described as a 27-lot single family residence development. In its comments on the EIR, SRVA stated that the description was insufficient because future owners of the lots could apply to build a secondary dwelling unit (commonly known as "granny flats" or "mother-in-law quarters"). Government Code section 65852.2 was enacted to prevent overly excessive restrictions on the building of these kinds of second units. The County's zoning code, adopted to implement the state statute, allowed granny flats with a conditional use permit in the Rural Residential zone. SRVA's argument followed that the EIR should analyze the project as one for 54 dwelling units, rather than a 27-lot subdivision, since every landowner could build a second dwelling unit.

The Court of Appeal agreed with the County, however, and held that the potential future addition of secondary dwellings by future homeowners was simply too speculative to require CEQA analysis. The court said,

> Whether a conditional use permit to build a second unit will ever be sought depends initially upon the desires of future lot owners, who are unknown. Although a conditional use permit can be sought for a

> second unit, there is no factual basis for believing that a future lot owner is likely to do so. Any conclusions about their intentions to build second units would therefore be pure speculation…Finally, even if the building of some second units might be foreseeable, it is impossible to predict how many units will be built, the size of such units, on which lots they might be built, their location within a lot, the visibility of a second unit from outside the subdivision, or how such units might impact the environment.

SRVA also argued that the analysis of alternatives to the proposed project was inadequate. The DEIR concluded that the superior alternative would be a land exchange with the Bureau of Land Management ("BLM") which would avoid the proposed project's visual impacts. However, the DEIR said that the BLM did not view the project site as a candidate for a land exchange and thus this alternative was infeasible. The FEIR contained several letters concerning the land exchange. One letter from the local BLM Field Manager indicated that the project proponent, not the BLM, rejected the idea of a land exchange.

The appellate court emphasized that local agencies must analyze feasible alternatives. The court held that the EIR's discussion of the BLM land exchange alternative was defective. The DEIR's assertion that the BLM was not interested in the land swap was in conflict with the Field Manager's letter. The inconsistency with the general plan was a factor in evaluating feasibility, but should not have been determinative. The court emphasized time and again that the County must independently analyze the alternatives to the proposed project and show how it came to that decision. The lack of evidence and the over-reliance on the project proponent's statements were fatal and the appellate court reversed the trial court's finding that the EIR was sufficient.

Uphold Our Heritage v. Town of Woodside **(2007) 147 Cal.App.4th 587**

Steven Jobs, the real party in interest, owned an old mansion that had been built in 1925 for Daniel Jackling, a key figure in the American copper industry. A leading architect of the time designed the house, which included many copper fixtures. Mr. Jobs wanted to demolish the deteriorating house and replace it with a more modern structure. Since the house was considered a historic resource under CEQA, an Environmental Impact Report ("EIR") had to be certified before issuance of the demolition permit. After certification of the EIR, opponents of the demolition brought suit claiming that the analysis of the feasibility of alternatives and the Statement of Overriding Interests were not supported by substantial evidence, and therefore, the Statement of Overriding Interests was not valid.

The EIR discussed five alternatives: no project alternative; historic rehabilitation of the house; historic rehabilitation and a new addition; on-site relocation and historic rehabilitation; and off-site relocation and historic rehabilitation. The appellate court focused on the feasibility analysis of alternatives 2 (historic

rehabilitation) and 3 (historic rehabilitation and new addition). The court found that substantial evidence did not support the Town of Woodside's ("Town") finding that the alternatives were not feasible. The court emphasized that the high cost of rehabilitation, $4.9 to $10 million, did not provide sufficient support for the determination that the project was not economically feasible. Although the cost of the alternative was relevant, the court stressed that it was only relevant as it relates to the cost of the demolition and new construction that Mr. Jobs desired. Since the record did not provide any cost analysis of the demolition and new construction, the Town could not find that the alternatives were not economically feasible. The court held that the Statement of Overriding Interests was invalid because it was based on the Town's finding of infeasibility.

2. CEQA Water Supply Analysis

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova **(2007) 40 Cal.4th 412**

The facts of this case involved a major planning effort for a new growth area in eastern Sacramento County ("County"). After several years of study, the County certified an Environmental Impact Report ("Vineyard EIR"), and approved a community plan ("Sunrise Douglas Community Plan") and a specific plan. One of the most controversial issues was the sufficiency of the long-term and short-term water supply analysis. The Vineyard EIR acknowledged that the short-term supply would come from groundwater pumping of a neighboring well field. However, the FEIR's long-term water supply was unclear. The FEIR claimed that a full analysis could not be completed until the Sacramento County Water Agency finished its environmental review of the Zone 40 supply (which was pending at the time of the Vineyard EIR's release). Additionally, the court reviewed the question of whether or not a portion of the Vineyard EIR required recirculation due to potential impacts to salmon habitat disclosed in the FEIR.

