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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

ATTAINABLE HOUSING AND THE MISSING MIDDLE—THE STRUGGLE TO ACHIEVE THE AMERICAN DREAM OF HOMEOWNERSHIP IS REAL

By Michele A. Staples and Nedda Mahrou

It has now been one year since California's comprehensive housing legislation package went into effect. The bills were part of the California Legislature's continuing efforts to address the state's housing issues that have been at the forefront of the statewide policy debate. Although the current housing debate tends to center on what we know as conventional income-restricted "affordable housing," the persistent issue of "attainable housing" (also known as workforce housing or entry level housing) is attracting more attention as the "missing middle" in the housing market.

What Exactly is 'Attainable Housing'?

California, like much of the nation, is suffering from an epidemic commonly referred to as a "housing crisis." The crux of the matter is that entry-level home prices continue to rise as the housing supply is unable to keep up with the rapidly growing demand. It is important to recognize that housing affordability is not only an issue for very-low to low-income households; rather, it has become increasingly difficult for moderate-income families and young professionals to afford homeownership. This has created an "attainable housing" dilemma whereby a new generation of first-time homebuyers are being squeezed out of the market due to the "missing middle" in the housing supply.

A new age group of those born in the early 1980s through the early 2000s, known as the millennial generation, has grown to become the largest age group in the country, yet they have the lowest rate of homeownership for their age bracket since the United States Census Bureau first began tracking this statistic 53 years ago in 1965. According to Freddie Mac, the homeownership rate for young adult households has declined by 8 percent since 2004. It is not simply a matter of consumer choice. Millennial generation consumers still want the American Dream of homeownership and the access to equity and wealth accumulation that comes with it. Freddie Mac identifies higher housing costs as the main culprit. In response, California lawmakers, local officials, and residential developers are brainstorming ways to provide more housing varieties that people of modest means want and can afford to buy.

Why is There Such a Shortage in the Attainable Housing Supply?

The straightforward reason for the attainable housing shortage is the simple fact that development has not kept pace with demand. However, the cause for this imbalance is not so simple to explain because there are many variables at play. From the homebuilder's perspective, Ryan Gatchalian and Jon Tanury of LMC, a Lennar company, distill the issue down to three critical factors affecting the decision to pursue a new housing project—time to market, certainty of approval, and building cost—each of which affects home pricing.

It's no secret that the entitlement process is often a major impediment to getting a cost-effective project approved. Depending on how strict local land use regulations are, the entitlement process can take significant time. For example, local planning policies and zoning restrictions can make it difficult or impossible to build adequate small-lot or multi-family housing projects. In those cases, the developer must spend the significant time and resources necessary to

process a project-specific General Plan amendment and/or zone change to enable higher density housing to be developed, all at considerable risk that the city or county will not approve the change at the end of the process.

A significant hurdle in the project-by-project zone change process is community opposition to higher-density residential projects, citing concerns such as additional traffic, parking issues, and environmental impacts, just to name a few. Recent revisions to the Housing Accountability Act increased the standard of proof required for a local government to justify denial of low- and moderate-income restricted housing development projects. Under a trio of housing bills passed last year as part of the comprehensive housing package, housing projects are protected from community opposition where there is substantial evidence allowing a "reasonable person" to conclude the project is consistent with applicable local planning rules. (*See*, "California Rings in the New Year with a Comprehensive Housing Bill Package that Takes Full Effect on January 1, 2018," *California Land Use Law & Policy Reporter*, Volume 27, Number 4, January 2018.) Nevertheless, community opposition is a persistent issue even for the income-restricted projects protected by the legislation because even if a project is approved, a subsequent legal challenge by a disgruntled neighbor could tie up the project for years. The significant delay results in increased market uncertainties and project carrying costs that cannot be absorbed by an attainably priced housing product.

In addition to the costs associated with getting a project approved are the hard costs of construction, including land prices, materials and labor. Also, development impact fees are an important hurdle that can make a dramatic difference in the financial viability of a project. The wide variability in local development fees is often a determining factor for developers in deciding where to build. Because of the combined impact of the entitlement time, uncertainty of approval and construction costs, the project's pro forma can only justify building top of the market homes to turn a profit.

How Can We Fill the Missing Middle with More Attainable Housing?

Trying to fill the missing middle is an uphill battle that cannot be solved overnight. Key players in reaching solutions are the Legislature, local governments, developers, and local communities.

Effective Attainable Housing Solutions in State Legislation

Senator Wiener (D-San Francisco) has been a leading proponent for increasing California's housing supply and he advocates for increased density and upzoning. The Senator has emphasized that cities and counties must also focus on accelerating their development review processes and should consider zoning reform that would allow the largest quantity of housing to be built. Indeed, larger California cities, including Los Angeles, San Francisco and San Diego have witnessed success through stronger upzoning efforts.

On December 4, 2018, Senator Wiener introduced SB 50 (the More HOMES Act), which is modeled on a previous bill (SB 827) that did not pass last year. SB 50 creates new zoning standards for the construction of housing near job centers and public transportation. The new legislation is geared towards adding denser housing development near "major transit stops," broadly defined as sites "containing an existing rail transit station or a ferry terminal served by either bus or rail transit service." SB 50 would also place higher density housing in communities that serve as job centers or are rich in career opportunities. The bill will be set for committee hearings in the coming months of the 2019-2020 legislative session.

Zoning reform goes a long way toward addressing two of the three critical attainable housing factors identified by residential developers: time to market and certainty of approval. By changing land use policies and zoning on an area-wide basis (rather than project-by-project), the local agency engages the community in the process, addresses their legitimate concerns and defends against any litigation challenging the proposed changes. Once the process is completed, developers who comply with the new zoning rules can have their projects approved by way of an abbreviated approval process. In some cases, only a ministerial approval is needed. Another possible idea for future legislation is to broaden the scope of current affordable housing incentives so that they apply to entry-level development projects that fall outside the income-restricted thresholds. For example, Government Code § 65915 provides for density bonuses and up to three concessions or incentives to projects

proposing a certain percentage of very low- and low-income households, or moderate-income households in a common interest development. Expanding such entitlement concessions to entry level "attainable housing" projects could serve as an attractive incentive that could reduce the time it takes for attainably-priced housing projects to get through the approval process and the project development costs, thereby reducing the overall cost of the homes. Parking reduction allowances and/or tandem parking alone could result in better utilization of developable land and larger living space in housing units rather than garages or driveways.

Attainable Housing Solutions in Larger Cities: The City of San Diego's Approach

The City of San Diego has taken aggressive steps to increase housing production to accommodate households of all income levels by, among other things, focusing on providing a level of housing certainty for proposed projects. There are a number of ways San Diego is accomplishing its attainable housing goals.

First, the City of San Diego offers a pre-submittal preliminary review process that allows applicants to ask city staff project-specific questions to help determine project feasibility. During preliminary review, applicants can also request an estimate of time and costs required to go through the entire permitting process. This program helps project proponents make informed decisions upfront before they spend time and money on a project that may not be financially viable.

Next, the City of San Diego has streamlined the entitlement process by reducing levels of review to make the process less of an impediment for developers. One critical way the city has streamlined the review process is by making updates to its Municipal Code and community plans. There are 49 community plans across the city, which will ultimately all be updated to allow higher density residential and infill development near transit. So far, there have been eight comprehensive community plan updates, which have added capacity for nearly 30,000 additional residential units in those neighborhoods through strategic upzoning. The city has found that community planning, rather than project-by-project zone changes, make the entitlement process more certain, faster, and as a result, less costly. Through these updates and zoning changes, the city is actively reducing the entitlement process requirements by supporting more ministerial development approvals so long as project proposals comply with updated community plans and associated zoning. The city has also found that community plan updates are an effective way to proactively include community groups in discussions so neighbors contribute to the planning process and more fully understand what types of future development are expected to be permitted in their communities.

According to San Diego's Deputy Director of Development Services, Gary Geiler, these forward-thinking efforts have allowed San Diego to contribute a significant amount of housing to the region's housing supply. For example, through 2016, the City of San Diego contributed nearly 53 percent of the affordable housing stock for the San Diego region, even though the city itself represents only 42 percent of the regional population.

