Volume 28, Number 8
May 2019

CALIFORNIA LAND USE™ LAW & POLICY Reporter

CONTENTS

LAND USE NEWS

RECENT FEDERAL DECISIONS

Continued on next page

CALIFORNIA LAND USE™
LAW & POLICY Reporter

RECENT CALIFORNIA DECISIONS

Publisher's Note: Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, P.O. Box 506, Auburn, CA 95604-0506; 530-852-7222; schuster@argentco.com

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $845.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 506; Auburn, CA 95604-0506; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

LAND USE NEWS

CONGESTION PRICING MAY CHANGE THE WAY THE UNITED STATES THINKS ABOUT LAND USE PLANNING FOR TRANSPORTATION IMPACTS

America's two largest cities are on the road to implementing congestion pricing, which would charge drivers a fee to enter certain areas in an effort to reduce traffic jams and the adverse environmental effects associated with them. New York City intends to implement a toll for traveling below 60th Street, while the City of Los Angeles is studying the effects of charging drivers to enter an area of West Los Angeles and Santa Monica just west of the 405 Freeway and north of the 10 Freeway. Both plans are focused on high-traffic areas, and would use revenue from the tolls to fund public transportation.

Background

Congestion pricing creates a surcharge for drivers in certain heavily trafficked areas, in an effort to reduce gridlock and its attendant carbon emissions. Four general types of congestion pricing are in use world-wide: 1) a cordon area with charges for crossing the cordon line; 2) area-wide congestion pricing; 3) a city-center toll ring, with toll collection surrounding the city; and 4) corridor or single facility congestion pricing, where access to a lane or facility is priced. Implementation of congestion pricing has successfully reduced traffic in urban areas, but not without controversy. Critics assert that congestion pricing disproportionately impacts lower-income workers, places an economic burden on areas just outside a congestion pricing zone, negatively effects retail businesses and economic activity in the area, and represents an increased tax on individuals who live or work in heavily populated areas.

Singapore became the first place in the world to institute congestion pricing in 1998. The system uses open road tolling, which does not require vehicles to stop in order to pay tolls. Rather, all roads linking into Singapore's Central Area include gantries which read devices affixed to windshields. Those devices are linked to cash cards, which can be reloaded by drivers. Singapore's Land Transportation Authority reports that road traffic has decreased by nearly 25,000 vehicles during peak hours, with average road speeds increasing by roughly twenty percent since implementation of the system.

London adopted a congestion charge on weekdays in Central London in 2003, and its congestion charge zone remains one of the largest in the world. The city charges £ 11.50 a day for any non-exempt vehicle entering the zone, with funds contributing to public transit improvements. As of 2013, only electric cars, hybrids, and low-emission vehicles can qualify for an exemption. Enforcement uses automatic number plate recognition technology. As of 2013, Transport for London reports that the congestion pricing scheme has resulted in a 10 percent reduction in traffic volumes from baseline conditions. Despite this, traffic speeds have continued to decrease over the period since congestion pricing was implemented.

Stockholm instituted a congestion tax on a permanent basis in 2007 encompassing essentially the entire Stockholm City Centre, with the charge depending on the time of day a motorist enters or exists the congestion tax area. A study conducted in 2012 showed a decrease in congestion and increased use of local public transportation.

Milan began a one-year trial program in congestion pricing in 2008. The initial Ecopass program was in place until December 31, 2011, and was replaced with the Area C congestion charge in January 2012. Vehicles entering the Area C charging zone incur a charge of € 5, with residents of the area receiving 40 free entries a year, and then a discounted charge of € 2 for subsequent entries. Electric vehicles, public utility vehicles, police and emergencies vehicles, buses and taxis are exempt from the charge, and all net earnings are invested to promote sustainable mobility and reduce air pollution. As of July 2015, the average number of cars entering the restricted area was nearly 30 percent less than during the same period in 2011. A study published in the Journal of Urban Economics estimated the welfare gain produced from air pollution reductions alone is around $3 billion.

New York City's Proposal

A New York State budget approved on March 31, 2019 included a plan to implement congestion pricing in Manhattan. The proposal would create the first congestion pricing scheme in the United States, imposing a toll on vehicles traveling below 60th Street. The approved plan deferred many controversial decisions, including the pricing scheme and who may be entitled to exemptions, delegating that authority to the Triborough Bridge and Tunnel Authority and a newly created traffic mobility review board. Eighty percent of the revenue generated by tolls is earmarked for the city's subway and bus network, with the remaining 20 percent split evenly between the Long Island Rail Road and the Metro-North Railroad.

The proceeds are intended to enable those entities to modernize public transit throughout the New York metropolitan area, with an aim towards reducing congestion and pollution in the nation's largest city. The proposal gained legislative approval with the support of environmentalists as well as transit riders who face increasingly antiquated and unreliable public transit options. Without congestion pricing, Governor Andrew Cuomo has predicted that subway and bus fares could rise by 30 percent.

The plan is unlikely to take effect until 2021, and will likely face opposition from suburban commuters, as well as questions about the impacts on low-income residents and the disabled.

The Los Angeles Study

The Southern California Association of Governments released a study on March 28 suggested that charging drivers $4 to enter an area west of the 405 freeway and north of the 10 Freeway could reduce traffic jams and speed up commute times through one of the most heavily traveled areas of the Los Angeles metropolitan area. The study proposed limiting congestion pricing to a 4.3 square mile area during weekday rush hours, finding this could reduce traffic delays and miles driven in the area by more than 20 percent. The study indicates such a decrease in driving would lead to a 9 percent increase in transit ridership, a 7 percent increase in biking, and a 7 percent increase in walking within the zone.

Before congestion pricing could be implemented, California law would need to be changed to allow tolling on surface streets, and a massive public outreach campaign would need to be undertaken to garner support. SCAG initially considered studying the impact of congestion pricing in downtown Los Angeles, Santa Monica, Hollywood, West Hollywood, and the area around the Los Angeles International Airport, but focused on the Westside because traffic is the worst in that region. Los Angeles City Councilman Mike Bonin, who represents the district containing the proposed-congestion pricing zone, indicated immediate skepticism for the plan, pointing out that Los Angeles does not have high-quality public transit alternatives, and that his constituents have the means, resources, and time to oppose implementation of a congestion pricing scheme. Polling suggests support for congestion pricing is only at forty percent currently.

The study proposes charging vehicles that drive in and out multiple times only once per day, and waiving charges to leave the area. While there is no timeline for implementing the study's proposal—or even introducing a legislative plan to allow for congestion pricing—the study is an early step towards addressing traffic and pollution in one of the nation's most persistent car cultures.

Conclusion and Implications

Growing concerns about pollution and carbon emissions, coupled with increasing commute times and climbing housing prices in major American cities make the implementation of some form of congestion pricing inevitable. New York City is on track to become the first city in the nation to implement congestion pricing, which will allow other major metropolitan areas to observe that scheme's effectiveness and learn from the city's experience mainstreaming congestion pricing for its residents. Congestion pricing is proven to reduce both traffic and emissions in cities around the world, and will also raise revenue which can be invested in both public transit options and carbon emissions reduction programs.
(Jordan Ferguson)

PROPOSED WATER TAX AND LEGISLATIVE FUNDING PROPOSALS FOR WATER PROJECTS COMPETE FOR SUPPORT IN UPHILL CLIMB FOR APPROVAL

California Governor Gavin Newsom is proposing to tax water users throughout California to help fund projects and programs to assist low-income communities where water quality and water supply issues are dire. Competing proposals urge utilizing existing funding sources rather than imposing a new and controversial water tax. Meanwhile, some Democratic California legislators are also pushing to lower the voting threshold to impose new local special taxes.

Background

With more than supermajority democratic control of both houses of the California Legislature in place, Governor Newsom wasted no time proposing a new and controversial tax on water. In January, Governor Newsom released a California budget proposal that included spending millions of dollars for a "Safe and Affordable Drinking Water Fund." That money would be used to help water systems, domestic wells and water users secure and maintain clean water supplies, primarily in small and disadvantaged communities.

The Water Tax

The details of Newsom's plan trickled out recently, revealing that water customers would be taxed from 95 cents to $10 a month in order to raise about $140 million annually. The amount of the tax would vary depending on factors such as the size of water meters and would include exceptions for certain disadvantaged communities. More than 3,000 local water suppliers throughout California would be made responsible for collecting the tax. Animal farmers, dairies and fertilizer producers and handlers would also pay sizeable fees for programs to remedy nitrate and other types of groundwater contamination.

Newsom describes the water quality and water supply conditions for many in low income communities through the state, "a moral disgrace and a medical emergency." According to Newsom, 1 million Californians live without clean water for drinking or bathing, and hundreds of water systems are out of compliance with primary drinking water quality standards due to contamination. Many struggling systems are located in the Central Valley and San Joaquin Valley.

Opposition

Similar legislative proposals were made and killed last year, including under threat of veto by then-Governor Jerry Brown. Newsom's water tax also faces stiff opposition, not only from taxpayer associations but also from Democratic legislators representing largely agricultural districts and from the vast majority of public water agencies. Last year's recall of a Democratic senator who voted to raise California's gas tax also has many legislators nervous. Despite Democratic supermajorities, the water tax may have difficulty reaching the required two-thirds threshold of votes necessary to impose or increase new taxes.

