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CALIFORNIA LAND USE™
LAW & POLICY Reporter

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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

CALIFORNIA WEIGHS IN ON WETLANDS

By Clark Morrison and Scott Birkey

On April 2, the State Water Resources Control Board (SWRCB) adopted sweeping new regulations for the protection of wetlands and other waters of the State of California. The regulations, carrying the ungainly title, *State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State* (collectively: Procedures), will become effective nine months following the completion of review by the California Office of Administrative Law. Once effective, the Procedures will layer on additional complexity to an already onerous permitting regime for the fill of wetlands and other waters in California.

The Procedures include two principal parts. The first is a statewide definition of the term "wetlands" that includes certain features that are not treated as wetlands under the federal Clean Water Act. The second is a set of rigorous permitting standards and application requirements to be implemented by the Regional Water Quality Control Boards (RWQCBs) in their review of applications for "Section 401 Certifications" and "Waste Discharge Requirements" under the Porter-Cologne Water Quality Control Act. The Procedures are intended for inclusion in the state's *Water Quality Control Plans for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California*.

Background

The Procedures were adopted in the context of the Trump administration's proposed roll-back of federal wetland jurisdiction under § 404 of the Clean Water Act. Although California originally proposed adopting its own wetland definition during Governor Wilson's administration—and the Procedures had been in the works for ten years—it was the Trump administration's proposed roll-back that provided the impetus for final adoption.

Following the U.S. Supreme Court's 2001 decision in *Solid Waste Agency of Northern Cook County* (*SWANCC*), which eliminated federal jurisdiction over isolated non-navigable waters, the SWRCB began to assert state jurisdiction over those features. Until then, the RWQCBs generally regulated wetland fill activities only when presented with a proposed U.S. Army Corps of Engineers (Corps) permit requiring state certification under § 401 of the Clean Water Act. When the U.S. Army Corps of Engineers stopped regulating isolated wetlands and other waters, the RWQCBs lost their regulatory hook under § 401. In order to "fill the *SWANCC* gap," as many of us described it, the RWQCBs began to regulate the fill of these features, independently, through the issuance of Waste Discharge Requirements (WDRs) under their Porter-Cologne authority.

It eventually became apparent that the RWQCBs had no consistent standards to apply in either the § 401 certification or WDR processes. Accordingly, in 2008, the SWRCB directed its staff to develop a state-wide wetlands definition and a set of permit standards for the discharge of dredged or fill material to wetlands and other "waters of the State" (*i.e.*, the Procedures). The process to develop the Procedures was slow and painstaking. In fits and starts over the next nine years, the SWRCB released drafts of the Procedures and other materials related to the Procedures.

Then came the national election in 2016 and the arrival of a new federal administration. Shortly after being elected, President Trump issued an Executive Order on February 28, 2107, signaling his intent to "repeal and replace" an Obama-era regulation that defined federal wetland jurisdiction quite broadly based upon Justice Kennedy's opinion in the Supreme Court's decision, *Rapanos v. United States*, 547 U.S.

715 (2006); *See*, https://www.supremecourt.gov/opinions/05pdf/04-1034.pdf.

The President's proposal, published in the Federal Register on February 14, 2019, would limit federal jurisdiction under the Clean Water Act, essentially to traditional navigable waters, their tributaries, and abutting wetlands. The comment period on the new definition closed on April 15, 2019.

The Executive Order created a flurry of activity at the SWRCB. Later in 2017, the SWRCB issued an updated version of the Procedures and initiated a renewed stakeholder and hearing process that became fairly intense in late 2018 and continued until final board action on April 2, 2019.

The Wetlands Definition

Much of the public debate focused on the Procedures' inclusion of a wetland definition that is broader than the federal definition. Under the federal definition, an area is a wetland if it satisfies three parameters: wetland hydrology; wetland (hydric) soils; and *[under normal circumstances]* the presence of wetland (hydrophytic) plants in certain concentrations. Under the state's definition, an area will be classified as a wetland if it exhibits wetland hydrology and wetland soils under normal circumstances, even if the area lacks vegetation (although if the area does exhibit vegetation, that vegetation must by dominated by hydrophytes to be considered jurisdictional). Think mudflats, playa pools and similar features. As such, the state definition eschews the three-parameter test in favor of a two-parameter test, jettisoning the requirement that hydrophytic vegetation be present before a feature can be considered a wetland.

The state's expanded wetlands definition caused considerable consternation throughout the regulated community, including homebuilders, mining interests, agriculture and public water and flood control agencies. Not only does the definition expand wetland protections to new areas, but it also creates the potential for confusion and inconsistency in the permitting of projects that include federal wetlands and other waters of the United States (WOTUS) and non-federal wetlands and other waters or the State (WOTS). That is, even though the state and federal government will apply the same technical manuals (*i.e.*, the 1987 Wetlands Delineation Manual and the Regional Supplements; *See*, https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/) in determining whether an area meets certain parameters, the ultimate jurisdictional calls and applicable permits standards for any particular project or area may be quite different as between the two levels of government. Unfortunately, industry's efforts to push back on the state's proposed two-parameter definition were effectively countered by the environmental community, which expressed considerable disappointment in the state's failure to adopt a one-parameter definition.

To make matters more confusing, the Procedures state that "artificial wetlands" are considered waters of the State except in very narrow circumstances. In particular, any artificial wetland greater than one acre in size is jurisdictional unless it *currently* used and maintained primarily for one of 11 identified purposes (various types of water and stormwater treatment purposes, crop irrigation or stock watering, fire suppression, industrial processing or cooling, active surface mining, log storage, groundwater recharge, and fields flooded for rice growing). These identified exemptions for artificial wetlands are subject to some additional specific limitations and, in any case, are considerably narrower than those provided by the Corps even under the expansive wetland regulations promulgated by the Obama administration.

Making matters worse, the problem of different—and in some instances potentially irreconcilable—state and federal wetland definitions are dwarfed by broader questions of state and federal jurisdiction over waters under the Clean Water Act (which is limited by questions of isolation and navigability at issue in *SWANCC, Rapanos* and both the Obama-era and Trump's newly proposed regulations). Given that the Procedures establish a permitting program for all waters of the State, and not just wetlands, one might reasonably ask whether the parameter wetlands definition really makes that much difference. In fact, there are only a couple of places in the Procedures where wetlands are treated more strictly than are other waters (one of which is a minimum 1:1 replacement mitigation ratio, which in most cases will be fairly meaningless given the Procedures' overall "no net loss" mitigation standard).

