27th Annual California Land Use & Development Law Briefing

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COUNSEL TO GREAT COMPANIES

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Land Use And Development Case Summaries
2017 Land Use And Development Law Briefing

1. PLANNING AND ZONING

NARAGHI LAKES NEIGHBORHOOD PRESERVATION ASSOCIATION V. CITY OF MODESTO,
1 Cal.App.5th 9 (2016)

The city approved a general plan amendment and rezoning to allow construction of a 170,000-square-foot shopping center on 18 acres. The city's General Plan provided that certain neighborhoods "should" include a "7-9 acre neighborhood shopping center, containing 60,000 to 100,000 square feet," and the city council found that the approved shopping center was consistent with that policy. The court upheld the city's findings, deferring to the city council's interpretation of the latter policy as offering "flexible descriptions to provide a basic model or pattern to guide the future development of the applicable neighborhood," rather than "rigid development mandates." The record also contained substantial evidence, the court determined, that the city consistently applied the acreage and square footage figures flexibly, as it previously had approved shopping centers larger than the stated ranges.

SPRING VALLEY LAKE ASSOCIATION v. CITY OF VICTORVILLE,
248 Cal.App.4th 91 (2016)

The Court of Appeal applied the rule that while a project need not conform perfectly with every general plan policy, a project is inconsistent with a general plan "if it conflicts with a general plan policy that is fundamental, mandatory, and clear." As such, the court overturned the City of Victorville's approvals for a Wal-Mart project, based in part on its finding that the project failed to comply with a city policy requiring on-site electricity generation "to the maximum extent feasible." Evidence of financial hardship in implementing on-site generation was not substantial evidence of infeasibility, the court reasoned. The City also failed to demonstrate how the project would satisfy a quantitative standard for building efficiency based on "likely" future satisfaction of that standard where the EIR showed a failure to meet the criterion.

ORANGE CITIZENS FOR PARKS AND RECREATION V. SUPERIOR COURT
2016 WL 7241419, No. S212800 (Calif. Supr. Ct., Dec. 15, 2016)

In 1973, the city council adopted a specific plan designating a parcel as open space. At the same time, the council adopted a resolution approving a recommendation by the planning commission to designate the property as both open space and low-density housing, but this recommendation was never integrated into the specific plan. In 2010, the city adopted a new general plan designating the site solely as open space. The council subsequently approved a developer's request for a general plan amendment to allow housing on the site. After opponents challenged the amendment by referendum, the city changed course, concluding that an "administrative correction" to the 2010 general plan was sufficient to reflect the dual designation recommended by the planning commission in 1973. The California Supreme Court rejected this course of action, finding that the 1973 planning commission recommendation was never integrated into either the specific plan or the 2010 general plan. Rather, the court concluded, the 2010 general

plan and the specific plan both gave the project site an unambiguous designation as open space. The 2010 general plan designation had not informed the public that the property would be subject to residential development and, while the proposed general plan amendment did so, it was rejected by the citizenry. Under those circumstances, the city was not permitted to conform its 2010 general plan to the 1973 planning commission recommendation through an "unreasonable" correction.

LA MIRADA AVE. NEIGHBORHOOD ASSOCIATION V. CITY OF LOS ANGELES,
2 Cal.App.5th 586 (2016)

The city granted Target's request for exemptions from applicable specific plan requirements in order to construct a structure more than 35 feet in height. While the lawsuit challenging the exemptions was pending, the city council approved amendments to the specific plan allowing the proposed construction. The court held that the case was moot because there was no longer any effective relief that could be granted and accordingly dismissed the appeal.

AVENUE 6E INVESTMENTS, LLC V. CITY OF YUMA ARIZONA,
818 F.3d 493 (9th Cir. 2016)

Plaintiffs sued the City of Yuma under the federal Fair Housing Act, contending that the City's refusal to rezone land to permit higher-density housing amounted to intentional discrimination and created a disparate impact because the denial disproportionately deprived Hispanic residents of housing opportunities. Taking the factual allegations in the complaint as true, the court held that the complaint presented plausible claims for relief for disparate treatment under the Act. The court noted that the city council had denied the rezoning request against the advice of its own experts and in the context of what a reasonable jury could interpret as racially charged opposition by Yuma residents, who had complained that approval of the rezoning would create a "low-cost, high-crime neighborhood." This was also the only request out of 76 applications for rezoning that the City had denied in the previous three years.

2. REAL ESTATE

SCHELLINGER BROTHERS V. COTTER,
2 Cal.App.5th 984 (2016)

A property owner under contract to sell the property to a developer installed a trench through the parcel, without any permits, which caused damage to an adjacent wetland. Remediation of the damage was expected to take at least seven years, during which time the property was undevelopable. Under these circumstances, the court concluded, damages for breach of contract, rather than an order of specific performance, was the only appropriate remedy.

YVANOVA V. NEW CENTURY MORTGAGE
62 Cal. 4th 919 (2016)

After her home was foreclosed on and sold at public auction, plaintiff brought a wrongful foreclosure action contending that the assignment of the deed of trust to the foreclosing party was defective and rendered the assignment void. The California Supreme Court held that a homeowner in default under a loan has standing to claim that a nonjudicial

foreclosure was wrongful because the assignment under which the foreclosing party obtained its interest in the trust deed was not merely voidable but void, depriving it of authority to order a trustee's sale.

3. PUBLIC RECORDS ACT

ARDON V. CITY OF LOS ANGELES,
62 Cal.4th 1176 (2016)

Section 6254.5 of the Public Records Act. provides that when an agency discloses a public record that is otherwise exempt from disclosure under the Act, the disclosure waives any of the exemptions in the Act. Resolving a significant split among California appellate courts, the California Supreme Court held that unintentional disclosure of documents in response to a Public Records Act request does not result in waiver of the attorney-client privilege under Section 6254.5 of the Act. The court reasoned that the inadvertent inclusion of privileged documents in a Public Records Act production does not constitute a "disclosure" under the Act, and therefore that the waiver provision under Section 6254.5 does not apply under such circumstances.

4. RALPH M. BROWN ACT

CENTER FOR LOCAL GOVERNMENT ACCOUNTABILITY V. CITY OF SAN DIEGO,
247 Cal.App.4th 1146 (2016)

Plaintiffs alleged that the city's practice of allowing only one public comment period for its two-day regular weekly meetings violated the Brown Act. The city argued that the case was not ripe for adjudication because plaintiff failed to comply with certain statutory preconditions before filing its complaint. The court concluded that the preconditions applied only to litigation to determine the Brown Act's applicability to past actions, whereas the challenged practice constituted an ongoing or threatened future action. Thus, plaintiff was not required to comply with the statutory preconditions before commencing the litigation.

SAN DIEGANS FOR OPEN GOVERNMENT V. CITY OF OCEANSIDE,
4 Cal.App.5th 637 (2016)

Under the Brown Act, the public meeting agenda must provide "a brief general description of each item of business to be transacted or discussed" at the public meeting and give the public a fair chance to participate in matters of particular or general concern. Plaintiffs claimed the city had violated this requirement in the agenda description of a proposed subsidy to a hotel developer of over $11 million from transient occupancy tax revenues. The court held that the agenda description satisfied this standard by providing the public with "more than a mere clue" that the city planned to provide a project developer with a substantial and ongoing financial subsidy using public funds.

5. CONFLICTS OF INTEREST

CALIFORNIA AMERICAN WATER CO. V. MARINA COAST WATER DISTRICT,
2 Cal.App.5th 748 (2016)

A member of the Board of the Monterey County Water Resources Agency participated in the selection of a specific company to manage a desalinization project at a time when he was a paid consultant to the company. The court held that the entire contract was void because the Board member had an irreconcilable conflict of interest under Government Code section 1090, which bars public officers or employees from being "financially interested in any contract made by [a] board of which they are members."

6. AFFORDABLE HOUSING

SAN FRANCISCO APARTMENT ASSOCIATION V. CITY AND COUNTY OF SAN FRANCISCO,
3 Cal.App.5th 463 (2016)

A San Francisco ordinance imposing a 10-year waiting period between withdrawal of a rental unit from the market and merger of the withdrawn unit into one or more other units was facially invalid under the Ellis Act because it effectively imposed a penalty on landowners' exercise of an absolute right under the Act to withdraw rental units from the market.

616 CROFT AVE. LLC V. CITY OF WEST HOLLYWOOD,
3 Cal.App.5th 621 (2016)

Citing extensively from last year's California Supreme Court decision in *Building Industry Association v. City of San José*, the court of appeal rejected a developer's claim that the city had the burden of proving that affordable housing fees were "reasonably related" to the deleterious impact of the development. The court held that the validity of such in-lieu fees, as an alternative to an on-site inclusionary housing requirement, does not depend on whether the fees collected from a developer are reasonably related to that development's impact on a city's affordable housing need. Rather, as with on-site requirements, in-lieu fees need only be reasonably related to the need for affordable housing within the city as a whole.

KALNEL GARDENS, LLC V. CITY OF LOS ANGELES,
3 Cal.App.5th 927 (2016)

Neighbors challenged the approval of a project with an affordable housing component, claiming that the project violated the Coastal Act because its height, density, setbacks, and other physical and visual characteristics were out of character with the existing neighborhood. The project proponent argued that, under the Mello Act and other density bonus statutes, the project qualified for exemptions from the latter requirements. The court of appeal held that density bonus statutes are subordinate to the Coastal Act, and their affordable housing exemptions apply to a project within the coastal zone only so long as the project conforms to the Coastal Act's overall protective provisions.

7. INITIATIVE AND REFERENDUM

BROOKSIDE INVESTMENTS, LTD. V. CITY OF EL MONTE,
5 Cal. App. 5th 540 (2016)

Elections Code section 9222 allows a city council to propose a ballot measure that repeals or amends a prior initiative. Voters in the City of El Monte approved an initiative that repealed a mobile home rent control ordinance and prohibited the council from passing any ordinance relating to the subject of mobile home park rents. Several years later, the city council proposed a ballot measure to repeal the initiative, which the voters approved. A mobile home park owner sued to invalidate the council-sponsored ballot measure, asserting that section 9222 could not constitutionally be applied to allow the city council's measure repealing the prior initiative. The court disagreed, holding that the statute was not inconsistent with the constitutional right of initiative, but merely provided a procedure under which city councils could propose ballot measures for consideration by the voters.

COUNTY OF KERN V. T.C.E.F., INC.,
246 Cal.App.4th 301 (2016)

In 2009, the Kern County Board of Supervisors enacted a zoning ordinance that allowed medical marijuana dispensaries in commercial zoning districts. Two years later, the Board enacted a new zoning ordinance that banned all medical marijuana dispensaries in the county. After opponents submitted a referendum petition with the requisite number of signatures, the Board responded by repealing the entire chapter of the zoning ordinance. The court found that by so doing, the county had also repealed the 2009 ordinance that authorized dispensaries in commercial zones. The effect was to ban all dispensaries, which was essentially the same outcome that would have occurred had the challenged ordinance gone into effect. As such, the Board's action violated the election law, which required the Board either to "entirely repeal" the challenged ordinance or to submit it to the voters for a decision.

8. VESTED RIGHTS

STEWART ENTERPRISES, INC. V. CITY OF OAKLAND,
248 Cal.App.4th 410 (2016)

The city issued an administrative zoning clearance and building permit for a proposed crematorium. Five days after the building permit was issued, in response to public opposition to the crematorium, the city council adopted an emergency ordinance requiring a use permit for any new crematorium activity in the city. The court held that the ordinance could not be applied to the developer because it had obtained a vested right under the city's permit-vesting ordinance. The court found that application of the emergency ordinance would impair the developer's vested right by preventing the construction of the crematorium under the building permit. The court was unpersuaded by the city's claim that the vested right was not impaired because the developer had the option of pursuing a use permit. The possibility the developer could regain the right to build the crematorium if it obtained a use permit did not, the court said, change the fact that "a project can be 'prohibited' even if the fulfillment of certain contingencies might at some later date reauthorize it." The court also rejected the city's claim that impairment of

the vested right was necessary in order to protect public health and welfare given the lack of evidence that the use posed any unmitigated risk to public health.

9. SUSTAINABLE COMMUNITIES STRATEGIES

BAY AREA CITIZENS V. ASSOC. OF BAY AREA GOVERNMENTS,
248 Cal.App.4th 966 (2016)

Plaintiffs challenged the adoption of a regional land use and transportation structure intended to reduce Bay Area greenhouse gas emissions under SB 375, the "Sustainable Communities and Climate Protection Act of 2008." The primary issue raised in the case was whether the Bay Area agencies should have relied on emissions reductions already expected from pre-existing statewide mandates to fulfill their statutory obligation, rather than adopting regional strategies to reduce emissions beyond those already expected from the statewide mandates. The court concluded that the agencies correctly declined to count statewide emissions reductions in developing their regional plan because doing so would have been inconsistent with the statute as interpreted by the state agency responsible for implementing California's greenhouse gas emission laws and would have interfered with the broad grant of discretion accorded regional agencies in developing regional planning strategies to achieve emissions reductions.

10. TAKINGS

BOXER V. CITY OF BEVERLY HILLS,
246 Cal.App.4th 1212 (2016)

Homeowners brought an inverse condemnation suit against the City of Beverly Hills based on impairment of their views by redwood trees planted by the City. The court rejected the argument that damage to the value of plaintiffs' properties, such as from an impaired viewshed, established a compensable taking. The mere existence of a diminution in the value of the plaintiff's property, the court held, does not result in a taking — it is an element of the measure of just compensation if such taking or damaging is otherwise proved. The court also rejected plaintiffs' contention that impairment of a view alone can constitute a taking. The court declined to find the homeowners had a "visibility right," stating that while a contract or statute could provide a right to an unobstructed view, the courts would not create such a right by implication.

PROPERTY RESERVE, INC. V. SUPERIOR COURT (DEPARTMENT OF WATER RESOURCES),
1 Cal.5th 151 (2016)

The Department of Water Resources sought to conduct environmental and geological testing (including drilling deep borings) on more than 150 privately owned parcels to investigate the feasibility of adding facilities to deliver water from Northern California to Central and Southern California. The eminent domain statutes require a court order authorizing precondemnation testing and deposit an amount of probable compensation for damage from those activities. The court found the statutes "constitutionally deficient" because they did not give a property owner the right to a jury trial on the amount of damages for precondemnation activities. It determined, however, that the appropriate remedy was "to reform the precondemnation entry statutes so as to afford the property owner the option of obtaining a jury trial on damages . . . ."

11. SLAPP STATUTE

CITY OF MONTEBELLO V. VASQUEZ,
1 Cal.5th 409 (2016)

The anti-SLAPP statute protects, as a free speech activity, "any written or oral statement or writing made before a legislative . . . proceeding." The City of Montebello sued three of its former councilmembers, claiming they violated Govt. Code §1090 by voting for a waste hauling contract in which they held a financial interest. The councilmembers moved to strike the complaint under the anti-SLAPP statute, but the lower courts concluded that the statute was inapplicable because council votes were not protected activities. The California Supreme Court reversed, holding that councilmembers' votes, as well as statements made by councilmembers in the course of deliberations, qualified as protected speech as "oral statement[s,] made before a legislative . . . proceeding."

CRUZ V. CITY OF CULVER CITY,
2 Cal.App.5th 239 (2016)

Neighbors challenged the city council's consideration of a church's request to change neighborhood parking restrictions, claiming the council had violated the Brown Act because the process was initiated during the public comment period rather than as a noticed agenda item. The court held that the city council's discussion at the hearing and its decision to place the parking item on a future agenda were activities arising from free speech, making the anti-SLAPP law applicable. The court rejected plaintiffs' claim that they were subject to the public interest exception to the anti-SLAPP statute, finding that the plaintiffs were acting in their own personal interests, not in the public interest.

RAND RESOURCES LLC V. CITY OF CARSON,
247 Cal.App.4th 1080 (2016)

The City of Carson entered into an agreement allowing plaintiff to act as its "sole agent" in negotiations to bring an NFL franchise to the city. Plaintiff later sued, claiming the city had breached the contract by allowing another group to negotiate on its behalf regarding the franchise. The city brought an anti-SLAPP motion, contending the suit interfered with its rights to free speech on a matter of public interest. The court of appeal rejected the claim that the suit was subject to the anti-SLAPP statute. It found that the gravamen of the complaint was the City's alleged breach of its agreement with plaintiff, which did not involve acts taken in furtherance of constitutional rights of free speech. The fact that some speech occurred in the course of the asserted breach did not mean that the cause of action arose out of protected free speech. To hold otherwise, the court reasoned, would place the vast majority, if not all, civil complaints alleging business disputes and a large portion of tort litigation within the scope of the anti-SLAPP statute.

12. TERRORISM THREATS

SAN DIEGO NAVY BROADWAY COMPLEX COALITION V. US DEPT. OF DEFENSE,
817 F.3d 653 (9th Cir. 2016)

The court rejected a claim under the National Environmental Policy Act that the Navy did not adequately consider environmental consequences of a potential terrorist threat to the redevelopment of the San Diego Broadway Naval Complex near downtown San Diego. Although it rejected the Navy's threshold claim that no analysis of a terrorist threat should be required under NEPA, the court employed a deferential standard of review of what constitutes an adequate analysis to fulfill this requirement. The court found it was sufficient that the environmental assessment referred to the Navy's anti-terrorism building specifications, which are designed to address a range of terrorist attack scenarios, including explosives, fire and chemical, biological and radiological weapons.

13. LAFCO

CITY OF SELMA V. FRESNO COUNTY LOCAL AGENCY FORMATION,
1 Cal.App.5th 573 (2016)

A statute is "directory" when it is obligatory but failure to comply "will not have the effect of invalidating the governmental action." The statute governing LAFCO decisions states that a hearing on a proposed annexation may not be continued for a period in excess of 70 days from the date specified in the original public hearing notice. Although the Fresno County LAFCO concededly violated this time limit in approving the annexation of 430 acres of county land, the court concluded that this violation did not render the LAFCO's subsequent annexation decision void because the statutory requirement was directory not mandatory.

14. MELLO-ROOS

BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA V. CITY OF SAN RAMON,
4 Cal.App.5th 62 (2016)

The Mello-Roos Act provides that a special tax approved by a landowner vote may only finance services "to the extent that they are in addition" to those provided in the territory of the district before the district was created. The Building Industry Association argued that a special tax imposed by the City of San Ramon was invalid under the Mello-Roos Act because it did not fund "additional services" as required by the Act but merely provided for increased quantities of existing services to meet new demand. The court found that the tax satisfied the statutory requirement because it was imposed to satisfy increased demand from new development and thus necessarily funded services "in addition to" those services previously provided.

TAB 2

2016 Significant Cases Impacting Land Use And Development Policy

1. PLANNING AND ZONING

NARAGHI LAKES NEIGHBORHOOD PRESERVATION ASSOCIATION v. CITY OF MODESTO,
1 Cal.App.5th **9 (2016)**

The City of Modesto's General Plan included a policy providing that certain neighborhoods "should" include a "7-9 acre neighborhood shopping center, containing 60,000 to 100,000 square feet." The court, in this case, upheld the City's determination that development of an approximately 170,000 square foot shopping center on about 18 acres in one such neighborhood would be consistent with that policy.

Over neighborhood opposition, the City approved a general plan amendment and rezoning to allow construction of the shopping center. In upholding the City's findings that these actions were consistent with its general plan, the court first stated that the project was compatible with general plan policies aside from its identification of acreage and square footage figures. The court then deferred to the City's interpretation of the latter policy as offering "flexible descriptions to provide a basic model or pattern to guide the future development of the applicable neighborhood," rather than "rigid development mandates."

The court found this interpretation was supported by the plain language of the general plan, including its use of the permissive word "should" in place of the mandatory "shall." The record also contained substantial evidence, the court determined, that the City consistently applied the acreage and square footage figures flexibly, as it previously had approved shopping centers larger than the stated ranges.

The court's decision reinforces existing case law emphasizing the significant discretion a local agency enjoys when considering whether a proposed development is consistent with its general plan.

SPRING VALLEY LAKE ASSOCIATION v. CITY OF VICTORVILLE,
248 Cal.App.4th 91 (2016)

Finding a variety of legal errors, including failure to comply with a city policy requiring on-site electricity generation "to the maximum extent feasible," the court, in this case, overturned the City of Victorville's approvals for a Wal-Mart project. The court found, among other things, that the project approvals were inconsistent with the City's general plan and that the City Council failed to make findings required under the Subdivision Map Act.

The court held the project was inconsistent with two sustainability provisions of the City's general plan. The first was a program requiring "all new commercial or industrial development to generate electricity on-site to the maximum extent feasible." The project did not include any on-site electricity generation; the EIR stated that incorporation of rooftop solar systems would make the project economically infeasible absent significant government credits and incentives, which could not be assured. The court held this explanation did not constitute substantial evidence that solar power generation or other alternatives (such as wind power, which the EIR did not discuss) were completely infeasible.

The second general plan requirement was a 15% improvement on 2008 Title 24 standards for all new construction. The EIR showed that the project would "currently" achieve only a 10% improvement, but would comply with new energy efficiency standards at the time of construction, and then would "likely" meet the 15% requirement. The court held that this, too, was inadequate.

The court agreed with the City that a project need not conform perfectly with each and every general plan policy, but applied the rule that a project is inconsistent with a general plan "if it conflicts with a general plan policy that is fundamental, mandatory, and clear." The court held that the City's on-site electricity generation requirement constituted such a policy, and therefore the City's finding that the project was consistent with its general plan was not supported by substantial evidence.

The court also concluded that the project approval violated the Subdivision Map Act. The Map Act requires a city to deny approval of a parcel map if it makes any of seven findings. These findings are stated in the negative, e.g., "the proposed map is not consistent with applicable general and specific plans…." In approving the Wal-Mart project, the City did not make findings on these seven topics, reasoning that the findings requirement applied only if the City were *denying* rather than approving the parcel map. Citing a 1975 California Attorney General Opinion, which had never been overturned by the Legislature, the court held that the City was required to address the seven findings in its approval of the parcel map.

ORANGE CITIZENS FOR PARKS AND RECREATION v. SUPERIOR COURT,
2016 WL 7241419, No. S212800 (Calif. Supr. Ct., Dec. 15, 2016)

The California Supreme Court unanimously denied an effort by the City of Orange to defend its approvals for a residential development project despite an intervening public vote that rejected a general plan amendment the City had passed to advance the project. By later attempting to make an "administrative correction" to its general plan, the court held, the City improperly sought "to evade the effect of the referendum petition."

To resolve the case, the court was forced to grapple with the convoluted planning history underlying an open space tract recently approved for development as 39 residential units. In 1973, the City Council adopted a specific plan that designated the property as open space, but also passed a resolution upholding the "recommendation of the Planning Commission" to designate the property as open space and low-density housing, not solely as open space. However, conforming revisions were not made to the specific plan. In 2010, the City adopted a new general plan that designated the project site as open space. The 2010 general plan stated that specific plans, including the 1973 plan, must be consistent with general plan land use policies.

The City Council later approved the developer's request to amend the general plan to allow housing on the property. Shortly thereafter, project opponents challenged the amendment by referendum. In response, the City "changed course" and argued there was no need to amend the general plan to approve the project because the 1973 resolution adopting the Planning Commission recommendation permitted residential development on the property. The City concluded, accordingly, that a successful referendum of its action amending the general plan would have no effect. The voters went on to reject the general plan amendment, and in ensuing litigation, the courts were asked to determine whether an amendment was required to authorize the project.

The California Supreme Court said it was. The court determined that the City Council conditioned its finding that the housing project was consistent with the general plan on the general plan amendment later rejected by voters. Nevertheless, the court continued, even if it were to assume the City had found the project consistent with the un-amended 2010 general plan, the court would not defer to the City's finding. The court rejected the City's argument that the specific plan had designated the property as open space and low-density housing. The 1973 planning commission recommendation to adopt this designation "never became integrated into the publicly available [specific] plan, let alone the 2010 General Plan." Rather, the court stated, the 2010 general plan land use element gave the project site "an unambiguous designation" as open space, and the publicly available specific plan designated the property similarly.

The court concluded that the 2010 general plan land use designation had not informed the public that the property would be subject to residential development. The proposed general plan amendment, in contrast, did so but was rejected by the citizenry. The City was not then permitted to conform its 2010 general plan to the 1973 planning commission recommendation through an "unreasonable" correction.

2. PUBLIC RECORDS ACT

ARDON v. CITY OF LOS ANGELES,
62 Cal.4th 1176 (2016)

The California Supreme Court has resolved a significant split among California appellate courts regarding whether inadvertent disclosure of documents in response to a Public Records Act requests results in waiver of the attorney-client privilege pursuant to section 6254.5 of the Act. The court held that this waiver provision applies only to the intentional release of a public record, and hence that a public agency's inadvertent disclosure of a document does not waive applicable privileges.

An attorney representing the plaintiff in a pending class action against the City of Los Angeles served the City with a request for documents under the Public Records Act. In response, an assistant city administrative officer provided the attorney with approximately 53 documents, among which were three memos containing attorney-client communications. After discovering this, the City notified plaintiff's counsel that the privileged documents had been produced inadvertently, and requested their return. After plaintiff's counsel refused, the City filed a motion to compel the return of the documents, which was denied by the trial court.

In a published decision, the Second District Court of Appeal affirmed the trial court's ruling, concluding that production of the documents had waived any privilege pursuant to Section 6254.5 of the Act. The California Supreme Court granted the City's petition for review of this decision. While the review was pending, the First District Court of Appeal decided *Newark Unified School District v. Superior Court*, holding that inadvertent disclosure of documents containing attorney-client communications in response to a Public Records Act request does not result in a waiver of the privilege under section 6254.5.

The California Supreme Court agreed with the reasoning in *Newark* and reversed the Court of Appeal. Section 6254.5 provides that "[n]otwithstanding any other provisions of law, whenever a state or local agency discloses a public record which is otherwise exempt from this chapter to any member of the public, this disclosure shall constitute a waiver of the exemptions" specified in the Public Records Act. Examining this language, the court found that the word "disclosure" was ambiguous as to whether inadvertent disclosures were included, and therefore turned to

the legislative history for guidance. It determined that the purpose of the bill was to address *intentional* disclosures and to prohibit agencies from selectively disclosing privileged documents to particular persons or entities while withholding them from the general public. The concluded that the bill did not contemplate inadvertent disclosure and that the central purposes of the statute — to preclude selective disclosures — would not be advanced by applying the waiver provisions to accidental disclosures. Quoting from the *Newark* decision, the court reasoned that when "a release is inadvertent, no 'selection' occurs because the agency has not exercised a choice in making the release . . . . Accordingly, an inadvertent release does not involve an attempt to assert the exemption as to some, but not all, members of the public, the problem section 6254.5 was intended to address." (Internal quotation marks omitted).

The court also observed that construing section 6254.5 to exclude inadvertent disclosures of attorney-client or work product material was consistent with the construction of similar waiver provisions in the litigation context. Evidence Code section 912(a) provides that the attorney-client privilege "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." Case law has construed Evidence Code section 912 restrictively, holding that "waiver" under that provision does not include inadvertent disclosure of privileged information as a result of human error in responding to discovery requests. The court concluded that, in light of the fact that human error is at least as likely to occur in the process of responding to a Public Records Act request as to a discovery request, there was no reason why inadvertent disclosures should be treated differently in the former situation than in the latter.

The court cautioned that its determination that inadvertent release of exempt documents does not waive the exemption under the Public Records Act "must not be construed as an invitation for agencies to recast, at their option, any past disclosures as inadvertent so that a privilege can be reasserted subsequently." The court observed that its holding applied only "to truly inadvertent disclosures and must not be abused to permit the type of selective disclosure section 6254.5 prohibits." It added that an agency's own characterization of its intent was not dispositive and that disputes over the issue of inadvertence under the Public Records Act would be resolved by courts, just as they were under the Evidence Code.

3. AFFORDABLE HOUSING

616 CROFT AVE., LLC v. CITY OF WEST HOLLYWOOD,
3 Cal.App.5th 621 (2016)

Last year, in *California Building Industry Association v. City of San Jose*, 61 Cal. 4th 435 (2015), the California Supreme Court ruled that inclusionary housing ordinances are legally permissible as long as it can be shown that an ordinance is reasonably related to the public welfare. The court rejected a claim that a city may impose inclusionary housing requirements on new residential development projects only if it first shows that the need for affordable housing is attributable to new development.

The court of appeal recently applied the California Supreme Court ruling to deny a challenge to the City of West Hollywood's collection of fees for inclusionary housing. The City requires developers of for-sale residential projects with 10 or fewer units either to sell a portion of the newly constructed units at below-market rates or, alternatively, to pay an in-lieu fee designed to fund construction of an equivalent number of affordable units. The City conditioned approval of

a developer's condominium project on payment of in-lieu fees. The developer paid the required fees under protest and filed suit.

Citing extensively from the California Supreme Court decision, the court of appeal rejected the developer's claim that the City had the burden of proving the fees were "reasonably related" to the deleterious impact of the development. The court held that the validity of in-lieu fees, as an alternative to an on-site inclusionary housing requirement, does not depend on whether the fees collected from a developer are reasonably related to that development's impact on a city's affordable housing need. Rather, like an on-site requirement, in-lieu fees must be reasonably related to the overall availability of affordable housing, and the challenger must show the fee schedule was invalid–an effort the developer here did not undertake.

KALNEL GARDENS, LLC v. CITY OF LOS ANGELES,
3 Cal.App.5th 927 (2016)

Kalnel Gardens proposed to build a 15-unit housing complex in Venice. Two of the units were designated for very-low-income households. Based on the inclusion of the very-low-income units, City of Los Angeles planning officials approved the project with density bonuses under the Housing Accountability Act, the Density Bonus Act, and the Mello Act, which together with other zoning concessions allowed the project to exceed local density, height, and setback restrictions. In addition to these concessions, City planning officials adopted a mitigated negative declaration under CEQA. The City's advisory agency approved the project's vesting tentative tract map and the City zoning administrator approved a coastal development permit under Coastal Act.

Neighbors appealed the planning approvals to the West Los Angeles Area Planning Commission, claiming, among other things, that the project violated the Coastal Act because its height, density, setbacks, and other physical and visual characteristics were out of character with the existing neighborhood. The Commission declined to consider issues related to the density bonus (which found to be outside its purview) and focused instead on the City's discretionary power to issue coastal development permits under the Coastal Act. The Commission found that the project did not conform to the Coastal Act because its size, height, bulk, mass and scale were incompatible with, and harmful to, the surrounding neighborhood and because the setbacks were too small. Kalnel appealed the Commission's decision to the City Council, which denied the appeal and adopted the Commission's findings. Kalnel then brought an administrative mandate action against the City alleging that it had violated the Housing Accountability Act, the Density Bonus Act, and the Mello Act.

The court of appeal upheld the City Council's action, holding that density bonus statutes are subordinate to the Coastal Act. Citing the Density Bonus Act, which is designed to address the shortage of affordable housing in California, but expressly provides that "[n]othing in this section shall be construed to supersede or in any way alter or lessen the effect or application of the [Coastal Act]," the court held that "it could not be clearer that the Density Bonus Act does not supersede the Coastal Act or in any way alter or lessen its effect."

