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# CALIFORNIA LAND USE™
## LAW & POLICY Reporter

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LAW & POLICY Reporter



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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

# DEFINING 'WATERS OF THE UNITED STATES' AND 'WATERS OF THE STATE'—CLEAR AS MUD

*By David C. Smith*

As many rally to the cry, "Drain the Swamp!," many others are actually fighting diligently to define, defend, and even expand it. From Washington, D.C., to Sacramento, regulators, politicians, and litigants of all stripes are fighting over what constitutes a "water" worthy of protection, what those protections should be, and who bears the burden and cost of such protection. "Waters of the United States" versus "Waters of the State," "three-prong wetlands" versus "two-prong wetlands," and Obama versus Trump have left this critical resource area clear as mud.

On the federal front, the decades-long battle to define "Waters of the United States" or "WOTUS" within statutory and constitutional bounds acceptable to the U.S. Supreme Court remains elusive. Regulations from 1987 were superseded by an Obama administration Rule in 2015 (2015 WOTUS Rule), but multiple rounds of battling litigation have left it valid in only 22 of the 50 states. The Trump administration on February 14 of this year published its proposed replacement to the 2015 WOTUS Rule (2019 WOTUS Rule), but with at least a 60-day public comment period and the promise of litigation should it be finalized, enactment of the 2019 WOTUS Rule is certainly not imminent.

On the state level in California, the threat of what opponents of the 2019 WOTUS Rule characterize as a severe curtailment of the scope of federal regulatory protection for aquatic resources has breathed new life and urgency into another decade-long undertaking—an effort launched in 2008 by the California State Water Resources Control Board (SWRCB) to adopt a statewide policy and related regulatory procedures to govern the discharge of dredge or fill material to "Waters of the State" (State Program). The state having largely piggy-backed on the federal program since the inception of regulating such resources, critics of the proposed State Program question the state's staffing, resources, and sophistication to take on such a broad sweeping program apart from the feds. Critics also find the proposed State Program duplicative and at the same time conflicting with the federal program rendering it, at best, unnecessary and, at worst, costly and will expose the state and its economy to significant peril and litigation.

## How We Got Here—Blame the 'Supremes'

How indeed? The High Court's first grappling with the issue was back in 1985. In *United States v. Riverside Bay View Homes*, 474 U.S. 121 (1985), the U.S. Supreme Court ruled that wetlands that were adjacent to a clearly jurisdictional resource such as a major lake or river are sufficiently intertwined with the ecology and hydrology that the wetlands themselves warranted protection under § 404 of the federal Clean Water Act that prohibits filling a WOTUS.

However, over 15 years later, the Court ruled that U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) had failed to provide a legitimate justification for exerting federal regulation over large, abandoned mining pits that had filled with water. A majority of the justices held that those pits were "isolated" in that they had no hydrologic or other appreciable connection to true WOTUS, and they were contained only within a single state and had no apparent impact on interstate commerce. Thus, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) or "*SWANCC*" became the catalyst for many to define regulatorily a consistent, predictable regime by which to identify and, where appropriate, regulate WOTUS.

The failure of those regulatory efforts (by administrations of both ideological perspectives) was evidenced in *Rapanos v. United States*, 547 U.S. 715 (2006). There, the only thing a fractured Supreme Court could agree upon was that the Corps and EPA had not yet figured it out. In a 4-1-4 ruling with no majority rationale being held, the conservative plurality, led by Justice Scalia, said that to be subject to federal regulation under the Clean Water Act as a WOTUS, a resource must be a "relatively permanent water" as the term "water" is generally understood in common parlance. Conversely, the liberal plurality, led by Justice Stevens, would largely defer to the agencies' expertise and allow them to regulate any resources they believed warranted protection.

On his own was Justice Kennedy who felt that the "relatively permanent" standard was too restrictive, but he did feel the agencies would have to demonstrate that a given resource had a "significant nexus" to another clear WOTUS. Though he was the only justice to embrace this perspective, Justice Kennedy's "significant nexus" test largely became the governing standard nationwide in the years that followed.

And the question of what is and is not a WOTUS took on new urgency courtesy of the High Court in 2016. Up until then, the Corps or EPA designating a given area as a WOTUS escaped oversight or judicial review. Having been characterized as not "final agency action," the assertion of jurisdiction by the agencies could not be challenged in court. But in *U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807 (2016), the Supreme Court found that an exertion of jurisdiction had a sufficient tangible impact on property ownership that it is itself final agency action subject to judicial review.

## WOTUS—Where Are We? It Depends Where You Are

### The 2015 WOTUS Rule (Obama), 80 Federal Register 37054 (2015)

A major problem for the agencies with Justice Kennedy's "significant nexus" test from *Rapanos* was that it was very field-intensive. Demonstrating and documenting that any given resource had the requisite nexus to an indisputable WOTUS necessitated many hours of boots on the ground, both by private industry consultants and regulators themselves. The costs and work backlog became significant.

Accordingly, the Obama administration sought to craft a rule that would clearly identify criteria that would establish WOTUS status indisputably based on the language of the rule itself. Thus, the 2015 WOTUS Rule established clear and quantifiable criteria—such as a specified linear-feet between one resource and another or presence in a flood plain—that could be affirmed from a desk in an office with access to Google Earth as sufficient for the exertion of jurisdiction.

Critics of the 2015 WOTUS Rule were widespread, both geographically and across industries. They argued that the criteria were arbitrary and cast a jurisdictional net far beyond what Justice Kennedy articulated in *Rapanos*. Upon the 2015 WOTUS Rule's final adoption on June 29, 2015, the lawsuits were immediate and numerous. States, agriculture, and industry interests all challenged the rule as beyond the agencies' authority under the Clean Water Act. Multiple courts agreed that the rule was likely invalid and enjoined its implementation. All such courts, however, only enjoined the 2015 WOTUS Rule in states that were parties to that given lawsuit. Thus, a haphazard patchwork of injunctions speckled the nation.

In an effort to reestablish uniformity and to buy itself time to craft its own replacement rule, the Trump administration adopted a separate rule delaying the implementation of the 2015 WOTUS Rule by an additional two years. Defenders of the 2015 WOTUS Rule, primarily environmental interests, sued to challenge the two-year delay, and they were successful. Two U.S. federal District Courts held that the means by which the Trump administration adopted the delay failed to comply with the Administrative Procedure Act and invalidated the delay. These two courts, however, issued injunctions nationwide, reestablishing the patchwork.

As if that wasn't confusing enough, in the midst of this swirl and prior to President Trump's inauguration, the Obama administration in trying to fend off the challenges to the 2015 WOTUS Rule, contended that only a Circuit Court of Appeals had jurisdiction to hear the challenge, not the multiple District Courts in which the states had filed their lawsuits. The Sixth Circuit Court of Appeals agreed and consolidated all of the pending challenges to itself. But then, to the great dismay of the Obama administration, the Sixth Circuit granted the states' request

for a nationwide injunction against implementation of the 2015 WOTUS Rule finding that it was likely illegally expansive beyond the bounds of the Clean Water Act.

Still wanting to pursue their actions in local District Courts, however, the states appealed to the Supreme Court the Sixth Circuit's procedural decision as to the proper court to hear the matter(s). The High Court made no ruling whatsoever on the merits of WOTUS, but disagreed that the Sixth Circuit had jurisdiction and sent the individual matters back to the District Courts in which they were originally filed.

Thus, with sporadic local injunctions against implementation of the 2015 WOTUS Rule, and a nationwide injunction against the Trump administration's two year delay in implementation, we are squarely back at the haphazard patchwork. At the time of this publication, the 2015 WOTUS Rule is the law of the land in 22 states (including California), the District of Columbia, and all U.S. territories. In the other 28 states, the agencies have reverted back to the prior regulations defining WOTUS adopted in 1987. EPA maintains a webpage dedicated to tracking this saga in real time: https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update

## The [Proposed] 2019 WOTUS Rule (Trump)—84 Federal Register 4154 (2019)

Amidst then-candidate Trump's promise of regulatory relief and rollback on the campaign trail, particularly in the agricultural heartland, rolling back the 2015 WOTUS Rule was near the top of the list. Opponents of that rule viewed it as a regulatory property and power grab by the federal government, grossly expanding the reach of federal regulation into local land use and water rights. Supporters of Trump called on him to look to Justice Scalia's approach in *Rapanos* and limit the bounds of federal regulation clearly to resources that are only "relatively permanent" in terms of water content and flow.

On December 11, 2018, EPA Acting Administrator Andrew Wheeler and Assistant Secretary of the Army for Civil Works R.D. James "unveiled" the Trump administration's proposed replacement for the 2015 WOTUS Rule. The proposal was merely "unveiled" because a proposed rule is not officially "released" until it is published in the Federal Register which did not occur until February 14, 2019. Official publication commences the public comment period for the proposed 2019 WOTUS Rule which is presently slated for 60 days, expiring on April 15, 2019.

Immediately upon unveiling, proponents praised and critics panned the proposed 2019 WOTUS Rule. Those in favor said it would provide clarity and consistency, allowing a property owner to walk onto his or her land and readily understand which resources would and would not be subject to federal regulation. Critics decried the pullback asserting that it would leave a significant portion of wetlands, streams, and other features without federal protection. Many have promised immediate litigation should the proposed rule be finalized.

## Comparing the Two WOTUS Rules

Although the 2019 WOTUS Rule is clearly closer to the Scalia approach in *Rapanos* than the 2015 WOTUS Rule, it likely extends the jurisdictional net somewhat more broadly than the four corners of Scalia's "relatively permanent" boundaries.

One of the most-stark examples of the differences in the respective WOTUS rules is the jurisdictional character, or lack thereof, of streams. Streams that flow constantly and uninterrupted largely qualify as "traditional navigable waters" and are regulated under both rules. Streams with less consistent flows are another matter.

On the far extreme are "ephemeral" streams. These are features that only flow when it rains. They collect and convey rainwater flows, but have no separate and independent source of water, such as snow melt or groundwater. Other streams are labeled "intermittent tributaries." These features also flow only occasionally, but those flows are not limited just to rainwater. Other sources of water—again, such as snow melt or groundwater—provide an at least partially consistent source of flows.

