Land Use and CEQA Litigation Update

Wednesday, May 17, 2023

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LAND USE AND CEQA LITIGATION UPDATE

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LEAGUE OF CALIFORNIA CITIES
City Attorney Conference
May 17-19, 2023

Cases From August 5, 2022
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City of Los Angeles, California v. Federal Aviation Administration (9th Cir. 2023) 63 F.4th 835.

BACKGROUND: The City of Los Angeles (City) filed a petition for review of the Federal Aviation Administration's (FAA) final environmental impact statement (FEIS) and record of decision (ROD) that let an airport authority start construction of a replacement terminal at Bob Hope Airport in Burbank.

HOLDINGS: The Ninth Circuit granted the petition in part and remanded, holding: (1) the City had standing to file petition challenging the FEIS's adequacy; (2) the FAA's purpose and need statement was sufficiently broad in light of relevant statutory context; (3) the FAA did not violate its duty to consider viable alternatives; (4) the FAA did not predetermine the outcome of its analysis; but (5) the FEIS did not adequately consider whether the project was consistent with the neighboring City's noise standards.

KEY FACTS AND ANALYSIS: The passenger terminal at the Bob Hope/Hollywood Burbank Airport (Airport) is more than fifty years old and violates safety standards set by the FAA. The Burbank-Glendale-Pasadena Airport Authority (Authority), which owns and operates the Airport, reached an agreement with the City of Burbank to build a new terminal. In May 2021, the FAA issued the FEIS and ROD that let the Authority start constructing the replacement terminal, and shortly after, the City petitioned for review under the National Environmental Policy Act, 42 U.S.C. section 4321 *et seq.* (NEPA).

First, the Ninth Circuit found that the City had standing to challenge the FEIS because the City provided sufficient evidence in the record that it could be impacted by the noise impacts from the airport project.

Second, the Ninth Circuit found that the purpose and need statement was sufficiently broad to comply with NEPA. In the FEIS, FAA stated that its purpose and need were "to provide a passenger terminal building that meets current FAA Airport Design Standards, passenger demand, and building requirements as well as improve utilization and operational efficiency of the passenger terminal building," and "to ensure that the Airport operates in a safe manner" as required by the Airport and Airway Improvement Act of 1982, 49 U.S.C. § 47101 *et seq.* (AAIA). FAA explained that its purpose and need addressed the Authority's goals of building an energy-efficient terminal in compliance with the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA) and state building codes, consolidating air facilities, and maintaining connections to rail and bus lines. FAA defined its purpose and need in the context of the applicable statutory framework and incorporated private goals without unreasonably eliminating alternatives from consideration. Therefore, its purpose and need statement was not too narrow to survive NEPA review.

Third, the Ninth Circuit found that the FAA did not violate its need to consider viable alternatives. Even if the rejected alternatives would meet FAA's purpose and need; the FAA found that the "new airport" alternative was infeasible because the Authority was not authorized to construct replacement airport, it rejected the alternative to build a remote landside facility due to lack of

space, difficulties in acquiring land, and increase in transit time for passengers, and it eliminated a southeast quadrant terminal because of space limitations and need to continue using the existing terminal during construction. The FAA properly rejected these alternatives, and the City further failed in its briefing to identify a viable alternative that the FAA did not consider.

Fourth, the Ninth Circuit rejected the City's contention that the FAA improperly predetermined the outcome of its analysis by placing the project in a ballot measure which was approved before the NEPA analysis. In rejecting alternatives, the FAA did not rely on Measure B, but rather provided other justifications.

Finally, the Ninth Circuit granted the petition on limited grounds related to the FAA's noise analysis. FAA failed to take a hard look at noise impacts from construction and based its cumulative impacts analysis and inadequately considered conclusions about construction noise. The FAA did not take a hard look at noise impacts from the Project because its analysis rested on an unsupported and irrational assumption that construction equipment would not be operated simultaneously; thus, the FAA failed to account for the simultaneous operation of construction equipment, failed to consider whether a significant impact would likely occur because of the combined effects of sound sources, and failed to perform the necessary calculations to conclude otherwise. For this reason the Ninth Circuit granted the petition in part, but rejected the City's remaining claims. The FAA was also required to revisit its cumulative impacts analyses relating to noise on remand.

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Yim v. City of Seattle (9th Cir. 2023) 63 F.4th 783.

BACKGROUND: Landlords and their trade association filed a state court action alleging that a city ordinance prohibiting them from inquiring about criminal history of current or potential tenants, and from taking adverse action, such as denying tenancy, against them based on that information violated their First Amendment and Substantive Due Process rights under the United States Constitution. Following removal, the United States District Court for the Western District of Washington entered summary judgment in the city's favor, and plaintiffs appealed.

HOLDINGS: The Ninth Circuit held that: (1) the city's ordinance was limited to a landlord or occupant of a unit that a prospective tenant was seeking to rent; (2) the ordinance provision prohibiting landlords from inquiring about tenants' criminal history was subject to First Amendment scrutiny; (3) the provision was not fatally underinclusive under the First Amendment; (4) the provision violated the landlords' First Amendment free speech rights; and (5) the provision prohibiting landlords from taking adverse action based on a tenants' criminal history did not violate landlords' substantive Due Process rights.

KEY FACTS AND ANALYSIS: In 2017, the City of Seattle (City) enacted the Fair Chance Housing Ordinance (Ordinance) prohibiting landlords from inquiring about the criminal history of current or potential tenants, and from taking adverse action, such as denying tenancy, based on that information. Shortly after the Ordinance was passed, Plaintiffs, several landlords who own small rental properties, and a landlord trade association that provides background screening services,

filed this action against the City, alleging violations of their federal and state rights of free speech and substantive due process. On cross-motions for summary judgment, the district court upheld the constitutionality of the Ordinance.

The Ninth Circuit held that the Ordinance's inquiry provision impinges upon the landlords' First Amendment rights as it is a regulation of speech that does not survive intermediate scrutiny. The court noted that the city's interests – in reducing barriers to housing faced by persons with criminal records and the use of criminal history as a proxy to discriminate on the basis of race – are substantial. Thus, the court was required to evaluate whether the Ordinance directly and materially advanced the government's substantial interests, and whether it is narrowly tailored to achieve them.

The Ninth Circuit held that the Ordinance was not "narrowly tailored" to achieve the city's stated goals because the inquiry provision – a complete ban on any discussion of criminal history between the landlord and prospective tenants – is not "in proportion to the interest served." The court noted that other cities have enacted similar ordinances without foreclosing all inquiries into criminal history by landlords. For instance, other cities' ordinances banned landlords from asking about arrest not leading to convictions, pending criminal charges, convictions older than two years old, the listing of a juvenile on a sex registry, and so forth. The court noted that that the similar ordinances appeared to meet the city's housing goals with significantly less burdensome restrictions on speech.

However, the Ninth Circuit rejected the landlords' claim that the adverse action provision of the Ordinance violates their Substantive Due Process rights, noting that landlords do not have a fundamental right to exclude. Therefore, the Ninth Circuit held that rational basis review was the applicable standard, which the Ordinance survived because the City offered a "legitimate reason" for passing the Ordinance.

Since the Ordinance contained a severability provision, the Ninth Circuit remanded the case to the district court to determine whether the presumption in favor of severability is rebuttable.

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Center for Community Action and Environmental Justice v. Federal Aviation Administration (9th Cir. 2023) 61 F.4th 633.

BACKGROUND: Environmental organizations and the State of California (Petitioners) petitioned for review of a decision by the Federal Aviation Administration (FAA) that found no significant environmental impact stemming from construction and operation of an air cargo facility at a public airport, alleging violations of the National Environmental Policy Act (NEPA). The Court of Appeal denied the petition and later issued an amended order, that denied the petitions for rehearing *en banc*.

HOLDING: The Ninth Circuit denied the petition, holding: (1) the FAA's use of one general study area to evaluate multiple potential environmental impacts was not an abrogation of its responsibility under NEPA to take "hard look" at environmental consequences of the project; (2)

the FAA's cumulative impacts analysis, when evaluating potential environmental impacts pursuant to NEPA, was not deficient; (3) the FAA's calculations regarding truck emissions in its environmental assessment (EA) pursuant to NEPA were not arbitrary or capricious; and (4) any failure by the FAA to explicitly discuss a proposed air cargo facility's adherence to California or federal ozone standards did not render its EA deficient.

KEY FACTS & ANALYSIS: Petitioners requested review of an FAA Record of Decision, which found no significant environmental impact stemming from the construction and operation of an air cargo facility project at the San Bernardino International Airport (Airport). The FAA issued an EA for the project, which Petitioners alleged erroneously found no significant environmental impacts.

First, the Ninth Circuit evaluated Petitioners' claim that the EA erroneously focused on two "study areas" which did not encompass the true impacts of the project. The argument was that the study areas did not conform to the FAA's Order 1050 "Desk Reference." The Ninth Circuit found that the Desk Reference was not a binding document, and could not alone serve as a basis for a NEPA claim. Petitioners' reliance on the Desk Reference could not support a substantial question that the project could have a significant impact on the environment, or that FAA failed to take the required "hard look" at the environmental impacts of the project.

Second, the Ninth Circuit dismissed Petitioners' argument that the FAA failed to sufficiently consider cumulative impacts. The FAA accounted for traffic impacts from over 80 projects in the general vicinity, and over 20 when evaluating impacts on air quality. The Petitioners failed to claim which specific cumulative impacts the FAA allegedly failed to evaluate.

Third the Ninth Circuit discussed the State of California's argument that the FAA should have prepared an environmental impacts statement (EIS) because an environmental impact report (EIR) prepared under the California Environmental Quality Act, Public Resources Code section 21000 *et seq.* (CEQA), found that the project could result in significant impacts to air quality, greenhouse gases, and noise. The Ninth Circuit dismissed this argument, stating that an EIS does not have to explain significant environmental effect through a CEQA analysis. California was required to identify specific findings in the EA that it believed raised questions regarding a potentially significant environmental impact and failed to do so. While the Ninth Circuit acknowledged that the CEQA and NEPA analyses differed, the court found that California was required to, and failed to demonstrate inadequacies in, the NEPA analysis, rather than showing their inconsistencies with similar CEQA analyses. The Ninth Circuit repeatedly stated that the FAA was not required to "explain away" the difference between the NEPA analyses and the CEQA analyses.

Fourth, the Ninth Circuit rejected Petitioners' argument that the FAA erroneously calculated truck trip emissions, which differed from the calculations in the CEQA documents. Petitioners did not argue that the NEPA analysis was improper. The FAA had also issued a post-hoc rationalization for the difference. The Ninth Circuit found no substantial question about whether the project would have a significant environmental impact purely because the truck trip calculations were different under NEPA and CEQA. The Ninth circuit also reviewed the truck trip calculations on the merits, and found no legitimate legal concern.

Finally, the Ninth Circuit evaluated Petitioners' argument that the project failed to meet California air quality and Federal ozone standards. However, the Ninth Circuit found that Petitioners failed to identify even one potential California air quality violation from the project, despite it being discussed in the EA. The Ninth Circuit also found that the EA adequately analyzed Federal ozone impacts. Because Petitioners failed to proffer a specific reason why the project would violate California and federal law, there was no ground to believe the EA was deficient in those regards.

The Ninth Circuit denied the petition, finding Petitioners failed to establish that the FAA acted arbitrarily or capriciously.

DISSENT: Circuit Judge Rawlinson dissented, arguing that the project's NEPA analysis failed to take the required hard look at environmental impacts, and listing several ways in which the analysis was deficient.

* * *

Socal Recovery, LLC v. City of Costa Mesa (9th Cir. 2023) 56 F.4th 802.

BACKGROUND: Sober living home operators (Appellants or Operators) brought actions alleging that the denial by the City of Costa Mesa (City) of their applications for special use permits and reasonable accommodation requests violated the U.S. Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (FHA), Americans with Disabilities Act (ADA), and California Fair Employment and Housing Act, Government Code section 12900 *et seq.* (FEHA). The United States District Court for the Central District of California, entered summary judgment in City's favor, and the Operators appealed. Appeals were consolidated.

HOLDING: The Ninth Circuit reversed and remanded, holding: (1) the Operators had standing to bring actions; (2) the Operators were not required to present individualized evidence of actual disability of their residents; (3) as matter of first impression, the Operators can satisfy th "actual disability" prong of a disability discrimination claim on a collective basis; and (4) the Operators were not required to show that City subjectively believed that their residents were disabled.

KEY FACTS & ANALYSIS: In 2014, the City amended its zoning code to reduce the number and concentration of sober living homes in its residential neighborhoods. The zoning ordinances required all sober living homes to have a permit -- sober living homes do not require a license from the State of California -- and to be located more than 650 feet away from any other sober living home or treatment center. No existing homes were grandfathered in, so if two sober living homes were within 650 feet of each other, one would have to cease operations. The zoning code defined sober living homes as group homes serving those who are "recovering from a drug and/or alcohol addiction and who are considered handicapped under state or federal law," and define group homes as "facilit[ies] that [are] being used as a supportive living environment for persons who are considered handicapped under state or federal law." The Operators submitted permit applications and reasonable accommodation requests so they could continue to operate their facilities. The City denied the permits based on the 650-feet separation requirement, issued citations, and filed state court abatement actions.

During discovery, the City requested all documents related to the "disability" status of every one of its clients. The Operators refused to produce those documents, or to have any of its employees testify about them, asserting privileges stemming from the U.S. Health Insurance Portability and Accountability Act (HIPPA). The City moved for summary judgment, arguing that without individualized evidence, the Operators' statutory disability discrimination claims failed because they had not demonstrated a genuine dispute of material fact as to whether any of its residents were "disabled" or "handicapped." Granting the City's motions for summary judgment, the district court found that Operators did not establish that *individual* residents in their sober living homes were actually disabled, or that the City regarded their residents as disabled.

The Ninth Circuit held that the district court applied the wrong legal standard because the Operators can satisfy the "actual disability" prong *on a collective basis* by demonstrating that they serve or intend to serve individuals with actual disabilities; the Operators need not provide individualized evidence of the actual disability of their residents. The Ninth Circuit continued that, in determining whether the Operators can establish disability under the "regarded as disabled" prong of the disability definition, the district court erred by finding that the Operators must prove the City's "subjective belief" that their residents were disabled. The Ninth Circuit explained that, under this prong, the analysis turns on how an individual is perceived by others.

The Ninth Circuit noted that the Operators provided the district court with evidence of (1) admissions criteria and house rules, (2) employee and former resident testimony, (3) public fears and stereotypes of their residents that may have influenced the City's perception, and (4) the actual content of City ordinances, denial letters, resolutions, citations, and abatement actions that acknowledged or stated the residents in the Operators' homes were disabled.

The Ninth Circuit also noted that the City conceded at oral argument that new homes could satisfy the actual disability standard using this type of evidence, *i.e.*, evidence of policies and procedures that the group home has a zero-tolerance policy, produced through declarations of individuals related to the group home. Thus, the court held, there is no reason to hold existing homes to a higher standard.

* * *

Gearing v. City of Half Moon Bay (9th Cir. 2022) 54 F.4th 1144.

BACKGROUND: Landowners brought a 42 U.S.C. section 1983 action against the City of Half Moon Bay (City), alleging a regulatory taking and related claims. The City moved for the federal court to abstain, pending resolution of a state court eminent domain action, which the district court granted. The landowners appealed.

HOLDING: The Ninth Circuit affirmed, holding that (1) even if *Pullman* abstention was prohibited when it would create an effective exhaustion requirement for a takings plaintiff, abstention from the instant action would not subject the landowners to such a requirement; (2) the landowners' action touched on a sensitive area of social policy, supporting the district court's determination that *Pullman* abstention was appropriate; (3) the constitutional question in the federal action could be mooted or narrowed by a definitive ruling on state law issues, supporting the determination that *Pullman* abstention was appropriate; and (4) the federal action involved unclear question of state law, supporting the determination that a *Pullman* abstention was appropriate.

KEY FACTS & ANALYSIS: After the City rejected landowners' proposal to develop housing on their properties, landowners sued the City in federal court pursuant to 42 U.S.C. section 1983, alleging a regulatory taking (and related claims) in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. The City then initiated eminent domain proceedings in state court to acquire the properties. The City filed a motion in the federal case to abstain pursuant to *Railroad Commission of Texas v. Pullman Co.* (1941) 312 U.S. 496 (*Pullman*), pending resolution of the eminent domain action. The district court granted the motion, and the landowners appealed.

Pullman abstention is an equitable doctrine that allows federal courts to refrain from deciding sensitive federal constitutional questions when state law issues may moot or narrow the constitutional questions. It is appropriate where (1) the federal constitutional claim "touches a sensitive area of social policy," (2) "constitutional adjudication plainly can be avoided [or narrowed by] a definitive ruling" by a state court, and (3) a "possibly determinative issue of state law is doubtful."

