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Land Use

In California, land use is increasingly tied to climate change policy. As evidenced by voters' recent rejection of Proposition 23, which would have suspended implementation of the Global Warming Solutions Act of 2006 (AB 32), Californians remain committed to curbing climate change. The Sustainable Communities and Climate Protection Act of 2008 (SB 375), specifically connects land use with the environmental goals outlined in AB 32 by requiring regional Sustainable Community Strategies and providing incentives for integrated housing and transportation planning. But policymakers must now determine how the laws will be implemented, which raises numerous legal, political, and practical questions. Both statutes are also having notable influence on the way Environmental Impact Reports (EIRs) are drafted.

Our panel of experts addresses these issues, as well as developments in litigation related to the California Environmental Quality Act (CEQA), and trends in inverse condemnation, regulatory taking, and eminent domain cases. They are William R. Devine and Mike Durkee of Allen Matkins Leck Gamble Mallory & Natsis; Deborah N. Behles of Golden Gate University; and Chuck Krolikowski of Newmeyer & Dillion. *California Lawyer* moderated the discussion, which was reported by Krishanna DeRita of Barkley Court Reporters.

Moderator: What political and legal challenges do local developments face in California, particularly when it comes to large mixed-use projects?

Durkee: California, to me, is full of contradictions. Currently, the push is to infill wherever possible, to densify, and to take advantage of existing capacities in existing urbanized places. The problem is that not only is such heightened urban densification potentially less attractive to live in, it can prove difficult to get approved locally. So you have two worthy goals that are colliding with each other, creating a political battleground: On the one hand are the needs of the state to house and better serve a growing population in an environmentally sensitive manner with a decreasing inventory of services and facilities. On the other hand is a community's desire to preserve and protect its existing character and scale. It's not going to get easier to develop in California. Some places might become relatively easier in the future, but regulation and the level of difficulty are increasing overall everywhere.

Devine: The emphasis on infill and higher-density mixed-use development brings the not-in-my-backyard issue and various compatibility issues. Even though public policy is pushing us in that direction, there are significant cost issues with regard to new infrastructure, transit, and affordable housing. We're also dealing with existing zoning laws that basically came into being over many years in the Euclidean zoning era, which separate uses. Now we are looking to bring those uses together. Even though California policy promotes more dense infill development, there are a number of practical challenges to address.

Behles: The increased emphasis on infill development is largely due to a policy choice that California has made to tackle climate change by building sustainable communities. And, as evidenced by the rejection of Proposition 23, the public support behind this policy choice remains high. The upcoming challenge for developers, the public, and regulators is the implementation of the requirements related to mitigating climate change. Some regulators have developed guidance and started making applicability decisions, but it is still unclear how some of the requirements will work in practice. As an initial step to assist with this transition, the California Air Pollution Control Officers Association recently published a guide for evaluating potential mitigation measures. In addition to the infill issues Bill [Devine] raised, the promotion of dense, urban environments raises public

health concerns because many of these communities where the infill will occur are already overburdened by pollution. One challenge will be mitigating the impacts of increased density and transportation to those overburdened communities.

Krolikowski: The political climate makes it more difficult to advise clients with respect to processing projects. I call it direct democracy at its best, or at its worst. For example, I have clients processing a green, mixed-use project in a blighted area, and they have spent significant sums on an EIR and weaving through various governmental agency reviews. During the process, the public is given full opportunity to comment, and the city council eventually approves the project. Despite the approval, a group of people then initiate a petition for a referendum, where they put it to the voters to overturn the city council's discretionary decision to approve the project. As a result, I must now advise my clients that not only must they successfully proceed through the administrative process but post-approval, must now face petitions for referendum and special elections. This kind of political challenge to land use approvals is on the rise. Depending upon the jurisdiction, all you need is 10 percent of registered voters to initiate the petition. One way to deal with this issue is to require a higher percentage voter approval to overturn a discretionary land use decision, such as a two-thirds vote.

