

LAW BRIEFING

Wetlands – The Supreme Court Dives In

As discussed in a special Allen Matkins Environmental Law Bulletin, on January 9, 2001 the U.S. Supreme Court issued a major new ruling which has the potential for significantly limiting, if not eliminating, federal jurisdiction by the Corps of Engineers over “nonnavigable, isolated intrastate waters.” Some observers believe that this much anticipated ruling in the case of *Solid Waste Agency of Northern Cook County v. US Army Corps of Engineers* (“SWANCC”) may affect as much as one-fifth of all wetlands and waters that have heretofore been subject to the Corps’ permitting program.

This case involved a proposed landfill that would require filling a series of permanent and seasonal pools of water in an old abandoned sand and gravel mining pit operation which was wholly located within two counties in Illinois. These pools did not cross state lines and they were not connected or adjacent to other streams or lakes which might be used in interstate commerce. To find federal jurisdiction, the Corps had to rely upon the so-called “Migratory Bird Rule.” Under this theory of jurisdiction, first published by the Corps in 1986, usage of an intrastate water by a migratory bird crossing state lines created federal jurisdiction for purposes of the Section 404 permitting program.

The Court, in a 5 - 4 ruling, was not persuaded by the Corps. Specifically, Chief Justice Rehnquist, writing for the majority, found that the Migratory Bird Rule is not authorized by the Clean Water Act which governs the wetlands permitting program, and that the Corps was therefore wrong to rely upon it in finding jurisdiction over the mining pit ponds. The majority opinion focused on the Clean Water Act’s limitation of jurisdiction to “navigable waters,” and found nothing in the Corps’ argument to suggest that the ponds in question met the definition of “navigable waters.” The Migratory Bird Rule itself has no basis in navigation, and even though the Court

appeared willing to give the term “navigation” a very broad meaning, it saw no basis for “reading the term ‘navigable waters’ out of the statute.”

The significance of this ruling is potentially huge for the federal wetlands permitting program, and its full impact will have to be distilled in the days and months to come. But if taken at its apparent face value, the Court may have just deleted an entire class of waterbodies (“nonnavigable, isolated intrastate waters”) from federal jurisdiction that has been asserted and applied by the Corps in one form or another

Even more important in California, although the Corps may not be able to assert claims over isolated, nonnavigable wetlands, fills of same will in many instances, if not most, still be subject to regulation under State law.

since at least 1977. Waters affected by this decision may include, depending on the site-specific facts, vernal pools, other seasonal and perennial ponds and wetlands that have no outlets, tributaries and washes associated with these isolated waters, artificially-created wetlands and waters that have no connection with navigable waters, and playa lakes.

There are a number of important caveats and qualifications that follow from the Court’s ruling. The Corps’ wetlands permitting program is still alive and well with regard to “navigable waters,” which are defined to include waters that are presently, in the past or in the future susceptible for use in interstate and foreign commerce. Furthermore, waters which are “adjacent” or tributary to navigable waters are still jurisdictional. The exact meaning of these terms (“navigable” and “adjacent waters”)

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Development Opportunities In Downtown Los Angeles

The City of Los Angeles has adopted, or is in the process of drafting, several ordinances that will provide incentives for developers to invest in downtown Los Angeles. Over the past few years, there has been over \$1 billion of investment in downtown with such projects as Staples Center, Disney Concert Hall, the Cathedral, the Old Bank District Project, Spring and Premier Towers projects, the Medici Apartments and the Los Angeles Center Studios. In an effort to keep this wave of investment going, and in the absence of redevelopment tools (the City’s Community Redevelopment Agency’s authority in downtown Los

Angeles has lapsed) the City has been forced to look at creative development strategies. The following summarizes some of the City’s efforts to continue the re-vitalization effort:

Financing & Entitlements

For the past three years, the Mayor’s Office of Economic Development/LA Business Team has made downtown a priority area of the City — the intention being to make downtown not only a place to live and work, but also a cultural, entertainment and tourist destination. Towards this end, the Mayor’s Office has supported and helped to obtain gap financing and expedite the permitting process for all of the downtown projects listed above.