Those opposed to the water tax note that voters have approved no less than eight water bonds totaling more than $30 billion since 2000, and they cite concerns that little of that funding has been used to create new water storage or develop new sources of water supply. Water tax opponents assert that statewide funding efforts should focus on these statewide water supply needs rather than directing funds to select local areas. Association of California Water Agencies (ACWA) representatives have taken the position that taxing a resource that is essential to living does not make sense and is not necessary when alterative funding solutions exist and the state has a substantial budget surplus.

The California Legislative Analyst's Office, which is the Legislature's non-partisan fiscal and policy advisor, recommends that the Legislature consider several issues as it deliberates and evaluates Newsom's Safe and Affordable Drinking Water proposal, including: 1) its consistency with the state's existing human right to water policy, 2) uncertainty about the estimated revenues that would be generated and the amount of funding needed to address the problem, 3) a comparison of the beneficiaries of the program with those who would pay the new charges, 4) the limited nature of alternative fund sources for the proposed program, and 5) trade-offs associated with the proposal's safe harbor provisions.

Competing Proposals

Democratic State Senator Anna Caballero (D - 12th Senate District) has proposed a competing proposal that appears to be gaining traction. Rather than imposing a new tax, Senator Caballero would utilize money from California's multi-billion-dollar budget surplus to create a trust fund to pay for water system and water supply related improvements.

Similarly, earlier this year California Assemblyman Devon Mathis (R - 26th Assembly District) introduced the Clean Water for All Act, a California Constitutional amendment that would cause, beginning with the 2021–22 fiscal year, not less than 2 percent of California's General Fund revenues to be set apart for the payment of principal and interest on bonds authorized under the Water Quality, Supply, and Infrastructure Improvement Act of 2014, for water supply, delivery, and quality projects administered by the California Department of Water Resources, and water quality projects administered by the State Water Resources Control Board.

Local Tax Thresholds

As these statewide tax proposals move their way through the legislative process, so too does a proposed major Constitutional amendment to reduce the voter approval threshold to approve bonds and impose or raise *local* special taxes. California Assemblywoman Cecilia Aguiar-Curry (D - 4th Assembly District)'s proposed amendment, which could potentially be placed on the November 2020 ballot, would reduce that threshold from a two-thirds vote to a 55-percent majority.

According to Assemblywoman Aguiar-Curry:

> I have heard about deteriorating buildings, decrepit community facilities and our extreme lack of affordable housing. This will empower communities to take action at the local level to improve the economies, neighborhoods and residents' quality of life.

Taxpayer advocate David Wolfe, legislative director for the Howard Jarvis Taxpayers Association, however, says "If this passes it's going to be devastating for property owners," asserting that the new taxes and bonds that might be approved under the lowered thresholds would significantly increase costs of homeownership and burden taxpayers with long-term debt that lasts for decades.

Conclusion and Implications

Funding water projects and programs at practically any level in California is often difficult. While stakeholders across California largely share the view that such projects and programs are necessary to sustain life and economy in California, there is significant disagreement in how to fund them. As the proposed water tax and competing and related proposals work their way through the legislative process, stakeholders will surely demand to know how existing revenues and funding sources are—or could be—utilized to tackle these significant challenges before imposing new taxes, fees or charges on all or any Californians. (Derek Hoffman, Michael Duane Davis)

CALIFORNIA'S METROPOLITAN WATER DISTRICT TO SUPPLY WATER INSTEAD OF THE IMPERIAL IRRIGATION DISTRICT TO FINISH THE COLORADO RIVER DROUGHT PLAN

With California's Imperial Irrigation District (IID) baulking and a deadline looming, the Metropolitan Water District of Southern California (MWD) broke an impasse on a seven-state Colorado River drought contingency plan (Plan) by agreeing to contribute the necessary water from its own reserves on behalf of IID. This made it possible, over the objections of IID, for the Colorado River Board of California to approve the Plan, and for representatives from the seven states involved, including California, to sign a letter to Congress calling for legislation to enact the deal.

Background

The Colorado River Compact is a 1922 agreement among seven U.S. states in the basin of the Colorado River in the American Southwest governing the allocation of the water rights to the river's water among the parties of the interstate compact. The compact divides the river basin into two areas, the Upper Divi-

sion (comprising Colorado, New Mexico, Utah and Wyoming) and the Lower Division (Nevada, Arizona and California), and requires the Upper Basin states not to deplete the flow of the river below 7,500,000 acre-feet (AF) during any period of ten consecutive years.

The Colorado River and its reservoirs provide water for more than 5 million acres of farmland and 40 million people, including Los Angeles, San Diego, Las Vegas, Phoenix and Denver. Nearly two decades of drought and overuse, exacerbated by worsening climate change, have pushed the river's reservoirs to historically low levels. In response to the drought and declining reservoir elevations in both Lake Powell and Lake Mead, the Secretary of the Department of the Interior worked with the seven Colorado River Basin States to develop the 2007 Colorado River Interim (Guidelines). Since the Guidelines were adopted, the Colorado River has remained in the historic drought and the risk of reaching critical elevations at Lake Mead has increased from under 10 percent when the Guidelines were developed to over 45 percent.

The Colorado River Drought Contingency Plan

The Plan consists of a short-term set of interstate agreements and one agreement between the states and the federal government designed to lower the risk of reaching critically low reservoir elevations to the risk level projected at the time the Guidelines were adopted in 2007. Beginning no later than 2020, the Secretary, seven Basin States, and Contractors, including MWD and IID, will begin work on the renegotiation of the Guidelines. That process is expected to result in new rules for management and operation of the Colorado River after 2026.

The Lower Basin Plan involves the Department of the Interior, California, Arizona, Nevada, and the Contractors, and requires the parties to contribute additional water to Lake Mead storage at predetermined elevations. It also incentivizes additional voluntary conservation of water to be stored in Lake Mead by allowing more flexibility in deliver of interim surplus storage (ICS). Under the Lower Basin Plan MWD was supposed to contribute the lion share of nearly 2 million AF of water between 2020 and 2026 constituting California's share of the Plan. IID was supposed to make 125,000 AF of the state's contributions for the first two years that such contributions are required.

At Metropolitan's December 11, 2018 board meeting, the Board authorized participation in the Plan, including all underlying agreements. However, the day before, at its December 10, 2018 board meeting, the IID Board approved participation in the Plan agreement but suspended implementation "until the following conditions were met:

> All seven Colorado River Basin States and the United States have approved the interstate Plan documents in the form voted on and approved by the IID Board of Directors in a public meeting.

The IID Board of Directors have voted on and approved in a public meeting any proposed federal legislation that is to be submitted to Congress in conjunction with the Plan.

The State of California and the United States have irrevocably committed to providing sufficient funding for the full completion of the ten-year Salton Sea Management Plan at a 1:1 federal to state funding commitment in addition to mitigating any and all future considerations as a result of the implementation of the Intra-California Agreement and the Interstate Plan Agreements.

The Bureau of Reclamation

The Bureau of Reclamation's deadline for approval of the Plan was March 18, 2018. As IID's third condition concerning Salton Sea restoration could not be secured by the Bureau's deadline, if at all, the MWD board at its March 12 meeting approved breaking the impasse on the Plan by contributing the necessary water from its own reserves on behalf of IID.

This allowed the Colorado River Board of California on March 18 by a vote of 8-1-1 to sign onto the Plan with the understanding that IID could join the Plan later. The following day representatives of the seven Western states participating in the Plan met with Bureau Commission Brenda Burman in Phoenix and signed a joint letter to Congress endorsing the Plan.

Conclusion and Implication

The signing event in Phoenix was held amid bitter complaints by IID, which was excluded from the deal even though it controls the single largest share of Colorado River water. While signing was underway, a veteran board member of IID spoke angrily at a

meeting on the shore of the Salton Sea, condemning his counterparts for writing his district out of the deal and suggesting they were sipping champagne while ignoring an urgent "environmental and public health disaster" at the shrinking lake.

Commissioner Burman, however, noted that the Plan was designed in a way that will avoid causing further declines in the Salton Sea, which has been receding as water has increasingly been transferred from the farmlands of the Imperial Valley to urban areas in Southern California. She added that it was IID that decided not to join the Plan, but is certainly invited to sigh on later if the district choses.

In their letter, the state's representatives have asked Congress to promptly pass legislation authorizing the Interior Secretary to implement the Plan. Hearings have been scheduled in the Senate and the House. Once legislation is passed, the agreements underlying the Plan will still need to be signed by representatives of the states.
(David D. Boyer)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT ADDRESSES FEDERALLY RESERVED WATER RIGHTS, NATIONAL ALASKA LANDS ACT AND SCOPE OF THE NATIONAL PARK SERVICE'S AUTHORITY OVER ALASKA'S NATION RIVER

Sturgeon v. Frost, et al., ___U.S.___, 139 S. Ct. 1066 (U.S. Mar 26, 2019).

