



WINTER 2008

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Get it on the CALENDAR

UPCOMING MILLER STARR REGALIA EVENTS

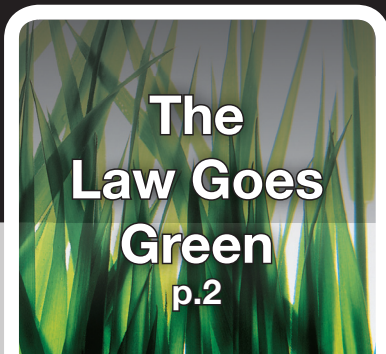
- **2.27.08 - 2.29.08** - California Bankers Counsel
www.calbankers.com
- **3.3.08** - East Bay Women's Conference
www.walnut-creek.com
- **3.6.08** - ULI San Francisco, East Bay Program Series
www.ulisf.org
- **3.18.08 - 3.20.08** - ICSC Monterey Idea Exchange
www.icsc.org

RECENT ARTICLES

- *"The Marketable Record Title Act - Is Private Foreclosure Barred Ten Years After Maturity, or Not?"*
By Lewis J. Soffer,
November 2007, Miller & Starr Newsalert
- *"Recent Exclusive Easement Case Opens the Door to 'Construction' Issues"*
By Kenneth R. Styles,
January 2008, Miller & Starr Newsalert
- *"The Book Stops Here: Firm Known for Real Estate Treatises"*
Daily Journal, January 24, 2008
- *"Legal Corner: Valuation is Key"*
By Anthony Leones,
January/February 2008, *Outdoor Advertising Magazine*
- *"Subprime Mortgage Repurchasing Demands Likely to Spur Litigation"*
By David E. Harris,
March 2008, *National Mortgage Broker*
- *"An Owner's Primer On Sublease Consents"*
By Hans Lapping,
March/April 2008, *BOMA Magazine*

SPEAKING ENGAGEMENTS

- **1.10.08** - San Joaquin Valley Housing Symposium:
"Air Quality, Water and Smart Growth"
presented by Kristina D. Lawson and Robia Chang



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Law Goes
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MSR SPEAKS

CATCHING UP WITH THE GREEN MOVEMENT:

How Climate Change Is Changing The Law In California

By Carolyn Nelson Rowan

A decade ago, most Californians had heard of the phenomenon known as “global warming,” but only recently did climate change begin to take center stage in political, social and economic arenas. In the past few years, climate change has become increasingly significant at the local, state, national, and international levels. Now it seems like everyone is “going green.”

The law is no exception. Federal, state, and local lawmakers and regulators are attempting to address climate change issues through the enactment of new legislation; others have focused their efforts on the use of existing environmental laws to combat global warming. California is considered to be a leader in climate change policy, a natural role for a state that is uniquely impacted by the effect of climate change, such as rising sea levels, drought, and wildfires. In the past, California has been known for implementing environmental regulations that are more stringent than federal counterparts, and in this era of global warming awareness, California continues to do so, as demonstrated by a recent decision of the federal Eastern District court (*Central Valley Chrysler-Jeep, Inc. v. Goldstone*, Case No. CV-F-04-6663 (AWI LJO), Dec. 11, 2007).

For real estate professionals and developers in California, several laws stand out as being particularly significant to the area of climate change: **the Global Warming Solutions Act and the California Environmental Quality Act.**

In 2005, Governor Schwarzenegger issued Executive Order S-3-05, and in 2006, the legislature enacted the Global Warming Solutions Act (AB 32, 2006), requiring California to reduce its greenhouse gas emissions to 1990 levels (a 25% reduction for today’s emission levels) by 2020, and to 80 percent below 1990 levels by 2050. AB 32 contains strong language regarding the danger posed by climate change: “Global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California. The potential adverse impacts of global warming include the exacerbation of air quality problems, a

reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, damage to marine ecosystems and the natural environment, and an increase in the incidences of infectious diseases, asthma, and other human health-related problems.”

Currently, one of the primary vehicles for addressing global warming in the context of development in California is the California Environmental Quality Act (Public Resources Code, §21000, et seq.; “CEQA”). CEQA requires that an agency approving a new project disclose, assess, and reduce to the extent feasible all significant environmental impacts of that project. When the agency finds substantial evidence that a project may have a significant impact on the environment, it prepares an environmental impact report (“EIR”) assessing that impact. In assessing whether a project’s impacts will be significant, CEQA requires the agency to consider not only the direct impacts of the particular project being considered, but also the cumulative impacts of existing and probable future projects on the environment.