Under the 2015 WOTUS Rule, both ephemeral streams and intermittent tributaries have the potential to be regulated. The 2015 WOTUS Rule would not focus on how much or how often the respective feature flows. Rather, if the feature has indicators that it *ever* flows, *i.e.*, bed, bank, and "ordinary high water mark," it is subject to regulation.

Conversely, the 2019 WOTUS Rule would not regulate ephemeral streams at all. And as to intermittent tributaries, the question would turn on just how

often and how much that tributary actually does flow with water.

Wetlands are another difference in approach. The 2015 WOTUS Rule would regulate all wetlands with a surface or subsurface connection to another WOTUS. The 2019 WOTUS Rule would, generally, regulate wetlands with a surface connection, but would not allow a subsurface connection to establish jurisdiction.

As to wetlands lacking a surface connection, this is where the 2015 WOTUS Rule sought to establish criteria establishing jurisdiction "by rule." Factors such as being located within a 100-year flood plain or being within 4,000 feet of another WOTUS would be sufficient, *by rule*, for the feature's regulation. The 2019 WOTUS Rule, conversely, does away with all such criteria and largely excludes such isolated wetlands that lack a surface connection to another WOTUS.

There are, of course, additional differences beyond these illustrative examples.

Again, at the time of this publication, the public comment period for the proposed 2019 WOTUS Rule closes on April 15, 2019. However, in a letter dated February 11, 2019, 36 Democrat senators, led by Thomas Carper, ranking member of the Senate Environment and Public Works Committee, called on EPA to extend the comment period to at least the period for which the 2015 WOTUS Rule was open for comment, 207 days.

## California's Proposed State Program and Regulating Fills of Waters of the State

### Overview and Background

On April 15, 2008, the California State Water Resources Control Board adopted a resolution directing staff to embark on a three-phase effort to adopt policies and procedures necessary to ensure that aquatic resources in the state were sufficiently protected under state law and not solely dependent on federal law. Nearly 11 years later, SWRCB members and staff continue to grapple with the proper policy and procedures to carry out just phase one of the 2008 resolution. As recently as February 22, 2019, SWRCB staff circulated yet another revised draft to be presented to the SWRCB for consideration. Recognizing that the content and schedule for the proposed State Program is constantly subject to change, at the time of publication of this article, SWRCB staff were scheduled to present the latest proposed State Program to the board at a March 5, 2019 workshop at which no action would be taken. The matter is tentatively set for SWRCB action on April 2, 2019. The latest information on the State Program and related processes can be found at: https://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.html

Key elements of the proposed State Program include: 1) a new definition of "wetlands" that is different than the federal definition; 2) processes separate and distinct from existing federal processes, including alternatives analyses, in seeking a permit to fill or alter jurisdictional features; and 3) mitigation ratios for impacts, again, frequently different from standards applied in the federal arena.

### But Why?

California, like most states, has relied on the Corps and EPA and their authority under the federal Clean Water Act to analyze and regulate proposed fill and impacts to wetlands and other jurisdictional waters. Under this regime, the state had at least two strong authorities under which it could require project modifications or mitigation beyond what the federal agencies imposed. The first is the state's authority to "certify," or not, that granting of the federal permit will not implicate state-established water quality standards. This authority is required under § 401 of the federal Clean Water Act. Additionally, the state has broad authority under California's Porter-Cologne Water Quality Control Act to impose "Waste Discharge Requirements" or "WDRs." Quite often the 401 Certification and WDRs are processed by the state concurrently based largely on the work and analyses performed by the federal agencies.

This existing regime led many opponents of the proposed State Program to question why the SWRCB was even pursuing a separate and seemingly conflicting policy. The initial proffered justification dates back to the Supreme Court decision in 2001, *SWANCC*. Once the High Court held that wholly intrastate isolated features were not subject to federal regulation, fears of a purported "*SWANCC* gap" spread rapidly. There was a sense that an untold and significant number of resources would simply fall through the regulatory cracks and be lost if urgent action was not taken.

But critics are quick to point out that the specter of a *SWANCC* gap was one of the primary drivers of the original 2008 SWRCB Resolution calling for the proposed State Program. But here we are nearly 11 years later, and the absence of any credible record of lost aquatic resources, opponents assert, demonstrates that the hypothetical *SWANCC* gap has proven to be a fiction.

The SWRCB staff has also said a uniform state policy is necessary to establish consistency by and between the nine Regional Water Quality Control Boards (RWQCBs) throughout the state. But, again, opponents of the proposed State Program—largely the regulated community that has to deal with the respective RWQCBs on these matters—state that there is no evidence of any such inconsistent operations. Further, they say that if there were inequitable and disparate treatment at the RWQCBs, it would be them, the ones subject to such hypothetical regulatory irregularities, that would be complaining. Nonetheless, the proposed State Program soldiers onward.

## Defining 'Wetlands'

Notwithstanding the confusion surrounding the bounds of jurisdiction related to aquatic resources at the federal and state levels, one component has been dependably clear—what actually *is* a "wetland"? A Corps- and EPA-promulgated regulation has long established that for a feature to be a true "wetland," three components must be present: 1) hydrology (it is wet); 2) soils of specified characteristics rendering them "hydric" based on saturation; and 3) indictor hydrophytic vegetation. As noted above, there has been much legal debate as to whether any given wetland is jurisdictional, isolated, or otherwise bears the requisite significant nexus to another WOTUS, but the foundational definition has been pretty stable—either all three components are present or they are not.

One of the most controversial aspects of the proposed State Program is a new and different definition of "wetland" for California. The new definition in the State Program would keep the first two components, but effectively eliminate the third, vegetation. Opponents of the State Program have offered multiple alternatives and language supplements that would keep the textbook definition consistent with the federal agencies, and still explicitly loop in resources SWRCB staff says it feels may escape regulation under the federal definition. Critics, again, point out that there is no record of a regulatory gap under the longstanding federal definition.

## Alternatives Analysis and the 'LEDPA'

The most impactful and cumbersome aspect of the proposed State Program is its requirement for the preparation of an alternatives analysis and the lack of alignment with that requirement with the federal process. The proposed State Program does authorize use and deferral to a federally authorized alternatives analysis in limited circumstances, but there are many instances in which a state analysis will be required either in addition to the federal analysis or when the federal agencies do not require one. For example, if the proposed activity is authorized under a federal "general" permit (Nationwide Permits), generally an alternatives analysis is not required. Nonetheless, the proposed State Program almost always requires the alternative analysis unless the state has already certified the federal general permit, and even then, there are multiple disqualifiers that will resurrect the alternatives requirement anew. The magnitude of impact on the aquatic resource—designated as "Tier 1," "Tier 2," or "Tier 3"—will dictate how extensive and elaborate the alternatives analysis must be.

Attempting to mirror the federal regulations, the proposed State Program would require the respective RWQCB conducting the alternatives analysis to certify that the proposed activity is the Least Environmentally Damaging Practicable Alternative or "LEDPA." In the federal regime, if your impact includes the fill of a wetland or another "special aquatic site" (*e.g.*, a mudflat), you must overcome a rebuttable presumption that an alternative does exist that can avoid the impact to the special aquatic resource. Depending on the region, this presumption, though labeled "rebuttable," is actually regarded as an insurmountable death knell, so the resource must absolutely be avoided to have any chance of getting the permit. The proposed State Program includes both the LEDPA mandate and presumption for fills to waters of the state, not just resources recognized as independently "special."

## Conclusion and Implications

Notwithstanding the flurry of regulatory activity at both the federal and state levels, clarity on what is

or is not a regulated resource in any given context is unlikely in the foreseeable future. And litigation on all fronts is a veritable certainty. Specifically, as to the proposed State Program, advocates on both sides of the issue have questioned whether it is in California's interest to seek delegation of the federal program under Clean Water Action § 404(g) so as to allow for one integrated program. One of the major gating issues for the regulated community on that front is whether a federal program delegated to the state still operates as a jurisdictional link to § 7 for interagency consultation under the federal Endangered Species Act.

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## RECENT FEDERAL DECISIONS

# D.C. CIRCUIT FINDS STATES WAIVE CLEAN WATER ACT WATER QUALITY CERTIFICATION LEVERAGE WHEN THEY CONTRACTUALLY AGREE TO DELAY FOR MORE THAN ONE YEAR

*Hoopa Valley Tribe v. Federal Energy Regulatory Commission*, 913 F.3d 1099 (D.C. Cir. 2019).

In a seemingly pedestrian statutory-interpretation ruling, on January 25, 2019, the D.C. Circuit undercut a widespread tactic by which states, project applicants, and interested third parties have used their water quality certification authority to routinely delayed federal dam licensing proceedings.

### Background

In 1954, the Federal Energy Regulatory Commission (FERC) licensed a "hydropower project ... consisting of a series of dams along the Klamath River in California" (Project), pursuant to Subchapter I of the Federal Power Act (FPA), 16 U.S.C. § 791a–823g. As the "licensing, conditioning, and development of hydropower projects on navigable waters" pursuant to the FPA "may result in any discharge into the navigable waters," water quality certification under the federal Clean Water Act (CWA) § 401 (33 U.S.C. § 1341(a)(1)) is a precondition to FERC's issuance of a license or other FPA-approval. The CWA provides that the "state certification requirements 'shall be waived with respect to'" a FERC application:

> . . .if the state 'fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request.' . . . .[T]he purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401. *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011).

In this matter, the original license expired in 2006; PacifiCorp, the successor in interest to the dams, has since operated the Project under "annual interim licenses pending [a] broader licensing process." PacifiCorp's proposed "broader licensing" included decommissioning various downstream dams, presumable on the basis that bringing them into compliance with modern environmental standards would not be cost-effective; the upstream dams would be modernized and relicensed. Currently, "[a]ll milestones for relicensing have been met except for the states' water quality certifications under Section 401."

In 2010, California, Oregon, various environmental groups, business interests and Native American tribes entered into

> . . .a formal agreement in 2010, the Klamath Hydroelectric Settlement Agreement [KHSA or the Agreement], imposing on PacifiCorp a series of interim environmental measures and funding obligations, while targeting a 2020 decommission date.

Under the KHSA, the states and PacifiCorp agreed to defer the one-year statutory limit for § 401 approval by annually withdrawing-and-resubmitting the water quality certification requests that serve as a pre-requisite to FERC's overarching review. The Agreement explicitly required abeyance of all state permitting reviews.