The U.S. Supreme Court has held that the National Park Service (Park Service) may not apply a regulation banning hovercraft use on navigable waters within national parks to the Nation River in Alaska's Yukon-Charley Preserve (Preserve). The Court's unanimous decision overturned a prior ruling of the Ninth Circuit Court of Appeals in favor of the Park Service, whereby the Ninth Circuit held that the reserved water rights doctrine permitted the Park Service to exercise regulatory authority over the state-owned Nation River in accordance with the Alaska National Interest Lands Conservation Act (ANILCA). *Sturgeon v. Frost, et al.*, 872 F.3d 927 (9th Cir. 2017). The Supreme Court's decision addresses the extent of federal regulatory over national parks in the State of Alaska under ANILCA and the nature of interests retained by the federal government under the reserved water rights doctrine.

Factual and Statutory Background

The dispute before the Court arose when Park Service rangers in the Preserve informed John Sturgeon, a hunter traveling by hovercraft on a stretch of the Nation River leading to moose hunting grounds, that Park Service regulations prohibit the use of hovercraft on navigable waters located within the boundaries of national parkland (Regulation). 36 C.F.R. § 2.17(e). The rangers ordered Sturgeon to remove his hovercraft from the Preserve. Sturgeon complied with the order and subsequently filed an action for an injunction against the Park Service, claiming that the Regulation could not be enforced on the Nation River under § 103(c) of ANILCA. 16 U.S.C. 3103(c).

The Secretary of the Interior, through the Director of the Park Service, issued the Regulation pursuant to the National Park Service Organic Act, 39 Stat. 535 (Organic Act), which allows the Park Service to regulate both lands and waters within all national park system units in the United States, without regard to ownership. *See*, 54 U.S.C. §§ 100751, 100501, 100102. Specifically, the Organic Act allows the Park Service to issue rules thought "necessary and proper" for "System units," and that the Park Service may prescribe rules regarding activities on "water located within system units." 57 U.S.C. §§ 100751(a), 100751(b). While ordinarily the Regulation would fall within the broad regulatory authority granted by the Organic Act, ANILCA alters the Park Service's usual authority with respect to national parks in Alaska, such as the Preserve. As noted in the Court's decision, "if Sturgeon lived in any other state, his suit would not have a prayer of success." *Sturgeon*, 139 S. Ct. at 1081.

ANILCA set aside certain federal land in Alaska for conservation purposes, and divided such land into "conservation system units" that became part of the National Park System. 54 U.S.C. § 100102(6). Unlike most national park territory, ANILCA created conservation system units in Alaska with boundaries that follow natural features of the land rather than boundaries drawn to encompass only federal property. This approach resulted in the inclusion of an unusual amount of non-federally owned property within Alaskan national parks, referred to as "inholdings," which elicited concerns from the state and native Alaskans prior to ANILCA's enactment regarding the Park Service's regulatory powers over the inholdings. Partially in response to such concerns, ANILCA includes both a goal of protecting the national interest in public lands in Alaska as well as a goal of satisfying the economic and social needs of the people of Alaska. 16 U.S.C. § 3101(d).

In its discussion of § 103(c) of ANILCA, the language on which Sturgeon's claim relies, the Court's decision explains that the legislative history

and stated purposes of ANILCA show that Congress intended to assure the state and native Alaskans that their inholdings would not be treated the same as other federal property. *Sturgeon*, 139 S. Ct. at 1076. Section 103(c) of ANILCA provides that only "public lands" are deemed included as part of a "conservation system unit" over which normal Park Service regulatory authority extends, and that no lands conveyed to the state, a Native Corporation or any private party are subject to the regulations "applicable solely to public lands within such units." 16 U.S.C. § 3103(c). Sturgeon argued that Nation River does not constitute "public lands" subject to federal regulation under § 103(c) of ANILCA; thus, the Park Service did not have the authority to enforce the Regulation on Nation River. *Sturgeon*, 139 S. Ct. at 1077.

Procedural History

Previous rulings by the U.S. District Court and Ninth Circuit upheld the application of the Regulation to the portion of the Nation River within the Preserve. The Ninth Circuit determined that the Nation River qualified as "public land" under ANILCA due to the implied reservation of water rights retained by the federal government pursuant to the reserved water rights doctrine as interpreted by prior holdings of the Ninth Circuit by which that court was bound. *Sturgeon v. Frost, et al.*, 872 F.3d 927 (9th Cir. 2017).

Following the lower court decisions in favor of the Park Service, the Supreme Court granted *certiorari* to examine whether: 1) the Nation River constitutes "public land" for purposes of ANILCA, and 2) if not, would the Park Service still have the authority to regulate Sturgeon's use of the hovercraft on the Nation River.

The Supreme Court's Decision

'Public Land' under ANILCA and Federal Reserved Water Rights

The Court determined that Nation River is not "public land" as defined under ANILCA. *Sturgeon*, 139 S. Ct. at 1079. As defined in ANILCA, "public lands" includes "lands, waters, and interests therein" to which the United States has title, except for certain lands selected for future transfer to the state or a Native Corporation. 16 U.S.C. § 3102(1)(2)(3). Accordingly, the Court reasoned that Nation River is non-public land because title cannot be held to running water, and the state owns the land beneath the Nation River as a result of the Submerged Lands Act, which vested title to the lands beneath navigable waters in the United States to the states in which such navigable waters are located. *Sturgeon*, 139 S. Ct. at 1078.

The Park Service argued that even if United States did not have title to the water flowing in Nation River or the land beneath it, but the United States has "title" to an "interest in the river under the reserved water rights doctrine," because ANILCA requires that waters within the land set aside by ANILCA be safeguarded from "depletion and diversion." *Id.* At 1079. The reserved water rights doctrine provides that:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. *Cappert v. United States*, 46 U.S. 128 (1976).

Dismissing the Park Service's contention, the Court explained that the reserved water rights doctrine merely permits the federal government to use (by withdrawing or maintaining) certain waters it does not own, and that such rights do not convey title. *Sturgeon*, 139 S. Ct. at 1079. Further, the Court explained that any federal right to Nation River under the reserved water rights doctrine would be limited, and if the right related to safeguarding against depletion or diversion as suggested by the Park Service, that purpose would not support the application of the Regulation to Nation River. *Id.*

ANILCA Exemption from Ordinary Park Service Authority

After concluding that Nation River constitutes non-public land for purposes of ANILCA, the Court further held that § 103(c) of ANILCA means that the Park Service does not have authority to enforce the Regulation on Nation River, because § 103(c) generally exempts non-public lands from the ordinary regulatory authority of the Park Service. *Id.* at 1081. The Court rejected the Park Service's assertion that language of § 103(c) stating that non-federally owned

lands "shall be subject to the regulations applicable solely to public lands within such units" should be interpreted to mean that non-public lands are exempt only from regulations specific to public lands, but not from rules that apply generally. *Id.* at 1082. The Court noted that if the Park Service's interpretation of this language were correct, it would mean that the sentence does "nothing but state the obvious." *Id.* at 1083. Further, the Court noted that the Park Service's construction would severely impair the core function of the third sentence of § 103(c), which provides that inholdings acquired by the federal government become part of a conservation unit at such time and may be administered as other federally-owned lands. *Id.*

ANILCA and Navigable Waters

The Court also rejected the Park Service's argument that the "overall statutory scheme" of ANILCA at least gave it the ability to regulate navigable waters, finding that navigable waters are similarly exempt from the ordinary regulatory authority of the Park Service pursuant to § 103(c) of ANILCA. *Id.* at 1086. The Park Service specifically cited statements regarding the protection of rivers in ANILCA's general statement of purposes and in sections regarding specific conservation units formed thereunder. *Id.* Nonetheless, the Court found no reason to treat navigable waters differently than other non-federally owned lands under ANILCA, especially since the definition of "land" set forth in ANILCA specifically includes "waters." *Id.* In its concluding discussion, the Court's decision emphasizes that ANILCA provides the Park Service with alternate methods for safeguarding rivers in Alaskan national parks, including the regulation of lands flanking the rivers or at the very least, purchasing the submerged lands under a river and regulating it as part of the federally-owned conservation unit pursuant to third sentence of § 103(c). *Id.*

Conclusion and Implications

Though the much of the Court's ruling applies only to the Park Service's regulatory authority over national park territory in Alaska, the Court's holding as to the nature of rights held by the United States under the reserved water rights doctrine is more broadly applicable. The Court's decision confirms that reserved water rights relate only to the use of water and do not represent an interest in which "title" can be held within the common understanding of the term. The Court's decision further establishes that the reserved water rights doctrine does not grant absolute authority over a particular waterway; rather, the government may take or maintain only the amount of water required for the purpose of the land reservation giving rise to reserved water rights.

NINTH CIRCUIT UPHOLDS CITY OF SANTA MONICA'S STRICT HOMESHARING RULES AGAINST CHALLENGE BY TRANSIENT ONLINE HOUSING ORGANIZATIONS

Homeaway.com, Inc. v. City of Santa Monica, ____F.3d____,
Case Nos. 18-55367, 18-55805, 18-55806 (9th Cir. March 13, 2019).