The Ninth Circuit first rejected the landowners' claim that the United State Supreme Court's rulings in *Knick v. Township of Scott, Pennsylvania* (2019) -- U.S. ---, 139 S.Ct. 2162, 204 L.Ed.2d 558 and *Pakdel v. City and County of San Francisco, California* (2021) -- U.S. ---, 141 S.Ct. 2226, 210 L.Ed.2d 617, precluded the *Pullman* abstention doctrine when the abstention would subject the plaintiff to exhaustion requirements. The Ninth Circuit found that, even if a *Pullman* abstention was prohibited when it would create an effective exhaustion requirement for a plaintiff alleging a regulatory taking claim, in this case, applying *Pullman* abstention would not subject the landowners to exhaustion requirements. At the conclusion of the eminent domain action, the landowners could still litigate their regulatory claims in federal court.

Next, the Ninth Circuit found that *Pullman*'s three requirements were satisfied. The claims touched on a sensitive area of social policy because they touched on land use planning. The constitutional adjudication could be narrowed by a state law ruling because the state decision would involve the interpretation of the same local and state laws used in the federal claim. Finally, the claims involved an unclear question of state law due to the complex nature of land use regulations, and this was particularly true because the landowners' claims relied on Senate Bill 330 (stats. 2019, ch. 654 (SB 330)), which had not yet been interpreted by any California courts.

* * *

Johnson v. City of Grants Pass (9th Cir. 2022) 50 F.4th 787.

BACKGROUND: Homeless persons (Plaintiffs) brought a putative class action against the City of Grants Pass (City) in Oregon challenging the constitutionality of the City's ordinances (Ordinance(s)) that precluded the use of a blanket, a pillow, or a cardboard box for protection from the elements while sleeping within, and which provided for civil fines, exclusion orders, and criminal prosecution for trespass. The district court granted partial summary judgment to Plaintiffs and issued a permanent injunction prohibiting enforcement of some of the Ordinances. The City appealed.

HOLDING: The Ninth Circuit affirmed in part, reversed in part, and remanded. In relevant part, the Ninth Circuit found that the City Ordinance precluding the use of bedding supplies when sleeping in public violated the Cruel and Unusual Punishments Clause in the Eighth Amendment to the U.S. Constitution, as applied to individuals who were involuntarily experiencing homelessness and who had no shelter in which to sleep. The Ninth Circuit held that: (1) the City's alleged reduction in enforcement of the Ordinances did not render the action moot; (2) the relief sought was within the limits of Article III of the U.S. Constitution; (3) the district court acted within its discretion in finding that the commonality requirement for class certification was met; and (4) the Ordinance precluding the use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public violated the Cruel and Unusual Punishments Clause as applied to individuals who were involuntarily experiencing homelessness and who had no shelter in which to lawfully sleep.

KEY FACTS & ANALYSIS: The City has a population of approximately 38,000 people and as many as 600 homeless persons. The number of homeless persons outnumbers the available shelter beds. The Ordinances prohibited individuals from sleeping on or in sidewalks, streets, alleyways, and doorways. It also prohibited occupying a "campsite" on public property and defined "campsite" as any place with bedding materials, stoves, or fires, for the purpose of maintaining a temporary place to live. The Ordinances also prohibited "overnight parking" in park parking lots, including being parked for more than two (2) hours during nighttime hours. Multiple violations of the Ordinances could result in an exclusion order, and criminal trespass if the order was violated.

First, the City claimed that the lawsuit was moot because it had stopped enforcing the Ordinances in the manner challenged. The Ninth Circuit rejected the City's mootness claim, citing established case law that voluntary cessation of an enforcement practice does not deprive a court of jurisdiction.

Second, the Ninth Circuit rejected the City's claim that the relief sought (enjoining enforcement of the Ordinances) by Plaintiffs was not within the court's grant of Article III jurisdiction because the remedy was better addressed by legislative discretion. The court cited previous history, including *Martin v. City of Boise* (9th Cir. 2019) 920 F.3d 584 (*Martin*), where courts had exercised their discretion in interpreting the constitutionality of anti-camping ordinances without overstepping its Article III jurisdiction.

Third, the Ninth Circuit considered whether the district court erred in certifying the class of at least 600 homeless persons in the City. The appellate court found that the class was properly certified, satisfying the commonality and numerosity requirements, despite an officer's guess that enforcement had only occurred against fewer than 50 people. The Ninth Circuit also considered, *sua sponte,* whether the class could proceed when the class representative passed away while the matter was on appeal. Finding that the class could proceed, the Ninth Circuit remanded for the district court to substitute a new class representative.

Finally, on the merits, the Ninth Circuit relied heavily on its decision in *Martin*, which prohibited the imposition of criminal penalties for sleeping or lying in public when an individual had no other option of where to sleep. The Ninth Circuit dismissed the City's argument that its penalties were civil, explaining that the City still authorized an individual to be cited for criminal trespass if that

person were found in a park after being issued an exclusion order. The Ninth Circuit also rejected the City's argument that the issue was moot because it had revised its Ordinances to permit sleeping in parks. The amended Ordinances still prohibited "campsites." The Ninth Circuit concluded that the prohibition violated the Cruel and Unusual Punishments Clause, but the Ninth Circuit remanded to the district court to narrow the injunctive relief so that it applied only to the extent necessary to protect "the most rudimentary precautions" against the elements.

The Ninth Circuit reiterated that its holding, like its holding in *Martin,* is narrow; the ruling only prohibits punishments for sleeping in public when an individual has no other option. The Ninth Circuit explained that it expanded on *Martin* by finding that class certification was not categorically impermissible in similar cases, and that "sleeping" in the context of *Martin* includes the rudimentary forms of protection from the elements.

DISSENT: Dissenting, Circuit Judge Collins stated that *Martin* seriously misconstrued the Eighth Amendment and the U.S. Supreme Court's caselaw construing it, but even assuming that *Martin* remained good law, the *Johnson* decision—which the circuit judge argued both misread and greatly expanded *Martin*'s holding—was egregiously wrong.

* * *

Potter v. City of Lacey (9th Cir. 2022) 46 F.4th 787.

BACKGROUND: A truck owner, who lived in trailer hitched to truck, brought a 42 U.S.C. section 1983 action in state court against a city and its police chief, relating to the issuance of a citation and threatened impoundment of a truck and trailer after he parked in the city hall parking lot, and alleging that the city ordinance regulating parking for recreational vehicles (RVs) violated federal and state constitutional rights of freedom of intrastate travel, and federal constitutional protections against cruel and unusual punishment and unreasonable searches and seizures. After removal, the United States District Court for the Western District of Washington granted the city's motion for summary judgment as to claims against it and its police chief. The owner appealed.

HOLDING: The Ninth Circuit held that a certification to the Supreme Court of Washington State was warranted on the question of state law, regarding whether the Washington State Constitution or any other source of Washington law protected the right to intrastate travel and, if so, whether the city's ordinance regulating parking for RVs violated it.

KEY FACTS & ANALYSIS: The City Council for the City of Lacey, Washington (City) enacted Ordinance 1551 (Ordinance) in September 2019 amending the City's parking laws to restrict the parking of RVs, motor homes, mobile homes, trailers, campers, vessels or boats upon streets, alleys, public rights-of way, or publicly owned parking lots for more than four hours, with only two exceptions. The exceptions included parking for the purposes or loading or unloading, or, if the owner obtained a permit according to the city manager's permitting policies. If neither exception applied, and an owner parked on the street for more than four hours, the owner was to be subsequently prohibited from parking on another City street for the following 24 hours. Additionally, the City punished the violations with a $35 fine and immediate impoundment. Cumulatively, the Ordinance rendered it impossible for vehicle-sheltered, homeless individuals to live in an RV on the City's public lands.

Two weeks after passing the Ordinance, the city manager adopted a two-tiered permitting system, one for City residents and one for non-residents ("an individual without a permanent address"). Homeowners or renters in the City were able to request up to four temporary permits per year, allowing them to park their RVs for up to 48 hours within 150 feet of the resident's home. The non-resident permitting system allowed someone without a permanent address to "receive a temporary parking permit in a designated parking area," as long as the requester is "actively engaged with social services." Notably, the City never designated a "safe lot," and the court noted that the "non-resident permitting system is essentially a bridge to nowhere."

Potter, a 64-year-old man who lived in the City for most of the period between 1997 and 2019, but was experiencing housing instability since 2016, began living in a 23-foot travel trailer that he hitched to his truck. After the Ordinance passed, Potter was unable to continue to live in his trailer, which was previously parked at city hall for months prior to the Ordinance passing, without risk of it being impounded.

Potter claimed the Ordinance violated his Fourth, Eighth, and Fourteenth Amendment rights under the U.S. Constitution, as well as his right to intrastate travel under the Washington State Constitution. The Ninth Circuit noted, "It is well-established that [we] should avoid adjudication of federal constitutional claims when alternative state grounds are available … even when the alternative ground is one of state constitutional law." The Ninth Circuit continued that the issue was dispositive and had not been settled by Washington case law. Therefore, the court certified the following question to the Washington Supreme Court:

> Is the right to intrastate travel in Washington protected under the Washington State Constitution, or other Washington law? If Washington state law protects the right to intrastate travel, does the [Ordinance] violate Jack Potter's intrastate travel rights?

DISSENT: Dissenting, Circuit Judge Bennett disagreed with the decision to certify the question, opining that the Ordinance does not violate any conception of the right to intrastate travel, even assuming that such right exists, whether under the Washington State or U.S. Constitutions, and that the Ordinance does not violate either the Fourth Amendment on its face or the Eighth Amendment's prohibition on cruel and unusual punishments.

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STATE CASES

East Oakland Stadium Alliance v. City of Oakland (Cal. Ct. App., Mar. 30, 2023, No. A166221) 2023 WL 2706692.

BACKGROUND: Oakland's professional baseball team proposed to construct a new ballpark and a large, adjoining development featuring several new commercial and residential buildings (the Project). The proposed building site was used largely for parking and storage activities associated with the Port of Oakland. Among other issues of public concern, the soil at the project site was

contaminated from long years of industrial use, the Project would generate substantial new pedestrian and vehicle traffic in the neighborhood, and the site's existing uses were required to be relocated.

The City of Oakland (City) prepared an Environmental Impact Report (EIR) under CEQA for the Project. Following certification, petitioners East Oakland Stadium Alliance (Petitioners) filed petitions for writ of mandate. The trial court found one mitigation measure to be inadequate, which was designed to address wind effects, but rejected the remaining claims. The judgment required the City to reconsider and revise the wind mitigation measure and otherwise denied the petitions. Petitioners appealed the denial of the remainder of their claims, and the City and related entities cross-appealed the rejection of the wind mitigation measure.

HOLDING: The First District Court of Appeal affirmed, upholding the judgment of the trial court on each of the matters discussed below.

KEY FACTS & ANALYSIS:

Railroad Impacts

Petitioners first contended the EIR's plan for safeguarding visitors from rail traffic was infeasible and ineffective.

The EIR proposed and the City adopted a series of mitigation measures, including the installation of fencing on both sides of the tracks for the length of the Project site's frontage; the elimination of one intersection and the installation of enhanced safety features at the remainder; and the construction of two overcrossings, one for bicycles and pedestrians and a second for vehicles. Although these measures would improve existing conditions, the EIR found that the Project will present significant and unavoidable environmental impacts because it will expose the vehicles and pedestrians expected to cross the tracks at the five remaining at-grade intersections to the safety hazards created by the railroad tracks.

First, the Court of Appeal found that, even if the multi-use path was infeasible, the fence would still preclude access to the tracks between intersections. Second, the Court of Appeal found that the City sufficiently analyzed the placement of the bike overpass for diverting traffic, and the substantial evidence standard precluded review of the thoroughness of the discussion. Third, the Court of Appeal found that the City sufficiently considered impacts caused by permanent closures of intersections. The Court of Appeal separately found that Petitioners did not sufficiently raise the issue of impacts from temporary closures during games.

Displacement of Current Parking and Storage

The EIR found that the truck parking yard currently on the site would be relocated to another site with sufficient alternate overnight parking in the same area. This was based on a 2020 study. Petitioners relied on comments that certain areas were already at overnight capacity to state that the EIR inadequately analyzed impacts on air quality. However, there was evidence of available parking at another site, and Petitioners had not shown that available space was inadequate.

The Court of Appeal further rejected Petitioners argument that the EIR insufficiently analyzed impacts to current users of the parking lot, which would relocate outside of the Port of Oakland

(the Port). The EIR contained two separate analyses of the Project's impact on air quality, differing in the geographic area over which the impacts were measured. The first of these analyses addressed the impact of the Project on air quality in the immediate vicinity of the Project site and assumed that all displaced parking would relocate to the "Roundhouse," which is nearly adjacent to the Project site. The second analysis considered the impact of the Project on air quality in the San Francisco Bay Area Air Basin, which includes Alameda and eight nearby counties. In discussing pollutant emissions associated with existing users of Howard Terminal, the EIR noted that it did not subtract these emissions from the analysis, despite their need to relocate, because it assumed the activities would continue to occur elsewhere in the greater Bay Area, even if not at the Port itself. Although the EIR recognized the likelihood that some truck parking might nonetheless relocate outside the Port, it concluded that the extent and character of relocation could not be reliably determined at this time and any attempt to estimate the extent of relocation was, therefore, speculative.

Finding that the EIR reasonably determined that sufficient parking would be available near the site to accommodate for displaced trucks, the Court of Appeal upheld the EIR's analysis on air quality from displaced trucks.

Emergency Generators

The Court of Appeal next rejected Petitioners' argument that the EIR's analysis of emissions from emergency electrical generators at the Project site was inadequate. The EIR's air quality analysis "conservatively" assumed that the Project would include 17 new emergency generators, one each at the ballpark and the mixed-use buildings. The analysis assumed that these generators would run for 50 hours per year, a figure chosen because it represented the maximum time allowed by California regulations for annual testing and maintenance of such generators. To limit emissions from the generators, the EIR included a mitigation measure restricting their annual testing and maintenance to a maximum of 20 hours, 30 hours less than the maximum permitted. Petitioners characterized the EIR as assuming the generators would operate for 50 hours of testing and maintenance annually, while allocating no time for actual emergency use, and argued that this assumption was unreasonable. The Court of Appeal found no inadequacy and that the City met its burden of providing a good faith effort at full disclosure.

The EIR's estimate of 50 hours of annual operating time included a cushion of 30 hours for emergency operation. The EIR was required to make neither a generally applicable nor a worst-case assumption; rather it was required to make a reasonable estimate of likely annual use of the generators at the Project site. The court held the EIR did so.

Greenhouse Gases

The Court of Appeal next rejected Petitioners' argument that the EIR improperly deferred mitigation of the Project's greenhouse gas (GHG) emissions. To reduce GHG emissions to the significance standard of no net additional emissions, the EIR adopted a single mitigation measure. Mitigation Measure GHG-1 prohibited the City from approving any construction-related permit for the Project unless the Project sponsor has "retain[ed] a qualified air quality consultant to develop a Project-wide GHG Reduction Plan" that "shall specify anticipated GHG emission reduction measures sufficient to reduce or offset these emissions ... such that the resulting GHG emissions are below the City's 'no net additional' threshold of significance." The Court of Appeal

found that this satisfied the CEQA Guidelines Section 15126.4 mitigation measure requirements.[1] Mitigation Measure GHG-1 provided far more than a bare promise that future mitigation would ensure there is no increase in GHG emissions. It set a quantitative standard as a baseline, required the Project sponsor to meet that baseline, specified the manner in which compliance with the baseline would be measured, established strict reporting requirements, and specified a variety of measures that must be adopted as necessary to meet the standard.

Hazardous Materials

The Court of Appeal next rejected Petitioner's arguments regarding the EIR's hazardous materials analysis.

In discussing the prevalence of hazardous materials, the EIR relied, in addition to extensive past investigation reports, on a consultant survey conducted in 2019 (site investigation) that sampled soil gas, soil, and groundwater throughout the entire Project site for chemicals of concern (COCs) identified in the previous investigations, including total petroleum hydrocarbons (TPH) and other contaminants. The conclusions of the site investigation were then used to prepare a human health and ecological risk assessment (health risk assessment). The health risk assessment evaluated potential human exposure to each COC at the Project site, determined the maximum exposure to each that could be anticipated without mitigation, and evaluated the health risks associated with such exposure. Based on this analysis, the health risk assessment established "target cleanup levels" to guide the remediation of each COC. Both the site investigation and the health risk assessment were reviewed by the California Department of Toxic Substances Control (DTSC), revised according to the agency's comments, and approved by DTSC. The health risk assessment was, in turn, intended to provide the basis for formulating a remedial action plan (RAP) for the Project that would reduce COCs below the target levels identified in the health risk assessment. The RAP was not complete at the time of the draft EIR, but a mitigation measure required its completion and approval by DTSC before the Project could proceed.

Petitioners first asserted that the Project description was inadequate because it failed to discuss separately the effect of removing the concrete cap that prevents the escape of existing soil contaminants. The Court of Appeal found that the EIR fully recognized the importance of the cap, and petitioner's remaining arguments regarding the cap could not overturn the EIR's analysis.

Petitioners also contended that the EIR's description of hazardous chemicals was deficient for failing to discuss the presence of a group of chemicals called "hydrocarbon oxidation products" (HOPs). The Court of Appeal found that the presence of HOPs was analyzed in a 2018 report on total petroleum hydrocarbons. It was a separate question, however, whether the environmental impact of HOPs was sufficiently distinct from that of hydrocarbons such that HOPs should have been separately measured and discussed by the EIR. The court noted this was a complex regulatory question that would seem to depend on a variety of factors, including the toxicity, prevalence, persistence, and behavior of HOPs in the soil relative to that of hydrocarbons, and whether HOPs required remediation techniques different from those used for hydrocarbons.