A 2016 amendment to the KHSA provided for the dams slated to be decommissioned to be transferred to a separate entity, and in 2018 FERC approve splitting the licensing proceedings, but has not yet approved the transfer of the annual, interim licenses (and pending application for decommissioning) to a new entity.

The Hoopa Valley Tribe was not a party to the original or amended KHSA. In 2012, the Tribe:

> . . .petitioned FERC for a declaratory order that California and Oregon had waived their Section 401 authority and that PacifiCorp had correspondingly failed to diligently prosecute its licensing application for the Project.

That petition and a 2014 rehearing request were both denied by the agency; the Tribe then sought review by the D.C. Circuit Court of Appeals. The D.C. Circuit Court held the matter in until the amended KHSA had been adopted, but as:

> . . .the decommissioning the agreement contemplated has yet to occur, and in light of Hoopa's pending petition, [the Court] removed the case from abeyance on May 9, 2018.

### The D.C. Circuit's Decision

The D.C. Circuit formulated the issue before it as:

> . . .whether a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year. If this type of coordinated withdrawal-and-resubmission scheme is a permissible manner for tolling a state's one-year waiver period, then (1) California and Oregon did not waive their Section 401 authority; (2) PacifiCorp did not fail to diligently prosecute its application; and (3) FERC did not abdicate its duty. However, if such a scheme is ineffective, then the states' and licensee's actions were an unsuccessful attempt to circumvent FERC's regulatory authority of whether and when to issue a federal license.

As an exercise in statutory construction, the Court of Appeals described its task as "undemanding inquiry because Section 401's text is clear"—waiver occurs if a state:

> . . .fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request.

The inclusion of a temporal element defines "the absolute maximum" time a state can take to act without waiver occurring as one year:

> Indeed, the Environmental Protection Agency ("EPA")—the agency charged with administering the CWA—generally finds a state's waiver after only six months. Citing 40 C.F.R. § 121.16.

Here, the states have kept the licensing-decommissioning proceedings in suspended animation for more than a decade by annually, since 2006, withdrawing and refiling identical applications "*in the same one-page letter*" (emphasis by the court). Thus, the Court of Appeals did not have to decide if submitting "a wholly new" application would trigger a new one-year certification period, or just how different a refiled request must be to qualify as "new."

While the opinion is technically narrow, disallowing "California and Oregon's deliberate and contractual idleness" in furtherance of "a coordinated withdrawal and resubmission scheme," its practical impact is potentially broad:

According to FERC, it is now commonplace for states to use § 401 to hold federal licensing hostage. At the time of briefing, 27 of the 43 licensing applications before FERC were awaiting a state's water quality certification, and four of those had been pending for *more than a decade*.

### Conclusion and Implications

The byzantine delays and intricacies involved in many environmental permitting proceedings, followed inevitably by litigation, all of which provide ample entry points for third parties to gain leverage, make the kind of contractual circumventions of statutorily-proscribed procedures attractive when a global settlement is on the table. Weighing whether to enter into any such deal should always include a cold-eyed assessment of whether there are any interested parties not included in the deal, and whether the courts may disagree with the legal theories and assumptions underlying the parties' bargain. The D.C. Circuit's decision is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/DC412967A23D8B368525838D0052E4CD/$file/14-1271-1770168.pdf
(Deborah Quick)

## RECENT CALIFORNIA DECISIONS

# SECOND DISTRICT COURT FINDS CITY'S ACCESS TO PRIVATE DATABASE DID NOT MEAN DATABASE FILES WERE PUBLIC RECORDS

*Anderson-Barker v. Superior Court*, ___Cal.App.5th ___, Case No. B285391 (2nd Dist. *Filed* Jan. 22, 2019).

The Second District Court of Appeal has held that data maintained on private databases pursuant to a contract with a public agency is not a disclosable public record because the public agency did not possess the data, but merely had access to it.

### Factual Background

The Los Angeles Police Department (LAPD) uses privately-owned companies to tow and store impounded vehicles. These tow companies are referred to as "Official Police Garages" (OPGs), and perform their services pursuant to written contracts with the City of Los Angeles (City). LAPD officers impound vehicles using a "CHP 180 form," with an officer and an OPG retaining a portion of the form. The OPG then enters vehicle information into a database maintained by a private OPG association. The City's OPG contracts require OPGs to retain data and records and make them available for law enforcement inspection, but state that the data stored by OPGs is owned by the OPG association.

In June 2015 Cynthia Anderson-Barker (Anderson-Barker) submitted a request under the California Public Records Act (CPRA) to the LAPD seeking disclosure of: 1) "All data recorded in [the OPG] database, for any vehicle seized at LAPD direction at any time from June 1, 2010 to the present, for which a CHP 180 form was prepared"; and 2) "All CHP 180 forms for any vehicle seized at LAPD direction at any time from June 1, 2010 to the present, for which a CHP 180 was prepared. This includes, but is not limited to documents that are indexed in Laserfiche. . . ." The LAPD responded that it would provide copies of CHP 180 forms in its files, but would not provide any OPG database or Laserfiche files.

Anderson-Barker filed a petition for writ of mandate, asserting that the City had "unfettered access" to the requested data and should be compelled to produce it. The trial court denied the petition, concluding that the City did not have a duty to disclose the requested data because the evidence showed it did not "possess or control the VIIC or Laserfiche records." Anderson-Barker then filed a petition for writ of mandate in the Court of Appeal requesting that the Court of Appeal direct the trial court to vacate its order.

### Legal Background

Regarding the process and standard for review, the Court of Appeal reiterated that:

> An order of the trial court under the [CPRA] is reviewable immediately by petition to the appellate court for issuance of an extraordinary writ. *Consolidated Irrigation v. Superior Court*, 205 Cal.App.4th 697, 708 (2012) (*Consolidated Irrigation*).

An appeals court conducts an independent review of the trial court's ruling and upholds factual findings if they are supported by substantial evidence.

The California Public Records Act requires that, upon request, state and local agencies make available for inspection and copying any public record "[e]xcept with respect to public records exempt from disclosure. . . ." Gov't Code § 6253(b); *see also* § 6253(c). Section 6252 (e) defines "public record" to mean:

> . . .any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

To prevail on a CPRA petition, a petitioner must establish that the requested files: 1) qualify as public records and 2) were in the possession of the agency. *Board of Pilot Commissioners v. Superior Court*, 218 Cal.App.4th 577, 597-598 (2013).

### The Court of Appeal's Decision

#### Constructive Posession

The court first addressed whether the City had "constructive possession" of the OPG database and Laserfiche data, noting that the City acknowledged it had a contractual right to access the data in question. Despite this contractual right, the court rejected the claim that such a right amounted to constructive possession of data because the City did not "control" the data. The City presented evidence that it did not direct what information the OPGs placed on their databases and had no authority to modify the data in any way. "The term "control" is generally defined as:

> . . .the power or authority to manage, direct, or oversee. . . .The mere fact that [the City] can 'access' the data does not equate to a form of possession or control. Slip Op. at p. 17, citing Black's Law Dict. (9th ed. 2009), p. 378.

The court held that:

> To conclude otherwise would effectively transform any privately-held information that a state or local agency has contracted to access into a disclosable public record. Nothing in the text or history of the CPRA suggests it was intended to apply so broadly. Slip Op. at p. 17.

#### Looking to the Freedom of Information Act

The court further noted that analogous federal Freedom of Information Act (FOIA) case law supported its interpretation, citing *Forsham v. Harris*, 445 U.S. 169, 186 (1980) for the proposition that:

> FOIA only applies to records an agency has *in fact* [created] or obtain[ed], and not to records which merely *could have been* obtained. Slip Op. at p. 18.

The court stated that the City "might" have a duty under the CPRA to produce any data "actually extracted" from the OPG databases, but that such a duty did not extend to all data "based solely on the fact that the City has the authority to access that information." Slip Op. at p. 19.

Finally, the court rejected the assertion that the decision in *City of San Jose v. Superior Court*, 2 Cal.5th 609 (2017) required a different outcome, holding that the *San Jose* case did not address the issue of possession of records, and therefore was inapplicable.

### Conclusion and Implications

In the end, that fact that the L.A. had access to information stored on an NGOs computer/database did not equate to classifying the date as a public record. This is significant because it clarifies the definition of "constructive possession" for CPRA purposes. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B285391.PDF (Alex DeGood)

## FIRST DISTRICT COURT FINDS POSSIBLE EARTHQUAKE/LANDSLIDE ZONE IS NOT AN 'ENVIRONMENTAL RESOURCE' UNDER LOCATION EXCEPTION TO CEQA CLASS 3 CATEGORICAL EXEMPTION

*Berkeley Hills Watershed Coalition v. City of Berkeley*, ___Cal.App.5th___, Case No. A153942 (1st Dist. Jan. 30, 2019).

The First District Court of Appeal upheld the City of Berkeley's determination that three new single-family homes on adjacent parcels in the Berkeley Hills fell within the scope of the Class 3 categorical exemption found in the California Environmental Quality Act (CEQA) Guidelines § 15303, and that the "location exception" did not apply. The court also held that the city did not violate a local ordinance requiring a use permit for the addition of a fifth bedroom to existing homes.

### Factual and Procedural Background

In 2016, a group of landowners submitted applications to the City of Berkeley for permits to construct

three new single-family homes on three contiguous parcels in the Berkeley Hills. In connection with the permit applications, the property owner hired a consulting firm to prepare a geotechnical and geologic hazard investigation of the proposed residences. The report indicated that a portion of the site is within the Alquist-Priolo Earthquake Fault Zone (APEFZ) and is also located in a potential earthquake-induced landslide area mapped by the California Geologic Survey on their Seismic Hazard Mapping Act map for the area. The city later retained its own consultants to peer review the report and provide additional information regarding slope stability and seismic hazards.

The city ultimately approved the use permits in 2017 after finding the proposed projects were categorically exempt from CEQA under the Class 3 categorical exemption for new construction of small structures. A group of petitioners filed a petition for writ of mandate challenging the city's approval. In contesting the city's CEQA exemption findings, the petitioners argued the "location" exception under Guidelines, § 15300.2, subdivision (a), applied and precluded the city from relying on the exemption. The petitioners also argued the city's approval violated zoning requirements regarding "fifth bedrooms."

The trial court denied the petition for writ of mandate and the petitioners appealed.