The Ninth Circuit Court of Appeals affirmed a District Court decision that denied popular online home-rental platforms AirBnB and HomeAway.com's challenge to an ordinance passed by the City of Santa Monica (City), which prohibits most types of short-term home rentals within the City. The Court of Appeals rejected arguments that the City's ordinance violates the federal Communications Decency Act and the First Amendment.

The City of Santa Monica's Ordinance

Increasingly popular online platforms like appellants Homeaway.com® and Airbnb® use websites that create online marketplaces that allow "guests" seeking accommodations and "hosts" offering accommodations to connect and enter into rental agreements. The City was unpleased—reporting that a proliferation of short-term rentals had negatively impacted the quality and character of the City's neighborhoods by "bringing commercial activity and removing

residential housing stock from the market" at a time when California is already suffering from severe housing shortages.

This led the City to enact an ordinance regulating the short-term vacation rental market by prohibiting most types of short-term rentals, with the exception of "licensed" home-shares. The ordinance also imposed obligations directly on hosting platforms: 1) collecting and remitting transient occupancy taxes, 2) disclosing certain listing and booking information regularly, 3) refraining from completing any booking transaction for properties not licensed and listed on the City's registry, and 4) refraining from collecting or receiving a fee for "facilitating or providing services ancillary to a vacation rental or unregistered home-share." The ordinance includes a safe harbor provision if housing platforms operate in compliance with these obligations.

The Ninth Circuit's Decision

The Communications Decency Act Claim

Airbnb and Homeaway.com challenged the City's ordinance, arguing that it is preempted by the Communications Decency Act of 1996 (CDA; 47 U.S.C. § 230). The CDA provides internet companies with immunity from certain claims in furtherance of its stated policy "to promote the continued development of the Internet and other interactive computer services." The Ninth Circuit has previously construed the provisions to extend immunity to:

> (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider. (*Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096.)

The court determined that immunity under the CDA does not attach any time a legal duty may lead a provider or user of an interactive computer service to respond with monitoring or other publication activities; rather, the duty must necessarily require the provider or user to monitor third-party content. Here, the City's ordinance prohibiting short-term housing rentals did not proscribe, mandate, or discuss the content of listings that online platforms displayed on their websites. Based on this, the court concluded that the CDA did not preempt the City's ordinance as applied to the online platforms.

The First Amendment Claim

Airbnb and Homeaway.com also challenged the City's ordinance as a violation of their First Amendment rights. The threshold question in determining whether the First Amendment applies is whether conduct with a "significant expressive element" drew the legal remedy or has the inevitable effect of "singling out those engaged in expressive activity." The court found that since the conduct at issue here—"completing booking transactions for unlawful rentals"—consists only of nonspeech, nonexpressive conduct, the City's ordinance did not implicate the First Amendment. The court further determined that the City's ordinance is "plainly a housing and rental regulation"—meaning that the "inevitable effect" of the ordinance on its face is to regulate nonexpressive conduct—namely, booking transactions (not speech). As such, any incidental impacts on speech cited by appellants raised minimal concerns according to the court.

Conclusion and Implications

Needless to say, the Ninth Circuit's decision was a major success for the City. "We are thrilled to have confirmation from the Ninth Circuit that our balanced approach to home sharing is working at a time when housing and affordability continue to challenge the region," Santa Monica Mayor Gleam Davis said. "This is a big win for Santa Monica residents and our residential neighborhoods." Although this decision permits the City to resume enforcement of its local ordinance, it is a setback for online home-sharing platforms, especially if other jurisdictions follow Santa Monica's lead by enacting their own rules to regulate short-term housing rentals. The opinion may be accessed online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/03/13/18-55367.pdf
(Nedda Mahrou)

D.C. CIRCUIT ADDRESSES IDENTIFYING AND MITIGATING ENVIRONMENTAL IMPACTS, UNDER NEPA, OF MODERN CONSTRUCTION ON HISTORICAL PROPERTIES

National Parks Conservation Association v. Semonite, 916 F.3d 1075 (D.C. Cir. 2019).

The National Environmental Policy Act (NEPA) establishes the process that federal agencies must use to assess the potential environmental effects of any project that requires their permission. (42 USC 4332.) These environmental effects include any impact "on our national heritage." (42 USC 4331(b).) In sum, federal agencies must first conduct a preliminary "environmental assessment" to determine if the proposed project may have any "significant impact" on the environment. (40 CFR 1508.9.) If this initial assessment identifies any potential environmental effect, the federal agency must prepare an Environmental Impact Statement (EIS) that discusses the environmental impact of the proposed action in detail, assesses potential alternatives to the action, and summaries other environmental considerations. 42 U.S.C. § 4332(C). Thus, developers often seek a finding that their proposed project will not pose any impact to the environment through the preliminary environmental assessment, thereby avoiding the more stringent EIS process. Although NEPA provides some guidance as to what specific factors must be considered when making this preliminary environmental assessment to determine if an EIS is necessary guidance on the details of this analysis has been provided by several courts throughout NEPA's lifespan. A March 2019 decision by the U.S. Court of Appeals for the District of Columbia Circuit provides further guidance as to how federal agencies must conduct these preliminary environmental assessments to determine if an EIS is needed for a specific project.

Background

The U.S. Army Corps of Engineers (Corps) granted permission to the Virginia Electric and Power Company to build a new electrical switching station across the historic James River (Project). The Project involved constructing 17 transmission towers on property surrounding the James River to support two transmission lines which "would cross the James River and cut through the middle of the historic district encompassing Jamestown and other historic resources." (Id. at 1078.) The Corps conducted a preliminary environmental assessment and concluded the Project did not require an EIS because the effect on the historical value of the surrounding property was minimal. The National Parks Conservation Association (NPCA) challenged the Corps' decision, claiming the NEPA required an EIS based on the specifics of the Project.

The D.C. Circuit's Decision

To address this issue, the court outlined the specific factors that the NEPA requires federal agencies to review when conducting their preliminary environmental assessments. Generally, the NEPA requires a review of both the "context" of the proposed project, meaning whether the project will have an impact on the local environment, and the "intensity" of the project, meaning the severity of the impact. According to the court, the parties conceded that the Project met the environmental context requirement, since it is located near historical property and sites. Thus, the court focused its inquiry on the intensity element, which NEPA further breaks down into ten factors, any of which may be significant enough to require an EIS. (40 CFR 1507.27(b).) The NPCA alleged that three specific factors applied to the Project and required an EIS, all of which were reviewed by the Court.

'Highly Controversial' Factor

First, the court reviewed the factor that requires an EIS if the project is deemed "highly controversial." Based on prior case law, the court defined this factor to exist when a "substantial dispute exists as to the size, nature, or effect of the major federal action." (*Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1083 (D.C. Cir. 2019) citing *Town of Cave Creek, Arizona v. F.A.A.*, 325 F.3d 320, 330 (D.C. Cir. 2003).) While the court recognized that a controversy is not created simply because some people are "highly agitated" and "willing to go to court," it noted that two federal agencies disputed the Corp's

decision to forgo an EIS based on its analysis of the size, nature and effect of the project. Specifically, the Advisory Council on Historic Preservation and the National Park Service challenged the Corp's method for assessing the overall impact of the Project on the historical significance of the surrounding property. While the court acknowledged that the Corps was not required to defer to these agencies, the fact that they constituted highly specialized governmental organizations that provided detailed objection to the Corps' analysis was enough to establish a legitimate controversy about the Project and warrant an EIS, according to the court.

'Intensity Factor'

The second factor considered by the court is deemed the "intensity factor" and requires a review of the "unique characteristics of the geographic area such as proximity to historic and cultural resources." (*Id.* at 1083.) While the parties did not dispute the historical significance of the property involved with the Project, they debated the extent to which the Project intruded on this significance. The Corps found that the Project amounted to "modern visual intrusions" that represent "a successful mix of progress and history." (Id. at 1086.) The Corps also cited to case law suggesting that aesthetic judgments are "inherently subjective" and therefore, do not required a full EIS to assess. In its analysis, the court focused on the intent of Congress when designating historical sites, which is to preserve "an unencumbered view of an attractive scenic expanse." (*Id.* at 1087 quoting *River Road Alliance, Inc. v. Corps of Engineers of U.S. Army, 764 F.2d 445, 451 (7th Cir. 1985))*. The court agreed with NPCA in that the Project would not simply blend into the scenery but constituted a "massive project" that would intrude through the historical nature of the James River because it will "be the only overhead crossing of the James River in a fifty one-mile stretch." (*Id.* at 1089.)

Adverse Impacts to Sites Listed in National Register of Historic Places

The final factor analyzed by the court focused on the "degree to which the action may adversely affect districts or sites listed in or eligible for listing in the National Register of Historic Places." (40 CFR 1508.27(b)(8).) The court cited to the Corp's record to conclude that the Project may affect fifty seven separate sites that are either on the National Register or eligible for inclusion. While the Corp's cited to other examples of projects located next to historical sites, the court found that the scope and size of the Project made its effect on numerous historical sites impossible to dismiss as minor.