Permitting Standards and Procedures

As described above, the Procedures establish permitting requirements that will be implemented through the state's existing 401 certification and

WDR processes, and do not supplant those regulations. They will, however, make things more challenging from an applicant's perspective. A few examples follow.

Alternatives Analyses

Under federal regulations known as the "Section 404(b)(1) Guidelines," an applicant has the burden of demonstrating that his or her proposed project is the "least environmentally damaging practicable alternative," or "LEDPA." For most projects, the Guidelines presume that a proposed project is not the LEDPA. That is, the Guidelines presume that there are available and practicable alternatives to the project with less impact on the aquatic environment. To rebut this presumption and obtain a permit, an applicant may have to prepare a very detailed and complex "LEDPA analysis" relying on the services of biologists, civil engineers, attorneys and, in some circumstances, land economists. These analyses, and subsequent negotiations with the agencies, often take years to complete even for small to moderately-sized projects. Typically, the LEDPA requirement is the biggest hurdle to permit issuance.

The Procedures adopt the § 404(b)(1) Guidelines, with modifications, for covered projects. The thresholds triggering preparation of a LEDPA analysis under the Procedures are quite low. Any project filling more than 1/10 acre or 300 lineal feet of waters must prepare an on-site alternatives analysis. Any project filling more than 2/10 acre or 300 lineal feet of waters must prepare both an on-site and off-site LEDPA analysis. This is in contrast to the Corps and its permitting requirements, which in most cases does not require a LEDPA analysis for small projects falling within the scope of its nationwide permit program, including its nationwide permits for Residential Development (NWP 29) and for Commercial and Institutional Developments (NWP 39). The Procedures contain a nominal exemption for such projects, but the exemption is not available for projects affecting wetlands or rare, threatened or endangered species habitat, making it almost meaningless.

The San Francisco RWQCB has been requiring LEDPA analyses for some time now, so applicants in the San Francisco Bay Area may not see much change as a result of this requirement. In other regions of the State, the water boards will have a significant learning curve with respect to LEDPA analyses as the Procedures begin to kick in. Although the SWRCB intends to provide additional guidance and training for the Regions, given the already understaffed status of the Regions, this new LEDPA requirement likely will result in some agency growing pains that project applicants may suffer.

Compensatory Mitigation

The Procedures require a mitigation plan to demonstrate that project-related impacts, together with mitigation, will not "cause a net loss of the overall abundance, diversity, and condition of aquatic resources" on a watershed basis. This determination must be made based upon a potentially very complex "watershed profile" prepared by the applicant. This watershed profile must include, for example:

> . . .information sufficient to direct, secondary (indirect) and cumulative impacts of [the] project and factors that may favor or hinder the success of compensatory mitigation projects and help define watershed goals. It may include such things as current trends in habitat loss or conservation, cumulative impacts of past development activities, current development trends, the presence and need of sensitive species, and chronic environmental problems and site conditions such as flooding or poor water quality.

Generally speaking, projects whose watershed profiles are developed from an existing watershed plan will be subject to more favorable mitigation ratios. Fortunately, during final negotiations, water board staff agreed to language making clear that regional habitat conservation plans meeting certain criteria may serve as a watershed plan for the purpose of determining compensatory mitigation.

Although the Procedures' no net loss requirement will drive the amount, type and location of compensatory mitigation in most circumstances, the environmental community was successful in lobbying the SWRCB to include a minimum 1:1 mitigation requirement for streams and wetlands, measured in length or area. This 1:1 requirement may be satisfied by any form of mitigation (*e.g.*, preservation, enhancement, restoration, creation), although restoration is preferred. To the extent that the 1:1 mitigation provided does not meet the "no net loss" standard, additional mitigation will be required.

Application Requirements

The Procedures' application requirements request much detailed information, which will make it difficult to secure "deemed complete" application status under the Permit Streamlining Act. In addition to the material already required under the RWQCB's Title 23 regulations, applicants must supply 1) state and federal (if any) delineation materials, 2) a detailed project description and an impact assessment down to the nearest hundredth of an acre and lineal foot, and 3) a complete LEDPA analysis. The RWQCBs may also require, among other things, a detailed compensatory mitigation plan and water quality monitoring plan.

A Note on Agriculture

Agricultural interests were heavily involved in development of the Procedures and, in the final few months, were able gain some concessions. These included a procedural exemption for prior converted cropland consistent with federal law and procedural exemptions for certain agricultural features as described in (and roughly paraphrased from) the Obama-era WOTUS regulations, including exemptions for ditches; artificially irrigated areas that would revert to dry land should irrigation cease; and features such as farm and stock watering ponds, irrigation ponds, and settling basins. The rice growers secured additional protective language to limit the potential for unnecessary regulation arising out of the fact that rice farms may exhibit wetland features for substantial parts of the year. Although agricultural interests obtained these procedural exemptions, they were unable to obtain the SWRCB's agreement to exempt farmed areas from the definition of waters of the State. They did stave off, however, rigorous efforts by the environmental community to secure permit requirements for crop conversions in agricultural areas.

Conclusion and Implications

The authors were heavily involved in the final stakeholder negotiations in late 2018 and early 2019, during which the regulated community was able to secure numerous improvements to the Procedures, adding some clarity and filing down a few of the program's pointier teeth. As a result of hard work by staff at the State Water Resources Control Board and stakeholders—particularly the building industry, agricultural and mining interests, water agencies and the environmental community—and despite the frustrations (and occasionally tempers) that arose during those negotiations, the final product was measurably better than the draft circulated in 2017.

Nonetheless, the program will present numerous challenges to the Regional Water Quality Control Boards and project applicants as the Procedures are phased in. Most notable of these are 1) the potential for inconsistencies between the state and federal wetland programs arising out of their different jurisdictional reaches and the agencies' likely differing interpretations of regulatory requirements, even where state and federal regulations have been coordinated; and 2) the lack of resources and training for the RWQCBs to implement the program. Although the SWRCB has promised both additional resources and training, it is the authors' view that the board is vastly underestimating the complexities associated with this new program.

