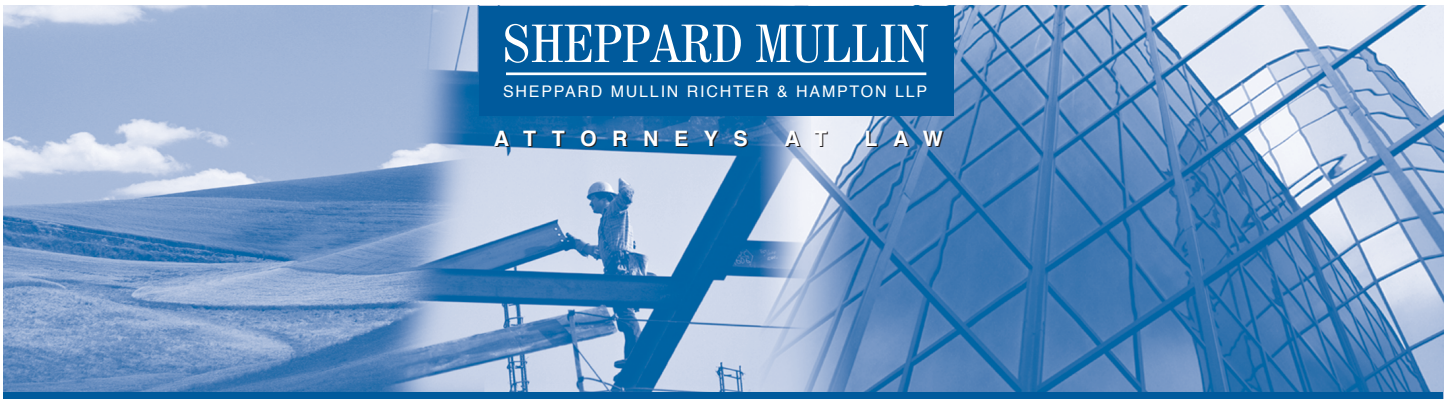



# Land Use and Real Estate Development Law Update

MARCH 2004

## News From The Courts

This Update includes summaries of recent State and Federal Court cases (both published and unpublished decisions) involving real estate development, land use, planning and zoning, and related environmental law.

**CEQA – Mitigation for Conversion of Farmland**

Where a proposed project will be built on, and thus consume, prime agricultural land, does the California Environmental Quality Act ("CEQA") require "mitigation," in the form of requiring the project applicant to acquire or fund the acquisition of easements to conserve other existing farmland? In the past year, the state appellate courts have issued at least three opinions involving this issue. However, the absence of definitive published case law precedent continues.

The most recent chapter in this saga began last September, when an appellate court published its decision in *Friends of the Kangaroo Rat v Department of Corrections*. The Court of Appeal for the Fifth Appellate District (Fresno) held in that case that the State Department of Corrections had properly conducted the environmental review for a new prison facility near Delano even though 480 acres of farmland would be lost to the project. The court held that the environmental reports had properly concluded it would not be "feasible" to mitigate for the consumption of farmland by requiring the State to acquire easements to preserve other existing farmland within the context of CEQA mitigation.

Then, in early February, the Third Appellate District (Sacramento) issued, but did not publish, its split decision in *South County Citizens for Responsible Growth v City of Elk Grove* (02/05/04), which reached a different conclusion. The case involved a CEQA lawsuit brought by a citizens group seeking to set aside the EIR certification and project approvals issued by City of Elk Grove for the Lent Ranch Marketplace project. The trial court had ruled for the plaintiffs and set aside the EIR for failing, among other things, to require payment of farmland conservation fees as a mitigation condition. The State Department of Conservation supported plaintiffs on this point.

The appeals court however, *reversed* the trial court on virtually all points and confirmed that the City had properly approved the EIR – with one exception. Two of the three justices on the appeal court concluded that there may be some merit to the idea of "mitigation for loss of agricultural land" by the payment of fees, and apparently the administrative record here gave some support to the "feasibility" of such mitigation measures. The majority distinguished (and partially disagreed with) the decision in the *Friends of the K-Rat*. The dissenting justice, however, agreed with the *Friends of the K-Rat* decision, and expressed doubt that farmland conservation fees would be deemed constitutional or legal. **Practice Note:** Apparently this EIR

had included some language which suggested that loss of farmland could feasibly be "mitigated" by purchase of conservation easements funded by the project, and the City had approved the EIR on that basis. In contrast, the State's EIR in *Friends of the K-Rat* had expressly rejected any idea that loss of farmland could be mitigated by anything other than denial of the project. This highlights the importance of having EIR's and Mitigated Negative Declarations, and related findings – even those which appear to support the project – carefully reviewed by legal counsel.

