

LAND USE & NATURAL RESOURCES

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COX CASTLE & NICHOLSON LLP 2011 FIRST QUARTER CEQA CASE LAW UPDATE

The year 2010 saw more published CEQA decisions than in any prior year. So far, the courts are issuing substantially fewer decisions in 2011, and there were only two published CEQA decisions in the first quarter of 2011. There were, however, several other important CEQA developments in the courts.

Of particular note, in *Association of Irrigated Residents et al v. California Air Resources Board*, San Francisco Superior Court Case No. CPF-09-509562, a San Francisco Superior Court judge ruled that the California Air Resources Board failed to conduct an adequate environmental impact review before it adopted the State's AB 32 Scoping Plan in December 2008. This plan sets forth the Board's basic outline of actions to reduce California's greenhouse gas emissions. The court enjoined the implementation of the Scoping Plan until the Board complies with CEQA. The implications of this decision are profound. It likely will slow California's efforts to adopt a cap and trade program and could affect not only the Board's December 2010 decision to proceed with a cap and trade program, but the implementation of many other measures as well such as California's low carbon fuel program and renewable portfolio standard. The Board has indicated that it may seek agreement from Petitioners that the injunction does not apply to programs other than cap and trade.

Also of note, the Supreme Court denied petitions for review that were filed in two cases, *Friends of Juana Briones House v. City of Palo Alto* and in *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (both of which were reported on in our Fourth Quarter 2010 Case Law update). Finally, the Supreme Court also denied the depublication requests that were filed in *Sunnyvale West Neighborhood Ass'n v. City of Sunnyvale City Council*, which was also reported in the Fourth Quarter 2010 Update.

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CASES IN THIS ISSUE:

LandValue 77, LLC v. Board of Trustees of California State University
Wollmer v. City of Berkeley

Where an EIR Is Found Legally Inadequate, The Entire EIR Must Be Set Aside: *LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675.

In this case, the Fifth District Court of Appeal held that, when a reviewing court determines that portions of an EIR are legally inadequate, the court must set aside the entire EIR, not just those portions of the EIR that were found to be inadequate.

At issue in *LandValue 77* was an EIR for a mixed-use development on the Cal State Fresno campus. The trial court determined that the EIR did not adequately analyze potential impacts related to traffic, water supply and air quality. The trial court's decision, however, did not require decertification of the entire EIR or rescission of the project approvals, nor did the court issue a peremptory writ of mandate. Petitioners appealed on the basis that the trial court's remedies were inadequate.

Citing Public Resources Code section 21168.99(b), CSU argued that the trial court's decision should have only included those remedies necessary to comply with CEQA and thus only the inadequate portions of the EIR should be set aside. The appellate court rejected that argument and reversed the trial court in part. The court stated that CEQA provides for the certification of an EIR only when it is complete, and that such requirement is not compatible with partial certification. Although some prior decisions have not required decertification of an entire EIR determined to be partially noncompliant with CEQA, the *LandValue 77* court held that issuance of a peremptory writ of mandate was required in such cases and the trial court's order must set aside the project approvals and entire EIR.

Court of Appeal Harmonizes CEQA and State Density Bonus Law To Uphold Use of In-Fill Exemption: *Wollmer v. City of Berkeley* (2011) 193 Cal.App. 4th 1329.

This case harmonizes the State Density Bonus Law and CEQA. The City relied on the categorical exemption for urban in-fill projects to approve an affordable senior housing development that relied on the density bonus law to exceed the number of units otherwise allowed on site. The case contains several rulings that should be helpful

when determining whether similar projects may be categorically exempt from CEQA review.

First, the court found that the City properly applied the in-fill exemption (CEQA Guideline § 15332), which requires that the project comply with all "applicable" general plan and zoning designations and regulations. The City properly harmonized the density bonus law, CEQA, and the City's own municipal code to find that when the DBL requires a zoning standard be waived, that standard is not "applicable," and therefore, a project utilizing the density bonus law may still meet the requirements of the in-fill exemption.

Next, the court rejected petitioner's claim that the project's location at the intersection of two major thoroughfares, which were also state highways, was an "unusual circumstance" that prevented the project from proceeding by in-fill exemption. CEQA Guidelines § 15300.2(c) provides that "[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." The court found that locating an in-fill project at the intersection of two major city streets is precisely what the law encourages. The court stated that the project's location is not an "unusual circumstance," let alone a circumstance creating an environmental risk that does not generally exist for other in-fill projects.

Finally, the court rejected petitioner's contention that the City allowed the project to mitigate its way into a categorical exemption by allowing the applicant to dedicate land for a left-turn lane on one of the streets fronting the project. The turn lane improved existing traffic. The Court found that the City did not mitigate the project into qualifying for a categorical exemption. Rather, the City properly exercised its discretion to find that the project would not cause a significant traffic impact. The dedication of a five-foot right-of-way, enabling the City to improve the traffic was not a CEQA mitigation measure, but rather a component of the project that assisted the City with an existing traffic issue.