The water agencies and regulated community will have some time to prepare for the "watershed" moment when the Procedures become law. As noted above, the Procedures will not become effective until nine months following review by the Office of Administrative Law. Even then, the SWRCB agreed to language requested by the building industry grandfathering in legitimate (*i.e.*, non-sham) § 401 certification and WDR applications submitted before the effective date, even if those applications are not yet complete. In the meantime, the SWRCB's final resolution directed staff to 1) develop (in coordination with stakeholders) implementation guidance for potential applicants and conduct staff training prior to the Procedures; effective date; and 2) work with stakeholders, other agencies and scientific organizations to develop best practices for preparation of certain climate change analyses required by the Procedures. The resolution also directs staff to provide periodic progress reports to the State Water Resources Control Board regarding implementation issues, including updates regarding application processing timelines and environmental performance measures.

For more information on the Procedures, *see*, https://www.waterboards.ca.gov/press_room/press_releases/2019/pr04022019_swrcb_dredge_fill.pdf

Postscript: On May 1, 2019, the San Joaquin Tributaries Authority, a coalition of water agencies whose members include the Modesto Irrigation District,

Turlock Irrigation District, Oakdale Irrigation District, South San Joaquin Irrigation District, and the City and County of San Francisco, filed suit in the Sacramento Superior Court, against the Procedures, alleging among other things that the Procedures improperly expand the State Water Board's jurisdictional reach. It remains to be seen whether and how this litigation will affect the ultimate implementation of the Procedures.

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LAND USE NEWS

CALIFORNIA ATTORNEY GENERAL ISSUES OPINION CLARIFYING LIMITATIONS OF LOCAL ORDINANCES ON STATE DENSITY BONUS LAW

In a recent opinion issued by the California Office of the Attorney General, the Attorney General answered an important question posed by local governments and developers alike concerning the Density Bonus Law (Gov. Code, §§ 65915-65918). Specifically, a member of the State Assembly requested to know whether a city or county may condition the granting of a developer's density bonus application on payment of a "public benefit fee" that is imposed only on the additional units granted under the Density Bonus Law. [Atty. Gen. Ops. No. 17-602 (April 9, 2019)]

Background

By way of background, the Density Bonus Law incentivizes the building of affordable housing by granting developers "a density increase over the otherwise maximum allowable gross residential density," as well as other incentives or concessions, in return for a commitment to provide affordable housing as part of a development project. In practical terms, this means that the density bonus rewards developers who agree to build a certain percentage of lower income housing because they are provided the opportunity to build more units than would otherwise be permitted under applicable regulations in the local jurisdiction where the project is being built.

The critical importance of the Density Bonus Law is that Government Code § 65915 takes away a local government's discretion when it comes to providing density bonuses for qualifying residential projects. Specifically, if a developer meets the requirements of § 65915, the city or county *must* award a density bonus. (Gov. Code, §65915, subd. (b) ["A city, county, or city and county *shall* grant one density bonus . . ."] italics added.)

The Opinion

The Attorney General's opinion succinctly answered the question posed as follows:

> The type of ordinance at issue here—one that imposes a fee only on additional units allowed as a density bonus—contradicts the Density Bonus Law. Rather than encourage construction of affordable housing, such a fee taxes developers for acquiring density bonuses. Thus the local law disincentives what the state law means to incentivize. Therefore, we conclude that an ordinance imposing a fee only on units created through a density bonus under section 65915 is invalid.

In reaching this conclusion, the opinion relied on "clear" Legislative intent, which states, in relevant part:

> In enacting this chapter it is the intent of the Legislature that the density bonus or other incentives offered by the city, county, or city and county pursuant to this chapter shall contribute significantly to the economic feasibility of lower income housing in proposed housing developments. In the absence of an agreement by a developer in accordance with § 65915, a locality shall not offer a density bonus or any other incentive that would undermine the intent of this chapter." Further, § 65915 explicitly states that the chapter should be interpreted "liberally in favor of producing the maximum number of total housing units.

The opinion reinforces the purpose of California's Density Bonus Laws, which is to make residential development projects financially feasible for developers to build. By offering the developer an economic incentive to include additional units in its project, density bonuses help incentivize the creation of more housing which would otherwise not be permitted or financially possible. Additionally, the opinion is in line with strong recent California Legislative intervention in the housing crisis, as was evident by the

groundbreaking package of housing bills passed last year.

Conclusion and Implications

The strongest takeaway from this opinion is the Attorney General's solid reaffirmation of the state's unwavering goal to create as much housing in California as possible. By concluding that cities and counties cannot condition granting a density bonus on the developer paying a public benefit fee on density bonus units, the Attorney General is sending a clear message to local jurisdictions throughout the state – housing laws in California will be enforced and interpreted in a way that ensures that the largest amount of housing may be built.

The Attorney General's opinion may be accessed online at: https://www.oag.ca.gov/system/files/opinions/pdfs/17-602_0.pdf
(Nedda Mahrou)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT HALTS MOTORIZED TRAFFIC IN SOUTHEASTERN OREGON'S HIGH DESERT IN THE FACE OF NEPA, FLPMA AND WILDERNESS ACT CHALLENGES

Oregon Natural Desert Association v. Rose, 921 F.3d 1185 (9th Cir. 2019).

The Oregon Natural Desert Association (ONDA) brought an action alleging that the United States Bureau of Land Management's (BLM) travel management plan and comprehensive recreation plan for a wilderness area violated the Steens Mountain Cooperative Management and Protection Act (Steens Act), the Federal Land Policy and Management Act (FLPMA), the Wilderness Act, and the National Environmental Policy Act (NEPA). The District Court granted the government's motion for summary judgment and plaintiff appealed. The Ninth Circuit affirmed in part, reversed in part, and remanded for further proceedings.

Factual and Procedural Background

This case arose from the BLM's decisions regarding the route network for motorized vehicles in the Steens Mountain Cooperative Management and Protection Area (Steens Mountain Area). The BLM issued two plans: the Steens Mountain Travel Management Plan (Travel Plan) and the Steens Mountain Comprehensive Recreation Plan (Recreation Plan). Plaintiff ONDA challenged the Recreation Plan and the Interior Board of Land Appeals' (IBLA) approval of the Travel Plan under NEPA, FLPMA, and the Steens Act. Harney County intervened to defend the IBLA's approval of the Travel Plan but also cross-claimed against the BLM to challenge the Recreation Plan as arbitrary and capricious. The U.S. District Court upheld both agency actions and an appeal to the Ninth Circuit then followed.