In its analysis of the water supply issue, the court clearly stated that there was no requirement, and indeed it would be unworkable, to require that a firm water supply be in hand at the time of land use approval. Even if there is uncertainty in the water supply for a project, the court observed that an EIR may still satisfy CEQA if it acknowledges the uncertainty and discusses alternatives. The EIR must also disclose any significant environmental impacts from those alternatives, as well as discuss possible mitigation measures to minimize the impacts.

The court held that the near-term water supply analysis met all the required steps for adequacy under CEQA. However, the court agreed with the petitioners that there was too great of a degree of uncertainty in terms of the long-term water supply. The court rejected the Vineyard EIR's reliance on a future environmental analysis of the Zone 40 water master plan as providing the required CEQA analysis.

The court also addressed the issue of recirculation under CEQA and held that recirculation was warranted. (Pub. Resources Code, § 21092.1.) Although the DEIR failed to analyze groundwater extraction on the Cosumnes River, the FEIR in responding to comments stated that it would have a less-than-significant impact on groundwater draw down while also acknowledging that during periods of very low flow, the depletions could impact timing and extent of dewatering. Because the FEIR mentioned a new potential impact, the court held that it must be recirculated for further public comment.

3. CEQA Impact Analysis

San Joaquin Raptor v. County of Merced **(2007) 149 Cal.App.4th 649**

The *San Joaquin Raptor* case involves an existing mining operation. The mine operator requested an amended conditional use permit ("CUP"), which would expand the physical breadth, depth and term of the existing operation. If granted, the amended CUP would operate to extend the expected useful life of the mine from five to thirty years, depending upon actual demand levels. The County of Merced Board of Supervisors ("County") eventually granted the CUP. Nearby property owners subsequently filed suit challenging the Environmental Impact Report ("EIR"). The trial court ruled for the County and the real party in interest, but the Court of Appeal, Fifth Appellate District reversed.

During the four years prior to the CUP amendment request, the mine operated with an average production rate of 240,000 tons per year ("TPY"), with a high of 312,890 tons. For CEQA purposes, the project was described as having an average production of 260,000 TPY in the DEIR. However, the CUP allowed for a maximum production level of 550,000 TPY. The court pointed out that there were numerous assurances in the DEIR that there would be no increase in production. The EIR also evaluated the effect of nighttime operations. This practice was necessitated by delivery specifications of certain users such as CalTrans. During these nighttime operations, the EIR stated that no mining operations would occur. Activities would be limited to batch plant operations and loadout. The EIR's air quality analysis looked at a higher mining production of 550,000 TPY, reflecting that the total amount of mined material would exceed the amount available for offsite delivery.

The opponents first attacked the project description. Although the EIR and record set forth the proposition that the proposed project was essentially an extension of the existing operation, the court noted that there were numerous provisions which allowed the mining to increase up to 500,000 TPY. Because the discussion of the potential level of activity was not stable in the document, the court felt the document misled the public. The court went on to observe that the allowance for fluctuating production levels tainted the impact analysis as well.

For example, the road impact analysis and related mitigation measures were based upon 260,000 TPY, not the 550,000 TPY. If the mine operated at maximum production, presumably the impacts would be greater, but no added mitigation was mandated.

The opponents also challenged the baseline for determining impacts. As a result of prior case law, lead agencies can use the existing mine operation as the baseline, and base the impact analysis on the increment of change over and above that operation. The question then was whether the County adequately described the baseline. The appellate court found the lead agency's description of the baseline lacked necessary detail. The court said, "The decision makers and general public should not be forced to sift through obscure minutiae or appendices in order to ferret out the fundamental baseline assumptions that are being used for purposes of the environmental analysis."

Turning next to the specific impact discussions of water supply, water quality, traffic and biological resources, the court also ruled that the EIR's approach was invalid. As noted above, the EIR's focus was on impacts at the average production level of 260,000 TPY. Since the court had determined that actual production could reach 550,000 TPY, the EIR's consideration of water supply and water quality lacked substantial evidence to support the conclusion that the project impacts would merely be a continuation of existing impact levels.