The Mello Act, which establishes minimum requirements for affordable housing within the coastal zone, does not include a similarly clear statement, but the appellate court noted that if the legislature had intended the Mello Act to supersede the Coastal Act, it would have said so. Further, the court explained, the Coastal Act is a comprehensive scheme to govern land use planning for the state's entire coastal zone which requires the design of new developments to protect scenic views and to be "visually compatible with the character of the surrounding areas," and provides that it shall be "liberally construed to accomplish its purposes and objectives." In

addition, interpretive guidance provided by the Legislature under the Public Resources Code states that conflicts should be resolved in a manner which, on balance, is the most protective of significant coastal resources. These provisions, the court said, make it clear that the Coastal Act must take precedence over the Mello Act. A contrary interpretation, it reasoned, would permit Mello Act housing even if it blocked coastal access, intruded into environmentally sensitive areas, or was visually incompatible with existing uses. The Mello Act's affordable housing requirements, the court held, apply to a project within the coastal zone only so long as the project conforms to the Coastal Act's overall protective provisions.

4. INITIATIVE AND REFERENDUM

BROOKSIDE INVESTMENT, LTD. v. CITY OF EL MONTE
5 Cal. App. 5th 540 (2016)

Elections Code section 9222 allows a city council to propose a ballot measure that repeals or amends a prior initiative. In this case, the court held that section 9222 does not unconstitutionally interfere with the voters' reserved power of initiative, even when the prior initiative restricts council action.

In 1988, the El Monte City Council enacted a mobilehome rent control ordinance. Two years later city voters approved an initiative that repealed the rent control ordinance. That initiative also prohibited the Council from passing any ordinance relating to the subject of mobilehome park rents, and barred the expenditure of tax revenues in connection with any such ordinance.

Several years later, the City Council proposed a ballot measure to repeal the initiative. City voters approved the repeal measure, and the City Council then enacted new rent control ordinances.

Brookside Investment, Ltd., a mobilehome park owner, sued to invalidate the Council-sponsored ballot measure, asserting that section 9222 could not constitutionally be applied to allow the City Council's measure repealing the prior initiative. The court disagreed.

The court first rejected Brookside's argument that section 9222 unconstitutionally interferes with the voters' right of initiative. The court acknowledged that the California Constitution expressly allows the State Legislature to propose ballot measures that repeal or amend prior initiatives, and that it does not contain a similar provision expressly authorizing local governments to do the same. It held, however, that an express constitutional authorization was not necessary. Since 1911, the California Constitution has given the Legislature the power to adopt procedures governing the use of the local initiative power, and statutory measures allowing city councils to propose ballot measures that amend or repeal prior initiatives existed both before and after those constitutional provisions were enacted. "In sum, far from withholding the power of local legislative bodies to independently propose ballot measures affecting voter-approved initiative ordinances, the 1911 constitutional amendments gave the Legislature the authority to establish procedures allowing such action."

Brookside next argued that the voters have a constitutional right to enact an initiative that validly precludes a council from proposing a hostile ballot measure. It argued that section 9222 could not constitutionally be interpreted to restrict that right. The court was not persuaded. It noted that section 9222, which permits local voters to consider both voter-sponsored and city council-sponsored measures, including proposed ordinances affecting previously approved initiatives,

"does not clearly narrow or impair the right of initiative guaranteed in the state Constitution. In either case, amendment or repeal would be accomplished by popular vote."

The court concluded, however, that it did not need to decide whether an initiative that purported to preclude a city council from later proposing a hostile ballot measure would impermissibly conflict with section 9222. The El Monte initiative did no such thing. The court interpreted the language of the El Monte initiative to prohibit only the City Council's adoption of its own mobile home rent ordinance without a vote of the people, not a Council-sponsored ballot measure.

Finally, the court held that the City did not violate the prohibition in the voters' initiative against the expenditure of tax revenues in connection with an ordinance relating to mobile home park rents. Because the initiative did not preclude the City Council from placing its measure on the ballot, the Council did not violate the initiative's prohibition against expenditures by incurring the costs typically associated with placing a measure on the ballot.

COUNTY OF KERN v. T.C.E.F., INC.,
246 Cal.App.4th 301 (2016)

When a referendum petition is presented against an ordinance and the board of supervisors decides to "entirely repeal the ordinance" rather than present it to the voters, the board must revoke the challenged ordinance in its entirety and may not take additional action that has the practical effect of implementing the essential feature of the ordinance.

In 2009, the Board of Supervisors of Kern County enacted a zoning ordinance that effectively allowed medical marijuana dispensaries in commercial zoning districts. In 2011, the Board enacted a new zoning ordinance, the Dispensary Ban Ordinance, which banned all medical marijuana dispensaries throughout the county's jurisdiction. Opponents circulated a referendum petition and obtained the requisite signatures. The Board responded by repealing the entire chapter of the zoning ordinance that included both the Dispensary Ban Ordinance and the 2009 ordinance allowing dispensaries in commercial zoning districts. The result was that dispensaries were not allowed in any zoning district anywhere in the county.

Elections Code section 9145 requires that when a county board of supervisors is presented with a qualified referendum petition, it must either "entirely repeal the ordinance against which a [referendum] petition is filed" or submit the ordinance to a vote. The court of appeal agreed with Kern County that this language did not necessarily require the county to return all circumstances to the status quo that existed before the Dispensary Ban Ordinance was enacted, and that the county had the discretion to take other actions besides repealing the referended ordinance. However, this discretion is limited by the overriding principle that these actions may not have the practical effect of implementing the core element of the challenged ordinance.

The court first noted that the election laws applicable to cities prohibit a city council, after a successful referendum, from enacting an ordinance in all essential features like the repealed ordinance. It explained that "this legal standard does not require a return to the status quo ante in every particular, allows for some changes, but significantly limits the authority of a city council to make changes that address the subject matter of the protested ordinance."

The court then applied this rule to counties, interpreting the phrase "entirely repeal the ordinance" as precluding additional actions that would implement the essential feature of a referended ordinance. "In other words, additional action by a board of supervisors violates section 9145 if it fails to return to the status quo ante on the essential feature of the protested

ordinance." The court observed that the focus should be on the practical effect of the board's action, "because substance, not form, is the proper test for determining the real character of conduct or a transaction."

The court found that by revoking the entire zoning chapter, the county had also repealed the 2009 ordinance that authorized dispensaries in commercial zones. The effect was to ban all dispensaries, which was essentially the same outcome that would have occurred had the Dispensary Ban Ordinance gone into effect unchallenged. The court was not persuaded by the county's arguments that dispensaries might be allowed under a zoning administrator's determination that a dispensary use was similar to a permitted use, or that a dispensary might be allowed with a use permit. The court found that the "avenues around the prohibition are too tenuous and have yet to be successfully traveled." It was also influenced by the fact that the County was pursuing this litigation, demonstrating "the County's current policy choice towards dispensaries." The court concluded that the repeal of the entire chapter would have implemented the essential feature of the Dispensary Ban Ordinance by (1) establishing a general rule that dispensaries were unauthorized and (2) giving County control over whether any dispensary would be treated as an exception to that general rule. As such, the Board's action violated the election law.

5. VESTED RIGHTS

STEWART ENTERPRISES INC., v. CITY OF OAKLAND,
248 Cal.App.4th 410 (2016)

After obtaining administrative zoning clearance for proposed crematorium, the developer bought the property and applied for a building permit. Five days after the building permit issued – and based on public opposition to the crematorium – the City Council adopted an emergency ordinance requiring a use permit for any new crematorium activity in the City.

The emergency ordinance was written to apply to "any building or structure for which rights to proceed with said building or structure have not yet vested pursuant to the provisions of State law. . ." Thus, the ordinance focused on vesting under the so-called "judicial" vested rights doctrine, which provides that a permit-based right does not "vest" until the developer has performed substantial work and incurred substantial liabilities in good-faith reliance on the permit. Having approved the emergency ordinance, the City notified the developer it could not proceed with the crematorium without first obtaining a use permit.

After the developer's administrative appeals failed, it filed suit claiming that the emergency ordinance impaired its vested right to go ahead with the crematorium. That claim was not based on the "judicial" vested rights doctrine, however, but on the City's own permit-vesting ordinance, which provided, in part, that when a subsisting building permit has been lawfully issued "neither the original adoption of the zoning regulations nor of any subsequent rezoning or other amendment thereto shall prohibit the construction, or other development or change, or use authorized by said permit."

The court evaluated three issues: (1) whether the developer had a vested right under the City's permit-vesting ordinance; (2) if so, whether the emergency ordinance impaired that right; and (3) if the developer had a vested right that was impaired, whether the impairment was justified based on the need to protect public health and welfare.

The court determined that the developer had a vested right under the City's permit-vesting ordinance since the ordinance precluded application of subsequently-enacted zoning regulations where the application of the regulations would prohibit construction authorized under a given permit.

Next, the court found that application of the emergency ordinance would impair the developer's vested right based on the simple fact that it prevented the construction of the crematorium under the building permit. The court was unpersuaded by the City's claim that the vested right was not impaired because the developer had the option of pursuing a use permit. The possibility the developer could regain the right to build the crematorium if it obtained a use permit does not the court noted, change the fact that "a project can be 'prohibited' even if the fulfillment of certain contingencies might at some later date reauthorize it."

Lastly, the court considered the City's claim that impairment of the vested right was necessary in order to protect public health and welfare. While the courts have recognized that vested rights may be impaired when necessary to address a "menace to public health and safety or a public nuisance," such a finding must be supported by substantial evidence. The court found that letters of opposition to the crematorium and general comments expressing concern about the crematorium's potential effects on public health were insufficient to make the required showing. Although it declined to establish a bright line rule, the court indicated that to justify the impairment of a vested right, the record would likely need to include "actual" evidence that the use poses an unmitigated risk to public health.

6. SUSTAINABLE COMMUNITIES STRATEGIES

BAY AREA CITIZENS v. ASSOCIATION OF BAY AREA GOVERNMENTS,
248 Cal. App. 4th 966 (2016)

The Sustainable Communities and Climate Protection Act of 2008 (SB 375) is one of several major statutes California has enacted in its efforts to reduce GHG emissions. SB 375 generally requires each of the state's metropolitan planning organizations (MPOs) to adopt a "sustainable communities strategy" demonstrating how specified land use changes and transportation strategies would enable the region to meet GHG reduction targets set specifically for that region by the California Air Resources Board.

The Association of Bay Area Governments and the Metropolitan Planning Commission constitute the MPO for the San Francisco Bay Area. The MPO adopted its first sustainable communities strategy, Plan Bay Area, in 2013. Lawsuits ensued, some alleging that Plan Bay Area did too little to reduce GHG emissions and some, like Citizens', alleging that the plan called for draconian and unnecessary land use changes.

Citizens alleged that SB 375 expressly required MPOs to "take into account" GHG emission reductions that will be achieved through statewide vehicle emission standards, low carbon fuel standards, and other mandates, and that once these statewide mandates were taken into account no land use changes were needed for the Bay Area to achieve the state's GHG emissions goals. Therefore, Citizens argued, the MPO violated CEQA by describing the project only in terms of GHG reductions that could be achieved through regional land use and transportation policy changes, and by declining to analyze alternatives that did not include such changes.

After reviewing the language of SB 375, its legislative history, and its interpretation by the Air Resources Board, the court rejected Citizens' claims. The court noted that under SB 375, the Board, in setting GHG reduction targets for each MPO, took the statewide mandates into account, and that each MPO was obligated, in its Sustainable Communities Strategy, to identify land use and transportation planning changes that would achieve additional GHG reductions.

Fundamentally, the court observed, Citizens' argument was "that the Legislature, via SB 375, launched a major new climate protection initiative requiring regional agencies to develop regional land use and transportation strategies through an elaborate planning process that in the end would be superfluous because the agencies could meet the Board's regional emissions reduction targets simply by invoking reductions already expected from pre-existing statewide mandates." "This," the court said, "makes no sense."

7. TAKINGS

BOXER V. CITY OF BEVERLY HILLS,
246 Cal.App.4th 1212 (2016)

In 1989, the City of Beverly Hills planted 31 coastal redwood trees in a park adjacent to Spalding Drive in Beverly Hills. In 2005, nearby homeowners complained to the City that the growing trees had begun to block previously unobstructed views of downtown Los Angeles, the Hollywood Sign, the Griffith Observatory, and other landmarks. They claimed the City had failed to trim and maintain the trees as intended and that further growth would entirely block the views from their property as well as exacerbate an existing fire hazard. The trees were not located on plaintiff homeowners' properties, nor did plaintiffs allege any physical intrusion, occupation or invasion of, or physical damage to, their properties.

The homeowners brought an inverse condemnation suit against the City of Beverly Hills seeking damages and injunctive relief based on impairment of the views from their backyards. Without a physical intrusion onto their property, the homeowners relied on a theory of "intangible intrusion," arguing that "because a 'property owner's loss of view is an aspect of compensable damage' in eminent domain cases, the impairment of their views [was] a harm sufficient to support their inverse condemnation claims."

The court rejected as "simply wrong" the argument that damage to the value of plaintiffs' properties, such as from an impaired viewshed, establishes a compensable taking. The mere existence of a diminution in the value of the plaintiff's property does not establish a compensable taking — it is an element of the measure of just compensation when such taking or damaging is otherwise proved.

The court also rejected plaintiffs' contention that impairment of a view alone can constitute a taking. The court was unpersuaded by several cases addressing compensation for a loss of view because those cases also involved a physical taking of the claimant's property. Several California cases discuss a "right" to visibility, but impairment of this right by government action was always "tethered to a compensable claim of impaired physical access." Plaintiffs failed to identify authority for the proposition that a reduction in visibility, per se, required the payment of compensation. Intangible intrusions onto property such as a reduction in view may give rise to an inverse condemnation claim only where there is some burden on the property that is direct, substantial, and peculiar to the property itself.

The court undertook a lengthy discussion of *Regency Outdoor Advertising, Inc. v. City of Los Angeles*, 39 Cal. 4th 507 (2006), in which an advertising company leasing property along a Los Angeles boulevard claimed that palm trees planted by the City along the median reduced the visibility of its billboards. The California Supreme Court rejected the company's inverse condemnation claim, holding that "impairment to visibility does not, in and of itself, constitute a taking of, or compensable damage to, the property in question." Impairment of a "visibility right" might warrant compensation, but the company had no such right. The court noted it would be especially difficult to establish a visibility right as against trees planted on City property, since planting trees could be viewed as an application of land-use regulations and police power, including "the government's well-established prerogative to plant trees on its own property."

In Boxer, the homeowners attempted to distinguish Regency as concerning "a view of property, rather than a view from property" (emphasis in original). The court found this distinction to be of little consequence in light of the well-established principle of California law that a "landowner does not have a right to an unobstructed view over adjoining property." As in Regency, the court declined to find the homeowners had a "visibility right," stating that while private parties or a legislative body could create a right to an unobstructed view, the courts would not imply such a right.

PROPERTY RESERVE v. SUPERIOR COURT,
1 Cal.5th 151 (2016)

The California Department of Water Resources sought a court order allowing it to conduct environmental and geological testing on more than 150 privately owned parcels to investigate the feasibility of adding water conveyance facilities to the Sacramento-San Joaquin Delta to deliver water from Northern California to Central and Southern California. The proposed environmental activities consisted of mapping and surveys while the proposed geological activities consisted of drilling deep holes or borings.

The trial court authorized the Department to conduct the environmental testing subject to detailed limitations in its order. The court, however, denied the Department's request to conduct geological testing under the precondemnation entry and testing statutes, ruling that such activities would constitute a taking, and the Department would, therefore, need to initiate an ordinary condemnation proceeding.

The court of appeal upheld the trial court's denial of the Department's request to conduct geological testing but reversed the trial court's grant of authority to conduct environmental testing. The court of appeal held that the precondemnation entry and testing statutes are limited to "innocuous or superficial" activities, and determined that because the Department's proposed activities were not, they would constitute a taking, which would require that the Department file a condemnation case.

The California Supreme Court reversed. First, the court examined the legislative history of the precondemnation statutes and determined that the statutes were not limited to activities that were "innocuous or superficial." The court held "that the current precondemnation entry and testing statutes are properly interpreted to encompass the type and degree of precondemnation environmental and geological testing" proposed by the Department.

The court then examined the procedure under the precondemnation statutes. As written, the statutes require that a public entity obtain a court order authorizing precondemnation entry and testing and deposit an amount of probable compensation for potential losses resulting from

those activities. The court found the statutes "constitutionally deficient" because they do not give a property owner the right to a jury trial on the amount of damages for precondemnation activities, while the takings clause of the California Constitution guarantees an affected property owner the right to have the amount of just compensation determined by a jury. Rather than invalidating the precondemnation entry and testing statutes on this ground, however, the court determined that the appropriate remedy "is to reform the precondemnation entry statutes so as to afford the property owner the option of obtaining a jury trial on damages . . . ." Accordingly, the court held that the precondemnation statutes are constitutional when the procedure is reformed to allow for a jury determination of damages.

The court's decision is significant as it allows public agencies to avoid a classic condemnation proceeding for certain precondemnation activities while providing property owners the option of having a jury determine the measure of their damages for such activities.

8. SLAPP STATUTE

CRUZ v. CITY OF CULVER CITY,
2 Cal.App.5th 239 (2016)

Learning that the City Council of Culver City was considering a church's request to change neighborhood parking restrictions, neighbors sued claiming the Council's action violated the Brown Act because the process had been initiated during the public comment period rather than as a noticed agenda item. In response to the City's motion to dismiss the action under the anti-SLAPP statute, plaintiffs argued they were subject to the public interest exception from the statute because their action concerned a matter affecting the public interest.

The court held that the Council's discussion at the hearing and its decision to place the parking item on a future agenda, were activities arising from free speech, making the anti-SLAPP law applicable. The court also rejected plaintiffs' claim that they were subject to the public interest exception to the anti-SLAPP statute. The public interest exception applies only to actions brought solely in the public interest, and plaintiffs' action did not qualify because "[k]eeping the parking restrictions at status quo would directly benefit plaintiffs . . . [who] sought personal relief in the form of a halt to any attempts by the church to undo the long-standing parking restrictions."

Because the anti-SLAPP statute applied, plaintiffs had the burden of showing it was probable they would prevail on the merits. They failed to satisfy this burden. The Brown Act allows a council to discuss and take action on non-agenda items in three circumstances: (1) the council may briefly respond to statements or questions from persons exercising their right to publicly testify at a hearing; (2) the council may ask a question for clarification, make a brief announcement, or make a brief report on its own activities; and (3) the council may ask staff to provide factual information, report back at a later time, or place an item on a future agenda. The Council's discussion and decision fell within all three exceptions. Accordingly, there was no Brown Act violation, and plaintiffs' action was properly dismissed under the anti-SLAPP statute.

9. TERRORISM THREATS

SAN DIEGO NAVY BROADWAY COMPLEX COALITION v. UNITED STATES DEPARTMENT OF DEFENSE, 817 F.3d 653 (9th Cir. 2016)

The Ninth Circuit rejected a claim, under the National Environmental Policy Act, that the Navy did not adequately consider the environmental consequences of a potential terrorist threat to the redevelopment of a military complex near downtown San Diego. The opinion upheld the Navy's Environmental Assessment for the complex, which concluded that the project would not create the potential for a significant impact from a terrorist attack., No. 12-57234 (9th Cir. March 30, 2016).

The Navy first approved the redevelopment of the San Diego Naval Complex in 1991. The project included both military functions and private commercial uses to generate revenue. However, adverse real estate conditions in San Diego delayed the project until the mid-2000s. In 2006, the Navy prepared an Environmental Assessment for the project to supplement its prior NEPA analysis from the early 1990s and executed a lease with a private development partner. But a citizens group filed a NEPA lawsuit, and the district court ruled that the Navy had failed to provide adequate public notice for the EA.

In response, the Navy prepared a new EA and reapproved the project in 2009. The new EA included a discussion of a potential terrorist attack, due to the Ninth Circuit's ruling in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016 (9th Cir. 2006), which had held that a categorical dismissal of the potential impacts from a terrorist attack at an installation built to store spent nuclear fuel rods was unreasonable under NEPA. The Navy's new EA concluded that a terrorist attack at the complex in San Diego was too speculative and remote to require NEPA analysis since there was no known specific threat targeting the complex or its location. The EA also explained that anti-terrorism building specifications would be followed to reduce the risks posed by a potential terrorist attack. The EA thus concluded that the project would not place military or civilian personnel in jeopardy and would not result in a significant impact under NEPA.

The court upheld the discussion in the EA, although it rejected the Navy's threshold claim that no analysis of a terrorist threat should be required under NEPA. The Navy argued that the new complex would consist merely of "everyday facilities," in contrast to the nuclear fuel storage facility at issue in the *Mothers for Peace* case. But the court emphasized that the complex would house military command personnel and would be located in a heavily populated urban area. The court thus concluded that the Navy was required to consider the potential for a terrorist attack, given the general risk of terrorism, the project's location, and its military functions.

The court also faulted the Navy for its reasoning that "no known specific threat of a terrorist attack" existed. As the court explained: "The risks associated with terrorism are constantly in flux, and whether or not the intelligence community is aware of a *specific* threat to a facility at the time a NEPA analysis is conducted should have no bearing on whether to consider the impacts of an attack." (Court's emphasis.) Nevertheless, the court found it was sufficient that the EA referred to its anti-terrorism building specifications, which are designed to address a range of terrorist attack scenarios, including explosives, fire and chemical, biological and radiological weapons.

The court's opinion emphasizes the requirement under the *Mothers for Peace* case that federal agencies must consider the impacts from a potential terrorist attack, at least when reviewing

projects such as military installations and nuclear facilities. But the opinion also reflects a relatively deferential view of what constitutes an adequate analysis to fulfill this requirement. In light of recent events worldwide, this issue may continue to garner attention under NEPA from claimants, commentators, and the courts.

10. MELLO ROOS

BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA v. CITY OF SAN RAMON,
4 Cal.App.5th 62 (2016)

The Building Industry Association challenged a special tax imposed by the City of San Ramon to fund additional services to meet the demand generated by new development. It argued, among other things, that the tax was invalid under the Mello-Roos Act because it did not fund "additional services" as required by the Act but merely provided for increased quantities of existing services to meet new demand.

The court of appeal upheld the tax, finding it in compliance with the requirements of the Act. Government. Code §53313(g) provides that a special tax approved by a landowner vote may only finance services "... to the extent that they are in addition to those provided in the territory of the district before the district was created. The additional services shall not supplant services already available within that territory when the district was created." The court found that the tax in question satisfied this requirement since services that met an increased demand would necessarily be "in addition to" the services previously provided. Contrary to the Association's argument, they did not "supplant" the services previously available because they added to rather than replacing those services.

Other provisions of the Mello-Roos Act, the court reasoned, supported this conclusion. Section 53311.5 states that the purpose of the Act is to finance facilities and services in developing areas and areas undergoing rehabilitation, which were the very situations likely to lead to increased demand for the services authorized under the Act. The court also pointed to Section 53326(b), which references the financing of services needed "to meet increased demands placed upon local agencies as the result of development or rehabilitation occurring in the district." Services financed by the San Ramon tax, the court concluded, fell squarely within the "additional services" referenced in the Act.

TAB 3

PERKINSCOIE
COUNSEL TO GREAT COMPANIES

LEGISLATIVE ALERT: LAND USE JANUARY 2017

SUMMARY OF SIGNIFICANT CALIFORNIA LAND USE LEGISLATION IN 2016
(effective January 1, 2017 except as otherwise noted)

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INTRODUCTION

In 2016, California's Legislature focused significantly on promoting affordable housing development and strengthening greenhouse gas regulation. New housing-related measures include "development bonuses" for commercial projects that include affordable housing, removal of obstacles to the construction of accessory dwelling units, improved permit streamlining for affordable housing projects, and expanded rights to challenge local agency disapproval of housing projects under the Housing Accountability Act. New climate change bills mandate the reduction of statewide greenhouse gas emissions to 40% below 1990 levels by 2030 and that the California Air Resources Board prioritize "direct emission reductions" from stationary sources. This casts some doubt on the future of California's cap-and-trade program, which sets market-wide limits but does not compel direct emission reductions from any particular source.

The Legislature also integrated groundwater management requirements into California's existing water supply assessment and verification framework (known as SB 610 and SB 221), improved the availability of CEQA documents to the public, extended CEQA litigation streamlining for certain "environmental leadership" projects, and required that environmental justice be addressed in general plans.

A. HOUSING

1. AB 2208: Expanded Housing Element Definition of Land Suitable for Residential Development

AB 2208 requires that for a city's or county's housing element, the term "land suitable for residential development" shall include the airspace and area above sites owned or leased by a city, county, or city and county. A housing element is the city's or county's plan to meet existing and future housing needs on a local and regional scale. Every general plan must contain a housing element. The legislation also requires local governments to assist the Department of Housing and Community Development with identifying and surveying potential housing sites.

2. AB 2584: Expanded Enforcement Rights Under the Housing Accountability Act

The Housing Accountability Act prohibits a local agency from disapproving certain housing development projects unless the agency first makes specific written findings. The Act previously authorized project applicants and persons eligible to apply for residency in a disapproved project to bring enforcement actions under the Act. AB 2584 amends the Housing Accountability Act to provide that housing organizations – which include trade or industry groups as well as housing non-profits meeting certain criteria – may sue to enforce the Act.

3. AB 2299 & SB 1069: Accessory Dwelling Units

AB 2299 and SB 1069 are intended to remove obstacles to the construction of accessory dwelling units (formerly known as second units) at existing single-family and multi-family residences. Both general law and charter cities are subject to the requirements of amended Government Code section 65852.2, which specifies the requirements cities can and cannot impose in ordinances governing accessory dwelling units. Cities are not required to enact such ordinances, but if they do not, they must approve applications for accessory dwelling units on a ministerial basis, applying only the statewide standards set forth in section 65852.2.

4. AB 2180: Shortened Time for Agencies to Approve or Reject Certain Projects That Include Affordable Housing

Once a public agency has completed its CEQA determinations for a proposed development project, its time to approve or deny the project is limited by the Permit Streamlining Act. Ordinarily, if it certifies an EIR, the lead agency (i.e., the agency with primary responsibility for approving or denying the project) then has 180 days to make its decision on the project. AB 2180 reduces this limit to 120 days if the project is a residential-unit-only development or is a mixed-use commercial-residential development where less than 50% of the total square footage is devoted to non-residential use. A lead agency will have only 90 days to approve or disapprove a project if the above criteria are met and: a) at least 49% of units of the project are affordable for very low or low-income households; and b) the project applicant has provided written notification to the lead agency that it has applied for financing, tax credits, bond authority, or some other form of financial assistance from a public agency. If the lead agency issues a mitigated negative declaration or determines the project is exempt from CEQA, the Act's normal 60-day deadline for lead agency action still applies.

In addition, AB 2180 requires responsible agencies (agencies that are not the lead agency, but that must issue their own discretionary approvals in order for a project to go forward) to approve or disapprove a project within 90 days of approval by the lead agency for the projects described above. The new 90-day timeframes do not apply to the California Coastal Commission.

5. AB 1934: Development Bonuses

AB 1934 creates a "development bonus" for commercial property owners that partner with an affordable housing project to construct a mixed-use development. The bill applies to all cities, including charter cities. In order to qualify for the bonus, affordable housing must be built (a) on site or (b) within the boundaries of the city, in "close proximity" to public amenities such as schools and employment centers, and located with one-half mile of a major transit stop.

The bonus required by the law is "incentives, mutually agreed upon by the developer and the jurisdiction." The bill provides a list of examples that these incentives may include, but incentives are not limited to the list provided. Enumerated incentives include:

(1) Up to a 20-percent increase in maximum allowable intensity in the General Plan.

(2) Up to a 20-percent increase in maximum allowable floor area ratio.

(3) Up to a 20-percent increase in maximum height requirements.

(4) Up to a 20-percent reduction in minimum parking requirements.

(5) Use of a limited-use/limited-application elevator for upper floor accessibility.

(6) An exception to a zoning ordinance or other land use regulation.

The commercial developer may construct the affordable units or pay an affordable housing developer to do so. An agreement approved by the city or county must enumerate how the commercial developer will provide such affordable housing. If the affordable housing construction is not timely commenced, the local government may withhold certificates of occupancy for the commercial development until completion of construction of the affordable units.

Importantly, the development bonus mandated by AB 1934 does not preclude any additional allowances or incentives offered to developers by local law or regulation, so a developer could still avail itself of any local bonus program.

6. AB 2556: Density Bonuses

AB 2556 alters when a housing developer that otherwise qualifies for a density bonus under state law must replace certain existing or former rental dwelling units on a project site. If the income category of households in occupancy of the existing or former units is unknown, AB 2556 imposes a rebuttable presumption that lower-income renter households occupied those units in the same proportion as statistical data indicate is typical within the jurisdiction. If the existing or former units have been subject to local rent or price control and have been occupied by households above lower income, AB 2556

authorizes the local agency either to require that replacement units be made available to low-income households or to require that units be replaced in compliance with the local rent or price control ordinance.

For projects that set aside 10 percent of units for transitional foster youth, disabled veterans, or homeless people, AB 2556 also requires local agencies to grant a density bonus equal to 20 percent of the number of the type of units giving rise to the bonus.

7. AB 2450: Recordation of Use Restrictions for Owner-Occupied Housing at Affordable Cost

AB 2450 requires all contracts with government agencies that restrict the use of property for owner-occupied housing at an affordable cost to be recorded with the county recorder office where the property is located.

Existing property tax law requires the county assessor to consider, when valuing real property for property taxation purposes, the effect of any enforceable restrictions to which the use of the land may be subjected. Under existing law, these restrictions include, but are not limited to, zoning, recorded contracts with governmental agencies, and various other restrictions imposed by governments. Under AB 2450, when assessing real property, an assessor may take in to account a contract that restricts the use of the property to owner-occupied housing available at affordable housing cost, including under any locally adopted inclusionary housing program.

Thus, AB 2450 will result in affordability restrictions imposed by a government contracts being taken into account in the assessment of real property. AB 1934 is scheduled to remain in effect until January 1, 2022.

8. SB 1413: School Districts: Employee Housing

SB 1413 attempts to reduce public school teacher turnover caused by housing price increases in certain markets, particularly in San Francisco. The legislation authorizes California school districts to establish and implement programs to provide affordable housing to teachers and school district employees. Programs available to school districts under this legislation include utilizing federal, state, and local funds, public and private programs, and public-private partnerships. School districts are also authorized to build and establish affordable housing for teachers and school district employees on district-owned property. Developers and school districts receiving local or state funds or tax credits to build affordable housing may restrict the housing to teachers or school district employees.

9. AB 2200: Funding for School Employee Housing

AB 2200 creates a new source of financing for developers of affordable rental housing for school employees. The bill requires the State Housing Finance Agency to administer a program to provide financing assistance to qualified school districts and qualified developers for the creation of affordable rental housing for school employees, including teachers.

The bill transfers $100,000,000 from the General Fund to the School Employee Housing Assistance Fund, which will continuously appropriate such money for the creation of affordable housing for school employees. Qualified developers may receive these funds in the form of loans. Each loan would be

less than or equal to $10,000,000, have a term of 55 years or more, and bear simple interest at 3% per annum on the unpaid principal balance. To obtain a loan, a qualified developer must show that the project's costs are reasonable compared to projects in the area and that the project is feasible and located within reasonable proximity to public transportation and public services. The State Housing Finance Agency must also consider a reasonable geographic distribution of funds, and will publish procedures for obtaining such loans. Qualified school districts may also receive the funds in the form of predevelopment grants.

To be considered a qualified developer under the program, the developer must have partnered with a qualified school district and plan to build affordable rental units for school employees, including teachers. The State Department of Education must certify a qualified school district, and to qualify for certification such district must (1) have acquired and designated surplus land from a school district, special district or city, (2) have a high average cost for teacher recruitment, (3) have a low retention rate and (4) have 60% of its students participating the National School Lunch Program.