This chapter of the saga apparently closed on February 18, 2004, when the California Supreme Court ordered that the opinion in the *Friends of the Kangaroo Rat* case be depublished, so that neither case may be cited as precedent. This issue may therefore continue to generate uncertainty, and litigation, in the CEQA arena.

**CEQA – "Expedited" Resolution of Litigation**

"In CEQA cases, time is money." *County of Orange v. Superior Court* (10/07/03)

In a case dealing with the procedural aspects of handling CEQA litigation, involving challenges to the sufficiency of supplemental environmental review for a long-pending housing proposal, an appellate court held that the Legislature had called for courts to provide "expedited" resolution of such cases. The court recognized that even unmeritorious CEQA litigation could use delay to impair or derail a proposed project: "A project opponent can 'win' even though it 'loses' in an eventual appeal because the sheer extra time required for the unnecessary appeal (with the risk of higher interest rates and other expenses) makes the project less commercially desirable, perhaps even to the point where a developer will abandon it or drastically scale it down."

This case involved a CEQA challenge to a proposed residential development. The court held that a developer seeking to defend the county's approval of its project should be permitted to include in the administrative record all of the documents supporting the approval of the projects, including documents relating to project modifications. The challengers objected to the inclusion of these additional materials, and argued that this procedural dispute was not ripe for appellate review until after the trial of the case. The appellate court decided that the interests of speedy resolution were better served by the appellate court adjudicating the dispute, rather than awaiting a trial on a partial or incomplete record. "The legislature has obviously structured the legal process for a CEQA challenge to be speedy, so as to prevent it from degenerating into a guerrilla war of attrition by which project opponents wear out project proponents."

**Consequences of Frivolous Land Use Litigation**

Opponents of development projects have usually been free to use the courts to oppose or delay projects without much fear of financial retribution – even if the opponents have engaged in malicious or frivolous litigation. However, an appellate court recently held that the San Diego Padres baseball team could pursue a lawsuit for malicious prosecution against an attorney who had brought a series of lawsuits to stop or delay the development of the new Padres baseball stadium. In response, the defendant attorney had filed a special motion seeking to strike the Padres' malicious prosecution claims by arguing that the Padres were pursuing a "strategic lawsuit against public participation" (SLAPP suit). The trial judge denied the defendant's motion to dismiss and held that the Padres could pursue the malicious prosecution claims. That decision was affirmed by the majority of the divided appellate court. *Padres, LP v Henderson* (12/17/03). Timothy Taylor and Karin Vogel of Sheppard Mullin's San Diego office represented the San Diego Regional Chamber of Commerce as *amicus curiae* in support of the Padres. The appeals court held that the attorney was *not* "absolutely privileged" to file the underlying lawsuits objecting to the baseball park, and would be required to prove his lack of malice and the existence of good cause for his previous litigation as a defense to the malicious prosecution. One justice dissented from this, arguing that the defendant attorney should have been shielded by the "petition immunity" of the First Amendment…" The defendant has asked the Supreme Court for review of the decision, which has been opposed, and the matter is pending a decision on the petition for review.

**Regulatory "Takings"**

The federal Ninth Circuit Court of Appeals recently dealt with two separate but similar cases challenging mobile home park rent control regulations. Plaintiffs lost in both cases, but raised questions regarding the treatment of takings claims in California courts. The plaintiffs in both cases had elected not to challenge the regulations in California state courts, but rather, went directly to federal court to pursue claims that the regulations had the effect of imposing an unconstitutional "taking" of their property in violation of the Fifth Amendment to the U.S. Constitution. The plaintiff property owners contended that they were not required to "ripen" their takings claims by exhausting state court remedies, because to do so would be "futile." Both cases involved contentions that California courts are out of step with federal constitutional law on protection of private property.