The Need for an EIS

Based on these three factors, the court found that the Project perfectly fit the intent of the EIS requirement, which is to provide "robust information" for projects that may have uncertain and controversial environmental impacts. (*Id.* at 1087.) Thus, the court required the Corps to complete an EIS to assess the Project's potential historical affects and explore ways to mitigate the impact of the Project on the historical significance of the surrounding property and James River.

Because the Corps is required to provide an EIS, the court noted that the Corps will also have to reevaluate its analysis of the Project under the federal Clean Water Act and the National Historic Preservation Act. Specifically, the court noted that the National Historic Preservation Act requires federal agencies to take concrete actions to minimize harm to any landmark if the Project "directly and adversely affects any National Historical Landmark." (*Id.* at 1088 citing 54 USC 306107.) The Project's towers are visible from Carter's Grove, a National Historic Landmark. The Corp's concluded that the Project did not "directly" affect Carter's Grove because the Project towers are not physically located in Carter's Grove. The court rejected this argument, finding that "directly" means "free from extraneous influence" or immediate." (Id.) Thus, the court directed the Corps to reconsider its Preservation Act analysis based on the proper definition of directly.

Conclusion and Implications

As noted by the Circuit Court of Appeals throughout its decision, several cases have addressed how NEPA should be interpreted and applied when assessing a project that may affect historic sites. Although the Corps noted that the Project would have some effect on the historic James River and surrounding historic properties, it concluded that the effect was similar to other projects that modernized areas with-

out adversely affecting their historic value. Thus, the Corps found that the Project represented a reasonable balance between allowing modernization without physically intruding on historic sites. While the court did not necessarily disagree with the Corps' conclusion, it found that the Project warranted further and more detailed analysis through an EIS. In doing so, the court gave strong consideration to the scenic value of the surrounding sites and rejected the idea that adverse impact is limited to physical intrusions or projects that fully block or dominate the scenic view. Instead, when part of the historical value of property relates to providing a glimpse into what historical figures originally saw, federal agencies must at least conduct a thorough analysis before permitting anything that may affect this historical value. The court's decision is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/87FABC162438AE4B852583B000549984/$file/18-5179.pdf
(Stephen M. McLoughlin, David D. Boyer)

NINTH CIRCUIT UPHOLDS ENVIRONMENTAL ANALYSES FOR FOREST SERVICE'S TRAVEL MANAGEMENT PLANS FOR RANGER DISTRICTS IN THE KAIBAB NATIONAL FOREST

WildEarth Guardians, et al. v. Provencio, 918 F.3d 620 (9th Cir. 2019).

The Ninth Circuit Court of Appeals upheld the U.S. Forest Service's (Forest Service) travel management plans and its determination that an Environmental Impact Statement (EIS) was not necessary. The Forest Service' approval of the plan did not violate the requirements of the Travel Management Rule (Rule), National Environmental Policy Act (NEPA), or the National Historic Preservation Act (NHPA).

Factual and Procedural Background

The Kaibab National Forest is comprised of three noncontiguous Ranger Districts in northern Arizona: the Williams Ranger District, the Tusayan Ranger District, and the North Kaibab Ranger District (Districts). The Forest Service developed travel management plans for each District that would allow for limited motorized big game retrieval within one mile of every open road. An Environmental Assessment (EA) was prepared for each plan—and a Decision Notice and Finding of No Significant Impact (DN/FONSI) was subsequently issued specifying limitations regarding motorized travel off of designated routes for big game retrieval. The District's approval of the travel management plans was administratively appealed and upheld by the Regional Forester.

After which, plaintiffs filed a complaint in district court challenging the Forest Service's approval of the travel management plans and alleging violations of the Travel Management Rule, the Administrative Procedure Act (APA), NEPA, and NHPA. On cross-motions for summary judgment, the district court granted Forest Service's motion and denied plaintiff's motion. Plaintiffs appealed.

The Ninth Circuit's Decision

The Travel Management Rule

The Rule generally prohibits off-road motorized travel, but allows limited use of motor vehicles within a specified distance of certain forest roads for the purpose of big game retrieval—subject to consideration of various criteria. Plaintiffs argued that allowing off-road motorized vehicle use for big game retrieval on all system routes violated the Rule's mandate that activities be limited and only on certain roads.

The Ninth Circuit disagreed. The court reasoned that "limited use" did not require a geographic limitation. The Forest Service had adopted a number of restrictions on motorized big game retrieval with respect to timing, qualified species, and number of vehicles. Similarly, the court rejected plaintiffs' interpretation that the word "certain" means "some, but not all" roads. Rather, the court held that the Forest Service complied with the Rule because it limited motor vehicle use to a defined set of roads in each District. Finally, plaintiffs claimed that the Forest Service failed to implement motorized big game retrieval "sparingly." The court held that this term: 1) did not impose a above and beyond the actual terms of the regulation because it was in the preamble; and

2) there is no authority requiring a strict geographic interpretation of "sparingly."

The National Environmental Policy Act

Plaintiffs argued the Forest Service was required to prepare an Environmental Impact Statement for each travel management plan. The court of appeal noted that NEPA's purpose is to ensure that an agency will not act on incomplete information and therefore requires any agency to assess the environmental impact of proposed actions that might significantly affect environmental quality. Before any action is taken an agency must ensure that environmental information is available to public officials and citizens. This information must be high quality and include scientific analysis and expert agency comments.

In this context, the court found that the environmental impacts discussed in the EAs did not raise substantial concerns necessitating the preparation of an EIS. The court noted that the presence of an articulated concern does not alone trigger the need to conduct an EIS. The evidence in the record indicated that, although the EAs acknowledged that motorized big game retrieval might have negative impacts on the environment, *e.g.*, the spread of invasive weeds, negative effects on wildlife, and the court therefore held that the agency's determination that the impacts would not be significant showed "a rational connection between the facts found and the conclusions made."

Plaintiffs next argued that an EIS was required because the travel demand management plans presented highly controversial and highly uncertain effects because motorize recreation would be allowed across the three Districts. The court disagreed reasoning that the Forest Service acknowledged the uncertainties around big game retrieval; considered the issue through the use of past data; and reasonably came to the conclusion that it was unlikely to cause significant impacts.

Next, the court found that, despite statements made by Forest Service indicating that other southwestern National Forests may follow the lead of the Kaibab National Forest, the travel management plans did not bind or necessarily shape other forests' plans in such a way that they should be considered precedential because a plan implemented elsewhere would be subject to its own NEPA analysis.

Finally, the court held that the U.S. Fish and Wildlife Service (FWS) was not required to prepare an EIS on the basis of impacts to threatened species because it had ultimately concluded that despite the potential for increased human disturbance, the reduction in overall roads would have a primarily beneficial effect on the owl and would not adversely affect its critical habitat.

The National Historic Preservation Act

The court noted the purpose of the NHPA is to "foster conditions under which our modern society and our historic property can exist in productive harmony," and federal agencies are required to "make a reasonable and good faith effort" to identify and take into account potentially affected historic properties and the effects of any action taken. Plaintiffs argued the Forest Service violated the NHPA in three ways.

First plaintiffs argued the Forest Service failed to make a reasonable and good faith effort to identify and evaluate the high density of cultural resources that could potentially be damaged. The court held that the Forest Service reasonably determined the potential density despite not completing 100 percent of field surveys because 100 percent surveys are only required where site density is expected to be high.

Plaintiffs also argued Forest Service arbitrarily relied on Exemption Q, which provides that activities that do not involve ground disturbance are exempt from further review. The court found that while application of the exemption would have been inappropriate there was no evidence in the record to support that the Forest Service actually applied the exemption as they consulted with potentially affected Native American Tribes which would have otherwise been waived under the exemption.

Lastly, plaintiffs argued the Forest Service arbitrarily concluded that motorized big game retrieval would have no adverse effect on cultural resources. The court upheld Forest Service's conclusion based on evidence in the record to support that adverse effects would be negligible.

The court noted that even if cultural resources might have been harmed, this alone did not indicate that the Forest Service violated the NHPA. The Forest Service satisfied its procedural obligations under both NHPA and NEPA by conducting the required prefield work; consulting with the appropriate entities; and reaching a determination consistent with the evidence it collected.

Conclusion and Implications

This decision out of the Ninth Circuit Court of Appeals affirmed the ruling by the U.S. District Court for Arizona in favor of the Kaibab National Forest's Supervisor, Heather Provencio, and the Forest Service. This case is noteworthy because the court discusses the procedural obligations that NEPA and the NHPA create. This case further emphasizes the importance of building a record replete with accurate information from a variety of reliable resources from which an agency may base its decision. The potential for environmental impact does not require preparation of an EIS if evidence in the record supports a conclusion of insignificance.