Adaptive Reuse Ordinance

Enacted on April 14, 1999, the Adaptive Reuse Ordinance is intended to encourage the rehabilitation and reuse of historic buildings in the downtown area and to promote mixed-use development in order to facilitate a 24-hour urban environment. Passage of the Ordinance was key in spurring two market-rate, loft-style development projects: The Old Bank District and Spring Towers. The Old Bank District project consists of seven historic buildings and includes 240 loft style housing units, 80,000 square feet of retail and a boutique hotel. The Spring Towers development project includes

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Friends Of Mammoth – More Bad News For Redevelopment

The ambitious redevelopment plans of the Town of Mammoth Lakes and its redevelopment agency were dealt a severe set-back by the Third District Court of Appeal in the decision of *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511.

The redevelopment agency of the Town of Mammoth ("Mammoth") undertook the formation of a redevelopment plan pursuant to state law. In connection with the preparation of the redevelopment plan (the "Plan"), Mammoth's redevelopment agency (the "Agency") undertook the preparation of an environmental impact report.

The Plan was highly ambitious and included three areas totaling over 1,100 acres, (a main area of approximately 907 acres which encompassed Mammoth's traditional commercial area and 1,200 units of housing), a 30 acre industrial park and a 200 acre airport. The Plan specifically authorized the Agency to "provide or participate in providing" at least 72 separate public improvements and facilities, including an overhead gondola, an expanded community library and meeting hall, a town amphitheater, a 300-seat performing arts center, child care facilities, fire and police facilities and an airport runway and taxiway extensions to serve commercial jet aircraft with accompanying expansions to the airport terminal. In all the expected cost of the project improvements exceeded \$135 million dollars.

The Agency prepared an EIR which did not analyze the direct environmental impacts potentially caused by each of the 72 development projects proposed in the Plan. The Agency's EIR instead provided that individual projects would be subject to additional environmental review on a case-by-case basis in accordance with Section 15168 of the CEQA Guidelines.

Plaintiffs brought an action contesting the certification of the EIR and contesting the validity of the Plan based on the Community Redevelopment Law.

The Court of Appeal held that the EIR was inadequate based on the provisions of Public Resources Code § 21090 which provides that a redevelopment plan EIR and all public and private projects implemented pursuant to the plan should be treated as a single project for purposes of CEQA. Accordingly, the Court held that as a matter of law, subsequent environmental review of the specific projects was *prohibited* by state law unless one of the three events specified in California Public Resources Code § 2116 applied: (a) substantial changes are proposed on the project; (b) substantial changes occur with respect to the circumstances under which the project is being undertaken; or (c) new information, not known at the time the environmental impact report was certified becomes available.

The court also attacked the Agency's determination of blight based on a survey which did not specifically show that any buildings were unsafe or unhealthy for human occupation, and which reported that less than two percent (2%) of the buildings within the proposed project area had any building code violations.

The court also found that no substantial evidence supported the Agency's finding that the area was "predominantly urbanized" (a requirement under the Health & Safety Code) because the Agency had included extensive areas of nondeveloped property within the project area and had classified it "urban" simply because it was located within the same assessor's parcels with other partially developed property.

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Development Opportunities (continued from page 1)

36 loft units ranging from 1600-2200 square feet.

The Adaptive Reuse Ordinance establishes an overlay zone within which the benefits of the Ordinance are

Enacted on April 14, 1999, the Adaptive Reuse Ordinance is intended to encourage the rehabilitation and reuse of historic buildings in the downtown area . . .

applicable to structures built prior to 1975. The Ordinance provides significant savings, both in terms of time and money, to developers looking to convert or renovate older buildings. Some of the benefits of the Ordinance are outlined as follows:

a. Planning and Land Use

Discretionary review by the Planning Department is not required.