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[1] The "CEQA Guidelines" are in Title 14 of the California Code of Regulations, section 15000 *et seq.*

Importantly, the EIR's decision not to analyze HOPs separately from TPH was supported by the judgment of DTSC, the regulatory body with authority over the cleanup. DTSC reviewed the site investigation and health risk assessment. Although DTSC's comments on the site investigation recognized the problem created by using SGC in measuring TPH, the agency did not recommend separate reporting of HOPs. That the DTSC did not require separate reporting of HOPs provided substantial evidence supporting the City's adoption of the EIR notwithstanding its failure to separately assess the impact of HOPs.

Health Risk Assessment (HRA)

The Court of Appeal next rejected the argument that the health risk assessment (HRA) was based on an ecological risk assessment prepared in 2002 and was therefore outdated because it predated the recognition of HOPs as separate from TPH. The contention was governed by the Court of Appeal's determination on the HOPs analysis (summary above).

Recirculation of the DEIR

The Court of Appeal rejected the argument that the Draft EIR (DEIR) should have been recirculated to disclose remedial measures to minimize soil and groundwater contamination at the Project site completed after the issuance of the final EIR.

At the time the DEIR was prepared, the City assumed that the Project sponsor would prepare a removal action workplan (RAW) rather than a remedial action plan (RAP), and the DEIR originally referred to the preparation of a RAW. By the time the Final EIR was issued, however, the Project sponsor had elected to prepare the more comprehensive document. Accordingly, the Final EIR retrospectively changed the DEIR's references from a "RAW" to a "RAP."

Although the decision to use a RAP was disclosed in the Final EIR, the release of the draft RAP, which Petitioners contended was the event requiring recirculation, did not occur until later. Further, to the extent petitioners contended that recirculation was required because the public was entitled to review and comment on the remediation measures adopted in the RAP, such an opportunity for public comment was a required part of DTSC's approval of the RAP.

Substantial evidence supported the City's decision not to recirculate the EIR. The draft RAP did not add new information to the EIR, other than to confirm which of the available remedial measures discussed in the DEIR were deemed most appropriate for implementation.

Deferred Mitigation of Contaminants

The Court of Appeal rejected the argument that leaving the detailed formulation of remedial measures for hazardous substances to a RAP failed to satisfy the requirement of a specific performance standard in CEQA Guidelines section 15126.4, subdivision (a)(1)(B) regarding deferral of mitigation.

The DEIR adopted three mitigation measures for handling contamination at the Project site. The first, Mitigation Measure HAZ-1a, required preparation of a RAP and its approval by DTSC, land use covenants, and "associated plans." It required these plans to identify areas with COC concentrations above the target cleanup levels in the health risk assessment and to describe

"specific remedial methods" to be applied to each of these areas, the procedures used to implement these methods, the analytical methods used "to verify that contaminated materials have been removed or treated such that the numerical cleanup levels have been achieved," and cap restoration actions for those areas that will require a cap. The second mitigation measure, HAZ-1b, required that, prior to the issuance of any grading or other construction permit for the Project, the Project sponsor provide evidence that DTSC concurred the proposed actions were consistent with the plans required by HAZ-1a. Further, prior to the issuance of any certificate of occupancy, the Project sponsor had to provide evidence that DTSC determined that the site was suitable for use. The third measure, HAZ-1c, required the preparation of Health and Safety Plans consistent with applicable regulations to protect workers and the public during the remediation activities. The Court of Appeal found that these measures satisfied the performance standard.

Alternatives Analysis

The Court of Appeal found that Petitioners had failed to raise their critiques regarding the environmental analysis for one of the Project's alternatives at the administrative levels, and accordingly could not assert that the EIR inadequately analyzed the alternative.

Cumulative Impacts

Finally, the Court of Appeal rejected the contention that the EIR's cumulative impacts analysis should have included consideration of the impact of the use of a portion of the Project site to expand the Port's turning basin for large vessels.

Under an agreement negotiated between the Project sponsor and the Port, an area at the southwest corner of Howard Terminal was designated a "Maritime Reservation Area." At any time up until 2029, the Port could, under the agreement, terminate the Project sponsor's development rights to some or all of 10 acres of the Maritime Reservation Area. In that event, the area would be returned to the Port and excavated to expand a turning basin for large vessels within Oakland's Inner Harbor. At the time of the DEIR, the Port and the Army Corps of Engineers were jointly conducting a feasibility study of the expansion that was scheduled to be completed by the end of 2023.

The DEIR did not consider the impacts of expanding the turning basin because "[t]he Port of Oakland has not proposed, designed, approved, or secured permits for" such an expansion. According to the DEIR, expansion of the turning basis would be analyzed "as a separate project" by the Port should it elect to exercise the option to take back a portion of the Project site. The draft EIR nonetheless discussed the environmental effects of turning basin expansion in each of its technical analyses to the extent such discussion was necessary "to address effects that are different from those identified for the proposed Project." The EIR did not consider the turning basin expansion to be a "cumulative project" for purposes of the DEIR because "an expanded turning basin is still being assessed in terms of feasibility."

The City's determination that the turning basin expansion was not a "probably future project" was supported by substantial evidence in the City's analysis.

Wind Impacts

Turning to the cross-appeal, the Court of Appeal upheld the trial court's holding that the EIR improperly deferred mitigation of wind impacts because the wind mitigation measure, which postponed formulation of the details of wind mitigation pursuant to CEQA Guidelines Section 15126.4, subdivision (a)(1)(B), did not contain the type of "specific performance standard" required by the guideline.

The DEIR contained a relatively brief discussion of the Project's impact on wind currents at the Project site. As the EIR recognized, the effect of wind increases with its speed. Buildings that stand alone or are much taller than surrounding structures can capture and redirect wind; such "redirected winds can be relatively strong and turbulent and may be, in some instances, incompatible with the intended uses of nearby ground-level pedestrian spaces." The EIR concluded that the Project will have a significant adverse environmental impact if it created winds that exceed 36 mph for more than one hour during daylight hours.

The EIR's single wind mitigation measure required a wind tunnel analysis for each proposed building exceeding 100 feet in height prior to the issuance of a building permit. The mitigation measure required no further action if the analysis determined that the building "would not create a net increase in hazardous wind hours or locations ... compared to then-existing conditions." If, however, the building's design would cause an increase in significant wind impacts, the Project sponsor was required to "work with the wind consultant to identify feasible mitigation strategies, including design changes (*e.g.*, setbacks, rounded/chamfered building corners, or stepped facades), to eliminate or reduce wind hazards to the maximum feasible extent without unduly restricting development potential. Wind reduction strategies could also include features, such as landscaping and/or installation of canopies along building frontages.

The Court of Appeal found that the standard was not sufficiently specific. By requiring a reduction in wind impacts "to the maximum feasible extent without unduly restricting development potential," the mitigation measure appeared to seek a balance between competing factors, mitigating adverse wind impacts only to the extent possible without "unduly" impairing the commercial value of the buildings. Even assuming that a mitigation measure may, in appropriate circumstances, strike a balance between the reduction of environmental impacts and commercial functionality, the mitigation measure must inform the public where that balance has been struck. The mitigation measure failed to do so, and was properly struck by the trial court.

For the reasons stated above, the Court of Appeal affirmed the trial court's decision.

* * *

Shenson v. County of Contra Costa (Cal. Ct. App., Mar. 30, 2023, No. A164045) 2023 WL 2706499.

BACKGROUND: Plaintiffs and appellants (collectively, the Owners) are two couples who purchased residential properties that are adjacent to a creek in neighboring subdivisions within Contra Costa County (County) in 2010 and 2016. The Owners sued the County and a flood control district (collectively, "Government Entities") for inverse condemnation and parallel tort causes of action

after drainage improvements that were constructed more than 40 years earlier by the subdivision developers failed, seriously damaging Owners' properties. Owners appealed from the judgment the superior court entered after granting summary judgment against them on their complaint.

HOLDING: The undisputed facts failed to demonstrate that the Government Entities owned or exercised actual control over the waterway or drainage improvements, thereby precluding the improvements from being rendered public works for which either entity is responsible.

KEY FACTS & ANALYSIS: The creek that runs along Owners' properties is a natural watercourse that functions as the main receptacle for storm water runoff emanating from the watershed above the Owners' properties, and is the only reasonable means of collecting and conveying that runoff. Pursuant to the Subdivision Map Act (Gov. Code, § 66410 *et seq.*), the County required the developers to make drainage improvements and to dedicate drainage easements to the County. When it approved the subdivision maps, however, the County did not accept the offers of dedication for the drainage improvements, which remained in the ownership of the developers and later the homeowners who purchased the property.

Owners claimed the County assumed ownership and responsibility for the drainage improvements by requiring the subdivision developers to construct them and to offer to dedicate easements to the County to enable it to maintain them. The County contended that it did not accept the offers to dedicate the easements and did not otherwise assume responsibility for maintaining the improvements.

The Court of Appeal noted that a public entity may be liable as a property owner when alterations or improvements to its own upstream property result in the discharge of an increased volume of or velocity of surface water in a natural watercourse causing damage to the property of a downstream owner. However, a government entity is only liable if its conduct was unreasonable and the lower property owner acted reasonably. Further, a government entity may be liable in inverse condemnation where the damage is caused by increased volume or velocity of surface waters from public works or improvements, such as a storm drainage system, on publicly owned land. On the other hand, inverse condemnation liability will not lie if the damage is caused by a private development approved or authorized by the public entity when the entity's sole affirmative action was the issuance of a permit and approval of the subdivision map.

Here, the court found that there was no triable issue as to whether the spill was public improvement or use because the Public Entities' merely requiring the developer to construct a drainage system and to offer a dedication did not convert private improvements into public works. Rather, the developer designed and built the improvements and offered the County easements for drainage purposes. However, the County never expressly accepted the offer, there were no records of the County maintaining or repairing the pipeline, or performing any maintenance on the portion of the creek upstream of Owners' properties.

Additionally, the Owners failed to cite any authority supporting the proposition that a county's imposition of conditions of approval through the Subdivision Map Act, including drainage and easement requirements, converts the improvements into a public work. The court also rejected Owners' claim that requiring drainage facilities and conveying water across properties, over which

it might not have flowed when the area was undeveloped, converted the improvements into public works.

Moreover, the Court of Appeal found that there was no triable issue as to whether the creek was incorporated into the public drainage system because there was no affirmative action by the Government Entities to assume ownership or responsibility of the watercourse. Further, the Government Entities did not provide any storm drainage services to the Owners' properties or any upstream properties within the watershed.

Finally, the Court of Appeal found that there was no triable issue as to whether the Government Entities acted unreasonably so as to impose liability. The court noted that only where the public entity owns the property that caused the harm can private property be converted in a public work. Since the court found, as a matter of law, that neither the drainage improvement nor the creek became a public work, the "reasonableness" test was not implicated.

Since Owners conceded that their related tort causes of action for nuisance, trespass, and dangerous condition on public property were all conditioned on the viability of their inverse condemnation claim, the court found that the tort claims failed as well. Thus, the court affirmed the judgment.

* * *

Hamilton and High, LLC v. City of Palo Alto (Cal. Ct. App., Mar. 20, 2023, No. H049425) 2023 WL 2570589.

BACKGROUND: Developers (Petitioners) brought a petition and complaint for mandamus, declaratory, and injunctive relief against the City of Palo Alto (City), alleging that the City's retention of unexpended "in-lieu parking fees" after failing to make certain public reports and findings violated Mitigation Fee Act. The Superior Court entered judgment in favor of the City. Developers appealed.

HOLDING: The Court of Appeal reversed and remanded, holding: (1) the City's in-lieu parking fee was a "fee" within meaning of Mitigation Fee Act; (2) the mandamus claim accrued when the City denied developers' request for a refund; (3) the Mitigation Fee Act required the City to make five-year findings regarding the entirety of the fund, including fees deposited within last five years; (4) the Mitigation Fee Act mandated that the City return unexpended fees upon its failure to make timely five-year findings; and (5) the general standard for holding invalid or setting aside zoning or planning actions due to procedural errors did not apply to the mandatory refund remedy.

KEY FACTS & ANALYSIS: In this appeal, the Court of Appeal considered the application of the Mitigation Fee Act (Gov. Code, § 66000 *et seq*.) (Act)) to the City's refusal to refund "in-lieu parking fees" to Petitioners who paid the fees years earlier as a condition of approval of a building project. Petitioners contended the City failed to make certain five-year findings statutorily required by section 66001, subdivision (d), of the Act and was therefore required to refund their unexpended fees.

The City countered that the in-lieu parking fee, charged when a developer elected not to provide parking directly, was not a "fee" subject to the Act. Consequently, the City contended that the five-year finding and refund provisions did not apply, and the City had no obligation under the Act to return the fees.

In addition to this principal claim, the City maintained that, even if the Act did apply, the claim for relief was barred by the statute of limitations and lacks a statutory basis. The City also contended that it complied with the Act's requirements by belatedly adopting five-year findings. Finally, the City asserted that Petitioners had not satisfied section 65010, subdivision (b), a "harmless error" provision applicable to parts of the Government Code.

First, the Court of Appeal found that the in-lieu parking fee met the Act's definition of "fees." By its plain terms, the Act applies when "a monetary exaction" imposed in connection with an applicant's development project for the purpose of defraying the cost of public facilities related to the development project is charged by a local agency as a condition of approval for a development project by a local agency. The provision of parking or alternative fee payment was a condition of approval for the project, with the purpose of defraying the cost of facilities related to the project. The requirement was expressly written in the City's municipal code. When a party elects to pay the in-lieu fee, the fee becomes a condition of approval. Accordingly, the Court of Appeal found that the Act applied to the in-lieu fee.

Second, the Court of Appeal rejected the City's argument that the challenge was barred by Code of Civil Procedure section 340's one-year statute of limitations applicable to claims based on penalty or forfeiture. The Court of Appeal concluded that, at the earliest, the cause of action accrued when the City denied the refund request for unexpended in-lieu fees. This timing complied with all three possible statutes of limitations in the Code of Civil Procedure – Sections 340, 338, and 343.

The Court of Appeal also found for Petitioners on the merits of the statutory refund claim. The City was obligated to issue five-year findings for the in-lieu fees, the City failed to make those findings, and the City's belated findings did not satisfy the Act. The Court of Appeal further found that Government Code Section 65010(b)'s "harmless error" standard did not apply to Petitioner's action to enforce the refund requirement for the City's failure to make the statutory findings.

The Court of Appeal reversed the judgment and directed the trial court to grant the mandate petition and the declaratory and injunctive relief causes of action.

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Pacific Palisades Residents Association, Inc. v. City of Los Angeles (Cal. Ct. App., Mar. 8, 2023, No. B306658) 2023 WL 2401079.

BACKGROUND: Pacific Palisades Residents Association (Petitioner) brought a writ proceeding against the City of Los Angeles (City) and the California Coastal Commission (Commission), challenging the approval of an eldercare facility in the City. The Superior Court denied the petition, and Petitioner appealed.

HOLDING: The Court of Appeal affirmed the judgement, holding: (1) the proposed eldercare facility was not subject to the City's zoning code yard requirements; (2) the evidence was sufficient to support the City's determination that the facility was compatible with the neighborhood and therefore eligible for the Class 32 CEQA exemption for in-fill projects; (3) the evidence was sufficient to support the City's determination that the facility did not violate the community plan's policy of preserving and protecting views from hillsides, public lands, and roadways; and (4) the evidence supported the Commission's determination that the proposed eldercare facility presented no substantial issue under the California Coastal Act (Pub. Res. Code, § 30000 *et seq.*).

KEY FACTS & ANALYSIS: An eldercare facility project in the City was subject to extensive opposition from Petitioner and other groups throughout its entitlement process. The project generally was an eldercare facility with a first floor bistro.

City's Zoning Code

Petitioner's first argument was whether the proposed facility was bigger than the City zoning code allowed because it failed to meet the zoning code's yard requirements. The operative code provision provided that no yard requirements would apply to the residential portions of buildings on lots used for combined commercial and residential uses where the residential portions were used exclusively for residential use, abutted a street or alley, and the first floor of the building was used for commercial uses. Finding all of these qualifications met, the Court of Appeal affirmed the trial court's determination that no yard requirements applied to the project.

Class 32 CEQA Exemption

Petitioner challenged the City's use of the Class 32 categorical exemption (CEQA Guidelines, § 15332), based on an argument that the project was not architecturally compatible with the neighborhood and violated a community policy for preserving views.

The Court of Appeal rejected the architectural compatibility, finding that substantial evidence supported the City's finding of compatibility. The City found that the project was consistent with the "urbanized uses" in the surrounding area. While the surrounding uses were primarily one or two story homes, and two or three story townhomes in a Mediterranean style, the Court of Appeal found that the finding of consistency did not require architectural uniformity, only compatibility.

Next, the Court of Appeal rejected the argument that the project was inconsistent with the community plan's goal of maintaining views from certain areas. The Court of Appeal found that major intrusions on views already existed from existing buildings. The Court of Appeal acknowledged that once the community plan was in place, it was the City's place to administer and exercise its discretion on it, and the Court of Appeal declined to override the City's decision regarding consistency with its community plan.