In *Hacienda Valley Mobile Estates v City of Morgan Hill* (12/18/03), the aggrieved property owner argued it should be allowed to bring its takings claims directly in federal court, because of the alleged 'hostility' of the California state courts to such claims, and "undue deference" allegedly shown by state courts to governmental agencies. The Ninth Circuit took note of the argument by the property owner that "the California courts apply a standard of review in takings cases that is unconstitutionally deferential to the government." However, the court concluded that none of the California decisions cited by plaintiffs contained a sufficiently "explicit rejection" of the federal constitutional standard of review to support the plaintiff's argument. While plaintiff cited several California cases rejecting takings claims, those cases did "not totally foreclose the possibility that the California courts will use" the proper standard of review required under the U.S. Constitution.

In the second case, *Carson Harbor Village Ltd v City of Carson* (01/02/04), the plaintiffs raised similar arguments about the constitutional inadequacy of the remedies for takings claims under recent California court decisions. Once again, the Ninth Circuit noted at least some of plaintiff's reservations about the handling of takings claims by California state courts, and acknowledged that the plaintiff "raises serious concerns about the adequacy of the new compensation procedures established in [recent California state court decisions]." One of the three justices on the appeals panel wrote a separate concurring opinion in order "to express … concern that California's procedures may not provide 'just compensation' . . ." for a governmental taking of property as required by the US Constitution." However, again the federal court would not speculate as to the outcome of a suit in California state court, so it again dismissed the federal suit as being 'unripe.'

### Fees – Right to "Pay Under Protest" and Recover Refund?

Several cases have recently involved the procedural issues in challenging the imposition of various types of development fees or exactions. Historically, developers or fee-payers in California have had the option of paying disputed fees "under protest" and subsequently suing for a refund of the disputed charge. However, there may be some situations where courts have held that such a remedy is not available or that challenges to particular types of fees must be brought within short periods of time following the enactment of fee resolutions, regardless of when the fee is actually collected from a particular project or fee-payer.

• **Street Excavation Fees:** In a significant case on the scope of relief from fees and exactions paid under protest, an appellate court held that the payment under protest remedy is available for a wide variety of charges or "exactions" – whether or not they are strictly considered as "development fees." *Williams Communications v. City of Riverside* (12/18/03). Fees paid to a city for permission to install fiber optic telephone conduit in the city's streets were held to be fully recoverable in a refund action. Plaintiff entered into a license agreement with the city, paid the fee, installed the conduit, and then sued for a refund on the basis that the license agreement had been entered into under duress, and that the fees were illegal because they exceeded the city's reasonable costs. The appellate court agreed, and held that the fees were recoverable under the "pay under protest" and refund sections of the Mitigation Fee Act. The court agreed that even though these fees were not true "development fees" they were nevertheless "other exactions" as used in the statutory scheme, and therefore the refund remedy of the Fee Act was applicable. Plaintiffs were entitled to a refund of the challenged fees, plus interest and attorneys fees (pursuant to the contract with the city).

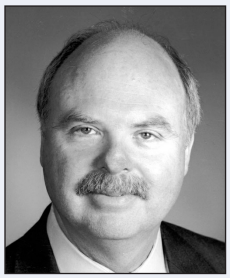
• **Building Permit Fees:** Whether such a "refund" remedy remains available in the case of challenges to building permit fees, for example, is an issue which is now pending before the California Supreme Court in B*arratt American Inc. v City of Rancho Cucamonga*.

However, an appellate court recently confirmed that the legality of changes in the method of calculating such building permit fees could be challenged by the means of "payment under protest" – at least where the change in fee calculation had not been adopted at a public process or by formal resolution or ordinance. In *Barratt American v City of Encinitas* (02/10/04) the appellate court held that a developer's challenge to a 1992 resolution setting a fee schedule was time-barred. However, the court also held that the developer was not barred from pursuing its claim that the city had subsequently modified (and increased) its building permit fees by informal action of the building official in changing the valuation multiplier schedule used to calculate such fees. Since there had been no formal public action on this change, the court held that the builder's challenge to these increased fees paid under protest were not time barred. The court also agreed with the rationale of a 1993 Attorney General Opinion that had declared that a local agency "may not charge building permit fees that are in excess of the estimated reasonable cost of providing the services rendered…"

**Homeowners' Associations – Enforcement of Design Covenants**

An appellate court has confirmed that a residential homeowners' association had authority to enforce protective covenants, including unrecorded design regulations, to prohibit an individual resident from installing a fence which was deemed to violate the community's design standards. In *Rancho Santa Fe Association v Dolan-King* (01/07/04) the court affirmed a verdict in favor of the owners' association which had sought an injunction and declaratory relief to prevent an individual home owner from erecting a five-foot tall wrought iron fence along one side of her 3-acre parcel. The association had determined that the fence fit the definition of "major construction" requiring association approval by reference to its historic but informal, unrecorded guidelines. The appellate court affirmed, holding that the guidelines were not inconsistent with the recorded covenants, and were reasonable attempts to illustrate the distinctions between minor and major construction. The court also affirmed the trial court's award of more than $300,000 in attorneys fees to the association.