In areas of the City of San Diego with larger lots, accessory dwelling units (also known as companion units, granny flats, or junior units) have contributed significant numbers of new housing units. Accessory dwelling units may be attached or detached, are accessory to a primary residence, and provide independent living facilities with kitchens. Recent state legislation provides clarification and fee assistance for creation of accessory dwelling units, such as allowing the units to be built concurrently with a single-family home and in zoning districts that allow for single-family uses, reducing parking requirements, and modifying utility fees. (For a summary of the recent state legislation, see the California Housing and Community Development webpage at: http://www.hcd.ca.gov/policy-research/AccessoryDwellingUnits.shtml)

In addition to increasing rental housing stock, accessory units increase attainable homeownership by enabling home buyers to earn additional income to offset the cost of their mortgage and other housing expenses. In an effort to encourage production of accessory dwelling units, the San Diego city council recently voted to exempt these units from many fees, including development impact fees and facility benefit assessment fees.

Attainable Housing Solutions in Smaller Cities: The City of Riverside's Approach

The City of Riverside is another example where local officials, led by Mayor Rusty Bailey, are finding

creative ways to provide more housing opportunities. Riverside is an 80-square-mile city whose downtown area was not historically a draw for shopping or entertainment and did not have a large concentration of multi-family residential projects. Last year, Riverside adopted a comprehensive update to its housing element, which included an implementation plan identifying dozens of candidate sites throughout the city for rezoning to accommodate nearly 5,000 units for affordable to lower-income households. The zoning ordinance, which went into effect in February 2018, rezoned a total of 57 sites to allow for multi-family residential development. The city estimates that over 400 residential units have been entitled or are under review since the housing element update was adopted. Through this process, the City of Riverside is creating housing opportunities near existing transit that is linked to employment centers. The plan for Riverside's downtown is focused on urban living, walkability and reduced reliance on cars. For example, underutilized parking lots near existing transit stops have been developed into multi-story, mixed-use residences above amenities and parking structures. The result is an emerging, vibrant downtown core.

Currently, the downtown Riverside housing market supports rental housing versus for-sale condominiums. But it is expected that the new apartments will prove out the concept of downtown living and attract for-sale homes in the future. The city's efforts in addressing housing affordability also include notable programs aimed at preventing chronic homelessness and serving the housing needs of aged-out foster youth through partnerships with the faith based community and the local community college. Additionally, in an effort to create a smoother permitting process, the city has created a "Streamline Riverside" program that includes a "one-stop-shop" that combines all city departments that are part of the development process on a single floor at City Hall. The initiative is designed to make obtaining permits and approvals easier and more efficient.

Innovative Home Designs and Housing Products that Reduce Construction Costs as a Solution to Restore the Middle

The real estate industry is actively researching how to create a cost-effective housing product for the missing middle, but it's also analyzing what this new generation of homebuyers wants in a home. Efforts are being made to broaden the variety of housing choices currently on the market, knowing that the primary way to make housing more attainable is to design them to cost less.

For example, micro-communal units are a new concept designed to save time and money by making efficient use of space and design features. They are sized similar to studio apartments, with communal areas including kitchens that are shared with others living in the building, making these buildings similar to student housing. The shared living areas reduce overall housing costs because rooms such as kitchens and bathrooms are the most expensive parts of a dwelling. In these projects, one kitchen could serve multiple dwelling units.

Modular design/manufactured housing is also a way to drive down the cost of each residential unit, and developers are considering other ideas to reduce construction costs, such as the use of pre-fabricated kitchens and bathrooms (currently used in hotel construction) that can be installed in the residential unit with minimal labor.

Another creative approach to reduce construction time and labor costs is the use of shipping containers in building homes. This involves repurposing large, metal storage containers into housing units fabricated at an off-site location and transported to their final destination. The San Diego region's first shipping container complex has been proposed for construction on an existing vacant lot located in the Logan Heights neighborhood.

Conclusion and Implications

Rising housing costs and inadequate supply have made attainability of homeownership a major concern in the nation. Addressing the missing middle is necessarily a function of reducing the time to market, certainty of approval, and building cost. The attainable housing dilemma must be addressed from many angles, including regulatory, community and market perspectives, in order to achieve workable solutions. This requires cooperation between multiple players to effectively promote production of more attainable housing units. The California Legislature has shown a clear commitment to tackling California's housing shortage by passing legislation that streamlines the development process and holds cities and counties accountable for addressing their community housing needs.

Local governments can look to success stories emerging in larger and smaller cities throughout California to streamline their development approval processes, engage communities in area-wide planning and zoning, allow an increased variety of housing types, and provide a wider range of incentives to make residential development more financially feasible and attractive. Finally, the residential homebuilders can incorporate innovative ideas in residential construction, by rethinking architecture and construction processes. Solutions to address the attainable housing shortage in California are resulting from coordinating regulatory, community and market perspectives to reduce the overall cost of housing production.

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RECENT FEDERAL DECISIONS

U.S. SUPREME COURT REVERSES FIFTH CIRCUIT—LIMITS AGENCY DISCRETION UNDER THE ENDANGERED SPECIES ACT IN ADDRESSING THE DUSKY GOPHER FROG

Weyerhaeuser Co. v. U.S. Fish and Wildlife Service, ___U.S.___, Case No. 17-71 (Nov. 27, 2018).

The U.S. Supreme Court has held that a designation by the U.S. Fish and Wildlife Service (FWS) of critical habitat for a given species for purposes of the Endangered Species Act (ESA) must be limited to area that is actual habitat of that species.

Factual and Procedural Background

Under the federal ESA, when the Fish and Wildlife Service designates an animal as an endangered species under the ESA, the FWS is also required to designate a "critical habitat" for that species. Under § 1532(5)(A) of the ESA a critical habitat consists of:

> (i) the specific areas within the geographical area occupied by the species…on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species…upon a determination by the Secretary that such areas are essential for the conservation of the Species. (139 S.Ct. 361, 365).

In 2001, the FWS listed the dusky gopher frog as an endangered species under the ESA and in 2010, the FWS published a proposed critical habitat for the frog. The FWS proposed to designate as critical habitat four areas with known existing dusky gopher frog populations. However, the FWS determined that those four areas alone were not adequate to ensure the frog's conservation and, therefore, it also designated as critical habitat an additional 1,544 acre site in Louisiana that was not occupied by the frog but that had once been home to the frog. This site, referred to by the FWS as "Unit 1," was at that time operated as a commercial timber farm but was, according to the FWS, essential for the frog's survival because of various characteristics and could be restored to a condition suitable for the frog with reasonable effort. The FWS then commissioned a report on the economic impacts of its designations and that report found that, with respect to Unit 1, the designation might bar future development of the site by its owners and thereby result in losses of up to $33.9 million. Despite that, the FWS determined that such potential costs were not disproportionate to the benefits from conservation and therefore proceeded with the proposed designation.

The owners of Unit 1, which included Weyerhaeuser, sued seeking to vacate the FWS' designation of Unit 1 as critical habitat. They argued that Unit 1 could not be critical habitat for the dusky gopher frog because the frog could not survive in that area in its then existing condition. They also argued that the FWS should have excluded Unit 1 from its critical habitat designation based on the economic impacts of making such a designation.

The trial court found for the FWS on both claims. It determined that Unit 1 satisfied the statutory definition of unoccupied critical habitat, which requires only that the FWS deem the land in question "essential for the conservation [of] the species," and it also approved the FWS' methodology for estimating the economic impact of its designation and therefore refused to consider the property owners' challenge to the FWS' decision not to exclude Unit 1 based on economic impact considerations. The Fifth Circuit Court of Appeals affirmed the lower court's decision and also concluded that the FWS' decision not to exclude Unit 1 was committed to agency discretion by law and, as a result, was not reviewable. (139 S. Ct. 361, 368).

The Supreme Court's Decision

The Court began its analysis by addressing the meaning of the term "critical habitat" for purposes of

the ESA. The Court noted that under § 4(a)(3)(A)(i) of the ESA, which is the only authority for critical habitat designations in the ESA but which the lower courts did not analyze, when the FWS designates a species as endangered, it must also "designate any *habitat of such species* which is then to be considered critical habitat."

The Court reasoned, based on this language, that only "habitat" of an endangered species is eligible for designation as critical habitat and, therefore, "even if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for conservation of the species, § 4(a)(3)(A)(i) does not authorize the Secretary to designate the area as critical habitat unless it is also habitat for the species." (139 S. Ct. 361, 369).

Based on this interpretation and because the Fifth Circuit did not initially consider the interpretation of the term "habitat" in § 4(a)(3)(A)(i) or assess the FWS' administrative findings regarding Unit 1, the Supreme Court vacated the Court of Appeal's judgment and remanded the case to the Court of Appeal to address those questions.