The Ninth Circuit's Decision

Consultation with the Steens Mountain Advisory Council

The Ninth Circuit first addressed the claim that the BLM had failed to satisfy its obligation to consult the Steens Mountain Advisory Council before issuing the Recreation Plan. Although the BLM must make any decision "to permanently close an existing road" or "restrict the access of motorized or mechanized vehicles on certain roads" in the Steens Mountain Area "in consultation with the advisory council," the Steens Act does not specify how such consultation must occur. Here, the Ninth Circuit found it sufficient that the BLM had: 1) opened the public comment period on the revised Recreation Plan Environmental Assessment in January 2015; 2) formally briefed the advisory council two weeks later and provided information regarding route analysis; and 3) been directed by the advisory council to "use the information" from the meetings and act as the BLM saw fit. Further, the Ninth Circuit concluded that, even if the consultation had been insufficient, any error was harmless to Harney County.

Definition of 'Roads and Trails'

The Ninth Circuit next found that the IBLA acted arbitrarily and capriciously by changing its definition of "roads and trails" without providing a reasonable explanation for the change. The Steens Act prohibits the use of motorized vehicles "off road" but also authorizes the use of motorized vehicles on "roads and trails," without defining those terms. The IBLA has reconciled this seeming contradiction by concluding that since the statute:

> . . .clearly meant to allow [the BLM] to designate roads and trails as open to motorized travel, the prohibition against motorized off-road travel logically can only mean that motorized travel that does not occur on either a road or a trail is prohibited.

In a 2009 decision on the Travel Plan, the IBLA had decided that a route that is now "difficult or impossible to identify on the ground" is neither a road nor a trail under the Steens Act. Based on this logic, the IBLA reversed the BLM's decision to allow motorized travel on certain "obscure routes." In its 2014 remand decision on the Travel Plan, however, the IBLA reversed course and overturned its own decision to close these routes. For the first time, the IBLA defined a "road" or "trail" to encompass something that "existed as a matter of record" in October 2000 (when Congress enacted the Steens Act) "and that might again be used in the future, despite a present difficulty in tracing [it] on the ground." Because the IBLA failed to "display awareness" that it was changing position and did not "show that there are good reasons for the new policy," the Ninth Circuit found that the IBLA had acted arbitrarily and capriciously.

The Travel Plan

The Ninth Circuit next held that the IBLA had acted arbitrarily and capriciously by affirming the BLM's issuance of the Travel Plan. Specifically, it concluded that the BLM had failed to establish the baseline environmental conditions necessary for a procedurally adequate assessment of the Travel Plan's environmental impacts. Nothing in the Travel Plan Environmental Assessment, for example, established the physical condition of the routes, such as whether they were overgrown with vegetation or had become impassable in certain spots. Despite this lack of information, the Environmental Assessment authorized most routes for "Level 2" maintenance, which involves mechanically grading a route and removing roadside vegetation. Without understanding the actual condition of the routes on the ground, however, the Ninth Circuit found that the BLM could not properly assess the environmental impact of allowing motorized travel on more than 500 miles of routes or of carrying out mechanical maintenance on these routes.

The Recreation Plan

Finally, the Ninth Circuit found that the BLM had acted arbitrarily and capriciously in issuing the Recreation Plan. Again, the court held that the BLM had failed to establish the baseline conditions necessary for it to consider information about significant environmental impacts. In particular, it had failed to provide baseline conditions for the "obscure routes," at least until after the public comment period had closed.

Conclusion and Implications

The case is notable for its application of the "arbitrary and capricious" standard of review for agency actions. In the end, the court found the Bureau of Land Management's actions, especially its failure to establish baseline conditions necessary for it to consider environmental impacts, deficient. The Ninth Circuit's decision is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/04/25/18-35258.pdf

(James M. Purvis)

NINTH CIRCUIT REVIVES ENVIRONMENTAL GROUPS' NEPA CHALLENGE TO DEPARTMENT OF AGRICULTURE'S GRAY WOLF KILLING POLICY

Western Watersheds Project et al. v. Todd Grimm et al., ___F.3d___, Case No. 18-35075 (9th Cir. Apr. 23, 2019).

On April 23, 2019, the Ninth Circuit Court of Appeals overturned a U.S. District Judge's January 2018 dismissal of an action brought by plaintiffs Western Watersheds Project, Center for Biological Diversity, Friends of the Clearwater, WildEarth Guardians, and Predator Defense (plaintiffs) to enjoin the federal government's participation in the elimination of gray wolves in Idaho, pending additional National Environmental Policy Act (NEPA) analysis. The U.S. District Court originally dismissed the suit based on the plaintiffs' lack of Article III standing.

Factual Background

In 1973, the U.S. Fish and Wildlife Service (FWS) listed the Northern Rocky Mountain gray wolf (*Canis*

lupus irremotus) as endangered under the federal Endangered Species Act (ESA). This subspecies of gray wolf is native to the northern Rocky Mountains and preys on bison, elk, the Rocky Mountain mule deer, and the beaver. However, the gray wolves are known to prey upon many other species of animals given the opportunity. In 1994, FWS' goal was to assist the gray wolf reach a population of thirty breeding pairs by reintroducing them into central Ohio. In anticipation of conflict between the wolves, and humans and their livestock and animals, the FWS authorized the killing of those wolves that preyed on livestock, domestic animals, and ungulates in the area. FWS reached its wolf breeding goal and in 2011, the gray wolf was successfully delisted.

Back in 2002, the Idaho Department of Fish and Game (IDFG) prepared a plan to be executed upon the gray wolves' delisting under the ESA. IDFG would maintain responsibility for managing the wolves in Idaho with the goal of addressing these issues of predation by way of sport hunting as its primary method. Ever since its delisting, FWS supported IDFG's wolf management activities through both legal and non-legal methods, including aerial hunting.

In June 2017, plaintiffs sued the USDA alleging that the agency violated NEPA for its wolf killing policy. The USDA said that NEPA's law did not constitute a major federal action significantly affecting, individually or cumulatively, the quality of the human and natural environment."