Coastal Commission's Determination

Finally, the Court of Appeal rejected Petitioner's attack on the Commission's determination that Petitioner's appeal presented no substantial issue under the Coastal Act, citing the deferential standard of review. The Court of Appeal found that the Petitioner's complaints regarding view, traffic, and parking did not override the substantial evidence (which was similar to the substantial

evidence supporting the City's decisions), which justified the Coastal Commission's exercise of its discretion.

* * *

Committee to Relocate Marilyn v. City of Palm Springs (2023) 88 Cal.App.5th 607.

BACKGROUND: Committee to Relocate Marilyn (Petitioner) filed a petition for writ of administrative mandate, challenging the City of Palm Springs' (City's) closure of downtown to all vehicular traffic for a period of three years to allow a tourism organization to install and display a large statue of Marilyn Monroe in the middle of the street. The Superior Court sustained the City's demurrer without leave to amend, and Petitioner appealed.

HOLDING: The Court of Appeal reversed and remanded on the grounds that: (1) the City exceeded its statutory authority to "temporarily" close portions of streets when it closed the downtown street for three years, and (2) the City's "temporary" closure of street for three years was a material change to the project, made by the City after it filed its notice of exemption citing Class 1 (existing facilities), and thus, the applicable statute of limitations under CEQA to challenge the project was 180 days from the date of notice of the change.

KEY FACTS & ANALYSIS: The City closed off one of its downtown streets to all vehicular traffic for a period of three years to allow a Palm Springs tourism organization to install and display a large statue of Marilyn Monroe in the middle of the street. Petitioner filed a petition for writ of administrative mandate challenging the street closure. It alleged the City did not have the statutory authority to close the street under Vehicle Code section 21101, subdivision (e), which permits cities to "[t]emporarily clos[e] a portion of any street for celebrations, parades, local special events, and other purposes" for the safety and protection of persons who use the street during the temporary closure. Petitioner contended the closure was not "temporary" for the purposes of the statute. Additionally, Petitioner alleged the City erroneously declared the street closure categorically exempt from environmental review under CEQA.

The Court of Appeal first concluded that the most reasonable construction of Vehicle Code section 21101 was that a temporary closure was only for a relatively short period of time, in order to safeguard persons during an event listed in the statute such as a parade or special event. The Court of Appeal concluded that the statute did not permit cities to close streets for whatever permanent duration of time it desired. Accordingly, the Court of Appeal found that Petitioner had sufficiently alleged that the City exceeded its statutory authority to close the street to survive the City's demurrer.

Second, the Court of Appeal found that the trial court erred in sustaining the City's demurrer to the CEQA cause of action. The trial court found that the CEQA cause of action was time barred by the 35-day statute of limitations following the City's filing of a notice of exemption for the project. The Court of Appeal, however, found that the notice of exemption did not trigger the shorter statute of limitations because the description of the project, citing the Class 1 existing facilities (CEQA Guidelines, § 15301) categorical exemption, included the City vacating vehicular access rights on the public street. The City, however, temporarily limited public access per Vehicle

Code section 21101, subdivision (e). The Court of Appeal found that this was a material change after the notice of exemption was filed, and accordingly, the 180 day statute of limitations applied from the date Petitioner knew or reasonably should have known that the project substantially differed from the project in the notice of exemption. Thus, the CEQA claim was timely.

As an final note, the Court of Appeal held Petitioner abandoned its claim alleging a violation of street vacating procedures under the Streets and Highway Code, as Petitioner failed to address the demurrer to this claim in its opening brief.

For the foregoing reasons, the Court of Appeal reversed the judgment of the trial court with instructions to enter a new order overruling the demurrer for the specified claims (above).

* * *

Robinson v. Superior Court of Kern County (2023) 88 Cal.App.5th 1144.

BACKGROUND: Investor-owned electric utility, Southern California Edison Company (SCE), filed a complaint in eminent domain seeking to condemn an easement across a landowner's property for the purpose of accessing and maintaining existing power transmission lines. The trial court granted SCE's motion for order of prejudgment possession. The landowner petitioned for writ of mandate.

HOLDING: The Court of Appeal held that: (1) SCE was a "public utility" to which eminent domain could extend; (2) SCE was not a "public entity" which would be required, pursuant to the Eminent Domain Law (Code Civ. Proc., § 1230.010 *et seq.*), to adopt a resolution of necessity before initiating suit to condemn property; (3) SCE was not required to obtain approval of its regulator before instituting eminent domain action; (4) a "public agency," which would be required to comply with CEQA before commencing an eminent domain action, does not include investor-owned public utilities; (5) as a matter of first impression, a nonpublic entity is "entitled to take the property by eminent domain," and could support an order for prejudgment possession of property pursuant to "quick take" procedure, when the plaintiff establishes it is statutorily authorized to exercise the power of eminent domain and proves by preponderance of evidence that all the requirements of the statute setting out general limitations on exercise of eminent domain are met; and (6) as a matter of first impression, trial court was required to make explicit findings as to whether all requirements of statute setting out general limitations on the exercise of eminent domain were met when granting a motion for order of prejudgment possession.

KEY FACTS & ANALYSIS: SCE filed a complaint in eminent domain to condemn an easement across a landowner's property for the purpose of accessing and maintaining existing power transmission lines. SCE also filed a motion for order of prejudgment possession under the quick-take provisions of Code of Civil Procedure section 1255.410. After the trial court granted the motion, the landowners appealed.

The Court of Appeal noted that it was publishing its opinion "because it resolves issues of first impression involving the interpretation of Section 1255.410," which requires that a trial court evaluating a quick take motion, in the absence of a timely opposition, shall grant the motion if:

(A) The plaintiff is entitled to take the property by eminent domain, and (B) The plaintiff deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article. (Code Civ. Proc., § 1255.410(d)(1).)

The Court noted that the trial court must *expressly* find, on the record, that *each* of the following requirements of Section 1240.030 are met: the public interest and necessity required the project; the property sought was for the project; and the project was planned and located to be most compatible with the greatest public good and least private injury. The Court of Appeal found that the trial court failed to make such expressed findings because it did not find that it was necessary for the access easement to be 16 feet wide, that the easement was compatible with the least private injury, or that it was necessary for SCE to have the right to move wires and anchors, crossarms, and other physical fixtures onto the property. Thus, the court vacated the order of prejudgment possession and directed the trial court to conduct further proceedings. Further, since the maintenance of power transmission lines is a matter of urgency, the court issued a preemptory writ in the first instance.

* * *

Los Angeles Waterkeeper v. State Water Resources Control Board (Cal. Ct. App., Feb. 27, 2023, No. B309148) 2023 WL 2237785.

BACKGROUND: Los Angeles Waterkeeper (Petitioner), an environmental advocacy group filed petitions for writs of mandate against the State Water Resources Control Board (the State Board) and the Los Angeles Regional Water Quality Control Board (the Regional Board, and together with the State Board, referred to as the Boards), alleging that the Boards violated a duty under the California Constitution and Water Code by permitting four publicly owned treatment works (POTWs) to discharge treated wastewater without evaluating whether the quantities discharged were reasonable or whether the treated wastewater could be recycled or otherwise put to better use, and that the Regional Board issued permits without making findings required under CEQA. The Boards demurred. The trial court sustained the demurrer as to the Regional Board but overruled the demurrer as to State Board. Following a bench trial, the trial court entered judgment for Petitioner, issued, writs of mandate, and awarded Petitioner its attorney fees. The State Board appealed and Petitioner cross-appealed.

HOLDING: The Court of Appeal affirmed in part and reversed in part, holding that (1) the Regional Board had no duty to prevent purportedly unreasonable discharge of treated wastewater; (2) assuming the State Board had a duty to prevent waste and unreasonable use of water, Petitioner failed to allege that the State Board acted in derogation of duty and thus failed to state a claim for mandamus; and (3) CEQA did not require the Regional Board to make findings regarding environmental impacts of wastewater discharge permits and whether there were feasible alternatives or mitigation measures.

KEY FACTS & ANALYSIS: In 2017, the Regional Board renewed permits allowing four POTWs to discharge millions of gallons of treated wastewater daily into the Los Angeles River and the Pacific Ocean. Petitioner sought review by the State Board, which declined review.

Petitioner filed petitions for writs of mandate against the Boards. Petitioner contended the Boards had a duty under Article X, Section 2 of the California Constitution (Article X, Section 2) and the Water Code to prevent the waste and unreasonable use of water. Petitioner alleged the Boards had failed in that duty by issuing the permits without evaluating whether the quantities discharged were reasonable, or whether the treated wastewater could be recycled or otherwise put to better use. Petitioner further alleged the Regional Board issued the permits without making findings required under CEQA.

California Constitution and Water Code Claims

The Court of Appeal first analyzed whether the Boards violated the California Constitution and the Water Code's requirement to prevent the unreasonable use of water. The Court of Appeal determined that the laws referenced provided the Legislature, State Board, and courts to adjudicate and regulate unreasonable uses. First, the Court of Appeal concluded that the laws did not impose a duty on the Regional Board to prevent POTWs from unreasonably using water, or require the Regional Board to conduct an assessment of the proposed use of water for reasonableness, but only to avoid unreasonably using water itself. Second, the Court of Appeal determined that Petitioner failed to plead facts establishing a derogation of the State Board's duty, assuming any existed, to prevent unreasonable uses of water. The Court of Appeal observed that the State Board's duty, if any, was highly discretionary, and that Petitioner had failed to allege that the State Board's decision not to investigate the POTWs' proposed uses abused that discretion.

CEQA Claims

Petitioner challenged the trial court's ruling that the Regional Board was exempt from complying with CEQA when issuing wastewater discharge permits. Petitioner contended that Public Resources Code Section 21002 (Section 21002) obligated the Regional Board to make findings about whether the project had significant and unavoidable impacts. The Court of Appeal disagreed, finding that Section 21002 was not an independent directive to the Regional Board to complete environmental review, independent of the environmental impact report (EIR) process. The Court of Appeal considered that environmental concerns would be otherwise addressed during the wastewater discharge process. The Court of Appeal concluded that Section 21002 has force only to the extent an agency is required to follow the environmental review process in chapter 3 of CEQA.

Attorney Fees

Because all judgements against the State Board were reversed, the Court of Appeal also reversed the attorney fees aware to Petitioner awarded by the trial court on the unreasonable use of water claims.

EXPLANATORY NOTE: Opinion previously published at 88 Cal.App.5th 874; ordered not citable (March 27, 2023).

* * *

Spencer v. City of Palos Verdes Estates (2023) 88 Cal.App.5th 849.

BACKGROUND: Non-local surfers, who encountered alleged harassment from a local surf group when trying to access a premier surf spot at a City of Palos Verdes Estates (City) beach, and non-profit organization dedicated to preserving coastal access (collectively, the Plaintiffs) brought an action against the local surf group, some of group's individual members, and the City alleging conspiracy to deny access under California Coastal Act (Act or Coastal Act). The Superior Court granted the City's motion for judgment on the pleadings. Plaintiffs appealed.

HOLDING: The Court of Appeal reversed the judgement of the superior court, holding: (1) a masonry and wood fort built on the City beach by the local surf group qualified as "development" requiring a permit under the Act; (2) the City, as landowner, could be held strictly liable under the Act for the unpermitted fort; and (3) the Plaintiffs successfully stated a conspiracy claim against the City under the Act based on the alleged harassment.

KEY FACTS & ANALYSIS: Lunada Bay is a premier surf spot located in, and owned by, the City. The Lunada Bay Boys (Bay Boys) are a group of young and middle-aged men, local to the City, who consider themselves to be the self-appointed guardians of Lunada Bay. One of their tenets is to keep outsiders away from the surf location. They accomplish this allegedly through threats and violence. The Plaintiffs brought an action against the Bay Boys, the City, and some individual members of the Bay Boys under the Act.

The Plaintiffs alleged that the City conspired with the Bay Boys essentially to privatize Lunada Bay, depriving nonlocals of access, in at least two ways: (1) by allowing the Bay Boys to build on City property a masonry and wood structure, known as the Rock Fort, which the Bay Boys used as their hangout; and (2) with knowledge of the Bay Boys' conduct, being complicit in the Bay Boys' harassing activities and tacitly approving them. The trial court granted the City judgment on the pleadings, on the joint bases that: (1) merely allowing the Rock Fort to be built was not actionable against the City, in the absence of allegations that the City itself performed its construction or entered into an advance agreement that it be built; and (2) condoning the Bay Boys' acts of harassment is not a Coastal Act violation as neither harassment itself, nor standing by while it occurs, is conduct reached by the Act. The Court of Appeal reversed on both theories.

With regard to the Rock Fort, the Court of Appeal found that the fort qualified as "development" under the Act, which therefore required a permit under the Act. The Court of Appeal then relied on two cases, *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com*. (1984) 153 Cal.App.3d 605, and *Lent v. California Coastal Com.* (2021) 62 Cal.App.5th 812, 832 (*Lent*), to find that a landowner could be liable for Coastal Act violations on their land, and, that by maintaining an unpermitted structure on their property, a landowner "undertakes activity" for the purposes of the Act. Accordingly, the City could be liable under the Act for Rock Fort, even though it did not build it.

With regard to the harassment, the Court of Appeal first found that harassment *may* qualify as development under the Act. The Court of Appeal compared the Bay Boys' alleged activities of running people off and engaging in fights to a lock gate with a security guard, which had previously been found to constitute development under the Act. The Court of Appeal also found that the

Plaintiffs sufficiently alleged that the City could be liable for conspiracy to commit the unpermitted development under the Act. The Plaintiffs alleged that City residents and the city council did not want outsiders in the city and city officials had previously stated a desire to keep outsiders away. They also alleged that the City was aware of the Bay Boys and had not stopped their activities, and had actually instituted their own acts to keep outsiders away by issuing traffic and parking citations.

The Court of Appeal therefore reversed the judgment of the trial court, finding that the Plaintiffs had sufficiently alleged that the City could be liable under the Act for the Bay Boys' activities.

* * *

Make UC a Good Neighbor v. Regents of University of California (2023) 88 Cal.App.5th 656.

BACKGROUND: Petitioner Make UC a Good Neighbor (Petitioner) sought review of an environmental impact report (EIR) issued under CEQA for the University of California, Berkley's (university's) long-range development plan and its immediate plan to construct a student housing project. The Superior Court denied the writ petition, and Petitioner appealed.

HOLDING: The Court of Appeal reversed and remanded with directions, holding: (1) the range of alternatives in the program EIR was not manifestly unreasonable; (2) the EIR failed to provide a valid reason for the decision not to analyze any alternative locations for the proposed student housing project; (3) the EIR's objective to develop and revitalize a university-owned property to help meet student housing needs did not convey any site-specific objective which excused the failure to analyze any alternative sites for the housing project; (4) the university did not engage in improper piecemealing; (5) a fair argument existed that the proposed housing project would contribute to noise in neighborhood due to loud student parties; and (6) the evidence was insufficient to show that the proposed housing project would have a potential environmental effect due to social or economic impacts on displacing existing residents, houses, or businesses.

KEY FACTS & ANALYSIS: The university issued an EIR for its long range development plan and an immediate plan to build student housing near a current historic landmark. Petitioner, a local citizens group, challenged the EIR on several grounds. The Court of Appeal rejected the bulk of their arguments, but did find that the EIR failed to justify its failure to consider alternative project sites for the student housing project, and failed to assess potential noise impacts from student parties. For those reasons, the Court of Appeal reversed and remanded for the trial court to order the university to fix the errors in the EIR. The Court of Appeal addressed each of Petitioner's arguments in turn:

Petitioner's first argument was that the university failed to analyze an alternative to its development plan that would limit student enrollment. The Court of Appeal disagreed. The EIR identified eight alternatives and excluded four from full consideration for various reasons. Two of the alternatives specifically included reduced enrollment of undergraduate students. The EIR rejected alternatives for reducing graduate students because that was one of the core objectives of the project. Considering the range of alternatives considered, the Court of Appeal found that the alternatives discussed in the EIR were not manifestly unreasonable. While the university was

required to mitigate projected student increases, it was not required to consider settling enrollment levels. Petitioner failed its burden to demonstrate that the range of alternatives was manifestly unreasonable.

Petitioner's next argument was that the alternatives analysis for the student housing project failed to analyze alternative locations for the project. The Court of Appeal agreed, holding that, while not all projects must consider alternative sites, they are required to explain the failure to do so. The university both failed to analyze alternative sites and did not give a reason for that failure, violating CEQA.

Third, the Court of Appeal rejected Petitioner's argument that the university improperly piecemealed its long range development plan by limiting its scope to the campus and neighboring properties. The Court of Appeal found it was "perfectly rational" for the university to develop a coherent vision for the campus and its neighboring properties while developing separate plans for more remote properties.

Fourth, the Court of Appeal agreed with Petitioner that the EIR failed to analyze potential noise impacts from student parties in the residential areas near campus, where evidence showed that student parties had been an issue for years. Given the long track record of student parties, that factor was required to be included in the noise analysis.