The Court also held that the decision of the FWS to not exclude an area from critical habitat for economic impact considerations is subject to judicial review. According the Court, under the Administrative Procedure Act there is a strong presumption in favor of judicial review of administrative actions. The FWS contended that in this case that presumption was rebutted because the action in question if committed to agency discretion by law because the section of the ESA permitting the FWS to elect to include or exclude areas for economic considerations, § 1533(b)(2), is a provision "so drawn that a court would have no meaningful standard against which to judge the agency's exercise of discretion." (139 S. Ct. 361, 370). However, the Court, after reviewing the text of § 1533(b)(2) of the ESA, found that it was not so drawn such that a court would have no meaningful standard against which to review the FWS' discretion. The Court also noted that the claim in question in this case was "the sort of claim that federal courts routinely assess when determining whether to set aside an agency decision as an abuse of discretion." (139 S. Ct. 361, 371) Accordingly, the Supreme Court vacated the Fifth Circuit's holding on this claim and remanded the case for consideration of the question of whether the FWS' assessment of the costs and benefits of its designation and its resulting decision not to exclude Unit 1 constituted an abuse of discretion.

Conclusion and Implications

Following this decision, when designating critical habitat for a given species for purposes of the Endangered Species Act, the FWS will be limited in its ability to so designate any areas that do not then constitute habitat actually occupied by the subject species. Additionally, this decision makes clear that the FWS' analysis of a given designation's economic impact and the related determination of whether to include or exclude any particular area based on such analysis is subject to judicial review. The Supreme Court's opinion is available online at: https://www.supremecourt.gov/opinions/18pdf/17-71_omjp.pdf (Bradley Scheick)

DISTRICT COURT CONCLUDES FEDERAL AGENCIES' ENVIRONMENTAL ASSESSMENT OF COASTAL 'FRACKING' VIOLATED THE ESA AND COASTAL ZONE ACT

Environmental Defense Center v. U.S. Bureau of Ocean Energy Management, ___F.Supp.3d___, Case No. CV168418PSGFFMX (C.D. Cal. Nov. 9, 2018).

The U.S. District Court for the Central District of California recently granted in part and denied in part seven cross-motions for summary judgment relating to the issuance of a final environmental assessment for fracking and acidizing in oil production off the California coast. The federal Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) issued a Final Environmental Assessment (EA) on the potential impacts of offshore well stimulation treatments, more commonly known as "fracking" or "acidizing," on the Pacific Outer Continental Shelf. Plaintiffs claim

BOEM and BSEE violated their statutory obligations under the National Environmental Policy Act (NEPA), federal Endangered Species Act (ESA), and Coastal Zone Management Act (CZMA) when they issued a Final EA. The court found the federal agencies had complied with NEPA requirements, but had violated provisions of the Endangered Species Act and CZMA. The court ordered prohibitory injunctions preventing the federal agencies from issuing any well stimulation treatments plans or permits until BOEM and BSEE 1) complete a formal consultation with Fish and Wildlife Service (FWS) pursuant to the Endangered Species Act, and 2) complete the CZMA review process.

Factual and Procedural Background

This case consolidated two successor cases which culminated in settlement agreements where BOEM and BSEE agreed to conduct an EA and withhold any future application permits for well stimulation treatments. After the agencies issued the Final EA and subsequent Finding of No Significant Impact (FONSI), three groups of plaintiffs filed separate suits challenging the EA and FONSI. All three cases were transferred to the U.S. District Court and consolidated in the present case. The parties then cross-moved for summary judgment on seven claims under NEPA, the Endangered Species Act, and CZMA.

NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) when federal action is proposed that will significantly affect the quality of the human environment. Alternatively, a federal agency may prepare an EA and provide a concise summary on whether an Environmental Impact Statement (EIS) is even required, and if the agency finds that there will be no significant impact, then it can forgo the EIS and issue a FONSI. BOEM and BSEE reviewed four proposed plans relating to well stimulation treatments and then issued a FONSI based on a determination that there would be no significant impact on the human environment. The federal agencies argued that they had not taken any "major federal action" to trigger the statutory requirements of NEPA. The plaintiffs disagreed, challenged the adequacy of the EA, and argued that the agencies should have prepared the more robust EIS.

Under § 7 of the Endangered Species Act, a federal agency must ensure that any action they authorize is not likely to result in the jeopardization of any endangered, or threatened species, or result in the destruction of critical habitat. 16 U.S.C. §1536(a)(2). The ESA requires procedural mandates, including at least informal consultation with Fish and Wildlife Services and National Marine Fisheries Services (NMFS), even if a certain substantive outcome or determination is not reached. Plaintiffs allege BOEM and BSEE failed to initiate consultation with either FWS or NMFS before issuing the EA. The federal agencies argue that the consultation requirements were not triggered because they had not taken "action" within the meaning of the statute.

The CZMA gives coastal states the right to review federal agency activity and if the state finds that federal activity is inconsistent with the state's coastal management plan, the state may seek relief in federal court. The plaintiffs allege BOEM and BSEE violated the CZMA by failing to prepare and submit a determination to the California Coastal Commission on whether the proposed use of well stimulation treatments is consistent with California's coastal management plan. The federal agencies argued that they had not taken the required federal agency activity that would have triggered review under the CZMA.

The District Court's Decision

The NEPA Claims

The court determined that NEPA claims were reviewable because the proposal to allow well stimulation treatments on the Pacific Outer Continental Shelf was a major federal action. The court then denied the plaintiffs' NEPA claims because the federal agencies took the requisite "hard look" at the environmental effects of "fracking" on the Pacific Outer Continental Shelf and reasonably concluded that there would be no significant impact. The court reviewed the agencies' action under a deferential standard that looks for agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Finding the federal agencies had made informed decision-making and satisfied public participation requirements for the EA, the court rejected the plaintiffs challenges to the substance of the EA. The court then considered whether an EIS should have been prepared instead of an EA, and found that the intensity factors required under the statute were not present. Lastly, the court found

BOEM and BSEE had provided a reasonable range of alternatives in preparing the EA.

The ESA Claims

The Endangered Species Act claims were based on the federal agencies' failure to initiate consultation with the FWS and NMFS, as required by Section 7 of the Act before issuing the Final EA. The NMFS claim was found moot because BOEM and BSEE adequately initiated and completed consultation with NMFS. NMFS issued a letter concurring with BOEM and BSEE's determination. In contrast, BOEM and BSEE asked FSW to engage in a formal consultation given the adverse effect of an accidental oil spill on certain species. The court determined that the federal agencies violated the Endangered Species Act, however, by issuing their Final EA before the consultation was complete. The court granted the plaintiffs' request for declaratory relief and issued an injunction prohibiting the agencies from proceeding with well stimulation treatments permitting until consultation with FWS is complete.

The Coastal Zone Managemnt Act Claims

Finally, the court granted the plaintiffs' motion for summary judgment on the CZMA claims and issued an injunction prohibiting the agencies from approving permits until they complete the required CZMA process. The court found that the broad statutory language of "federal agency activity" included the federal action at issue and the federal proposal as described in the Final EA is reviewable under 16 U.S.C. §1456(c)(1).

Conclusion and Implications

This case illustrates that issuance of plans or permits may constitute an "action" under the Endanger Species Act or a "federal agency activity" under the CZMA, triggering interagency consultation and review requirements. Even under a deferential standard of review, federal agencies may be ordered to refrain from any further action unless and until the Endangered Species Act and CZMA consultations are completed.
(Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

SIXTH DISTRICT COURT AFFIRMS THAT A PEREMPTORY WRIT IS A FINAL JUDGMENT UNDER CEQA BASED UPON ITS 'SUBSTANCE AND EFFECT'

Alliance of Concerned Citizens Organized For Responsible Development v. City of San Juan Bautista, ___Cal.App.5th___, Case No. H044410 (6th Dist. Nov. 26, 2018).

The Sixth District Court of Appeal has issued a *partially* published decision: 1) affirming that a supplemental return filed by the City of San Juan Bautista and its city council complied with the terms and conditions of a previously issued peremptory writ regarding a proposed gas station, convenience store, and fast food restaurant project; and 2) rejecting petitioner's argument that the peremptory writ, which resolved all issues raised in the pleadings but was misleadingly labeled by the trial court as an "interlocutory remand," was not the final judgment but an un-appealable interlocutory order. The Court of Appeal reaffirmed that a peremptory writ of mandate is considered a final judgment under the California Environmental Quality Act (CEQA) based upon the "substance and effect" of the order and whether it conclusively and comprehensively resolves the claims raised in the lawsuit, regardless of how the order is labeled by the trial court.