Procedural History

In June 2016, plaintiffs brought the following NEPA-based claims against the U.S. Department of Agriculture, Wildlife Services (Wildlife Services) in District Court: 1) Failure to prepare an Environmental Impact Statement (EIS); 2) Failure to take a hard look at the effects of actions and alternatives; 3) Violations under 5 U.S.C. §706 (2)(A) for decisions not to supplement NEPA analysis as arbitrary and capricious; and 4) Violations under U.S.C. §706 (1) for failure to supplement the 2011 Environmental Assessment as an action unlawfully withheld or reasonably delayed.

Specifically, plaintiffs alleged that NEPA requires Wildlife Services to prepare an EIS and supplement the Environmental Assessment for the agency's killing of the gray wolf. The District Court held that plaintiffs failed to show that Article III standing because plaintiffs failed to show redressability. The District Court explained that plaintiffs failed to show that eliminating the USDA's rule would actually result in fewer wolf killings therefore, making their injury not redressable.

The Ninth Circuit's Decision

NEPA violations constitute procedural injuries. To prevail on a cause of action involving procedural injuries, plaintiffs are required to:

> . . .show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.

Further, to establish injury in fact, the plaintiffs may demonstrate that they:

> . . .use the affected area and are persons or who the aesthetic and recreational values of the area will be lessened by the challenged activity.

Standing: Injury in Fact

In order to prevail, plaintiffs needed to establish injury in fact:

> Environmental plaintiffs may establish injury-in-fact by demonstrating that "they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000)).

In this case, plaintiffs submitted declarations from their members stating that the wolf-killing threatened the aesthetic and recreational interests in tracking and observing wolves in the wild, often in specific regions. The Court of Appeals deemed those interests to fall under the scope of NEPA's protections. Thus, plaintiffs successfully established injury-in-fact.

Standing: Redressability

Next, the Ninth Circuit reviewed the District Court's ruling that the plaintiffs' injuries were not redressable:

> To establish redressability, '[p]laintiffs alleging procedural injury 'must show only that they have a procedural right that, if exercised, *could* protect their concrete interests.' *Salmon Spawning*, 545 F.3d at 1226 (quoting *Defs. of Wildlife v. EPA*, 420 F.3d 946, 957 (9th Cir. 2005), *overruled on other grounds by Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007)). Thus, the proper inquiry here is whether Plaintiffs have shown that halting Wildlife Services' wolf-killing activities pending additional NEPA analysis could protect their aesthetic and recreational interests in gray wolves in Idaho. We hold that they have.

The Ninth Circuit overturned the District Court's conclusion and emphasized that the court erred because it relied on an incorrect standard by relying on an unpublished case that lacks precedential effect. Additionally, to properly establish redressability, plaintiffs must show that they have a procedural right and if exercised, *could* protect their concrete interests—a more relaxed standard applied to procedural injury cases. Under this standard of redressability, plaintiffs need only show that merely halting Wildlife Services' wolf-killing activities pending additional NEPA analysis would have the potential to protect their aesthetic and recreational interests in gray wolves in Idaho. This differs from the District Court's heightened standard which ruled the plaintiffs must show that fewer wolves would be killed.

Wildlife also argued that based on its current wolf-maintenance responsibilities, IDFG would exercise its independent authority and continue wolf-hunting to address the predation issues thus, defeating redressability. The Ninth Circuit quickly held that IDFG has not expressed an intent or ability to replace Wildlife Services' lethal wolf-management operations. Therefore, whether IDGF would implement an identical program as such is a matter of speculation.

Conclusion and Implications

In a win for the conservation groups, the Ninth Circuit Court of Appeals reversed the U.S. District Court's ruling and held that the plaintiffs' procedural injuries were indeed redressable. Though courts generally grant a high level of deference to oversight agencies such as the Fish and Wildlife Service, a win on a procedural challenge, like Article III standing, may be a new avenue for conservation groups to challenge controversial laws to better protect endangered species. Interestingly the court pointed out in a footnote why it did not directly address the additional issue of demonstrating causation: "Causation is not at issue here. However, because standing is a constitutional requirement, we note that Plaintiffs' injury—reduced aesthetic and recreational enjoyment of wolves in Idaho—is 'not too tenuously connected' to Wildlife Services' alleged NEPA violation, thus establishing causation under the relaxed standard for procedural injuries. *Salmon Spawning*, 545 F.3d at 1229." The Ninth Circuit's decision is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/04/23/18-35075.pdf
(Rachel S. Cheong; David D. Boyer)

RECENT CALIFORNIA DECISIONS

CALIFORNIA SUPREME COURT UPHOLDS SAN FRANCISCO ORDINANCE REQUIRING WIRELESS PHONE SERVICE PROVIDERS TO OBTAIN PERMITS TO MAINTAIN LINES AND EQUIPMENT IN PUBLIC RIGHTS-OF-WAY

T-Mobile West LLC v. City and County of San Francisco, ___Cal.5th___, 438 P.3d 239, Case No. S238001 (Cal. Apr. 4, 2019).

The California Supreme Court upheld City and County of San Francisco Ordinance No. 12-11 requiring wireless telephone service companies to obtain permits to install and maintain lines and equipment in public rights-of-way. Under the ordinance, some permits will not issue unless the application conforms to certain aesthetic guidelines. Various wireless telephone service providers brought suit and asserted that: 1) the ordinance was preempted by California Public Utilities Code § 7901; and 2) even if not preempted, the ordinance violated Public Utilities Code § 7901.1. The California Supreme Court rejected each of these claims.

Factual and Procedural Background

Plaintiffs were wireless telephone service companies that install and operate wireless equipment throughout San Francisco, including on utility poles located along public roads and highways. In January 2011, San Francisco adopted Ordinance No. 12-11, which requires "any Person seeking to construct, install, or maintain a Personal Wireless Service Facility in the Public Rights-of-Way to obtain" a permit. At the time, the board of supervisors found that the city needed to regulate the placement of such equipment to prevent installation in ways or locations "that will diminish the City's beauty."