B. AIR QUALITY/CLIMATE CHANGE

1. SB 32 and AB 197: Major Climate Change Legislation

California Governor Jerry Brown signed into law two controversial anti-climate change bills that will tighten greenhouse gas (GHG) limits by 40% and increase legislative supervision of the California Air Resources Board (CARB)—the agency responsible for reducing GHG emissions. The California Legislature passed both bills, SB 32 and the closely related AB 197, on August 24, 2016. The new legislation will likely trigger heightened CEQA thresholds for new projects and new regulations, which in turn may increase costs and risks for developers, utilities, transportation companies and manufacturers.

SB 32 Requires 40% Reduction of GHG Emissions by 2030

SB 32 is considered the successor to the California Global Warming Solutions Act of 2006, also known as AB 32, which required California to reduce emissions to 1990 levels by 2020. AB 32 identified CARB as the main agency responsible for implementing the emissions reductions.

SB 32 extends AB 32 by requiring CARB to reduce statewide GHG emissions to 40% below the 1990 level by 2030. SB 32 also requires CARB to update its implementation plan, known as the Scoping Plan, to address the 2030 target and ensure GHG reductions will benefit the state's most disadvantaged communities.

AB 197 Requires Direct GHG Emission Reductions and Public Reporting of Facilities Emitting GHG

AB 197 and SB 32 each required that, in order to become effective, the other bill also be enacted. AB 197 increases legislative oversight of CARB by subjecting the agency to supervision by a new Joint Legislative Committee on Climate Change Policies and adding two legislators as ex-officio, nonvoting members. CARB must also publish data on GHG emissions, air pollutants, and environmental toxins on

its website, including emissions for "each facility" that reports such information. AB 197 also requires CARB to limit SB 32's economic impact on disadvantaged communities.

Impact on Cap-and-Trade and Consequences for Industry

Both bills create some doubt over the future of cap-and-trade. Cap-and-trade is California's system of auctioning the right to emit GHGs. It limits the total amount of GHG emissions that may be emitted by all applicable sources and then auctions off the rights to emit portions of that total. Market forces determine the most cost-effective way to achieve emissions limits. However, cap-and-trade does not require polluters to actually reduce their GHG emissions in California. GHG emissions may be reduced elsewhere because climate change is considered to be affected by global emissions rather than localized emissions of GHGs.

SB 32 does not extend cap-and-trade beyond 2020. Further, under AB 197, CARB must "prioritize . . . direct emission reductions at large stationary sources." This provision is intended to decrease CARB's reliance on indirect emissions reductions through cap-and-trade to achieve GHG reductions and instead focus CARB on direct reductions at large emitters like power plants and refineries. It is not clear, though, what it means for CARB to "prioritize" direct reductions at stationary sources.

Impacts on CEQA Compliance

Consistency with AB 32's 2020 GHG reduction goals has been accepted by the courts, including the Supreme Court of California, as an acceptable standard for determining whether a project's GHG emissions would be cumulatively considerable under CEQA. *See Center for Biological Diversity v. Dep't of Fish & Wildlife*, 62 Cal. 4th 204 (2015).

However, the Supreme Court of California also has granted review in *Cleveland National Forest Foundation v. San Diego Association of Governments*. There, the Court will determine whether an EIR for a regional transportation plan can limit its analysis to consistency with the 2020 GHG reduction goals in AB 32 or whether the analysis must extend beyond 2020 to reflect the longer term goals identified in the executive order that preceded AB 32. Recently, in *Center for Biological Diversity v. Dep't of Fish & Wildlife*, 62 Cal. 4th at 223, the Supreme Court appeared to tip its hand by stating: "An EIR taking a goal-consistency approach to CEQA significance may in the near future need to consider the project's effects on meeting longer-term emissions reduction targets." In a footnote, the Court cited both the executive order and the pendency of SB 32.

As has occurred with AB 32, regardless of the outcome of the Court's decision in *Cleveland National Forest Foundation v. San Diego Association of Governments*, SB 32 will likely be used to establish new significance thresholds based on compliance with the new, longer-term goal.

Impacts on Utilities and Renewable Energy Companies

In June 2016, CARB released a draft Scoping Plan Update for 2030 as required by Executive Order B-30-15. It singles out the electric, manufacturing and transportation industries as California's largest contributors to GHG emissions. At the same time, the Governor's Executive Order B-32-15 directs state agencies to transition transportation fleets to zero-emission technologies.

Electrification of the transportation fleet could benefit electric utilities as the increased number of electric vehicles would offset the loss of base load to energy efficiency measures and distributed generation assets like residential solar. Moreover, these electric vehicles will require an expansion of California's vehicle charging infrastructure. These chargers might offer an additional source of utility revenue if, for example, utilities include chargers in rate base.

Electric utilities may not need to procure additional renewables to satisfy SB 32 because of SB 350 (2015, De Leon), which modified California's Renewables Portfolio Standards (RPS) Program. As modified, the RPS Program requires that the amount of electricity generated and sold to retail customers from renewable energy sources be increased to 50% by 2030.

On the other hand, the GHG reductions necessary to meet SB 32's goal may require CARB to impose additional restrictions on fossil-fuel plants, especially if the Diablo Canyon nuclear plant is closed and no new nuclear facilities are constructed. Utilities should closely monitor developments at CARB, given that the extension of the agency's statutory mandate to 2030 authorizes it to implement more aggressive GHG reduction measures.

New Challenges for Manufacturing and Transportation as Targets for Emission Reductions

CARB has recognized manufacturing as one of the largest contributors to California's GHG emissions. AB 197 provides CARB a statutory basis to target manufacturing facilities by requiring direct reductions. Emission reduction measures might include policies that, for example, increase the deployment of combined heat and power facilities, require waste diversion, reduce water consumption and mandate energy efficiency retrofits. Manufacturers will also face greater public scrutiny, as CARB will publish emissions data at the more granular level of individual facilities.

Additional GHG reduction measures will also likely apply to the transportation industry, such as increased fuel efficiency requirements. Implementing CARB policies may require significant investment by transportation companies.

SB 1128: BAAQMD Commute Benefit Pilot Project Made Permanent

SB 1128 makes permanent the authority of the Metropolitan Transportation Commission ("MTC") and the Bay Area Quality Management District ("BAAQMD") to establish commute benefit ordinances applicable to employers with over 50 employees operating within the jurisdiction of both agencies. Employers must offer their employees at least one of the following programs: (1) allow employees to exclude commuting costs for transit passes or vanpool charges from taxable wages, (2) an employer-provided subsidy to employees for monthly costs of commuting by public transit, van pool, or bicycle, or (3) transportation furnished by the employer. The employer can offer more generous commute benefits and petition the MTC or BAAQMD for approvals of alternative commute benefits. Any commute benefit ordinance adopted by the MTC and BAAQMD will specify how implementing agencies will inform covered employers about the ordinance, how the employer will demonstrate compliance, procedures for evaluating alternative compliance proposals, and consequences for noncompliance.

SB 1386: Natural and Working Lands

SB 1386 declares that it is the policy of the state that the protection and management of natural and working lands is an important strategy in meeting the state's greenhouse gas emissions reduction goals through carbon sequestration. The law requires all state agencies to consider this policy when adopting policies, regulations, expenditures, or grant decisions relating to the protection and management of natural and working lands. SB 1386 was opposed by the solar industry over concerns that the law would prioritize conservation of natural and working lands over renewable energy development.

C. WATER SUPPLY

1. SB 1262: Water Supply Planning

SB 1262 is the Legislature's first attempt to integrate groundwater management requirements under the Sustainable Groundwater Management Act ("SGMA") into local planning. The Act incorporates parts of SGMA into two of California's water supply planning laws: the water supply assessment statute (Water Code § 10910, also known as "SB 610") and the written verification statute (Government Code § 66473.7, also known as "SB 221"). SB 610 and SB 221 require information regarding water availability to be provided to local decision-makers prior to approval of large development projects. Specifically, SB 610 requires that certain categories of projects subject to the California Environmental Quality Act ("CEQA") receive a water supply assessment that determines whether future water supplies will be sufficient to meet the project's water demands. SB 221 requires written verification of water supply adequacy prior to approval of certain subdivisions under the Subdivision Map Act.

Under SB 1262, if a proposed project's water supply includes groundwater from a non-adjudicated basin designated as medium or high priority under SGMA, then any written verification or water supply assessment must provide: (i) whether the Department of Water Resources ("DWR") has designated the basin as subject to critical conditions of overdraft and (ii) a copy of the applicable Groundwater Sustainability Plan or alternative plan. For non-adjudicated basins designated by DWR as low or very low priority, a water supply assessment or written verification must state whether a basin is overdrafted or projected to become overdrafted. These requirements apply to projects subject to CEQA, proposed residential developments of more than 500 units, and proposed residential developments that would increase by 10% or more the number of service connections of a small public water system.

SB 1262 also prohibits hauled water from being considered a source of water. The Act further requires, for projects subject to CEQA, that the lead agency identify any water system whose service area either includes or is adjacent to the project site.

2. SB 1263: Public Water System Permits

SB 1263 bans the creation of new, small water districts. It prohibits a city or county, including charter governments, from issuing a permit for the construction of a new residential development where the water supply is provided by hauled water, bottled water, a water-vending machine, or a retail water facility.

Under SB 1263, applications to build a new public water system must be submitted to the State Water Resources Control Board at least 6 months prior to the start of construction. The Board may deny an

application or direct an applicant to consult with nearby water systems that might be able to supply water instead. Although the Board may delegate its permitting authority to a local agency, a building permit may not issue without the concurrence of the Board.

D. CEQA

1. SB 122: Availability of CEQA Documents Through OPR Database; Option for Preparation of Administrative Record During CEQA Process

SB 122 is intended to expedite the CEQA process by two means. First, to make CEQA documents more readily available to the public, the Office of Planning and Research is required to establish and maintain "a database for the collection, storage, retrieval, and dissemination of environmental documents, notices of exemption, notices of preparation, notices of determination, and notices of completion" that are provided to it by public agencies. The database "shall be available to the public online through the Internet." Pub. Res. Code § 21159.2(b).

Second, at the beginning of the CEQA process, an applicant may request that the lead agency prepare the record of proceedings concurrently with the agency's process. The lead agency is not required to consent to such a process, but if it does so, technical requirements include that:

- All documents and other materials placed in the record of proceedings be posted on, and be downloadable from an Internet Web site, commencing with the date of the release of the draft environmental document for the project
- These documents include the draft environmental document "and all other documents submitted to, cited by, or relied on by the lead agency, in the preparation of the draft environmental document for the project."
- After the draft environmental document is released, documents prepared by the lead agency or submitted by the applicant that are part of the record, as well as comments on the draft environmental document that have been submitted electronically, be made available to the public electronically within five business days, and that comments not submitted in electronic format be converted and made electronically available within seven days
- The record of proceedings be certified within 30 days of the filing of the notice of determination for the project
- The costs of preparing the record and complying with the new requirements are not recoverable costs under Code of Civil Procedure section 1032
- The lead agency may charge the applicant a reasonable fee to recover the costs incurred by the lead agency in preparing the record of proceedings pursuant to these new provisions.

(Pub. Res. Code § 21167.6.2.)

2. SB 734: Extension of Jobs and Economic Improvement Through Environmental Leadership Act of 2011

SB 734 is an urgency statute that took effect on August 26, 2016. The bill extends to January 1, 2018, the Governor's ability to certify large projects meeting certain requirements as "environmental leadership development projects." These projects obtain litigation streamlining benefits under the 2011 Act.

Two sets of new requirements accompany the extension of the 2011 Act. First, the Act's prevailing wage and union labor provisions have been strengthened. Second, in order to be certified, a multifamily residential project must provide unbundled parking, such that private vehicle parking spaces are priced and rented or purchase separately from dwelling units. This requirement does not apply if the dwelling units are subject to affordability restrictions that prevent the cost of parking spaces from being unbundled from the cost of dwelling units. (Pub. Res. Code §§ 21183, 21184.5, 21189.1, 21189.3.)

E. GENERAL PLAN

1. AB 2651 & AB 1000: New Content Requirements for General Plans

The Planning and Zoning Law requires each city and county to adopt a general plan to establish the community's long-range planning goals and objectives. General plans are required to include the following mandatory elements: land use, circulation, housing, conservation, open space, noise, and safety. Many local agencies choose to include additional optional elements addressing other topics.

AB 2651 and AB 1000 make two changes to the mandatory general plan content requirements:

Greenways: Greenways are defined as pedestrian and bicycle, non-motorized vehicle transportation, and recreational vehicle travel corridors that are adjacent to urban waterways and meet certain other requirements. Amendments to Government Code § 65302 now require that greenways be addressed in the land use element, rather than the open space element, of the general plan.

Environmental Justice: Government Code § 65302 was also amended to require that cities and counties include an environmental justice element in their general plans. The environmental justice element shall identify objectives and policies to reduce health risks in disadvantaged communities, promote civil engagement in public decision-making, and prioritize improvements and programs that address the needs of disadvantaged communities. Cities and counties may alternatively comply with this new requirement through the adoption of such environmental justice goals, policies, and objectives integrated throughout other elements of their general plans. The new environmental justice content is required to be adopted upon an agency's adoption or next revision of two or more general plan elements concurrently on or after January 1, 2018.

TAB 4

PERKINSCOIE
COUNSEL TO GREAT COMPANIES

OVERVIEW OF THE STATE DENSITY BONUS LAW

Prepared by Alan Murphy and Cecily Barclay
January 2017

This report summarizes how the state Density Bonus Law can be applied by multi-family housing developers and shows how increased densities can be achieved by providing on-site affordable housing. The report also describes other benefits the Density Bonus Law can confer upon a typical multi-family residential developer, including incentives and concessions from cities, waivers or reductions of development standards, and limitations on parking standards.[1]

I. Qualifying Projects Under the Density Bonus Law

The state Density Bonus Law (Gov't Code §§ 65915–65918)[2] requires cities to grant a specified increase over the otherwise maximum allowable gross residential density for eligible development projects that include a certain amount of affordable or otherwise restricted housing. An applicant has the option of accepting a lesser percentage density increase than that specified by statute, including no increase in density. § 65915(f). Such an election does not undermine an applicant's eligibility for the benefits associated with qualifying for the density bonus, as described in the next part of this document.

State law provides that a city "shall grant" a density bonus of an amount identified by statute when an applicant constructs a housing development with at least one of the following features, as potentially relevant to a typical multi-family housing developer:

- Ten percent of units are affordable to "lower-income households," as defined by statute;
- Five percent of units are affordable to "very low-income households," as defined by statute;
- Ten percent of units are for "transitional foster youth", "disabled veterans," or "homeless persons," as defined by statute, and are affordable to "very low-income households";
- The project features a residential development for senior citizens that has at least 35 dwelling units; or

[1] Although this document refers to "cities" for simplicity's sake, the Density Bonus Law applies in equal measure to counties.
[2] Unless otherwise noted, all subsequent citations are to the Government Code.

- Ten percent of units in a community apartment project, condominium project, planned development or stock cooperative are affordable to "moderate-income" individuals and families, as defined by statute, provided all units in the development are offered to the public for purchase.

§ 65915(b)(1); *see also* Civ. Code § 51.3(b)(4). Any units awarded as a density bonus are excluded from the above calculations. § 65915(b)(3). All residential units must be "on contiguous sites that are the subject of one development application," but do not have to be on the same subdivision map or parcel. § 65915(i).

To determine how many bonus units are awarded, the Density Bonus Law uses a sliding scale based on the percentage of affordable units provided. Please see Appendix A for a chart that shows the percentage of density bonus units available for a project that includes a specified percentage of affordable units. For instance, a project in which 10 percent of units are affordable is awarded (1) a 20 percent density bonus if the restricted units are affordable to low-income households or (2) a 32.5 percent bonus if those units instead are affordable to very low-income households. Developments meeting the criteria listed above for units for senior citizens, transitional foster youth, disabled veterans, or homeless individuals receive a density bonus equal to 20 percent of the number of the type of units giving rise to the bonus.

Under certain circumstances, a housing development's eligibility for a density bonus or other associated benefits is restricted if proposed on a property on which rental units are or have been restricted to affordable rents, subject to rent or price control, or occupied by low-income or very low-income households. § 65915(c)(3).

Finally, the Density Bonus Law requires the grant of a density bonus, if desired by the applicant, for qualifying projects that convert apartments to condominiums. § 65915.5. Additionally, local agencies must grant bonus incentives to commercial developers that partner with a housing developer to provide affordable housing. § 65915.7.

II. Potential Benefits Under the Density Bonus Law

The Density Bonus Law offers further benefits beyond enabling a developer of multi-family housing to increase residential densities as described above. These benefits include incentives, concessions, waivers and reductions in development standards and parking accommodations cities must grant developers entitled to a density bonus.

A. Incentives and Concessions

To begin, state law allows qualifying projects to receive one to three "incentives or concessions for the production of housing units." § 65915(a). The number of permitted incentives or concessions varies based on the percentage of affordable units built. § 65915(d)(2). For example, a project that reserves at least 20 percent of units for low-income households would

be entitled to two incentives or concessions, while three incentives or concessions would be available to a project with at least 30 percent low-income housing. § 65915(d)(2),(3).[3]

A concession or incentive is defined as any of the following:

- A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed minimum building standards, including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable and actual cost reductions, to provide for affordable housing costs or rents;

- Approval of mixed-use zoning in conjunction with the housing project if commercial, office, industrial, or other land uses will reduce the cost of the housing development and are compatible with the project and development in the area; and

- Other regulatory incentives or concessions proposed by the developer or the city that result in identifiable and actual cost reductions to provide for affordable housing costs or rents.

§ 65915(k).

A city must grant up to the specified number of requested incentives or concessions unless the city makes one of the following findings, based on substantial evidence:

- The concession or incentive does not result in identifiable and actual cost reductions to provide for affordable housing costs.

- The concession or incentive would have a specific, adverse impact on public health and safety, the physical environment, or any real property that is listed in the California Register of Historical Resources, and for which there is no feasible method to satisfactorily mitigate or avoid the impact without rendering the development unaffordable to low-income and moderate-income households.[4]

- The concession or incentive would be contrary to state or federal law.

§ 65915(d)(1). If a city fails to make these findings and nevertheless refuses to grant the requested incentive or concession, a developer may initiate judicial proceedings. § 65915(d)(3).

[3] It appears, however, that a project qualifying for a density bonus by providing housing for senior citizens, transitional foster youth, disabled veterans, or homeless individuals would not be eligible for any incentives or concessions. § 65915(d)(2).

[4] Note that an adverse impact on public welfare (such as aesthetics or compatibility with surrounding development) would not provide grounds for denying a requested incentive or concession.

B. Waiver of Development Standards

In addition to providing for concessions and incentives, the Density Bonus Law prohibits a city from applying "any development standard that will have the effect of physically precluding the construction" of a qualifying development. § 65915(e)(1). An applicant is entitled to submit a proposal for a waiver or reduction of any such development standards. The city must grant the requested waiver or reduction unless it determines (1) the waiver or reduction would have a specific, adverse impact on health, safety, or the physical environment, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact; (2) the waiver or reduction would have an adverse impact on real property that is listed in the California Register of Historical Resources; or (3) the grant would be contrary to state or federal law. The courts have confirmed that this statutory section enables development of project "amenities," including an interior courtyard, a community plaza, and high ceilings, provided the project with amenities would have been physically precluded by a development standard.

C. Limitation on Parking Standards

The Density Bonus Law additionally provides that, on the request of a developer that qualifies for a density bonus, a city may not require on-site parking ratios above the following:

- Zero to one bedroom: one parking space;
- Two to three bedrooms: two spaces;
- Four or more bedrooms: two-and-a-half spaces.

§ 65915(p)(1). For certain projects, these ratios could represent a significant reduction in parking otherwise required by a local jurisdiction.

Further, at the developer's request, a city typically may not impose an on-site parking ratio above one-half space per bedroom for a development that:

- Contains 20 percent of units for low-income households or 11 percent of units for very low-income households, as measured prior to the density bonus award;
- Is located within one-half mile of a "major transit stop," as defined by statute;[5] and
- Enables a resident to access the major transit stop without encountering natural or constructed impediments.

§ 65915(p)(2).

[5] "Major transit stop" is defined as (1) a site containing an existing rail transit station, a ferry terminal served by either a bus or rail transit service, or the intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods, or (2) a major transit stop included in the applicable regional transportation plan.

However, a city may impose a higher parking ratio not to exceed that specified in the first paragraph of this Section II.C, above, if the city or an independent consultant has conducted an areawide or citywide parking study in the last seven years that provides substantial evidence to support the higher ratio. § 65915(p)(7).

A separate set of reduced parking ratios is available to certain developments composed exclusively of low-income units. § 65915(p)(3). A developer also may request further parking incentives or concessions beyond those provided here under the standard process for awards of incentives and concessions. § 65915(p)(5).

III. Conclusion

The Density Bonus Law offers multi-family housing developers a range of options to increase densities beyond the otherwise maximum allowable density. In addition, applying for incentives, concessions, and waivers of development standards can allow developers to design projects better suited to their goals.

Attachment:
Appendix A - State Density Bonus Affordable Unit Chart

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Appendix A:
State Density Bonus Affordable Unit Chart*

Affordable Unit Percentage**	Very Low-Income Density Bonus	Low-Income Density Bonus	Moderate-Income Density Bonus
5%	20%	-	-
6%	22.5%	-	-
7%	25%	-	-
8%	27.5%	-	-
9%	30%	-	-
10%	32.5%	20%	5%
11%	35%	21.5%	6%
12%	35%	23%	7%
13%	35%	24.5%	8%
14%	35%	26%	9%
15%	35%	27.5%	10%
16%	35%	29%	11%
17%	35%	30.5%	12%
18%	35%	32%	13%
19%	35%	33.5%	14%
20%	35%	35%	15%
21%	35%	35%	16%
22%	35%	35%	17%
23%	35%	35%	18%
24%	35%	35%	19%
25%	35%	35%	20%
26%	35%	35%	21%
27%	35%	35%	22%
28%	35%	35%	23%
29%	35%	35%	24%
30%	35%	35%	25%
31%	35%	35%	26%
32%	35%	35%	27%
33%	35%	35%	28%
34%	35%	35%	29%
35%	35%	35%	30%
36%	35%	35%	31%
37%	35%	35%	32%
38%	35%	35%	33%
39%	35%	35%	34%
40%	35%	35%	35%

* All density bonus calculations resulting in fractions are rounded up to the next whole number.
** Affordable unit percentage is calculated excluding units added by a density bonus.

Color Divider for 4B

SELECT NEWLY-ENACTED/PROPOSED AFFORDABLE HOUSING LAWS
January 1, 2016 - December 31, 2016

New Adopted Affordable Housing Law

	City/County	Ordinance	Ordinance Summary	Status
1.	City of Los Angeles	Build Better LA (Measure JJJ) Applies to: For-Sale Projects and Rental Projects	All projects with 10 or more residential units and that require a General Plan or zoning amendment subject to inclusionary requirement of up to 20% for rental apartments and 40% for for-sale units. Also imposes local hire requirements. Ordinance limits City's ability to deny General Plan amendments for qualifying projects. Developer may also pay in-lieu fees or provide off-site units.	Passed by voters on November 8, 2016 (64.8% in favor, 35.2% opposed).
2.	City of Napa	Housing Impact Fees for Residential Non-Residential Development (Res. 2016-69) Applies to: All New Development Projects	Increases affordable housing impact fees for all development in the city.	Passed on May 17, 2016.
3.	City of Oakland	Housing Impact Fees for Residential Development (Ord. 13365) Applies to: For-Sale Units and Rental Units	Created affordable housing impact fees for residential projects. Fee amount depends on geographic zone. Developers can alternatively comply by providing affordable units.	Passed May 3, 2016. Ordinance No. 13365.

	City/County	Ordinance	Ordinance Summary	Status
4.	City of San Jose	Housing Impact Fees for Residential Development (Res. 77218) Applies to: Rental Projects	Imposes fee on new rental housing for projects with three or more units. Ordinance adopted in 2014, but took effect in July 2016 (does not apply to certain downtown high rises until 2021).	Council rejected proposal to limit application to limit to projects with 20 or more units (consistent with for-sale unit ordinance) in December 2016.
5.	San Luis Obispo County	In-Lieu Fee Increase Applies to: For-Sale Projects and Non-Residential Development	Fee increases for residential in-lieu housing impact fees and commercial development housing impact fees.	Passed by the Board of Supervisors on December 6, 2016. Ordinance No. 3238.

Proposed Affordable Housing Laws

	City/County	Ordinance	Ordinance Summary	Status
1.	City of Palo Alto	Housing Impact Fee for Nonresidential Projects and Inclusionary Zoning for Residential Projects Applies to: For-Sale Projects, Rental Projects, Non-Residential Development	Combination of two ordinances that would increase impact fees for certain non-residential projects depending on use type (most significant increase for office/ R&D), impose a new fee for rental projects, and reduce the trigger for paying in lieu fees such that any project with 3 or more units must pay an in-lieu fee or provide affordable units.	Passed on first reading on December 12, 2016, but not adopted on second reading on January 9, 2017. Reopened for public discussion.

2.	City of Belmont	Inclusionary Zoning and Housing Impact Fee Ordinance Applies to: For-Sale Projects, Rental Projects, and Non-Residential Development	Belmont has neither a inclusionary zoning ordinance nor a housing impact fee ordinance. The city is considering an inclusionary zoning ordinance for projects with 30 or more units. For projects with 30 or more units, 15% of the units must be affordable. For projects with less than 30 units, rental projects, and non-residential projects, an impact fee would be required.	Planning Commission conducted a study session on October 4, 2016 and a public hearing on November 1, 2016. The Council could vote on the ordinance soon.
3.	City of Mill Valley	Housing Impact Fees and Inclusionary Housing Ordinance Applies to: For-Sale Projects and Rental Projects	Proposed increases to inclusionary requirements (for-sale projects) and increased impact fees (rental projects).	Planning Commission reviewed proposed ordinances on August 23, 2016. Planning Department preparing revised draft ordinance.
4.	City of Sonoma	Inclusionary Housing / Housing Impact Fee Ordinance Applies to: For-Sale Projects, Rental Projects, Non-Residential Development	Sonoma is studying possible modifications to its inclusionary housing requirements and the addition of impact fees for non-residential development and rental projects.	City Council and Planning Commission held an initial study session on May 16, 2016 and reviewed the results of the housing study on August 15, 2016.

TAB 5

PERKINSCOIE
COUNSEL TO GREAT COMPANIES

CEQA YEAR IN REVIEW 2016

A SUMMARY OF PUBLISHED APPELLATE OPINIONS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

By: Stephen Kostka, Chris Berka, Marc Bruner, Julie Jones, Barbara Schussman, Laura Zagar, Marie Cooper, Jacob Aronson, Anne Beaumont, Christopher Chou, Michelle Chan, Garrett Colli, Brian Daluiso, Sunny Tsou

In 2016, the California appellate courts issued published opinions in 21 CEQA cases. In several of those opinions, including a ground-breaking decision by the California Supreme Court, the courts grappled with limits on the scope of required environmental review for a subsequent project approval after a negative declaration or EIR has previously been adopted or certified for the project. Other key decisions addressed emergent questions regarding the requirements for analyzing the impacts of greenhouse gas emissions and energy use, as well as mitigation of those impacts.

Courts also considered the boundaries of CEQA's reach, one finding that CEQA is not concerned with the social and psychological effects of a change in community character, and another confirming that CEQA generally applies to a project's effects on the environment, not to the environment's impacts on a project. And in a controversial decision that may have far-reaching implications, an appellate court found an EIR deficient because it did not provide evidence supporting its use of policies from the agency's general plan as standards of significance.

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Courts of Appeal

A. EXCLUSIONS AND EXEMPTIONS FROM CEQA

1. Ordinance Prohibiting Mobile Medical Marijuana Dispensaries Not a Project Subject to CEQA

Union of Medical Marijuana Patients, Inc. v. City of Upland
(4th Dist. 2016) 245 CA4th 1265

The court of appeal held that a city ordinance prohibiting mobile medical marijuana dispensaries was not a "project" subject to CEQA because there was no evidence showing the ordinance would result in foreseeable impacts on the environment.

Background. In 2007, the City of Upland adopted a zoning ordinance prohibiting any medical marijuana dispensary in any zone within the city. The city adopted a negative declaration, which concluded the ordinance would not have a significant effect on the environment. The negative declaration was not challenged.

Six years later, the city adopted an ordinance that specifically prohibited mobile marijuana dispensaries. Based on its findings that mobile dispensaries are associated with increased criminal activity and that 34 mobile dispensaries just outside the city advertised direct delivery of marijuana, the city concluded there was a high likelihood that mobile dispensaries would "immediately flourish" in the city without the ordinance.

The Union of Medical Marijuana Patients submitted comments arguing that the ordinance amounted to a "project" under CEQA because it would have foreseeable environmental effects, including "(1) increased travel by residents who would now be forced to travel outside the city to obtain medical marijuana; and (2) increased indoor cultivation activity within the city," which would result in increased utility use and hazardous waste. The city did not respond to these comments and UMMP sued to challenge the ordinance based on the city's claimed failure to comply with CEQA.

The Court's Decision. The court of appeal agreed with the trial court's decision upholding the city's actions, ruling that the ordinance "merely restates the prohibition on mobile dispensaries that was imposed by the 2007 ordinance." Because it did not change the status quo, adoption of the ordinance did not meet the key test for a "project" that is subject to CEQA: that it "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."

The court also concluded that even if the ordinance was not a mere restatement of the prior ordinance, it did not amount to a CEQA project because the environmental impacts claimed by UMMP were based on layers of assumptions about what might occur as a result of the ordinance. UMMP did not identify any evidence that residents "would be forced to travel greater distances" to obtain the medical marijuana or that the ordinance would result in indoor cultivation, leading to increased electrical and water consumption, waste plant material and odor, and hazardous waste materials associated with fertilizing and harvesting marijuana plants. These alleged impacts, the court ruled, were too "speculative and unlikely" to be deemed "reasonably foreseeable."

2. Zoning Ordinance Regulating Medical Marijuana Facilities Not Necessarily a Project Subject to CEQA

Union of Medical Marijuana Patients v. City of San Diego
(4th Dist. 2016) 4 CA5th 103 (review granted Jan. 11, 2017)

In another case involving regulation of medical marijuana facilities, *Union of Medical Marijuana Patients v. City of San Diego*, the court of appeal again held that the enactment of a zoning ordinance regulating medical marijuana facilities is not necessarily a "project" under CEQA. The decision confirms that enactment of a zoning ordinance is not a project subject to

CEQA unless it is shown that the ordinance may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment.

The Court's Analysis. Union of Medical Marijuana Patients challenged a San Diego ordinance that regulated the establishment and location of medical marijuana consumer cooperatives, arguing that enactment of the ordinance was a project under CEQA and that the city should have analyzed its environmental impacts. UMMP relied on Public Resources Code section 21080, which states that CEQA applies to discretionary projects carried out or approved by public agencies, and includes the enactment and amendment of zoning ordinances in its list of examples.

The court, however, explained that section 21080 cannot be read in isolation and must be read together with section 21065, which defines a CEQA "project" as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" that is directly undertaken, supported, or authorized by a public agency. The court concluded that while section 21080 lists zoning ordinances as an example of an activity undertaken by a public agency, a zoning ordinance qualifies as a CEQA project only if it satisfies the definition in section 21065: that it may cause a direct or indirect change in the environment.

The court then addressed UMMP's arguments that the ordinance would cause reasonably foreseeable indirect changes in the environment. It found there was insufficient evidence in the record to support any of UMMP's arguments regarding the ordinance's environmental impacts: (1) that it would force patients to drive farther to obtain medical marijuana; (2) that it would result in more home marijuana cultivation; and (3) that it would cause increased development.