Projects are categorically exempt from the California Environmental Quality Act (CEQA).

No variance required for existing conditions for yards, height, parking and floor area that do not meet current Code.

Residential density requirements are waived.

b. Structural Seismic Safety

Under certain flexible conditions, conversion of a commercial building to residential use may be made without full compliance with structural requirements for a new building.

c. Disabled Access

Conversion of an existing building to a privately-owned residential

use does not trigger the disabled access requirements in the residential use area.

The Ordinance also provides for general flexibility in the fire/life safety and building standards required for adaptive reuse projects.

Proposed Entertainment Overlay Zone

Several departments within the City family are currently in the process of jointly drafting an ordinance that would provide for an "Entertainment Overlay Zone" in the heart of downtown Los Angeles. Applicable to Spring Street and Broadway between 3rd and 9th Streets, the intent of the Entertainment Zone would be to provide incentives for entertainment uses to locate in the heart of downtown Los Angeles. This Ordinance is modeled after an Ordinance in San Francisco, which led to the revitalization of the South of Market Area. It is expected that the

Ordinance will allow night clubs and bars to remain open past 2:00 a.m., and also provide business tax and other incentives to those establishments that choose to locate within the boundaries of the entertainment overlay zone. It is expected that this Ordinance will be drafted and enacted by June of 2001.

Conclusion

The combination of the City programs outlined above has the potential to provide a unique advantage, over time, to the downtown area. In addition, the Community Redevelopment Agency is currently in the process of enacting a new downtown redevelopment project area, which will further supplement the economic tools available for development projects in the area. ■

Court Of Appeal Approves Conditional Development Agreement

California's Development Agreement Statute (Government Code § 65864 et seq.) allows a city or county to freeze zoning and other land use regulations to guarantee that a development project will not be subject to subsequent changes in the approval process. The Development Agreement Statute was enacted by the California legislature in response to *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785. In *Avco*, land use restrictions were applied to a project after development work had been undertaken but prior to the issuance of building permits. The Supreme Court held that a developer had no "vested right to complete a project before building permits were issued." In *Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors* (2000) 84 Cal.App.4th 221, the Court of Appeal for the Second Appellate District upheld the County of San Luis Obispo's entering into a "conditional" development agreement for the development of a 13,800-acre ranch. The owner of the ranch engaged in extensive negotiations with the County and the Advisory Council, including a mediation proceeding. After achieving a consensus in the mediation, the County prepared a development agreement which froze the zoning applicable to the property in exchange for the developer's commitment to file a specific plan in compliance with the County Land Use Requirements, including the specific standards set forth in the County's Salinas River Area Plan. Essentially, the development agreement contemplated a second development agreement that would govern the actual construction of the Project. The development agreement contemplated a low density project consisting of 550 housing units in an 1,800 acre area, and required that at least 8,400 acres be set aside for open space with an additional 3,600 acres committed to a 40 year Williamson Act Agricultural Preservation Agreement.

Dissenters from the mediation sued to invalidate the development agreement claiming that the County's entering into the development agreement was a "surrender" of its legislative powers. In upholding the development agreement, the Court said:

"The statute is best served through a liberal construction which encompasses agreements that substantially comply with its specific terms and conditions and achieve its essential objectives . . . the statement of legislative purpose in Section 65864 encourages the creation of rights and obligations early in a project in order to promote public and private participation during planning, especially when the scope of the project requires a lengthy process of obtaining regulatory approvals."

Accordingly, the court upheld the agreement which committed the County to its current development criteria while leaving subsequent construction and project specific issues to subsequent consideration, including the adoption of an environmental impact report. In this regard, the court held:

"Additionally, environmental review is advanced by considering environmental issues at the earliest feasible time . . . the Agreement makes environmental review an integral part of the planning process, thus avoiding the sort of 'post-hoc rationalizations to support action already taken' which might occur if environmental review were deferred until later." Citing *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376, 394.