As road impacts were calculated based upon impacts to roads measured over a 20 year time period, the court said that determining impacts based upon the annual average of 260,000 TPY was not unreasonable, but that the EIR was required to include some discussion of the impacts associated with higher production years. For air quality, the DEIR examined the impacts based upon 260,000 TPY. In response to comments, the FEIR examined impacts at the maximum production number. As the impacts remained the same based upon the San Joaquin Valley Air Pollution Control District thresholds of significance, no recirculation was required.

Finally, with respect to biological impacts, the EIR established setbacks and protective measures for vernal pools on the project site. The EIR assumed (a point highlighted by the court) that sensitive species were present, and included an additional 300-foot setback from vernal pools or ephemerally wet drainage swales. Protocol species surveys were required, and if the species were detected, either the 300-foot setback remained in place or the project could proceed based upon management plans approved by California Department of Fish and Game and U.S. Fish and Wildlife Service. The opponents challenged this practice as the management plans would be approved outside of the public review and CEQA disclosure steps. In agreeing, the court did not invalidate the practice in every instance and instead noted that in this case there was a lack of performance criteria or standards. The court also reached a similar result with respect to burrowing owl impacts and mitigation.

4. Global Warming

***State of California v. County of San Bernardino*, San Bernardino County Superior Court (filed Apr. 13, 2007)**

The California Attorney General filed suit against the County of San Bernardino ("County") alleging that the Environmental Impact Report ("EIR") prepared for the County's General Plan failed to comply with the requirements of CEQA in its analysis of greenhouse gases ("GHGs"), climate change, and diesel engine exhaust emissions.

The parties settled the case agreeing that the County would amend the plan within 30 months adding a policy of greenhouse gas reduction and calling for the adoption of a Greenhouse Gas Emissions Reduction Plan. The amended General Plan will include an inventory of all known, or reasonably discoverable, sources of greenhouse gases in the County. Because definitive data sources for this inventory do not exist, the parties agreed that the measurements will be estimates, but the estimates will be supported by substantial evidence and will represent the County's best efforts. The agreement provides that the County will inventory emissions for 1990 and the current year and will project emissions for 2020. In addition, the County will create a target for the reduction of sources of emissions reasonably attributable to the County's discretionary land use decisions.

The settlement allowed the updated General Plan to remain in effect. The County will conduct an environmental review under CEQA of both the General Plan amendment and the Greenhouse Gas Emissions Reduction Plan.

The Attorney General's press release on the agreement lists the following as feasible mitigation measures:

- High-density developments that reduce vehicle trips and utilize public transit.
- Parking spaces for high-occupancy vehicles and car-share programs
- Electric vehicle charging facilities and conveniently located alternative fueling stations.
- Limits on parking.
- Transportation impact fees on developments to fund public transit service.
- Regional transportation centers where various types of public transportation meet.
- Energy efficient design for buildings, appliances, lighting and office equipment.
- Solar panels, water reuse systems and on-site renewable energy production.
- Methane recovery in landfills and wastewater treatment plants to generate electricity.

- Carbon emissions credit purchases that fund alternative energy projects.

The Attorney General's press release is available at http://ag.ca.gov/globalwarming

The Attorney General has submitted various other letters commenting on CEQA documents' insufficient analysis of GHGs and climate change. These include the regional transportation plans for the Merced County, Orange County, the San Diego region and Sacramento. (The Attorney General letters are available at http://ag.ca.gov/globalwarming/ceqa/comments.php.)

Alternative Approaches to Analyze Greenhouse Gas Emissions and Global Climate Change in CEQA Documents, Association of Environmental Professionals

In response to the lack of legislative or executive guidance on how to evaluate climate change impacts in CEQA documents, the Association of Environmental Professionals ("AEP") prepared a paper suggesting seven different approaches to the problem. The paper indicates the problems with the various approaches as well as situations in which a particular approach may be more suitable. The paper notes the lack of thresholds of significance for measuring the impacts of a project on climate change and points out that this may or may not relieve an agency from evaluating the potential for a project to significantly affect the environment.

The seven approaches include:

1. No analysis.
2. Screening analysis which would exempt small or exempt projects from doing a detailed analysis.
3. Qualitative analysis without a significance determination.
4. Qualitative analysis with a significance determination.
5. Quantitative analysis without a significance determination.
6. Quantitative analysis with net zero threshold.
7. Quantitative analysis relative to the emission reduction strategies contained in the California Climate Action Team's 2006 Report to the Governor.

(The paper is available at http://www.califaep.org/)

Mitigation

- ICLEI – Local Governments for Sustainability: The International Council on Local Environmental Initiatives released Preparing for Climate Change, A Guidebook for Local, Regional and State Governments to help local, regional and state decision-makers prepare for climate change by recommending a detailed process for climate change preparedness. The attorney general has recognized ICLEI as a resource for climate change mitigation. (The guidebook is available at http://www.iclei.org/.)