Note: The California Supreme Court granted review of this case on January 11, 2017.

3. MOU Allocating Responsibility for Development of Groundwater Management Plan Not a Project Under CEQA

Delaware Tetra Technologies Inc. v. County of San Bernardino
(4th Dist. 2016) 247 CA4th 352

A memorandum of understanding between a water district, county, property owner, and water company outlining mutual responsibilities for preparing a groundwater management plan for installation and operation of groundwater extraction wells was not a "project" requiring review under CEQA, according to the court in *Delaware Tetra Technologies*. The court concluded that the memorandum established a process for completing the groundwater management plan under which the county ultimately retained full discretion to consider a final EIR, approve or disapprove the proposed plan and project, and require additional mitigation measures or alternatives after the plan was completed.

Background. In 2002, San Bernardino County adopted an ordinance governing groundwater pumping. The ordinance required that groundwater well operators obtain a permit and comply with specified standards designed to maintain the health of affected aquifers. Several years later, a landowner and water company proposed to sink a number of groundwater wells, extract groundwater over a 50-year period, and transport the water by pipeline to an aqueduct for distribution by a water district to end-users.

After the water district released a draft EIR on the proposed project, the water district, county, property owner and water company negotiated a memorandum of understanding governing the project. In the MOU, the parties agreed that a groundwater management plan, which would include monitoring and mitigation components, would be developed in conjunction with finalization of the EIR. The county adopted a resolution finding that the MOU satisfied provisions of the ordinance that made a permit unnecessary.

Petitioner, a company that alleged its business would be harmed by the project, challenged the resolution, arguing the county was required to undertake a full review under CEQA before approving the MOU. The trial court disagreed, and upheld the county's actions. The petitioner appealed.

The Court of Appeal's Decision. The court of appeal agreed with the trial court, ruling that the county was not required to comply with CEQA before approving the MOU. The court noted that a proposed activity is a "project" subject to CEQA only if it "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." The MOU, the court concluded, would not have such an effect because it did not commit the county to proceed with the groundwater management plan or the project. It merely established a framework for completion of the groundwater management plan, which would be submitted to the board of supervisors for its consideration along with the final EIR, and did not hamper the board's discretion to approve, deny, or condition the groundwater management plan, or the groundwater pumping project.

4. Unusual Circumstances Exception to Categorical Exemptions Not Applicable to a Car Wash Located in a Commercial Zone

Walters v. City of Redondo Beach
(2nd Dist. 2016) 1 CA5th 809

In *Walters v. City of Redondo Beach*, the Second District Court of Appeal considered a challenge to the city's use of the categorical exemption for small facilities in approving a use permit for a car wash and coffee shop. The court upheld the city's use of the exemption, finding that the project fell within the terms of the exemption and that the unusual circumstances exception to the categorical exemptions did not apply.

Background. The proposed car wash and coffee shop together totaled roughly 4,000 square feet on a 25,000 square-foot lot, located in a commercial zone. The lot had served as the site for a previous car wash and snack bar, which operated until June 2001. The property fell into disrepair and in 2011, the property was found to be a blight on the area and the existing structure was demolished.

A few years later, the owner sought a conditional use permit for a new car wash and coffee shop on the property. The city granted the CUP and found it categorically exempt under Guidelines section 15303, the categorical exemption for small facilities. The neighboring property owners challenged the city's CEQA determination and issuance of the CUP.

Applicability of the Small Facilities Exemption. The categorical exemption for small facilities applies to "construction and location of limited numbers of new, small facilities or structures" and the installation of small new equipment and facilities in small structures. Examples cited in section 15303 include a store, motel, office, restaurant or similar structure not exceeding 2,500 square feet in floor area. The listed examples also include up to four such commercial buildings, not exceeding 10,000 square feet in floor area, on sites in an urban area.

The project opponents contended that car washes are not covered by the exemption, and the type of equipment used at a car wash (blowers, vacuums, air nozzles) made the exemption inapplicable. The court disagreed, finding that car washes are similar to stores, motels, offices and restaurants in that they are commercial businesses that serve consumers, require parking for customers, contain equipment, and are often located near residential areas. The court also rejected the notion that equipment used at car washes was "substantially different" from the types of equipment associated with stores, motels, offices, or restaurants.

The opponents also argued that Guidelines section 15303 does not apply to a single commercial building larger than 2,500 square feet, even in an urbanized area. But the court again disagreed, affirming an earlier case interpreting the exemption

which held that the exemption applies to the construction of one to four buildings, so long as the total floor area of the buildings does not exceed 10,000 square feet.

No Exception for Unusual Circumstances. The project opponents also contended that the unusual circumstances exception precluded the city from relying on the exemption. The court applied the test laid out in the California Supreme Court's opinion in *Berkeley Hillside Preservation v. City of Berkeley*. Under this test, there are two alternatives to show unusual circumstances.

Under the first alternative, a challenger must prove both unusual circumstances and that a significant environmental impact might occur due to those circumstances. In considering the first alternative, the court found there was nothing particularly unusual about the car wash. There were many other car washes in the surrounding area, a car wash had been located on the site for nearly 40 years, and the presence of large air blowers and outdoor activity was not qualitatively different from facilities such as fast food restaurants, convenience stores or motels found in the area.

Under the second alternative, a challenger can show unusual circumstances by demonstrating that the project "*will* have a significant environment effect." The court determined the appellants fell short of demonstrating this, emphasizing that it is not enough for petitioners to merely present a fair argument that a significant environmental impact may occur; they must show that there is no evidence in the record sufficient to support the city's determination no significant impacts will occur.

B. NEGATIVE DECLARATIONS

1. CEQA Is Not Concerned With the Social and Psychological Impacts of Changes in the Character of a Community

Preserve Poway v. City of Poway
(4th Dist. 2016) 245 CA4th 560

CEQA does not require the social and psychological effects of changes in community character resulting from a project to be treated as an environmental impact, according to the court's decision in *Preserve Poway v. City of Poway*.

The case involved a project that would replace an existing horse boarding facility (called the Stock Farm) with a 12-home residential development. Project opponents challenged the negative declaration the city adopted, claiming that an EIR was required because the loss of the Stock Farm would have a significant impact on Poway's horse-friendly "community character" and Poway would lose its "city in the country" feel. The trial court agreed with these arguments, and ruled against the city. The city appealed, and the court of appeal upheld the city's actions, ruling that the impact of closing the Stock Farm on the character of the community is beyond CEQA's reach.

The Court's Analysis. The court of appeal observed that changes to community character have been treated as relevant concerns in CEQA cases only in the context of aesthetic impacts. However, the court explained, the community character issue before it "is not a matter of what is pleasing to the eye; it is a matter of what is pleasing to the psyche." The opponents' claims thus went beyond aesthetic concerns to include "psychological and social factors giving residents a sense of place and identity." The court held that CEQA does not require an analysis of such subjective psychological feelings or social impacts, and the fact that there was a heated public debate about community character was insufficient to place the project within CEQA's reach. As the court noted, "CEQA's overriding and primary goal is to protect the physical environment;" the "environment" for purposes of CEQA is the physical conditions within the area that will be affected by a proposed project.

Further, the court explained, the CEQA Guidelines and case law make it clear that a project's social and psychological effects are not to be treated as effects on the environment. This conclusion is also supported by cases decided under NEPA in which

federal courts have rejected claims that a project's social and psychological effects should be treated as environmental impacts.

2. Opinion Evidence Submitted by Persons Not Qualified to Provide an Expert Opinion Is Insufficient to Establish that a Project May Cause Urban Decay Impacts

Joshua Tree Downtown Business Alliance v. County of San Bernardino
(4th Dist. 2016) 1 CA5th 677

In *Joshua Tree Downtown Business Alliance v. County of San Bernardino*, the court of appeal upheld the county's mitigated negative declaration over opponents' concerns about the potential for urban decay impacts. In rejecting the opponents' claims, the court carefully analyzed lay testimony regarding purported urban decay effects and concluded that none of the purported predictions about urban decay amounted to substantial evidence under CEQA.

Background. The proposed project, a 9,100 square-foot store, required a conditional use permit from the county. The county prepared an initial study and adopted a mitigated negative declaration for the project, determining an EIR was not required.

The project opponents challenged the county's determination, claiming it failed to adequately analyze urban decay impacts and that a fair argument could be made, based on the evidence before the county, that significant urban decay impacts would occur, necessitating an EIR.

The Court's Analysis of Urban Decay Issues. The court of appeal upheld the county's mitigated negative declaration, finding that there was no substantial evidence in the administrative record that would support a fair argument that the project might lead to significant urban decay impacts. It based that finding on an exacting analysis of the record, including the testimony presented to the county on the issue. The court emphasized that opinion evidence, without an adequate foundation in the record, does not constitute substantial evidence for purposes of CEQA. The court specifically discounted the testimony of a resident lawyer/business owner regarding potential economic impacts of the project, concluding that she was not qualified to opine on whether the project would cause urban decay. Further, without any relevant studies or surveys, the conclusory remarks regarding economic impacts were speculative. The court also noted that the courts defer to agencies on disputed issues of credibility.

Separately, the court considered and rejected the opponents' claim that the county failed to conduct an adequate investigation of potential urban decay effects. The fact that the initial study did not contain a thorough analysis of urban decay effects was insufficient to invalidate the county's negative declaration, the court ruled, because an initial study and negative declaration need not disclose all the evidence supporting the agency's findings. The county had considered urban decay and concluded that there was no evidence the project would have a negative economic effect that would cause urban decay.

3. Public Agency Discretion to Determine Historical Significance Affirmed

Friends of the Willow Glen Trestle v. City of San Jose
(6th Dist. 2016) 2 CA5th 457

Resolving a long-standing debate, the court in *Friends of the Willow Glen Trestle v. City of San Jose* ruled that the City of San Jose's determination that a railroad trestle bridge was not a historic resource should be evaluated under the substantial evidence standard of review. It rejected the contention that the fair argument standard should apply, even though the city made its determination in the context of a mitigated negative declaration.

Background. The City of San Jose proposed to demolish and replace a wooden trestle bridge that had been constructed in 1922. The city evaluated the historical significance of the trestle bridge in an initial study based on information developed for an earlier project. The prior review found the trestle bridge was typical of its kind, that components had likely been replaced in the preceding decades, and concluded it was not historically significant. The initial study for the new bridge concluded that, even though the trestle bridge was "locally important," it was not historically significant.

Project opponents submitted a report claiming the trestle bridge was "an important historical icon" and stated it qualified for listing in the California Register of Historic Resources. The city disagreed, and ratified the initial study's analysis by adopting a mitigated negative declaration.

The project opponents sued, claiming the city erred because the evidence supported a fair argument that a significant effect on historic resources would occur. The trial court agreed and ordered the city to prepare an EIR. The issue on appeal was whether the city's decision should be reviewed under the fair argument standard or the substantial evidence standard.

The Court's Decision. The court of appeal relied on the language of section 20184.1 of CEQA, which identifies the criteria under which a resource is deemed or presumed to be historically significant. It noted that the statute allows an agency to determine that resources presumed to be historic (such as resources listed on a local register) are not historically significant when it finds "the preponderance of evidence" supports that conclusion. Logically, if the agency makes such a finding, that finding must be upheld if it is supported by substantial evidence. The court then reasoned that the same standard must apply to determinations made under the provision of section 20184.1 that applies to structures that have not been listed and are *not* presumed historic: "Since the standard of judicial review for a presumptively historical resource is substantial evidence rather than fair argument, it cannot be that the Legislature intended for the standard of judicial review for a lead agency's decision under the final sentence of section 21084.1 to be fair argument rather than substantial evidence."

4. BAAQMD's CEQA Guidelines on Pollution Impacts to Project Occupants and Users Are Invalid

California Building Industry Association v. Bay Area Air Quality Management District
(1st. Dist. 2016) 2 CA5th 1067

On remand from the California Supreme Court, the court of appeal held that the Bay Area Air Quality Management District's CEQA Guidelines, which provide significance thresholds for exposure of new residents to existing sources of air pollution, are invalid to the extent they indicate lead agencies should routinely apply them to evaluate the effects of existing environmental conditions on a proposed project's occupants or users.

Background. The lawsuit was filed by the California Building Industry Association seeking to overturn the application of BAAQMD's significance thresholds for the exposure of new project residents and users to existing toxic air contaminants and particulates. CBIA's primary concern was that by increasing the burdens of CEQA compliance, the thresholds would hamper development of infill housing. Arguing that CEQA is limited to a project's impacts on the environment and does not extend to the environment's impacts on a project, CBIA claimed that BAAQMD's receptor thresholds were inconsistent with CEQA to the extent they treat the impacts of existing air pollution on occupants or users of a new projects as an environmental impact.

In a decision issued in late 2015, the California Supreme Court ruled that an analysis of the effects of existing environmental conditions on a project's occupants or users is ordinarily not required under CEQA, but that CEQA requires an analysis of existing environmental hazards if the project might exacerbate them. The court sent the case back to the court of appeal, instructing it to consider the validity of BAAQMD's significance thresholds in light of these principles.

The Court of Appeal's Opinion. The court of appeal's opinion contains four important rulings on the use of BAAQMD's receptor thresholds:

- A lead agency may not require an EIR or mitigation measures for the sole reason that future project occupants or users will be exposed to health risks from a nearby source of harmful air pollution.

BAAQMD conceded that the purpose of the challenged receptor thresholds is to give public agencies a basis for determining whether future occupants or users of a project will be exposed to unacceptable health risks due to emissions from nearby pollution sources. That purpose, the court concluded, cannot be squared with the rule that CEQA does not generally require an agency to consider the effects of existing environmental conditions on a proposed project's future occupants or users.

- Public agencies may elect to evaluate the effects of existing environmental conditions on future occupants or users of *their own projects*.

The supreme court had noted in its opinion that CEQA does not bar a public agency from considering the effects of existing conditions on a project that it proposes to undertake itself. Accordingly, the court of appeal ruled that an agency may elect to use BAAQMD's receptor thresholds as guidance in assessing the effects of emissions on occupants or users of its own projects.

- BAAQMD's receptor thresholds may be applied to determine whether a proposed project would worsen existing environmental conditions.

CEQA's focus is on the changes a proposed project will make to the physical environment. As a result, when a project might worsen existing environmental conditions, BAAQMD's receptor thresholds may appropriately be used to assess the impacts on project occupants or users to the extent the impacts stem from changes the project will make to the environment.

- BAAQMD's receptor thresholds may be used to analyze impacts on a project's occupants or users where such an analysis is required by statute.

Several provisions of CEQA require an analysis of the health effects of existing environmental conditions on a project's occupants or users in specific situations. These statutes include certain school siting and construction projects and exemptions from CEQA for various categories of housing development projects. Because these statutes mandate an analysis of the impacts of air pollution on the project's occupants or users, the receptor thresholds may permissibly be used for that purpose.

Conclusion. The court rejected BAAQMD's argument that its Guidelines were merely advisory, finding that "they suggest a routine analysis of whether new receptors will be exposed to specific amounts of toxic air contaminants." Having ruled that it would be improper for a lead agency to use BAAQMD's receptor thresholds to require an EIR, mitigation measures, or other CEQA review when such a use is not authorized, it concluded the Guidelines should be invalidated in part. The court accordingly ruled that those portions of BAAQMD's Guidelines that suggest lead agencies should apply the receptor thresholds "to routinely assess the effect of existing environmental conditions on future users or occupants of a project" must be invalidated.

C. ENVIRONMENTAL IMPACT REPORTS

1. City Cannot Rely on Energy Efficiency Standards in General Plan As Mitigation for Project's Greenhouse Gas Impacts Where Compliance with Plan's Standards Is Not Shown

Spring Valley Lake Association v. City of Victorville
(4th Dist. 2016) 248 CA4th 91

Finding a variety of legal errors, including failure to comply with a city policy requiring on-site electricity generation "to the maximum extent feasible," the court of appeal overturned the City of Victorville's approvals for a Wal-Mart project. With respect

to the CEQA-based challenges to the project, the court found that the EIR's analysis of greenhouse gas emissions was inadequate and that the city was required to recirculate the EIR due to changes in its air quality/GHG and hydrology/water quality analyses.

The EIR's Greenhouse Gas Analysis. The court held that the EIR's GHG emissions analysis was inadequate because it relied in part on the conclusion that the project would achieve the energy efficiency required by the city's general plan. The city's general plan required a 15% improvement on 2008 Title 24 standards for all new construction. The EIR showed that the project would "currently" achieve only a 10% improvement, but would comply with new energy efficiency standards at the time of construction and then would "likely" meet the 15% general plan requirement. The court held that this equivocal finding was insufficient to show that the 15% improvement in energy efficiency would actually be achieved.

EIR Recirculation. The final EIR revised the draft EIR's analyses of biology, traffic, air quality/GHG and hydrology/water quality, but the city determined the EIR did not need to be recirculated for further public comment. As to biology and traffic, the court agreed, but it found the final EIR contained significant new information regarding air quality/GHG and hydrology/water quality that should have led to recirculation. The change in the air quality/GHG chapter was the addition of an analysis of general plan consistency analysis. The court stated that because the analysis did not support the finding that the project was consistent with the general plan requirement regarding on-site energy generation and because the public did not have the opportunity to comment, the EIR should have been recirculated. The hydrology/water quality analysis suffered from a different problem. According to the court, the final EIR showed a "complete redesign" of the project's stormwater management plan, and 26 pages of EIR text were replaced with 350 pages of technical reports and a conclusion. The court held that these revisions deprived the public of a meaningful opportunity to comment.

Conclusion. *Spring Valley Lake* illustrates the difficulties cities and counties face as they use their general plans to promote sustainability and greenhouse gas reduction goals and later try to implement them in the context of specific development projects. The case falls in line with other recent appellate decisions—such as those requiring extensive analysis of energy use under CEQA Guidelines Appendix F—demonstrating increased judicial scrutiny of public agencies' commitments to the reduction of greenhouse gas emissions.

2. EIR Must Provide Specific Analysis of Project's Energy Use

Ukiah Citizens for Safety First v. City of Ukiah
(1st. Dist. 2016) 248 CA4th 256

In *Ukiah Citizens for Safety First*, the First District Court of Appeal concluded that the City of Ukiah's EIR for a proposed Costco store failed to satisfy CEQA's requirements for evaluating energy impacts. The EIR discussed energy use in general terms but failed to provide an analysis of the project's expected energy consumption.

CEQA's Guidance on Energy Impacts. Section 21000(b)(3) of CEQA provides that an EIR must incorporate a statement regarding mitigation measures proposed "to reduce the wasteful, inefficient, and unnecessary consumption of energy." Section 15126.4(a)(1)(C) of the Guidelines states that: "energy conservation measures, as well as other appropriate mitigation measures, shall be discussed when relevant." And Appendix F of the Guidelines includes a list of possible energy impacts and potential conservation measures that are intended to assist the lead agency in the preparation of an EIR.

The Court's Rulings on the EIR's Analysis of Energy Impacts. The EIR concluded that the project "would not exceed existing gas and electric supply or result in wasteful, inefficient, or unnecessary consumption of energy." In support of this conclusion, the EIR noted that the project would conform to California Building Code energy conservation standards, and that the project's design incorporated several sustainable features.

Ukiah Citizens claimed that the EIR failed to provide sufficient information regarding the project's energy consumption and generally failed to satisfy Appendix F.

The court of appeal agreed. The analysis failed to calculate the energy consumption of project-related vehicle trips. It also improperly relied on compliance with building code standards to mitigate the project's construction and operational energy impacts instead of providing a complete evaluation applying the criteria in Appendix F. The court further found that the city's reliance on mitigation measures designed to reduce greenhouse gas emissions was insufficient to satisfy the requirement that an analysis of energy use be provided.

Implications. EIRs for sizable development projects, particularly those that may generate significant vehicle trips, should not gloss over the issues described in Appendix F when discussing potential energy impacts. Failure to identify energy consumption associated with project vehicle trips may raise a red flag, as would reliance on building or construction standards as mitigation for all types of energy use, without further analysis. Project applicants and lead agencies would be well-served by providing an analysis of each of the potential energy impacts and mitigation measures listed in Appendix F that may be relevant to the project.

3. Sustainable Communities Strategies Need Not Take Account of Statewide GHG Reduction Mandates

Bay Area Citizens v. Association of Bay Area Governments
(1st. Dist. 2016) 248 CA4th 966

The First District Court of Appeal upheld the San Francisco Bay Area's Sustainable Communities Strategy, rejecting the claim that such strategies must take account of the effects of statewide greenhouse gas reduction mandates.

The Bay Area Sustainable Communities Strategy. The Sustainable Communities and Climate Protection Act of 2008 (SB 375) is one of several major statutes California has enacted in its efforts to reduce GHG emissions. SB 375 generally requires each of the state's metropolitan planning organizations to adopt a "sustainable communities strategy" demonstrating how specified land use changes and transportation strategies would enable the region to meet GHG reduction targets set specifically for that region by the California Air Resources Board.

The Association of Bay Area Governments and the Metropolitan Planning Commission constitute the Metropolitan Planning Organization for the San Francisco Bay Area. The MPO adopted its first sustainable communities strategy, Plan Bay Area, in 2013. Lawsuits ensued, some alleging that Plan Bay Area did too little to reduce GHG emissions and some, like Bay Area Citizens', alleging that the plan called for draconian and unnecessary land use changes.

The Claims in the Litigation. Bay Area Citizens alleged that SB 375 expressly required MPOs to "take into account" GHG emission reductions that will be achieved through statewide vehicle emission standards, low carbon fuel standards, and other mandates, and that once these statewide mandates were factored into the mix, no land use changes were needed for the Bay Area to achieve the state's GHG emissions goals. Therefore, Citizens argued, the MPO violated CEQA by describing the project only in terms of GHG reductions that could be achieved through regional land use and transportation policy changes, and by declining to analyze alternatives that did not include such policy changes.

The Court's Analysis. After reviewing the language of SB 375, its legislative history, and its interpretation by the Air Resources Board, the court rejected Citizens' claims. The court noted that under SB 375, the Board, in setting GHG reduction targets for each MPO, took the statewide mandates into account, and that each MPO was obligated, in its Sustainable Communities Strategy, to identify land use and transportation planning changes that would achieve additional GHG reductions.

Fundamentally, the court observed, Citizens' argument was "that the Legislature, via SB 375, launched a major new climate protection initiative requiring regional agencies to develop regional land use and transportation strategies through an elaborate planning process that in the end would be superfluous because the agencies could meet the Board's regional emissions reduction targets simply by invoking reductions already expected from pre-existing statewide mandates." This, the court said, "makes no sense."

4. Court Rules that General Plan Policies, Standing Alone, May Not Be Used As Thresholds of Significance for Traffic Impacts

East Sacramento Partnership for a Livable City v. City of Sacramento
(3rd Dist. 2016) 5 CA5th 281

Background. The City of Sacramento certified an EIR for a 328-unit residential project located in East Sacramento and approved the Project. A neighborhood group, East Sacramento Partnership for a Livable City, challenged the EIR contending, among other things, that the project description was defective; the EIR failed to analyze health risks to project occupants; and the EIR failed to account for significant traffic impacts. The trial court ruled for the city on all claims, but the court of appeal found that the EIR's analysis of traffic impacts was fatally flawed because it relied on general plan traffic policies as thresholds of significance without supporting evidence.

No Deficiencies in Project Description. ESPLC asserted that the EIR was deficient because it did not include various proposed roadway improvements as part of the project. The court ruled that the key improvement ESPLC complained about, a tunnel that would be used only for access to and from the project, was not a component part of the project because it was not a reasonably foreseeable consequence of project approval. Other access was available for the project, the tunnel was not a necessary part of the project, and the project was not conditioned on construction of the tunnel. In addition, the evidence showed that construction of the tunnel was not foreseeable, because it was currently infeasible for financial and other reasons.

Analysis of Risks to Project Occupants from Existing Air Pollution Not Required. ESPLC contended that the EIR failed to evaluate significant health risks posed to future project residents due to existing toxic air contaminants and methane migration in the area. Based on the supreme court's recent decision in *California Building Industry Association v. Bay Area Air Quality Management District*, the court held that the city was not required to analyze the impact of such existing environmental conditions on a project's future users or residents. It also rejected ESPLC's argument that an exception should apply on the theory the project would exacerbate existing bad air quality, traffic and other environmental conditions, as unsupported by any evidence.

Use of General Plan Traffic Standards As Thresholds of Significance Must Be Supported by Other Evidence. The EIR's analysis of traffic impacts used the level of service method, measured on an A to F scale. The court first ruled against ESPLC on its claim the EIR was deficient because it did not analyze traffic on road segments, but instead focused on intersections. The court found evidence in the administrative record that roadway capacity was governed by intersections was sufficient to support the EIR's methodology.

The court found a problem, however, with the EIR's use of policies on acceptable levels of traffic contained in the mobility element of the city's general plan as the standard of significance for intersection impacts. Those policies permit LOS E and F conditions in certain locations. In a ruling that a number of observers have questioned, the court held that compliance with a general plan policy, standing alone, is insufficient to show an impact is insignificant where it may be "fairly argued" that the project will generate significant environmental effects. The EIR was deficient, according to the court, because it did not contain an explanation why the congested conditions that would result from increases in traffic would not be significant, other than its reliance on the mobility element of the general plan. Stating that the general plan standing alone "does not constitute substantial evidence that there is no significant impact," the court found the EIR inadequate because it did not identify other evidence to support use of the plan standards as thresholds of significance. Notably, the city had found LOS E and F

conditions to be significant adverse impacts at other intersections within the city.

The case may be used to question the common practice of using local agencies' and congestion management agencies' adopted LOS criteria as significance standards. However, it is possible that the decision will be limited to the circumstances that occurred here, where even LOS F conditions were treated as acceptable and no other threshold was applied—meaning no change in the physical environment would be considered significant in certain locations.

5. Agency's CEQA Analysis Must Consider the Project's Long-Term Impacts

North Coast Rivers Alliance v. A. G. Kawamura
(3rd Dist. 2016) 243 CA4th 647

The Third Appellate District's opinion in *North Coast Rivers* addresses CEQA's requirements for projects that might continue operating past their initial termination date, project objectives, alternatives and cumulative impacts.

Background. The California Department of Food and Agriculture prepared a program EIR for a seven-year program to eradicate the light brown apple moth. The EIR stated that a control program would not be studied as an alternative because it would not achieve the agency's objective of eradicating the moth. After the EIR was completed, the Department learned that the moth infestation had spread to such an extent that eradication was no longer feasible. The Department then approved a seven-year control program, based on the program EIR, finding the control program would use the same methods as were proposed for the eradication program, but to a lesser degree, resulting in lesser impacts.

A group of cities together with environmental and other organizations sued, challenging the Department's approval on CEQA grounds. The appellate court agreed with several of their claims.

Summary of the Court of Appeal's Rulings. Fundamentally, the court found that the program EIR, which only studied a seven-year eradication program, was insufficient to support the Department's approval of a long-term control program, given the EIR's concession that a control program "would have to go on forever." The court concluded the EIR was deficient despite the possibility a new EIR might be prepared for the continuation of control activities after seven years. Noting that the Department was unwilling to commit to preparing another EIR in the future, the court concluded the EIR was lacking because it did not examine the long-term impacts of a control program.

The court labelled as "supposition" the Department's assertion that the impacts of a control program would be lower than the impacts of an eradication program because a control program would employ the same measures, but to a lesser degree. Noting that the record "supports an opposing inference" because a control program would need to go on forever, the court found no evidence to support the Department's position given the EIR's failure to study the impacts of a control program.

D. SUPPLEMENTAL ENVIRONMENTAL REVIEW

1. Courts Must Defer to Agency Determination Whether a Changed Project Should Be Treated As a New Project

Friends of the College of San Mateo Gardens v. San Mateo County Community College District
(Supreme Court 2016) 1 C5th 937

The California Supreme Court resolved the vexing question of whether a change to a project that previously has been studied under CEQA constitutes a new project necessitating a new environmental review, or a modification that can be evaluated under CEQA's subsequent review provisions, which allow reliance on earlier CEQA documents.

The court held that the question turns on whether the prior document retains relevance—meaning at least some of the environmental impacts of the modified project were considered in the original document. If so, the prior document can be used and the agency then determines whether the project changes will require major revisions to the original CEQA document due to new, previously unconsidered significant environmental effects.

Background. The case before the court involved a master plan for new construction and building renovations at the community college district's three campuses. The district approved the plan after adopting a mitigated negative declaration, finding that implementation of the plan would have no significant unmitigated effects.

Five years later, the district decided to demolish one building complex that it previously had planned to renovate and to renovate other buildings that it previously had planned to demolish. The district prepared an addendum to the prior mitigated negative declaration to document its analysis showing the project changes did not necessitate a subsequent CEQA document.

The Challenge to the District's Determination. Friends of the College of San Mateo Gardens challenged the district's approvals and claimed the changes to the master plan amounted to a new project, requiring a new round of CEQA compliance commencing with a new initial study and precluding the district from relying on its earlier mitigated negative declaration. Both the trial court and the court of appeal agreed, finding the newly proposed building demolition was a new project.

The Supreme Court's Decision. In overruling the lower courts, the California Supreme Court explained: "When an agency proposes changes to a previously approved project, CEQA does not authorize courts to invalidate the agency's action based solely on their own abstract evaluation of whether the agency's proposal is a new project, rather than a modified version of an old one." To the contrary, the agency's environmental review obligations "depend on the effect of the proposed changes on the decisionmaking process, rather than on any abstract characterization of the project as 'new' or 'old.'"

The court found a decision to proceed under CEQA's subsequent review provisions must necessarily rest on a determination—whether implicit or explicit—that the original environmental document retains some informational value. That question does not turn on whether the project is new or old in the abstract, on the identity of the project proponent, or on other matters unrelated to environmental consequences. If the original document retains some informational value despite the proposed changes, the agency can use it and then proceed to determine whether a subsequent or supplemental environmental document is required. Whether the original document retains relevance is a factual question for the agency to decide.

FCSMG also asserted that CEQA's subsequent review provisions do not apply to a project originally approved based on a negative declaration, rather than a full EIR, because negative declarations are not mentioned in the CEQA statute. The court rejected that argument, finding that the Resources Agency's decision to add negative declarations to the subsequent review provisions in CEQA Guidelines section 15162 did not conflict with the statute and reasonably filled a gap in the law. The court reasoned that both negative declarations and EIRs are entitled to a presumption of finality once they are adopted.

The court noted, however, that "CEQA Guidelines section 15162 requires an agency to prepare an EIR whenever there is substantial evidence that the changes to a project for which a negative declaration was previously approved might have a significant environmental impact not previously considered in connection with the project as originally approved, and the courts must enforce that standard."

Conclusion. The court's decision unequivocally disposes of the artificial distinction between a new project and a modified project—and in doing so announces a clear standard for applying CEQA's subsequent review provisions based on whether the underlying CEQA document provides relevant information about the impacts of the modified project.

2. Supplemental EIR in Warriors Arena Case Upheld Against Challenges to Its Scope and to Its Analysis of Greenhouse Gas Emissions

Mission Bay Alliance v. Office of Community Investment and Infrastructure
No. A148865 (1st Dist. Nov. 29, 2016) (review denied Jan. 17, 2017)

The Golden State Warriors' new Mission Bay stadium survived another round of legal challenges brought by Mission Bay Alliance and SaveMuni. The appellate court's opinion provides important guidance on tiered environmental review and analysis of greenhouse gas emissions.