Factual Background

In November 2014, the City of San Juan Bautista (City) approved entitlements for a gas station, convenience store, and fast food restaurant (Project) subject to a Mitigated Negative Declaration (MND). Petitioner, Alliance of Concerned Citizens Organized for Responsible Development (ACCORD), filed a petition for writ of mandate and complaint for injunctive relief (petition) challenging the Project and related MND, alleging numerous CEQA violations (including failure to prepare an Environmental Impact Report (EIR)) and also violations of the state Planning and Zoning Law. Specifically, ACCORD alleged that the Project was inconsistent with the City's general plan and violated City's Code.

Following a hearing on the petition in February 2016, the trial court issued a "Peremptory Writ of Interlocutory Remand For Reconsideration of Potential Noise Impacts" (the March 2016 Writ). Although styled as an "interlocutory" writ, the March 2016 Writ was neither tentative nor a partial adjudication of the issues and claims raised by ACCORD in the petition. Rather, both in substance and effect, the March 2016 Writ disposed of the entirety of both CEQA and non-CEQA issues raised by the petition. More particularly, the March 2016 Writ required the City and City Council to set aside the resolutions approving the Project, reconsider the significance of the Project's potential noise impacts, take further action consistent with CEQA, and file a return to the March 2016 Writ by no later than October 10, 2016. The March 2016 Writ resolved all other claims in favor of the Respondents (City and City Council) and Real Party in Interest (Harbhajan Dadwal).

The only remaining issue left to be resolved by the trial court was whether the return ultimately filed by the Respondents satisfied the terms and conditions of the March 2016 Writ and, more generally, complied with CEQA.

Notwithstanding the above, the March 2016 Writ expressly stated that it was not a final judgment and that, following submittal of the return, the trial court would "conduct such further proceedings as are necessary and appropriate and determine whether to enter a final judgment." More significantly, the March 2016 Writ stated that: "Nothing contained herein shall be construed as a final judgment for purposes of appellate review by any party to this action." ACCORD did not appeal from the March 2016 Writ.

Respondents' filed a supplemental return (Supplemental Return) to the March 2016 Writ stating that Respondents had filed a return to the writ prior to the return date of October 10, 2016, and that the Supplemental Return had been filed "to advise the court that the Project was approved after a public hearing

on October 18, 2016." Specifically, the Supplemental Return stated that Respondents had adopted resolutions setting aside the prior approvals, conducted a new noise study, and prepared a new Initial Study/ Mitigated Negative Declaration (IS/MND). At the conclusion of subsequent public hearings, the City Council adopted new resolutions again approving the Project. Shortly thereafter, and in accordance with the March 2016 Writ, the City requested entry of a "final judgment."

ACCORD filed objections to the Supplemental Return and proposed final judgment, arguing that Supplemental Return failed to comply with CEQA or the requirements of the March 2016 Writ and that adopting the new IS/MND was an abuse of discretion. On December 12, 2016, the trial court filed a document labeled as a "Final Judgment on Petition for Writ of Mandamus" (the December 2016 Judgment) determining that the Respondents had complied with the terms of the March 2016 Writ and CEQA. Although the March 2016 Writ had fully and completely resolved the claims asserted in ACCORD's petition, subject to submittal/approval of the Supplemental Return, the December 2016 Judgment allegedly "denied" the petition and entered "Judgment" in favor of the City and Real Party in Interest "in all matters."

ACCORD timely appealed the December 2016 Judgment alleging that the Respondents were required to prepare an EIR because there was substantial evidence of a fair argument that the Project would have significant noise and traffic impacts and the Project violated the City's Code provisions governing "formula retail businesses."

The Court of Appeal's Decision

The Court of Appeal ordered supplemental briefing on: 1) whether the March 2016 Writ was the final judgment despite its label; 2) whether the December 2016 Judgment was a post-judgment order despite its label; and 3) whether ACCORD's contentions had been forfeited and are not cognizable on the appeal:

> . . .except insofar as they relate to whether the trial court erred in determining that respondents fully complied with its March 2016 decision.

As outlined below, the Court of Appeal ultimately held that, based on the substance and effect of the documents, and for purposes of appeal "the March 2016 [Writ] was the final judgment and the December 2016 [Judgment] was a post-judgment order." In light of these findings, the Court of Appeal rejected ACCORD's arguments on the limited issues it had validly raised on appeal with respect to the December 2016 Judgment.

The Court of Appeal first considered the effect of the March 2016 Writ and whether that decision constituted a final judgment for purposes of ACCORD's appeal rights, despite the fact it was labeled as an "Interlocutory Remand." The court reasoned it "is not the form of the decree but the substance and effect of the adjudication which is determinative" of whether it is a final judgment:

> [W]here no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final.
>
> Because:
>
> . . . [t]he March 2016 decision disposed of all CEQA and non-CEQA issues raised by the petition and conclude[d] that respondents had not complied with CEQA with respect to the potential noise impacts of the project. . . [t]he decision was not tentative or partial.

On that point, the Court of Appeal found that the March 2016 Writ provided specific direction to the Respondents regarding the steps necessary to comply with the terms of the writ. It was neither here nor there that additional proceedings before the trial court were required to ensure the adequacy of the Supplemental Return as "a trial court has continuing jurisdiction to ensure compliance with a preemptory writ of mandate" and the scope of the proceedings were to be limited to confirming Respondents' compliance with the March 2016 Writ. Further, the Court of Appeal found irrelevant the "Interlocutory Remand" label affixed to the March 2016 Writ and language stating that "nothing herein shall be construed as a final judgment." In substance and effect, the March 2016 Writ disposed of all issues raised by the petition and concluded the entire matter between the parties, and therefore constituted a final judgment for purposes of an appeal.

ACCORD argued that the March 2016 Writ was an interlocutory remand and therefore not an appealable order. As such, the December 2016 Judgment, not the March 2016 Writ, should be considered the final judgment for purposes of appeal. In *Voices of the Wetlands*, the California Supreme Court held that Code of Civil Procedure § 1094.5 does not impose an absolute bar on interlocutory remands in administrative mandamus actions. In a concurring opinion, Justice Werdegar, joined by Chief Justice Cantil-Sakauye, acknowledged the limited scope of the Court's decision and suggested that an interlocutory remand would not be proper in a CEQA action. The California Supreme Court has not decided the propriety of an interlocutory remand in CEQA cases. The Court of Appeal in the instant case found it unnecessary to address this issue in its decision because:

> . . in substance and effect, the March 2016 [Writ] was the final determination of the parties' rights—i.e., the final judgment, in this case.

Thus, despite its misleading label, the Court of Appeal held that the March 2016 Writ was the final judgment and the December 2016 Judgment, which effectively discharged the peremptory writ, was an appealable post-judgment order. As ACCORD had timely appealed the December 2016 Judgment, but not the March 2016 Writ, the Court of Appeal's scope of review was limited exclusively to the December 16 Judgment, which properly determined that Respondents' had timely and comprehensively satisfied the conditions of the March 2016 Writ.

Finally, the Court of Appeal rejected ACCORD's argument that principles of fairness and due process support the granting of an extension of the appeal period. It was immaterial that the trial court had mischaracterized the March 2016 Writ and potentially mislead the parties based upon the language in the March 2016 Writ that it was not a final judgment and would not affect the parties' appeal rights. The Court of Appeal determined it had no statutory or other authority to extend the time for appeal "even to relieve against mistake, inadvertence, accident, or misfortune." Nor, for that matter, could the appeal timeline be extended by stipulation of the parties or under the legal principles of estoppel, or waiver. In sum:

> This court is not changing the character of the March 2016 decision. We merely recognize its actual substance and effect as the final judgment. The December 2016 decision was mischaracterized as the final judgment.

Conclusion and Implications

The Court of Appeal's decision is significant in that reaffirms the well-settled principle that an order granting a peremptory writ of mandate which disposes of all issues/claims raised in the CEQA petition (including any non-CEQA claims) constitutes a final judgment from which an appeal must be filed within 60 days, regardless of the trial court's continuing jurisdiction to enforce and determine compliance with the writ upon the respondent's return. The analysis hinges on the "substance and effect" of the order, and not to any label affixed to the order by the trial court. CEQA attorneys should be mindful of this as the failure to timely appeal a peremptory writ of mandate that conclusively and comprehensively resolves a party's claims can have potentially grave implications. The court's opinion is available online at: http://www.courts.ca.gov/opinions/documents/H044410.PDF (Paige Gosney)

FOURTH DISTRICT COURT RULES IN FAVOR OF COASTAL COMMISSION AND CITY OF SOLANA BEACH IN CONSTITUTIONAL CHALLENGE TO LAND USE PLAN AMENDMENTS

Beach and Bluff Conservancy v. City of Solana Beach, 28 Cal.App.5th 244 (4th Dist. 2018).