To that end, the ordinance specifies areas designated for heightened aesthetic review, including historic districts and areas that have "good" or "excellent" views or are adjacent to parks or open spaces. The ordinance then establishes various standards of aesthetic compatibility for wireless equipment. In historic districts, for example, installation may only be approved if the planning department determines that it would not "significantly degrade the aesthetic attributes that were the basis for the special designation" of the building or district. In "view" districts, proposed installation may not "significantly impair" the protected views.

Plaintiffs sought declaratory and injunctive relief. Among other things, the complaint alleged that the ordinance was preempted by Public Utilities Code§ 7901 and violated Public Utilities Code § 7901.1. The trial court ruled that § 7901 did not preempt the challenged portions of the ordinance and rejected plaintiffs' claims that the ordinance violated § 7901.1. The Court of Appeal affirmed, and plaintiffs then timely petitioned for review to the California Supreme Court.

The California Supreme Court's Decision

The Preemption Claim

Plaintiffs contended that § 7901 preempted San Francisco's local ordinance to the extent it allowed the city to condition permit approval on aesthetic considerations. That section provides that telephone corporations may construct telephone lines and erect equipment along public roads in ways and locations provided they do not "incommode the public use of the road or highway." This language, plaintiffs asserted, grants them the unfettered right to construct lines and erect equipment along public roads so long as they do not obstruct the path of travel and thereby preempted the city's local ordinance. The California Supreme Court disagreed.

At the outset, the Court observed that plaintiffs' argument rested on the premise that the city only has the power to regulate telephone line construction based on aesthetic considerations if § 7901's "incommode" clause can be read to accommodate that

power. The Court found that premise to be flawed, finding that the city has inherent local police power to determine the appropriate uses of land within its jurisdiction, which includes the authority to establish aesthetic conditions for land use. Under its preemption cases, the Court explained, the question is not whether such language can be read to permit the city's exercise of power. The question is whether the statute divests the city of that power.

The Court also disagreed with plaintiffs' contention that the incommode clause limits their right to construct lines only if the installed lines and equipment would physically obstruct the path of travel. Instead, referencing various dictionary definitions, the Court found that "incommode" should be read more broadly to include anything that might "disturb" or "give inconvenience" to public road use. For example, lines or equipment might generate noise, cause negative health consequences, or create safety concerns. All of these impacts, the Court observed, could disturb public road use or disturb its quiet enjoyment.

With this context in mind, the Court analyzed whether § 7901 preempted the local ordinance. Because the location and manner of line installation are areas over which local governments traditionally exercise control, the Court presumed that the ordinance was not preempted absent a clear indication of preemptive intent. The Court then found that no such clear indication existed, concluding that: 1) nothing in the ordinance was expressly contradictory to the language of the statute; 2) § 7901 had not occupied the field, and the city was not attempting to regulate in an area over which the state has traditionally exercised control; and 3) obstacle preemption did not apply because the local ordinance did not hinder the accomplishment of the purposes behind section 7901.

Finally, the Court considered the Public Utilities Commission's own understanding of the statutory scheme, noting that it has "consistently accorded deference to the PUC's views concerning utilities regulation." With respect to the preemption issue, the Court found that the PUC's default policy is one of deference to municipalities in matters concerning the design and location of wireless facilities. In particular, in a 1996 opinion adopting a general order governing wireless facility construction, the PUC recognized:

> . . .that primary authority regarding cell siting issues should continue to be deferred to local authorities.

The Section 7901.1 Claim

Plaintiffs also asserted that the ordinance violated § 7901.1 by singling out wireless telephone corporations. Section 7901.1 provides that, consistent with § 7901, municipalities may "exercise reasonable control as to the time, place, and manner" in which roads are "accessed," but that such control must "be applied to all entities in an equivalent manner." The Court rejected plaintiffs' claim, finding that § 7901.1 only applies to temporary access to public rights-of-way, during initial construction and installation. Because the parties had stipulated that San Francisco treats all companies equally in that respect, the Court found that § 7901.1 had not been violated.

In arriving at this conclusion, the Court paid particular attention to the legislative history, which noted that the "bill [was] intended to bolster the cities[']abilities with regard to construction management." Before § 7901.1's enactment, telephone companies had been taking the "extreme" position, based on their statewide franchises, that "cities [had] absolutely no ability to control construction." Section 7901.1 was enacted, therefore, to:

> . . .send a message to telephone corporations that cities have authority to manage their construction, without jeopardizing the telephone [corporations'] statewide franchise.

Conclusion and Implications

The case is significant because it contains a robust analysis of plaintiffs' preemption claims and provides important guidance for how such claims are to be analyzed. The decision is available online at: https://www.courts.ca.gov/opinions/documents/S238001.PDF (James M. Purvis)

SECOND DISTRICT COURT HOLDS INQUIRIES RELATED TO POTENTIAL DEVELOPMENT INSUFFICIENT TO JUSTIFY ORDINANCE IMPOSING MORATORIUM ON CHARTER SCHOOLS

California Charter Schools Association v. City of Huntington Park, ___Cal.App.5th___, Case No. B284162 (2nd Dist. Apr. 25, 2019).

This action arose after the City of Huntington Park (City) enacted and extended an urgency ordinance that imposed a temporary moratorium on charter schools while it considered amending its zoning code. The Court of Appeal concluded that the ordinance was not valid under Government Code § 65858 because the City could not show there was any immediate threat of actual development that would justify imposing the urgency ordinance.

Factual Background

The City is 3.1 square miles in size and contains approximately 59,000 residents and 20 schools, six of which are charter schools. The City has more schools than any community in the southeast part of Los Angeles County. As a result, the City enacted an urgency interim zoning ordinance to impose a temporary moratorium on the establishment, construction and development of new charter schools within its borders. The City's reason for the ordinance was that population density and the high numbers of schools attracting students from outside the City contribute to traffic, parking and noise problems within neighborhoods.

Specifically, the City cited various findings that demonstrated a "current and immediate threat" to public health, safety and welfare, such as the City's "numerous inquiries and requests for the establishment and operation of charter schools." The City's community development department reported that it had received "a proliferation of inquiries and requests for the establishment and operation of charter schools." Therefore, the moratorium on charter schools was urgently necessary, because according to the city council and city attorney, there was a "huge, huge" need for a diversity of revenue producing land uses that have no choice but to compete with schools for limited space for development.