## The Court of Appeal's Decision

### CEQA Claims

Although the petitioners conceded that the projects fell within the "Class 3" categorical exemption, which applies to "construction and location of limited numbers of new, small facilities or structures," including "up to three single-family residences" in "urbanized areas," they alleged that the city was precluded from relying on the exemption because the projects met the "location" exception set forth in Guidelines, § 15300.2, subdivision (a). That section provides that several categorical exemptions, including Class 3, are "qualified by consideration of where the project is to be located" and do not apply:

> . . .where the project may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies.

The petitioners argued that this exception applied because the projects were located in the APEFZ, which the petitioners alleged was is an environmental resource of hazardous concern. The court disagreed.

At the outset, the court clarified that the same bifurcated standard of review applicable to the unusual circumstances exception (CEQA Guidelines, § 15300.2, subd. (c)), also applies to the location exception. According to the court, whether a project is located where there is "an environmental resource of hazardous or critical concern" is a factual inquiry subject to review for substantial evidence. If this standard is met, the court then applies the fair argument standard in determining whether a project "may impact on" the environmental resource due to the project's location.

Applying this standard, the court held that the exception did not apply to the projects. The court first explained that for the location exception to apply, it is the "environmental *resource*" which must be "designated, precisely mapped, and officially adopted pursuant to law." The petitioners, however, cited statutes that mapped the physical locations of potential earthquakes and landslides. Citing the dictionary definition of "resource," the court concluded that earthquakes and landslides are geologic events, not environmental resources, as contemplated by the location exception. Moreover, while the APEFZ is "officially mapped" in accordance with the Seismic Hazards Mapping Act, that statute was enacted for the purpose of preventing economic loss and protecting health and safety, not to identify the locations of environmental resources. Similarly, as the California Supreme Court affirmed in *California Building Industry Assn. v. Bay Area Air Quality Management Dist.*, 62 Cal.4th 369 (2015), CEQA is concerned with a project's significant effects on the environment, not the significant effects of the environment on the project. According, the court held that the location exception was not applicable based solely on the fact the project was located in a potential earthquake and landslide zone.

The court then considered whether the city's determination that the project site was not located in an environmentally sensitive area was otherwise supported by substantial evidence and easily found that

it was. The geotechnical reports produced during the administrative process were designed to evaluate the potential impact of landslides and fault ruptures on the project. There was no evidence that the project posed a risk of harm to the APEFZ. The court therefore held that the petitioners failed to meet their burden of showing that the projects were located where there is "an environmental resource of hazardous or critical concern."

Because the court found that the city's determination that the project was not located in an environmentally sensitive area was supported by substantial evidence, it did not need to reach the second prong of the location exception inquiry—whether substantial evidence supports a "fair argument" that the project "may impact" the mapped resource—but it did anyhow. The court found that the petitioners failed to identify any substantial evidence that would support a fair argument that the project would have an adverse effect on the environment. The petitioners pointed to no evidence in the geologic reports that construction of the proposed residences would exacerbate existing hazardous conditions or harm the environment. Nor did petitioners submit their own geotechnical evidence, or any other evidence, to establish as much.

### Municipal Code Claim

Turning to the municipal code claim, the court considered whether the city violated a code provision that requires a use permit for the addition of a fifth bedroom to a parcel. The petitioners alleged that the city violated this provision because it did not require additional use permits, despite the fact that all of the residences had more than four bedrooms. The court was not persuaded.

During the administrative proceedings, the city attorney explained that this particular ordinance applies only to modifications of existing dwellings—not to new construction. The purpose of the ordinance was to gain discretion over creation of "mini-dorms" via the addition of bedrooms to existing buildings, which in some cases could otherwise be done without discretionary review.

The court gave deference to the city's interpretation finding that the ordinance was intertwined with issues of fact, policy, and discretion regarding zoning requirements and impacts to the local community. And even without such deference, the court concluded the city's interpretation was correct based on the plain meaning of the words used in the ordinance. Use of the word "addition of a fifth bedroom" implies the preexistence of four bedrooms. Because the projects were all new construction, the "fifth bedroom" ordinance did not apply.

### Conclusion and Implications

This is the third published opinion in the last year to interpret the location exception of CEQA Guidelines § 15300.2, subdivision (a). The court reiterated that the same bifurcated standard of review that applies to the unusual circumstances exception also applies to the location exception. In evaluating an agency's determination whether a project is located where there is "an environmental resource of hazardous or critical concern," the court applies the deferential substantial evidence standard of review, but when determining whether the project "may impact on" the environmental resource because of its location, the court applies the fair argument standard. The decision also emphasizes that it is the petitioners' burden to demonstrate that an exception to the categorical exemptions applies.

The opinion is available here: https://www.courts.ca.gov/opinions/documents/A153942.PDF
(Christina L. Berglund, Chris Stiles)

# FIRST DISTRICT COURT MAKES DISTINCTION BETWEEN PUBLIC AND PRIVATE USE OF PROPERTY AND APPLICATION OF CIVIL CODE SECTION 1009 IN EASEMENT MATTER

*Ditzian v. Unger*, 31 Cal.App.5th 738 (1st. Dist. 2019).

In this case, respondents filed a suit against their neighbor (appellant) seeking to establish a prescriptive easement over the appellant's property. Less than a year prior to filing the lawsuit, the appellant had constructed a fence on its property preventing the respondents from using a path on appellant's property to access the dunes at MacKerricher State Park. The trial court ruled in favor of the respondents, granting them a private easement over the appellant's property and the court of appeal affirmed.

## Background

The appellant bought its property in 2006. At the time, the neighboring property, owned by the respondents' predecessors (the Bolstas), had access to the dunes through the appellant's property (a fact acknowledged by the appellant and established by testimony). Respondents purchased the property from the Bolstas in 2013.

Respondents testified that they had visited the Bolstas from time to time between 2008 and 2013 and on those visits had used a path over the appellant's property to access the dunes. Access through the appellant's property became a problem months after the respondents' began to use the property for vacation rentals through Airbnb in July 2015, with the appellant building a fence in the fall of 2015 to block access to the dunes from the respondents' property.

The trial court, after a site visit, remarked on the importance of access to the dunes:

> Hiking out to the dunes is the greatest highlight of living on or visiting the property. Enjoyment of that natural resource is presumably why the parties bought the property in the first place. It would be more startling and unexpected if no one ever bothered to hike out to the dunes on a regular basis.

## The Court of Appeal's Decision

### Prescriptive Easements

In order to establish a prescriptive easement, the party claiming the easement must show that the land's use has been open, notorious, continuous and adverse for an uninterrupted period of five years. Whether the elements have been established is a question of fact. The trial court considered the evidence presented and granted respondents a prescriptive easement. The easement grant extended to respondents' personal and business invitees (*i.e.* Airbnb renters). On appeal, the appellant's primary contention was that California Civil Code § 1009 prevented respondents from obtaining a prescriptive easement. According to the Court of Appeal, § 1009, provides, in part, that "the public's use of another's property for recreational purposes will never ripen into a vested right." The court, in rejecting appellant's argument, cited cases discussing the distinction between a public versus a private use and an appurtenant versus an "in gross" easement.

### Public versus Private Use

The court of appeal analyzed § 1009 and focused on the distinction between public and private use, citing *Pulido v. Pereira,* 234 Cal.App.4th 1246 (2015) and, a case discussed in *Pulido, Bustillos v. Murphy,* 96 Cal.App.4th 1277 (2002). In *Bustillos*, a private easement was not granted because the interest sought was indistinguishable from the public's interest at large. By comparison, the interest sought (and granted) in *Pulido* was a personal right of way easement "to access their own property," which made the interest "distinguishable from the interest of the public at large."

Turning to the facts of this case, the court explained that it was not identical to *Pulido* because the respondents were "seeking an easement over appellant's property to gain access to a public recreational

area." The court held, however, that the respondents, and their paying Airbnb guests, had an interest in the appellant's property that was distinguishable from the general public's interest. The court ruled that the easement granted to the respondents "is plainly an easement 'appurtenant' to respondents' property" based on their previous use of the appellant's property as owners of the neighboring property. On the other hand, the easement granted in *Bustillos* was "plainly personal (or 'in gross')", which would not prevent "other similarly situated members of the public from making the same prescriptive easement claim."

### Conclusion and Implications

When considering whether Civil Code § 1009 can prevent a party from obtaining an interest in the land of another, *Ditzian* holds that the analysis needs to consider the type of interest sought (public v. private) and not solely the reason for the use (*i.e.* recreational use). The opinion may be accessed online at the following link: https://www.courts.ca.gov/opinions/documents/A152946.PDF
(Eddy Beltran, Nedda Mahrou)

## FIRST DISTRICT COURT FINDS CITY'S DESIGN REVIEW PROCESS FOR MULTI-FAMILY DWELLINGS IN HIGH DENSITY RESIDENTIAL DISTRICT DID NOT REQUIRE CEQA ANALYSIS

*McCorkle Eastside Neighborhood Group et al. v City of St. Helena et al.*,
___Cal.App.5th___, Case No. A153238 (1st Dist. Jan. 25, 2019).

In *McCorkle Eastside Neighborhood Group et al. v City of St. Helena*, the Court of Appeal for the First District dealt with allegations that the city's and city council's approval of resolution granting demolition and design permits to a property owner violated California Environmental Quality Act (CEQA) and local zoning laws. This case addresses the delegation of authority and whether design review also requires CEQA review for environmental impacts.

### Factual and Procedural Background

In 2015, the city of St. Helena (City) began the process for amending the housing element of its General Plan to conform with state policies by committing to eliminate the Conditional Use Permit (CUP) requirement for multi-family dwellings within High Density Residential (HR) districts. In 2016, the City amended its zoning ordinance to comply with this commitment. Section 17.44.020(C) of the St. Helena Municipal Code makes "[m]ultiple-family dwellings, apartments and dwelling groups consistent with the density requirements of this chapter" a permitted use within the HR district. Section 17.44.030 provides a list of uses requiring use permits, and multi-family dwellings are not on that list. Design review is still required for multi-family residential units within an HR district under § 17.44.040.