Background. The project includes a 18,500-seat stadium that will host over 200 events per year, two 11-story office and retail buildings, as well as parking and open space. In April 2015, Governor Brown certified the project as an "environmental leadership development project," which qualified it for expedited schedules for environmental review and litigation. San Francisco's Office of Community Investment and Infrastructure, acting as lead agency, prepared the EIR for the project as a supplemental EIR which was based on a program EIR adopted for the Mission Bay area in 1998.

MBA filed suit to challenge the project approvals, and appealed after the superior court rejected its claims. In a lengthy opinion, the court of appeal upheld the lower court's decision. MBA's primary claims under CEQA were that the supplemental EIR was incomplete because it omitted several impact issues that had been considered in the underlying program EIR, and that the supplemental EIR's analysis of a number of other issues was inadequate.

Scope of Supplemental EIR Supported by Substantial Evidence. A program EIR can serve as the basis for "tiered" CEQA review where the program EIR covers a large project or program addressing general and environmental matters, and supplemental EIRs are prepared for subsequent projects requiring additional analysis. When determining the scope of the supplemental EIR, the agency examines the program EIR to determine what issues have been covered in the program EIR and what additional environmental analysis is necessary.

In the initial study it prepared for this analysis, OCII determined that further study of several impacts would not be needed: land use, biological resources, hazardous materials, and recreational uses. MBA, however, argued that further study of these issues was required based on evidence it believed would support a "fair argument" that significant impacts not covered by the program EIR would occur. But, as the court explained, where the question is whether further environmental review is necessary following a program EIR, the substantial evidence standard, not the fair argument standard, applies to a court's review of the agency's determinations. The court found OCII's determinations that no new significant impacts relating to land use, biological resources, hazardous materials, and recreation would occur were supported by substantial evidence and therefore must be upheld.

Supplemental EIR's Impact Analysis Was Adequate. MBA alleged that the SEIR's analysis of transportation impacts, noise, wind, greenhouse gas emissions, and toxic air emissions were all inadequate. The court disagreed, and found that the city had properly analyzed these issues and implemented suitable mitigation measures.

Analysis Showing Compliance With GHG Emissions Reduction Strategy Is Sufficient Under CEQA. The court's ruling on the SEIR's analysis of greenhouse gas emissions is particularly noteworthy. The SEIR's significance standard for greenhouse gas emissions was based on compliance with San Francisco's strategy for reducing greenhouse gas emissions. San Francisco's greenhouse gas strategy, adopted in 2010, is based on the CEQA Guidelines and the Bay Area Air Quality Management District's interpretation of those Guidelines. The strategy contains emission reduction targets and 42 specific regulations for reducing emissions from new projects. BAAQMD had determined the strategy measures met or exceeded BAAQMD's own recommendations.

While the SEIR assessed compliance with the greenhouse gas strategy, it did not include a quantitative analysis of the stadium's projected greenhouse gas emissions. MBA asserted that CEQA requires that emissions be quantified, but the appellate court disagreed, holding that the project's compliance with San Francisco's greenhouse gas strategy was sufficient to conclude that the project's emissions would not have a significant environmental impact. While quantification of greenhouse gas emissions is one available way to assess the impacts of greenhouse gas emissions, in its recent decision in *Center for Biological Diversity*, the California Supreme Court also identified other "potential pathways" for complying with CEQA, including adherence to a regulatory program with a performance-based methodology for reducing greenhouse gas emissions. Further, under CEQA Guidelines section 15183.5(b), an agency may determine that a project's greenhouse gas emissions will not have a cumulatively considerable effect if it will comply with a preexisting mitigation program. Because the project would satisfy the requirements of San Francisco's greenhouse gas strategy—a program crafted in accordance with CEQA Guidelines and approved by BAAQMD—the court upheld the SEIR's finding that the project's greenhouse gas emissions would not be significant.

Conclusion. This decision is good news for agencies and developers that plan to rely on a program EIR as a basis for environmental review of later projects. The court's opinion makes it clear that a lead agency's determinations that impacts of a later project have already been covered by the program EIR will not be second-guessed by a court as long as those determinations are supported in the record. The opinion is also particularly helpful because it demonstrates that where a local agency has developed a comprehensive greenhouse gas emission reduction plan, a quantitative analysis of greenhouse gas emissions is not always required, and an analysis showing compliance with such a plan should be sufficient under CEQA.

3. A Court Must Uphold an Agency Decision that a Supplemental EIR Is Not Required If It Is Supported by Substantial Evidence

The Committee for Re-Evaluation of the T-Line Loop v. San Francisco Municipal Transportation Agency
No A147498 (1st Dist. Dec. 22, 2016)

Background. The San Francisco Municipal Transportation Agency approved a contract to install a short length of light rail line needed to complete a partially constructed loop around a single city block. When it approved the contract, the city relied on an EIR certified in 1998 for plans to add a light rail line connecting the southeastern portion of San Francisco to the rest of the city. Completion of the loop at the end of the line would allow trains on the line to turn around to provide service for special events and peak travel periods.

The Committee filed suit, claiming the city violated CEQA by failing to undertake a new CEQA review instead of relying on the 1998 EIR, which the Committee claimed did not include an analysis of the loop portion of the line, and did not account for changes in circumstances since the EIR was completed. The trial court ruled against the Committee, finding the city had complied with CEQA. The court of appeal agreed with the trial court, and upheld the city's determinations.

Evidence Supported City's Decision to Rely on Prior EIR. The court first ruled that the party challenging an agency's determination that it can rely on a previously certified EIR has the burden to prove that the agency's decision to do so was not supported by substantial evidence. Citing the supreme court's recent decision in *Friends of the College of San Mateo Gardens*, discussed above, the court explained that the question whether a previously prepared environmental document "remains relevant" is largely a factual question for the agency to decide, and a reviewing court's task is limited to deciding whether the agency's decision is based upon substantial evidence.

The Committee argued that the loop project was not reviewed in the 1998 EIR and the city's determination it was should be resolved under the "fair argument" standard—a standard which would require that the city's decision be set aside if there is any evidence in the record that would support a fair argument the loop project was not covered in the EIR. The court rejected

that argument, and found there was ample evidence in the EIR and elsewhere in the record that the loop was analyzed as a component of the light rail line extension described in the EIR.

Challenge to Adequacy of EIR Was Time-Barred. The court also rejected the Committee's argument that even if the loop was discussed in the EIR, the analysis of its impacts was not sufficiently detailed to comply with CEQA. As the court explained, an EIR is conclusively presumed valid unless a timely lawsuit is filed to challenge it. No suit had been filed to contest the validity of the 1998 EIR, and as a result, the Committee's claims the EIR's analysis was deficient were time-barred.

Evidence Supported City's Decision that No New Impacts Would Occur. The court next addressed the Committee's assertion that a new EIR was required because the loop project would have significant impacts that were not examined in the prior EIR. The Committee again argued the court should apply the fair argument test and overturn the city's decision if there is evidence in the administrative record that the project might have a new significant impact on the environment. The court again disagreed, ruling that the Committee had the burden to prove that there was no evidence that would support the city's decision that a further EIR was not required. The court found that the 1998 EIR provided a project-level analysis that evaluated both impacts and alternatives, and provided a detailed examination of site-specific considerations including planning, construction and operation. It also found that statements in planning department reports, and other evidence in the record, supported the city's determination that no significant changes to the loop project were proposed, and that there were no substantial changes in the area that would lead to new or more severe significant impacts of the project.

No Violation of Procedural Requirements. The Committee's contention that the city failed to follow proper procedures in determining that no further CEQA analysis was needed also failed. The court found no procedural flaws, noting that CEQA does not specify a particular procedure an agency must follow or require a public hearing when it makes a decision that a new EIR is not required.

4. An Agency Is Not Required to Allow an Appeal to Its Elected Decision-Making Body of a Determination that Supplemental Environmental Review Is Not Required for a Modified Project

San Diegans for Open Government v. City of San Diego
No. D069922 (4th Dist. Div. 1, Dec. 16, 2016)

The court held that CEQA's requirement that an appeal to an agency's elected decision-making body be allowed for certain types of CEQA determinations does not apply to an agency determination that supplemental CEQA review is not required for a project that has previously been reviewed under CEQA.

Background. The case was brought to challenge a project involving development of an office, residential, and retail uses within an area previously approved for development under a master plan. The master plan had been assessed under CEQA on three occasions (in an EIR, an addendum and a mitigated negative declaration) before the city issued a permit to begin the first phases of project development. A year later, the developer modified its design plans and sought approval of the modified plans through the city's conformance review process. City staff found the modified plans were in substantial conformance with the conditions and requirements of the prior development permit. Staff also concluded that no further CEQA documentation was required because the modified project was consistent with the prior EIR, addendum and negative declaration, and there were no new impacts or changed circumstances that would require further review.

The project opponents appealed the staff's determination to the planning commission. After the planning commission denied the appeal, the opponents attempted to appeal the decision to the city council. The city refused to process the appeal, stating that a determination that subsequent environmental review of a project is not required may not be appealed to the city council.

The opponents filed suit, claiming they had a right to have their appeal heard by the city council. The trial court rejected their claims, as did the court of appeal.

The Court of Appeal's Decision. San Diegans for Open Government relied on a provision of CEQA (section 21151(c)) that provides: "If a nonelected decisionmaking body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to this division, that certification, approval, or determination may be appealed to the agency's elected decisionmaking body, if any."

The court had no difficulty finding that the statute did not apply. The city's action did not involve certification of an EIR, approval of a negative declaration, or a determination that the project was not subject to CEQA. The city had previously determined the master plan was subject to CEQA and its determination relating to the project modification was simply that no additional CEQA review was required. The conformance review decision did not alter the city council's prior determinations relating to the project, and it confirmed that the project remained subject to the mitigation measures contained in the environmental documents the city had previously adopted for the project.

E. CEQA PROCEDURES

1. Public/Private Partnerships: New Guidance on Designating the CEQA Lead Agency

Center for Biological Diversity v. County of San Bernardino
(4th Dist. 2016) 247 CA4th 326

With public/private partnerships becoming more common, the court in *Center for Biological Diversity v. County of San Bernardino* outlined—with a new test—how to determine the CEQA lead agency for a project in which a private entity partners with multiple public agencies.

Background. Cadiz, Inc. partnered with Santa Margarita Water District, San Bernardino County, and Fenner Valley Mutual Water Company (a private, nonprofit entity formed by Cadiz) to pump fresh groundwater from an aquifer below Cadiz's Mojave Desert property to customers in nearby counties. The purpose of the project was to conserve groundwater and increase available water supplies. The county and water district entered into an agreement designating the water district as the lead agency and the county as a responsible agency for environmental review purposes.

Description of the Legal Challenge. Several environmental organizations challenged the project's approval, alleging that the water district was improperly designated as the lead agency. They argued that the county, rather than the water district, should have been the lead agency because the county had general governmental powers to approve or exempt the project from the county's permitting requirements for pumping.

The Court of Appeal's Decision. The court of appeal held that the water district was properly designated as the lead agency. Where there is more than one public agency involved in a project, the CEQA Guidelines identify which should be the lead agency. Section 15051(a) of the Guidelines provides that if a public agency will carry out the project, it shall be the lead agency even if the project is located in another agency's jurisdiction. Subsection (b) states that if a nongovernmental entity will carry out the project, then the public agency with the greatest responsibility for supervising or approving the project as a whole shall be the lead. Subsection (c) provides that if there is more than one public agency that satisfies (b), then the lead agency shall be the one which acts first on the project. And subsection (d) provides that if more than one public agency has a substantial claim to be the lead agency, the agencies may enter into an agreement designating which will serve as lead.

The court found that while the water district hadn't acted first, it satisfied the other three tests in Guidelines section 15051. Having closely examined the water district's responsibilities in comparison to Cadiz and the county, the court determined that the EIR provided sufficient support for the designation of the water district as the lead agency "based on its cooperative partnership with Cadiz in implementing, carrying out, supervising, and approving the Project as a whole."

The court cited, among other things, the water district's responsibilities for obtaining financing; approving design, construction, and project terms; and managing and overseeing the project operation. Although the county had authority over pumping, the court recognized that the project encompassed more than that and that the water district had more authority over the project as a whole. The court also concluded the agreement the water district and county had entered into properly designated the water district as lead agency because an agency need not have an equal or greater claim to be lead agency, but merely a substantial one in order to be designated by agreement. As the court noted, an agency with a limited purpose may be designated lead agency on a project if it is "the public agency that shoulders primary responsibility for creating and implementing a project . . . even though other public agencies have a role in approving or realizing it." Additionally, the court explained, the lead agency may benefit from a project as long as it remains able to provide the information necessary for an adequate environmental review.

New Test for Determining the Lead Agency. The court also provided guidance—in the form of a new test based on section 15051—for analyzing projects conducted in partnership between a public agency and a nongovernmental entity. It held that, in a public/private partnership, the lead agency may be either "(1) the public agency that is a part of the public/private partnership, or (2) the public agency with the greatest responsibility for supervising or approving the project as a whole." Citing the evidence in the EIR, the court ruled that the water district was properly designated as the lead agency under either prong of the new test.

F. CEQA LITIGATION

1. Writ of Mandate Must Be Issued by Trial Court Rather Than Court of Appeal

Center for Biological Diversity v. Department of Fish and Wildlife
(2nd Dist. 2016) 1 CA5th 452

In a case decided on remand from the California Supreme Court, the court of appeal ruled that it did not have the authority to issue its own writ of mandate and instead left that task to the superior court.

History of the Litigation. The case involved an EIR prepared by the Department of Fish & Wildlife for the Newhall Ranch project in the Santa Clarita Valley. The trial court struck down the EIR, but the court of appeal reversed and rejected all of the Center for Biological Diversity's CEQA claims. In its ruling finding that substantial evidence did not support the EIR's evaluation of climate change impacts, the supreme court reversed the court of appeal's decision and remanded the case to the court of appeal.

The Court of Appeal's Decision on Remand. On remand, the court of appeal—in an unpublished portion of its opinion—addressed a number of CEQA issues left unresolved by the supreme court's decision. The published portion of the opinion addressed the project developer's contention that the court of appeal should issue its own writ of mandate specifying the steps the Department would need to take to comply with CEQA, instead of sending the case back to the trial court for that purpose. The court of appeal rejected this contention and remanded the case to the superior court.

The Court's Reasons for Not Issuing Its Own Writ of Mandate. The court's decision turned on the interpretation of Public Resources Code section 21168.9(a), which provides that "If a court finds, as a result of a trial, hearing, or remand from an appellate court, that any determination, finding, or decision of a public agency has been made without compliance with this division, the court shall enter an order" that includes one of three statutorily prescribed mandates. According to the project developer, this text allows the court of appeal, in a case remanded from the supreme court, to enter its own writ of mandate under CEQA.

In rejecting this claim, the court of appeal determined that it has a limited role under the longstanding rules established in the Code of Civil Procedure: it can affirm, reverse or modify the judgment that is being appealed, and then it must remit the case to the lower court. The court examined the legislative history and determined: "There is no evidence that the Legislature intended when an environmental impact report's certification was litigated on appeal to alter the established procedures for remitting jurisdiction of the trial court." The court thus concluded that "we do not have the authority to issue our own writ of mandate. Rather, our duty is to decide issues pertinent to the writ of mandate's scope, insofar as possible, and then remit the matter to the trial court." The court made it clear, however, that these limitations do not apply, for example, when an original proceeding is commenced in an appellate court.

The Guidance Provided to the Trial Court. As for the merits of the case, the court of appeal reversed the trial court's judgment striking down the EIR except as to greenhouse gas emissions and biological resources impacts. "But beyond that, we leave further matters in the trial court's good hands." The court of appeal explained that the specific remedy to be ordered, including whether to allow certain project activities to proceed, depended on factual issues to be resolved by the trial court. This included how to address Public Resources section 21168.9(b), which limits a court's authority to "include only those mandates which are necessary" to achieve compliance with CEQA. Finally, the court emphasized that resolution of the climate change issues could be particularly complicated. "It is speculatively injudicious for us to decide these matters and that is why the scope of our remittitur is narrowly drawn."

2. Failure to Discover an Agency's Approval of an Exempt Project Does Not Extend the Time to File a CEQA Lawsuit

Communities for a Better Environment v. Bay Area Air Quality Management District
(1st Dist. 2016) 1 CA5th 715

The First District Court of Appeal ruled that the accrual of a claim that a public agency exemption determination violated CEQA is not postponed by the plaintiff's failure to discover the violation.

Background. CBE brought an action against the Bay Area Air Quality Management District challenging BAAQMD's determination that its approval of a permit authorizing a rail-to truck transloading facility to switch from loading ethanol to crude oil was exempt from CEQA.

In July 2013, BAAQMD determined that its approval was an exempt ministerial action, but did not file a Notice of Exemption. Two months later, the facility began transloading crude oil. Over the next few months, BAAQMD modified several conditions of the permit and ultimately issued another permit incorporating the modifications. CBE subsequently filed its lawsuit against BAAQMD.

The Trial Court's Decision. During the trial court proceedings, BAAQMD argued that CBE's petition was time-barred because it was filed more than 180 days after the issuance of the first permit, the time to file suit specified by statute when no Notice of Exemption is filed. CBE responded that a "discovery rule" should apply, which would mean that the limitations period did not begin to run until CBE first became aware of the operational change in January 2014. The trial court rejected CBE's argument and dismissed the case as time-barred because it was filed more than 180 days after BAAQMD's decision to approve the project.

The Court of Appeal's Decision. The court of appeal agreed with the trial court, holding that a discovery rule cannot be applied to postpone the running of the CEQA's statutory limitations periods because the specified time periods are dates on which the public is deemed to have constructive notice of a potential CEQA violation. The court concluded that allowing a discovery rule to delay the statutory triggering date would conflict with the general principle that CEQA's statutes of limitation

specify dates a plaintiff is deemed to have constructive notice of a potential CEQA violation. A plaintiff's lack of actual notice of the violation is irrelevant.

Conclusion. The court of appeal's decision reflects the strong public interest underlying CEQA's short statutes of limitation. As the court of appeal stated, a discovery exception could not be read into the statute without violating "the Legislature's clear determination that the public interest is not served unless CEQA challenges are promptly filed and diligently prosecuted."

3. Developers Are Eligible to Recover the Cost of Reimbursing a Public Agency for Its Costs of Preparing Administrative Record

Citizens for Ceres v. City of Ceres
(5th Dist. 2016) 3 CA5th 237

In *Citizens for Ceres*, the court clarified that the developer may recover costs of the preparation of the record, distinguishing the limitations placed on the recovery of such costs applied by the court in an earlier appellate court case.

Description of the Project and the Litigation. Citizens for Ceres challenged the city's approval of a shopping center with approximately 300,000 square feet of retail space. The city issued a notice to prepare an EIR in 2007 and Wal-Mart subsequently bought the project, intending to construct a new Wal-Mart SuperCenter, which would replace an existing Wal-Mart in the city. The draft EIR was ultimately released for public comment in 2010 and a final EIR was completed in 2011. The city approved the project that same year, which then triggered five years of litigation.

The project opponent asserted that the CEQA review of the project was deficient on several grounds, including: (1) insufficient mitigation measures to reduce the urban decay impact of the project; (2) lack of sufficient analysis of the project's impacts on landfill and recycling facilities; (3) lack of adequate information about the project's air pollution impacts and potential effects on human health; and (4) lack of substantial evidence supporting the statement of overriding considerations.

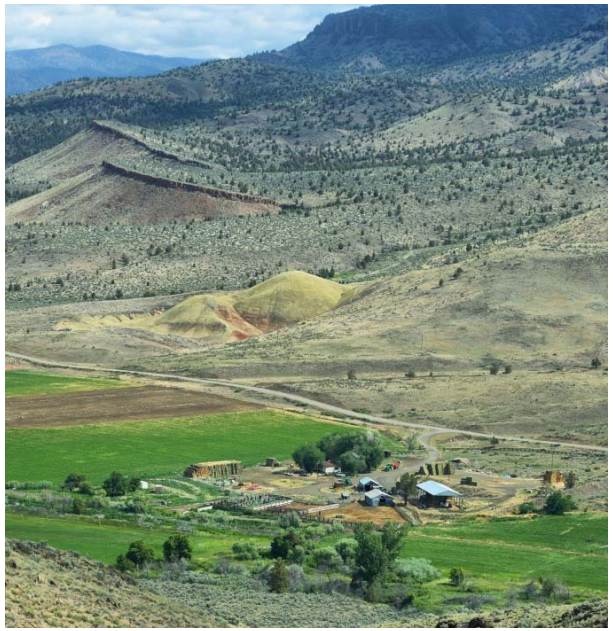
After prevailing in the trial court, Wal-Mart filed a memorandum of costs seeking recovery of the $48,889 in costs incurred by the city for preparation of the administrative record by its own outside counsel. Pursuant to an agreement between the city and Wal-Mart's predecessor in interest, Wal-Mart was required to reimburse the city for costs of litigation. The project opponent challenged Wal-Mart's memorandum of costs, arguing that only the lead agency may recover such costs under California Public Resources Code section 21167.6.

The Court of Appeal's Ruling on the Cost Award. On appeal, the court held that section 21167.6 allows the project developer, named as the real party in interest in the case, to recover costs incurred by the agency in preparing the administrative record, when the developer is required to reimburse the agency for its costs of litigation. In doing so, the court distinguished the decision in *Hayward Area Planning v. City of Hayward*, which held that the statute bars a real party in interest from recovering the cost of preparing the administrative record when the petitioner had requested a lead agency to prepare the record, and had not consented to the real party in interest's involvement in the administrative record's preparation.

The court reasoned that the underlying premise of *Hayward Area Planning* was that section 21167.6 allows a prevailing party to recover the costs of preparing the administrative record when it is prepared by (1) the agency; (2) the plaintiff; or (3) by another method agreed upon by the agency and the plaintiff. Here, the administrative record was prepared by the agency and the developer was required to reimburse the agency for its costs. An award to the developer for the costs associated with an agency-prepared record was therefore consistent with *Hayward Area Planning* and the intent of section 21167.6. The court found that nothing in the language of CEQA limited who could recover the costs of preparing an administrative record as long as the record was prepared in accordance with section 21167.6.

Conclusion. Developers obligated to reimburse the agency for litigation costs may recover the costs associated with preparation of the administrative record by the agency when the agency prevails in the litigation and is entitled to an award of costs. However, developers should exercise caution on how the record is prepared. Should the developer opt to prepare the record itself, it should ensure that the project opponent is aware of, and agrees with, this approach.

TAB 6



Update on GHG Analyses After *Newhall Ranch*

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CEQA Guidelines

15064.4(b): Lead agencies should consider the following factors, among others, when assessing significance of GHG impacts:

(1) Extent to which project may increase or reduce GHG emissions

(2) Whether emissions exceed a threshold that the agency determines applies

(3) Extent to which project complies with requirements to implement a statewide, regional or local plan for the reduction or mitigation of GHG emissions

Newhall Ranch

Consistency with AB 32's reduction goals is an acceptable significance criterion

- Guidelines section 15064.4 does not mandate use of absolute numerical thresholds
- The State's Scoping Plan assumes continued population growth; relies on increased efficiency and conservation
- To the extent a project incorporates efficiency and conservation measures sufficient to contribute its portion to the necessary overall GHG reductions, one can reasonably argue that the project's impact is not cumulatively considerable

Newhall Ranch

An agency can compare project emissions to a hypothetical scenario

- An agency can use a comparative tool such as a Business As Usual (BAU) model for evaluating efficiency and conservation efforts
- Using a hypothetical scenario as a method of evaluating a project's efficiency and conservation measures does not violate Guidelines section 15125 or contravene the decision in *Communities for a Better Environment v. SCAQMD*

Newhall Ranch

Evidence did not support agency determination that project's 31% reduction in comparison to BAU model is consistent with achieving AB 32's statewide goal

- Scoping Plan does not relate statewide level of reduction to level of reduction required from individual projects
- No evidence in the record that the same level of reduction is needed from new buildings as from existing ones

Newhall Ranch

Options for compliance

- BAU based on Scoping Plan's methodology might be available if a lead agency can determine the level of reduction from BAU that a new development at the proposed location must contribute in order to comply with statewide goals
- Assess consistency by looking to compliance with regulatory programs designed to reduce GHG emissions from particular activities
- Rely on existing numerical thresholds

Subsequent Developments

Shift in Target Year

- California Supreme Court to decide whether an EIR for a regional transportation plan must include an analysis of the plan's consistency with GHG emission reduction goals reflected in Executive Order No. 2-3-05 (80% below 1990 levels by 2050)
- SB 32 (2016) establishes a new statewide goal: 40% below 1990 levels by 2030

What are we seeing?

Use of numerical standards

- 1,000 MT threshold
- BAAQMD 4.6 MT per service population threshold (method that assigns share of GHG emission reductions to new land use development projects in BAAQMD's jurisdiction)
- Recalculation of BAAQMD threshold to reflect the year 2030 goal in SB 32 (2.7 MT per service population)
- Recalculation of BAAQMD threshold based on trajectory toward Governor's goal for 2050 (e.g., 2.1 MT per service population in 2035)

What are we seeing?

Comparison to regulations adopted to address the project's GHG emissions

- *Mission Bay Alliance v. Office of Community Investment*, No. A148865 (1st Dist. Nov. 29, 2016) (Court upheld San Francisco's determination that new Warriors' arena would not result in significant GHG emissions based on comparison to City's GHG reduction strategy)
- *But see Spring Valley Lake Association v. City of Victorville* (2016) 248 CA4th 91 (City could not rely on general plan building efficiency standard where evidence indicated standard would not be achieved)

What are we seeing?

Net Zero Analysis for Newhall Ranch

- If project will result in no net increase in GHG emissions, it will not contribute to the cumulative impact pertaining to climate change
- Project applicant proposed a program to achieve zero net emissions
- Draft Additional Environmental Analysis recognizes at 2-16: “Achieving zero net emissions is just one way to reach a less-than-significant conclusion; it is not the only approach; and it may not be needed or appropriate for all projects.”

What are we seeing?

Net Zero Analysis for Newhall Ranch

- Zero net energy use from all residential and commercial buildings through onsite and offsite aggregated renewable energy generation
- EV charging station for all new residences; 7.5% of parking spaces for commercial buildings
- EV subsidy of $1K per new residence for ½ of residences
- Funding for EV school buses and transit buses ($100K per bus up to 10 buses)
- TDM Program
- Solar heating for private pools

What are we seeing?

Net Zero Analysis for Newhall Ranch

- Offsite building retrofit program in LA County
- Installation of offsite EV charging stations (~2,036)
- Purchase of credits for construction and vegetation-clearing emissions
- Purchase of credits for remaining mobile source emissions to offset ~109MT per residential unit and 507MT per commercial square foot

Other Ideas?

Consider analyzing consistency with regulations that address each source of GHG emissions

- Use of VMT threshold to address GHGs from resident, employee and retail customer vehicles
- Consistency with SB 375 Sustainable Communities Strategy to address GHGs from all cars and light-duty trucks
- Analysis of degree to which building siting and design incorporate features to reduce energy consumption or accomplish Zero Net Energy

TAB 7

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California Land Use & Development Law Report

LEGAL COMMENTARY ON PLANNING AND DEVELOPMENT™

State Allocation Board Approves Level 3 Fees — CBIA Seeks Injunction

By Geoffrey Robinson on May 26, 2016

Posted in Exactions and Assessments

In a move that could result in doubling developer fees overnight in more than 200 school districts, the State Allocation Board last night voted to formally notify the California Senate and Assembly that state funds for new school facility construction are no longer available. The decision, by a 6 to 4 vote, will enable school districts that have adopted Level 2 fees to collect fees at twice the Level 2 rate.

Senate Bill 50, which became law in 1998, authorizes school districts to charge developer fees at one of three levels. The base statutory rate, known as the "Level 1 fee," is currently $3.48 for residential development and $0.56 for commercial development. School districts that satisfy certain criteria may charge "Level 2" fees in an amount intended to fund 50% of the cost of providing facilities for students from new residential development. SB 50 authorizes districts that have adopted Level 2 fees to charge fees at a "Level 3" rate if the State Allocation Board certifies that state funds for new school facility construction are no longer available. The Level 3 rate can be up to double the amount of the Level 2 fee adopted by the school district. Over 200 school districts have adopted Level 2 fees. The doubling of such fees could result in developers in some districts paying more than $30,000 in school mitigation for each new home.

The SAB's action comes as a deep disappointment to the building industry, which has been actively working to pass a statewide $9 billion school bond currently on the November 2016 ballot. The school bond initiative was sponsored by Californians for Quality Schools – a coalition of the California Building Industry Association and the Coalition for Adequate School Housing, a school district organization. (See our report on the background of the $9 billion bond measure — $9 Billion School Bond Measure Headed for November 2016 Ballot). The full text of the bond measure can be found **here**.

The CBIA is seeking immediate injunctive relief in Sacramento Superior Court to prevent the SAB's action from going into effect. CBIA contends that the SAB's determination that state funds are no longer available is erroneous because over $150 million in funding for new construction approved by the voters in 2006 remains to be apportioned. A court decision on CBIA's request for a temporary restraining order is expected later today.

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California Land Use & Development Law Report

LEGAL COMMENTARY ON PLANNING AND DEVELOPMENT™

Court Blocks Implementation of Level 3 School Fees

By Geoffrey Robinson on May 27, 2016

Posted in Exactions and Assessments

A Sacramento Superior Court judge has issued a temporary restraining order barring the State Allocation Board from formally notifying the California Senate and Assembly that state funds for new school facility construction are no longer available. The order, issued yesterday, effectively blocks implementation of Level 3 school fees, which would otherwise have been triggered as a result of the notification.

As we reported yesterday (see State Allocation Board Approves Level 3 Fees), on May 25, the State Allocation Board voted to provide notice to the Senate and Assembly that "state funds for new school facility construction are not available." Under Government Code § 65595.7, this notice authorizes school districts that have adopted Level 2 fees to increase the fees to a Level 3 rate, which may be up to 200% of the Level 2 fee. Under the State School Facility Program, Level 2 fees are intended to fund 50% of the cost of providing school facilities for new residential development, with the other half paid for from state bond revenues. However, upon a determination by the State Allocation Board that such state funds have been exhausted, the law authorizes school districts to increase their fees to cover the full cost of new facilities. The formal trigger for Level 3 fees is the notice from the SAB to the Senate and Assembly that school facility funds are not available.

The judge's order barring the SAB from transmitting the notice results from a lawsuit filed by the California Building Industry Association on the same day as the SAB's action. In the suit, CBIA contends that the SAB erred in concluding that state funds have been exhausted because funds from bonds authorized by the voters in 2006 through Proposition 1D remain available for new school construction. CBIA maintains that the SAB used "creative accounting" to relabel certain funds designated under Proposition 1D for new construction as "seismic repair" funds and concluded that such funds were therefore not available for new construction. This action, CBIA argues, was unlawful both because only the legislature or the voters are authorized to reallocate funds approved for a specific purpose by the voters, and because under Proposition 1D, seismic repair funds are a subcategory of the funds approved for new construction.

The court's decision is not a ruling on the merits of the CBIA's claims. Rather, it is intended to preserve the status quo pending a hearing on CBIA's motion for a preliminary injunction, set for July 1, 2016. The restraining order will remain in effect until that hearing, at which time the court will decide whether to extend the bar against the SAB notice pending a trial on the merits, which could be several months away.

In the interim, CBIA, together with the Coalition for Adequate School Housing, a school district-sponsored advocacy group, will continue to campaign for voter approval of a $9 billion school bond initiative on the November 2016 ballot. This initiative, placed on the ballot through the efforts of Californians for Quality Schools — an entity formed by CBIA and CASH — would include $3 billion in new school construction funding, effectively mooting the issue of whether such funds remain from the last bond authorization.