New development projects will often cause impacts that may relate to climate change problems. For example, a residential development may create traffic and increased energy consumption, which may lead to increased greenhouse gas emissions, especially when viewed cumulatively with existing development and other new projects. For this reason, an increasing number of EIRs for developments in California are addressing global warming issues. Not all CEQA documents are currently required to contain an analysis of climate change impacts. But because increased greenhouse gas emissions impact the physical environment in numerous ways (e.g., rising sea levels, pervasive drought, an increase in the incidences of infectious diseases, and the extinction of animals), the growing consensus is that these impacts must be analyzed under CEQA.

Several lawsuits have been filed to require agencies to analyze climate change and greenhouse gas emissions in connection with projects. One of the most

notable uses of CEQA to combat climate change occurred last year, when Attorney General Jerry Brown filed a lawsuit against the County of San Bernardino contesting the adequacy of the County’s general plan under CEQA. The lawsuit contended that the EIR for the general plan did not adequately analyze the effects of development on global climate change, nor did it identify feasible mitigation measures. In August, the parties reached a settlement, establishing one of the first greenhouse gas reduction plans in California. The reduction plan is aimed at cutting greenhouse gas emissions attributable to land use decisions and county government operations.

While it is becoming increasingly common for a CEQA document to address the impact a development project may have on climate change, the process is complicated by the lack of a uniform standard for analyzing such impacts. “Significant impacts” must be analyzed under CEQA, but determining what is “significant” has proven quite difficult with respect to climate change impacts. Typically, an analysis of whether a project may have an adverse impact on the environment has involved a comparison of the physical environment before the project (the “environmental baseline”), with the environment that will exist when the project is finished. When it comes to analyzing climate change, however, this calculation is very difficult and some might say impossible. The “environmental baseline” is constantly changing. For instance, a project currently slated to be built next to the ocean might be under water in 50 or 100 years. If that is a possibility, must the potential danger to humans and property be analyzed in an EIR? Further problems arise in determining whether the impacts of any given development on climate change are “speculative” in nature. Even if it is determined that a project will have a significant impact on the environment, additional issues arise when attempting to determine how much mitigation is required to reduce the impact so it is not significant.

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In short, while California has quickly assumed a lead role in the legal battle against climate change, much of the specifics remain uncertain. It is safe to expect that in the coming months and years, many of these uncertainties will be worked out. Indeed, the Governor has already taken steps to provide partial guidance on how greenhouse gases should be addressed in certain CEQA documents by signing Senate Bill 97 (SB 97) on August 24, 2007. SB 97 requires the Governor's Office of Planning and Research (OPR), by July 1, 2009, to prepare, develop and transmit to the Resources Agency guidelines for the feasible mitigation of greenhouse gas emissions, as required by CEQA, including, but not limited to, effects associated with transportation or energy consumption. The Resources Agency would be required to certify and adopt those guidelines by January 1, 2010. Another bill currently making its way through the legislature—Senate Bill 375 (SB 375)—would also address CEQA review in the context of climate change. SB 375 will not come up for a vote on the Assembly floor until later this year.

However, it will take time for the OPR to issue the guidelines and for SB 375 to work its way through the legislature. Until then, developers must attempt to navigate their way through CEQA and AB 32. In the meantime, two things are clear: climate change considerations are likely to become an increasingly greater part of the development approval process, and California will continue as a leader in the legal battle against global warming.

Carolyn Nelson Rowan is a litigation associate in the firm's Walnut Creek office and may be reached at 925.935.9400 or CNR@msrlegal.com.

BUYERS BEWARE

*The Requirement to Comply with CEQA
Does Not End at Project Approval*

By Kristina D. Lawson

In California, those involved with land development are usually aware that the requirements of the California Environmental Quality Act (Public Resources Code, §§ 21000 et seq.) – commonly referred to as CEQA - must be complied with before a project may be approved by a local agency. In general, CEQA requires that, prior to project approval, an agency inform itself of the potentially significant environmental effects of a proposed action, provide the public with an opportunity to comment on the environmental issues, and prevent or reduce harm to the environment where feasible. Throughout the state, CEQA is often used as a means by which project opponents seek to prevent development projects from being approved and constructed.