On October 17, 2018, in *Beach and Bluff Conservancy v. City of Solana Beach*, the Fourth District Court of Appeal ruled against a coastal property owner's group in its facial challenges to amendments to the City of Solana Beach's local coastal program land use plan. The amendments at issue adopted policies encouraging greater public access and restricting the use of seawalls and other shoreline protection devices.

Factual and Procedural Background

In March 2012, the California Coastal Commission (Commission) approved an amended land use plan for the City of Solana Beach (ALUP) and in January 2014 the Commission approved certain further amendments to that ALUP required to incorporate modifications requested by the Commission.

In a suit for declaratory relief and traditional *mandamus* under Code of Civil Procedure § 1085 initially filed in April 2013, Beach and Bluff Conservancy (Conservancy) challenged seven policies of the City of Solana Beach's (City) ALUP as facially inconsistent with the California Coastal Act and/or facially unconstitutional. The trial court granted the Conservancy's motion and petition for writ of mandate regarding two of the challenged policies and denied the motion and petition regarding the other five challenged policies. The Conservancy timely appealed.

The Court of Appeal's Decision

On appeal, the Conservancy challenged the first three of the following five policies as inconsistent with the Coastal Act, the fourth on the ground it violates the "unconstitutional conditions" doctrine, and the fifth on the ground it violates both the Coastal Act and the Constitution:

- Policy 2.60, restricting the right of blufftop property owners to repair existing private beach stairways and prohibit construction of new stairways;

- Policy 4.22, prohibiting bluff retention devices for the sole purpose of protecting an accessory structure;

- Policy 4.43, providing that a permit for a bluff retention device will expire when an existing blufftop structure requiring protection is redeveloped, is no longer present, or no longer requires protection;

- Policy 4.19, providing that new shoreline or bluff protective devices, such as seawalls, that alter natural landforms shall not be permitted to protect new development. As a condition for a permit for new blufftop development or redevelopment, the policy requires a property owner to record a deed restriction waiving any future right to construct new bluff retention devices; and

- Policy 2.60.5, requiring conversion of a private beach stairway to a public accessway "where feasible and where public access can reasonably be provided" when the property owner applies for a coastal development permit to replace more than 50 percent of the stairway.

Administrative *Mandamus* vs. Traditional *Mandamus*

In response to the Conservancy's challenge on appeal, the City contended that under the Coastal Act the Conservancy's exclusive remedy for its challenges was an action for administrative *mandamus* under Code of Civil Procedure § 1094.5 rather than traditional *mandamus* under § 1085. Administrative *mandamus* under § 1094.5 applies to quasi-judicial decisions that involve the application of a rule to a specific set of facts, whereas traditional *mandamus* under § 1085 applies to quasi-legislative decisions that involve the formulation of a rule to be applied to all future cases. (239 Cal Rptr. 3d 96-97)

Because the Commission acts in a quasi-judicial capacity when it reviews and decides whether to certify a local government's LUP—the Commission's review of an LUP is limited, by statute, to its administrative determination that the plan does, or does not, conform with the requirements of the Coastal Act—the Court of Appeal agreed with the City and concluded the Conservancy's sole remedy to challenge the amended LUP was to file a petition for writ of administrative mandate under § 1094.5, notwithstanding the fact the City acted legislatively when it enacted the policies at issue.

The court therefore held that the Conservancy's challenge to policies 2.60, 2.60.5, 4.22, and 4.53 on the ground they are inconsistent with the Coastal Act, were barred by the Conservancy's failure to file writ petition under § 1094.5 within the applicable 60 day period. (239 Cal Rptr. 3d 100).

Unconstitutional Conditions Doctrine/Takings

The court then held that the Conservancy's challenges to policies 2.60.5 and 4.19 under the "unconstitutional conditions" doctrine fail on the merits. (239 Cal Rptr. 3d 105). The Conservancy contended that Policy 2.60.5 is unconstitutional because it exacts private property for public use without compensation as a condition of a permit. According to the

Conservancy, repairing or replacing existing stairways creates no new burden on public access that could justify depriving private owners the right to exclude the public without compensation. The Conservancy also contended the waiver condition imposed by Policy 4.19 is an unconstitutional exaction because there is no logical connection or nexus between the waiver requirement and any identified adverse public impact of new development.

As the court discussed, the doctrine of unconstitutional conditions limits the government's power to require one to surrender a constitutional right in exchange for a discretionary benefit. In the takings context, under *Nollan* and *Dolan*, the U.S. Supreme Court has held the government may impose such a condition only when the government demonstrates there is an "essential nexus" and "rough proportionality" between the required dedication and the projected impact of the proposed land use. A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.

To date, under settled U.S. Supreme Court and California Supreme Court case law, the two-part *Nollan* and *Dolan* test developed for use in land exaction takings litigation applies only in the case of individual adjudicative permit approval decisions, not to generally applicable legislative general zoning decisions. Thus, the court held that the unconstitutional conditions doctrine does not apply to facial challenges such as those raised by the Conservancy. (239 Cal Rptr. 3d 104).

In reaching this decision, the court reasoned that Policy 2.60.5's permit condition requiring conversion of a private stairway to a public accessway cannot be deemed on its face to conflict with constitutional principles in general or in the great majority of cases because it does not inevitably require a property owner to convert a private stairway to a public stairway when the owner replaces or repairs the stairway. Whether the policy effects an exaction or physical invasion of private property for which the City must pay just compensation under *Nollan* and *Dolan* can be determined only on a case-by-case basis as individual property owners subject to the policy's permit condition apply for permits to repair or replace their beach stairways.

Further, the court reasoned that Policy 4.19 does not inevitably pose a present and total conflict with the Constitution because the group has a "heavy burden" to show the ALUP amendment is unconstitutional in all or most cases and cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise regarding the particular application of the amendment. The court also reasoned that the condition requiring a property owner to waive the right to new or additional bluff retention devices does not constitute a physical invasion of property or deprive blufftop property owners of all economically viable use of their properties. Finally, the court noted that the unconstitutional conditions doctrine does not apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (*i.e.*, a dedication of property or the payment of money) as a condition of approval.

Conclusion and Implications

Beach and Bluff Conservancy shows the importance of timely filing land use challenges under the correct procedures and highlights the difficulty in bringing successful facial takings challenges. The Conservancy's constitutional challenges failed because they are not ripe for adjudication until there has been a final, definitive, position regarding how the City will apply the challenged enactment in a given case; only then can it be determined whether a taking under the unconstitutional conditions doctrine has occurred. The court's opinion is available online at: http://www.courts.ca.gov/opinions/documents/D072304.PDF (Bradley Scheick)

SECOND DISTRICT COURT AFFIRMS TRIAL COURT'S INVALIDATION OF CITY BILLBOARD AGREEMENT

Citizens For Amending Proposition L v. City of Pomona, ___Cal.App.5th___, Case No. B283740 (2nd Dist. Nov. 7, 2018).

The Second District Court of Appeal has held that a purported amendment of a development agreement to continue to permit billboards in Pomona was invalid due to a proposition prohibiting such billboards.

Factual Background

In 1993 appellant City of Pomona (Pomona) entered into a development agreement with Regency Outdoor Advertising, Inc. (Regency) to permit advertising billboards alongside several Pomona freeways. Shortly thereafter, in November 1993, the citizens of Pomona passed a ballot initiative, Proposition L (Prop. L), which prohibited the construction of additional billboards within city limits. Pomona's agreement with Regency expired by its terms in June 2014, at which time Regency was to remove the billboards permitted by the agreement.

After several years of negotiation, Pomona and Regency agreed to amend the agreement. At its June 16, 2014 meeting, the city council introduced for first reading Ordinance No. 4190 to extend the agreement for 12 years, and included various provisions, including a $1 million payment from Regency to Pomona. On June 24, 2014, the original agreement ended. Regency did not remove any of the billboards it had placed pursuant to the agreement. Almost two weeks later, on July 7, 2014, the city council introduced Ordinance No. 4190 for second reading and adoption.