California Land Use & Development Law Report

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Court of Appeal Clears the Way for Level 3 School Fees

By Geoffrey Robinson on October 31, 2016

Posted in Exactions and Assessments

The California Court of Appeal yesterday lifted a stay it had imposed in a lawsuit by the California Building Industry Association challenging implementation of "Level 3" school facilities fees. Lifting the stay allows the California State Allocation Board to formally notify the Legislature that it is no longer apportioning State funds for school facilities. Receipt by the Legislature of the notice will authorize school districts to impose up to twice the amount of their current "Level 2" fees.

As we reported earlier (State Allocation Board Approves Level 3 Fees), in May of this year, the State Allocation Board voted to notify the Legislature that "state funds for new school facility construction are not available." By law, this notice authorizes school districts to increase their Level 2 fees by up to 100%, to a Level 3 rate. Under the State School Facility Program, Level 2 fees are intended to fund 50% of the cost of school facilities for new residential development, with the other half paid from State funds. If the State is no longer providing such funds, however, school districts are authorized to increase their fees to cover the full cost of new facilities.

The formal trigger for Level 3 fees is the notice from the SAB to the Senate and Assembly that school facility funds are not available. Although the SAB voted to provide this notice, the move was blocked when a judge issued a temporary restraining order barring the SAB from transmitting the notice pending further consideration of a lawsuit filed by CBIA challenging the Board's decision. (See our report: Court Blocks Implementation of Level 3 Fees). The TRO was in effect until late August, when the trial court denied CBIA's request for a preliminary injunction and dissolved the TRO. However, CBIA filed an immediate request with the Court of Appeal for a stay pending its appeal from the trial court's ruling. The appellate court issued the stay, which was in effect until yesterday.

Now that the legal impediments have been cleared away, the SAB is expected to provide the formal notice to the Legislature. Once the notice is printed in the Senate and Assembly journals — which could occur in a matter of days — school districts will be authorized to levy fees at the higher, Level 3 rate which, in some districts, will mean fees of over $30,000 per residential unit.

UPDATE: On November 1, 2016, the State Allocation Board sent Senate and Assembly Notification Letters providing notice that funds were no longer available for school construction under the State School Facility Program.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Plaintiff and Petitioner,

v.

STATE ALLOCATION BOARD; and DOES 1 through 100,

Defendants and Respondents.

Case No. 34-2016-80002356

Assigned to The Honorable Michael P. Kenny

~~[PROPOSED]~~ ORDER DENYING: (1) PRELIMINARY INJUNCTION AFTER RULING ON SUBMITTED MATTER; AND (2) EX PARTE APPLICATION FOR TEMPORARY STAY

Trial Date: None Set
Action Filed: May 25, 2016

THE PRELIMINARY INJUNCTION

The court, having issued its Ruling on Submitted Matter: Order to Show Cause Re: Preliminary Injunction on August 22, 2016, a copy of which is attached hereto as Exhibit A and fully incorporated herein by this reference, IT IS HEREBY ORDERED THAT:

1. Petitioner California Building Industry Association's request for a preliminary injunction is **DENIED**; and

2. The temporary restraining order entered in this action on May 26, 2016 is **TERMINATED**.

THE EX PARTE APPLICATION FOR TEMPORARY STAY

Petitioner California Building Industry Association's ex parte application for the issuance of a temporary stay under Code of Civil Procedure section 918, subdivision (a), staying enforcement and/or implementation of the court's Ruling on Submitted Matter (Exhibit A hereto) was heard by the court on August 26 and 29, 2016 in Department 31 of the above-entitled court, the Honorable Michael P. Kenny presiding. The appearances of counsel were as noted in the court's records.

Having reviewed the ex parte application moving and opposing papers and all evidence and argument presented to the court before its decision, and good cause appearing,

IT IS HEREBY ORDERED that California Building Industry Association's ex parte application for the issuance of a temporary stay under Code of Civil Procedure section 918, subdivision (a) is **DENIED**.

Dated: 11/1/16

Superior Court Judge
MICHAEL P. KENNY

Approved as to form:

Rutan & Tucker, LLP

David P. Lanferman
Matthew D. Francois
Attorneys for Plaintiff and Petitioner
California Building Industry Association

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Exhibit A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Plaintiff and Petitioner,

v.

STATE ALLOCATION BOARD; and DOES 1 through 100,

Defendants and Respondents.

Case No. 34-2016-80002356-CU-WM-GDS

RULING ON SUBMITTED MATTER: ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

This matter came on for a hearing on the order to show cause on July 22, 2016. All parties appeared and presented oral argument, after which the Court took the matter under submission. The Court now issues its ruling on the submitted matter.

1. Factual And Procedural Background

In 1998, the Legislature passed the "Leroy F. Greene School Facilities Act of 1998," creating statutory authority for local school districts to impose fees on new development. (Ed. Code § 17070.10.) These fees may be imposed at three different levels and are designed to mitigate the costs of school facilities. At issue in this case is Respondent's authorization of "Level 3" fees.

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Government Code section 65995.7, subdivision (a) provides for imposition of Level 3 fees as follows,

> "[i]f state funds for new school facility construction are not available, the governing board of a school district that complies with Section 65995.5 may increase the alternative fee, charge, dedication, or other requirement calculated pursuant to subdivision (c) of Section 65995.5 by an amount that may not exceed the amount calculated pursuant to subdivision (c) of Section 65995.5, except that for the purposes of calculating this additional amount, the amount identified in paragraph (2) of subdivision (c) of Section 65995.5 may not be subtracted from the amount determined pursuant to paragraph (1) of subdivision (c) of Section 65995.5. For purposes of this section, state funds are not available if the State Allocation Board is no longer approving apportionments for new construction pursuant to Article 5 (commencing with Section 17072.20) of Chapter 12.5 of Part 10 of the Education Code due to a lack of funds available for new construction. Upon making a determination that state funds are no longer available, the State Allocation Board shall notify the Secretary of the Senate and the Chief Clerk of the Assembly, in writing, of that determination and the date when state funds are no longer available for publication in the respective journal of each house. For the purposes of making this determination, the board shall not consider whether funds are available for, or whether it is making preliminary apportionments or final apportionments pursuant to, Article 11 (commencing with Section 17078.10)."

Article 5 refers to Education Code section 17072.20, which provides the process by which a school district may request project apportionment for new construction funding.

After a hearing related to developer fees, Respondent set a review of the interim funding proposal and detailed analysis of whether Level 3 fees could be legally imposed for its May 25, 2016 agenda. Staff prepared a report concluding that funds seemed to be exhausted when considering those appropriated for "new construction." On May 25, 2016, Respondent made a finding that, pursuant to Government Code section 65995.7, state funds for new construction are no longer available, and the Board is no longer approving apportionments for new construction due to the lack of funds.

The Court heard Plaintiff's ex parte application for the issuance of a temporary restraining order and for an order to show cause re: preliminary injunction against Respondent on May 26, 2016 at 2:30 p.m. Having considered the evidence presented, the Court granted the Application and issued an order to Respondent to,

a. Refrain from implementing or giving notice of any SAB determination purporting to find that state funds for new school facility construction are not available at this time.
b. Refrain from taking any actions in furtherance or implementing any finding or determination as to the availability of state funds for new school facility construction pending further order of this Court.
c. Refrain from authorizing the imposition of Level 3 school fees pending further order of this Court.

The Court also ordered Respondent to appear at a hearing to show cause why the Court should not issue a preliminary injunction. The Court now considers this issue.

II. Standard

"In deciding whether to issue a preliminary injunction, a court must weigh two 'interrelated' factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction.... The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt v. California* (1992) 4 Cal.4th 668, 677-678.)

The party seeking injunctive relief bears the burden of showing all elements necessary to support issuance of a preliminary injunction. (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481.)

When a party seeks to enjoin a state agency in the performance of its duties, the party must make a significant showing of irreparable injury, as there is a general rule against enjoining agencies in the performance of their duties. (*Tahoe Keys Property Owners Association v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1471.) Because a preliminary injunction restrains the defendant's actions prior to a trial on the merits, it is considered an extraordinary and drastic remedy, and will not be granted lightly. (*Tahoe Keys*, (1994) 23 Cal.App.4th at 1471; *Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 356.)

III. Discussion

A. Objections to Amicus briefing and evidence, request to present oral testimony

Petitioner has filed objections to the amicus brief filed jointly by the Fremont Unified School District and the Dublin Unified School District.[1] Petitioner objects to the Districts' introduction of evidence and argument concerning local funding resources to build new schools, arguing instead that this case is solely concerned with the availability of state funds. Petitioner argues this improperly expands the briefing beyond issues raised by the parties, and that such evidence is, regardless, irrelevant. The Court agrees, and finds any evidence and argument concerning the availability of local funds is irrelevant and will not be considered in ruling on the preliminary injunction.

Petitioner also objects to the Districts' five declarations and exhibits filed in support of the amicus brief. Petitioner makes an argument that the Districts were prohibited from introducing any new evidence, and then makes specific objections. While the Court agrees the amicus brief may not expand the issues of the case, the Court declines to find such a brief may not be supported by any evidence not already submitted by the parties.

The Court notes Petitioner's specific objections fail to comply with California Rules of Court Rule 3.1354, as required by the Court's "Prerogative Writ Departments and Protocol." Specifically, the objections are to be consecutively numbered and must "quote or set forth the objectionable statement or material." The Court finds there are 11 specific objections (as grouped by Petitioner) and rules as follows. Objections 2, 3, 4, 5, 6, (as to paragraphs 6 and 7 only), 7, 8, 9, 10, and 11 are **SUSTAINED** on the grounds of relevancy and improper opinion testimony. All other objections are **OVERRULED.**

[1] The Court notes the declarations in support of the amicus brief violate California Rules of Court rule 3.1110, subdivision (f), requiring each exhibit to be separated by a sheet with paper or plastic tabs extending below the bottom of the page.

Respondent has filed objections to the declarations submitted in support of Petitioner's reply memorandum. Respondent argues the Court should refuse to consider this new evidence as it was submitted in connection with reply papers. The general rule is that points raised for the first time in a reply brief will not be considered, including new evidence. However, the Court finds this matter is unique in that Respondent's brief on the order to show cause is similar to an opening brief, and it may not have been possible for Petitioner to present all evidence in connection with its ex parte application. The Court has also reviewed Respondent's specific evidentiary objections, and they are **OVERRULED**. The Court indicated in its tentative ruling that if Respondent determined it needed to submit additional briefing in order to respond to Petitioner's additional evidence, it could make a request at the hearing on this matter, and the Court would permit additional briefing. Respondent did not make any such request.

Amici Curiae Dublin Unified School District and Fremont Unified School District requested permission to introduce oral evidence at the hearing. This request is **DENIED**.

B. Preliminary injunction

Likelihood of Success on the Merits

Respondent argues the key language in section 65995.7 is, "[f]or purposes of this section, state funds are not available if the State Allocation Board is no longer approving apportionments for new construction *pursuant to Article 5* (commencing with Section 17072.20) of Chapter 12.5 of Part 10 of the Education Code *due to a lack of funds available for new construction.*" (emphasis added.) Respondent argues when funds are not available for new construction pursuant to Article 5, Level 3 fees may be approved. Petitioner argues only Article 11 fees should be excluded from consideration in determining the amount of fees available, and that even if only Article 5 fees are considered, such fees remain currently available, the amount being irrelevant.

Pursuant to the plain language of section 65995.7, authorization for Level 3 fees is

triggered by a lack of funds available for new construction. The question becomes whether funds available for new construction are solely those held as Article 5 funds, or whether other funds must also be considered. Both parties acknowledge that section 65995.7 expressly excludes Article 11 funds pursuant to its plain language. Petitioners argue this language provides an intent that *only* Article 11 funds be excluded from consideration in determining whether funds are available for new construction. Respondent disagrees.

Respondent cites to the legislative history and language describing Article 11 funds to refute Petitioner's arguments. Article 11, described in Education Code section 17078.30, was enacted in 2002 and provides,

> "(a)(1) A portion of the funds reserved for the purposes set forth in this article from the proceeds of state bonds approved by the voters at the November 5, 2002, statewide general election that are not included in a preliminary apportionment for an application that is received by the deadline specified in subdivision (c) of Section 17078.20 shall thereafter be available to the board for apportionment for any new construction purpose under any other article of this chapter."

Section 65995.7 was amended in 2002 to include the final sentence exempting Article 11 funds. Respondent contends this language was necessary because of the section 17078.30 language providing that the funds would be available for "any new construction purpose" and would consequently otherwise be available for section 65995.7 purposes. The inclusion of the final section, Respondent argues, was to clarify that the Legislature intended to continue the "restrictive definition of 'new construction' under subdivision (a) to new construction pursuant to Article 5 *only* even though Article 11 also could make funding available for Article 5 purposes." (Opposition, p. 7.)

In arguing that sufficient funds remain available for apportionment, Petitioner points to Article 8 of Chapter 12.5, which is titled "Hardship Application." Respondent contends the $85.2 million for "seismic repair" is not available for new construction pursuant to Article 5, as these funds are solely for the Seismic Mitigation Program pursuant to Article 8 of Chapter 12.5.

Accordingly, these funds are irrelevant to a determination of whether Level 3 fees may be currently authorized.

Education Code section 17075.10 provides a school district may apply for hardship assistance in cases of extraordinary circumstances which "may include, but are not limited to, the need to repair, reconstruct, or replace the most vulnerable school facilities that are identified as Category 2 building...determined by the department to pose an unacceptable risk of injury to its occupants in the event of a seismic event." To obtain such funds, a district must demonstrate certain needs. Subdivision (b)(2) allows for funding when a district can,

> "Demonstrate that due to unusual circumstances that are beyond the control of the district, excessive costs need to be incurred in the construction of school facilities. Funds for the purpose of seismic mitigation work or facility replacement pursuant to this section shall be allocated by the board on a 50-percent state share basis from funds reserved for that purpose in any bond approved by the voters after January 1, 2006. If the board determines that the seismic mitigation work of a school building would require funding that is greater than 50 percent of the funds required to construct a new facility, the school district shall be eligible for funding to construct a new facility under this chapter."

The Court finds, based on a plain reading of section 17075.10, Article 8 funds are intended for use in connection with seismic repairs, which repairs may at times be so extensive as to require constructing a new facility. This does not, however, mean that such funds are also available for new construction for Article 5 purposes. Such a reading would eliminate the language of section 17075.10 providing that Article 8 funds are for excessive costs due to unusual circumstances, including seismic mitigation work. The same appears true for other Article funds Petitioner seeks to incorporate for Article 5 use.

The Court finds Government Code section 65995.7, subdivision (a) allows for authorization of Level 3 fees when Article 5 funds are insufficient to allow for continued apportionment for new construction.

Petitioner argues that even if Article 5 funds are the benchmark, $2.2 million of Article 5

funds continue to exist. Petitioner contends those funds must be apportioned until no further Article 5 funds remain. Until this happens, Level 3 fees may not be approved. Petitioner also argues additional funds will soon be available for apportionment.

Respondent argues that despite the existence of $2.2 million in funds available for new construction pursuant to Article 5, Respondent cannot apportion any funds because Fresno Unified School District's approved application for $15,685,743 is next in line for Article 5 new construction funds apportionment. (Kampmeinert Decl., ¶ 4, Exh. 3.)[2] Because Fresno's requested apportionment exceeds the amount of available Article 5 new construction funds, Respondent cannot apportion any of the Article 5 new construction funds. Respondent cites to Education Code section 17070.63 requiring a school district receiving funds to "certify that the grant amount, combined with local funds, shall be sufficient to complete the school construction project for which the grant is intended." Absent receipt of the entire requested amount, Respondent argues Fresno cannot certify that funds received will be sufficient to complete its project, and consequently apportionment cannot occur.[3]

Respondent also argues the $2.2 million in funds available for new construction will not be supplemented, even by the $73.4 million that Petitioner claims will soon be available. (Kampmeinert Decl., ¶¶ 7-9.)

The Court finds Section 65995.7 allows for Level 3 fees when the State Allocation Board is no longer approving apportionments for new construction pursuant to Article 5 due to a lack of funds available for new construction. Here, Respondent is not approving apportionments as the

[2] At the hearing on this matter, counsel for Petitioner asserted the Fresno project has been completed and is no longer in need of apportionment. The Court has reviewed Petitioner's briefing and can find no citation to evidence to support this assertion.

[3] Petitioner argues Fresno is not required to request apportionment for the entire project, and consequently apportionment of only a portion may occur. However, the evidence supports a finding that Fresno has requested apportionment of an amount exceeding available new construction funds, making this argument irrelevant.

funds provided fall far short of that needed for the "next in line" approved application.[4] The statute does not require Respondent to approve apportionments for projects when such an apportionment would fall quite short of enabling a receiving district to certify grant sufficiency. The statute also does not require Respondent to wait for additional funds that may become available at some point in the future.

Relative Interim Harm

Petitioner has vehemently argued that not enjoining Respondent's authorization of Level 3 fees will result in great harm, not only to Petitioner and its members, but also to California homebuyers (in the form of increased new home construction purchase prices.) Respondent and the *amici curiae* have all argued the general public, in addition to school districts, will all experience great harm if Respondent is unable to impose the increased fees, including a stall in building schools necessary to keep in pace with the population increase resulting from housing construction.

The Court acknowledges both sides have raised considerable arguments as to the allegedly significant harms that will result should the injunction be denied and should it be imposed. The Court also finds that the harms to Petitioner resulting from improperly authorized Level 3 fees are greater than the harm to Respondent and the public. However, these harms do not overcome the fact that the Court finds no likelihood of success on the merits.

Accordingly, even considering the potential harms, Petitioners have failed to tip the scale in their favor.

IV. Conclusion

The request for a preliminary injunction is **DENIED** as Petitioner has failed to prove any likelihood of success on the merits. The temporary restraining order is also hereby

[4] This distinguishes the present circumstances from those analyzed by the Attorney General in Opinion No. 01-803.

TERMINATED.

A plain reading of the subject statutes, combined with the legislative history, establishes that Respondent is only required to consider Article 5 funds when determining whether sufficient funds remain available for apportionment for new construction. Other Articles' funds are segregated for separate purposes; consequently, the funds are not interchangeable or synonymous.

The evidence before the Court establishes that Respondent cannot approve apportionments for new construction pursuant to Chapter 5, as available funds are insufficient for the "next in line" approved application. Accordingly, Respondent may make a finding, as it did on May 25, 2016, that pursuant to Government Code section 65995.7, state funds for new construction are no longer available, and the Board is no longer approving apportionments for new construction due to the lack of funds.

Counsel for Respondent shall prepare order incorporating this ruling as an exhibit to the order; submit them to counsel for Petitioner for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit it to the Court for signature and entry in accordance with Rule of Court 3.1312(b).

DATED: August 22, 2016

Judge MICHAEL P. KENNY
Superior Court of California,
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

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Superior Court of California,
County of Sacramento

Dated: August 22, 2016

By: S. LEE
Deputy Clerk

IN THE

Court of Appeal of the State of California

IN AND FOR THE THIRD APPELLATE DISTRICT

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,
Plaintiff and Appellant,
v.
STATE ALLOCATION BOARD,
Defendant and Respondent.

C082812
Sacramento County
No. 34201680002356

BY THE COURT:

The petition for writ of supersedeas is denied. The stay entered by this court on September 1, 2016, of all further proceedings in Sacramento County Superior Court case number 34201680002356 is vacated.

BLEASE, Acting P.J.

---

cc: See Mailing List

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: California Building Industry Association v. State Allocation Board
C082812
Sacramento County No. 34201680002356

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

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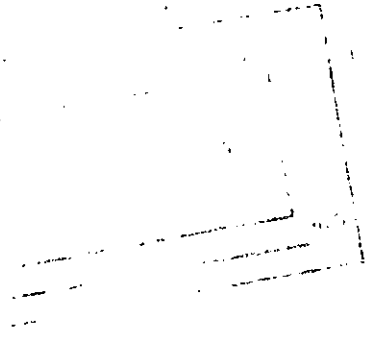

STATE ALLOCATION BOARD
707 3rd Street
West Sacramento, CA 95605
http://www.dgs.ca.gov/opsc

November 1, 2016

Mr. Danny Alvarez
Secretary of the Senate
State Capitol, Room 3044
Sacramento, CA 95814

Dear Mr. Alvarez:

At its May 25, 2016 meeting, the State Allocation Board made a determination that effective May 25, 2016, state funds are no longer available for school facility construction. Government Code Section 65995.7(a) requires the State Allocation Board to notify the Secretary of the Senate and Chief Clerk of the Assembly, in writing, of that determination, including the date when state funds are no longer available, for publication in the respective journal of each house.

This letter serves as the notification fulfilling the State Allocation Board's obligation under Government Code Section 65995.7(a). I have attached the Board's approved agenda item for your reference.

Should you have any questions, please contact Lisa Silverman, Executive Officer, at (916) 375-4751.

Sincerely,

Eraina Ortega

Eraina Ortega, Chair
State Allocation Board

Attachment

cc: Mr. E. Dotson Wilson, Chief Clerk of the Assembly
The Honorable Senate Member Carol Liu, Vice-Chair, State Allocation Board
The Honorable Senate Member Loni Hancock, State Allocation Board
The Honorable Senate Member Bob Huff, State Allocation Board
The Honorable Assembly Member Adrin Nazarian, State Allocation Board
The Honorable Assembly Member Susan Bonilla, State Allocation Board
The Honorable Assembly Member Rocky Chavez, State Allocation Board
Mr. Daniel Kim, Director, Department of General Services
Mr. Tom Torlakson, Superintendent of Public Instruction
Mr. Michael Cohen, Director, Department of Finance
Mr. Cesar Diaz, Governor's Appointee
Ms. Lisa Silverman, Executive Officer, State Allocation Board
Ms. Barbara Kampmeinert, Deputy Executive Officer, Office of Public School Construction
Ms. Jonette Banzon, State Allocation Board Legal Counsel

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Ms. Jonette Banzon, State Allocation Board Legal Counsel

REPORT OF THE EXECUTIVE OFFICER
State Allocation Board Meeting, May 25, 2016

DEVELOPER FEES

PURPOSE OF REPORT

To present the State Allocation Board (Board) with options to take action that could allow school districts the ability to impose Level III developer fees.

DESCRIPTION

At the April 2016 meeting, the Board heard a staff report on the developer fee statutory framework (Attachment A). There are three levels of residential construction fees that may be levied by school districts onto developers commonly known as Levels I, II, and III.

A district may charge the highest fee, Level III, when it has met the Level II requirements and when, pursuant to Government Code Section 65995.7, "state funds for new school facility construction are not available." The Board must make a finding that state funds for new construction are not available in order for districts to charge Level III fees. The Board must also notify the Secretary of the Senate and the Chief Clerk of the Assembly of its finding.

The Board directed staff to return with an action item related to Level III fees. This item presents the Board with options related to making a finding that could allow school districts to impose Level III developer fees.

AUTHORITY

See Attachment B.

BACKGROUND

Pursuant to Government Code Section 65995.7, if a school district meets the requirements to charge developers Level II fees, and "if state funds for new school facility construction are not available," a school district may begin to charge developers Level III fees. "For purposes of this section, state funds are not available if the State Allocation Board is no longer approving apportionments for new construction pursuant to Article 5 (commencing with Section 17072.20) of Chapter 12.5 of Part 10 of the Education Code due to a lack of funds available for new construction."

Historically, the conditions necessary for districts to charge Level III fees have not been met.

However, there was a short time period in 2001 and 2002 when this issue also came before the Board for consideration. The SFP regulations in effect during this timeframe specified that Level III fees could be charged when the Board had more "New Construction Grants requests Ready for Apportionment" than funds available for that purpose. At that time, the Board was making apportionments on a quarterly basis. In July 2001, the program had $1.179 billion in grant requests, but only $951.8 million in funds available for apportionment. Because there was still bond authority available, and the Board was still making apportionments (regardless of the timing of such action) the Attorney General ruled that the Board could not make a finding that funds were not available, and further ruled that the regulation was invalid because it was in direct conflict with statute (the Attorney General's opinion is included as Attachment C). The opinion stated, "As long as state funds are available and the Board is approving apportionments, school districts may not increase their school impact fees from Level II to Level III."

(Continued on Page Two)

STAFF ANALYSIS/STATEMENTS

Government Code Section 65995.7 allows school districts to charge Level III developer fees "if state funds for new school facility construction are not available." This section further identifies two conditions within the definition of funds being considered "not available":

- **The Board is no longer approving apportionments for new construction pursuant to Article 5 of Chapter 12.5 of Part 10 of the Education Code.**
- **There must be a lack of funds available for new construction.**

Staff has provided an analysis of these two conditions below for the Board's consideration.

Is the Board still approving apportionments for new construction pursuant to Article 5?

No. The last time the Board approved an apportionment for new construction pursuant to Article 5 was September 8, 2015. The unfunded approval for the September 2015 apportionments was February 2015 and there have been no new construction unfunded approvals since that date.

While the Board is still approving apportionments for projects under the Facility Hardship and Seismic Mitigation Program (SMP), these projects are funded pursuant to Article 8 of Chapter 12.5 of Part 10 of the Education Code, not Article 5.

ARTICLE 5

* New Construction
*Addition of Classroom Space
*Housing Unhoused Pupils

ARTICLE 8

*Facility Hardship
*Seismic Mitigation Program
*Financial Hardship
*Excessive Cost Hardship - Supplemental grants

The Board has statutory authority pursuant to Education Code (EC) Section 17075.15(a) to use funds from any bond act to provide funding for the purposes of Article 8. Further, the Board has specific statutory authority in EC Section 17075.15(b) to adopt regulations for the purposes of Article 8.

(Continued on Page Three)

STAFF ANALYSIS/STATEMENTS (cont.)

The Board has taken two actions to specify that health and safety projects in the Facility Hardship program will receive priority for bond authority over typical new construction and modernization projects. This priority was first adopted by the Board in a policy decision made at the August 4, 2010 meeting and was formalized into the priority funding process through SFP Regulation Section 1859.93.1, which was adopted in April 2015.

This regulation section reads in part:

"Applications, except those identified in (c) through (e) below, shall be funded as follows:
(a) First, to applications for Facility Hardship pursuant to Section 1859.82, except those for the seismic mitigation of the Most Vulnerable Category 2 Buildings, in order of receipt of an Approved Application for funding; then,
(b) If there are no applications pursuant to subsection (a), to applications for New Construction Grant(s) in order of receipt of an Approved Application for Funding..."

Due to continual submittals of Facility Hardship applications, the result of the Board's action has been that the Board is no longer providing apportionments pursuant to Article 5.

Is there a lack of funds available for new construction?

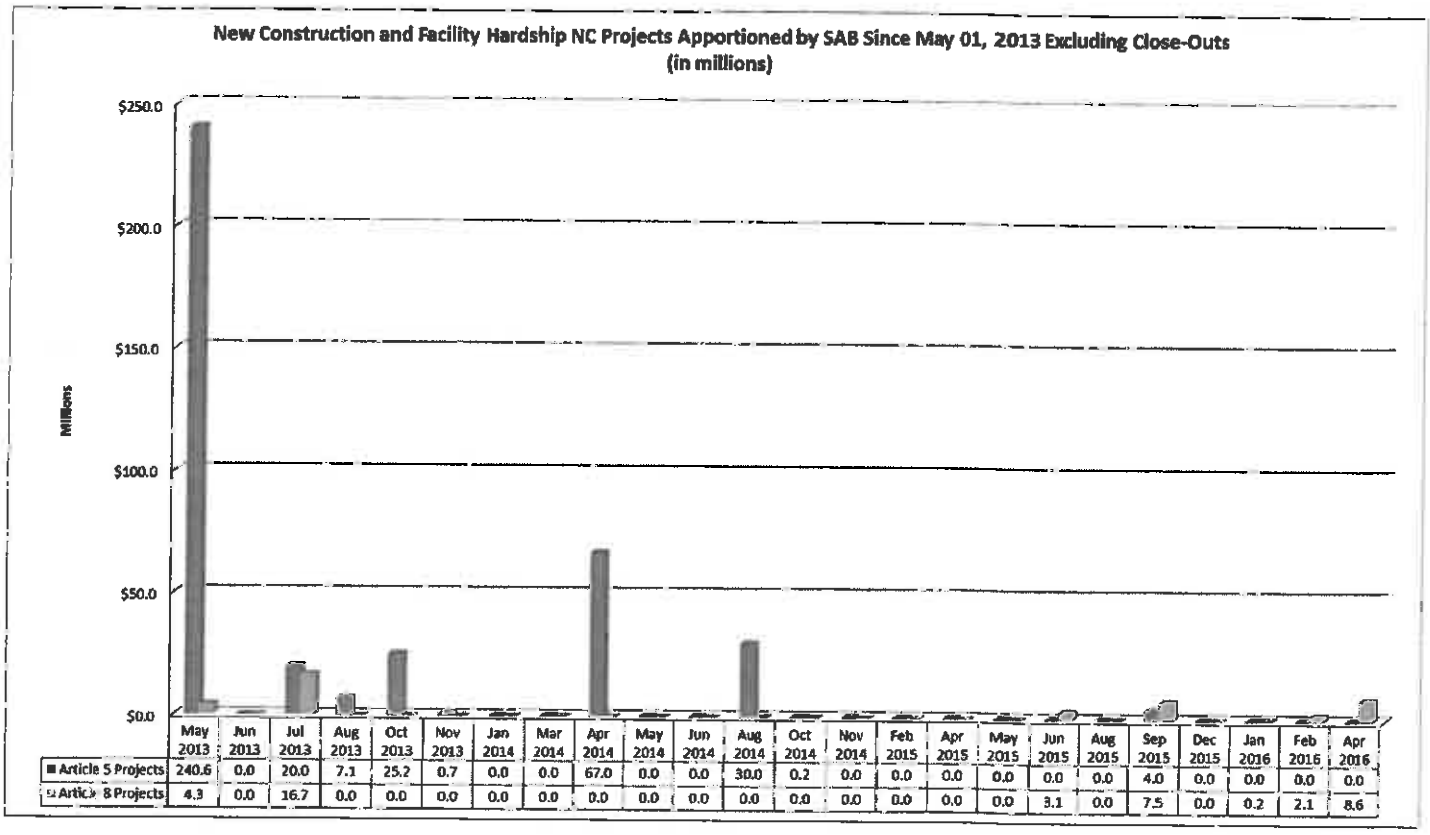
Yes. Since the inception of the SFP, over $13 billion in bond authority has been made available for new construction. The Status of Funds report currently shows a remaining balance of $2.2 million in new construction funds. However, the Board, through its statutory discretion, has committed those funds first to Facility Hardship projects submitted under Article 8.

Since the Board established the "True" Unfunded List (the list of projects outside of bond authority) for applications received between July 13, 2012 and November 1, 2012, only 17 new construction projects have moved off of that list to receive an unfunded approval and receive an apportionment. It has been over seven months (September 2015) since the Board took action in granting a new construction apportionment from a project that was originally on the "True" Unfunded List. There are still 26 new construction projects on the "True" Unfunded List that represent a need of approximately $181 million in new construction bond authority.

The graph below shows the amount of funds that have been apportioned to both Article 5 and Article 8 projects over the past two years. It is important to note that the apportionments were made possible in large part due to returns of funds to the program from project rescissions and closeouts, and the transfer of funds from the Career Technical Educational Facilities Program and the High Performance Incentive Grant.

(Continued on Page Four)

STAFF ANALYSIS/STATEMENTS (cont.)