The Court of Appeal's Decision

Cities have the authority to adopt urgency ordinances under § 65858 pursuant to their police power. Section 65858, subdivision (a) states the purpose behind the statute:

> . . .the legislative body of a county, city, including a charter city, or city and county, to protect the public safety, health, and welfare, may adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time.

Subdivision (c) of the statute is relevant for purposes of this case and reads in relevant part that:

> . . .[t]he legislative body shall *not adopt* or *extend* any interim ordinance pursuant to this section unless the ordinance contains legislative findings that *there is a current and immediate threat* to the public health, safety, or welfare, and that the approval of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use which is required in order to comply with a zoning ordinance would result in *that threat* to public health, safety, or welfare. (Italics added.)

Discussion of 'Urgency'

The court began its analysis by noting that whether the facts constitute an "urgency" under the statute is a legal question. The court then relied on case law to reach its conclusion that the City exceeded its authority in adopting the ordinance at issue. Specifically, the court cited *Building Industry Legal Defense Foundation v. Superior Court*, 72 Cal.App.4th 1410 (1999), as persuasive authority. There, the court found that a current and immediate threat means that the approval of an entitlement or use is imminent.

The court in *Building Industry* concluded that:

> . . .[l]imiting the reach of an interim ordinance to those situations where actual approval of an entitlement for use is imminent is consistent with the purpose of interim controls.

The court explained that issuing a building permit and approving a development application are acts that give landowners a right to proceed with development. Formally submitting the development application merely starts the wheels rolling because the city retains power to deny it. Accordingly, simply processing a development application does not confer any type of vested right onto the landowner. As such, mere inquiries, requests and meetings about a use (such as those involved here) do not meet the definition of current and immediate threat under the statute.

Conclusion and Implications

The key takeaway from this opinion is that in order for findings to be sufficient enough to constitute a current and immediate threat under § 65858, subdivision (c), there must be something more than mere inquiries, requests, and meetings in connection with a development application. Otherwise, an urgency ordinance adopted under § 65858 will not hold up in court.

The opinion may be accessed online at: https://www.courts.ca.gov/opinions/nonpub/B284162.PDF (Nedda Mahrou)

THIRD DISTRICT COURT REJECTS CHALLENGE TO PROJECT APPROVALS ON STATUTE OF LIMITATIONS GROUNDS

Harris v. City of Woodland, *Unpub.*, Case No. C087349 (3rd Dist. Apr. 23, 2019).

In *Harris v. City of Woodland*, an *unpublished* decision out of the Third District Court of Appeal, the court affirmed the trial court's ruling granting the City of Woodland's (City) motion for judgment with respect to petitioner's challenges to the City's actions in approving a project on statute of limitation grounds. However, it reversed the trial court's order denying the petition for writ of mandate because petitioner's request for relief under Code of Civil Procedure § 1085 to compel the City to perform certain alleged ministerial duties in accordance with law remained pending and had not been dealt with by the trial court.

Factual Background

On September 6, 2016, the City Council for the City of Woodland (City) approved the Prudler tentative subdivision map project (the Project). The Project was described as:

> . . .a request to amend the General Plan and Spring Lake Specific Plan, rezone the project site, and approve a Tentative Subdivision Map, Conditional Use Permit, and Development Agreement to allow the development of 183 detached single-family units in two phases with a 1.46-acre park on an approximately 38-acre site.

Approval of the Project consisted of the city council: 1) adopting a resolution certifying the environmental impact report, and adopting findings of fact, a statement of overriding considerations, and a mitigation monitoring and reporting program for the Project; 2) adopting a resolution amending the General Plan land use diagram and circulation element for the Project; 3) adopting a resolution amending the Spring Lake Specific Plan East Street cross section for the Project; 4) adopting a resolution approving the tentative map and conditional use permit for the Project; 5) introducing an ordinance rezoning the property; and 6) introducing an ordinance approving a development agreement.

Procedural Background

On September 20, 2016, Bobby Harris (Harris) notified the City pursuant to Government Code § 65009, subdivision (d), that the project approval violated §§ 65913, 65913.2, subdivision (a), 65864 and 65867.5, subdivision (b):

> . . .predicated [on] violating City of Woodland's voter-adopted, Urban Limit Line Ordinance and General Plan housing provisions.

The City failed to respond to the letter within 60 days, as required by § 65009, subdivision (d)(3)(A).

On May 17, 2017, Harris filed a petition for writ of mandate pursuant to Code of Civil Procedure §§ 1085 and 1094.5 against the City and real party in interest Yolo Residential Investors, LLC (Yolo Residential) following the City's approval of the Project. Harris challenged portions of the project approval, which consisted of the adoption of four resolutions and introduction of two ordinances and sought to compel the City to perform certain alleged ministerial duties in accordance with law.

The City and Yolo Residential collectively filed a motion for judgment denying the petition for writ of mandate pursuant to Code of Civil Procedure § 10941 (motion for judgment) on two grounds: 1) the project approval challenges were barred by the applicable statutes of limitations; and 2) the City's actions in approving the project were not arbitrary or capricious.

The trial court granted the motion for judgment and denied Harris' petition for writ of mandate. Harris appealed.

The Court of Appeal's Decision

The Court of Appeal held that challenges to the Project approval actions, except for the tentative map approval, were time barred under Government Code § 65009, Subdivision (c)(1). It explained that § 65009 imposed relatively short statutes of limitation on legal challenges to local land use decisions. It further explained that the 90-day limitations period under § 65009, subdivision (c)(1), expressly and unequivocally applied to Harris's request to void and have set aside the two resolutions amending the General Plan and the Spring Lake Specific Plan (§ 65009, subd. (c)(1)(A)), the resolution approving the conditional use permit (*id.*, subd. (c)(1)(E)), the zoning ordinance (*id.*, subd. (c)(1)(B)), and the development agreement ordinance (*id.*, subd. (c)(1)(D)). The statute requires that the "action or proceeding" be commenced and service be made within 90 days of the legislative body's decision. (§ 65009, subd. (c)(1).) It held the notice served on September 20, 2016, did not commence an action or proceeding within the meaning of § 65009, subdivision (c)(1), as is evident by the California Legislature's distinction between a notice and an action or proceeding in § 65009, subdivision (d). It further held it was undisputed the petition was filed more than 90 days after the City's approval of the resolutions and ordinances. Accordingly, the court held Harris's request to void and have set aside the Project approval resolutions and ordinances, except for the tentative map approval, was time barred under § 65009, subdivision (c)(1).