Durkee: I agree, but I probably wouldn't be so quick to change the role of the people. The California Constitution makes it clear that the reserve power held by the people is equal to the reserve power held by a city council. And I'm often doing pro-project initiatives, so I don't want the rules to change too much because when I'm in a place where it's difficult to get a local government's vote, I might not have as much difficulty with the community's vote, and therefore need to preserve it as an option.

Devine: In California, as in most other states, land use decisions are primarily handled at the local level, but we have statewide and federal policies that directly impact local decision-making in the land use and development arena. A key question is how do we meet the environmental goals that the state is now setting for us at local levels? One change is that there will be more regional and even statewide involvement in local decision-making. That's going to be a big battle because there will be resistance not only from the people in affected communities, but also the cities themselves, and from groups like the League of California Cities. For example, with AB 32 and SB 375, a state entity, the California Air Resources Board (CARB), is going to dictate regulation, which will filter down through the Sustainable Community Strategies to the local government. There's going to be a real confrontation between local general plans and local control versus a top-down sustainability strategy.

Behles:: We've already seen some of that type of conflict. The City of Pleasanton's housing cap was recently struck down as inconsistent with state law requiring the city to meet its fair share of the region's affordable housing.

Krolikowski: The conflict is real; you have public entities strapped for cash that want to see development occur, and yet those same public entities want to impose conditions of approval that constrain those same projects. Specifically, the local agencies continue to impose the same standard conditions they have imposed before, and developers are realizing that compliance with those conditions does not make economic sense. So you either have a developer who backs out of the project and the city does not receive the tax increment it is looking for, or you are seeing more regulatory taking challenges to conditions of approval that go "too far."

Durkee: You have the separation of powers doctrine and a home rule attitude in California cities and counties that goes back to the birth of this state. The cities and counties don't like it when a district or commission—like the San Francisco Bay Conservation and Development Commission—tells them how to develop their community or that they should not put development in a particular place. All of these changes in law have a fundamental tension point, and that is they have regional agencies suggesting to cities and counties what they "should" do, instead of the state telling cities and counties, "You must address these things in your local General Plan." I don't count out cities and counties in the long run. I was on a panel in the early 1990s discussing the inevitable "regional" approach to land use and development that would be the future of California; it's 20 years later and while regional agencies have input, cities and counties still control what development takes place—or not.

Moderator: What legal issues are arising from CEQA?

Devine: Perhaps the most significant CEQA issue over the last couple of years relates

to how best to address climate change. With AB 32 and SB 375, the question that's come into play in CEQA documents is determining how best to deal with what is a cumulative impact issue—how do we address a global issue at a project level? That issue expands itself into other key aspects of CEQA, such as mitigation measures, significance thresholds, and alternatives. Increasingly, one of the biggest costs of development is the CEQA document because of how much effort goes into it. Much of that relates to the likelihood that someone is going to challenge it, and it becomes easy for a court to find something wrong with an EIR when the information required is so difficult to calculate and quantify. This makes it increasingly impossible to prepare an EIR that can survive a legal challenge.

Krolikowski: We have received some guidance this past year in *Communities for a Better Environment v. City of Richmond* (184 Cal.App.4th 70 (2010)), where the issue of greenhouse gas mitigation measures was reviewed. In that case, Chevron was processing a refinery expansion project and it was conceded that the project could cause a significant impact on the environment with respect to greenhouse gas emissions. Notwithstanding the potential impacts, Chevron deferred most of its EIR mitigation measures to be addressed in the future. Chevron asserted that because greenhouse gas emission mitigation is a new area, they should not be held to standards that have not yet been scientifically proven. Despite this argument, the court held that Chevron must investigate the most current research/science and develop real potential mitigation measures for its EIR.

Behles: Another CEQA trend is green projects being required to go through an EIR analysis. One such case involved a city's ban on plastic bags (*Save the Plastic Bag Coalition v. City of Manhattan Beach* 181 Cal.App.4th 521 (2010) (Petition for review pending)). The appellate court found that an EIR was required after a group raised a fair argument that the ban could result in significant environmental impacts. What this likely demonstrates is that regulators need to be careful to examine unintended consequences when approving projects that might seem green on their face. In addition, this case was brought by a group with a vested interest in the case, which raises an interesting standing issue.

