

LAND USE LAW

Quarterly Update

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TOO SPECULATIVE OR NOT TOO SPECULATIVE

by Brandon Martin

The California Supreme Court may finally be preparing to provide a more useful answer to the question of just how speculative the possibility of an environmental impact is *too speculative* to trigger the need to prepare an EIR under CEQA requirements. The need to distinguish between potential grounds for environmental impacts that are genuine concerns and impacts that are probably nothing more than remote possibilities or outlandish theories is felt throughout the CEQA procedures from the initial determination of whether there are significant environmental impacts sufficient to require an EIR to whether a subsequent or supplemental EIR should be prepared after certification of a final EIR.

In *Wal-Mart Stores, Inc. v. City of Turlock*, the Fifth District Court of Appeals was confronted with the City of Turlock's decision to enact an ordinance without an EIR in order to ban the development of "big box" retail stores with full-service grocery departments. One of the businesses effected by the city's ordinance, Wal-Mart, sought a writ requiring the City to perform an EIR asserting that the ban on development of "big box" retail stores would trigger changes in the physical environment that were not considered in any previous EIR. Wal-Mart asserted, *inter alia*, that the ordinance would "inevitably lead" to the development of a multitenant shopping center in the place of the proposed Wal-Mart Supercenter, and that the ban within the City of Turlock would force the development into outlying areas surrounding the city in either Stanislaus County or Merced County, greatly increasing the amount of time the citizens of Turlock would spend in traffic traveling to and from the Wal-Mart Supercenter. The court countered that the development of multitenant shopping

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Brandon's primary areas of practice with Borton Petrini, LLP are real estate law and land use planning.

He is a member of the State Bar of California and is active within the business, real estate, and professional community, staying current with legal and societal developments related to business and industry.

LAND USE ONLINE RESOURCES

By Brandon Martin

This new feature of our Land Use Law Quarterly Update provides links to practical and interesting websites directly from the bookmarks and favorite folders of land use attorneys from Borton Petrini LLP. In this feature, I list three websites that have recently been useful to me and explains why they should be good additions to any planning or development team's list of handy web sites.

CALIFORNIA LAND USE PLANNING INFORMATION NETWORK ("LUPIN")

WEBSITE: <<http://ceres.ca.gov/planning>>

This web site is a hyperlinked summary of important background information for developers, attorneys, and land use practitioners that includes well-organized summaries of relevant governmental web sites for project geographic areas organized by County and Bioregion. The web site also serves as an excellent gateway into governmental documents including papers, maps, spatial data, local plans and ordinances, photos and satellite imagery, built environment information, and more. The usefulness of the site is a result of a clean and simple organizational structure that makes finding key information simple and fast.

CALIFORNIA MILITARY LAND USE COMPATIBILITY ANALYST ("CMLUCA")

WEBSITE: <<http://sample1.casil.ucdavis.edu/Calmap8/index.html>>

This new feature is crucial for developers evaluating potential or proposed projects within any of the regions in California that may involve our military's missions. The web site allows any private applicant proposing a development project or a city or county to determine whether the proposed development project "(1) is located within 1000 feet of a military installation, (2) is located within special use airspace, or (3) is located beneath a low level flight path." Local planning agencies are now required to notify the military whenever a proposed development project or general plan amendment triggers any of those three threshold considerations. This web site should not be relied on exclusively, but it should be consulted early and often by thorough and conscientious development teams.

CALIFORNIA PLANNING AND DEVELOPMENT REPORT ("CP&DR")

WEBSITE: <<http://www.cp-dr.com/binn/main.taf>>

This web site is the home site for a monthly newsletter edited by William Fulton and Paul Shigley. Articles featured on "the front page" are available free to the browsing public, but the remainder of the current issue as well as archives are only available to subscribers. The site is significant for California land-use practitioners because Fulton and Shigley wrote the well-read and influential plain English textbook *Guide to California Planning*. This guide is used in both undergraduate and graduate classrooms by students seeking degrees in urban planning and journalism. Fulton and Shigley are both influential in informing and shaping the viewpoints that journalists take towards the planning process and development projects. Not surprisingly, they are by no means pro-growth advocates, but their opinions and writings can be useful particularly when a project team is looking to communicate with planners and journalists on contemporary issues from their perspective and background.