The opinion is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/03/13/17-17373.pdf

(Caroline Soto, Christina Berglund)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT REJECTS CHALLENGE TO CITY'S MODIFICATION OF SITE SPECIFIC CONDITIONS ON THE GROUNDS OF COLLATERAL ESTOPPEL

1100 Wilshire Property Owners Association v. City of Los Angeles, *Unpub.*, Case No. B286266 (2nd Dist. Mar. 5, 2019).

In *1100 Wilshire Property Owners Association v. City of Los Angeles*, an *unpublished* decision out of the Second District Court of Appeal, 1100 Wilshire Property Owners Association (Association) appealed from an order denying its petition for a writ of mandate to compel the City of Los Angeles (City) to set aside building permits issued to a commercial property owner (Wilshire Commercial), which allowed the commercial property owner to convert guest parking spaces in the building to private storage space. The appellate court held the Association's claims were barred by the doctrine of collateral estoppel because they were a re-litigation between the parties of the validity of the City's clarification of a parking condition. Further, the court held the association failed to demonstrate that the California Environmental Quality Act (CEQA) applied to the parking condition.

Factual Background

The Project and Parking Condition No. 11.b

In 2004, the owner of 1100 Wilshire Boulevard proposed expanding and converting the existing building into a "mixed-use" development consisting of 460 residential units and 39,000 square feet of commercial and retail space (the initially proposed project).

The City's planning department conducted CEQA and issued a Mitigated Negative Declaration (MND). It determined that environmental impacts may result from project implementation, but such impacts could be mitigated to a level of insignificance with the incorporation of environmental mitigation measures for on-site parking for residents and guests. To address the environmental impacts, the City developed "condition No. 11.b," which provided:

> The existing 697 on-site parking spaces shall be maintained and not reduced: 1) a minimum of [two] parking spaces plus [one-fourth of a] guest space per joint living and work unit shall be exclusively provided for joint living and work units; and 2) commercial parking shall be provided in compliance with the parking requirements of [LAMC] [s]ection 12.21[-A(4)] ... for commercial uses on the site. Any remaining parking spaces shall be maintained and not reduced" (original condition No. 11.b).

The Revised Project

Thereafter, the developer substantially reduced the size of the initially proposed project (revised project). In May 2004, the City issued an addendum to the MND, which concluded that most, if not all, of the previously issued environmental mitigation measures, including those for onsite parking, were no longer necessary. The City, nonetheless, further determined that certain measures, including parking capacity, could be included as "site specific conditions" of the revised project. On November 18, 2004, the City approved the vesting tentative map (VTM) with original condition No. 11.b is listed as one of the "site specific conditions." Thereafter, the VTM was recorded, and the revised project was constructed.

The Owners of 1100 Wilshire

1100 Wilshire consists of residential condominium units whose owners constitute the Association and the single commercial condominium owner. Wilshire Commercial owns the ground floor parking lot, and the Association's members have an easement for guest parking spaces in the ground floor lot.

In 2012, Wilshire Commercial applied to the City for building permits to change the use of a portion of the guest parking area (approximately 47 parking spaces) in the ground floor lot from guest parking spaces to private storage space. The City's building

department initially issued the permits, but subsequently revoked them when the Association filed a request that the permits be rescinded on the grounds that the issuance violated original condition No. 11b.

On September 29, 2014, allegedly at the urging of Wilshire Commercial, the City issued a letter of clarification (2014 letter of clarification) to modify original condition No. 11.b by eliminating the requirement that the existing parking spaces needed to be maintained and not reduced.

On June 10, 2015, relying on revised condition No. 11.b, as authorized in the 2014 letter of clarification, the City's building department issued building permits to Wilshire Commercial that permitted the conversion of certain guest parking spaces into storage space (2015 building permits).

Procedural Background

On July 15, 2015, the Association filed an administrative appeal with the building department requesting that the City revoke the approval of the 2015 building permits (the administrative appeal). The Association claimed that the 2014 letter of clarification was invalid because it was issued in violation of notice and hearing procedures set forth in the Municipal Code, and that the 2015 building permits (issued based on revised condition No. 11.b as authorized by the 2014 letter of clarification) should be revoked because they failed to comply with original condition No. 11.b. The building department denied the request. The Association appealed the denial to the City's zoning administrator, which upheld the building department's approval of the 2015 building permits. The Association then appealed the zoning administrator's decision to the area planning commission, which affirmed the zoning administrator's decision on August 16, 2016.

On July, 30, 2015, shortly after the Association filed the administrative appeal of the 2015 building permits, the Association also filed a petition for a writ of mandate in Superior Court challenging the legal validity of the 2014 clarification letter. The Association alleged the City lacked the legal authority to revise the original condition No. 11.b through a letter of clarification, that the City had failed to comply with the tract map modification due process requirements, and that original condition No. 11.b was an "environmental mitigation measure" imposed to comply with CEQA and that any modification of such a measure must comply with CEQA. On June 9, 2016, the Superior Court denied the petition on the ground that the statute of limitations barred the claims. The Association did not appeal.

The Current Action

On November 14, 2016, following the area planning commission's denial of the administrative appeal, the Association again filed a petition for writ of mandate alleging that the 2015 building permits must be set aside because they were based on the 2014 letter of clarification, and reiterating the CEQA claims set forth in the prior action. On August 17, 2017, the trial court denied the petition, holding they were a renewed challenge to the 2014 letter of clarification, and thus, collateral estoppel barred relief because that challenge had already been rejected in the prior action, which was a final decision. The trial court also denied the Association's CEQA claim, finding that after the initially proposed project was reduced in size and scope, original condition No. 11.b was imposed as a "site specific" condition not subject to CEQA, and thus, the 2015 building permits did not violate CEQA. The Association timely appealed.

The Court of Appeal's Decision

The court held that because the Association sought to set aside the 2014 letter of clarification based on the same arguments rejected in the prior action, the action was barred under the doctrine of collateral estoppel. The court explained that although the Association did not litigate the validity of the 2015 building permits in the prior legal action, the success of its attack on the building permits in the current action depended on whether the City properly issued the 2014 letter of clarification that authorized revised condition No. 11.b. The court held though that the Association, however, already litigated the issues of whether the City violated the municipal code when the City issued the 2014 letter of clarification and the validity of revised condition No. 11.b in the prior action. The underlying issues in the current action presented identical factual allegations as those at issue in the prior legal action, which issues were actually litigated before. While the trial court in the prior action rejected the Association's challenge to the 2014 letter of clarification because the challenge was time-barred, the doctrine of col-

lateral estoppel applies to matters decided on statute of limitations grounds.

Thus the court's prior conclusion concerning the statute of limitations operated to collaterally estop any future attack on the 2014 letter of clarification no matter how recharacterized or repackaged. Having failed to appeal from the court's order denying the petition in the prior action the issues decided in that action were finally decided for the purposes of collateral estoppel.

The court also agreed the CEQA claim failed because original condition No. 11.b was not imposed as an environmental mitigation measure and, thus, modification of the condition did not require compliance with CEQA. It explained that when a condition is imposed as a result of a CEQA analysis, then any subsequent modification of that mitigation condition requires compliance with CEQA. In contrast, where a condition is imposed as a general project condition, compliance with CEQA is not required before modification of that condition.

Conclusion and Implications

The Second District Court of Appeal concluded that collateral estoppel barred the Associations' attempt to challenge the 2015 building permits and the CEQA challenge failed because condition No. 11.b was imposed as a site specific condition rather than as an environmental mitigation measure. It thus affirmed the trial court's denied of the petition for writ of mandate.
(Giselle Roohparvar)

SECOND DISTRICT COURT HOLDS CLAIM TIME BARRED UNDER PLANNING AND ZONING LAW DESPITE PLANNING COMMISSION'S FAILURE TO MAKE DECISION

1305 Ingraham, LLC. v. City of Los Angeles, ___Cal.App.5th___, Case No. B287327 (2nd Dist. Mar. 12, 2019).

The Second District Court of Appeal held that appellant's claim was barred by the 90-day statute of limitations set forth in Planning and Zoning Law (Gov. Code, § 65000 *et seq.*) even though the planning commission never made a decision on appeal.

Factual and Procedural History

On June 15, 2016, the City of Los Angeles (City) issued a "Specific Plan Compliance Review Density Bonus & Affordable Housing Incentives" for a mixed-use affordable housing project in downtown Los Angeles. Appellant, a nearby property owner, appealed the determination to the City planning commission. A hearing was set for July 28, 2016, but no hearing was ever held. The project was considered approved on August 1, and the City filed a notice of determination on August 8, 2016. Nine months later, appellant filed a petition for writ of mandate in the Superior Court alleging that the city failed to comply with the California Environmental Quality Act (CEQA). Real party in interest demurred on the basis that appellant's claim was time-barred by CEQA's 30-day limitations period in Public Resources Code § 21167.

Appellant subsequently filed an amended petition abandoning the CEQA claim in favor of claiming a violation of due process—claiming it was entitled to a hearing under the Los Angeles Municipal Code (LAMC). The City and real party demurred again arguing the 90-day limitations period for Planning and Zoning Law claims barred appellant's amended petition. The trial court sustained the demurrer without leave to amend, and this appeal followed.

The Court of Appeal's Decision

Government Code § 65009, subdivision (c)(1) sets forth a 90-day statute of limitations to challenge a legislative body's decision under Planning and Zoning Law. At dispute was whether a "decision" triggering the limitations period existed.