- Attorney General Paper: The Attorney General has issued a paper suggesting potential mitigation measures in the areas of transportation, energy efficiency, land use, solid waste and carbon offsets. Examples of land use related mitigation include:

    - Encouraging mixed-use, infill, and higher density development
    - Discouraging development that will increase passenger vehicle VMT
    - Incorporating public transit into project design
    - Requiring measures that take advantage of shade, prevailing winds
    - landscaping and sun screens to reduce energy use
    - Preserving and creating open space and parks
    - Facilitating "brownfield" development located near existing public
    - transportation and jobs
    - Requiring pedestrian-only streets and plazas within developments

(The paper is available at http://ag.ca.gov/globalwarming/)

5. Physical Takings

Yamagiwa v. City of Half Moon Bay **(N.D. Cal. 2007) 2007 U.S.Dist.LEXIS 22573**

The property at issue, known as Beachwood, was a 24.7 acre undeveloped parcel that changed hands three or four times between the 1970's and today. The current owner, the Keenan Trust, is managed by Joyce Yamagiwa, trustee. All of the previous owners as well as Yamagiwa envisioned residential development on the property and bought it for that purpose. One of the previous developers applied for a Vesting Tentative Map ("VTM") in 1990, which was granted by the City of Half Moon Bay ("City"). Before the developer could obtain

other necessary permits, the City imposed a sewer moratorium in 1991 that was extended 11 times and spanned seven years. Without the ability to pinpoint a sewer source that would service the proposed subdivision, the original developer and, later, Yamagiwa was unable to apply for a Coastal Development Permit. The City made no mention of wetlands during the VTM approval process, but once plaintiff was finally able to apply to the City for a Coastal Development Permit, the City denied the permit because wetlands existed on most of the property. In plaintiff's previous challenge to the City's determination, the California appellate court upheld the City's finding that there were wetlands on the property. (*Yamagiwa v. City of Half Moon Bay* (2005) 2005 Cal.App.Unpub.LEXIS 6468.) The factual issue faced by the federal district court in the present case was whether the City's actions or lack thereof caused the formation of the wetlands on the Beachwood property, in turn leading to a lack of development potential.

For the purposes of this litigation, there were three time periods that were important: Pre-TAAD, TAAD, and Post-TAAD. TAAD stands for the Terrace Avenue Assessment District, which was established by the City in 1982 in order to, among other things, construct certain water and sewer improvements. The City included Beachwood within the assessment district, constructed certain storm and drainage pipes on Beachwood, and acquired an easement over those sections of the property where maintenance would have to be done. The construction-phase of TAAD was important to this case because the ultimate factual question of what caused the formation of the wetlands hinged on whether the construction and maintenance done by the City during the TAAD project led to pooling on the property or whether pooling occurred prior to TAAD.

In the end, the court agreed with all the facts as the plaintiff presented them. There had been no pooling on the property prior to TAAD. During the construction-phase, the topography of Beachwood changed due to moving fill and grading areas. This change in topography impeded the water drainage from the property. In addition, the City never maintained the storm pipes, and therefore, debris collected on top of the entrance to the pipe, forcing at least 50 percent of the water to drain onto Beachwood, instead of draining into the pipe. The court also pointed out that the City never mentioned the existence of wetlands on the property prior to 1998, even though the initial study drafted in 1976 as well as the environmental checklist created in 1982 contemplated possible impacts to the environment. Both documents determined that there would not be any significant environmental effects.

The court finally concluded that the wetlands were man-made and created by the City through the initial construction during TAAD and the failure to maintain the storm pipes.

The five legal issues before the court were: 1) whether the City's creation of the wetlands constituted a taking under the California Constitution, Article I, section

19; 2) whether the City's creation of the wetlands constituted a taking under the Fifth Amendment of the federal constitution; 3) whether the City committed a nuisance; 4) whether the City committed a trespass; and 5) whether plaintiff was entitled to a permanent injunction that would enjoin the City from collecting assessment fees for sewer service expansion and highway improvements from the owner of Beachwood. The court found in favor of the plaintiff on all issues.