Plaintiffs filed a verified petition for writ of mandate and complaint for declaratory relief against Pomona but not Regency. Pomona filed a demurrer and motion to strike, arguing that the action should be dismissed because plaintiffs failed to join Regency, which it asserted was an indispensable party. Pomona further argued that the Prop. L allegations should be stricken because Prop. L was not applicable to the agreement, which was enacted before its passage. The trial court overruled the demurrer and substantively denied the motion to strike. After a stay in the proceedings, the trial court granted the petition for writ of mandate and awarded plaintiffs $75,200.40 in attorney's fees. Pomona timely appealed.

Legal Background

A writ of mandate under Code of Civil Procedure § 1085 is a vehicle to compel a public entity to perform a legal duty, typically one that is ministerial. *Weiss v. City of Los Angeles*, 2 Cal.App.5th 194, 204 (2016) "As a general rule, a party must be 'beneficially interested' to seek a writ of mandate." Code Civ. Proc., § 1086. There is an exception to the general standing requirement, called public interest standing, when a case concerns a "public right and the object of the mandamus is to procure the enforcement of a public duty[.]" *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal.4th 155, 166 (2011).

Code of Civil Procedure § 389 governs the joinder of parties to litigation, and sets forth the standards by which courts analyze whether a party is "indispensable" to an action and an action cannot continue without the party.

Amendment of a development agreement is a legislative act and is:

> . . .presumed to be valid; to overcome this presumption the petitioner must bring forth evidence compelling the conclusion that the ordinance is unreasonable and invalid. *County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 973.

The Court of Appeal's Decision

Standing

The court first addressed plaintiffs' standing, holding that the trial court properly found the plaintiffs to have public interest standing. Pomona asserted that the plaintiffs were merely interested in supporting a different billboard company, and thus had personal economic interests rather than general public interests. The court rejected this assertion, noting that one plaintiff was a Pomona resident and chairperson of the civic organization that was a named party. The court then held that:

> Compliance with the law, particularly one enacted by voter initiative in response to the initial formation of the contract allowing billboards into the city, is in our view a 'sharp' public duty. Slip Op. at p. 20.

Indispensable Party

The court next addressed whether Regency was an indispensable party to the litigation. Code of Civil Procedure § 389(a) requires, among other things, that an affected non-party's interests are sufficiently protected and advanced by another party. The court held that Regency's interests were sufficiently advanced by Pomona because "the interests of Regency and Pomona [were] aligned not only legally but also financially," as both Regency and Pomona had the same legal interest in seeing the agreement amendment upheld, and both sought to gain substantial financial benefits for the agreement—Pomona a $1 million payment, and Regent the continued operation of lucrative billboards. Slip Op. at p. 32.

The Agreement Amendment as a Legislative Act

The court then turned to Pomona's argument that the agreement amendment, as a legislative act, could only be set aside if it was clearly unreasonable and invalid. The court agreed with Pomona's standard of review, but held that the ordinance purporting to amend the development agreement was clearly invalid because it did not take effect until after the development agreement had expired. The agreement expired June 24, 2014, yet the amendment ordinance was not adopted until July 7, 2014. As such, it violated Prop. L, which prohibited allowing any new billboards. Slip Op. at p. 36.

Attorney's Fees

Finally, the court upheld the trial court's award of attorney's fees, holding that the benefit gained by the litigation was "significant and widespread" and extended beyond any personal benefit that accrued to plaintiffs. Slip Op. at p. 44.

Conclusion and Implications

In the end, the court held that the amendment to the development agreement to continue to permit billboards in Pomona was invalid due to Proposition L.

This case is significant because it contains an extensive and clear discussion of both public interest standing and the law concerning indispensable parties. The court's opinion is available online at: http://www.courts.ca.gov/opinions/documents/B283740.PDF (Alex DeGood)

THIRD DISTRICT COURT FINDS LOCAL GOVERNMENT MAY BASE ITS CEQA IMPACT ANALYSIS ON REASONABLY FORESEEABLE LEVELS OF GROWTH AND DEVELOPMENT

High Sierra Rural Alliance v. County of Plumas, 29 Cal.App.5th 102 (3rd Dist. 2018).

The Third District Court of Appeal certified for publication its decision in *High Sierra Rural Alliance v. County of Plumas*. Rejecting arguments that Plumas County (County) violated the California Environmental Quality Act (CEQA) and the Timberland Productivity Act (Timberland Act) when it adopted a General Plan update, the appellate court affirmed the trial court's judgment in Plumas County's favor.

Factual and Procedural History

In 2005, the County began efforts to update its 1984 General Plan. Over the next eight years, the County engaged in a community engagement and education process to create the 2035 General Plan Update (GPU) that reflected the County's planning goals and values. In December 2013, the County's board of supervisors certified the Final Environmental Impact Report (EIR) and adopted the GPU. High Sierra Rural Alliance filed suit, arguing that the GPU conflicted with the Timberland Act and that the EIR for the GPU did not adequately analyze impacts of potential growth outside of designated planning areas. The trial court disagreed and denied the petition and complaint in its entirety. High Sierra appealed.

The Court of Appeal's Decision

The Third District's opinion began with a brief description contrasting the County's large size with its small population. Although the County covers approximately 2,613 square miles or over 1.67 million acres, its vast lands supported only 20,007 residents in 2010. The court also highlighted the minimal expected population growth, with the Department of Finance estimating the County's population to remain under 21,000 until 2025, at which point the population is expected to decline.

The County's GPU was Consistent with the Timberland Act

Turning to High Sierra's Timberland Act claims, the court started with an overview of the act and the GPU policies related to timberland production zone (TPZ) lands. The court then settled a heretofore unresolved question under the Timberland Act—namely, whether any residence approved on land zoned for timberland production must be "necessary for" the management of the relevant parcel as timberland. The court agreed with the County's interpretation of Government Code § 51104, subdivision (h)(6), as providing that any "residence" on TPZ lands must be "necessary for" and "compatible with" the management of land zoned as timberland production. The court also made clear that "section 51104 suffices to supply the restrictions on residences and structures on timberland production zone parcels," and thus the County's GPU did not conflict with the Timberland Act simply because it failed to recite the statutory language in § 51104 in its relevant policies.

In discussing the Timberland Act arguments, the court explained that the requisite finding under the Timberland Act that a residence or structure is necessary for the management of a timberland production zoned parcel is not an exercise of discretion in the CEQA context. As explained by the court, an agency can exercise CEQA discretion only where it has "the power (that is, the discretion) to stop or modify" a project in a way which would mitigate the environmental damage in any significant way." Because the court concluded that the Timberland Act affords the County no discretion to stop or request modification of a proposed residence or structure in order to mitigate environmental impacts," the court rejected High Sierra's argument.

The General Plan Update EIR Complied with CEQA

Next, the court rejected High Sierra's CEQA claims. High Sierra argued that the EIR failed to acknowledge and analyze the potential for rural sprawl. But the EIR explained that full build-out under the GPU would not occur for another three hundred years. Based on the substantial evidence in the record, the court concluded that the County could properly focus its analysis on the reasonably foreseeable growth occurring under the GPU through year 2035. The court also agreed with the County that historic land use data supported the conclusion that growth would occur almost exclusively within the designated planning areas. The court rejected High Sierra's speculation that one of the GPU policies would open the floodgates to residential subdivisions on agricultural, timber, and mining lands. High Sierra's reliance on a working paper about real estate markets in the northern Rockies failed to persuade the court because the paper did not cite any data specific to Plumas County.

Finally, the court held that the County did not violate CEQA by failing to recirculate the EIR. The court was unconvinced by High Sierra's argument that the inclusion in the Final EIR of building intensity standards and more accurate maps showing potential development outside of planning areas triggered recirculation.

Conclusion and Implications

The opinion is the first precedent to explore the intersections of CEQA and the Timberland Act. In particular, the Third District clarified the effect of Government Code § 51104, subdivision (h), on local agencies. The opinion is also the first CEQA precedent clearly holding that a local government, in preparing an EIR for a General Plan update, may base its impact analysis on reasonably foreseeable levels of population growth and development, as opposed to theoretically possible levels. The decision is available at: http://www.courts.ca.gov/opinions/documents/C082315.PDF

(L. Elizabeth Sarine, Chris Stiles)

FIRST DISTRICT COURT HOLDS SAND MINING IS NOT A PUBLIC TRUST USE BUT UPHOLDS FINDING THAT MINE WILL NOT IMPAIR THE PUBLIC TRUST

San Francisco Baykeeper, Inc. v. State Lands Commission, 29 Cal.App.5th 562 (1st Dist. 2018).