OFFICIAL CALIFORNIA LEGISLATIVE INFORMATION ("LEGINFO")

WEBSITE: <<http://www.leginfo.ca.gov/>>

Development teams who are not regularly monitoring whether proposed legislation effects their projects may be taking unnecessary risks. The state legislature is a unfamiliar battleground for many developers because of California's largely decentralized land-use system and development process, but monitoring and understanding legislation early enough so that it does not adversely effect otherwise well-thought-out plans may take some monitoring. It is never pleasant to find out that a war must be fought on two fronts, but it is better to be aware of each battle early enough so that it can be prepared for before it is lost. Leginfo is a regularly updated, but not real-time, free comprehensive index of all currently filed legislation. This informational resource should be used in conjunction with staff members at a friendly assemblyman's or senator's office as well as in conjunction with lobbyists or trade groups.



within the City of Turlock or the development of a Wal-Mart Supercenter outside of the City of Turlock were simply too speculative and, thus, not reasonably foreseeable environmental impacts resulting from the ordinance. The court pointed out that the physical changes described by Wal-Mart “will not occur unless (1) a specific development project is proposed, (2) the city grants its approval to that specific project, (3) the project is completed, and (4) customers visit the project.” In combination with the lack of evidence affirmatively showing likelihood of development in more than anecdotal form, the court concluded that the impacts were simply too speculative.

The *Wal-Mart Stores* court comments openly in a footnote to its opinion that “a similar asserted environmental impact, displacement of the housing development allegedly arising from a planning action, may be considered by the California Supreme Court in *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2005) 125 Cal.App.4th 810, review granted April 13, 2005.” The *Muzzy Ranch Co.* case actually revolves around whether an airport land use plan is a project, a determination that involves a different test than the determination of whether a significant environmental impact exists. However, the court rejected an argument based on the contention that diversion of residential housing from one area to another as a result of a partial roadblock to residential development in the area surrounding an airport is too speculative to trigger CEQA. Each of the four steps listed by the court in *Wal-Mart* as grounds for finding the development of multitenant shopping within Turlock or superstore construction outside of Turlock is too speculative are present in and consistent with the *Muzzy Ranch Co.* opinion’s determination that the displacement of the housing development was not too speculative. While both opinions make determinations of the speculativeness of future projects, the two opinions can be distinguished on the grounds that they analyze the degree of speculation from the perspective of two different stages in the CEQA process and apply two different tests. Nevertheless, the Supreme Court may have chosen to review *Muzzy Ranch Co.* in order to take the opportunity to provide a more uniform approach to analysis of the degree of speculation throughout the CEQA process.

There will always be technical and scientific debate regarding the credibility or quality of theories asserting significant environmental impacts, but if the Supreme Court can resolve *Wal-Mart* and *Muzzy Ranch Co.* so that the legal

standard is clear, both agencies and developers will have a better foundation for making key decisions.



**BRANCIFORTE HEIGHTS --
 A CAUTIONARY TALE**

By Brandon Martin

The recent *Branciforte Heights, LLC v. City of Santa Cruz* opinion reads like a cautionary tale about the necessity of avoiding assumptions regarding enforcement of agreements with municipalities.

In *Branciforte Heights*, a developer entered into a subdivision development agreement with the City of Santa Cruz, clearly assuming that Section 66477(e) of the Subdivision Map Act imposed a duty on the city to provide open space credit against park and recreation fees. Section 66477(a) reads: “if the subdivider provides park and recreational improvements to the dedicated land, the value of the improvements together with any equipment located thereon *shall be a credit* against the payment of fees or dedication of land required by the ordinance.” However, subdivision (e) of section 66477 addresses private open space requirements separately in the following language: “Common interest developments, as defined in section 1351 of the Civil Code, *shall be eligible* to receive a credit, *as determined by the legislative body*, against the amount of land required to be dedicated, or the amount of the fee imposed, pursuant to this section, for the value of the private open space within the development which is usable for active recreational uses.”

The trial court agreed with the developer, but the appellate court found that the City of Santa Cruz had adopted a Section 66477 ordinance without specifically enacting the private open space provision of subdivision (e). The result is “in the absence of such a municipal ordinance, the city has no clear, present and ministerial duty to provide Branciforte with a specific amount of credit for private open space and Branciforte has no clear, present, and beneficial right to performance of such a duty.” The developer will have to pay the fees without receiving the private open space credit.

If there is a lesson to be learned it is that specifying requirements and expectations upfront and in detail instead of relying on legislative mandates that may or may not exist is in the best interest of developers.



DISCLAIMER: THE INFORMATION PROVIDED IN THIS UPDATE IS NOT A SUBSTITUTE FOR LEGAL ADVICE. READERS SHOULD BE ADVISED THAT IF THEY HAVE QUESTIONS ABOUT THIS OR ANY OTHER AREA OF LAND USE LAW, THEY SHOULD SEEK THE ADVICE OF COMPETENT COUNSEL SPECIALIZING IN LAND USE LAW.

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