

Exclusive

## The Legal Regulations Landowners Need to Know

LOS ANGELES—In this EXCLUSIVE interview, David Waite of Cox, Castle & Nicholson talks about the trends and new legal... [Read More](#)



GlobeSt.com™

## The Legal Regulations Landowners Need To Know

June 21, 2016

Kesli Maree Borland



*David Waite is a real estate and land use partner at Cox, Castle & Nicholson.*

land-use decisions. David Waite, a partner and land-use expert at Cox, Castle & Nicholson, recently spoke at the 2016 ULI Spring Conference about these issues, so to delve in deeper and find out how these issues are affecting landowners and the proactive steps that landowners can take to offset the impacts of these new regulations, we sat down with Waite for an exclusive interview.

LOS ANGELES—Landowners are facing some regulatory challenges that may alter development and investment decisions. The California Supreme Court recently weighed in on CEQA and ESA guidelines, offering some guidance for landowners and those involved in land acquisitions transactions, while rezoning issues are also affecting

GlobeSt.com: What industry trends do you see affecting landowners right now?

David Waite: Landowners that are in the so-called “path of development” extending from the urban core and beyond “first ring” suburban communities are evaluating whether properties that they own or control have the ability to allow for the development of more intense or alternative land uses that can accommodate growth and development. For example, landowners are evaluating whether land currently zoned for agricultural uses can be rezoned for residential, commercial or industrial uses. These new land uses include not only residential subdivisions and master-planned communities, but also commercial and industrial uses such as inland ports including warehouse, distribution, logistics, solar facilities and wind farms. Because there is very little land available within the urban core of California’s major cities that can accommodate growth and development on a large scale, there will be increasing demand to convert existing agricultural land uses to allow for growth and development.

GlobeSt.com: What are some of the major legal issues/challenges that landowners are facing in court? How do you see CEQA and ESA affecting the future of land ownership and acquisition?

Waite: The California Supreme Court’s recent California Environmental Quality Act (CEQA) decision ushers in two critical rulings affecting land use and environmental law. In *Center for Biological Diversity v. California Department of Fish and Wildlife* (November 30, 2015, Case No. 217763), a 5-1-1 decision, arose out of an environmental impact report (EIR) prepared for the Newhall Ranch master-planned community located in northern Los Angeles County. The EIR was jointly prepared by the California Department of Fish and Wildlife and the U.S. Army Corps of Engineers to evaluate the impacts of several resource agency project approvals, including a resource management plan, a conservation plan for the endangered spineflower plant, a streambed alteration agreement, and two permits for the incidental take of protected species.

The rulings in the case are likely to make the CEQA process, and the analysis of greenhouse gas (GHG) emissions in CEQA documents substantially more complicated. In so doing, however, the Supreme Court provides at least one “safe harbor” analytical framework by which project level GHG emissions are to be evaluated under CEQA. The EIR analytical framework upheld by the Court was a determination of significance of GHG emissions related to the project

by comparing those emissions to the reductions from “business as usual” that will be needed to reduce emissions to 1990 levels by 2020, as required by AB 32, the Global Warming Solutions Act. This comparison to “business as usual” emissions is based on the 2008 Climate Change Scoping Plan released by the California Air Resources Board. The court held that consistency with meeting AB 32’s statewide goals is a permissible significance criterion for project emissions under CEQA: “The critical CEQA question is the cumulative significance of a project’s greenhouse gas emissions, and from a climate change point of view it does not matter where in the state those emissions are produced.” The Court found that the BAU methodology was properly used as a yardstick for determining the significance of future emissions associated with the project.

After upholding the EIR’s methodology, however, the Supreme Court held that the EIR did not adequately substantiate the conclusion that cumulative impacts from the Newhall project would be less than significant. The EIR reached this determination based on an anticipated 31 per cent reduction against business as usual, compared to a statewide target of a 29 per cent reduction from business as usual. The Court held that “the EIR’s deficiency stems from taking a quantitative comparison method developed by the Scoping Plan as a measure of the greenhouse gas reduction effort required by the state as a whole, and attempting to use that method, without adjustments, for a purpose very different from its original design” – namely, measuring the impacts of a specific project in a specific location.

Within the accepted framework and methodology, the challenge going forward is that an EIR must support, through “substantial evidence,” a reasoned and analytical comparison of the statewide emission reduction standards to be applied to a specific land use at a specific location and how the project level GHG emissions achieve to those standards. Exactly how that analysis will be done on future projects is unclear and will undoubtedly be the subject of future discourse and debate. The required analysis will unquestionably vary depending upon the type of project, and some form of equivalency analysis of the statewide standards to the project location. The challenge going forward is how best to quantify and analyze project level greenhouse gas emissions and to correlate those emissions to statewide GHG reduction mandates and standards. In a concurring and dissenting opinion, Justice Corrigan correctly

observes that this could result in CEQA compliance becoming a “moving target, impossible to satisfy.”

The second portion of the Supreme Court’s ruling expanded the regulatory hurdles a project with fully protected species habitat must address. The fully protected species at issue was a fish, the unarmored threespine stickleback. With a few exceptions, a fully protected fish cannot be “taken or possessed at any time.” “Take” is defined as “hunt, pursue, catch, capture, or kill,” or to attempt those activities. The project included mitigation measures allowing the United States Fish and Wildlife Service to temporarily collect and relocate stickleback if necessary to prevent harm during construction. The California Department of Fish and Wildlife (the “Department”) concluded that these measures were not “take” and were consistent with the fully protected fish statute. The majority disagreed, holding the “capture and relocation” authorized by the mitigation measures was “take.” The majority reasoned that because the research exception specifically states that research does not include CEQA mitigation measures, such measures must constitute take.

GlobeSt.com: What proactive solutions for land planning and land management do you recommend to offset regulatory impacts?

Waite: Invariably, the conversion of land uses to allow for more intense development outside the urban core and “first ring” cities and suburbs can contribute to urban sprawl, resulting in increased traffic and congestion. Responding to this concern, many cities and counties are beginning to develop comprehensive land use plans, including updates to their general plans, to encourage a healthy balance of jobs and housing. The goal is to reduce “vehicle miles traveled,” the emerging regulatory metric for evaluating traffic patterns for new development projects. In addition, cities and counties are looking closely at how to reduce greenhouse gas (“GHG”) emissions for new development projects and to manage California’s precious water resources. In many cases, transitioning from agricultural uses to non-agricultural uses can result in a reduction in GHG emissions and reduce water consumption. New energy efficient homes, and emerging technologies such as the promise of autonomous electric vehicles can reduce GHG emissions. Overall, comprehensive proactive land use planning by cities and counties that

anticipates shifting land uses and emerging technologies can offset regulatory impacts over time.