The First District Court of Appeal upheld a trial court's decision to discharge a writ in a long-running dispute over a sand mining operation near San Francisco Bay. The court held that the State Lands Commission (SLC) erred by concluding that private commercial sand mining constitutes a public trust use of sovereign lands. The court also concluded, however, that there was substantial evidence supporting the SLC's finding that the mining operation would not impair the public trust, and, in that ground, affirmed the trial court order discharging the writ.

Factual and Procedural History

In 1998, the State Lands Commission (SLC) issued several ten-year mineral extraction leases, which authorized commercial sand mining from delineated areas under the central San Francisco Bay, Suisun Bay, and the western Sacramento-San Joaquin River Delta. The parcels covered by these leases were all sovereign lands, owned by the State of California subject to the public trust, and managed by the SLC. After the leases expired, the mine operator sought to obtain new ten-year leases from the SLC covering essentially the same parcels in the San Francisco Bay that were mined under the previous leases. The operator sought authorization to remove a maximum of 2.04 million cubic yards of sand per year, using a mining method referred to as dredge mining to obtain marine aggregate sand, which is particularly desirable to the construction industry.

In 2012, the SLC certified the Final Environmental Impact Report (EIR) and approved a revised version of the project referred to as the "Reduced Project Alternative with Increased Volume Option." Shortly thereafter, Baykeeper filed a petition for writ of mandate, alleging that the SLC's approval violated both the California Environmental Quality Act (CEQA) and the common law public trust doctrine. The trial court denied the petition and Baykeeper appealed. In 2015, the First District Court of Appeal affirmed the trial court's determination that the Final EIR complied with CEQA but reversed a finding that the SLC complied with the public trust doctrine and remanded the case for further proceedings.

After the Court of Appeal issued its decision in that case, the trail court issued a preemptory writ directing the SLC to reconsider the sand mining project in light of the common law public trust doctrine. The SLC later reapproved the project after making public trust findings. Specifically, the SLC found that sand mining is a public trust use, or alternatively, even if sand mining is not a public trust use, approval of the leases was consistent with the common law public trust doctrine. The trial later discharged the writ, finding that the SLC's public trust findings were supported by the record. Baykeeper appealed.

The Court of Appeal's Decision

On appeal, Baykeeper argued that the SLC violated the public trust doctrine by reapproving the leases pursuant to findings that: 1) sand mining is a public trust use of sovereign lands and 2) the project will not impair the public trust. The Court of Appeal agreed with Baykeeper that sand mining is not a public trust use, but found that the record supported the SLC's finding that the public trust would not be impaired by the project.

Commercial Sand Mining Is Not a Public Trust Use

The Court of Appeal first considered Baykeeper's challenge to the SLC's determination that the sand mining leases qualified as a public trust use of the submerged lands under the Bay. The SLC argued that the sand mining leases were a public trust use because the mine operator would use boats to extract alluvial sand and then transport this valuable resource into the stream of commerce. The Court of Appeal disagreed. The court explained that the defining principles of the public trust doctrine establish that, by its very nature, a public trust use is a use that facilitates *public* access and enjoyment of trust property for such

purposes as navigation, commerce, and recreation. Because the leases authorized *private* commercial sand mining, the mining could not be considered a public trust use of the submerged lands at issue in the case. According to the court, the SLC's interpretation of public trust use was overboard because it would give the state trustee free authority to allocate trust property without regard to its obligation to preserve trust resources for public use and enjoyment. The court concluded by noting that stretching this concept to include a private commercial operation that does not facilitate public access to or enjoyment of trust lands would destroy the principle itself.

Taking a different tack, the SLC argued that the sand mining leases constituted a public rather than private "use" of trust property because the alluvial sand would not actually be *used* by the mine operator, but rather by members of the public who need it for their various projects, and because the state would also participate in this endeavor by deriving revenue from the leases. The court easily rejected this argument because the SLC did not approve a project authorizing the mine operator to distribute alluvial sand to the public on behalf of the state. Rather, it approved leases that authorize a private party to extract and remove a trust asset so that it can make whatever profit from that product the market will bear. Because that use was not for the benefit of the public, it was not a not a public trust use of the land under the Bay.

Substantial Evidence Supported the Finding that the Public Trust Would Not Be Impaired

The SLC's alternative ground for approving the project was based on findings that the project would further the interests of the public and the state without impairing public trust uses or values. As explained by the court, even though commercial sand mining is not categorically permissible as a public trust use, the SLC may authorize private uses of trust property that do not impair the trust. Consistent with this common law rule, Public Resources § 6900 codifies the SLC's authority to grant leases for the extraction of minerals other than oil and gas from trust lands:

> . . .when it appears to be in the public interest. . .[and when]. . . it appears that the execution of such leases and the operations thereunder will not interfere with the trusts upon which such lands are held or substantially impair the public rights to navigation or fishing.

Baykeeper argued that the SLC could not make the requisite "impairment" findings because the mining would cause erosion at Ocean Beach and the San Francisco Bar, both of which are public trust resources. The court disagreed. As part of its public trust analysis, the SLC concluded that the sand mining activities would not impair public trust uses by either substantially depleting the sand resource or substantially interfering with sand transport and coastal morphology. The court held that this finding was supported by substantial evidence in the record, including project specific modeling, summaries of scientific evidence, and several reports prepared engineers. Although the record showed that Baykeeper and the SLC took different sides in the scientific controversy regarding the impacts of sand mining on coastal morphology, the court held that the disagreement was not a ground for overturning a finding by the SLC that was supported by substantial evidence.

Conclusion and Implications

The purpose of the public trust doctrine is to protect public access and enjoyment of trust property for such purposes as navigation, commerce, and recreation. Therefore, private commercial uses, such as the sand mine at issue here, will generally not qualify as public trust uses. Such uses may nevertheless be permitted by trustee agencies provided that the use does not impair the public trust. When an agency finds that a use will not impair the public trust, the finding will be upheld as long as it is supported by substantial evidence.

The opinion is available here: http://www.courts.ca.gov/opinions/documents/A151821.PDF
(Chris Stiles)

SECOND DISTRICT COURT DENIES COMMUNITY GROUP CHALLENGE TO WEST LOS ANGELES MIXED-USE DEVELOPMENT PROJECT

Westsiders Opposed to Overdevelopment v. City of Los Angeles, 27 Cal.App.5th 1079 (2nd Dist. 2018).

On October 1, 2018, in *Westsiders Opposed to Overdevelopment v. City of Los Angeles*, the Second District Court of Appeal denied an appeal challenging the City of Los Angeles' approval of an 800,000 square foot mixed-use project on a five-acre site in West Los Angeles. The proposed project included the demolition of an existing automobile dealership and the construction of 516 residential units in a seven story building, 99,000 of ground floor retail space, and 200,000 square feet of office floor area in a ten story building (Project).

Factual and Procedural Background

In September 2016, the City of Los Angeles (City) approved a General Plan amendment changing the land use designation of a single lot located at the intersection of South Bundy Drive and West Olympic Blvd from light industrial to general commercial in order to permit the development on that site of the Project. The next month a citizens group known as Westsiders Opposed to Overdevelopment (Westsiders) filed a petition for a writ of mandate challenging the General Plan amendment.

Westsiders' challenge was based on §§ 555(a) and (b) of the city charter of Los Angeles, which, respectively, provide in relevant part, that the City may amended its General Plan "by geographic area, when the "area involved has significant social, economic or physical identity," and that amendments to the General Plan may be initiated by the city council, the city planning commission or the director of planning.

Westsiders argued that 1) under § 555(a) of the charter bars the amendment of the General Plan for a single project site because such a small area cannot constitute a "geographic area" with "significant social, economic or physical identity, and 2) because the General Plan amendment in question had been requested by the developer of the proposed-mixed use project, the City had therefore effectively allowed it to be initiated by a member of the public in violation of § 555(b) of the charter.

At the Trial Court

The trial court denied Westsiders' petition, finding that the City had not exceeded its authority under either § 555(a) or 555(b) of the Charter nor had it abused its discretion in either its approval of the General Plan amendment or its initiation of the General Plan amendment. Westsiders timely appealed.

The Court of Appeal's Decision

Standard of Review

The Court of Appeal began its analysis by addressing the proper standard of review, concluding that, despite Westsiders' contention that its challenge should be reviewed under Code of Civil Procedure § 1094.5, a General Plan amendment is reviewable under Code of Civil Procedure § 1085 as a legislative act. As such, the court further concluded, the City's action must be evaluated based on several basic principles applicable in lawsuits challenging legislative acts, including: 1) that the legislative act is presumed valid, 2) that a city is not required to make explicit findings to support its action, and 3) that judicial review is limited to determining whether the City's act in adopting the subject amendment was "arbitrary, capricious, entirely without evidentiary support, or procedurally unfair." (27 Cal. App. 5th 1079, *3).