Finally, the Court of Appeal rejected Petitioner's claim that the EIR violated CEQA by failing to address the impacts on population growth and the displacement of residents. The EIR analyzed these factors and imposed mitigation measures related to them. A mitigation measure requiring the area to provide summaries of enrollment projections and housing productions to be included in planning projections was an enforceable mitigation measure and properly included in the EIR. The Court of Appeal also found that the evidence was insufficient to show that the housing project would have an environmental impact due to social or economic impacts of displacing residents, or driving up home prices, because there was no evidence in the record supporting Petitioner's claim.

The Court of Appeal reversed the trial court's denial of the petition, and remanded to require the university to fix its CEQA analysis regarding alternative sites for the housing project and its noise analysis.

* * *

Arcadians for Environmental Preservation v. City of Arcadia (2023) 88 Cal.App.5th 418.

BACKGROUND: Arcadians for Environmental Preservation (AEP), founded by the neighbor of a home-remodel project, filed a petition for writ of administrative mandamus challenging the approval by the City of Arcadia (City) of a homeowner's application to expand the first story of her single-family home and add a second story. AEP contended that the project was not categorically exempt from CEQA as a minor alteration to an existing private structure. The Superior Court denied petition, finding AEP failed to exhaust administrative remedies. AEP appealed.

HOLDING: The Court of Appeal affirmed, holding: (1) AEP failed to exhaust administrative remedies for the argument that the CEQA exemption did not apply; (2) the City provided adequate

public notice that the minor-alteration exemption would be discussed at the City's hearings; (3) the City made an implied finding that no exception barred application of the exemption; and (4) AEP failed to establish that the cumulative-effects exception precluded the application of the minor-alteration exemption.

KEY FACTS & ANALYSIS: Following the City planning commissions' vote to conditionally approve the project, the applicant's neighbor appealed the approval to the city council, contesting certain components of the project's design. The notice of public hearing for the appeal stated that the city council would consider "Categorical Exemption per Section 15301 from the California Environmental Quality Act (CEQA) for an addition to an existing structure" as well as the approval of the project. The city council ultimately upheld the project approval and found that the CEQA exemption applied. The neighbor formed AEP and petitioned for writ of administrative mandamus contending that the City erred in finding that the exemption applied.

The Court of Appeal first found that AEP failed to exhaust its administrative remedies. No member of AEP objected to the project at the administrative proceedings. While the neighbor's administrative appeal referenced environmental impacts of the project, it did not mention any indication to the applicability of the private structures exemption. Relying on previous case law, the Court of Appeal found that a request for an environmental impact report for a project alone is not sufficient to preserve a challenge to the application of a specific CEQA exemption. The Court of Appeal distinguished *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745 (*SORE*) on the ground that in *SORE,* unlike in the case at issue, the comments on the project reasonably apprised that city of the possible legal challenge.

Second, the Court of Appeal found that the exhaustion requirement was not excused by any deficiency in the notice. Both the planning commission and city council notices of public hearing indicated the exemption considered. Although there were minor inconsistencies in the identification of the exemption, the notices were sufficiently clear so that no prejudice occurred which would defeat the exhaustion requirement.

Third, the Court of Appeal found that AEP had not demonstrated that the City failed to proceed as required by law when it impliedly found no exception to the exemption applied. In finding the exemption applied, the City did not expressly state whether an exception to the exemption removed the project from its scope. Specifically, AEP contended that the cumulative impacts exception or the unusual circumstances exception applied. The Court of Appeal cited case law finding that a city impliedly finds that no exception applies when it finds that an exemption *does* apply. While cities may not ignore evidence in the record that an exception would apply, it does not have to affirmatively make a finding.

Finally, the Court of Appeal concluded that AEP failed to demonstrate that the City erred in impliedly finding that the cumulative effects exception did not apply. While the written administrative appeal discussed the impacts of "multiple large scale projects," it did not provide any evidence of what impacts were created, nor did it reference any other additions to single family homes contributing to the speculative impacts.

For these reasons, the Court of Appeal affirmed the judgment of the trial court upholding the City's approval of the project.

* * *

IBC Business Owners for Sensible Development v. City of Irvine (2023) 88 Cal.App.5th 100.

BACKGROUND: Petitioner IBC Owners for Sensible Development (Petitioner) filed a petition for writ of mandate to challenge the approval by the City of Irvine (City) of an office complex development project, alleging the City's determination that the development project would have no further environmental effects other than those studied in a program environmental impact report (EIR) for a specific area of the City known as the Irvine Business Complex, and adoption of an addendum to the program EIR, did not comply with CEQA. The Superior Court granted the petition, and City and developer appealed.

HOLDING: The Court of Appeal affirmed the trial court's grant of the petition, holding: (1) the new vehicle miles traveled metric did not apply; (2) the project did not violate the traffic impact assumptions in the program EIR; (3) evidence did not support the City's conclusion that greenhouse gas emissions associated with the development project were consistent with the program EIR; (4) unusual circumstances existed which precluded the City's implied determination that and exception to a CEQA exemption did not apply; and (5) a reasonable possibility existed that the development project might have a significant impact on the environment due to greenhouse gas emissions.

KEY FACTS & ANALYSIS: The Irvine Business Complex (IBC) covers roughly 2,800 acres in the City. In 2010, the City adopted a plan to guide development of the IBC. It also prepared and approved a program environmental impact report (the 2010 PEIR) that studied the effects of the development plan under CEQA. Several years later, a developer submitted a plan to redevelop a 4.95-acre parcel in the IBC. It sought to replace the existing two story, 69,780-square-foot building with a 275,000-square-foot office complex, consisting of five-and six-story office buildings and a seven-story parking structure. The City determined all the environmental effects of the proposed project had been studied in the 2010 PEIR, and it found the project would have no further significant environmental effects. It approved the project over the objections of Hale Holdings, LLC (Hale Holdings), the managing member of Petitioner. Petitioner then filed a petition for writ of mandate. The trial court granted the writ and entered judgment in favor of the Petitioner.

The City and developer appealed, arguing the City correctly approved the project. First, they contended the City correctly found all the project's environmental effects were within the scope of the 2010 PEIR. Second, they asserted the project was exempt from environmental review. The Court of Appeal disagreed with both contentions for the reasons set forth below and affirmed.

On the first claim, the Petitioner alleged the City incorrectly found that all of the project's environmental effects were within the scope of the 2010 PEIR on two grounds: (1) the traffic analysis failed to perform a vehicle miles travelled (VMT) analysis adopted as part of the CEQA guidelines after the PEIR was adopted, and (2) the City had insufficient evidence to support its

findings that the project's greenhouse gas emissions were consistent with the 2010 PEIR and would not have a significant environmental impact.

On the VMT claim, the Court of Appeal found that the City's traffic findings were supported by substantial evidence based on level of service (LOS) for the project and evaluated in the 2010 PEIR. The City began undertaking the addendum to the 2010 PEIR before July 2020, the date after which projects require a VMT analysis. The Court of Appeal accordingly found that the City's traffic analysis did not violate CEQA.

On the greenhouse gas impacts claim, the Court of Appeal found that the City's conclusion that the project's greenhouse gas analysis would be consistent with the 2010 PEIR and that its emissions would comply with the thresholds adopted by the South Coast Air Quality Management District (SCAQMD) were not supported by substantial evidence.

On the first analysis, the addendum's analysis failed to indicate the amount of emissions the project would produce, and relied on the implementation of mitigation measures to find that the project would meet the 2010 PEIR's target of net zero emissions. This analysis alone was insufficient. Furthermore, the record contained evidence that the project's emissions could have significant environmental effects through draft documents mentioning a study prepared by the City indicating the greenhouse gas output.

On the second analysis, the Court of Appeal found that as a matter of law, the project would not comply with the thresholds adopted by SCAQMD. The City's conclusion was based on a SCAQMD draft guidance evaluating CEQA thresholds, which included a first tier finding that CEQA-exempt projects would meet guidance thresholds. However, the Court of Appeal rejected the City's finding that the project was exempt.

The City argued that any deficiencies in its addendum were inconsequential because the project was categorically exempt from CEQA as a Class 32 infill exemption. The Court of Appeal found that the City improperly impliedly found that the unusual circumstances exception to the exemption did not apply, because the record contained substantial evidence that unusual circumstances existed which would support a fair argument of a reasonable possibility that the project would have a significant effect on the environment due to the unusual circumstances.

The substantial evidence of unusual circumstances was that the project was not a standalone project, but rather part of an overarching "Vision Plan" for the IBC. In the context of the IBC, the project would replace a 2 story building with a 6 story one that would be taller than the other buildings nearby. The project would also involve the largest amount of internal density transfer in the IBC by a considerable amount. The Court of Appeal found that the resulting density was sufficient evidence to support a finding of unusual circumstances. The Court of Appeal also found that the unusual circumstances could support a fair argument of a reasonable possibility that the project would have a significant effect on the environment because the project's estimated greenhouse gas emissions appeared to greatly exceed the tier 3 thresholds in SCAQMD's draft guidance. The City's consultants had also indicated in an internal correspondence that it was unlikely that mitigation measures would lower emissions below that threshold due to the size of the project.

For the above reasons, the Court of Appeal affirmed the judgement of the trial court granting the petition for writ of mandate.

* * *

Save Our Capitol! v. Department of General Services (2023) 87 Cal.App.5th 655.

BACKGROUND: Organizations filed petitions for writ of mandate, contending that the environmental impact report (EIR) prepared by State entities, namely Department of General Services and Joint Committee on Rules of the California State Senate and Assembly (collectively DGS), regarding environmental effects of the proposed demolition and construction of the annex and other facilities at the State Capitol did not comply with CEQA. The Superior Court denied the petitions, and the organizations appealed.

HOLDING: The Court of Appeal affirmed in part, reversed in part, and remanded with instructions, holding: (1) the project description was impermissibly unstable with regard to the exterior design of the new annex; (2) the EIR's discussion of impacts on historical resources was deficient regarding the exterior design of new annex; (3) the EIR contained an adequate plan to mitigate construction impacts on trees; (4) the EIR inadequately analyzed aesthetic impacts of a visitor center; (5) the EIR inadequately analyzed aesthetic impacts of the new annex on light and glare; (6) sufficient evidence supported a finding that impacts from construction-related traffic would be less than significant; and (7) the EIR failed to analyze a reasonable range of alternatives.

KEY FACTS & ANALYSIS: DGS prepared a EIR to determine the environmental effects of a project which would significantly affect the California State Capitol Building in Sacramento (Historic Capitol). DGS would demolish the State Capitol Building Annex attached to the Historic Capitol (the existing Annex) and replace it with a larger new annex building (the new Annex), construct an underground visitor center attached to the Historic Capitol's west side, and construct an underground parking garage east of the new Annex.

Petitioner organizations (Petitioners) filed a writ of mandate contending the EIR did not comply with CEQA. The trial court denied the petitions. Plaintiffs contended (1) the EIR lacked a stable project description; (2) the EIR did not adequately analyze and mitigate the project's impacts on cultural resources, biological resources, aesthetics, traffic, and utilities and service systems; (3) the EIR's analysis of alternatives to the project was legally deficient; and (4) DGS violated CEQA by not recirculating the EIR a second time before certifying it.

Project Description

On the first claim, Petitioners argued the project's description was not stable because it did not disclose the project's glass exterior, failed to disclose temporary construction areas, and did not substantiate that a significant increase in the annex's size would not increase the number of employees working on site.

The Court of Appeal found that a change to a glass exterior in the final EIR the public was foreclosed from commenting on it, and this rendered the project description between the draft and

final EIR insufficiently stable, accurate, and finite under CEQA. The Court of Appeal found that the remaining claims did not establish an inadequate project description. The recirculated draft EIR contained information regarding construction areas, and determined that a speculation on the number of employees did not determine the accuracy of the project description.

Impacts

Petitioners contended the EIR did not analyze adequately the project's impacts on cultural or historic resources, biological resources, aesthetics, traffic, and utilities and service systems.

Cultural Resources

DGS concluded the project's impacts on historical resources was significant and unavoidable. It adopted findings and a statement of overriding considerations describing why it nonetheless approved the project. The Court of Appeal found that the analysis was deficient because it did not account for public comment on the new Annex's exterior glass design. Because the public did not have an opportunity to comment on the Annex's exterior design, the final EIR did not have an opportunity to respond. Those written responses would describe the disposition of any significant environmental issues raised by commenters. The Court of Appeal rejected DGS' remaining arguments regarding cultural resources as conclusory.

Biological Resources

Petitioners argued that the impacts analysis for trees and birds was deficient. On trees, the EIR disclosed the number of trees which would be effected by the project and acknowledged how construction activities would impact trees. While the EIR did not explain how trees would be damaged by compacted soil in root zones, the EIR adequately described the trees affected, and imposed mitigation measures to protect trees that would remain in the project areas. The fact that the annex was enlarged in the final EIR such that the project may impact both city and state owned trees did not require a different analysis on impacts or require different mitigation because the trees would be impacted in the same way and the same mitigation measures would apply. The Court of Appeal also determined that DGS could rely on abiding by regulations and a tree protection plan as a valid mitigation measures.

The Court of Appeal found that Petitioner's arguments regarding bird strike death was unsupported by any evidence, and the EIR discussed a pattern on the glass to prevent bird strikes.

Aesthetics, Lights, and Glare

Petitioners contended substantial evidence did not support the EIR's conclusion that the visitor center would not significantly impair the scenic vista of the Historic Capitol from the Capitol Mall. They claimed the finding was not supported because the visitor center would result in a large hole in the ground which would impact lower plaza elevations, and because no elevations, view simulations, or other means of evaluating the visual impact were provided in the EIR.

Petitioners also claimed the EIR's finding that the project would be similar to the existing visual setting and would not substantially degrade the site's visual character or quality lacked substantial evidence. The conclusion was allegedly not supported by analysis from a professional with expertise, such as an architectural historian.

Petitioners further contended the EIR did not meaningfully analyze the Annex's impacts on light and glare. Compliance with building standards did not automatically render impacts insignificant.

On the first claim, the Court of Appeal found that, while CEQA does not expressly require visual simulations, an EIR must contain enough detail for people to understand meaningfully the issues raised. Due to the importance of the project site, the Court of Appeal concluded that CEQA required the EIR to render or represent the view of the west side of the project from the Capitol Mall, and the EIR was deficient for failing to do so.

The Court of Appeal rejected Petitioners' second claim, because Petitioners failed to support their argument that substantial evidence did not support DGS' aesthetic finding.

Finally, the Court of Appeal agreed with Petitioners that the EIR did not meaningfully analyze impacts on light and glare due to the change to a glass exterior. Although the final EIR stated the project would meet CALgreen standards on light and glare, the EIR failed to analyze whether the impacts on light and glare would still be significant despite that compliance.

Traffic and Utilities

The Court of Appeal rejected Petitioners' two arguments on the adequacy of the EIR's traffic analysis. First, it found that substantial evidence supported DGS' findings that the project would not increase the number of employees and thereby impact traffic. The Court of Appeal rejected Petitioners' utilities claims on similar grounds. Second, it found that the EIR reasonably mitigated impacts from construction traffic through a traffic management plan approved by the City engineer, and identified alternative circulation routes.

Alternatives Analysis

Petitioners argued that the project failed to analyze an alternative of moving the visitor center to the south side of the Historic Capitol, where the draft EIR showed a parking garage which was moved in the final EIR. Petitioners contended that the public had no ability to raise the alternative, because the change did not occur until the final EIR.

The Court of Appeal agreed with Petitioners. Although the final EIR analyzed 11 alternatives, it failed to analyze the alternative suggested by Petitioners as a way to feasibly attain most objectives while lessening the project's significant impacts the west lawn, a historic resource.

The Court of Appeal separately rejected Petitioners' claim that the EIR did not sufficiently analyze the alternative of renovating the annex, finding Petitioners failed to raise an argument that the EIR did not satisfy CEQA, but rather Petitioners merely claimed DGS was biased.

Recirculation

Other than the impacts already discussed above (project description, aesthetics, cultural resources), the Court of Appeal rejected Petitioners' arguments that the EIR should have been recirculated based on changes in the final EIR increasing the number of impacted trees and an extension of the project boundary. DGS reasonably concluded that these changes were not "significant new information" and would not exacerbate existing impacts.

The matter was remanded with directions to issue a peremptory writ of mandate directing DGS to vacate partially its certification of the EIR and to revise and recirculate the deficient portions of the EIR consistent with the opinion before it considered recertifying the EIR. During the remand, DGS could proceed only with hard and soft demolition of the existing Annex.

DISSENT: Justice Mauro concurred in part and dissented in part, and would have found that the draft EIR sufficiently analyzed the aesthetic impact on the west size, even without a visual simulation.

* * *

Ventura29 LLC v. City of San Buenaventura (2023) 87 Cal.App.5th 1028.

BACKGROUND: A developer brought this action against the City of San Buenaventura (City), asserting causes of action for inverse condemnation, private nuisance, trespass, and negligence, arising from the City engineer's modification of an approved grading plan to require developer to remove uncertified fill, which the City had dumped on the property 38 years before the developer acquired it. The Superior Court sustained the City's demurrer without leave to amend, and the developer appealed.