State Takings Claim

The strict liability test when dealing with state takings claims states that "the government is strictly liable for any physical injury to property substantially caused by a public improvement as deliberately designed and constructed." (See *Bunch v. Coachella Valley Water Dist*. (1997) 15 Cal.4th 432.) In order to satisfy the strict liability test, plaintiff had to prove the following:

> *First*, that she has an interest in real or personal property; *Second*, the City substantially participated in the planning, approval, construction or operation of a public project or public improvement; *Third*, Yamagiwa's property suffered damages; and *Fourth*, the City's project, act or omission was a substantial cause of the damage.

Since Yamagiwa exercised control over the property and represented the true owner in her capacity as trustee, the first element of interest or ownership was easily satisfied. The court also found that the second element of public project or public improvement was easily satisfied. According to the court, the approval of the project by the City, the construction of the drainage system done at the behest of the City, and the acquisition by the City of an easement on Beachwood clearly established that TAAD was a public project or improvement.

The element of damage is satisfied when the plaintiff can show any depreciation in the market value of the property. Here, both the defendant's appraiser and the plaintiff's appraiser found that the market value had been "massively diminished" due to the wetlands. Therefore, the court found that the plaintiff had suffered adequate damages. In evaluating the element of substantial cause, the court emphasized that the test is not whether the City's actions were *the* substantial cause of the damage but whether the City's actions were *a* substantial cause. Again, the court had no problem finding in favor of the plaintiff. The court re-stated its factual finding that the wetlands were created through the actions of the City, and therefore, the court concluded that the City's public project was a substantial cause of the damage arising from the existence of wetlands on Beachwood.

Federal Takings Claim

Citing *Aris Gloves, Inc. v. United States* (Ct. Cl. 1970) 420 F.2d 1386, the court stated "[a] taking can occur simply when the Government by its action deprives the owner of all or most of his interest in his property." The court laid out a four pronged test for finding a physical taking, citing *Ridge Line, Inc. v. U.S.* (Fed. Cl. 2003) 346 F.3d 1346. The first two prongs contain two alternative findings that satisfy the prong. The court enunciated the four prongs as follows:

1) A) the City intended to invade a protected property interest; or
   B) the asserted invasion was the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action;

AND

2) A) the invasion must appropriate a benefit to the City at the expense of the property owners; or
   B) the invasion must at least preempt the owner's right to enjoy the property for an extended period of time, rather than merely inflict an injury that reduces its value.

AND

3) the owner must have a 'legally protected property interest';

AND

4) the owner must show damages.

The court focused on prong 1(B) and 2(B), finding that 1(A) and 2(A) were not applicable to this case. The court described prong 1(B) as an objective foresee-ability requirement. Although the court had addressed the cause of the wetlands, it had not yet addressed whether the creation of the wetlands was a foreseeable result of the City's actions. The court found that the failure to implement a maintenance plan and the change in the topography of the land "set in motion a chain of events that ultimately and foreseeably resulted in the formation of wetlands on Beachwood." Therefore, the court held that the first prong was satisfied. In holding that the second prong of substantial injury was also satisfied, the court emphasized that the existence of wetlands has made residential development, the sole interest of Yamagiwa in owning the property, infeasible.

Lastly, the plaintiff had to show an interest in the property and damages. The court found that these requirements had been discussed under the state takings claim, and the plaintiff had met the requirements.

Nuisance and Trespass

Relying on many of the same legal and factual conclusions, the court went on to hold that the City had committed a nuisance and a trespass on Beachwood. Under the nuisance claim, the court focused on the issues of consent and reasonableness, since most of the other elements (i.e., property interest, interference with enjoyment, damages, and substantial cause) had already been found in the takings claims. The court stated that consenting to the construction and easement was distinct from consenting to the creation of wetlands on the property. Not surprisingly, the court also found that an ordinary person would be reasonably annoyed with the existence of wetlands on his or her property, and therefore, the reasonableness prong was satisfied.

The main element discussed by the court under the trespass claim was intent. In order to prove that there was a trespass, the plaintiff must show that the City acted intentionally, recklessly, or negligently. The court relied on two facts in holding that the City had the requisite intent: first, at least 50% of the storm water entering the southeast corner did not make it into the drain pipe due to the debris on the debris rack at the entrance of the pipe, and second, the change in topography forced water from the street to flow directly onto the property. The court concluded that the City had the requisite intent and was, therefore, liable for trespass since the other elements were satisfied.

Damages

After holding the City liable for state and federal inverse condemnation, nuisance and trespass, the court determined the amount of damages that should be awarded. The court based the award on expert testimony establishing the depreciation in value of the property, i.e., the value of the property if it was suitable for development versus the value of the property with the wetlands. The defendant's expert stated that the depreciation amounted to $26,620,000.00, whereas the plaintiff's expert testified to $36,795,000.00. The court found the latter assessment more credible and awarded the plaintiff over $36 million in damages.