General Plan and a 'Geographic Area'

The court then proceeded to address in detail each of Westsiders arguments, turning first with Westsiders' contention that the General Plan could not be amended for a "single project or single parcel" because such a small piece of land could not qualify as a "geographic area" with "significant social, economic or physical identity." According to Westsiders, 1) the plain meaning of "geographic area" is a "region," and a single lot or small lot is not a region, and 2) a single lot cannot qualify as having a "significant social, economic, or physical identity" within the meaning of the charter.

The court found that the subject parcel did constitute a "geographic area" with a unique "economic or physical identity" for purposes of § 555(a) of the City Charter. In reaching this conclusion, the court, citing to rules of statutory interpretation applicable to city charters, including that a charter city has all power over municipal affairs subject only to the "clear and explicit limitations and restrictions contained in the charter" and that courts may not construe a charter to restrict municipal power without a clear mandate in the charter itself, rejected Westsiders' claims and held that there are no "clear and explicit limitations [or] restrictions" in the charter regarding the size of the geographic area that may be the subject of a General Plan amendment. (27 Cal. App. 5th 1079, *4).

Restrictions or Limitations Regarding Amendments

Westsiders also argued that the City effectively allowed the developer to "initiate" the amendment, contrary to § 555(b) of the City charter, which only allows "[t]he Council, the City Planning Commission or the Director of Planning [to] propose amendments to the General Plan." (27 Cal. App. 5th 1079, *5). Again citing to principles of city charter interpretation, the court rejected Westsiders' argument, holding that the charter contains no "clear and explicit limitations [or] restrictions" regarding who may request an amendment. The court thus declined to read the term "initiation" in the title of the charter provision or "propose" in the body of the section:

> . . .as meaning that the seed for any proposed amendment must sprout in the heads of City officials without any input from private citizens. Any other result, the court noted, would stifle public participation in public land use decision-making. (27 Cal. App. 5th 1079, *5).

Findings as to a Geographic Area or Significant Economic or Physical Identity

Westsiders next argued that the City never made the required findings, applicable under Code of Civil Procedure § 1094.5, that the subject lot constituted a "geographic area" or that "the lot has a significant economic or physical identity." (27 Cal. App. 5th 1079, *6). However, Westsiders failed to cite any authority in support of this argument and, instead, cited only to 8,000 pages in the administrative record and argued—in one sentence—that the City's finding that the project site has a "unique economic and physical identity" is not supported by the evidence.

The court held that the City is not required to make explicit findings to support a General Plan amendment because legislative acts need not be accompanied by findings. In addition, the court reasoned that although the City used the word "unique" instead of "significant" in discussing the site's "economic and physical identity," the City clearly found the proposed project possessed the appropriate significant economic and physical characteristics. Moreover, the court would not address this argument further because it was not supported by any argument or specific citation to the record. (27 Cal. App. 5th 1079, *6).

Spot Zoning

Finally, the Westsiders claimed that the General Plan amendment resulted in unlawful spot zoning because the project is allegedly not the result of a substantial public need. The court held that Westsiders waived its spot zoning argument, however, because the group failed to raise the issue in the trial court. (27 Cal. App. 5th 1079, *6).

Conclusion and Implications

This decision highlights the deference that must be given both to a city's own legislative acts under Code of Civil Procedure § 1085 and to a city's interpretation of its own charter. In both such cases, a reviewing court must give significant weight to the decisions and judgments of the city and therefore, as this decision shows, successfully challenging a city's legislative actions or interpretations of its own charter can be difficult. The court's opinion is available online at: http://www.courts.ca.gov/opinions/documents/B285458.PDF
(Bradley Scheick)

THIRD DISTRICT COURT ADDRESSES PROPOSITION 218 AND A MUNICIPAL REFERENDUM SEEKING TO ALTER WATER RATES TO FACILITATE WATER INFRASTRUCTURE

Wilde v. City of Dunsmuir, ___Cal.App.5th___, Case No. C082664 (3rd Dist. Nov. 15, 2018).

The Third District Court of Appeal has held that Proposition 218 does not preclude placing a referendum on the ballot regarding legislatively imposed fees.

Factual Background

In March 2016, the Dunsmuir (City) city council passed Resolution 2016-02 by which it raised water rates. Resolution 2016-02 set forth a five-year plan for a $15 million upgrade to the City's water storage and delivery infrastructure. Consistent with the requirements of Proposition 218, the City provided notice of the public hearing on water rate adjustments and protest ballots with which residents could file an objection. The City received only 40 protest votes at a time when 800 were required for a successful protest, and Resolution 2016-02 went into effect.

After the resolution's adoption, petitioner Leslie Wilde (Wilde) gathered 145 voter signatures calling for a referendum to repeal the resolution. These signatures were verified. Nonetheless, the City's attorney informed Wilde the City refused to place the referendum on the ballot, stating:

> The setting of Prop. 218 rates is an administrative act not subject to the referendum process. Also, Proposition 218 provides for initiatives ([Cal.Const. art.] XIII C, § 3), but not referenda.

Wilde filed a petition for writ of mandate to place her referendum on the ballot. In July 2016, the trial court denied the writ petition, agreeing with the City that the setting of new water rates constituted an administrative act that was not subject to referendum.

While Wilde's writ petition was pending in Superior Court, she gathered a sufficient number of signatures for an initiative to amend the City's water and sewer rate structure. The City placed Wilde's initiative on the November 8, 2016 ballot as Measure W. Measure W would have implemented a different water and sewer rate structure than that adopted by Resolution 2016-02. Measure W was rejected by the voters.

Legal Background

The powers of initiative and referendum are considered rights reserved by the people, and courts:

> . . .apply a liberal construction to this power… If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it. *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591. . . .The powers of referendum and initiative apply only to legislative acts by a local governing body. *Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 516, fn. 6.

However, acts of a local governmental entity may be administrative in nature when they merely carry out previously determined policies rather than constituting new legislative policy.

In November 1996 the electorate adopted Proposition 218, which added Articles XIII C and XIII D to the California Constitution, which among other things imposed a two-thirds vote requirement for the passage of a special assessment (special taxes had already required a two-thirds vote under Proposition 13). Article XIII C, § 3 states that:

> . . .the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge.

The Court of Appeal's Decision

The court first addressed whether the lawsuit was moot in light of the fact that the City electorate had rejected Wilde's initiative, holding that it was not, as the initiative and proposed referendum concerned different things. Wilde's initiative sought to replace the City's water rates with a different set of water rates, whereas her proposed referendum sought to

repeal the City's water rate resolution. As such, the voters' rejection of the initiative did mean that the voters would necessarily reject the referendum. Slip Op. at p. 6.

The court next discussed whether Proposition 218 in some manner restricted or precluded the use of a referendum, holding that it did not. The court noted that article XIII C, § 3 of the California Constitution, added by Proposition 218, "confirms voter initiative rights and contains no negative language that limits any power of the voters." Given this, the court held that "Section 3 cannot be read to repeal California voters' referendum power to challenge local resolutions and ordinances." While a referendum cannot be used to challenge a tax measure, here the parties agreed the water service charge was a fee, and therefore a referendum was permitted. Slip Op. at p. 13.

Next, the court examined whether the water rate resolution prescribed a new policy or simply administratively carried out previously determined legislative policies. Looking to the uncontested factual recitals in the resolution, the court found that:

> . . .[t]he new water rates are the product of a newly formulated set of policies that implemented a new set of choices: to replace a 105-year-old water storage tank as well as selected old water mains. In addition to these decisions to replace infrastructure, the 2015 Dunsmuir Water Master Plan also represents policy choices about how to allocate the new infrastructure costs. Slip Op. at p. 16.

Further, the resolution adjusted the allocation of rates and departed from continued maintenance of old facilities, which the court found to be new policy. Slip Op. at p. 17.

Finally, the rejected the contention that the proposed referendum was improper because it would undermine "essential government services," as it would not affect the "ordinary working or budgeting of the City," but rather would challenge "policy choices" regarding the City's water infrastructure and rates. Slip Op. at pp. 20-21.

Conclusion and Implications

This case is significant because it makes it clear the Proposition 218 did *not* limit the referendum power, and provides guidance for interpreting whether a local government action is legislative or administrative in nature. The court's published opinion is available online at: http://www.courts.ca.gov/opinions/documents/C082664.PDF
(Alex DeGood)

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