HOLDING: The Court of Appeal affirmed, holding: (1) the developer's contention that time-sensitive construction would come to a grinding halt with no forward progress did not excuse its failure to exhaust administrative remedies; (2) the City engineer's alleged oral modification of the grading plan did not excuse developer from having to exhaust administrative remedies; (3) the developer's lack of knowledge of its right to appeal did not excuse its failure to exhaust administrative remedies; (4) the City was not equitably estopped from asserting that the developer forfeited its inverse condemnation claim by failing to exhaust administrative remedies; and (5) the developer's concession that prior owners may have known of the uncertified fill on the property precluded application of the discovery rule.

KEY FACTS & ANALYSIS: The Court of Appeal first rejected the developer's argument that exhausting administrative remedies would have halted constructions. The developer would still have been required to remove the fill even without the City engineer's modification, and could have done so while the appeal was pending. The Court of Appeal also stated "[p]ermitting a developer to bring an action for damages without exhausting its administrative remedies would have a chilling effect on governmental regulation of new construction."

The developer next contended that the City engineer's oral modification of the grading plan violated the municipal code's requirements that modifications be in writing. Even if this was true, the absence of a writing did not excuse the failure to exhaust administrative remedies.

The Court of Appeal found that the developer's lack of knowledge of the exhaustion requirement did not excuse its failure, even if the City failed to inform the developer if the decision was appealable. The Court of Appeal referenced the sophistication of real estate developers in particular.

Fourth, the Court of Appeal found that the City was not equitably estopped from asserting a forfeiture by failing to inform the developer of a right to appeal. The developer cited no authority imposing a duty on the City to inform a real estate developer of the right to appeal a decision by the City engineer. Accordingly, the developer could not argue that the City was estopped from contending the developer forfeited its claims by failing to exhaust administrative remedies. The Court of Appeal distinguished *Uniwill v. City of Los Angeles* (2004) 124 Cal.App.4th 537. *Uniwill* held that the 90-day filing deadline of Government Code section 66499.37 does not apply where, after approval of a tentative tract map and commencement of the project, a city demands that the developer comply with additional conditions but the demand constitutes a mere threat instead of a requirement imposed by the advisory agency. The decision at issue did not involve Government Code section 66499.37.

Finally, the Court of Appeal found that the remaining causes of action for private nuisance, trespass, and negligence were barred by the applicable statutes of limitation. The "discovery rule" could not save the causes of action because the developer had conceded that a prior owner of the property possibly was aware that the City had dumped the fill on the property. The complaint failed to show that prior owners would have been unable, despite reasonable diligence, to have discovered the uncertified 80 million pounds of fill. Therefore, the Court of Appeal affirmed the judgement of the trail court, sustaining the City's demurrer.

* * *

Save Livermore Downtown v. City of Livermore (2022) 87 Cal.App.5th 1116.

BACKGROUND: Save Livermore Downtown (Petitioner) opposed an affordable housing project in the City of Livermore (City) through a petition for writ of mandate. The petition alleged that the project violated planning and zoning laws and that the City violated CEQA. The Superior Court denied the petition, and Petitioner appealed. The Developer also moved for a bond, which the Superior Court granted.

HOLDING: The Court of Appeal affirmed, holding: (1) the project was consistent with City's downtown specific plan, as required for its approval, (2) the City's findings that the project was consistent with the specific plan were adequate; (3) the project was exempt from CEQA review; (4) the trial court acted within its discretion in determining that a bond would not cause Petitioner undue economic hardship; and (5) the trial court acted within its discretion in determining that the organization filed the petition for the purpose of delaying project, as would support imposition of bond.

KEY FACTS & ANALYSIS: The City approved an affordable housing project in its downtown area. This area was subject to a specific plan. The specific plan was subject to an environmental impact report (EIR), supplemental environmental impact report (SEIR), and several addenda for amendments thereto. One of the addenda contemplated the project.

The City found that the project conformed with the general and specific plans, and that no changes would trigger the need to revise an EIR, SEIR, or any addenda. The City found that the project was exempt from CEQA because it was consistent with a certified EIR, and separately because it was infill development.

Petitioner challenged the project on the ground that it violated zoning and planning laws and that it was inconsistent with the specific plan, and not exempt from CEQA. The developer moved for a bond pursuant to Code of Civil Procedure section 529.2. The Superior Court denied the petition and granted the motion for a bond.

The Court of Appeal assessed the City's determination that the project was consistent with the general and specific plans, and found that Petitioner failed to show any standard was violated, and substantial evidence supported the City's determination. With regard to the specific plan, Petitioner only pointed to inconsistencies between the project's details and the specific plan; however, the City found, with supporting evidence, that the project was consistent with the "objectives, policies, general land uses, and programs" of the specific plan; moreover, the Housing Accountability Act (Gov. Code, § 65589.5) had a role in making the consistency determinations. Petitioner did not show that the project was inconsistent with the overarching policies, and, when evaluating the claimed in consistencies, the Court of Appeal found that the matters were subjective, and the record supported the City's conclusions. The court's analysis is explained in the quoted passages, below:

> "[I]t is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be 'in harmony' with the policies stated in the plan. [Citation.] It is, emphatically, not the role of the courts to micromanage these development decisions." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719, 29 Cal.Rptr.2d 182 (*Sequoyah Hills*).) We decide merely whether city officials "considered the applicable policies and the extent to which the proposed project conforms with those policies, whether the city officials made appropriate findings on this issue, and whether those findings are supported by substantial evidence." (*Id*. at pp. 719–720, 29 Cal.Rptr.2d 182.) We "defer to a procedurally proper consistency finding unless no reasonable person could have reached the same conclusion." (*Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal.5th 141, 155, 211 Cal.Rptr.3d 230, 385 P.3d 386.)
>
> A second factor is relevant because this project will provide affordable housing. Under the Housing Accountability Act (Gov. Code, § 65589.5) (HAA), a local agency may not disapprove a housing development project for very low-, low-, or moderate-income households, nor condition approval in a manner that renders the project infeasible, unless it makes one of several specific findings, among them that the project would have a specific, adverse impact on public health and safety or that the project is inconsistent with both the zoning ordinance and land use designation at the time the application was deemed complete. (Gov. Code, § 65589.5, subd. (d)(2) & (5).) And for any housing development, without regard to income-level, a local agency may not disapprove a project that complies with "applicable, *objective* ... standards and criteria, including design review standards," in effect when the application was deemed complete, unless the project would have a specific, adverse impact on public health or safety that cannot feasibly be mitigated or avoided. (Gov. Code, § 65589.5, subd. (j)(1), italics added.) An objective standard is one that can be applied without "personal interpretation or subjective judgment." (*California Renters Legal Advocacy &*

Education Fund v. City of San Mateo (2021) 68 Cal.App.5th 820, 840, 283 Cal.Rptr.3d 877 (*California Renters*).)

In reviewing challenges to approval of a project, we review the City's actions rather than the trial court's decision. (*California Renters*, at p. 837, 283 Cal.Rptr.3d 877.) As a general matter, we determine "whether the City prejudicially abused its discretion in approving the [p]roject by not proceeding in a manner required by law, by reaching a decision not supported by its findings, or by making findings not supported by the evidence." (*Bankers Hill 150, supra,* 74 Cal.App.5th at p. 768, 289 Cal.Rptr.3d 268.)

When a project is subject to the HAA, however, a different standard may apply: *California Renters*, in reviewing a decision denying an application to build new housing, explained that instead of asking, "as is common in administrative mandamus actions, 'whether the City's findings are supported by substantial evidence' [citation], we inquire whether there is 'substantial evidence that would allow a reasonable person to conclude that the housing development project' complies with pertinent standards." (*California Renters, supra,* 68 Cal.App.5th at p. 837, 283 Cal.Rptr.3d 877; Gov. Code, § 65589.5, subd. (f)(4).) But the court in *Bankers Hill* [*v. City of San Diego*] recognized that this "stringent, independent review" may be unnecessary where, as here, the agency approves a project. (*Bankers Hill 150, supra,* 74 Cal.App.5th at p. 777, 289 Cal.Rptr.3d 268.) In fact, there seems to be no practical difference in the two standards when an agency finds a project consistent with its general plan, as even under the ordinary standard that finding "'can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion.'" (*The Highway 68 Coalition v. County of Monterey* (2017) 14 Cal.App.5th 883, 896, 222 Cal.Rptr.3d 423 [applying deferential standard to consistency determination not involving the HAA].) Using either lens to review the project's consistency with the specific plan—asking whether there is substantial evidence from which a reasonable person could find the project consistent, or whether there is substantial evidence supporting the City's finding of consistency—leads to the same conclusion.

[Petitioner] fails to show the project is inconsistent with the "objectives, policies, general land uses and programs" of the Downtown Specific Plan under these standards. (*Families Unafraid, supra,* 62 Cal.App.4th at p. 1336, 74 Cal.Rptr.2d 1.) In finding the project consistent with the plan, the City explained that the plan's policies include allowing housing of a range of types and densities and focusing on redevelopment of "catalyst" sites like the former Lucky's parcel, and that the purpose of the plan was to revitalize the City's historic core as the pedestrian-oriented center of the City. The project would further this policy by developing affordable residential units and pedestrian connections to First Street. The City also found the project conformed with applicable development standards for setbacks, height, and open space: it would dedicate approximately 0.7 acres for a public park; and it included façades with horizontal plane changes at regular intervals, vertical modules, articulated and detailed building corners, minimal streetside setbacks to reinforce continuous public streets and pathway space, and

> distinctive architectural details that complemented other traditional building styles nearby.
>
> [Petitioner] makes no effort to show the project would not promote the overarching policies of providing housing, including affordable housing, and revitalizing the Downtown area. Rather, its challenges are limited to asserted inconsistencies between details of the project and standards in the Downtown Specific Plan. We reject each of Petitioner's specific complaints in turn.

The Court of Appeal also rejected the contention that the findings were conclusory and inadequate. Although the findings were brief, the findings found the project conformed with applicable standards and referenced architectural details supporting its conclusion. The findings did not need to address every detail raised by Petitioner.

Petitioner also contended that the project was not exempt from CEQA because information from the regional water quality control board (Water Board) about the presence of certain compounds in soil and groundwater was new information that took the project out of the CEQA exemption. The SEIR specifically considered the chance that the project contained contaminants. The City could therefore reasonably conclude that the evidence was present in the site's earlier use.

Finally, The Court of Appeal found that the trial court had discretion to require payment of the bond. There was evidence that the Petitioner had many wealthy members who gave substantially to the Petitioner. There was also evidence that the petition was filed to delay, particularly because it was filed at the very last moment, and sought an extension of time which caused delay on the hearing on the merits.

EXPLANATORY NOTE: Review filed (March 7, 2023).

* * *

AIDS Healthcare Foundation v. City of Los Angeles (2022) 86 Cal.App.5th 322.

BACKGROUND: Plaintiff Aids Healthcare Foundation (Plaintiff) brought an action in which it sought injunctive relief for a violation of the Political Reform Act (Gov. Code, § 81000 *et seq*.) (PRA) and asserted a claim under state statute allowing a taxpayer action to prevent waste, which action was based on challenge to land-use decisions that the City of Los Angeles' (City's) planning and land-use management committee made while two of its members allegedly were the beneficiaries of an extensive, ongoing bribery scheme directed at committee projects. The Superior Court sustained the City's demurrer without leave to amend, and dismissed the case. Plaintiff appealed.

HOLDING: The Court of Appeal affirmed and held that the 90-day limitations period provided for in statute on challenges to certain land-use and zoning decisions applied to Plaintiff's claims.

KEY FACTS & ANALYSIS: This appeal placed the anti-corruption objectives of the PRA against the desire for certainty in real estate development that justifies the 90-day statute of limitations period in Government Code sections 65009 and 66499.37. Plaintiff challenged land use decisions by the Los Angeles City Council Planning and Land Use Management (PLUM) Committee, made while

two of its members allegedly were the beneficiaries of an extensive and ongoing bribery scheme directed at PLUM committee projects. Plaintiff contended the three-year catch-all statute of limitations in Code of Civil Procedure section 338, subdivision (a), applied to those PRA claims. The City asserted that the more specific 90-day statutes of limitations in Government Code sections 65009 and 66499.37 applied. The trial court found for the City and Plaintiff appealed.

The Court of Appeal agreed with the trial court that Government Code section 65009 controlled. The land use gravamen of the case implicated the 90 day statute of limitations for land use approvals. The Court of Appeal referenced the broad language of Government Code section 65009's reach. The Court of Appeal also concluded that application of the statute of limitations did not unconstitutionally amend the PRA, which did not specify an overarching statute of limitation. Finally, the Court of Appeal rejected Plaintiff's argument that policy considerations overrode the statutory language regarding the limitations period applicable to challenges to land use decisions.

EXPLANATORY NOTE: Review denied (March 22, 2023).

* * *

Save Lafayette v. City of Lafayette (2022) 85 Cal.App.5th 842.

BACKGROUND: City of Lafayette residents (Petitioners or Residents) petitioned for writ of mandate alleging that an apartment development project approved by the City of Lafayette (City) conflicted with the City's general plan and zoning requirements, that the environmental impact report (EIR) was inadequate, and that a supplemental EIR was required. The Superior Court denied the petition. Residents appealed.

HOLDING: In the published portion of the opinion, the Court of Appeal affirmed and as a matter of first impression and held that, under the Housing Accountability Act, Government Code section 65589.5 (HAA), the City's general plan and zoning standards in effect when the original application was deemed complete applied. The Court of Appeal addressed the CEQA issues in the unpublished text.

KEY FACTS & ANALYSIS: The City approved an application in 2011 for the project, and notified the developer that the application was deemed complete, and certified an EIR in 2013. Before the project was approved, the developer and City suspended processing while the developer pursued a smaller proposal. In 2018, the parties revised the original proposal, which the City approved in 2020 after an addendum to the EIR.

The project was consistent with the 2011 standards, and inconsistent with the 2018 standards. The issue on appeal was whether the 2011 standards applied to the project, or whether the time limits in the Permit Streamlining Act, Government Code section 65920 *et seq.* (PSA), deprived the City of the ability to act the application such that the City should have treated the project as a new application in 2018.

The PSA contains no provision for suspension of the project, but also did not contain any provision that an application would be deemed withdrawn or disapproved if an agency fails to act within the dates provided. The Court of Appeal also found that no resubmittal was required under the PSA for an application which was already deemed complete. The PSA also specifically addresses disapproval in another section, and excluded from viable reasons an agency's failure to act. Finally, The PSA's relationship to the HAA favored a finding that would further the development of housing, and thus a statutory construction that the deemed complete application "froze" the applicable standards in 2011. Accordingly, the Court of Appeal upheld the trail court's decision, holding that the 2011 standards applied.

In the unpublished decision, the Court of Appeal addressed Petitioner's claims that the EIR did not adequately examine three impacts, and that an SEIR rather than addendum was necessary.

Special Status Species

The EIR addendum explained that the resumed project was generally similar to the original and would not result in new or substantially more severe impacts to biological resources. The addendum proposed a revision to the original mitigation measures, including requiring a survey for nesting raptors and migratory birds within seven days of beginning construction instead of 14 days. Petitioner contended, based on a letter by an ecologist, that the original EIR and addendum did not address the potential for loss of habitat provided by mature trees that would be removed and the loss of breeding territory for the birds, and that birds would be killed by colliding with windows. Petitioner argued that five protected species either seen or heard from the project site by the ecologist was new information that required an SEIR.

The Court of Appeal rejected Petitioner's arguments. Just like in the original EIR, there was no indication that the special-status birds nested at the project site; the ecologist simply observed or heard the birds at or near the site. Because the original EIR contemplated special-status species, just not as many as the ecologist identified, the Court of Appeal held that the EIR was adequate as an information document and the record contained substantial evidence that there were no new information of substantial importance based on the ecologist.

Wildfire Risk

The 2013 EIR considered whether the project would expose people or structures to significant risks from wildland fires. It explained that the project site was in a "high" risk zone and the applicant would be required to prepare a City-approved vegetation management plan and mandatory compliance with the California Building Code. The 2013 EIR also concluded that the project would not have a significant impact on an emergency response plan. By the time the project resumed, the site was in a "Very High" risk zone and the addendum discussed evacuation and mitigation measures. Petitioner contended the change warranted an SEIR.

The Court of Appeal found that the "Very High" risk designation was not new information because the 2013 EIR already contemplated that the City (as compared to the project site) was in the "Very High" risk zone and there was no new information about the physical environment that required a more detailed analysis than when the site was in a "High" risk zone. Moreover, a new report that explained how the project's additional roadway capacity would improve evacuation times was substantial evidence supporting the City's finding that the EIR discussion was adequate.

Tree Removal.
The 2013 EIR explained that the project would require removing 91 trees and planting 700 trees. The 2020 addendum reported the Project would remove 101 trees but plant 768 trees, and thus the impacts on tree resources would be similar as reported in the 2013 EIR. Petitioner argued that removal of 10 more trees created a substantially more significant environmental impact requiring an SEIR.

The Court of Appeal found that, because many of the trees were still being removed and with the additional 68 trees planted, there was substantial evidence to support the City's conclusion that the change was not substantial.

EXPLANATORY NOTE: Review denied (Mar. 15, 2023).

* * *

Saint Ignatius Neighborhood Assn. v. City and County of San Francisco (2022) 301 Cal.Rptr.3d 641.