A developer purchased a one-half acre lot in the City which lot is located within the City's HR district with the intent to build a multi-family dwelling on the property. The lot contained a dilapidated single-family home and its soil had been contaminated with lead by a prior occupant. The developer committed to remediating this contamination with Napa County. The developer submitted an application for a demolition permit to demolish the existing structure as well as a design review plan for the proposed eight units. The City's planning commission staff deemed the application complete in October 2016, and prepared a report concluding: 1) the proposed project fell within the Class 32 infill exemption of CEQA Guidelines § 15332 and was thus exempt from CEQA; and 2) the project met the criteria for design review.

At a full City planning commission hearing, several neighbors and the Neighborhood Group opposed the project arguing: 1) the site of the proposed development was contaminated; 2) McCorkle Avenue contains no storm drains and routinely floods; 3) there is little public open space in the area and children are required to play in the street; 4) the space required for a firetruck turnaround was not adequate; 5) the proposed project was located in a historical district, and was not consistent with the design of four historical homes located across the street; and 6) the

proposed project was next door to the pending multifamily Brenkle project, and the cumulative effects of those projects would be significant.

The city cttorney advised the planning commission that because the St. Helena Municipal Code now did not require issuance of a use permit for multifamily dwellings in HR districts, the commission was required to approve the project so long as it met the design review criteria. Issues pertaining to use, such as parking, traffic, safety and soil remediation, were not to be considered. The city attorney indicated that a Class 32 exemption applied to the project under CEQA Guidelines § 15332, but that in any event CEQA would not apply to a nondiscretionary project such as this. The planning commission approved the demolition and design review, including findings that the project was exempt from CEQA under CEQA Guidelines § 15332 and would not cause any significant environmental effects. One commissioner specifically noted that although the vote was "tough", she had voted to approve "based on what the restrictions of our discussion and our—our jurisdiction are, specific to design review."

The Neighborhood Group appealed to the city council, which voted 3-2 to deny the appeal and approve the action of the Planning Commission. It issued a resolution making findings in support of its approval for design review. It additionally made findings in the resolution that the project was consistent with the General Plan's goals of permitting infill development, encouraging a mix of housing types and prices, addressing workforce housing, encouraging higher density where appropriate, and allowing the conversion of single-family homes to multifamily housing. The resolution addressed specifically the arguments that the project was not consistent with the General Plan.

The Neighborhood Group filed a petition for writ of mandate and first amended petition for writ of mandate against the City alleging violations of CEQA and local zoning laws. The City answered and, after briefs were filed, a hearing was held. The trial court denied the petition.

### The Court of Appeal's Decision

First the court explored the basic purposes of CEQA and discussed a three-step process under CEQA and the implementing regulations: First, the public agency must determine whether the proposed development is a "project." ([Pub.Res.Code], § 21065.). Second, if the activity is a "project" then the public agency must then decide whether it is exempt from compliance with CEQA under either a statutory exemption ( [Pub.Res.Code], § 21080) or a categorical exemption set forth in the regulations ( [Pub. Res.Code], § 21084, subd. (a); [CEQA Guidelines], § 15300). In connection with the second step, a categorically exempt project is not subject to CEQA, and no further environmental review is required. If the project is not exempt, the agency must determine whether the project may have a significant effect on the environment. If the agency decides the project will not have such an effect, it must "adopt a Negative Declaration to that effect." ([Pub. Res. Code], § 21080, subd. (c); *see* [CEQA Guidelines], § 15070.) Third, if there is no exemption, then the agency must proceed with the preparation of an Environmental Impact Report before approving the project.

CEQA applies to discretionary projects. A "discretionary project" is defined as one:

> . . .which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations. (Guidelines, § 15357.)

The "touchstone" for determining whether an agency is required to prepare an Environmental Impact Report (EIR) is whether the agency could meaningfully address any environmental concerns that might be identified in the EIR.

### Delegation of Authority Claim

The court then quickly addressed the improper delegation of authority claim to the planning commission. The Neighborhood Group claimed that *Vedanta Society of Southern California v. California Quartet, Ltd.*, 84 Cal.App.4th 517, 534–535 (2000), and *Kleist v. City of Glendale*, 56 Cal.App.3d 770, 779 (1976) each state that CEQA requires a decision by an elected body. The court instead stated that those decisions stand for the uncontroversial proposition that the elected decision makers of a local body have the ultimate responsibility for making a decision

under CEQA and delegation is inconsistent with that rule. (*Ibid.*) Here, the unelected planning commission found the project exempt and appellants took an appeal to the full elected city council. The city council held a full hearing and issued findings on this appeal. The court found no improper delegation of the City's authority under CEQA.

### Exemption Claim

Next the court reviewed the City's finding that the project was exempt under CEQA by adopting a Class 32 infill exemption (CEQA Guidelines § 15332). The court pointed out that assuming the city council did not consider traffic, noise or air and water quality for purposes of the Class 32 exemption despite its findings to the contrary, it nonetheless properly found that its discretion was limited to design review, given that no use permit was required for multi-family housing in HR districts. Specifically, the court stated that in this case, the city council found the design review ordinances prevented it from disapproving the project for non-design related matters. The city council made extensive findings for all of the elements required by the City's municipal code as it related to HR districts, and that the city council's conclusion that CEQA review was "limited to design issues such as scale, orientation, bulk, mass, materials and colors," and the proposed project would not result in design-related CEQA impacts. These findings were supported by substantial evidence and must be upheld on appeal.

The court also found that the city council found that proposed project was consistent with the General Plan, that the evidence supported these findings and that the city council did not abuse its discretion in finding that the project was consistent with the General Plan.

### Conclusion and Implications

Ultimately, the Court of Appeal affirmed the trial court and held that a) the city council did not improperly delegate its decision-making authority to planning commission; b) the city council's discretion was limited to design review and did not extend to addressing environmental effects under CEQA; and c) issues addressed during design review process did not require invocation of CEQA review. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A153238M.PDF
(Alexis Sinclair)

## FIFTH DISTRICT COURT INTERPRETS CIVIL CODE SECTION 1009, SUBDIVISION (B) TO PROHIBIT IMPLIED IN FACT DEDICATIONS OF PRIVATE NONCOASTAL PROPERTY

*Mikkelsen v. Hansen*, ___Cal.App.5th___, Case No. F072990 (5th Dist. Jan. 10, 2019).

This case involves an action filed by subdivision residents against the owners of land who erected a wall across a pedestrian path on their property. The dispute involved Civil Code § 1009, which governs public uses on private property. The trial court issued a permanent injunction based on an implied-in-fact dedication. However, on appeal, the appellate court reversed, holding that the statute proscribes implied-in-fact dedications.

### Background

The property at issue is a pedestrian path connecting two cul-de-sacs in two separate subdivisions which were previously owned by the same developer. In 1978, the developer expressly offered to dedicate one segment for public use and the offer was formally accepted by the municipality. However, the second segment was neither expressly offered for dedication, nor formally accepted. Defendants currently own this second segment and erected a wall across it, obstructing access between the two subdivisions. This led to a suit being filed by plaintiffs who are subdivision residents that argued they could use the path because the segment at issue was an "implied-in-fact" and "implied-in-law" dedication.

### Civil Code Section 1009, Subdivision (b) and Implied-in-Fact Dedications of Private Noncoastal Property

The California Legislature enacted Civil Code § 1009 in 1972. Subdivision (b) of the statute provides:

> Regardless of whether or not a private owner of real property has recorded a notice of consent to use of any particular property pursuant to [s]ection 813 … or has posted signs on such property pursuant to [s]ection 1008 … no use of such property by the public after the effective date of this section shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of dedication of such property to such use, made by the owner thereof in the manner prescribed in subdivision (c) of this section, which has been accepted by the county, city, or other public body to which the offer of dedication was made, in the manner set forth in subdivision (c).

### The Court of Appeal's Decision

As the appeal in this matter was pending, the California Supreme Court decided *Scher v. Burke*, 3.Cal.5th 136 (2017), which addressed whether § 1009, subdivision (b) "applies to nonrecreational use … as it applies to recreational use of other private noncoastal property." The Supreme Court examined the plain language of the statute and emphasized that the provision:

> . . .is written in categorical terms: '*no use*' of the subject property after March 1972 'shall ever ripen' into an implied dedication of the property to the public.
>
> In other words, this prohibition on:
>
> . . .reliance on post-1972 public use to support a clam of implied dedication does not distinguish between recreational and nonrecreational use.

Therefore, per the high court's decision in *Scher*, § 1009, subdivision (b), *prohibits* reliance on post-1972 public use to support claims of implied-in-law dedications.

The Court of Appeal began by analyzing the difference between implied-in-fact dedications and dedications implied-in-law. A dedication is implied-in-fact when the period of public use is less than the period for prescription and the acts or omissions of the owner afford an implication of actual consent or acquiescence to dedication. A dedication is implied-in-law when the public use is adverse and exceeds the period for prescription. The protracted adverse use establishes the conclusive presumption of consent against the owner.

Here, the court agreed that the plain language of the statute indicates that any post-1972 dedication of noncoastal property requires an "express written irrevocable offer of dedication of [the] property to [public] use" by the owner and acceptance by the county, city, or public body in a prescribed manner. Public use along can never ripen to confer a vested right to the public to continue using such property permanently. As such, § 1009, subdivision (b), forecloses implied-in-fact dedications because such dedications only arise where an express offer is lacking and call for acceptance by public use.

### Conclusion and Implications

The court's statutory interpretation prevented plaintiffs from establishing an implied dedication of a public path on non-coastal property because Civil Code § 1009, subdivision (b) bars all use of private real property after March 1972, not just recreational use, from ripening into a public dedication absent an express, written, irrevocable offer of such property to such use, and acceptance by a city or county. Although *Scher* applied to implied-in-law dedications, this case extends the Supreme Court's holding to implied-in-fact dedications as well.

The opinion may be accessed online at: https://www.courts.ca.gov/opinions/documents/F072990.PDF

(Nedda Mahrou)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

# THIRD DISTRICT COURT AFFIRMS TRIAL COURT DECISION THAT CHALLENGE TO HIGHWAY DEDICATION WAS TIME BARRED

*Prout v. Department of Transportation*, ___Cal.App.5th___, Case No. C076812 (3rd Dist. Jan. 11, 2019).