The other development is a number of decisions related to categorical exemptions, including a decision affirming the statute of limitations and decisions creating uncertainty related to the requirement to exhaust administrative remedies before bringing a case. This will likely become increasingly important as California climate change law created new categorical exemptions.

Devine: More specifics are required when it comes to discussing mitigation measures and alternatives, and both of those issues have some feasibility components to them. In *Communities for a Better Environment v. City of Richmond,* the court addressed the specifics needed for mitigation measures. *Center for Biological Diversity v. County of San Bernardino* (185 Cal.App.4th 866 (2010)), which involves the development of a composting facility, speaks to the level of analysis required in a CEQA document when it comes to alternatives. In *San Bernardino,* the court essentially said that the information provided was inadequate to support the finding that an enclosed composting facility alternative was infeasible. Historically, you could dismiss alternatives as not feasible with a relatively lower level of analysis than was given to the actual project. Now, case law interpreting CEQA is demanding more analysis to justify findings of infeasibility for mitigation measures or alternatives. EIRs are becoming so detailed that I wonder whether the decision-makers or the public can understand much of their content. This is an area where reform needs to happen.

We talked about how state policy is pushing us toward higher density, mixed-use and I know that SB 375 has some exemptions options. But they are so narrow that they are of little value. So another area to focus on is defining clear exemptions and streamlining opportunities that are meaningful. Ostensibly the government is saying, "We want infill," and you do a small infill project, and they make you do an EIR, which subjects you to all kinds of other risks. *Tomlinson v. County of Alameda* (188 Cal.App.4th 1406 (2010)) dealt with the issue of the infill exemption and the court said it doesn't apply because part of the project is outside the city limits.

Behles: Categorical exemptions should be narrowly applied by agencies, but that does not always occur in practice. Problematically, under CEQA, public notice of an exemption decision is not always required, and if notice is given, it is sometimes posted in a location that is difficult for the public to access. One reform I would suggest is a stronger notice requirement to ensure that the public knows when exemption decisions are made, especially in light of the statute of limitations and the likelihood that reliance on these

exemptions will increase in the future.

Krolikowski: With respect to categorical exemptions, I agree. Notice to the public needs to be provided, at least within a certain distance of the project location—similar to a planning commission or city council hearing.

Durkee: I disagree. All statutes of limitation in California are remarkably short. Practically speaking, CEQA attaches to land use decisions, which themselves provide that noticing requirement. And if you have specific facts where they changed the project and never noticed it, plenty of CEQA case law exists holding that the statute of the limitation starts when you knew or should have known that they changed. The cornerstone of land use is to notice and invite public involvement, but to provide short challenge periods.

Krolikowski: Another related point is an EIR case where a general plan amendment changed just a few words, but the impact of those changes created a situation of potential growth inducement. In *Inyo Citizens for Better Planning v. Board of Supervisors* (180 Cal.App.4th 1 (2009)), the county prepared and the court approved a negative declaration for a general plan amendment. However, the Court of Appeal reversed, saying that an EIR was required for such a project due to its potential for growth inducement. Just the slightest change in the language of a general or specific plan or zoning code section can create some of these conflicts and issues.

Durkee: But for a small handful of true believers, I don't believe that most CEQA challenges are brought to secure better, most substantive CEQA work. Instead, the challengers are using an available procedural "sword" to question what the courts are not allowed to look at-that is, the policy wisdom of the approval itself. We don't have CEQA challenges for denials; we only have CEQA challenges for approvals. Ultimately the approval decision is the local legislature's to make and the courts can't question its wisdom. When I hear certain groups argue that they want to make CEQA a more effective statute, what they are really saying is they want it to be a more effective litigation sword, so that they might ultimately have more influence on local land use decisions. The purpose of CEQA is to analyze environmental impacts, and through information and analysis, hopefully provide for better decision making, not to provide a "veto" to the local legislature's decision.