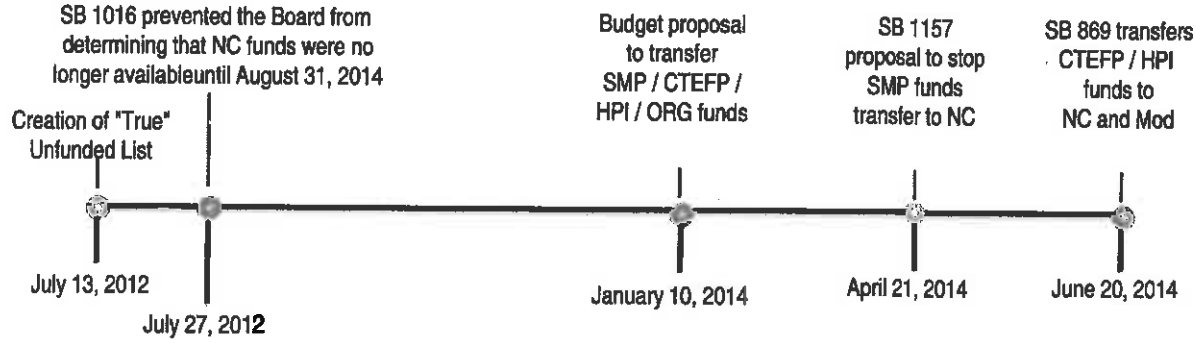


	May 2013	Jun 2013	Jul 2013	Aug 2013	Oct 2013	Nov 2013	Jan 2014	Mar 2014	Apr 2014	May 2014	Jun 2014	Aug 2014	Oct 2014	Nov 2014	Feb 2015	Apr 2015	May 2015	Jun 2015	Aug 2015	Sep 2015	Dec 2015	Jan 2016	Feb 2016	Apr 2016
Article 5 Projects	240.6	0.0	20.0	7.1	25.2	0.7	0.0	0.0	67.0	0.0	0.0	30.0	0.2	0.0	0.0	0.0	0.0	0.0	0.0	4.0	0.0	0.0	0.0	0.0
Article 8 Projects	4.3	0.0	16.7	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	3.1	0.0	7.5	0.0	0.2	2.1	8.6

Seismic Mitigation Program Funds

Proposition 1D provided that of the $1.9 billion made available for New Construction, "up to 10.5 percent shall be available for purposes of seismic repair, reconstruction, or replacement pursuant to Section 17075.10." EC Section 17075.10 falls in Article 8 of Chapter 12.5. At its January 2008 meeting, the Board approved regulations to administer the seismic funds. Those regulations specified that the entire 10.5 percent, or $199.5 million, was available for the SMP.

SMP funds do remain; however, to date there has not been a consensus leading to action to transfer any of these funds back to new construction. Below is a timeline showing various actions from legislators and the Administration related to shifting funds into the new construction program and delaying Level III fees.



(Continued on Page Five)

STAFF ANALYSIS/STATEMENTS (cont.)

Summary

It has been over seven months since the Board apportioned funds for new construction pursuant to Article 5, and 15 months since an unfunded approval was provided. The Administration, members of the Legislature and the Board have all differentiated the funds within the original allotment between funds available for the new construction housing of unhoused pupils pursuant to Article 5 and funds available for Facility Hardship and SMP projects pursuant to Article 8. The new construction funds and other options to replenish the new construction funds seem to be exhausted. The Board appears to be within its statutory authority to make a finding that new construction funds are not available for new construction apportionments.

BOARD OPTIONS

1. **Make a finding to allow districts to impose Level III fees.**

   - Pursuant to Government Code Section 65995.7, upon finding that the conditions in statute have been met, determine that state funds for new construction are not available.
   - Notify the Secretary of the Senate and the Chief Clerk of the Assembly that this determination was made as of May 25, 2016.

2. **Take no action (does not require a vote).**

BOARD ACTION

In considering this Item, the SAB approved a motion: 1) making a finding that, pursuant to Government Code Section 65995.7, state funds for new construction are no longer available; and 2) the SAB is no longer approving apportionments for new construction pursuant to Article 5, Chapter 12.5 of Part 10 of the Education Code, due to a lack of funds for this purpose thereby authorizing school districts to begin to impose Level III developer fees if they so choose. The motion also included that the Secretary of the Senate and the Chief Clerk of the Assembly be notified that this determination was made as of May 25, 2016.

TAB 8

WETLANDS & PROTECTED SPECIES:
LEGAL DEVELOPMENTS IN 2016

A. WETLANDS & OTHER "WATERS OF THE UNITED STATES"

1. Supreme Court rules that approved jurisdictional determinations are judicially reviewable

U.S. Army Corps of Engineers v. Hawkes Co., Inc., 136 S. Ct. 1807 (2016): The U.S. Supreme Court ruled that "approved jurisdictional determinations" issued by the Army Corps of Engineers under Section 404 of the Clean Water Act are reviewable in court. The decision resolves a circuit split on the issue and has important implications for landowners, developers and regulators.

Background. An "approved jurisdictional determination" is an official determination by the Corps (or in some cases, the Environmental Protection Agency) that identifies which water features on a particular property are covered by the Clean Water Act's permitting requirements. This determination is particularly important with respect to such features as ephemeral and intermittent streams and washes, manmade drainages, and small ponds and wetlands, where federal jurisdiction may be in dispute. Some courts had held that an approved JD was not a final agency action subject to judicial review. These courts reasoned that an approved JD merely put the landowner on notice that a Clean Water Act permit would be required if he or she chose to fill the jurisdictional waters on the property. Under this line of reasoning, the landowner would have to wait to challenge an approved JD until the Corps made a final decision on a Clean Water Act permit application. Alternatively, the landowner could proceed with filling the waters on the property without seeking a permit, and then raise a challenge to the approved JD as a defense in an enforcement action by the Corps or EPA.

But in the *Hawkes* case, the U.S. Court of Appeals for the Eighth Circuit reached the opposite conclusion, deciding that an approved JD has a "powerful coercive effect" and should be subject to "immediate judicial review." The Supreme Court accepted the case to resolve the split of circuit court authority.

The Supreme Court's Decision. The Court unanimously upheld the Eighth Circuit's decision and ruled that an approved JD is judicially reviewable.

The case involved a 530-acre property in Minnesota where three peat mining companies sought review of an approved JD that they believed represented an overly expansive view of federal permitting jurisdiction. The Supreme Court began by noting that "it is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does." The Court observed that the time and costs for obtaining a Clean Water Act permit can be significant. For example, one study found that the average applicant for an individualized, site-specific permit spends more than two years and over $270,000 to complete the process. Moreover, there are substantial civil and criminal penalties for filling a jurisdictional water without a permit.

With this background in mind, the Supreme Court outlined the two conditions that must be satisfied for an agency action to be final and thus judicially reviewable under the federal Administrative Procedure Act. The action must: (1) "mark the consummation of the agency's decisionmaking process" and (2) "be one by which rights or obligations have been determined, or from which legal consequences will flow."

With respect to the first condition, the Corps conceded that a jurisdictional determination marks the consummation of the agency's decisionmaking on the question of whether a property contains jurisdictional waters. Thus, the Court's analysis focused on the second condition and whether an approved jurisdictional determination also gives rise to "direct and appreciable legal consequences."

In addressing this issue, the Court found that both a negative approved JD (which determines that there are no jurisdictional waters on a particular piece of property) and an affirmative approved JD (which finds that there are jurisdictional waters) have real and meaningful consequences. A negative JD binds the government for five years and prevents it from requiring a permit or seeking penalties. Conversely, an affirmative JD represents the government's definitive denial of the legal safe harbor that a negative JD would afford.

The Court also emphasized that there was no adequate alternative to judicial review. The Court observed that having to wait for a final permit decision was an inadequate remedy for the landowner, since the permit process is often "arduous, expensive, and long." Proceeding without a permit and waiting for an enforcement action reflected an even more problematic remedy according to the Court. This approach would compel the landowners to expose themselves to civil penalties of up to $37,500 for each day that a jurisdictional water body remained illegally filled, "to say nothing of potential criminal liability." The Court stated bluntly that landowners "need not assume such risks while waiting for EPA to drop the hammer in order to have their day in court."

Moreover, the Court rejected the Corps' argument that seeking review in an enforcement action or at the end of the permitting process would be the only avenues for review if the Corps had not adopted the practice of issuing standalone jurisdictional determinations, which is not required by the Clean Water Act. The Court responded: "True enough. But such a 'count your blessings' argument is not an adequate rejoinder to the assertion to the right of judicial review."

Three associate justices (Kennedy, Thomas and Alito) published a concurring opinion to express their concern over the fact that the reach of the Clean Water Act remains "notoriously unclear" and "continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."

Importance of the Decision. The Court's decision provides landowners and developers with a clear, direct avenue to challenge an approved JD in court. Such a challenge presumably would make it clear whether or not a permit is required, without having to go through a long permit process or risky enforcement proceeding.

But the Corps may respond to the decision by ceasing or curtailing the longstanding practice of issuing approved jurisdictional determinations. If the Corps reacts in this way, landowners and

developers would lose a valuable tool for learning relatively early on in the process what the Corps' position is on its jurisdiction over a particular piece of property. Without this tool, landowners and developers would either have to submit a permit application to ascertain the Corps' view on the matter or proceed with development while risking an enforcement proceeding – precisely the situation that the Corps warned about in arguing against judicial review. Rather than make the process clearer, this approach could very well lead to increased uncertainty as to the scope of the Clean Water Act's permitting requirements.

It remains to be seen whether the Court's ruling will help or hurt those who seek greater clarity on the key question of when the Clean Water Act applies and when it does not.

2. Sixth Circuit decides it has jurisdiction to hear consolidated nationwide challenges to new Clean Water Act regulations

In re U.S. Department of Defense and U.S. Environmental Protection Agency Final Rule, 817 F.3d 261 (6th Cir. 2016): In an important procedural ruling under the Clean Water Act, the Sixth Circuit decided that it has jurisdiction to hear a set of consolidated cases challenging the federal regulations that define the key term "waters of the United States."[1]

Background. In June 2015, the Army Corps and the Environmental Protection Agency jointly adopted new regulations defining the "waters of the United States" that are subject to federal permitting authority under the Clean Water Act. See 80 Fed. Reg. 37,054 (June 29, 2015). Various lawsuits were filed to challenge the new regulations, which represent a significant and controversial expansion of federal jurisdiction.

Four of the lawsuits were transferred by the Judicial Panel on Multi-District Litigation to the U.S. Court of Appeals for the Sixth Circuit. As a threshold matter, the court faced the issue of whether the cases challenging the new regulations were properly heard by the district courts in the first instance or whether the Clean Water Act provided for direct review in the federal appellate courts. But in October 2015, before deciding this jurisdictional issue, the Sixth Circuit issued a nationwide stay of the regulations pending further proceedings. See *In re EPA and Dept. of Defense Final Rule*, 803 F.3d 804 (6th Cir. 2015).

In issuing the stay, the court expressed doubt that the new regulations were consistent with the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006). The court cautioned that the "sheer breadth" of the definitional changes embodied in the new regulations "counsels strongly in favor of maintaining the status quo for the time being."

In its follow-up decision in February 2016, the court turned to the issue of whether jurisdiction over the lawsuits challenging the regulations properly lies in the district courts or in the court of appeals.

The Sixth Circuit's Decision. In a 2-1 decision with three different opinions, the court found that the new regulations were subject to direct review in the court of appeals. The decision cited the

[1] As of the date of the publication of these materials, a petition for certiorari was pending before the U.S. Supreme Court.

provisions of the Clean Water Act that provide for such direct review for cases challenging EPA actions that establish an effluent or "other limitation" or that issue or deny a discharge permit. See 33 U.S.C. § 1369(b)(1)(E), (F). The court acknowledged that these statutory provisions did not directly apply under a strict literal interpretation, but the court employed a "practical, functional" reading and reasoned that the regulations sought to establish new limitations under the Clean Water Act and would significantly affect decisions on whether to issue or deny permits. The court also emphasized that the direct review provisions of the Clean Water Act evince a Congressional preference for circuit court review in order to serve the interests of "judicial economy, clarity, uniformity and finality."

As a result of the ruling, the Sixth Circuit is now proceeding to hear the merits of the claims challenging the validity of the new Clean Water Act regulations.

However, two of the judges filed separate opinions to state their disagreement with the conclusion that the Clean Water Act provisions for direct circuit review actually applied. One of the judges nevertheless concurred with the decision that these provisions did apply, stating he was bound by prior case law precedent. The other judge filed a dissent claiming that a foreseeable consequence of the decision, if it is allowed to stand, is that the appellate courts "would exercise original submitted-matter jurisdiction over all things related to the Clean Water Act," which Congress clearly did not intend.

Importance of the Decision. If the decision stands, it could be construed to broaden substantially the types of cases under the Clean Water Act that are subject to direct review in the federal appellate courts. Equally important, direct appellate review in this case would ensure a certain measure of uniformity in how the courts will address the new Clean Water Act regulations adopted in 2015.

Indeed, two courts have cited the Sixth Circuit's decision as the basis for refraining to address challenges to the new regulations. See *State of Georgia ex el. Olens v. McCarthy*, 833 F.3d 1317 (11th Cir. 2016) (holding case in abeyance pending a decision by the Sixth Circuit on the validity of the regulations); *Washington Cattlemen's Assn. v. U.S. Environmental Protection Agency*, 2016 WL 6645765 (D. Minn. Nov. 8, 2016) (district court found that it lacked subject matter jurisdiction to hear a challenge to the regulations in light of the Sixth Circuit's ruling that the matter is subject to direct circuit court review).

Ultimately, it is possible that the fate of the new regulations will be decided by political factors rather than by the courts. Scott Pruitt, the nominee to head the EPA in the Trump administration, is a vocal critic of the new regulations and he was part of the coalition of state attorneys general that sued to challenge their adoption.

As a result, the uncertainty over the reach of the Clean Water Act, an issue that has been in a state of considerable flux since the Supreme Court's 2006 decision in the *Rapanos* case, is likely to continue in 2017.

3. D.C. Circuit confirms that the EPA has broad "veto" authority over Corps wetlands permits

Mingo Logan Coal Co. v. Environmental Protection Agency, 829 F.3d 710 (D.C. Cir. 2016): The court affirmed the broad authority of the EPA to "veto" Corps approval of a permit under section 404 of the Clean Water Act to fill wetlands and other waters of the United States.

Background. In 2007, the Corps issued a permit under section 404 of the Clean Water Act that authorized a large coal mining operation in West Virginia, which would result in the filling of jurisdictional streams with soil and rock. Four years after the permit was issued, the EPA exercised its veto authority under section 404(c) of the Clean Water Act and effectively "withdrew" the permit with respect to two of the authorized mining sites. Section 404(c) authorizes the EPA to prohibit the filling of wetlands, streams or other "waters of the U.S." if it finds that there would be an "unacceptable adverse effect" on the aquatic environment.

The permittee sued, arguing that the EPA could not properly exercise its veto authority under section 404(c) after the Corps already had issued a permit. The D.C. Circuit rejected this claim, finding no such temporal restriction on the EPA's veto power. See *Mingo Logan Coal Co. v. Environmental Protection Agency*, 714 F.3d 608 (D.C. Cir. 2013).

The court remanded the case to the district court to consider whether the EPA's permit withdrawal in this case was based on the appropriate factors. The district court upheld the EPA's action and the D.C. Circuit affirmed.

The D.C. Circuit's Decision. The court first held that the permittee waived the claim that the EPA improperly failed to consider the economic impacts its decision, because the permittee did not adequately raise this challenge during the administrative process and the ensuing litigation.

The court next held that in making its decision, the EPA properly could consider water quality effects downstream of the mining operations. The court also ruled that the EPA was not bound by the determination by the state of West Virginia, which adopts and implements its own state water quality standards under the Clean Water Act, that the filling of streams would not cause water quality problems downstream. Rather, the EPA has independent authority to consider water quality effects as part of its decision on whether or not to veto a section 404 fill permit. Further, the court emphasized that downstream water quality was just one of the EPA's concerns in vetoing the permit in this case; the EPA also based its decision on the adverse impacts to fish and wildlife.

Finally, the court found that the EPA adequately explained the basis for its permit veto in light of the new studies and information that became available after the Corps' initial permit approval. As the court explained, the EPA made it clear as part of its veto decision that "the game had changed" due to additional data and information that were not available at the time the permit was issued, including peer-reviewed studies of the ecology in the region and a growing scientific concern over the adverse effects caused by this type of mining operation.

Importance of the Decision. The *Mingo Logan* decision highlights that the EPA retains substantial discretion and authority over Corps-issued Clean Water Act permits and that a landowner faces a decidedly uphill in challenging an EPA permit veto.

4. The California State Water Resources Control Board has adopted draft statewide procedures for projects involving discharges of dredged or fill material

State Water Resources Control Board, *Preliminary Draft: Procedures for Discharges of Dredged or Fill Material to Waters of the State* (June 17, 2016): The State Water Board has adopted draft procedures that would govern projects in California involving the discharge of dredged or fill material. The proposed procedures consist of the following three components: (1) a definition of what constitutes a "wetland" under state law; (2) a set of procedures for the state law delineation of wetlands; and (3) a set of procedures governing the submittal of a permit application to the applicable Regional Water Quality Control Board.

In proposing the procedures, the State Water Board emphasized the following points:

- First, there is a need to strengthen the protections for those water bodies that are no longer protected under the Clean Water Act due to U.S. Supreme Court decisions. The State and Regional Water Boards historically relied on the protections afforded to wetlands under the federal permit process. But as the U.S. Supreme Court has narrowed the reach of the Clean Water Act, the State and Regional Boards have increasingly exercised their independent state law authority under the Porter-Cologne Water Quality Control Act to "fill the gap" in regulation.

- Second, there is a need to address the inconsistency across the Regional Water Boards in the requirements for discharges of dredged or fill material into waters of the state, including wetlands. There is no single accepted definition of wetlands at the state level, and the Regional Water Boards may have different requirements and levels of analysis for dredge and fill projects. The State Water Board's proposal is intended to provide uniform statewide standards.

- Third, the current regulations have not been adequate to prevent losses in the quantity and quality of wetlands in California. To address this issue, the State Water Board's proposal would both extend the coverage of regulatory protections to waters that do not fall under the federal Clean Water Act and strengthen the substance of the protections.

The State Water Board has not finalized its proposal and there could be important changes in the details during the ongoing administrative process. Importantly, however, as this initiative demonstrates, a decline in federal jurisdiction under the Clean Water Act does not mean a decline in regulation in California. To the contrary, the state's response to reduced federal jurisdiction has been to exercise its state law authority more aggressively, both with respect to which water bodies should be regulated and how strict the regulatory standards should be. Thus, one can reasonably expect that if the new federal Clean Water Act regulations are overturned, withdrawn or curtailed for whatever reason, the State Water Board will adopt even more robust protections governing dredge and fill projects in California.

B. PROTECTED SPECIES: Endangered Species Act, Marine Mammal Protection Act, Migratory Bird Treaty Act, and Bald & Golden Eagle Protection Act

1. An area need not currently contain members of a listed species to be included within the critical habitat designation for that species

Alaska Oil & Gas Assn. v. Jewell, 815 F.3d 544 (9th Cir. 2016): This case holds that critical habitat designations under the Endangered Species Act should focus on the geographical areas that contain the physical and biological features that are essential for the species' future success and recovery, even if the species does not currently occupy those areas.[2]

Background. In 2008, the U.S. Fish & Wildlife Service listed the polar bear as a threatened species under the ESA. Once a species is listed, the ESA requires the FWS to designate the habitat that is critical to the conservation of the species. In 2010, the FWS designated approximately 187,000 square miles in Alaska as critical habitat for the polar bear, an area larger than the state of California. Nearly 96% of the designated area is sea ice; the remainder consists of a five-mile band of terrestrial denning sites and barrier islands, including a one-mile radius around those islands.

The state of Alaska, Native corporations and villages, and oil and gas associations sued to challenge the critical habitat designation. The district court vacated the designation, finding that the area of terrestrial and barrier island habitat was unjustifiably large and that the FWS violated the ESA's procedural requirements by failing to respond adequately to the state of Alaska's comments during the administrative process.

The Ninth Circuit's Decision. A unanimous panel of the Ninth Circuit reversed the district court's ruling and reinstated the critical habitat designation.

In making the designation, the FWS identified terrestrial denning habitat as a necessary element for the polar bear's conservation, and it included in the designation those areas with the characteristics that make for good denning sites (such as steep, stable slopes; access between the den and coast; proximity to sea ice in the fall; and freedom from human disturbance). The FWS similarly included within the designation barrier islands that were suitable for a variety of important uses by the bear, including denning, feeding, resting and migrating along the coast.

The district court faulted the FWS for not showing specifically what areas the bears actually used and occupied to support the critical habitat designation. But the Ninth Circuit found that the district court imposed a level of specificity the ESA does not require. The court emphasized that the ESA "is concerned with protecting the future of the species, not merely the preservation of existing bears." Thus, "the district court erroneously focused on the areas existing polar bears have been shown to utilize rather than the features necessary for future species protection." The Ninth Circuit found that the FWS' critical habitat designation appropriately looked to the physical and biological elements that were required for the sustained preservation of the bear population, "even if there is no available evidence documenting current activity."

[2] As of the date of the publication of these materials, a petition for certiorari was pending before the U.S. Supreme Court.

The Ninth Circuit also emphasized that while the ESA requires using the best scientific data that is *available*, it does not require the best scientific data that is *possible*. According to the court, the record showed that the FWS used an appropriate mapping methodology, which was developed jointly with the United States Geological Survey, in light of the significant limitations and uncertainties in the available scientific data.

Further, the Ninth Circuit held that it is appropriate to consider future climate change, such as receding sea ice, when designating critical habitat. As the decision pointed out, the courts have recognized that climate change is a relevant factor when a species is listed; it likewise is relevant when designating critical habitat.

Lastly, the court upheld the FWS' reasoning for excluding certain human structures and activities from the designation, like the city of Barrow, while including others, like the industrialized area of Deadhorse. According to the court, the record showed routine polar bear activity and denning near Deadhorse and that despite some human activity, polar bears could still move through Deadhorse to access den sites.

As for the alleged procedural violation, the Ninth Circuit found that the FWS adequately explained why it did not incorporate the state of Alaska's comments into its critical habitat designation. Section 4(i) of the ESA (16 U.S.C. § 1533(i)) requires written justification when the FWS adopts a rule (such as a critical habitat designation) that is not consistent with comments provided by an affected state. The court dismissed a number of technical objections to the FWS' response to Alaska's comments, and it emphasized section 4(i) "does not guarantee that the State will be satisfied."

Importance of the Decision. The decision highlights that a critical habitat designation is designed to ensure the species' future success and recovery, not merely the survival of existing members of the species. It therefore makes little sense, according to the Ninth Circuit, to limit the designation to the habitat that the existing population of the species currently uses. The decision establishes important precedent (at least within the Ninth Circuit) on the factors to be considered when designating critical habitat.

2. ESA allows for use of long-term climate change projections in the listing of a species

Alaska Oil & Gas Assn. v. Pritzker, 840 F.3d 671 (9th Cir. 2016): In another important case involving the consideration of climate change impacts, the court upheld the listing of two seal populations in Alaska as threatened based on future climate projections by the National Marine Fisheries Service.

Background. Using its long-term climate change projections, NMFS determined that the loss of sea ice over shallow waters in the arctic would make the two seal populations endangered by the year 2095. Based on this determination, NMFS adopted a rule that listed the two populations as threatened under the Endangered Species Act. As phrased by the court, the case turned on the following issue: "When NMFS determines that a species that is not presently endangered will lose its habitat due to climate change by the end of the century, may NMFS list that species as threatened under the Endangered Species Act?"

The Ninth Circuit's Decision. Based on the facts in the administrative record, the court answered in the affirmative. The court started its analysis by emphasizing that "we must defer to the agency's interpretation of complex scientific data as long as the agency provides a reasonable explanation for adopting its approach and discloses the limitations of that approach." Applying this deferential standard of review, the court found that NMFS' projections of future climatic conditions were "reasonable, scientifically sound, and supported by evidence." The court noted that a majority of independent peer reviewers agreed that NMFS' long-term projections were based on the best scientific data available.

The court next rejected the claim that NMFS' use of longer-term climate projections impermissibly diverged from its previous practice of setting 2050 as the relevant endpoint for climate change analyses. The court found that NMFS reasonably changed its approach in response to new research and that it adequately explained the basis for doing so.

The court also rejected the claim that NMFS failed to provide a sufficient evidentiary basis for the relationship between habitat loss and the seal's survival. This claim centered on the lack of quantitative data for even the current state of the seal populations. Citing its earlier decision in *Alaska Oil & Gas Assn. v. Jewell*, the court explained that the ESA did not require NMFS to wait to make the listing until it had such quantitative data, which currently is unavailable. In a related vein, the court also ruled that NMFS was not required to estimate an "extinction date" or "extinction threshold" to justify the finding that a species is likely to become endangered within the foreseeable future.

Importance of the Decision. Taken in conjunction with the court's decision in *Alaska Oil & Gas Assn. v. Jewell*, the court's ruling reflects the growing role played by climate change in decision-making under the ESA. These two decisions also illustrate the deference shown by the Ninth Circuit to the federal agencies when applying the ESA requirement to use the best available scientific data, including where the agencies make predictions about long-term future conditions in the face of significant uncertainties and limitations in the information that is currently available.

3. Take under Marine Mammal Protection Act must include measures to achieve "least practicable adverse impact" on covered marine species

Natural Resources Defense Council v. Pritzker, 828 F.3d 1125 (9th Cir. 2016): In this case, the Ninth Circuit ruled that take authorizations under the Marine Mammal Protection Act must include mitigation measures to achieve the "least practicable adverse impact" on marine mammals.

Background. The decision is the most recent in a long line of cases between environmental groups and the U.S. Navy over the impacts of the Navy's Low Frequency Active sonar program on marine mammals. The case involved a challenge to the 2012 approval by the National Marine Fisheries Service of an incidental take authorization under the MMPA for the Navy's LFA sonar program. NMFS imposed several mitigation measures to ensure that the program would have only a negligible impact on marine mammal populations.

The Ninth Circuit's Decision. The Ninth Circuit agreed with the plaintiffs that the mitigation measures were insufficient to comply with the MMPA. While the mitigation was designed to comply with the MMPA requirement that there is only a "negligible impact" on marine mammal species, the court found that NMFS had an independent obligation, which it failed to satisfy, to ensure the "least practicable adverse impact" on such species. Put another way, under the court's reasoning, the fact that the program would have only an insignificant effect on marine mammal populations overall did not mean that this was the least practicable impact that could be achieved. Reviewing the evidence in the administrative record, the court determined that NMFS should have at least evaluated the practicability of affording greater protection to "offshore biologically important areas."

Importance of the Decision. The details of the decision are focused on the Navy's LFA sonar program, and therefore may have limited relevance beyond the military readiness context. But the ruling does highlight more broadly that the MMPA imposes stringent standards on activities affecting marine mammals.

4. ESA requirement for Incidental Take Statement applies only to listed animal species, not to listed plants

Center for Biological Diversity v. Bureau of Land Management, 833 F.3d 1136 (9th Cir. 2016): The court held that the ESA requirement that a Biological Opinion include an Incidental Take Statement applies only to listed animal species, and not to listed plants.

Background. The Bureau of Land Management approved a Recreation Area Management Plan allowing for increased off-road vehicle use in the Imperial Sand Dunes in southern California. To evaluate the resulting impacts on a threatened plant species (Peirson's milkvetch), BLM prepared a Biological Opinion, which recognized that individual plants could be killed or injured but found no jeopardy to the species. The Biological Opinion did not include an incidental take statement to specify how many plants were allowed to be taken.

The plaintiffs argued that this omission violated section 7 of the ESA. This provision states that an incidental take statement is required when a Biological Opinion makes a no jeopardy finding but determines that members of the listed species likely will be taken.

The Ninth Circuit's Decision. The court read the requirements of section 7 of the ESA in conjunction with the provisions of section 9, which prohibit the take of listed animal species but not listed plants. Based on the text of section 9, the court reasoned that there is no such thing as a "take" of a plant under the ESA, and that as a result any requirement under section 7 to issue an incidental take statement likewise did not apply to plants.

Importance of the Decision. In cases where a project may affect a listed plant species, a Biological Opinion may be required under section 7 of the ESA to evaluate whether the project would jeopardize the species' continued existence and whether conservation measures are required to avoid jeopardy. But the Ninth Circuit's decision clarifies that any such Biological Opinion need not include an incidental take statement, since this requirement applies only to animal species.

5. Federal government has no "take" liability when it acts as a regulatory agency in granting a permit for private development on federal land

Protect Our Communities Foundation v. Jewell, 825 F.3d 571 (9th Cir. 2016): In a case where the Bureau of Land Management granted a right of way on federal land to authorize a private wind energy project, the court flatly rejected the claim that BLM was liable under the Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act for the take of protected birds resulting from project operations. The court reasoned that a governmental agency does not proximately cause a take when it issues a permit in a purely regulatory capacity, as opposed to the situation where the government itself affirmatively undertakes an activity that causes a take.

6. Federal agency improperly refused to consider information submitted by project opponents regarding feasibility of mitigation to reduce impacts to protected bird species

Public Employees for Environmental Responsibility v. Hopper, 827 F.3d 1077 (D.C. Cir. 2016): The D.C. Circuit ruled that federal approval of the Cape Wind Energy Project off the Massachusetts coast did not comply with the Endangered Species Act.

Background. The U.S. Fish & Wildlife Service, in issuing an incidental take statement for the project, decided against imposing a condition that would require the project to turn off the windmills temporarily during periods of poor visibility to reduce the risk of collision by protected bird species flying through the windfarm – a process called "feathering." The plaintiffs initially challenged the incidental take statement based on the claim that the FWS did not independently review whether feathering was practicable and that the FWS instead merely accepted the conclusions of the project proponent and the federal agency that approved the project (the Bureau of Ocean Energy Management). The district court agreed and remanded the matter to the FWS for its independent evaluation.

On remand to the agency, the plaintiffs submitted evidence showing that feathering would have only a minimal economic impact on the project. But the FWS reissued the incidental take statement without requiring the feathering measure, citing its own economist's report and ignoring the submissions by the plaintiffs.

The D.C. Circuit's Decision. In addition to addressing a number of claims under various federal statutes, the D.C. Circuit agreed with the plaintiffs that the FWS' refusal to consider their submissions on remand violated the ESA requirement to use the best scientific and commercial data available.

The FWS took the position that it was not required to respond to the plaintiffs' submissions on remand. According to the FWS, the district court's remand order did not reopen the administrative record and was merely intended to allow for an independent review by the FWS of the evidence that was in the record at the time the incidental take statement initially was issued. But, according to the court, the scope and intent of the district court's remand order were immaterial, since the FWS itself had reopened the record after the remand by considering a new report by its economist as support for its continued decision not to require feathering. Because it

reopened the record to include its own evidence, the court reasoned, the FWS was required to consider the plaintiffs' submissions as well.

Importance of the Decision. The decision highlights the importance of taking a clear and consistent approach toward the scope and contents of the administrative record, and ensuring that comments and submissions by project opponents are adequately considered as part of the federal agency decision-making process under the ESA.

7. ESA allows for consideration of voluntary conservation plans in deciding whether to list a species

Defenders of Wildlife v. Jewell, 815 F.3d 1 (D.C. Cir. 2016): The D.C. Circuit ruled that the U.S. Fish & Wildlife Service, in deciding to withdraw its previous proposal to list the dune sagebrush lizard as endangered, did not improperly consider a conservation plan voluntarily adopted by the state of Texas.