The Third District Court of Appeal has held that an offer of dedication through a 1990 subdivision map could not be challenged 22 years later upon Caltrans using the dedicated land for highway construction

## Factual Background

In 1977, Loren Prout (Prout) acquired a 165-acre parcel of land on the north side of State Highway 12 in Calaveras County that he wanted to develop into a residential subdivision called Golden Oaks Ranchettes (Ranchettes). Years later, in 1989, Prout's civil engineer submitted an application for an encroachment permit to the California Department of Transportation (Caltrans) connecting private roads to Highway 12, which Caltrans issued in 1990. The issued encroachment permit identified a lengthy 20-foot wide strip totaling 1.31 acres to be dedicated to Caltrans through a subdivision map. The final Ranchettes map identified the 1.31 acre area as "in the process of being deeded to Caltrans for highway purposes." Prout never transferred by deed the 1.31-acre strip of land. He admitted at trial that he has not been assessed or paid property taxes on that strip since the subdivision maps were recorded.

In 2007, Caltrans began preparations to rehabilitate Highway 12 and initially informed Prout that it would pay for the 1.31. acre strip of land. However, in 2008 Caltrans asserted the terms of the April 1990 encroachment permit required that Prout dedicate the 1.31-acre strip of land to Caltrans, and Caltrans would be preparing a deed package for his signature. Prout received the letter but did not make any objection or sign a deed conveying the land to Caltrans. Nonetheless, Caltrans began highway improvements and occupied the land, completing roadwork in 2011.

Prout thereafter filed a complaint for inverse condemnation, alleging among other things that the dedication requirement was an illegal exaction. Caltrans cross-complained for breach of contract, promissory estoppel, and specific performance. The trial court ruled for Caltrans and Prout appealed.

## Legal Background

Under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the government cannot, as a condition for issuance of a development permit, impose a requirement that the landowner dedicate land for public use, unless there is an "essential nexus" between the condition and the projected impact of the proposed development. *Nolan* at pp. 841-842. When a government agency conditions its approval of a real property development project on the grant of an easement or other exaction which would otherwise constitute a taking requiring compensation, the property owner must challenge the condition by petition for writ of mandate filed before, or simultaneously with, a complaint for inverse condemnation. *Uniwill v. City of Los Angeles*, 124 Cal.App.4th 537, 542-543 (2004).

To state a cause of action for inverse condemnation, the property owner must show there was an invasion or appropriation (a taking or damage) by a public entity of some valuable property right possessed by the owner, directly and specially affecting the owner to his detriment. *City of Los Angeles v. Superior Court*, 194 Cal.App.4th 210, 221 (2011). The government is obligated to pay for property taken for public use or damaged constructing public improvements.

## The Court of Appeal's Decision

### Statute of Limitation on *Nollan* Claim

The court first addressed Prout's *Nollan* claim, holding that the four-year statute of limitations to challenge the dedication condition began to run upon Caltrans's issuance of the encroachment permit in 1990, not when Caltrans physically occupied the land in 2010. Prout filed a subdivision map with the stating he was in the process of dedicating the land and accepted the benefit of the encroachment permit by connecting a private road to the highway. Such action reflected "acquiescence in the condition by… specifically agreeing to the condition [and] failing

to challenge its validity, and accepting the benefits afforded by the permit." *Rosco Holdings Inc. v. State of California*, 212 Cal.App.3d 642, 654 (1989). Slip Op. at p. 8.

### Inverse Condemnation Claim

The court next addressed Prout's inverse condemnation claim, holding that while Caltrans always maintained the ability to discover that Prout failed to complete the formal deed process, Prout did not revoke the offer before Caltrans accepted it by physically occupying the land for the dedicated public use, and thus the acceptance was valid. Slip Op. at p. 10.

### Dedication of Land

The court then addressed the law concerning dedications of land, noting that:

> [W]here the public at large relies on an offer to dedicate land to public use to such an extent that it would be unfair under principles of estoppel to deny the public continued use of the land for that purpose, implied acceptance of the offer of dedication will be found. Slip Op. at p. 11, citing *Biagini v. Beckham*, 163 Cal.App.4th 1000, 1012 (2008)

Further, the court noted that dedication by map is a common method of dedication (citing *Flavio v. McKenzie*, 218 Cal.App.2d 549, 553 (1963)) and that if the public's acceptance precedes any revocation of the offer, the dedication is effectual and irrevocable. Slip Op. at p. 12, citing *McKinney v. Ruderman*, 203 Cal.App.2d 109, 116 (1962).

With this as background, the court rejected Prout's claim that he meant not to dedicate the strip of land, in light of the fact that he signed his consent on the first page of the subdivision map, never paid taxes on the strip of land, and left that strip outside of the fencing installed around the subdivision.

The court also found that Caltrans's acceptance of the offer to dedicate 20 after the offer was reasonable given Prout never exerted any ownership of the strip, and longer periods between offer and acceptance have been upheld. Slip Op. at p. 14, citing *City of Yuba City v. Consolidated Mausoleum Syndicate*, 207 Cal. 587, 589-590 (1929).

### Conclusion and Implications

This case is significant because it provides a clear overview of the law concerning the offer and acceptance of dedications when the offer and acceptance do not accord with the typical process, including acceptance of a dedication many years after it was offered. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C076812.PDF
(Alex DeGood)

## FOURTH DISTRICT COURT REJECTS CHALLENGES TO AMENDED LEASE AGREEMENT FOR SAN DIEGO AMUSEMENT PARK

*San Diegans for Open Government v. City of San Diego*, 31 Cal.App.5th 349 (4th Dist. 2018).

The Fourth District Court of Appeal rejected a challenge to an amended lease agreement between the City of San Diego and the operator of an amusement park in Mission Beach. The court upheld the city's determination that the amended lease was categorically exempt from the California Environmental Quality Act (CEQA). The court also held that the amended lease did not violate a city proposition limiting development in the area, or a city charter provision requiring that certain contracts can only be approved by ordinance.

### Factual Background and Procedural History

In 1925, a developer built an amusement park on the San Diego oceanfront, which is now commonly known as Belmont Park. Upon the developer's death, the amusement park was granted to the city for the enjoyment of the people and the city later dedicated the park and surrounding land, collectively referred to as Mission Beach Park, to be used solely for park and recreational purposes.

In 1987, the city entered into a lease agreement with the park operator and approved a development

plan to revitalize the park. The 1987 lease authorized the operator to demolish and renovate certain facilities, and to construct several new buildings for restaurants, shops, and other commercial uses. The lease was for a 50-year term and included a right of first refusal to enter into a new agreement in the future.

Following the execution of the 1987 lease, the city's electorate passed "Proposition G," which limited the development of Mission Beach Park to certain specified uses. It also included an exemption for projects that had obtained "vested rights" as of the effective date of the measure. In 1988, the city passed an ordinance providing that the 1987 lease and development plan for Belmont Park provided a vested right under Proposition G, and as a result, the use and redevelopment of the park could continue as planned.

In 2015, the city entered into an amended lease with the current operator Symphony Asset Pool XVI, LLC. The amended lease required Symphony to pay rent, operate, and maintain the property, and also gave Symphony the opportunity to extend the lease beyond the original 50-year term. Under the terms of the agreement, if Symphony completed ongoing and planned improvements, made additional improvements, and paid the city a lump sum payment, the amended lease could be extended an additional 50 years. Prior to approving the amended lease, the city determined that it was categorically exempt from CEQA under the "existing facilities" exemption.

Shortly thereafter, a local group filed a lawsuit challenging the amended lease on three grounds: 1) that the amended lease violated Proposition G by authorizing new uses in excess of the vested rights conferred under the 1987 lease; 2) that the city improperly determined that the amended lease was categorically exempt from CEQA; and 3) that the approval of the amended lease violated the city charter, which at the time required certain agreements lasting more than five years to be adopted by ordinance after notice and a public hearing. The trial court ruled in favor of the city and the petitioner appealed.

## The Court of Appeal's Decision

### The Amended Lease Did Not Violate Proposition G

The Court of Appeal court first considered whether the amended lease violated Proposition G. The petitioner argued the lease agreement violated Proposition G because the scope of work allowed under the amended lease exceeded the vested rights determined by the city in 1988, and because the extension of the lease beyond the original 50-year term exceeded the vested rights obtained in 1988. The court rejected both arguments. First, the court found that the original lease included a long list of allowable uses and all of the uses allowed under the amended lease were encompassed within the broad language of the original agreement. Second, the court held that the extension beyond the original 50-year term did not violate Proposition G because the 1987 lease contemplated such an extension by including a right of first refusal to enter into a new agreement. Furthermore, neither Proposition G nor the city's 1988 ordinance finding a vested right contained any time limit on the rights vested.

### The City Did Not Violate CEQA

Turning to the petitioner's CEQA claim, the court considered whether the city properly determined that the amended lease was categorically exempt from CEQA under CEQA Guidelines § 15301. Section 15301, known as the "existing facilities" exemption, covers the:

> . . .operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination.

The petitioner argued that the amended lease did not fit within this exemption because it contemplated a wide range of improvements, including construction of a new restaurant and bar, food court venues, and a new arcade, which according to the petitioner, involved more than a negligible expansion the existing use. The court disagreed.

The court found that all of the construction activities cited by the petitioner had already been completed at the time the amended lease was entered, and thus were existing facilities. The court noted that while the amended lease did contemplate additional improvements to a pool facility in the future, the petitioner did not argue those activities were outside

the scope of the exemption. At any rate, the court added, those activities involved only the refurbishment of existing facilities and not new construction, and therefore, they too fell squarely within the exemption.

The petitioner next argued that, even if the amended lease did fit within the existing facilities exemption, the unusual circumstances exception in CEQA Guidelines § 15003.2, subdivision (c) applied and precluded the city from relying on the exemption. Under that section, a categorical exemption:

> . . .shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

The petitioner argued that the existence of the voter-passed Proposition G constituted an unusual circumstance within the meaning of section 15003.2 because the voters had used the initiative power to declare a distinct interest in minimizing the environmental impacts of development in Mission Beach. The petitioner also argued that there was a fair argument that the project would result in significant traffic and noise impacts. To support this claim, the petitioner cited a statement by a Symphony representative that the project would generate an additional $100 million in revenue over the term of the lease, which the petitioner argued could only occur with significantly more visitors and therefore significantly more traffic and noise. The court rejected these arguments, finding that the types of impacts alleged by the petitioner were speculative, and in any event, the petitioner failed to establish that the alleged traffic and noise impacts would be *due to* the alleged unusual circumstance (*i.e.*, the existence of Proposition G).