Behles: Another purpose of CEQA that is sometimes forgotten is to provide information to the community that lives around a particular facility or project about the potential environmental impacts, risks, and hazards. I've seen CEQA work as a valuable tool for providing that information to the neighboring communities.

Durkee: I do think there's a huge importance to notice in that regard. I just see mischief with re-noticing, but I don't disagree that the cornerstone has to be public review and comment.

A change that I'd like to see is that there should be a way for an objectively adequate EIR to exist. If a community likes the project, then it will be approved, even if it's a poorly drafted and executed EIR. Conversely, in another community with well-heeled opposition to the project, the EIR, even if well prepared, may never be good enough.

Another change I would like to see is that public agencies should be forced to certify the EIR, which is different from approving the project, if the developer is willing to pay for it. In certain places, which oftentimes are the most politically difficult to secure an approval, if the local agency does not like the project, it will not certify the EIR—even though those two acts are distinct and different. So the agency spends a lot of time and a lot of the developer's money and yet, there is no mandate that the public agency has to certify the EIR at the end of that exercise.

Moderator: What trends do you see in inverse condemnation, regulatory taking, and eminent domain cases?

Krolikowski: There has been increased public awareness about the eminent domain process in the past few years. There has been a groundswell of judicial review of eminent domain cases favoring property owners and holding government entities more accountable. Essentially there are two major disputes in eminent domain cases: One is the recovery of damages to the remainder (called severance damages) for part-take

cases, and the other is the recovery of business goodwill. For years, public entities have argued that property owners have to prove entitlement to certain compensation claims, such as severance damages.

In 2007, the California Supreme Court set the rules straight when it came to assessing severance damage claims. (*Metropolitan Water Dist. of S. Cal. v. Campus Crusade for Christ, Inc.* (41 Cal.4th 954 (2007)). The court confirmed that there is no burden of proof on the issue of compensation, and that with respect to certain severance damage issues, the property owner only has to produce some evidence that the remainder of their property is damaged. Since 2007, we have had several other pro-property owner decisions, including *Los Angeles Unified School District v. Pulgarin* (175 Cal.App.4th 101(2009)), *City of Stockton v. Marina Towers, LLC* (171 Cal.App.4th 93 (2009)), and *Tracy Joint Unified School District v. Pombo* (189 Cal.App.4th 889 (2010)). Additionally, there has been a recent rise in eminent domain filings, as public entities are attempting to spend the money that was available to them before the election, and to lock in the "date of value" for assessing just compensation. As prices and values begin to rise, public entities can deposit the appraised value of the property into court to lock in the date of value in order to acquire the property at a lower price.

Durkee: I wonder how all of this is going to work with this move toward sustainable communities. Who is paying for bike lanes and so forth? This potentially brings us back to inverse condemnation because somebody is going to have to pay for it and the normally, it's the developer. But asking a developer to cure the past sins and decisions of a community violates the rules regarding nexus and proportionality.

Krolikowski: I am also seeing a rise in regulatory taking challenges. Developers who, a few years ago, factored in the conditions of approval under their project costs, are now taking a closer look at whether they should challenge certain conditions. With regulatory takings, you have to prove that the regulation went "too far." However, for exaction and dedication cases, which are handled differently, a property owner must show that the regulation has impacted all economic or beneficial use of their property. If the property owner does not lose all economic or beneficial use, then you go to the *Penn Central* factors (*Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978)), which were expounded upon in California in *Kavanau v. Santa Monica Rent Control Bd.* (16 Cal.4th 761(1997)).

Behles: A big component of sustainable communities is the development of renewable energy. Transmission line issues are often cited as one of the main reasons that renewable projects fail. Utilities can take property for transmission lines, but there has been a backlash to that type of use of eminent domain in other states.

Krolikowski: Several California cases discuss transmission lines. One of the most significant is *San Diego Gas & Electric Co. v. Daley* (205 Cal.App.3d 1334 (1988)). In that case, the court decided that even the perception of impaired value resulting from the location of transmission lines was something that the appraiser could consider in assessing whether the property has been damaged.