Relying on a specific section of the LAMC, which provides that prior to deciding an appeal the planning commission shall hold a hearing, appellant asserted that a hearing is a prerequisite to any decision. Because there had been no hearing, appellant argued the required "decision" had not been made. The Court of Appeal disagreed looking to a later provision in the LAMC, which specified that if the planning commission failed to act in the time allowed, the planning

director's decision becomes final. Here, because the planning commission failed to render its own written decision—the planning director's decision became final and the statute of limitations began running 15 days after the scheduled July 28, 2016 hearing date.

The court explained that such an interpretation did not lead to "absurd results" as argued by appellant. The court found that the LAMC provisions do not condone or authorize inaction, but instead act as a "backstop" providing interested parties with an actionable decision in the event of a procedural lapse by the decision-making body.

Appellant also argued that the LAMC must be interpreted to require an appeal be deemed denied only if the planning commission fails to act after it has heard the appeal. The court rejected this argument—holding that the purpose of the local code section, which, in part, is "to promote orderly development [and] evaluate and mitigate significant environmental impacts" would not be served if the statute is interpreted to allow a project to remain in a state of "perpetual limbo due to a procedural error."

Finally, appellant argued that § 65009 by its own terms applied solely to legislative bodies, which did not include the findings of the planning director, a single person. Relying on *Stockton Citizens for Sensible Planning v. City of Stockton*, 210 Cal.App.4th 1484 (2012), the court held that it is the subject matter of the decision being reviewed that controls application of Government Code § 65009—not the legislative body charged with making the decision.

Conclusion and Implications

The court affirmed the trial court's order sustaining the demurrer without leave to amend. This case clarifies that the 90-day statute of limitations applies even where inferior administrative bodies and individuals are charged with making land use decisions. While the case is specific to Los Angeles, it provides a useful illustration of a local government's discretion in establishing procedures for challenging land use approvals. The court's decision is available online at: https://www.courts.ca.gov/opinions/documents/B287327.PDF

(Christina Berglund)

FOURTH DISTRICT COURT FINDS FIRE PROTECTION DISTRICT'S RESOLUTION TO APPLY TO LAFCO FOR DISSOLUTION NOT SUBJECT TO REFERENDUM PROCESS

Southcott v. Julian-Cuyamaca Fire Protection District, ___Cal.App.5th___, Case No. D074324 (4th Dist. Mar. 7, 2019).

In this case decided by the Fourth District Court of Appeal, the appellate court affirmed a lower court decision to deny a petition for writ of mandate filed by residents against a local fire protection district. The fire district followed procedures to apply to the local agency formation commission for dissolution and failed to act on residents' subsequent referendum petition seeking to prevent dissolution. The Court of Appeal agreed with the trial court that the fire district's actions were not subject to the referendum process.

Factual Background

This matter began after the board of directors for the Julian-Cuyamaca Fire Protection District (District) passed a resolution under the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (LGRA; Gov. Code, § 56000 *et seq.*) to apply to the San Diego Local Agency Formation Commission (LAFCO) to approve dissolution of the District. Thirty days after it adopted the resolution, the District received a referendum petition by plaintiffs, seeking to rescind the resolution or have the resolution set for an election under California's referendum process. The District took no action on the referendum petition and the plaintiffs filed a petition for writ of mandate, which was denied by the trial court. This appeal followed.

The Cortese-Knox-Hertzberg Local Government Reorganization Act

The legislature created a broad statutory scheme covering changes of city and district organization in enacting the Cortese-Knox-Hertzberg Local Govern-

ment Reorganization Act (LGRA). The LGRA states that it:'

> . . .provides the sole and exclusive authority and procedure for the initiation, conduct, and completion of changes of organization and reorganization for cities and districts.

A change of organization is defined to include any of the following: city incorporation or disincorporation, district formation and *dissolution*, annexation to or detachment from a city or district, consolidation of cities or special districts, and a merger or establishment of a subsidiary district. Under the LGRA, each county has a LAFCO. For proposed dissolutions, the LAFCO determines the value of any written protests, and if the protests are not in the majority, LAFCO orders dissolution by resolution, with or without confirmation of voters depending on whether certain requirements are met. (Gov. Code, §§ 57052, 57077.1, 57078.)

The Court of Appeal's Decision

Here, the Fire District Law contains formation procedures for local fire protection services that complement the LGRA's procedures. However, the Fire District Law does not contain any provisions covering *dissolutions* of fire protection districts, except to mandate compliance with the LGRA. Nevertheless, the LGRA governs changes of organization, which is specifically defined to include district dissolution. Therefore, the Court of Appeal determined that the legislature has evidenced its intention that the LGRA provides the exclusive method for dissolving a fire protection district.

The Referendum Process

The court then turned to the issue of whether the District's resolution to apply to the LAFCO for dissolution could be challenged through the voter referendum process. The California Constitution, article 2, § 9, subdivision (a) provides:

> The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the state.

The court cited *Worthington v. City Council of Rohnert Park,* 130 Cal.App.4th 1132 (2005), for the notion that a fundamental principle of referendum law is that a referendum may be used to review only legislative acts and not a local government's executive or administrative acts. Additionally, the *Worthington* case notes that when a local government's discretion is "largely preempted" by statutory mandate, its action is administrative and not subject to referendum.

Here, the Court of Appeal concluded that the District's resolution that proposed a plan for the LAFCO's consideration was not subject to the referendum process. Although the resolution may be characterized as a legislative act in a purely local context, it is not legislative when viewed in the context of the state's regulation over the dissolution of districts. In addition, the LGRA includes detailed provisions regarding the method of protesting a proposed dissolution of a district when elections are required. As such, plaintiffs could not make use of the referendum process in connection with the District's resolution.

Conclusion and Implications

According to the Court of Appeal, with respect to dissolving a fire protection district, the California Legislature's clear intention was that the Reorganization act would govern. Therefore, the court concluded that plaintiffs' use of the referendum process under these circumstances would undermine the state's regulation over this field. The opinion may be accessed online at: https://www.courts.ca.gov/opinions/documents/D074324.PDF
(Nedda Mahrou)

SIXTH DISTRICT REFUSES TO BROADEN *TOMLINSON* INTERPRETATION OF NOTICE REQUIREMENTS FOR PROJECTS THAT ARE CATEGORICALLY EXEMPT FROM CEQA

Turn Down The Lights v. City of Monterey, *Unpub.*, Case Nos. H044656 & H045556 (6th Dist. Feb. 28, 2019).

In *Turn Down The Lights v. City of Monterey*, an *unpublished* decision, defendant City of Monterey appealed the trial court's decision to grant plaintiff Turn Down the Lights' (plaintiff) petition for writ of mandate on the City's determination that its project to replace high-pressure sodium lightbulbs with low electric LED light fixtures in street lights was categorically exempt from environmental review under the California Environmental Quality Act (CEQA). The appeal presented the question of whether on this record plaintiff was required to exhaust administrative remedies in order to challenge the city's project approval in court. The appellate court reversed the trial court's judgment, holding that plaintiff failed to exhaust administrative remedies by not objecting to the project before the city council approved it.

Factual and Procedural Background

Project Approval and Implementation

The agenda for a November 2011 meeting of the Monterey City Council included the following item: "Award Street and Tunnel Lighting Replacement Project Contract ***CIP*** (Plans & Public Works - 405-04)." A three-page staff report for that agenda item described the project as involving:

> . . .removal of existing high-pressure-sodium street light and tunnel light fixtures, and installation of new LED street light fixtures and new induction tunnel fixtures.

A section in the staff report entitled "Environmental Determination" stated:

> The City's Planning, Engineering, and Environmental Compliance Division determined that this project is exempt from CEQA regulations under Article 19, Section 15302.

The item was opened for public comment, and no member of the public commented. The City Council approved the contract with Republic ITS, Inc. by resolution.

Notice of Exemption and Lawsuit

The city filed a Notice of Exemption, citing the categorical exemption in CEQA Guidelines § 15302 for:

> . . .replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced.

Plaintiff challenged the categorical exemption determination by petition for writ of mandate in the trial court.

The trial court granted plaintiff's *mandamus* petition via written decision after briefing and a hearing. The court concluded the project was not exempt under CEQA Guidelines section 15302, reasoning that "new LED bulbs and light fixtures are neither a structure nor a facility, by any reasonable definition of these terms." The trial court also excused plaintiff from the duty to exhaust administrative remedies, finding that "the exhaustion requirement does not apply because the City did not provide the 'notice required by law.'"

The Court of Appeal's Decision

Exhaustion of Administrative Remedies

Plaintiff contended that the duty to exhaust administrative remedies was never triggered. The court reasoned that as it was undisputed that plaintiff did not object to the project before the City Council approved the contract, the only question before it was a legal one: whether the reference to CEQA in the supporting three-page staff report without reference to CEQA on the City Council agenda was adequate notice to trigger the duty to exhaust administrative remedies.

Public Resources Code § 21177(a) sets forth the general rule for exhaustion of administrative remedies under CEQA:

> An action or proceeding shall not be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination.

Section 21177(e) provides an exception:

> This section does not apply to any alleged grounds for noncompliance with this division for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law.