### The Amended Lease Did Not Violate the City's Charter

The final issue in the case was whether the approval of the amended lease violated a provision in the city's charter requiring that certain agreements lasting more than five years can only be approved by ordinance following publication in a local newspaper and a public hearing. The petitioner argued that the charter provision applies to *any* contract lasting more than five years, while the city countered that the provision only applies to agreements that require the city to expend funds. After finding that the charter language was ambiguous and could support either interpretation, the court explained that the city's interpretation of its own charter is entitled to deference. The city's longstanding interpretation of the provision was that it applied solely to agreements requiring the city to expend funds. Because it found this interpretation to be reasonable and consistent with the legislative history, the court deferred to the city and ruled that the charter provision did not apply to the amended lease.

### Conclusion and Implications

While this case does not break new CEQA ground, it provides several helpful remainders regarding categorical exemptions. As demonstrated here, the categorical exemption for existing facilities can apply in a wide variety of situations, including the extension of a lease or contract, and the relevant question for determining whether the exemption applies is whether the approval authorizes more than a negligible expansion of use beyond that existing at the time of the agency's determination. The case also reaffirms that, for the unusual circumstances exception to apply, it is not enough that some unusual circumstances exist or that the project may have a significant impact; rather, the significant environmental impact must be *due to* the unusual circumstances.

The opinion is available at: https://www.courts.ca.gov/opinions/documents/D073284.PDF
(Collin McCarthy, Chris Stiles)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

# SECOND DISTRICT ADDRESSES EXEMPTION OF CERTAIN DEVELOPMENT PROJECTS FROM PERMITTING IN LAND USE PLAN AND THE CALIFORNIA COASTAL ACT

*Venice Coalition to Preserve Unique Community Character v. City of Los Angeles et al.*, ___Cal.App.5th___, Case No. B285295 (2nd Dist. Jan. 9, 2019).

In *Venice Coalition to Preserve Unique Community Character v. City of Los Angeles*, the Court of Appeal for the Second District dealt with whether the City of Los Angeles (City) engaged in a pattern and practice of illegally exempting certain development projects in Venice from permitting requirements in the Venice Land Use Plan and in the California Coastal Act. This case addresses whether certain development projects are subject to ministerial or discretionary review and what qualifies for exemption under the California Coastal Act of 1976 (the Coastal Act).

## Factual and Procedural Background

This case arose out of a complaint by the Venice Coalition to Preserve Unique Community Character and Celia R. Williams (collectively: Venice Coalition) for declaratory and injunctive relief against the City of Los Angeles and department of city planning for the City of Los Angeles (collectively: City) alleging violations of due process under the California Constitution, violations of the Coastal Act, the Venice Land Use Plan (LUP), and the California Code of Civil Procedure.

The two primary issues in this case are a) whether a community is afforded an opportunity for notice and a hearing for approvals of development projects by a city which are ministerial in nature; and b) whether exemptions granted by the City were authorized under Public Resources Code § 30610 of the Coastal Act.

The City initially filed a motion for judgment on the pleadings, which the trial court denied. The City then filed a motion for summary judgment, which the trial court granted and the Venice Coalition appealed the summary judgment to the Court of Appeal.

## The Court of Appeal's Decision

Initially, the Court of Appeal laid out the City's approval process for development projects in Venice whereby it employs two different but parallel processes. One involves the Venice Specific Plan which governs all development in Venice. The other process is pursuant to the Coastal Act, with which all development in Venice must also comply. To comply with the Specific Plan, all development projects in Venice must either undergo a project permit compliance review, or a determination that a review is not required. To comply with the Coastal Act, all development projects in Venice must obtain a Coastal Development Permit (CDP) or an exemption from the CDP requirement.

### The Coastal Act

The court then turned to review the Coastal Act and its requirements. The court stated that the broad goals of the Coastal Act are permanent protection of the state's natural and scenic resources; protection of the ecological balance of the coastal zone; and regulation of existing and future developments to ensure consistency with the policies of the Coastal Act. (§ 30001.) With certain exceptions:

> . . .any person wishing to perform or undertake any development in the coastal zone must obtain a coastal development permit 'in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency. ...' (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, 55 Cal.4th 783, 794 (2012); § 30600, subd. (a).)

The Coastal Act authorizes exemptions from the CDP requirement for certain minor developments such as improvements to existing single family residences and other structures.

Once the California Coastal Commission certifies a local government's program, and all implementing actions become effective, the commission delegates authority over coastal development permits to the local government." (*Pacific Palisades, supra*, 55 Cal.4th at p. 794, 149 Cal.Rptr.3d 383, 288 P.3d 717.) Prior to the certification of its local coastal program:

> . . .'a local government may, with respect to any development within its area of jurisdiction ..., establish procedures for the filing, processing, review, modification, approval, or denial of a coastal development permit.' (*Ibid.*)

Actions pursuant to a locally issued CDP are appealable to the Coastal Commission.

The Court of Appeal pointed out that in 1978, the Coastal Commission granted to the City the authority to issue both CDP's for development within the Coastal Zone and exemptions for development projects that do not require a CDP under the Coastal Act. The City's CDP program is codified in § 12.20.2 of the Los Angeles Municipal Code. In 2001, the Coastal Commission certified the Venice LUP. The City submitted a Venice local implementation plan to the Coastal Commission in 2004; as of yet, the implementation plan has not been certified.

### Venice Land Use and Specific Plans

The Court of Appeal next turned to review the Venice Land Use and Specific Plans, stating that the certified Venice LUP is a part of the City's General Plan, which guides the City's use of land and the design and character of buildings and open space. One of the goals of the LUP is to control building heights and bulks to "preserve the nature and character of existing residential neighborhoods." The Specific Plan sets forth two processes by which a development project may be evaluated and approved. For many small-scale development projects, such as construction and demolition of four unit or smaller residential projects not located on walk streets, the director of planning may issue a "Venice Sign-Off" (VSO), which exempts the project from a project permit compliance review. All other projects must be evaluated for project permit compliance.

On the first claim that Venice residents are denied due process by issuing VSOs without notice and a hearing, the court reviewed whether such actions were legislative, adjudicative or ministerial. The court found that land use decisions that require a public official to exercise judgment are discretionary and require notice and a hearing. Actions which require a public officer to perform "in a prescribed manner in obedience to the mandate of legal authority" without regard to his or her own judgment are ministerial and do not trigger due process protections. (*Rodriguez v. Solis*, 1 Cal.App.4th 495, 501 (1991))

Section 8A of the Venice Specific Plan provides that the director of planning may issue a VSO to certain projects upon a determination that they are exempt from project permit compliance review and that the director of planning uses forms that are essentially checklists requiring only a determination that the proposed project does or does not meet objective measurement criteria. However, the court pointed out that §§ 8B and 8C of the Venice Specific Plan govern development projects not subject to VSO approval and therefore subject to project permit compliance review. Under § 8C, the Director of Planning must make certain findings, including that the project:

> . . .is compatible in scale and character with the existing neighborhood, and ... not be materially detrimental to adjoining lots or the immediate neighborhood.

The Court of Appeal agreed with the trial court that the VSO process is *ministerial* and do not need to be reviewed for compliance with the LUP. Therefore, for VSO projects the Venice Coalition is not entitled to notice or a hearing.

### Additions to Existing Structures

Regarding the claim whether additions to existing structures are eligible for exemptions under the Coastal Act, the City was issuing exemptions from the CDP process for additions to existing buildings and demolitions ordered as part of a nuisance abatement order. One specific question in the Venice Coalition's claim that that improvements that increase the existing height or floor area by more than 10 percent are impermissible in all areas of the Coastal Zone. Specifically at question is what increases in floor area or height are allowed under **§§** 13250, subdivision (b)(4) and 13253, subdivision (b)(4) of title 14 of the California Code of Regulations. The court pointed out that the plain language of the regulation makes clear that the 10 percent limitation contained therein applies *only* to property within a certain proximity to the sea or in a designated scenic resource area (*i.e.* property located between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide of the sea where there is no beach, whichever is the greater distance, or in significant scenic resources

areas as designated by the commission or regional commission). The court found that the Coastal Act contemplates improvements to existing structures does include additions and that to follow the Venice Coalition's interpretation, the regulations would disallow all improvements that increase the size of an existing structure as opposed to just limiting those within the specific coastal area to less than 10 percent.

### Limitations on the City's Authority

Further, while the City did not argue it on appeal, the Court of Appeal affirmed the trial court finding that no provision of the Coastal Act limits the City's power to abate nuisances and order demolition of unsafe or substandard conditions. To the contrary, the Coastal Act explicitly provides that no provision in the Coastal Act can limit "the power of any city or county or city and county to declare, prohibit, and abate nuisances."

### Conclusion and Implications

The Court of Appeal came to a couple primary conclusions in this case regarding the Coastal Act and the application of Due Process: a) that there is no provision of the Coastal Act limits city's power to abate nuisances and order demolition of unsafe or substandard conditions;  and b) there is no due process protection for a ministerial process by which city's director of planning, pursuant to neighborhood's Specific Plan under city's General Plan, issued sign-off to exempt a small-scale development project in neighborhood from project permit compliance review. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B285295.PDF (Alexis Sinclair)

# LEGISLATIVE UPDATE

This Legislative Update is designed to apprise our readers of potentially important land use legislation. When a significant bill is introduced, we will provide a short description. Updates will follow, and if enacted, we will provide additional coverage.

We strive to be current, but deadlines require us to complete our legislative review several weeks before publication. Therefore, bills covered can be substantively amended or conclusively acted upon by the date of publication. All references below to the Legislature refer to the California Legislature, and to the Governor refer to Gavin Newsom.

## Coastal Resources

**AB 65 (Petrie-Norris)—**This bill would require specified actions be taken by the State Coastal Conservancy when it allocates any funding appropriated pursuant to the California Drought, Water, Parks, Climate, Coastal Protection, and Outdoor Access for All Act of 2018, including that it prioritize projects that use natural infrastructure to help adapt to climate change impacts on coastal resources.

AB 65 was introduced in the Assembly on December 3, 2018, and, most recently, on January 17, 2019, was referred to the Committee on Natural Resources.