BACKGROUND: Saint Ignatius Neighborhood Association (SINA) filed a petition for writ of mandate challenging the approval by City and County of San Francisco (City) of an application submitted by a high school seeking authorization to install four 90-foot light standards in its athletic stadium. The Superior Court denied the petition. SINA appealed.

HOLDING: The Court of Appeal reversed, holding: (1) the project did not qualify for the "existing facilities" exemption under the CEQA Guidelines, and (2) the project did not qualify for the "new construction or conversion of small structures" exemption under the CEQA Guidelines.

KEY FACTS & ANALYSIS: Plaintiff SINA appealed a judgment denying its petition for writ of mandate challenging the approval by the City of an application submitted by Saint Ignatius College Preparatory High School (the school), seeking authorization to install four 90-foot light standards in the school's athletic stadium. SINA contended the City erred by finding the proposed lighting project was exempt from review under CEQA. The Court of Appeal agreed and reversed the judgement of the trial court.

As the Court of Appeal explained, the City's determination that the project was exempt from compliance with CEQA requirements is subject to the abuse of discretion standard found in Public Resources Code section 21168.5. (*Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 693.) Abuse of discretion is established if the City had not proceeded in a manner required by law or if the determination or decision was not supported by substantial evidence. As the court further explained, interpretation of the language of the CEQA Guidelines and the scope of a categorial exemption is a legal question subject to *de novo* review, while the determination that a project fits within an exemption is subject to review for substantial evidence. (*Save our Carmel River, supra,* at pp. 693–694.)

The Court of Appeal first found that the trial court erred in upholding the City's finding that a Class 1 (CEQA Guidelines, § 15301, existing facilities) exemption applied. While the project would not expand an existing stadium, it would result in significantly increased nighttime use, qualifying as a significant expansion of the stadium's existing use. Specifically, the court agreed that substantial evidence supported the City's findings that the project would not result in an increase in the capacity of the stadium or the overall frequency of its use, but increasing the use of the field to 150 nights a year, where it was undisputed that without the lights the stadium was quiet and dark most evenings during the fall and winter months, was a significant expansion of the facility's existing use.

Second, the Court of Appeal found that the Class 3 (CEQA Guidelines, § 15303, New Construction or Conversion of Small Structures) also did not apply. The court determined that the installation of 90 foot light standards could not fairly be considered "small structures." The Court of Appeal accordingly concluded that neither CEQA exemption applied and reversed the trial court's decision.

EXPLANATORY NOTE: Opinion previously published at 85 Cal.App.5th 1063; ordered unpublished (March 22, 2023).

* * *

American Chemistry Council v. Dep't of Toxic Substances Control (2022) 86 Cal.App.5th 146.

BACKGROUND: A chemical company and chemical industry group, American Chemical Council (collectively, ACC or Appellants), filed petition for a writ of mandate and a complaint for declaratory and injunctive relief to challenge the enactment by the California Department of Toxic Substances Control (Department) of a regulation listing spray polyurethane foam systems, or "spray foam systems," containing unreacted methylene diphenyl diisocyanates (MDI) as a priority product under California's "Green Chemistry law" (Health & Saf. Code, § 25251 *et seq.*). The Superior Court entered judgment that the Department acted within its authority and properly complied with the California Administrative Procedure Act, Government Code section 11340 *et seq.* (APA), but violated CEQA. ACC appealed, and the Department cross-appealed.

HOLDINGS: The Court of Appeal affirmed in part and reversed in part, holding: (1) the Department was not obligated to establish an exposure threshold before enacting the regulation; (2) the Department was not precluded from combining together distinct product categories when defining "spray foam systems" in the regulation; (3) the Department did not exceed its discretion when it included high-pressure foam systems in the definition of spray polyurethane foam systems; (4) the Department did not exceed its discretion when it included products already regulated by existing workplace regulations in its definition of spray polyurethane foam systems; (5) the Department conducted an adequate economic-impact assessment under the APA; (6) an enforceable consent decree was not a reasonable alternative to the regulation; and (7) the 180-day period in which a chemical company and chemical industry group could file their writ petition in their CEQA-based challenge began no later than when the Office of Administrative Law endorsed, approved, and filed the regulatory package.

KEY FACTS & ANALYSIS: The Green Chemistry law defines "consumer product" as a "product or part of the product that is used, bought, or leased for use by a person for any purposes." The Green Chemistry law includes two core authorizations for further regulatory actions. The first requires the Department to adopt regulations to establish a process to identify and prioritize those chemicals in consumer products that may be considered a chemical of concern. The second authorization requires the Department to adopt regulations that establish a process for evaluation of chemicals of concern in consumer products, their potential alternatives, and how to best limit exposure or reduce the level of hazard posed by the chemicals.

The Green Chemistry law also establishes a green ribbon science panel (Panel), which is authorized to advise on matters in support of the goals of the law. The statutory scheme includes limitations on the newly granted authority by noting the statute may not limit any other agency's existing authority over hazardous materials, and the statute does not authorize the Department to supersede the regulatory authority of any other department.

The regulations ultimately adopted to implement the Green Chemistry law, the Safer Consumer Products regulations (22 Cal. Code Regs., § 69501 *et seq.*), specify the "process for identifying and prioritizing Priority Products and their Chemicals of Concern, and identifying and analyzing alternatives to determine how best to eliminate or reduce potential exposures to, or the level of potential adverse impacts posed by, the Chemical(s) of Concern in Priority Products." The regulations set forth a four-step process for identifying and regulating priority products and their chemicals of concern: (1) to identify candidate chemicals; (2) to identify and prioritize products containing candidate chemicals; (3) to have responsible parties submit alternatives analysis reports for priority products; and (4) to utilize those reports to identify and implement regulatory responses for priority products. (The Court of Appeal noted that the case focuses primarily on the second step.)

Spray foam systems were initially identified as a potential priority product in March 2014, and the Department drafted multiple documents over several years detailing relevant findings to the listing regulation. The documents included a 2017 "Summary of Technical Information and Scientific Conclusions for Designating Spray Polyurethane Foam Systems with Unreacted Methylene Diphenyl Diisocyanates as a Priority Product" (the Technical Summary), a 2018 "Economic and Fiscal Impact Statement" (the Economic Assessment), and a 2018 "California Environmental Quality Act Notice of Exemption" (NOE).

After public hearings and considerations of the Technical Summary, Economic Assessment, and NOE, the Department elected to add spray foam systems as a priority product. In March 2018, the Department submitted the final regulatory package for the listing regulation to the Office of Administrative Law, which was approved on April 26, 2018.

On May 30, 2018, ACC submitted an informal dispute resolution request to have the Department withdraw its listing of spray foam systems as a priority product. This request was denied on December 3, 2018. ACC then filed an appeal to the director, which was denied on February 25, 2019.

On August 9, 2019, Appellants filed a petition for writ of mandate and complaint for declaratory and injunctive relief. An amended petition and complaint was filed on January 31, 2020, which contained one cause of action alleging a violation of statutory and regulatory authority, two causes of action under the APA, and one under CEQA. Ultimately, the trial court rejected the excess of authority and APA claims, but found a violation of CEQA.

First, the Court of Appeal rejected Appellants' argument that the Department lacked authority to list spray foam systems as a priority product without expressly considering "any threshold level of what constitutes an exposure" to the underlying chemical of concern. The Court of Appeal noted that, based on the plain language of subdivision (a) of Health and Safety Code section 25252, the notion that a potential for exposure or a potential effect requires a set exposure level is unsustainable. The court noted, "Upon review of the statutes and regulations, we see nothing in their language or structure that requires the Department 'to identify any threshold level of what constitutes an exposure' in order to prioritize a product."

Second, the Court of Appeal rejected Appellants' argument that the Department exceeded its authority in defining spray foam systems by (1) combining together distinct product categories of products, (2) failing to capture only "consumer products" in the definition of a spray foam system, and (3) including products already subject to regulation within the same definition. Specifically, the court disagreed with Appellants' claim that the Department improperly combined together distinct product categories when defining spray foam systems, such as high- and low-pressure foam systems. The court noted that Appellants' failed to identify any authority in support of limiting the Department's authority to a single uniform product category.

Appellants also argued that the definition of spray foam was improper because it included products that are not "consumer products" because the high-pressure foam systems are used exclusively by professional workers in commercial settings who are specifically trained in their usage. However, the Court of Appeal noted that the statutory definition of consumer products includes a product that is used by a person for *any* purpose.

Appellants also argued—again focusing on high-pressure spray foam systems—that the Department exceeded its authority by adopting a definition that included products already regulated by existing workplace regulations pursuant to the federal Occupational Safety and Health Administration (OSHA) and California's parallel agency. The Court of Appeal rejected this argument, noting that the Department determined OSHA's regulatory efforts were "the least desirable because the original hazard … is still present in the workplace" and did "not apply to consumers or sole proprietors." Further, the Department noted that its listing of spray foam systems would work as "an important supplement" to the current standards and would not constitute duplicating existing laws. Thus, the Court held, "Listing spray foam systems as a priority product, then, does not run afoul of the regulations prohibiting the Department from superseding existing regulatory authority because the existing regulations do not provide an equivalent protection to public health."

The Court of Appeal also found that the Department satisfied the APA, rejecting Appellants' argument that the Department engaged in a mismatched analysis when considering the costs and benefits of the proposed regulation. Specifically, Appellants claimed the Department identified

benefits from the listing decision that would only arise after additional regulatory actions were taken—such as expanded business interests arising from researching alternative chemical options and future health benefits from reducing future exposures—while failing to account for any costs arising in the same timeframe—such as research, development, and consulting fees and allegedly increased consumer costs from reduced heating efficiency.

The Court of Appeal explained that its review of a finding regarding the potential for a significant economic impact asks whether the Department made "an initial showing that there was some factual basis for [its] decision" that substantially complied with the statutory scheme and is supported by substantial evidence in the record. The court found that the Department's process substantially complied with the requirements of the APA, because (among other reasons) the Department engaged in a multi-step process to determine whether the proposed regulation may or will not have a significant economic impact. Further, the Department released the determination publicly for comment, and updated the initial determination to reflect either changes based on or rejections of the comments received.

The Court of Appeal also found that the Department's Reasonable Alternatives Analysis was adequate, including because the Department appropriately explained why it did not believe voluntary programs would be an appropriate alternative to identifying the product as a priority product. Therefore, the court rejected Appellants' argument that enforceable consent agreements could be put in place in lieu of listing spray foam systems as a priority product.

Turning to Appellants' CEQA claim, the Court of Appeal found it was untimely. Neither party contested that the 180-day statute of limitations applied, but the issue was when the period began to run. The Department contended the project was approved no later than the point at which the regulatory packet was approved and filed by the Office of Administrative Law, which was April 26, 2018. The court agreed, noting the Department made a firm and public commitment to its planned listing when the packet was approved and filed. Since the CEQA claim was not filed until August 9, 2019, after the 180-day period, the court held the CEQA claim was untimely.

Thus, the judgment was affirmed with respect to the first, second, and third causes of action seeking relief based on allegations the Department exceeded its authority through the listing determination and allegations the Department violated the APA. The judgment was reversed with respect to the fourth cause of action, under CEQA, and remanded with instructions that the trial court dismiss the claim as untimely.

EXPLANATORY NOTE: Review denied (Mar. 29, 2023).

* * *

Save North Petaluma River and Wetlands v. City of Petaluma (2022) 86 Cal.App.5th 207.

BACKGROUND: Save North Petaluma River and Wetlands (Petitioner) challenged a 180-unit apartment complex project by filing a petition for writ of mandate, challenging a decision of the City of Petaluma (City) to certify an environmental impact report (EIR). The Superior Court denied the petition. Petitioner appealed.

HOLDING: The Court of Appeal affirmed, holding: (1) the EIR adequately analyzed impacts to special status species, as required under CEQA, and (2) the EIR adequately analyzed public safety impacts relating to fire and flood emergencies.

KEY FACTS & ANALYSIS: Petitioner challenged the EIR's analysis of special status plant and animal species because (1) the City never investigated the project's baseline conditions as of 2007 when the notice of preparation was published, and the record contained no evidence of studies at that point in time, (2) substantial evidence did not support the EIR's discussion of baseline conditions for special status species, and (3) absent complete accurate information, the EIR could not adequately analyze or mitigate impacts.

The Court of Appeal rejected this argument, finding that a 2004 Wetlands Research Associates, Inc. (WRA) Special Status Species Report was a sufficient basis for evaluating the project's impacts on special species. It was not invalidated simply because it preceded the notice of preparation. The EIR also indicated its analysis included updated database reviews from several enumerated more recent years. The Court of Appeal found that the City was not required to conduct a new study at the time of the notice of preparation. Petitioner also failed to show any evidence that the biological conditions on the site differed meaningfully between 2004 and 2007. The 2008 and 2009 data matched the earlier conclusions that no special interest species existed on the sites. Moreover, the City had worked with its consultant to address special status species not mentioned in the 2004 WRA report in the EIR. The fact that no study was conducted in 2007, without any other evidence that the EIR failed to adequately analyze impacts on special status species, was not enough to show that the City lacked substantial evidence to support its analysis.

Petitioner next argued that the project did not properly analyze public safety impacts. However, the Court of Appeal reviewed the analysis, with several references to the California Fire Code as grounds for determining fire safety; moreover, the court found that the EIR specifically determined the City's Fire Department approved the plans as providing adequate emergency access. Thus, Petitioner failed to identify any other adopted emergency response plan that should have been analyzed.

Petitioner also indicated a letter submitted a week before the City Council hearing on the Final EIR calling for further study of the impact of additional development on public safety. Even assuming the letter was evidence as a potential public safety impact, the Court of Appeal refused to reweigh the conflicting evidence or set aside the EIR. Petitioner had failed to prove the EIR was legally inadequate.

* * *

Dedication and Everlasting Love to Animals, Inc. v. City of El Monte (2022) 85 Cal.App.5th 113.

BACKGROUND: A property owner brought an action, designated as a limited civil case, challenging an administrative hearing officer's decision upholding citations for the property owner's violations of the City of El Monte's (City's) municipal code based on accumulated trash on the property owner's vacant lot. The Superior Court affirmed, and the property owner filed a notice of appeal

to the Appellate Division of the Superior Court. The Appellate Division rejected the filing, and the property owner appealed to the Court of Appeal.

HOLDING: The Court of Appeal transferred the appeal back to the Appellate Division of the Superior Court, holding (1) the appeal was a civil case, (2) the Appellate Division of the Superior Court, and not the Court of Appeal, has jurisdiction over the appeal, and (3) the Court of Appeal could transfer the appeal to the Appellate Division of the Superior Court.

KEY FACTS & ANALYSIS: The plaintiff owned a vacant lot in the City, which was cited several times for the accumulation of trash on the lot. The plaintiff filed for an administrative hearing, and the citations were upheld. The plaintiff then appealed to the superior court in compliance with the City's Municipal Code as a limited civil case. Because the appeal was to a limited civil case, the Court of Appeal concluded it did not have jurisdiction to hear it, but that it could transfer the appeal to the Appellate Division of the Superior Court.

* * *

Sheetz v. County of El Dorado (2022) 84 Cal.App.5th 394.

BACKGROUND: A landowner (Petitioner) filed a petition for writ of mandate and complaint for declaratory and injunctive relief to challenge a $23,420 traffic impact mitigation fee imposed by the County of El Dorado (County) as a condition of issuing him a building permit for the construction of a single-family residence on his property. The superior court sustained the County's demurrer in part and denied the petition for writ of mandate, and the landowner appealed.

HOLDING: The Court of Appeal affirmed, holding: (1) the fee was not subject to the heightened scrutiny of *the Nollan/Dolan* test; (2) the County was not required by the Mitigation Fee Act (Gov. Code, § 66000 *et seq*.) to evaluate the specific traffic impacts attributable to the landowner's development before imposing the fee; and (3) the fee was reasonably related to the burden imposed by the development.

KEY FACTS & ANALYSIS: In this land-use regulation case, Petitioner challenged the $23,420 traffic impact mitigation fee (TIM fee or fee) imposed by the County as a condition of issuing him a building permit for the construction of a single-family residence. Petitioners appealed from the judgment entered after the trial court sustained the County's demurrer without leave to amend and denied his verified petition for writ of mandate. Petitioner contended a reversal was required because the TIM fee was invalid under both the Mitigation Fee Act and the "Takings Clause" in the Fifth Amendment to the U.S. Constitution, specifically the application of the "unconstitutional conditions doctrine" in the context of land-use exactions established in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*). Finding no error, the Court of Appeal affirmed.

The Court of Appeal first concluded, on both the complaint and petition, that the trial court properly determined that the TIM fee was not subject to the heightened scrutiny of the *Nollan/Dolan* test. The fee was not an "ad hoc exaction" imposed on a property owner on an individual and discretionary basis. Rather, it was a development impact fee imposed pursuant to

a legislatively authorized fee program that generally applied to all new development projects within the County. The fee was calculated using a formula that considered various specified factors attributable to development impacts. Therefore, the validity of the fee and the program that authorized it was only subject to the deferential "reasonable relationship" test embodied in the Mitigation Fee Act.

The Court of Appeal then concluded, on both the complaint and petition, that the TIM fee did not violate the Mitigation Fee Act because the County met its burden to show a reasonable relationship in that its fees imposed on this class of development projects met the standard for quasi-legislative decisions in Section 66001 of the Mitigation Fee Act.