Permanent Injunction

In *Furey v. City of Sacramento* (1978) 24 Cal.3d 862, the California Supreme Court held that taxpayers, who paid assessment fees for benefits that they could no longer enjoy, could not seek a refund for assessment fees previously paid. However, the court granted injunctive relief enjoining the government from collecting further assessments. Here, the court found that the facts in *Furey* as well as the law enunciated in that case compelled the court to enjoin the City from collecting any further assessment fees for the expansion of sewer facilities and highway improvements. These improvements would have served the

Beachwood subdivision had it been built. Since it would now be impossible to build residences on the property, the court granted the permanent injunction.

6. Indirect Regulation of Economic Competition

Hernandez v. City of Hanford (2007) 41 Cal.4th 279

The case involves the City of Hanford ("City") and two of its residents, Tracy and Adrian Hernandez ("Hernandez"). Hernandez challenged a city ordinance prohibiting the sale of furniture in the Planned Commercial ("PC") district by any stores other than large department stores (defined as "stores containing 50,000 square feet or more"). Furniture sales in the large department stores were limited to an area of 2,500 square feet. Hernandez was cited for violating the ordinance while operating a bedroom furniture store within the PC district. Hernandez challenged the ordinance on two fronts: (1) the ordinance was invalid because it was enacted for the primary purpose of regulating economic competition, and (2) the ordinance violated the equal protection clause because it treated large department storeowners and small furniture storeowners differently.

The Supreme Court began its analysis by asking whether the ordinance was an invalid regulation of economic competition. Previous decisions left determinations of what constituted an invalid impact on economic competition unclear. *Hernandez* holds that so long as the primary purpose of the zoning action, "its principal and ultimate objective," is to achieve a valid *public* purpose, rather than simply to serve an impermissible anti-competitive *private* purpose, the ordinance is valid.

In this case, the City's prohibition on furniture sales did have a direct impact on economic competition by prohibiting Hernandez from selling furniture. However, the City enacted the ordinance to promote the legitimate *public* purpose of preserving the economic viability of downtown Hanford. Thus, the court held that the ordinance served the traditional zoning objective of regulating where a business may locate in a city and was not an invalid restriction on economic competition.

With respect to the equal protection clause issue, the Supreme Court reversed the appellate court's determination that the ordinance's unequal treatment to large department stores and other furniture stores was not rationally related to its stated goal of protecting the downtown district. The Supreme Court determined that the ordinance was rationally related to the purpose of attracting and retaining large department stores in the PC district. Therefore, the ordinance was held to be constitutionally valid and enforceable against Hernandez.

7. Draft Policy for Maintaining Instream Flows in Northern California Coastal Streams, State Water Resources Control Board (December 2007)

The draft policy was released on December 28, 2007, and the comment period will close on February 19, 2008. The draft policy will implement section 1259.4 of the Water Code, which was enacted in 2004. The policy only applies if the site is within the geographic area and type of action covered by the policy. The geographic area spans all coastal streams from the Mattole River to San Francisco. This area includes all of Marin and Sonoma counties and portions of Napa, Mendocino and Humboldt counties. There are three types of actions covered by the policy: applications to appropriate water, small domestic use and livestock stockpond registrations, and water right petitions. If the project is covered, it will need to adhere to the principles, requirements and guidelines outlined in the policy. The following are the five principles that the policy seeks to uphold:

1) Water diversions shall be seasonally limited to periods in which instream flows are naturally high to prevent adverse effects to fish and fish habitat;
2) Water shall be diverted only when stream flows are higher than the minimum instream flows needed for fish spawning and passage;
3) The maximum rate at which water is diverted in a watershed shall not adversely affect the natural flow variability needed for maintaining adequate channel structure and habitat for fish;
4) Construction or permitting of new onstream dams shall be restricted. When allowed, onstream dams shall be constructed in a manner that does not adversely affect fish and their habitat; and
5) The cumulative effects of water diversions on instream flows needed for the protection of fish and their habitat shall be considered and minimized.

For the full text of the policy, go to:
http://www.waterrights.ca.gov/HTML/instreamflow_nccs.html

8. EPA and Corps Jointly Issue *Rapanos* Guidance

On June 5, 2007, the EPA and the Army Corps of Engineers ("Corps") jointly issued guidance consistent with the Supreme Court's decision in *Rapanos*. This document is entitled "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States*" ("Guidance"). The issue in *Rapanos* was whether a wetland or tributary can be defined as a "water of the United States." and thus be subject to jurisdiction under the Clean Water Act ("CWA"). Because the court issued five separate opinions, it was unclear whether certain types of waters were jurisdictional. The Guidance document establishes several categories of waters and discusses whether or not the agencies may assert jurisdiction.