While those involved in the land development process are knowledgeable about CEQA-related matters, potential purchasers of projects, property managers, tenant representatives, and other real estate professionals may not be aware that CEQA's reach extends far beyond a project's entitlement processing phase. In addition to extending throughout the construction phase of a project, CEQA compliance may be required for many years after a project is finally constructed. The Second District Court of Appeal's recent decision in *Lincoln Place Tenants Ass'n v. City of Los Angeles* (2007) 155 Cal.App.4th 425 ("Lincoln Place") highlights that lack of compliance with adopted mitigation measures can stop projects at nearly any point in their development, and, in some cases, even after development is completed.

At issue in *Lincoln Place* was a development that had been proposed over 15 years ago. As approved in 1995, the project involved demolition of a large garden-style apartment complex and replacement of the complex with hundreds of condominiums, townhomes, and low-income apartments. An environmental impact report (“EIR”) was prepared in connection with the project, and various mitigation measures from the EIR were incorporated into the subdivision map approval.

A “mitigation measure” is a suggestion or change that would reduce or minimize significant adverse impacts on the environment that would be caused by a project. (*No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 256.) CEQA requires agencies to include in EIRs, and adopt as conditions of project approval if feasible, mitigation measures that are capable of avoiding such impacts altogether, minimizing impacts by limiting the degree or magnitude of an action, rectifying impacts by repairing, rehabilitating, or restoring the impacted environment, or reducing or eliminating impacts over time by preservation and maintenance operations during the life of the action. (14 Cal. Code Regs., § 15370.) These mitigation measures are not simply window dressing in the EIR – they must be fully enforceable through permit conditions, agreements, or other measures. (Pub. Resources Code, § 21081.6(b).) “The purpose of these [monitoring] requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded.” (*Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal. App.4th 1252, 1261.)

In *Lincoln Place*, one of the incorporated mitigation measures was a requirement to prepare a relocation plan. The plan provided that: “[p]rior to the issuance of each building permit or demolition permit associated with the proposed project, the applicant will submit a Relocation Plan for review and approval by the General Manager of the Los Angeles Housing Department.” The plan would permit current tenants to relocate to a comparable unit at the complex, or opt to receive the maximum relocation payment permissible under the City’s regulations, or accept one of the newly constructed affordable units. The plan also called for an informational program to advise the Lincoln Place tenants of their rights under the plan.

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IN THE COURTROOM

After a seven-day trial in United States District Court for the Northern District, MSR shareholder Dan Miller and associates William “Fritz” Pahland and Dana Tsubota obtained a favorable judgment for our client, Baywood Partners, Inc., against Darling International Inc. Baywood is a local developer who had contracted to purchase approximately 19 acres of property in Petaluma. Darling, the seller, sought to cancel the contract based on an alleged failure by Baywood to make a second deposit under the contract. The Court concluded that Baywood was entitled to specific performance of the contract and held that Darling, a publicly traded company, had waived and was estopped by its conduct from asserting contract termination. The Court awarded Baywood 95 percent of its attorneys’ fees, expert fees and costs as the prevailing party.

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The petitioner in *Lincoln Place* alleged that the current owner of the project -AIMCO- never sent the required relocation forms to the tenants, and that none of the tenants ever received a notice of the relocation assistance package as required by the project approval conditions and mitigation measures. The court agreed with the petitioners. In strong language, the court stated, "AIMCO cannot attempt to defeat the conditions it imposed upon itself in order to obtain approval of the [subdivision map] by ignoring such conditions or attempting to render them meaningless by moving ahead with the project in spite of them." (*Lincoln Place, supra*, 155 Cal.App.4th at 450.) With respect to the city of Los Angeles, the court further found the "mitigation conditions imposed a greater duty on the City than to sit idly by while AIMCO improperly attempted to evict the tenants." (*Id.* at 453.) Accordingly, the court granted the petition for writ of mandate and entered judgment against the City to compel it to enforce the mitigation provisions of the EIR that were adopted as conditions of the subdivision map approval. The court also issued an injunction against the developer to prevent it from evicting any more tenants until such time as the mitigation measures had been complied with or amended in compliance with applicable law.