**ABOUT THE AUTHOR**



*Dave Lanferman* is a member of the Real Estate, Land Use and Environmental practice group in Sheppard Mullin's San Francisco office where his practice emphasizes development processing and entitlements, CEQA and land use litigation. His expertise includes environmental review of development proposals, mitigation, impact and development fees and exactions, counseling residential and commercial developers, as well as public agencies, on project review and conditions of project approval. He is a member of the editorial board of the California Real Estate Reporter, and former chair of the Real Estate Section of the Alameda County Bar Association. For further information, please contact Dave at (415) 774-2996 or dlanferman@sheppardmullin.com.

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Richard F. Anthony .....(213) 617-4124
Nancy Brandel .....617-5425
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R. Marshall Tanner .....424-8239

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Domenic C. Drago .....720-8989
Rafael F. Muilenburg .....72 -8908
Amelia D. Sanchez .....720-8944

# CHANGES TO THE GENERAL PLAN GUIDELINES

In October 2003, the Governor's Office of Planning and Research ("OPR") promulgated the most recent edition of its General Plan Guidelines. Although the Guidelines are advisory and not mandatory, they are California's only official document explaining the general plan's legal requirements. California courts have also emphasized the importance of these Guidelines, stating that they assist courts in determining compliance with the state's planning laws. *Twain Harte Homeowners Ass'n v. County of Tuolumne*, 138 Cal.App.3d 664, 702 (1982).

Major changes to the General Plan Guidelines:

1. **Environmental Justice-** According to state planning law, environmental justice is defined as the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies. Gov Code § 65040.12(e). A 2001 legislative mandate required the OPR to provide guidance to cities and counties for integrating environmental justice into their government plans. As a result, the OPR addressed environmental justice considerations in the General Plan Guidelines. These considerations include:

    - Planning for the equitable distribution of new public facilities and services that increase and enhance community quality of life.
    - Avoiding over concentration of industrial facilities and uses that pose a significant hazard to human health and safety near residential dwellings.
    - Avoiding proximity of new schools and residential dwellings to industrial facilities and uses that pose a significant hazard to human health and safety.

2. **Two New Optional Elements-** A general plan must address seven mandatory elements, including land use, circulation, housing, conservation, open space, noise and safety. In addition, a general plan may address optional elements that relate to physical development. The 2003 Guidelines offer advice on the two new optional elements of water and energy. Discussion on the water element addresses water supply and demand, water quality, wastewater treatment and disposal, watershed features and processes, flood management, stormwater management, and interagency coordination and collaboration. The Guidelines discuss the energy element in relation to land use, circulation, subdivision design, energy facility siting policies, distributed generation, public facilities and fleets, geothermal energy, building standards, water and wastewater, and environmental justice.

3. **Public Participation-** The new Guidelines include a more expansive section on public participation in the development of the general plan. Specifically, the Guidelines address the role of community participation in the general plan process, including desired goals and tools to achieve those goals.

4. **Sustainable Development-** Revisions to the 1998 Guidelines on sustainable development have been incorporated into the discussion on environmental justice.

5. **Annual Progress Reports-** The Guidelines expound on the required monitoring by planning agencies in implementing their general plan. The Guidelines also offer suggestions on how to prepare an annual progress report.

*For a complete version of the 2003 General Plan Guidelines, please visit http://www.opr.ca.gov.*


**ABOUT THE AUTHOR**

*Katherine Kim* is an associate in the Real Estate, Land Use and Environmental Practice Group in Sheppard Mullin's San Francisco office. She has worked on many aspects of complex development projects, including endangered species, wetlands and water quality matters, land use planning, and development agreements. She advises and represents clients on issues that arise in project planning and permitting, regulatory compliance and land use litigation. For further information, please contact Katherine at (415) 774-2912 or kkim@sheppardmullin.com.