Waters that are jurisdictional

First, the Guidance says that the Corps will continue to assert jurisdiction over traditionally navigable waters and their adjacent wetlands. The *Rapanos* decision did not affect those waters. Navigable is defined as "the waters of the United Sates, including the territorial seas." (33 U.S.C. § 1362(7).) Waters of the United States are under federal jurisdiction because of their role in interstate commerce. Wetlands are included as jurisdictional because of their importance to the drainage network and integrity of the nation's waters.

Second, the Guidance addresses relatively permanent non-navigable tributaries of traditional navigable waters and wetlands with a continuous surface connection with such tributaries. The Guidance says that the agencies will assert jurisdiction when the water is a non-navigable tributary of a traditionally navigable water. This means that the non-navigable water body flows either directly or indirectly (by means of another tributary) into a traditionally navigable water. This includes relatively permanent waters that typically flow year round and waters that flow at least seasonally (e.g., typically three months). Additionally, the wetlands that directly abut those tributaries will be deemed jurisdictional.

The Guidance notes that "relatively permanent" does not include ephemeral tributaries which flow only in response to precipitation. Also not included are intermittent streams which do not flow year round or seasonally. However, the agencies will decide whether those kinds of waters will be deemed jurisdictional using the significant nexus test described below.

Finally, the Guidance says that the agencies will assert jurisdiction over certain waters when they have a significant nexus with a traditional navigable water. (The significant nexus test is discussed below.) These waters include:

1) Non-navigable tributaries that are not relatively permanent;
2) Wetlands that are adjacent to non-navigable tributaries that are not relatively permanent; and
3) Wetlands adjacent, but not directly abutting, relatively permanent tributaries (separated by a berm, dike, etc.).

The significant nexus test

In applying the significant nexus test, the agencies will focus on the integral relationship between ecological characteristics of tributaries and adjacent wetlands. This is influenced by physical proximity, as well as shared hydrological and biological characteristics. The agencies will first determine whether the tributary has any adjacent wetlands. If not, they will look to the flow characteristics and functions of the tributary itself to see if the tributary has an effect on traditionally navigable waters. This will be considered together with the

functions performed by the wetlands adjacent to that tributary. Principal hydrological considerations include:

1) Volume of flow of water in the tributary
2) Duration of flow of water in the tributary
3) Frequency of flow of water in the tributary
4) Proximity of the tributary to traditional navigable water
5) Other relevant factors

Then, the agencies will evaluate whether the tributary and adjacent wetlands are likely to have an effect on the integrity of a traditionally navigable water. The effect must be more than speculative or insubstantial. If, using all of the aforementioned factors, the agencies determine that there is a significant nexus, then the provisions of the CWA will apply and the water will be deemed jurisdictional.

Swales, erosional features, and ditches

The Guidance also clarifies that swales and erosional features (such as gullies, small washes, etc.) are generally not jurisdictional. Additionally, ditches in upland areas that do not carry a relatively permanent flow of water are not jurisdictional.

Documentation

Finally, the Guidance states that the administrative record must support a jurisdictional determination. Thus, any paperwork must explain the reasons for a jurisdictional determination and disclose any data used in that determination. This includes maps, photos, soil surveys, literature, and references.

The Guidance can be found on the US EPA website at http://www.epa.gov/owow/wetlands/guidance/CWAwaters.html.

The U.S. Army Corps of Engineers has extended the deadline for public comment on the *Rapanos* guidance document. Initially, the comment period ended on December 5, 2007. However, the Corps extended that deadline until January 19, 2008. The special notice is posted at http://www.spk.usace.army.mil/pub/ outgoing/co/reg/pn/Special_Notice-Extension_of_Rapanos_Comments.pdf.

All Corps documents related to the Rapanos decision and guidance are located at http://www.usace.army.mil/cw/cecwo/reg/cwa_guide/cwa_guide.htm.

9. Endangered Species Rulings Reversed

On November 27, 2007, the U.S. Fish and Wildlife Service ("USFWS") reversed seven rulings on endangered species that it found were improperly influenced by former Deputy Assistant Secretary of the Department of Interior, Julie MacDonald. The review began after questions were raised concerning the scientific information used and whether the appropriate legal standards were followed.