The *Tomlinson* Decision and Notice

The Court of Appeal relied on the Supreme Court case *Tomlinson v. County of Alameda,* 54 Cal.4th 281 (2012) (*Tomlinson*), which was the seminal case discussing § 21177 as it applied to categorical exemption determinations. Under *Tomlinson*:

> . . .the exhaustion-of-administrative-remedies requirement set forth in Section 21177(a) applied to a public agency's decision that a proposed project is categorically exempt from CEQA compliance as long as the public agency *gave notice of the ground for its exemption determination*, and that determination was preceded by public hearings at which members of the public had the opportunity to raise any concerns or objections to the proposed project.

Plaintiff argued that its duty to exhaust administrative remedies was never triggered because: CEQA was not referenced on the face of the city council agenda; the agenda "does not disclose that LED streetlights would be installed citywide including in the historic districts"; the staff report did not explain why the CEQA Guidelines section it referenced applied; and the collective effect of those deficiencies was that the hearing on the project did not qualify as an "opportunity for members of the public to raise those objections orally," citing § 21177(e).

The court rejected plaintiff's argument, explaining that it did not read *Tomlinson* as requiring that notice of a CEQA determination be given on the meeting agenda as opposed to in an accompanying staff report, nor did it interpret *Tomlinson* as mandating that any notice identify both an exemption and the reasoning for applying the exemption. The court explained that the agenda description here informed the public that the city was planning to "Award [a] Street and Tunnel Lighting Replacement Project Contract," which was sufficient to prompt residents concerned about the environmental effects of artificial lighting to investigate further by contacting city staff, reading the staff report, or attending the city council meeting. A member of the public accessing the staff report would have found its CEQA discussion with relative ease. The staff report was three pages long, and it unambiguously stated (under the section heading "Environmental Determination" in bold font and all caps) that the project was exempt from CEQA under Guidelines § 15302. Therefore, the court concluded on the facts of this case that notice of a claimed CEQA exemption was adequate under *Tomlinson* to trigger plaintiff's duty to exhaust administrative remedies.

Conclusion and Implications

In a postscript, the court explained that its opinion should not be interpreted as broadly concluding that CEQA need never be mentioned on a meeting agenda. Under a different set of facts, an agenda reference to CEQA might be necessary. But, the court pointed out, *Tomlinson* advised courts to employ a case-by-case approach to determine whether the exhaustion requirement was triggered. It would be a significant expansion of that decision to require a reference to CEQA on the face of the agenda whenever a CEQA exemption was considered. This is why the court concluded that the agenda description and staff report here, read together, provided adequate notice of the nature of the project and the exemption determination, such that the city council meeting provided an "opportunity for members of the public to raise ... objections orally or in writing" before the project was approved.
(Giselle Roohparvar)

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 April 8, 2019, was ordered to a third reading.

AB 552 (Stone)—This bill would establish the Coastal Adaptation, Access, and Resilience Program for the purpose of funding specified activities intended to help the state prepare, plan, and implement actions to address and adapt to sea level rise and coastal climate change.

AB 552 was introduced in the Assembly on February 13, 2019, and, most recently, on April 11, 2019, was amended and re-referred to the Committee on Appropriations.

AB 1011 (Petrie-Norris)—This bill would direct the Coastal Commission to give extra consideration to a request to waive the filing fee for an application for a coastal development permit required for a private nonprofit organization that qualifies for tax-exempt status under specified federal law.

AB 1011 was introduced in the Assembly on February 21, 2019, and, most recently, on April 11, 2019, was in the Senate where it was read for the first time and referred to the Committee on Rules for assignment.

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, indefinitely.

AB 202 was introduced in the Assembly on January 14, 2019, and, most recently, on March 26, 2019, was in the Senate where it was read for the first time and referred to the Committee on Rules for assignment.

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 March 25, 2019, failed passage in its first hearing in 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 April 11, 2019,

was amended, re-referred to the Committee on Appropriations and currently pending re-referral to the Committee on Revenue and Taxation.

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 April 11, 2019, was read for a second time and ordered to a third reading.

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 April 11, 2019, was amended, re-referred to the Committee on Natural Resources, read for a second time and then further amended.

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 Treaty 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 April 10, 2019, was set for its first hearing and then referred to the Committee on Appropriations' suspense file.

AB 490 (Salas)—This bill would establish specified procedures for the administrative and judicial review of the environmental review and approvals granted for projects that meet certain requirements, including the requirement that the projects be located in an infill site that is also a transit priority area. Among other things, the bill would require actions seeking judicial review pursuant to the California Environmental Quality Act or the granting of project approvals, including any appeals therefrom, to be resolved, to the extent feasible, within 270 days of the filing of the certified record of proceedings.

AB 490 was introduced in the Assembly on February 12, 2019, and, most recently, on April 11, 2019, was amended, re-referred to the Committee on Natural Resources, read for a second time and then further amended.

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 April 11, 2019, was read for a second time, amended, and re-referred to the Committee on the Judiciary.

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 April 11, 2019, had its April 22 hearing in the Committee on Appropriations postponed by the committee.

SB 226 (Nielsen)—This bill would require the Natural Resources and Environmental Protection agencies to jointly develop and implement a watershed restoration grant program, as provided, for purposes of awarding grants to eligible counties to assist them with watershed restoration on watersheds that have been affected by wildfire. This bill would further provide that projects funded by the grant program are exempt from the requirements of the California Environmental Quality Act.

SB 226 was introduced in the Senate on February 7, 2019, and, most recently, on April 11, 2019, was re-referred to the Committee on Environmental Quality.

SB 621 (Glazer)—This bill would require any action or proceeding brought under the California Environmental Quality Act to attack, review, set aside, void, or annul the certification of an environmental

impact report for an affordable housing project or the granting of an approval of an affordable housing project, to require the action or proceeding, including any potential appeals therefrom, to be resolved, to the extent feasible, within 270 days of the filing of the certified record of proceeding with the court.

SB 621 was introduced in the Senate on February 22, 2019, and, most recently, on April 11, 2019, was read for a second time, amended, and re-referred to the Committee on the Judiciary.

SB 632 (Galgiani)—This bill would amend the California Environmental Quality Act to until a specified date, exempt from CEQA any activity or approval necessary for, or incidental to, actions that are consistent with the draft Program Environmental Impact Report for the Vegetation Treatment Program issued by the State Board of Forestry and Fire Protection in November of 2017.

SB 632 was introduced in the Senate on February 22, 2019, and, most recently, on April 10, 2019, was read for a second time, amended, and then re-referred to the Committee on Environmental Quality.

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 April 11, 2019, was amended, re-referred to the Committee on Local Government, read for a second time and then further amended.

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 April 11, 2019, was re-referred to the Committee on Appropriations.

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 April 8, 2019, was re-referred to the Committee on Appropriations.

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 April 1, 2019, was re-referred to the Committee on Housing and Community Development.

AB 1279 (Bloom)—This bill would require the Department of Housing and Community development to designated areas in this state as high-resource areas, defined as areas of high opportunity and low residential density that are not currently experiencing gentrification and displacement, and that are not at a high risk of future gentrification and displacement, by January 1, 2021, and every five years thereafter.

AB 1279 was introduced in the Assembly on February 21, 2019, and, most recently, on April 10, 2019, was re-referred to the Committee on Local Government.

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 April 4, 2019, was set for hearing on April 24 in the Committee on 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 April 11, 2019, was re-referred to the Committee on Appropriations.

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 April 11, 2019, was read for a second time and amended.

AB 1483 (Grayson)—This bill would require a city or county to compile a list that provides zoning and planning standards, fees imposed under the Mitigation Fee Act, special taxes, and assessments applicable to housing development projects in the jurisdiction. In addition, this bill would require each city and county to annually submit specified information concerning pending housing development projects with completed applications within the city or county, the number of applications deemed complete, and the number of discretionary permits, building permits, and certificates of occupancy issued by the city or county to the Department of Housing and Community Development and any applicable metropolitan planning organization.

AB 1483 was introduced in the Assembly on February 22, 2019, and, most recently, on April 11, 2019, was read for a second time and amended.

AB 1484 (Grayson)—This bill would prohibit a local agency from imposing a fee on a housing development project unless the type and amount of the exaction is specifically identified on the local agency's internet website at the time the application for the development project is submitted to the local agency, and to include the location on its internet website of all fees imposed upon a housing development project in the list of information provided to a development project applicant.

AB 1484 was introduced in the Assembly on February 22, 2019, and, most recently, on April 11, 2019, was re-referred to the Committee on Local Government.

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 April 5, 2019, was set for hearing in the Committee on Public Safety on April 23, 2019.

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 April 9, 2019, was read for a second time and ordered to a third reading.

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 April 11, 2019, had its April 24 hearing in the Committee on Governance and Finance postponed by the committee.

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 emergency 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 April 11, 2019, was re-referred to the Committee on Housing and Community Development.

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 April 1, 2019, was re-referred to the Committee on Public Safety.

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 April 11, 2019, was referred to the Committee on Housing.
(Paige Gosney)

CALIFORNIA LAND USE™
LAW & POLICY Reporter

California Land Use Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108