The court also held that the development agreement complied with the requirements of the State's Development Agreement Statute which requires enumeration of specific development criteria within the agreement. The court held that the agreement's reference to existing land use ordinances as the governing

development criteria satisfied the requirements of the Development Agreement Statute.

The *Santa Margarita* decision supports the notion that comprehensive planning in the earlier stages of development is an important and worthwhile objective. The court appears to have been swayed (although it makes no mention of the fact) that the project was approved on a very low density basis and that the developer had gone through a lengthy development screening process with the County, including a mediation proceeding which included the opponents.

Although the *Santa Margarita* decision is certainly good authority for the proposition that development agreements do not constitute an invalid surrender of a city or county's police power, it is worthwhile to remember that a city's or county's entering into a statutory development agreement is a legislative act and therefore purely discretionary and that municipalities are often reluctant to enter into these arguments until they have fully extracted the development considerations they are looking for in exchange.

Additionally, developers should not place too much reliance on the *Santa Margarita* decision, at least from a CEQA standpoint. The court affirms in its decision that the development agreement was a "project" but says nothing about the project's compliance with CEQA. The court states in its opinion that environmental review was an integral part of the planning process but fails to mention any certification of an EIR with respect to the approval of the development agreement itself. Accordingly, a developer seeking the substantial benefits of the vested rights that a development agreement provides should be sure to cause at least a "first-tier" EIR to be certified to ensure that the development agreement survives a CEQA attack. ■

Additionally, developers should not place too much reliance on the Santa Margarita decision, at least from a CEQA standpoint. The court affirms in its decision that the development agreement was a "project" but says nothing about the project's compliance with CEQA.

The court also attacked the Agency's determination of blight based on a survey which did not specifically show that any buildings were unsafe or unhealthy for human occupation, and which reported that less than two percent (2%) of the buildings within the proposed project area had any building code violations. In sharp wording, the Court held that the Agency's efforts to incorporate large amounts of undeveloped and non-urbanized property was a classic misuse of redevelopment power.

The *Friends of Mammoth* case is the most recent of a consistent line of recent appellate decisions striking down the efforts of redevelopment agencies to establish new redevelopment project areas based on surveys which do not support the requisite criteria of the Health & Safety Code for the redevelopment of "blighted areas."

From a CEQA standpoint, the decision is particularly perplexing for redevelopment agencies. The court's holding that a redevelopment plan is a single project for CEQA purposes requires that a redevelopment agency conduct an up-front CEQA analysis of all the activities proposed within the redevelopment plan. In this regard, the court's decision gave little guidance as to what was required, saying only that the analysis must be conducted "at least to the same extent each project is detailed in the redevelopment plan and its accompanying final report." ■

promises to become much more important, but we know, for example, that all tidally-influenced waters and "adjacent" wetlands remain jurisdictional. Also, the Court struck down use of the Migratory Bird Rule as a basis for jurisdiction over isolated, intrastate waters, but it did not expressly state that these waters could never be found to be jurisdictional under the Clean Water Act. We might expect to hear a whole host of new creative claims to jurisdiction from environmental groups that have nothing to do with migratory bird use.

Even more important in California, although the Corps may not be able to assert claims over isolated, nonnavigable wetlands, fills of same will in many instances, if not most, still be subject to regulation under State law. Wetland fills are governed by several State statutes, including the California Environmental Quality Act, the California Coastal Act, the Fish and Game Code, and arguably (although legally untested), the Porter-Cologne Water Quality Act as implemented by the Regional Water Quality Control Boards.

Nonetheless, with regard to isolated wetlands, the import of the Supreme Court decision appears to be the removal of one important regulatory agency (the Corps of Engineers) from the "jungle of jurisdictions" that we know to govern the fill of wetlands and waters. What this decision means for other regulatory programs remains to be seen, but there is already hope in some quarters that the Court may be primed to hear another regulatory takings case or a challenge to the interpretation of the Endangered Species Act. ■

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