After completion of the review, the California red-legged frog and the arroyo toad will have their final critical habitat designations revised. The USFWS will proceed with this revision as soon as funding is made available. Five other species, including the white tailed prairie dog, the Canada lynx, and the Preble's meadow jumping mouse will also have revisions made to critical habitat or listing status.

The Center for Biological Diversity and Earthjustice filed suit on December 17, 2007, to force the USFWS to overturn the 2006 reduction in critical habitat for the red-legged frog. The Center for Biological Diversity also filed suit on December 27, 2007, to compel the Department of the Interior to hand over documents about MacDonald's interference in endangered species and habitat decisions.

More information about the USFWS review can be found at http://www.fws.gov/endangered/. The petition regarding the red-legged frog can be found at http://www.biologicaldiversity.org/swcbd/PROGRAMS/esa/pdfs/Complaint-RLF.pdf.

10. U.S. EPA Refuses to Grant California a Waiver under the Clean Air Act

Under Clean Air Act section 209(a), a state may not regulate motor vehicle emission standards. However, section 209(b) allows the Environmental Protection Agency ("EPA") to waive this limitation if the state adopted standards for the control of emissions prior to March 30, 1966, and the state finds its standards at least as protective of public health and welfare as the applicable federal standard. California applied to the EPA for such a waiver so that it could enforce its stricter vehicle emission standards.

The EPA denied the request, asserting it wanted to avoid a piecemeal approach to the regulation. California joined by 15 other states filed suit challenging this decision in the Ninth Circuit U.S Court of Appeals.

11. *Schutte & Koerting, Inc. v. Regional Water Quality Control Board, San Diego Region* (December 20, 2007) 2007 Cal. App. LEXIS 2146

Exhaustion of local remedies is a well-known doctrine among those who have attempted to appeal an administrative decision. The doctrine requires that a petitioner appealing a governmental agency's determination or order must exhaust all of the remedies available through that agency before appealing to the courts. The Court of Appeal, Fourth Appellate District has now made it easier for petitioners appealing a determination of a regional water quality control board ("regional board") to exhaust their local remedies. In *Schutte & Koerting v. Regional Water Quality Control Board, San Diego Region* (2007) Cal.App.LEXIS 2146, the appellate court held that anyone appealing the determination or order of a regional board must only request a hearing before the State Water Resources Control Board ("State Board") in order to exhaust his or her local remedies.

The two petitioners in this case, Ametek and Schutte & Koerting, operated and continue to operate an aerospace facility in El Cajon, California. The manufacturing process used at the facility "generated wastewater and other wastes, including metal cleaning solvents. . . heavy metal waste, paint products, various acids, epoxies, caustic soda. . . and storm water." This waste leaked into the ground and contaminated the groundwater, leaving an underground plume flowing off the property. Since 1988, the San Diego Regional Board ("SD Regional Board") has overseen the investigation and clean-up of this site by the petitioners. Over the years, the SD Regional Board has approved various clean-up and abatement orders as well as human health risk assessments ("HHRA"). The dispute in this case arose over the most recent HHRA ordered by the Regional Board. For the purposes of this case, the procedure and not the substance of the appeal was at issue.

In an attempt to overturn the Regional Board's determination, petitioners requested and received a hearing before the State Board. The State Board agreed with the SD Regional Board, and petitioners appealed to the superior court. Before getting to the merits of the case, the superior court dismissed the claims on the grounds that petitioners had failed to exhaust their local remedies by not requesting a hearing before the Regional Board. Petitioners again appealed.

The appellate court reversed the ruling of the superior court and held that petitioners had exhausted their local remedies. The appellate court's discussion focused on section 13330, subdivision (b) of the Water Code, which states

> Any party aggrieved by a final decision or order of a regional board for which the state board denies review may obtain review of the decision or order of the regional board in the superior court by filing

> in the court a petition for writ of mandate not later than 30 days from the date on which the state board denies review.

In interpreting this language, the court found that review by a regional board was never mentioned in the statute. The statute only requires a request for review before the State Board. The court concluded

> [b]ecause section 13330(b) requires exhaustion of administrative remedies before the State Board, but is silent with respect to exhaustion before the Regional Board. . . a party who is aggrieved by a final decision or order of a regional board, and who has exhausted its administrative remedies before the State Board and has acted within the time limits specified in that section, may obtain judicial review without seeking or obtaining a hearing before the Regional Board.

Even if the petitioners fail to win their lawsuit against the Regional Board, their success in this case will be important for many cases to come. It relieves petitioners of one additional administrative stop and frees up the regional boards to hear other matters, until litigation ensues.