The Court of Appeal found that Petitioner's causes of action for declaratory relief in its complaint were improper because a local agency's application of law had to be challenged by petition for administrative mandamus. Judgment affirmed.

EXPLANATORY NOTE: Review denied (Feb. 1, 2023).

* * *

Hobbs v. City of Pacific Grove (2022) 85 Cal.App.5th 311.

BACKGROUND: Property owners (Plaintiffs) who held licenses for short-term rentals (STRs) brought an action against the City of Pacific Grove (City), seeking declaratory and injunctive relief based on allegations that the City violated their due process rights under the United States and California Constitutions by adopting an ordinance that arbitrarily limited the number of homes which could be offered as short-term rentals and subjecting them to random selection for nonrenewal of licensure. The Superior Court granted summary adjudication in favor of the City. Plaintiffs appealed.

HOLDING: The Court of Appeal affirmed, holding (1) the ordinance did not violate Plaintiffs' procedural due process rights, (2) rational basis review applied to the substantive due process claim, and (3) the ordinance did not violate Plaintiff's substantive due process rights.

KEY FACTS & ANALYSIS: After permitting STRs as of 2010, the City took several actions to limit the number of STRs, including imposing a City-wide cap, a density cap per block, and a distance limitation between licensed properties. As of 2017, the City's municipal code stated that licenses could not be automatically renewed and that renewals could be denied for any reason. By early 2018, the City exceeded the City-wide cap and enacted an ordinance imposing a "lottery system" to reduce the number of licenses by picking 51 that would sunset the following year, 22 of which were in the Coastal Zone. The City's voters also approved Measure M, which contemplated an 18 month phase-out of all STR permits except for those in the Coastal Zone. Plaintiffs, homeowners whose license was selected for non-renewal under the lottery system, sued the City for a violation of their substantive and procedural due process rights.

The Court of Appeal first found that the City did not violate the owners' due process rights because the owners had no vested right to continued renewal of their one-year STR licenses, which were

expressly limited by the City's municipal code. In addition, the Court found that the random selection process was a legislative and not adjudicative act, which could implicate procedural due process principles.

The Court of Appeal then addressed the owners' substantive due process claims that the City violated their right to allow guests in their homes. The court denied the owners' argument that the ordinance implicated their associational freedom, and found that rational basis review, rather than strict scrutiny review, was warranted. Under that standard of review, the court found that the ordinance had a rational relation to the City's goal of enhancing its residential character, and left owners with other economic uses of their homes including long term rentals.

The trial court granted summary adjudication for the homeowners on the claim that the ordinance required Coastal Commission approval, but this issue was moot on appeal because the ordinance was incorporated into the City's Local Coastal Plan.

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Today's IV, Inc. v. Los Angeles County Metro. Transportation Auth. (2022) 83 Cal.App.5th 1137.

BACKGROUND: The owner (Owner) of the Los Angeles Bonaventure Hotel brought an action for nuisance and inverse condemnation against the Los Angeles County Metropolitan Transportation Authority (Metro) and general contractor (RCC or the Contractor, and collectively with Owner, the Respondents), alleging that Respondents' construction of the "Regional Connector Transit Project" in downtown Los Angeles, which included a subterranean rail line (the project), interfered with the operation of the Owner's hotel. The trial court found no liability and entered judgment in favor of Respondents. Owner appealed from the May 15, 2020, judgment in favor of Metro and the May 15, 2020, judgment in favor of RCC.

HOLDING: The Court of Appeal affirmed, holding: (1) the Owner failed to allege that traffic detours set up by Metro caused its property to suffer from an intangible intrusion burdening property in way that was direct, substantial, and peculiar to the property itself, and thus failed to state claim for inverse condemnation under the intangible-intrusion theory; (2) the Owner failed to allege that an intrusion of noise and dust was unique, special or peculiar in comparison with other stakeholders in the area, and thus failed to state claim against Metro for inverse condemnation under the intangible-intrusion theory; (3) the Owner alleged that invasion of, or interference with, use and enjoyment of its property caused by the construction project was substantial, as required to state claim for private nuisance; (4) the Owner failed to allege that the gravity of harm to Owner's use and enjoyment of its property outweighed the social utility of the construction project, and thus failed to state claim for private nuisance; (5) statute providing that nothing which is done or maintained under the expressed authorization of a statute can be deemed a nuisance provided Respondents with immunity from liability for owner's nuisance claim; (6) whether or not the general contractor's method of construction was reasonable did not hinge on whether the general contractor possibly breached terms of its contract with Metro, in connection with its subcontractor's classification of noise limits, and thus did not create triable issue of material fact precluding summary adjudication on the nuisance claim; and (7) testimony of hotel's former

managing director that Respondents conspired to harm hotel was speculative and did not create triable issue of material fact precluding summary adjudication on nuisance claim.

KEY FACTS & ANALYSIS: the Owner owns and operates a landmark hotel located in downtown Los Angeles, which occupies an entire city block. The only access to the hotel's parking garage and loading dock is via Flower Street, which is a one-way southbound street in that location. The hotel's main guest/invitee drop-off and pick-up point is on Flower Street, and there is limited guest access from adjacent Figueroa Street.

The City National Plaza and Towers (CNP), consisting of two office buildings, a plaza, and a subterranean garage, occupies the city block between Flower and Figueroa Streets. CNP has two entrances/exits from its garage.

Metro undertook a project that, when completed, would directly link the tracks of three metro rail lines. Metro awarded a contract to RCC to build the project. The project resulted from nearly 20 years of planning and environmental review, including a Mitigation and Monitoring Report Program (MMRP) to govern the methods of the project's construction and to mitigate identified potential negative environmental, traffic, and transit impacts. Indeed, the Court of Appeal analyzed the mitigation measures specific to traffic management and not hindering access to public parking lots during construction.

Having conducted various studies on tunnel design and construction on Flower Street, Metro concluded that part of the tunnel extending under Flower Street would be built using cut-and-cover construction, rather than an underground tunnel boring machine (TBM), for multiple reasons: (1) unsuitable and unstable soil having high subsidence risk; (2) the shallowness of the tunnel at that point; and (3) the presence of hundreds of underground tiebacks along the tunnel route. Metro considered cut-and-cover as the only practicable method for this specific location, and use of the TBM was precluded because the tiebacks and other risks made it infeasible.

On May 25, 2012, the Owner filed a petition for writ of mandate and complaint for injunctive and declaratory relief under CEQA against Metro to halt the project. The trial court ruled in Metro's favor and Division Five of the Court of Appeal, Second Appellate District, affirmed. The Court of Appeal found substantial evidence that the TBM methods are not feasible alternatives to the cut-and-cover technique.

The Owner claimed that, in January 2014, FSP, owner of CNP, began negotiating with Respondents regarding FSP's concerns about the traffic management plans. The Owner further alleged that, as a result of the negotiations, in June 2015, "Metro surreptitiously entered into an agreement with the [the hotel's] neighbor, [FSP]" and "did so with the express intent of ... isolating and punishing the Bonaventure for opposing the Project" and to "depriv[e] the [hotel] of its rights under the [MMRP]." The Owner claimed the settlement agreement provided that FSP would work together with Metro to dismiss FSP's pending CEQA case against Metro and that the settlement agreement was "kept secret" when Respondents proposed construction schedules and traffic detours.

The Owner also claimed Metro agreed to perform more work at night and on the weekends than what was contemplated in the EIR and MMRP, which caused a "disproportionate amount of damage" to Owner, which "functioned as a hotel with sleeping as its primary function," but did not disrupt CNP since it functioned as "an office building and garage" with its operations "almost entirely during normal weekday business hours." The Owner also claimed the night and weekend work also eliminated access to Owner's hotel parking garage, loading dock, and main passenger pick-up/drop-off area. Owner further alleged the settlement agreement resulted in Respondents declining to use TBM and failing to implement the mitigation measured provided in the final EIR.

On March 17, 2016, the Owner initiated the underlying action against Respondents. On October 31, 2018, Owner filed the operative fourth amended complaint alleging the following causes of action: (1) declaratory relief against Metro and RCC for CEQA violations; (2) equal protection violations against Metro; (3) nuisance against Metro and the Contractor; (4) trespass against the Contractor; and (5) inverse condemnation against Metro. The Owner sought punitive damages against the Contractor.

Appeal from Order Sustaining Metro's Demurrer to the Amended Complaint's Inverse Condemnation Cause of Action:
The Owner claimed it adequately pled a cause of action for inverse condemnation and that the trial court erroneously sustained Metro's demurrer to the inverse condemnation cause of action without leave to amend. Metro argued none of the allegations in the complaint regarding noise impacts and temporary interferences demonstrated the construction was unreasonable or in an unnecessary manner or that impacts to the hotel were unique.

The Court of appeal noted that the Owner relied on the intangible intrusion theory for its inverse condemnation claims, which required Owner to establish that its property suffered from an intangible intrusion burdening the property in a way that is direct, substantial, and peculiar to the property itself. At oral argument, the Owner clarified that it was not alleging that Metro's use of the cut-and-cover construction was the problem. Rather, Owner was complaining about the techniques used to implement the cut-and-over method. However, the court found that the operative complaint contained allegations specifically complaining about the use of cut-and-cover in lieu of TBM. The court also found the Owner's claim that Metros' construction caused unreasonable and unnecessary restrictions was not a material fact properly pled.

The Court of Appeal also found that the Owner was not entitled to compensation for temporary interference with their right of access, provided such interference was not unreasonable and the right of ingress and egress is not absolute. The court noted, "Metro correctly points out that 'street alterations which cause significantly increased traffic, or which reduce but do not eliminate access to a property, do not give rise to a compensable taking.'"

With regard to Owner's allegations regarding excessive noise and dust, the Court of Appeal found that the operative complaint did not sufficiently plead that the intrusion suffered was "unique, special or peculiar" in comparison with other stakeholders in the area. Thus, the Court affirmed the order sustaining the demurrer.

The Court of Appeal also noted that, because the Owner did not contend otherwise in its briefing, it did not appear that the complaint could be amended to allege any additional or new facts sufficient to state a cause of action for inverse condemnation. Thus, the Court did not find the trial court abused its discretion in sustaining the order without leave to amend.

Appeal from Orders Granting Judgment on the Pleadings in Favor of Metro and RCC:
The Owner argued the trial court erroneously granted judgment on the pleadings on the nuisance cause of action as to both Metro and RCC. Metro filed a Motion for Judgement on the Pleadings (MJOP), arguing that the allegations fell short of stating a *prima facie* case of nuisance because Owner failed to plead an essential element – that the seriousness of the harm to Owner outweighed the social utility of Metro's conduct. Metro also argued that the complaint disclosed a complete defense to a nuisance claim because Metro is immune from liability for nuisance pursuant to Civil Code section 3482. RCC filed an MJOP and joined in Metro's MJOP as to the nuisance cause of action. The trial court granted the motion with prejudice, noting the injuries complained of were the normal consequences of a public construction in a metropolitan area and were temporary.

The Court of Appeal premised its discussion, "As a preliminary matter, we note the [complaint] is peppered with statements that Metro's/RCC's conduct and/or construction was 'unreasonable.' We treat these statements as legal conclusions which the court may disregard when evaluating the legal sufficiency of the pleading." The Court of Appeal found that the complaint adequately pled the substantial damage/interference elements related to private nuisance, including a claim of over $27 million in damages for lost revenues from rooms, food and beverages, and parking. The Owner also alleged the hotel lost a lucrative, long-term airline contract because the construction "interrupted flight crew sleep." However, the court held, "Even if the manner of construction was the challenged interference, [Owner] was still required to plead in the [Complaint] that the seriousness of the harm it suffered outweighed the social utility of the Project. The [Complaint] contains no such allegation."

The Court of Appeal also found that the Complaint included facts sufficient to invoke the protection of Civil Code section 3482 ["Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance"] via Public Utilities Code section 30631 [in relevant part, with italics in original "[Metro] may ... construct, develop, ... operate, maintain, control, use ... rights-of-way, rail lines, ... stations, platforms, ... *and any and all other facilities for, incidental to, necessary for, or convenient for rapid transit service, including, but not limited to, facilities and structures physically or functionally related to rapid transit service ... underground, upon, or above the ground and under, upon, or over public street[s]*"] because the relevant statute authorized the accompanying noise and impaired access that major public construction projects typically create.

Appeal from Order Granting Summary Adjudication of the Complaint's Nuisance Causes of Action in Favor of RCC:
RCC filed a motion for summary adjudication, similarly arguing that the Owner's nuisance cause of action claim was barred by Civil Code section 3482 because the statute provides immunity to RCC's conduct that Owner asserted was a nuisance. Specifically, RCC claimed it was authorized by Public Utilities Code sections 30631 [quoted above] and 130242 [in relevant part, "[Metro] may enter into contracts with private entities, the scope of which may combine within a single

contract all or some of the planning, design, permitting, development, joint development, construction, construction management, acquisition, leasing, installation, and warranty of all or components of (1) transit systems, including, without limitation, passenger loading or intermodal station facilities, and (2) facilities on real property owned or to be owned by the authority[]"] to complete the project and argued that "the types of alleged nuisances claimed here, such as noise, vibration, dirt, and dust, are unfortunate but innate features of temporary, transportation related public works projects that Civil Code section 3482 deems not to be actionable nuisances." RCC also contended that Owner could not show a triable issue of material fact that Respondents conspired to spite, punish, or harm Owner.

The Court of Appeal agreed with the trial court and rejected Owner's attempt to classify an alleged breach of contract (between the construction method agreement between RCC and Metro) as evidence of the construction being "unreasonable" for a nuisance claim. The court also noted Owner's conspiracy theory arguments were "too far-fetched."

Appeal from Order Granting RCC's Motion to Strike:
The Owner argued the trial court erroneously struck the prayer for punitive damages against RCC wherein RCC claimed that the complaint failed to allege specific facts showing RCC's conduct was "oppressive, fraudulent, or malicious, as opposed to simply reciting conclusory language to that effect." The Court of Appeal noted that Owner's request for punitive damages was based on the nuisance cause of action. Since the nuisance cause of action was properly entered in RCC's favor, the court did not reach Owner's claim regarding the motion to strike the prayer for punitive damages.

EXPLANATORY NOTE: Review denied (Jan. 18, 2023).

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County of San Bernardino v. Mancini (2022) 83 Cal.App.5th 1095.

BACKGROUND: San Bernardino County (County) brought an action against a church, whose adherents consumed cannabis blessed by pastors as sacrament, and the church owner, alleging a violation of a County ordinance prohibiting commercial cannabis activity on unincorporated county land. The Superior Court determined that the church was operating an illegal cannabis dispensary, issued s permanent injunction, and denied a motion brought by church and owner, seeking to set aside judgment. The church and owner appealed.

HOLDING: The Court of Appeal affirmed the judgement, holding: (1) the church and owner failed to submit a proposed pleading, as required by statute for motions to vacate a judgement; (2) the church and owner failed to establish excusable neglect for the failure to file the pleading; (3) the church and owner failed to establish that its counsel's failure to file a trial brief and his and owner's failure to attend a hearing affected the trial court's ruling; (4) state law did not preempt the County ordinance; (5) the ordinance and injunction did not impose a substantial burden on religious exercise of the church or owner, for purposes of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* (RLUIPA); (6) the church and owner failed to establish that the County enforced the ordinance for discriminatory reasons, in violation of any

constitutional provision; and (7) the ordinance applied to church's not-for-profit *quid pro quo* scheme.

KEY FACTS & ANALYSIS: After rejecting the church and owner's motion to vacate the judgement based on their neglect, the Court of Appeal analyzed their legal arguments.

First, state law did not preempt the County ordinance. While California law permitted the use of cannabis, it did not mandate that local governments allow dispensaries.

Second, the church and owner failed to show that the County ordinance imposed a substantial burden on their religious exercise for RLUIPA purposes. The church members could still use and possess blessed cannabis. The County ordinance only impacted the church's ability to sell, dispense, or deliver blessed cannabis, which was not a religious activity. The trial court's injunction was also limited to prohibiting "commercial cannabis activity," and still permitted the church to dispense free blessed cannabis for immediate use as part of religious rituals and ceremony.

Third, the Court of Appeal did not find any evidence in the record of discriminatory enforcement on the basis of religious belief. The appellant's claim for discriminatory enforcement in violation of the California Constitution therefore failed.

Finally, the Court of Appeal opined that the church members' tax deductible status for contributions to the church did not render the ordinance unenforceable against them. The ordinance still applied to the church even if the church's collection of contributions was not for profit.

EXPLANATORY NOTE: Review denied (Dec. 21, 2022).

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Notes on the Summaries:
"BACKGROUND" and "HOLDING" for cases are from the WestLaw Synopses.
"KEY FACTS & ANALYSIS" for cases are from the text of cases and, occasionally, from published on-line analyses.

Thank You:
The author wants to thank Jessica Sanders and Star Leal, Associates, and Lauren Ramey, Assistant, at Rutan & Tucker, LLP, for their assistance with this paper and power point presentation. The author also wants to thank Eric Danly, City Attorney for Petaluma, for his time and efforts reviewing this summary and providing comments on behalf of the League of California Cities.