## Environmental Protection and Quality

**AB 202 (Mathis)—**This bill would extend the operation of the California State Safe Harbor Agreement Program Act, which establishes a program to encourage landowners to manage their lands voluntarily, by means of state safe harbor agreements approved by the Department of Fish and Wildlife, to benefit endangered, threatened, or candidate species, of declining or vulnerable species, without being subject to additional regulatory restrictions as a result of their conservation efforts, through January 1, 2024.

AB 202 was introduced in the Assembly on January 14, 2019, and, most recently, on February 4, 2019, was referred to the Committee on Water, Parks and Wildlife.

**AB 231 (Mathis)—**This bill would exempt from the California Environmental Quality Act (CEQA) a project: 1) to construct or expand a recycled water pipeline for the purpose of mitigating drought conditions for which a state of emergency was proclaimed by the Governor if the project meets specified criteria; and, 2) the development and approval of building standards by state agencies for recycled water systems.

AB 231 was introduced in the Assembly on January 17, 2019, and, most recently, on February 7, 2019, was referred to the Committee on Natural Resources.

**AB 296 (Cooley)—**This bill would establish the Climate Innovation Grant Program, to be administered by the Climate Innovation Commission, the purpose of which would be to award grants in the form of matching funds for the development and research of new innovations and technologies to address issues related to emissions of greenhouse gases and impacts caused by climate change.

AB 296 was introduced in the Assembly on January 28, 2019, and, most recently, on February 7, 2019, was referred to the Committee on Natural Resources.

**AB 394 (Obernolte)—**This bill would exempt from the California Environmental Quality Act projects or activities recommended by the State Board of Forestry and Fire Protection that improve the fire safety of an existing subdivision if certain conditions are met.

AB 394 was introduced in the Assembly on February 6, 2019, and, most recently, on February 15, 2019, was referred to the Committee on Natural Resources.

**AB 430 (Gallagher)—**This bill would exempt from the California Environmental Quality Act projects involving the development of new housing in the County of Butte.

AB 430 was introduced in the Assembly on February 7, 2019, and, most recently, on February 15, 2019, was referred to the Committee on Natural Resources.

**AB 454 (Kalra)—**This bill would amend the Fish and Game Code to make unlawful the taking or possession of any migratory nongame bird designated in the federal Migratory Bird Treat Act as of January 1, 2017, any additional migratory nongame bird that

may be designated in the federal act after that date.

AB 454 was introduced in the Assembly on February 11, 2019, and, most recently, on February 12, 2019, was printed and may be heard in committee on March 14, 2019.

**SB 25 (Caballero)—**This bill would amend the California Environmental Quality Act to establish specified procedures for the administrative and judicial review of the environmental review and approvals granted for projects located in qualified opportunity zones that are funded, in whole or in part, by qualified opportunity funds, or by moneys from the Greenhouse Gas Reduction Fund and allocated by the Strategic Growth Council.

SB 25 was introduced in the Senate on December 3, 2018, and, most recently, on February 12, 2019, was set for hearing on March 20 in the Committee on Environmental Quality.

**SB 62 (Dodd)—**This bill would make permanent the exception to the Endangered Species Act for the accidental take of candidate, threatened, or endangered species resulting from acts that occur on a farm or a ranch in the course of otherwise lawful routine and ongoing agricultural activities.

SB 62 was introduced in the Senate on January 3, 2019, and, most recently, on January 16, 2019, was referred to the Committee on Natural Resources and Water.

### Housing / Redevelopment

**AB 11 (Chiu)—**This bill, the Community Redevelopment Law of 2019, would authorize a city or county, or two or more cities acting jointly, to propose the formation of an affordable housing and infrastructure agency that would, among other things, prepare a proposed redevelopment project plan that would be considered at a public hearing by the agency where it would be authorized to either adopt the redevelopment project plan or abandon proceedings, in which case the agency would cease to exist.

AB 11 was introduced in the Assembly on December 3, 2018, and, most recently, on January 17, 2019, was referred to the Committees on Housing and Community Development and Local Government.

**AB 68 (Ting)**—This bill would amend the law relating to accessory dwelling units to, among other things: 1) prohibit a local ordinance from imposing requirements on minimum lot size, lot coverage, or floor area ratio, and establishing size requirements for accessory dwelling units that do not permit at least an 800 square feet unit of at least 16 feet in height to be constructed; and, 2) require a local agency to ministerially approve or deny a permit application for the creation of an accessory dwelling unit or junior accessory dwelling unit within 60 days of receipt.

AB 68 was introduced in the Assembly on December 3, 2018, and, most recently, on January 17, 2019, was referred to the Committees on Housing and Community Development and Local Government.

**AB 69 (Ting)—**This bill would require the Department of Housing and Community Development to propose small home building standards governing accessory dwelling units and homes smaller than 800 square feet, which would be submitted to the California Building Standards Commission for adoption on or before January 1, 2021.]

AB 69 was introduced in the Assembly on December 3, 2018, and, most recently, on January 17, 2019, was referred to the Committees on Housing and Community Development and Local Government.

**AB 168 (Aguiar-Curry)—**This bill would amend existing law, which allows for the ministerial approval of multi-family housing projects meeting certain objective planning standards, to require that the standards also include a requirement that the proposed development not be located on a site that is a tribal cultural resource.

AB 168 was introduced in the Assembly on January 9, 2019, and, most recently, on January 24, 2019, was referred to the Committee on Housing and Community Development.

**AB 191 (Patterson)—**This bill would, until January 1, 2030, exempt homes being rebuilt after wildfires or specified emergency events that occurred on or after January 1, 2017, from meeting certain current building standards.

AB 191 was introduced in the Assembly on January 10, 2019, and, most recently, on February 4, 2019, was referred to the Committee on Housing and Community Development.

**SB 50 (Wiener)—**This bill would require a city,

county, or city and county to grant upon request an equitable communities incentive when a development proponent seeks and agrees to construct a residential development, as defined, that satisfies specified criteria, including, among other things, that the residential development is either a job-rich housing project or a transit-rich housing project, as those terms are defined; the site does not contain, or has not contained, housing occupied by tenants or accommodations withdrawn from rent or lease in accordance with specified law within specified time periods; and the residential development complies with specified additional requirements under existing law.

SB 50 was introduced in the Senate on December 3, 2018, and, most recently, on January 24, 2019, was referred to the Committees on Housing and Governance and Finance.

### Public Agencies

**AB 485 (Medina)—**The bill would prohibit a local agency from signing a nondisclosure agreement regarding a warehouse distribution center as part of negotiations or in the contract for any economic development subsidy.

AB 485 was introduced in the Assembly on February 12, 2019, and, most recently, on February 13, 2019, was printed and may be acted upon on or after March 15, 2019.

**AB 637 (Gray)—**This bill would prohibit the State Water Resources Control Board or a Regional Water Quality Control Board from adopting or implementing any policy or plan that results in a direct or indirect reduction to the drinking water supplies that serve a severely disadvantaged community, as defined.

AB 637 was introduced in the Assembly on February 15, 2019, and, most recently, on February 15, 2019, was printed and read for the first time.

**SB 47 (Allen)—**This bill would amend the Elections Code provisions relating to initiatives and referendums to require, for a state or local initiative, referendum, or recall petition that requires voter signatures and for which the circulation is paid for by a committee, as specified, that an Official Top Funders disclosure be made, either on the petition or on a separate sheet, that identifies the name of the committee, any top contributors, as defined, and the month and year during which the Official Top Funders disclosure is valid, among other things.

SB 47 was introduced in the Senate on December 3, 2018, and, most recently, on January 16, 2019, was referred to the Committee on Elections and Constitutional Amendments and Public Service.

**SB 53 (Wilk)—**This bill would amend the Bagley Keene Open Meeting Act to specify that the definition of "state body" includes an advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body that consists of three or more individuals, as prescribed, except a board, commission, committee, or similar multimember body on which a member of a body serves in his or her official capacity as a representative of that state body and that is supported, in whole or in part, by funds provided by the state body, whether the multimember body is organized and operated by the state body or by a private corporation.

SB 53 was introduced in the Senate on December 10, 2018, and, most recently, on January 16, 2019, was referred to the Committee on Governmental Organization.

**SB 295 (McGuire)—**This bill would prohibit an ordinance passed by the board of directors of a public utility district from taking effect less than 45 days, instead of 30 days, after its passage and would make conforming changes.

SB 295 was introduced in the Senate on February 14, 2019, and, most recently, on February 15, 2019, was printed and may be acted upon on or after March 17, 2019.

### Zoning and General Plans

**AB 139 (Quirk-Silva)—**This bill would amend the Planning and Zoning Law to require the annual report prepared by local planning agencies regarding reasonable and practical means to implement the General Plan or housing element to include: 1) the number of emergency shelter beds currently available within the jurisdiction and the number of shelter beds that the jurisdiction has contracted for that are located within another jurisdiction; and 2) the identification of public and private nonprofit corporations known to the local government that have legal and managerial capacity to acquire and manage emergen-

cy shelters and transitional housing programs within the county and region; and 3) to require an annual assessment of emergency shelter and transitional housing needs within the county or region.

AB 139 was introduced in the Assembly on December 11, 2018, and, most recently, on January 24, 2019, was referred to the Committee on Housing and Community Development.

**AB 148 (Quirk-Silva)—**This bill would, among other things, require each sustainable communities strategy set forth in a regional transportation plan prepared by a local planning agency in accordance with existing law to identify areas within the region sufficient to house an eight-year projection of the emergency shelter needs for the region.

AB 148 was introduced in the Assembly on December 13, 2018, and, most recently, on January 24, 2019, was referred to the Committees on Transportation and Natural Resources.

**AB 180 (Gipson)—**This bill would amend the Planning and Zoning Law to require those references to redevelopment agencies within General Plan housing element provisions to instead refer to housing successor agencies.

AB 180 was introduced in the Assembly on January 9, 2019, and, most recently, on January 10, 2019, was printed and may be heard in committee on February 9, 2019.

**SB 182 (Jackson)—**This bill would amend the Planning and Zoning Law to require the safety element of a General Plan, upon the next revision of the housing element or the hazard mitigation plan, on or after January 1, 2020, whichever occurs first, to be reviewed and updated as necessary to include a comprehensive retrofit plan.

SB 182 was introduced in the Senate on January 29, 2019, and, most recently, on February 6, 2019, was referred to the Committee on Governance and Finance.

(Paige Gosney)

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