Devine: There are a couple of recent court cases where the outcome could cause local jurisdictions to be more careful in how they draw up mitigation measures and dedication requirements, and how they establish a real connection when conducting a proportionality analysis. The court in *Patterson* (*Building Industry Assoc. of Central California v. City of Patterson,* 171 Cal.App.4th 886 (2009)), dealt with affordable housing, and basically said that the city did not follow the appropriate analysis to determine the nexus or the rough proportionality between the new development and the demand for affordable housing. Then earlier this year, Chuck [Krolikowski] was involved in a case where a city in Orange County imposed exactions on a project that significantly exceeded the demand created by that project. The court found the dedication an unconstitutional taking and the jury awarded the developer almost $7 million in damages, plus attorneys fees. The city has appealed. If upheld, this case will have a chilling effect on the willingness of cities to seek excessive exactions. (*Scalzo v. City of San Juan Capistrano,* No. G044137 (Cal. Ct. App., 4th District, Div. 3)).

Krolikowski: The difference between exaction and dedication conditions in relation to other regulatory conduct is that under *Ehrlich v. City of Culver City* (12 Cal.4th 854 (1996)), the public entity carries the burden to show the required nexus and proportionality during the planning process. In most regulatory taking cases, the property owner has the burden to show that the public entity abused its discretion or its decisions were arbitrary and capricious. With respect to exaction and dedication conditions, the

public entity needs to present the evidence to show the relationship between the project and the need for the exaction or dedication. The public entity also needs to present evidence showing the rough proportionality between the same. In the *San Juan Capistrano* case I worked on earlier this year, the court determined that the city did not present any evidence of nexus or proportionality.

Durkee: The Subdivision Map Act (Gov. Code §§ 66410–.37) has a provision that provides that when a subdivider has an offsite improvement obligation to be sited on a neighbor's property that the subdivider does not control, and the neighbor is not willing to cooperate to allow the improvement, then the subdivider must show the improvement on its final map when it is submitted to the public agency. Then within 120 days, the public agency must either use its power of condemnation to acquire the land needed from the neighbor, or forgive the offsite improvement obligation. If it's the only way of access for a project, you could be well down the road by the time you get to the final map. If the neighboring property owner doesn't want to cooperate, you have to approach the public agency and say "You have to forgive the condition, but you can't; that's my only point of access, so therefore you have to condemn." Public agencies do not like to condemn a neighbor's property when it's for the development of another property. It's a situation that is coming up more frequently: The public agencies are shy to enforce the offsite improvement obligations of projects they approved years ago because they haven't been able to negotiate with the neighbor, and now the only way the city is going to resolve things is with its condemnation powers.

Krolikowski: Public entities are reluctant to condemn private property to satisfy private development conditions. The developer has to be diligent in pursuing the removal of that condition to the extent the public entity does not condemn.

In regard to developments in regulatory taking cases, the U.S. Supreme Court in *Lingle v. Chevron, U.S.A., Inc.* (544 U.S. 528 (2005)), helped clarify some of the ways to establish a regulatory taking. However, the regulatory taking cases are more complex than a physical taking case, and they require a lot of time as you must exhaust your administrative remedies first, which means you have to first pursue invalidation or removal of the offending condition or regulation. With the economy and the scope of regulations government entities are imposing on projects, developers are taking a closer look at those regulations.

Moderator: What additional trends are you watching and why?

Behles: I am watching the trend toward distributed energy generation. One of the major ways California expects to mitigate climate change is through increased use of renewable energy. To accomplish this, California originally focused on large solar and wind facilities in the desert or remote locations, but that view has started to shift. Most recently, the California Public Utilities Commission (CPUC) approved new photovoltaic projects for the investor-owned utilities to encourage distributed generation. Additionally, the California Legislature passed AB 2514, a bill that requires the CPUC to take a hard look at energy storage, which is considered an essential component for integrating to a 33 percent renewable portfolio standard. Energy storage enables energy to be stored and used when resources such as solar are not available. In October, the Federal Energy Regulatory Commission issued a decision giving California significant latitude to determine what compensation small energy providers will receive through feed-in tariffs. California agencies are also now evaluating how renewables will be developed and integrated to achieve California's 33 percent renewable energy goal by 2020 in the CPUC's long-term procurement and other related proceedings.