Background. Between the time the FWS initially proposed listing the lizard and the time it decided to withdraw that proposal, the FWS received updated information about conservation efforts for the lizard in Texas and New Mexico. Based on this information, the FWS concluded that current and future threats to the lizard were not of sufficient imminence, intensity or magnitude to indicate that the lizard was in danger of extinction or likely to become endangered within the foreseeable future.

This updated information included a conservation plan that the state of Texas voluntarily adopted. This plan aimed to direct development away from lizard habitat and to provide mitigation for impacts on the lizard. The plaintiffs claimed that the plan was insufficiently certain to be implemented and effective, but the district court rejected this claim.

The D.C. Circuit's Decision. The D.C. Circuit affirmed and upheld the FWS' withdrawal of its previously proposed listing of the lizard. The court emphasized that the FWS properly followed its *Policy for Evaluation of Conservation Efforts when Making Listing Decisions* (68 Fed. Reg. 15,100) (Mar. 28 2003), which specifically envisions the consideration of voluntarily adopted conservation plans.

The court next found that the administrative record supported the FWS' findings that the measures in the Texas plan were sufficiently certain to be implemented and to be effective. The court characterized the plaintiffs' objections as narrow, fact-specific disputes and it refused to second-guess the experience and expertise of the federal agency. "The Texas plan may not be foolproof," the court acknowledged, but the FWS thoroughly evaluated the scope and effect of the plan and explained the grounds for its conclusions based on its experience and expertise. According to the court, this was sufficient to comply with the ESA.

Importance of the Decision. The decision highlights that voluntarily adopted conservation plans and agreements can play a critical role in the decision on whether or not to list a species as threatened or endangered. The ruling also highlights the deference that courts typically afford to the determinations of federal agencies with respect to the regulatory programs those agencies are charged with implementing.

8. Windfarm project complied with ESA requirement that an incidental take permit minimize and mitigate the impacts to listed species to the maximum extent practicable

Union Neighbors United, Inc. v. Jewell, 831 F.3d 564 (D.C. Cir. 2016): The D.C. Circuit held that the mitigation measures included in an incidental take permit issued by the U.S. Fish & Wildlife Service for a windfarm project in Ohio to minimize the impacts on the endangered Indiana bat complied with the ESA.

Background. The project was designed based on a conservation plan that contained several measures to protect the bat, including moving the project away from known bat habitat to already-developed lands and imposing restrictions on project operations. The FWS issued an incidental take permit for the project based on the measures in the conservation plan.

In addition to a challenge under the National Environmental Policy Act, the plaintiffs alleged that the FWS violated section 10 of the ESA, which requires that any incidental take permit include measures that will, to the maximum extent practicable, minimize and mitigate the impacts to the listed species.

The D.C. Circuit's Decision. While the court ruled that the FWS' evaluation of alternatives failed to comply with NEPA, it found no violation of the ESA. First, the court found that the requirements of section 10 are designed to protect against impacts to the species' population as a whole, "rather than a discrete number of individual members of the species." The court noted that this view was supported by the record and was consistent with the FWS' longstanding reading of the agency's 1996 handbook on incidental take permits. Here, while the project would result in the take of individual bats, it would not have a significant impact on the species overall.

Applying this standard, the court rejected the claim that the project should have taken further steps to reduce impacts to individual bats. In other words, the ESA requirement to minimize and mitigate impacts to the maximum extent practicable did not equate with a requirement to reduce the amount of the take of individual bats to the lowest number that is practicable. Rather, the record showed that the impacts to the bat population were sufficiently offset as a whole to comply with the ESA.

Importance of the Decision. The decision refrained from adopting an overly strict view of what is required to meet the directive in section 10 of the ESA that an incidental take permit contain measures that will minimize and mitigate impacts to listed species to the maximum extent practicable. Instead, the decision adopted a more reasonable view that accords with the FWS' longstanding interpretation of its rules and policies.

9. Fifth Circuit rejects numerous challenges to a critical habitat designation

Markle Interests, LLC v. U.S. Fish & Wildlife Service, 827 F.3d 452 (5th Cir. 2016): In this case, the Fifth Circuit upheld a critical habitat designation by the U.S. Fish & Wildlife Service for an endangered frog species (known as the dusky gopher frog) in Mississippi and Louisiana, even though the designation included lands that were not currently occupied by the frog.

The Fifth Circuit's Decision. Relying on a Ninth Circuit case from 2015 and echoing the Ninth Circuit's decision in *Alaska Oil & Gas Assn. v. Jewell*, 815 F.3d 544 (9th Cir. 2016), the Fifth Circuit ruled that there is no requirement in either the statute or the regulations that land must be currently occupied by a species to be designated as critical habitat. Here, the court found that the record supported the determinations by the FWS that the lands included within the critical habitat designation for the frog included features essential to the species' future success and recovery and that the existing occupied habitat was inadequate for this purpose.

The court next ruled that there is no judicial review available for a determination by the FWS not to exclude certain areas from a critical habitat designation based on the economic impacts of the designation. The court relied on Ninth Circuit law for this ruling, which makes it virtually impossible for landowners to challenge the substance of a decision by the FWS not to approve an economic impact exclusion for their land. The court emphasized that while the FWS must give "consideration" to the economic impacts of a critical habitat designation, the statute states only that the FWS "*may*" – but is not required to – exclude certain areas based on that consideration.

Finally, the court flatly rejected the claim that the critical habitat designation violated the constitutional limits on Congressional authority as set forth in the Commerce Clause. According to the court, a critical habitat designation, even if it alone does not have a direct impact on interstate commerce, is an essential part of a larger regulatory scheme under the ESA that does have such an interstate impact.

The Dissent. One of the judges dissented with respect to the first ruling, claiming there was no evidence that the disputed lands within the designation do or will support the biological and physical characteristics that are essential to the frog's survival and recovery. The dissent stated:

> The majority opinion interprets the Endangered Species Act to allow the Government to impose restrictions on private land use even though the land is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not play any supporting role in the existence of current habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

According to the dissent, the designation was based on nothing more than the federal government's "hope" that private landowners would make substantial and costly physical modifications to the land in order to make it more suitable for the frog.

Importance of the Decision. The case is important because it relies on Ninth Circuit law to advance a broad and protective view of the ESA provisions governing the designation of critical habitat.

10. New critical habitat regulations adopted under the ESA

In February 2016, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the "Services") jointly published final regulations and a final policy addressing critical habitat under the Endangered Species Act. See 81 Fed. Reg. 7214, 7226, 7414 (Feb. 11, 2016). The final rules and policy will broadly impact many aspects of ESA implementation, including jeopardy findings and the development of species conservation plans. Ultimately, private activities will be subject to increased scrutiny by federal agencies, and obtaining permits and other approvals will be more costly and time-consuming.

Impacts of the final rules and policy are likely to include the following:

- Critical habitat designations are likely to be more frequent, more robust, and broader in geographic scope, including areas that listed species may have periodically used in the past or may potentially use in the future.

- An increase in critical habitat designations means an increased likelihood that development activities will occur in or near designated critical habitat – and therefore be subject to ESA restrictions.

- The expanded definition of "destruction or adverse modification" of critical habitat includes not only the alteration of the physical or biological features essential to the conservation of a species, but also alterations that delay the development of those features, even if the features do not yet exist in the area designated as critical habitat. Consequently, activities occurring in designated areas are more susceptible to a finding of destruction or adverse modification of critical habitat, which may trigger severe ESA restrictions.

- Raising the bar to avoid adverse modification of critical habitat findings to require meeting a recovery standard, rather than merely avoiding the risk of extinction, means that a lesser degree of impact (or greater degree of mitigation) will be necessary to avoid ESA prohibitions when critical habitat is involved.

- Requiring that adverse modification apply to the entire designated area, not just the locally affected area, will limit to some degree the potential for restrictions on development activities in a particular area within a larger critical habitat designation.

"Destruction or Adverse Modification." The first regulation amends the definition of "destruction or adverse modification" under Section 7(a)(2) of the ESA to mean "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species *or that preclude or significantly delay development of such features*." See 81 Fed. Reg. 7214 (Feb. 11, 2016) (emphasis added).

The Services' stated purpose of the amendment is to formalize agency guidance issued after the Fifth and Ninth Circuits invalidated an earlier version of the definition. See *Sierra Club v. U.S. Fish & Wildlife Service*, 245 F.3d 434 (5th Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish*

and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004). The Services have stated that the revised definition clarifies their intent yet "does not alter the overall meaning of the proposed definition." In practice, however, the revised definition now permits a finding of destruction or adverse modification even in areas that do not contain physical or biological features essential to the conservation of a species. The final rule thus broadens the definition "to encompass all potential types of alterations if they reduce the value of the habitat for conservation."

Moreover, the final rules do not allow adequate consideration of the "net effects" of conservation activities outside of the area of designated critical habitat, stating that such activities "should not be considered when evaluating effects to critical habitat." The absence of an appropriate "net effects" analysis could serve as a disincentive to voluntary mitigation efforts.

Critical Habitat Designations. The second regulation amends the definitions, procedures and criteria for designating critical habitat under Section 4 of the ESA. See 81 Fed. Reg. 7414 (Feb. 11, 2016). The most noteworthy – and the most controversial – definitional changes are the addition of two new definitions for "geographical area occupied by the species" and "physical or biological features." As defined, "geographical area occupied by the species" is broad and can include areas that are "used only periodically or temporarily by a listed species during some portion of its life history." Similarly, the term "physical or biological features" is broadly defined to include "habitat characteristics that support ephemeral or dynamic habitat conditions." These definitions allow for marginal habitat to be included within critical habitat designations.

The regulation also provides that, "to the maximum extent prudent and determinable," the Services will finalize critical habitat designations concurrently with the issuance of proposed and final listing rules. The regulation states that only in "rare circumstances" will a designation of critical habitat not be prudent or determinable.

Despite the agencies' claim that the amended rules "do not substantially change the manner in which critical habitat is designated," in fact the new regulations represent a complete overhaul of the designation procedures and criteria. The changes are likely to significantly broaden designations of critical habitat.

Exclusions from Critical Habitat. Finally, the Services issued a non-binding policy to address the agencies' process for identifying exclusions from critical habitat under Section 4(b)(2) of the ESA. See 81 Fed. Reg. 7226 (Feb. 11, 2016). The policy explains that exclusion decisions are discretionary, that areas covered by conservation plans or agreements will be considered but not necessarily excluded, and that the focus of exclusions will be on non-federal lands.

The Services state that the purpose of the policy is to "provide greater predictability and transparency regarding how the Services generally consider exclusions under section 4(b)(2)." In practice, however, the lack of clear guidance on when exclusions will apply could result in inconsistent applications of the policy and confusion among the regulated community. Specifically, the absence of clear criteria for the exclusion of areas covered by conservation agreements with assurances, safe harbor agreements, habitat conservation plans or other initiatives may discourage these initiatives, or at least make them more costly and time-consuming.

Importance of the New Regulations and Policy. The final rules and policy represent a significant change in the implementation of the processes and criteria for critical habitat designations and adverse modification findings. Although one of the stated purposes of the final rules and policy is to clarify these issues and provide greater predictability and transparency, the final rules and policy may in fact result in new issues and areas of controversy. The likely effect is increased and broader critical habitat designations – an expectation that even the Services acknowledge and correlate with the impacts of global climate change on species habitat and range.

Led by the state of Alabama, 18 states have filed a lawsuit to challenge the validity of the Services' new regulations, suggesting that the future of implementing the ESA's critical habitat requirements is anything but clear.

11. Fish & Wildlife Service Approves New 30-Year Eagle Act Rule

The U.S. Fish and Wildlife Service formally approved the long-awaited 30-year eagle take rule, which will allow renewable energy companies and other developers of large projects to obtain a 30-year permit (as opposed to the previous five-year permit) for the incidental take of bald and golden eagles. In exchange, permittees must commit to detailed mitigation and conservation measures aimed to better understand and reduce impacts to bald and golden eagles. See 81 Fed. Reg. 91,494 (Dec. 16, 2016).

Background. The Bald and Golden Eagle Protection Act imposes criminal and civil penalties against anyone who "takes" bald or golden eagles without a permit. "Take" is broadly defined under the Eagle Act as "wound, kill, capture, trap, collect, molest or disturb." The FWS administers the Eagle Act, including the permit program for the take of eagles that is incidental to otherwise lawful activity. In 2009, the FWS implemented eagle permit regulations which allowed for five-year incidental take permits. However, there was strong concern among project developers and financial institutions that the relatively short five-year duration of eagle take permits did not line up with the longer duration of most wildlife permits, such as incidental take permits issued under the Endangered Species Act, or with the longer lifespan of large projects, such as wind energy development.

In response to these concerns, the FWS amended its regulations in 2013 by extending the maximum duration of an incidental take permit from five to 30 years, largely to facilitate wind energy development. But shortly after the 2013 Rule went into effect, the regulations were struck down by the U.S. District Court for the Northern District of California largely on procedural grounds. The court held the FWS did not adequately justify its decision not to conduct an environmental review under the National Environmental Policy Act.

Subsequently, the FWS published a new proposed rule in May 2016, sought public comment, and issued a final programmatic environmental impact statement analyzing the new 30-year rule in November 2016.

Requirements of the New 30-Year Rule. In issuing the new rule, the FWS has emphasized that the goal is to get project developers into a permitting framework, so that their activities can be closely monitored, with extensive mitigation measures in place to avoid and minimize impacts to eagles to the greatest extent practicable. For that reason, the FWS views the new rule as a way to

enhance the protection and conservation of eagles, even though authorizing any take of eagles is a controversial subject.

Under the new rule, the longer 30-year permits are subject to review every five years. New conditions may be added to the permit if needed. Provided it is in compliance with its permit, a permit holder can continue its operations during these five-year reviews. Additionally, the five-year review will not include a public process.

The new rule also underscores transparency. It requires third-party contractors to monitor any take activity by permit holders, with the results reported directly to FWS. In addition, the FWS website will publish eagle mortality data from permitted sites.

In return for the significant conservation, monitoring, and mitigation requirements, permittees that maintain compliance with their 30-year permits will not face prosecution should an authorized incidental take of a bald or golden eagle occur.

Importance of the New Rule. The new 30-year rule will primarily impact renewable energy (especially wind energy) and other project development, particularly in the Western United States. The 30-year duration will better align with the longer lifespans of these types of projects, which should reduce regulatory uncertainty for both project developers and financial institutions.

TAB 9

Biographies

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Cecily Barclay focuses her practice on land use and entitlements, real estate acquisition and development and local government law. She regularly assists landowners, developers and public agencies throughout Northern California in all aspects of acquisition, entitlement and development of land, including land use application processing, drafting and negotiating purchase and sale agreements, negotiating and securing the approval of development agreements, general plan amendments, specific plans, planned development zoning, annexations, initiatives and referenda, and tentative and final subdivision maps. She also advises clients on riparian and appropriative water rights, including in connection with vineyard and agricultural properties.

In addition to processing entitlements for large mixed-use master planned communities, as well as for reuse of former military facilities and other infill development sites, Cecily also has significant experience negotiating school fee mitigation agreements, preparing conservation easements to mitigate for loss of biological resources, drafting affordable housing programs, Williamson Act contracts and related issues pertaining to agricultural properties; and assisting local agencies in drafting ordinances relating to updating general plans and housing elements, planned development zoning, specific plans, mitigation fees, affordable housing and growth management.

Cecily is the author of *California Land Use and Planning Law*, a well-known publication which definitively summarizes the major provisions of California's land use and planning laws. Cecily recently co-authored *Development by Agreement*, an ABA publication providing a national analysis of laws and practices concerning various forms of development agreements. She regularly speaks and writes on topics involving land use and local government law, including programs and articles for the American Bar Association, American Planning Association, California Continuing Education of the Bar, League of California Cities, University of California Extension programs, Urban Land Institute, and other state and national associations and conferences. Cecily's practice also focuses on how agencies and developers must comply with state housing laws, particularly anti-NIMBY (Not In My Back Yard) and density bonus laws. Cecily is also the president of two nonprofit affordable housing corporations in Oakland and has served for several years on the ABA, state and local government Section's Publications Oversight Board.

ANNE BEAUMONT | COUNSEL | SAN DIEGO, CA

www.perkinscoie.com/ABeaumont/

Anne Beaumont is a counsel with the firm's Environment, Energy & Resources practice. She has extensive experience representing clients in environmental, regulatory and litigation matters involving natural resources, tribal issues, telecommunications, land use and the siting and defense of large-scale infrastructure and energy projects.

Infrastructure Development and Natural Resources

Anne represents utilities, energy developers, and others in the development of cutting-edge energy and infrastructure projects. She has been involved in landmark transmission line and renewable energy projects in California and the Southwest. Anne regularly represents clients before federal and state agencies, including the California Public Utilities Commission, Bureau of Land Management, U.S. Forest Service, U.S. Fish and Wildlife Service, California Department of Fish and Wildlife, National Park Service, California State and Regional Water Boards and U.S. Army Corps of Engineers.

Anne advises clients on compliance with federal and state environmental statutes, including the National Environmental Policy Act (NEPA), California Environmental Quality Act (CEQA), federal and California Endangered Species Acts (ESA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),Clean Water Act, Migratory Bird Treaty Act (MBTA), Federal Aviation Act, and Bald and Golden Eagle Protection Act.

Administrative Proceedings and Enforcement Actions

Anne has extensive knowledge in administrative proceedings (including evidentiary and rule-making proceedings) and enforcement actions. These proceedings often relate to large-scale infrastructure project applications before state and federal agencies, complex telecommunications proceedings before the California Public Utilities Commission and enforcement actions brought by federal and state agencies. In these administrative proceedings, Anne frequently works closely with expert witnesses, conducts discovery and prepares witness examinations, briefings and comments.

Complex Civil Litigation and Appeals

Anne also has substantial experience in complex civil litigation and appeals, representing clients in both state and federal court. Her litigation matters cover a wide range of topics, including environmental issues, natural resources, telecommunications, tribal matters and employment law. Her appellate experience includes challenges to federal and state approvals of infrastructure and energy projects and appeals from the California Public Utilities Commission.

MARC R. BRUNER | PARTNER | SAN FRANCISCO, CA

www.perkinscoie.com/MBruner/

Marc Bruner represents governmental entities and private companies in a wide variety of environmental matters. He regularly works with clients in resolving complex compliance issues under the federal Clean Water Act, the California Porter-Cologne Water Quality Control Act, the federal and California Endangered Species Acts, the National Environmental Policy Act, the California Environmental Quality Act, the California Integrated Waste Management Act, and the panoply of California laws and regulations governing water supply, air quality, coastal development, development along the banks of streams and rivers, historic resources, and the management and disposal of solid and hazardous wastes.

Marc is particularly well-versed in the rules and regulations governing the management of industrial, municipal and construction stormwater and the treatment and discharge of process wastewater under federal NPDES permits and state law waste discharge requirements. He is very familiar with the recent developments in this rapidly emerging area of the law, and with the regulations and proceedings of the State Water Resources Control Board and the California Regional Water Quality Control Boards. He has advised companies and local governments on a broad range of stormwater and wastewater compliance issues.

Marc has a keen understanding of the differences between the federal and state law requirements as well as the areas of overlap and the opportunities and best practices for coordination. Marc also understands the strategic and practical considerations involved in negotiating compliance issues with the federal and state regulators.

Marc is co-author of the chapters covering wetlands and endangered species in *California Land Use and Planning Law*, a leading treatise routinely relied upon by landowners, developers and local governments throughout the state. He speaks regularly on environmental and land use topics, including CEQA, NEPA, water quality, wetlands and endangered species and water supply requirements for new developments.

GARRETT COLLI | ASSOCIATE | SAN FRANCISCO, CA

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As an associate in the firm's Real Estate & Land Use practice, Garrett Colli focuses on coordinating land use entitlements and environmental compliance for residential, commercial, industrial, and renewable energy projects. Garrett also negotiates purchase and sale agreements, leases, easements, and related transactional documents in support of development projects. Garrett regularly advises clients regarding California Environmental Quality Act (CEQA) compliance, and is experienced in securing approvals under the Subdivision Map Act, the Clean Water Act, the Federal Land Policy Management Act, and the California Surface Mining and Reclamation Act. He frequently represents clients at public hearings to obtain zoning approvals, and has also defended clients in regulatory enforcement proceedings, including actions by the U.S. Environmental Protection Agency, regional water quality boards and local agencies.

Garrett's clients include developers, financial institutions, landowners, energy companies, and public agencies. His recent work includes representing one of the country's largest mixed-use developers in projects in San Francisco accounting for more than 20,000 units of housing with related commercial and retail components. This past year, Garrett represented a private real estate investment company in securing entitlements to transition a dated mall in Laguna Hills, California into a premier regional mixed-use destination with nearly 1,000,000 square feet of commercial use and 988 condominium units. Garrett is currently representing a developer in negotiations for a disposition and development agreement, preparation of a specific plan and CEQA compliance with respect to the redevelopment of a former Navy base.

MATTHEW S. GRAY | PARTNER | SAN FRANCISCO, CA

www.perkinscoie.com/MGray/

Matthew Gray focuses his practice on land use entitlement processing, environmental compliance, and real estate transactions. He represents a range of local agencies, real estate developers and landowners in all stages of the land use entitlement and development process. He assists clients in negotiating and securing approval of development agreements, general plan amendments, specific plans, zoning, subdivision approvals, and annexation of property into cities and special districts; regularly appears before planning commissions and city councils; and advises clients on compliance with the California Environmental Quality Act and other federal and state regulatory programs during the development process. Matt also has experience negotiating affordable housing agreements, complex mitigation fee agreements and conservation easements; forming land-based financing mechanisms, including Mello-Roos Districts; securing cancellation or termination of Williamson Act contracts on agricultural lands; advising clients on issues relating to water supply; and using the initiative and referendum process in the land use planning context. Matt negotiates purchase and sale agreements; site development agreements; CC&R's and easement agreements; and related transactional documents in connection with mixed-use, commercial, and residential development projects.

Matt has worked on a wide variety of significant land use projects throughout California, including large urban redevelopment projects, military base reuse projects, mixed-use waterfront developments, renewable energy and related infrastructure projects, regional shopping centers, and master-planned residential communities.

Matt teaches an Annual Land Use Law Review and Update course at University of California Davis Extension. He has also taught Planning Law and Legal Process at University of California Berkeley Extension. He regularly lectures on the Subdivision Map Act through California Continuing Education of the Bar (CEB) and before local municipal engineers' associations.

He is an active member of San Francisco Planning and Urban Research (SPUR). He has served on the board of directors of the AIDS Legal Referral Panel and as chair of the Amicus Committee of Bay Area Lawyers for Individual Freedom.

JULIE JONES | PARTNER | SAN FRANCISCO, CA

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Julie focuses on environmental and land use counseling and litigation for complex development projects. She resolves issues that arise under the California Environmental Quality Act, the National Environmental Policy Act, the Clean Water Act, federal and state species protection statutes, and a range of other local, state and federal statutes and common law doctrines that affect land use. An experienced litigator in California and federal courts, Julie defends projects and uses this experience to help clients obtain the approvals they need while minimizing litigation risk.

Julie's strategic problem solving has assisted private and public entities in permitting major university, traditional and renewable energy, water supply, marine terminal and master planned community projects. Recent accomplishments include:

- Securing approvals for faculty and below-market-rate housing developments in Palo Alto under the terms of a complex development agreement. In spite of controversy regarding traffic, no litigation was filed and the projects are under construction.
- Assisting Stanford University in obtaining approval of a 1.5-million-square-foot office, research and development and medical clinic project in Redwood City. The project involved complex traffic, air quality and greenhouse gas issues. No litigation was filed.
- Leading a litigation team in, and arguing, the successful defense of a Planned Parenthood clinic against a campaign attempting to use CEQA to challenge permits for new clinics.

Litigation successes include overcoming challenges to a university/county agreement for trails, a transportation sales tax ballot measure, a city/county agreement for urban services, a transportation authority's light rail extension, and a university development and roadway project. Julie also represented a port in the successful defense of major expansion and dredging projects against NEPA and Endangered Species Act claims.

Julie is the author of the sustainable development chapter of *California Land Use and Planning Law* and has co-authored the treatise's chapters on federal and state wetland regulation and endangered species protections. She is also a regular contributor to the California Land Use and Development Law Report, and lectures on CEQA and NEPA for clients, professionals and industry associations.

ALAN MURPHY | PARTNER | SAN FRANCISCO, CA

www.perkinscoie.com/AMurphy/

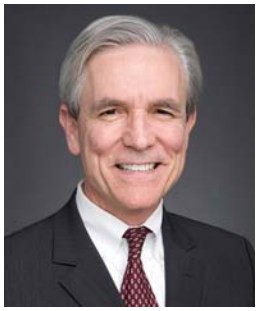
Alan Murphy focuses his practice on land use and development matters, including associated environmental review. He secures and defends land use entitlements and counsels clients in preparing development applications, during the approval process and in the due diligence period. Alan has significant experience with local general plans, specific plans, zoning codes, conditional uses, variances, the Subdivision Map Act, development agreements, impact fees, the California Environmental Quality Act (CEQA), the National Environmental Policy Act (NEPA) and San Francisco's discretionary review process.

In his practice, Alan strives to identify innovative solutions to complex and politically sensitive development challenges. He routinely interacts with public agency staff and regularly appears on behalf of clients before city councils and boards of supervisors, planning commissions and local appellate boards. He also defends against land use and environmental litigation, and he represents property owners in zoning enforcement actions.

Alan's clients have included developers, landowners, financial and educational institutions, energy companies and public agencies. His experience includes representing clients in securing entitlements to redevelop over 500,000 square feet of office and R&D uses in both Foster City and Mountain View; advocating before various San Francisco decision-making bodies for proposals to establish new residential units; processing a proposal for a 200-acre rural residential development and a 1,950-acre wildlife preserve in Santa Clara County; and representing an air district in litigation challenging rule amendments. Alan also has worked on a citizens' initiative to amend a city's general plan, specific plan, zoning and other ordinances to accommodate a major development project.

As an accredited LEED Green Associate, Alan can assist clients in complying with U.S. Green Building Council certification requirements. He is chair of the Program Committee for the Association of Environmental Professionals 2017 state conference, and serves on the Urban Land Institute San Francisco's Sustainable Development Committee.

Alan routinely provides pro bono legal services to those in need. He has worked with an environmental nonprofit organization on an extensive analysis of legal authorities governing ocean ecosystems and resources. He also has screened requests for clemency from federal prisoners, worked on an application for asylum and drafted part of a U.S. Supreme Court amicus brief on behalf of Catholic nuns.



GEOFFREY L. ROBINSON | PARTNER | SAN FRANCISCO, CA

www.perkinscoie.com/GRobinson/

Geoff Robinson focuses his practice on land use, development and real estate litigation. He represents clients in civil and administrative proceedings involving planning and zoning laws, CEQA, development fees and exactions, and public facilities financing. He is an authority on writs of mandate in the trial court and is co-author of the treatise California Administrative Mandamus (CEB, Third Edition - 2015) and other publications on civil writ practice. He also has substantial experience in the area of development mitigation and has litigated numerous cases involving challenges to development exactions, mitigation requirements and public financing districts. He has also handled a broad range of water law matters, including a ground water basin rights adjudication, and appellate litigation involving the validity of a water supply assessment and an Urban Water Management Plan.

Geoff has been an active participant in pro bono efforts, representing individuals, nonprofits and public agencies before state and federal courts, including several matters in the California Supreme Court. He is the recipient of the California State Bar President's Pro Bono Award.

Geoff served as law clerk to Judge Thomas J. MacBride of the U.S. District Court for the Eastern District of California and as extern to Judge Joseph T. Sneed of the U.S. Court of Appeals for the Ninth Circuit.

BARBARA J. SCHUSSMAN | PARTNER | SAN FRANCISCO, CA

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Barbara Schussman, a partner in the firm's Environment, Energy & Resources practice, focuses on securing federal, state and local agency approvals needed to develop a wide range of private and public projects, including water supply and storage projects, university campuses, hospitals, research and development facilities, oil refineries, maritime port and airport expansions, industrial scale solar facilities, and numerous industrial, commercial, housing and mixed use developments.

Barbara counsels clients regarding compliance with the California Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA), legislative and quasi-adjudicatory approvals required under the California Planning and Zoning Law, and permits and approvals required by other land use and environmental regulations, including the Clean Air Act, Clean Water Act, federal and state Endangered Species Acts, California Coastal Act and the Subdivision Map Act. She also is an experienced litigator, and has defended approvals and environmental permits in both the state and federal courts, including the California Supreme Court.

She is the author of the CEQA chapter of *California Land Use and Planning Law*. She also teaches and lectures on CEQA and NEPA compliance and litigation issues for a variety of organizations.

Barbara's recent successes include:

- CEQA and CEQA+ compliance and permitting for a public project to recycle agricultural and other sources of wastewater for groundwater injection and reuse as drinking water in Monterey County.
- New zoning, conditional use permit, development agreement and CEQA compliance for Stanford Hospital and Lucile Packard Children's Hospital's $5 billion hospital replacement and expansion project in Palo Alto.
- County and BLM approvals for a 445-megawatt photovoltaic solar project in Riverside County, and defense of CEQA litigation filed by the Colorado River Indian Tribes.
- Harbor Commission, Army Corps of Engineers and Coastal Act approvals and CEQA and NEPA compliance for two major marine terminal projects at the Port of Los Angeles;
- Defense of Coastal Act, Clean Air Act and CEQA challenges to rulemaking actions by the South Coast Air Quality Management District.

LAURA GODFREY ZAGAR | PARTNER | SAN DIEGO, CA

www.perkinscoie.com/LZagar/

Laura Godfrey Zagar focuses her practice on multijurisdictional, complex energy and infrastructure projects as well as complex environmental litigation. Laura has played a prominent part in several innovative energy and infrastructure projects, including transmission lines, renewable energy, and water projects.

Energy and Infrastructure Development

Laura represents utilities, energy developers and others before federal, state and local agencies on a wide range of energy and infrastructure projects. Her experience includes numerous major transmission lines, as well as renewable generation (including solar, wind, and biomass), conventional generation, telecommunications, and water projects. Laura has extensive knowledge in proceedings before the California Public Utilities Commission (CPUC) and other state commissions, as well as the transmission planning process as conducted by the California Independent System Operator (CAISO). Laura counsels clients on the implications of California's Global Warming Solutions Act of 2006 (AB 32) and California's Renewables Portfolio Standard (RPS).

Natural Resources

Laura is highly experienced with federal, state and local authorities with jurisdiction over natural resources or infrastructure projects. She represents clients on natural resource issues before regulatory bodies such as the Bureau of Land Management, the U.S. Forest Service, the U.S. Fish and Wildlife Service, the California Fish and Wildlife Service, and California’s State Water Resources Control Board and the Regional Water Quality Control Boards. Laura provides clients with counseling on a wide array of environmental statutes. Areas of focus include the National Environmental Policy Act (NEPA), the California Environmental Quality Act (CEQA), federal and California Endangered Species Acts (ESA), Clean Air Act, Clean Water Act, California’s Porter-Cologne Act, Federal Aviation Act, and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Laura also advises clients on statutes and regulations governing the use of federal lands, including the Federal Land Policy and Management Act (FLPMA) and the National Forest Management Act (NFMA).

Litigation and Administrative Proceedings

Laura is an experienced litigator in both federal and state court, with substantial experience in complex and appellate litigation. She represents clients in litigation related to approvals of energy and infrastructure projects, and also has extensive experience in environmental and toxic tort litigation.