Again, this case highlights that the reach of CEQA extends far beyond the original project approval. When conducting due diligence or otherwise considering purchasing a project, buyers should carefully review all project conditions of approval, including adopted CEQA mitigation measures.

Kristina D. Lawson is a land use and environmental associate in the firm's Walnut Creek office and may be reached at 925.935.9400 or KDL@msrlegal.com.

NEWS

New Year Brings Two New Attorneys to MSR



Joel R. Hall

Joel R. Hall has joined the firm as shareholder in MSR's Palo Alto office. Joel has more than 35 years of real estate law experience with a primary focus on commercial lease transactions. He has represented both developers and tenants in office and retail leasing transactions and is recognized in the retail industry for his extensive know-how in negotiating leases. He is a former Assistant General Counsel of Gap, Inc. and in private practice his previous clients have included Apple Inc., Chico's, FAS Inc., Ross Stores, Inc., and Gymboree Retail Stores, Inc.

Joel is a recognized expert and is an effective speaker on commercial leasing topics and frequent lecturer at industry trade association meetings. His writings have been cited in numerous shopping center publications and have been quoted as secondary authority in both state and federal appellate court opinions. He is a member of the State Bar of California, including the Real Property Law Section, and he is on the Board of Directors of the Advanced Commercial Leasing Institute at Georgetown – University Law Center.



Robin M. Pearson

Robin M. Pearson has joined MSR as senior counsel in our Walnut Creek office. With more than 17 years of experience in diverse fields of the law, Robin's primary focus is on real property litigation, including title insurance issues, insurance coverage, commercial landlord/tenant disputes, quiet title actions, foreclosures, and disputes involving the purchase and sale of property.

Robin is very active with the Contra Costa County Bar Association and recently began her term as the group's president. She serves on its Board of Directors and is the Chair of its Diversity Committee. Robin also serves on the Board of Directors of the Family Support Services of the Bay Area and is a member of the American Inns of Court.



MSR RETOOLS ITS POPULAR SUBDIVISIONS CHAPTER

Recently, MSR reorganized one of its key chapters of Miller & Starr California Real Estate 3d in an effort to make subdivisions-related material even more user-friendly and accessible. Chapter 25 is now a suite of four chapters that offer more focused subject matter. The new chapters encompass the following topics:

Chapter 25:

Subdivisions, Land Use Planning and Approvals

Chapter 25A:

California Environmental Quality Act (CEQA)

Chapter 25B:

Common Interest Developments

Chapter 25C:

Subdivision Offerings, Sales and Leasing

Chapter 25 primarily deals with the Subdivision Map Act and its detailed substantive and procedural requirements regarding tentative, final and parcel maps, required findings, exemptions, conditions of approval, as well as standards of judicial review. Chapter 25A is devoted to the analysis of the California Environmental Quality Act (CEQA). Chapter 25B focuses on common interest developments (including time-shares), primarily as ongoing entities. Chapter 25C is a completely rewritten and reorganized treatment of the Department of Real Estate processes pertaining to subdivision public reports, the scope of the Subdivided Lands Act, and the purchase money handling, sales documentation and advertising regulations affecting the marketing and sale of subdivisions in California.

The firm's founding partner, Harry D. Miller, and Arthur F. Coon, originally wrote the previous version of the chapter. In 2007, Mr. Coon, joined by founding partner, Edmund L. Regalia, Karl E. Geier and Karen R. Turk, rewrote and restructured the material.



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ULI SAN FRANCISCO: EAST BAY PROGRAM SERIES

Developing Multiple Product Types:
Homebuilding, Retail, Apartments & Office

Bob Burke
Senior Vice President
Shea Properties

Don Hofer
Vice President of Community Development
Shea Homes

WHEN:
Thursday, March 6, 2008
4-5:30pm

WHERE:
Scott's Seafood
1333 N California Blvd
Walnut Creek

The J.F. Shea Company was founded more than 125 years ago as a plumbing supply store, but it has grown to be the parent company of Shea Homes and Shea Properties --- a fully integrated developer of multiple real estate product types, including for-sale housing, age restricted housing, apartments, retail, office and industrial developments.

Please join us for a special reception and presentation with Bob Burke of Shea Properties and Don Hofer of Shea Homes. Burke and Hofer will share learned lessons in their careers and discuss the advantages of developing mixed-use communities and buildings all within one privately held organization.