Devine: I am following four different but interconnected trends. First, there were a couple Ninth Circuit decisions this year addressing critical habitat designations. *Home Building Association of Northern California v. U.S. Fish & Wildlife Service* (616 F.3d 983 (9th Circ. 2010)), recognized the U.S. Fish and Wildlife Service designation of 850,000 acres of vernal pool habitat, even though that particular habitat is only there for a limited time each year. In *Arizona Cattle Growers Association v. Salazar* (606 F.3d 1160 (9th Circ. 2010)) the court held that critical habitat for an endangered owl included not only the areas they occupy, but also the areas over which they migrate, which includes large acreages across state boundaries. The ever-expanding designations of critical habitat increasingly limit or restrict development opportunities.

Second, urban water management plans will receive greater attention, as we begin to see in the recent decision in *Sonoma County Water Coalition v. Sonoma County Water Agency* (189 Cal.App.4th 33 (2010)). Starting next year, the five-year updates for such

plans will be triggered and there will be a much more significant focus on such plans. We will see challenges, similar to CEQA, because the water management plan becomes the underlying foundation for any new development. The court in *Sonoma County* was relatively lenient in terms of allowing a county to look at long-term supplies without requiring significant detail. I'm not certain other courts will follow suit.

Third, is the entire area of climate change regulation. As discussed earlier, CARB recently established greenhouse gas emission reduction targets pursuant to the requirements of SB 375. Those reduction targets will now be utilized at the regional government level to develop Sustainable Communities Strategies. Additionally, CARB will be adopting and implementing regulations under AB 32 between now and the end of 2011 that will impact many industries throughout the state. At the same time, CEQA documents will attempt to incorporate this ever-changing area into project-specific environmental documents that will be subject to continual critical review and legal challenge. All these suggest a significant period of uncertainty for development over the next four to five years.

The fourth and final trend is a significant emphasis on renewable energy. Significant focus in recent months has been on utility-scale solar projects in the desert and the relevant biological and water supply impacts. CARB, as part of its effort to implement AB 32, recently adopted regulations implementing a renewable energy portfolio standard requiring that 33 percent of energy delivered from California's large utility operators must be from renewable energy sources by 2020. To accomplish this goal, there's a need for significant development of utility-scale projects, new transmission lines, and distributed energy facilities such as rooftop and smaller-scale photovoltaic solar. Each of these will present a unique set of challenges.

Durkee: The importance of major urban centers is going to diminish. There will be urban centers because people will choose to live there, and if their job is there, that's great. But most of us have good home offices. So the face of land use is going to change based on shifts in how we live and work. Things are going to get smaller and more efficient. Developers will come up with new product lines that fit a growing demographic of people who want to be more efficient and have a smaller environmental "footprint." If you look at what historically densely populated places have done, you will see efficient apartments, smaller homes, less individual impact on the surroundings around you. Hopefully more people get on bikes and they walk and communities will be built not because you are forced to build them, but because you figure out how to make something that people like. That will be a big part of California's future because the bad news for California is that I don't know that the state is getting less popular.

Renewables will be a huge part of California. In 2006, I don't think we were talking about greenhouse gas. That's how radically some of these things have changed. It's going to be a time to see remarkably new, innovative-and old-stuff. We used to call it neo-traditionalism. Then we called it smart growth. Now we call it sustainability. Ultimately, we're just talking about some cool neighborhood like SoHo where you can walk to the market, where you know your neighbors and you look out for each other. Everything old is new again.

Krolikowski: I see two trends as a result of AB 32 and SB 375. The first is a state of confusion while local entities figure out how and who is going to implement them. On the flip side, with the economy, builders will have some incentives to do more infill and mixed-use projects, and potentially use brownfield sites. Once the local entities and developers figure out how to implement the legislation, some interesting projects will be in the pipeline.