With respect to Harris' challenge to the tentative map approval, the court held that challenge was time barred under Government Code § 66499.37's 90-day statute of limitations. The court held given it was undisputed the petition was filed more than 90 days after the City's approval of the tentative map, Harris's challenge to the tentative map approval was therefore time barred under § 66499.37.

The Writ of Mandate

Finally, the court agreed with Harris that the trial court failed to consider his request for *mandamus* relief under Code of Civil Procedure § 1085. In that request, Harris sought to compel the City to perform certain alleged ministerial duties as required by law. The court determined the trial court erred in denying the petition for writ of mandate because the City and Yolo Residential did not move for judgment on his request to compel the City to perform certain alleged ministerial duties, and the trial court did not rule on that claim either. Therefore, because that claim survived and will need to be adjudicated in the future, the court concluded the trial court erred in denying the petition for writ in its entirety.

Conclusion and Implications

The Third District Court of Appeal affirmed the trial court's order granting the motion for judgment on Harris' petition to void and have set aside the Project approval resolutions and ordinances, but reversed the trial court's order denying Harris' petition for writ.

(Giselle Roohparvar)

THIRD DISTRICT COURT REJECTS CHALLENGE TO CITY OF LOS ANGELES' AUTHORITY AND PROCESS BY WHICH IT ISSUES USE VARIANCES

McQuiston v. City of Los Angeles, *Unpub.*, Case No. B285686 (3rd Dist. Apr. 17, 2019).

In *McQuiston v. City of Los Angeles*, an *unpublished* decision out of the Third District Court of Appeal, petitioner J.H. McQuiston (McQuiston) challenged the City of Los Angeles' (City) authority and process by which it issues use variances—along with a shotgun approach of various other somewhat related causes of action. The City demurred to McQuiston's complaint for failure to state a cause of action. The trial court granted the demurrer without leave to amend, and the appellate court affirmed the judgment, plus awarded costs on appeal for good measure.

Factual and Procedural Background

In his second amended complaint, McQuiston sued the City, the Central Area Planning Commission, and the Mayor of Los Angeles, challenging: 1) the City's authority to issue use variances in the MR1 Restricted Industrial Zone; 2) the method by which the City provided notice of requested variances 3) the participation of city councilmembers in the variance process; 4) the mayor's alleged use of undated resignations to remove appointees to area practice commissions; 5) the city attorney's alleged failure to enforce the law regarding variance; and 6) the costs for a variance appeal. McQuiston expressly alleged that he was not challenging the City's decision with respect to any particular parcel, but that he was instead contesting the constitutionality of the process itself.

The City demurred to the second amended complaint, asserting that none of the causes of action stated facts sufficient to constitute a cause of action. The trial court sustained the City's demurrers to the second amended complaint without leave to amend. McQuiston appealed.

The Court of Appeal's Decision

First Cause of Action: Issuance of Use Variances

McQuiston contended the City is prohibited by the California Constitution, state law, and local law from issuing use variances. McQuiston's argument was as follows: a city's zoning laws set forth the permissible uses for a parcel of land so zoned, and that any use that is not expressly stated in the zoning law is barred. Because a use variance departs from the uses explicitly listed in the zoning ordinance, a "use" variance (*i.e.*, "departure from law'" by definition is inconsistent with uses listed per the City's General Plan for a parcel. Thus, it is impossible for the City to issue valid use-variances. McQuiston based his claim on his understanding of the interplay between Government Code § 65906,1 concerning variances, and article XI, § 7 of the California Constitution.

The court explained § 65906, the statute prohibiting use variances, does not apply to charter cities such as Los Angeles, by its express terms. The court further rejected McQuiston's assertion that the constitutional requirement that local laws not conflict with general laws (Cal. Const., art. XI, § 7) means that the provisions of § 65906 apply to charter cities as well as non-charter cities. It explained that in Government Code § 65803, the California Legislature expressly exempted charter cities from the general zoning framework except when the statute was expressly made applicable to charter cities—and by its own terms, § 65906 was not designated by the Legislature as applicable to charter cities. The court affirmed the demurrer as to the first cause of action.

Second Cause of Action: Notice

In his second cause of action, McQuiston alleged that the "notice of prospective variance to parcels in the Plan zone" was invalidly selective, and the notice procedures deny him due process. The court found McQuiston failed to plead facts showing that a property, life, or liberty interest was diminished by the City's notice practices, and affirmed the demurrer as to the second cause of action.

Third Cause of Action: Unlawful Participation in Execution of City's Laws

In his third cause of action, McQuiston alleged

that city legislators unconstitutionally participate in variance proceedings in violation of article III of the California Constitution, which prohibits a legislator from taking part in the executive or judicial process pertaining to a law. The court affirmed the demurrer to the third cause of action on the grounds that article III pertains to state government, not local government; that McQuiston had provided no authority to support the proposition that anyone is prohibited from speaking during public commentary before the City Commission by virtue of his or her title; and that the authority on which McQuiston relied was inapposite.

Fourth Cause of Action: Mayor's Alleged Unlawful Termination of City Commissioners

In his fourth cause of action, McQuiston alleged that the Mayor of Los Angeles could not legally remove City commissioners from their posts by means of undated resignations, and that commissioners could not be impartial if the Mayor could remove them at his discretion. The court affirmed the demurrer to the fourth cause of action on the grounds that the plain language of the City Charter granted the Mayor the power to remove members of most commissions without confirmation by the City Council and to appoint members for the remainder of a commissioner's remaining unexpired term.

Sixth Cause of Action: Excessive Fees

In his sixth cause of action, McQuiston alleged that the fees charged for the variance process were arbitrary and based on a fee schedule rather than on the cost of the City's actual work on the variance issue, in violation of articles XIII C and XIII D of the California Constitution. The court affirmed the demurrer to the sixth cause of action on the grounds that neither of the aforementioned articles pertains to variance process fees.

Conclusion and Implications

The court concluded that McQuiston failed to state a cause of action on all six of its claims. It therefore affirmed the trial courts determination and granted the City its costs on appeal. In the end, the Court of Appeal stated what it thought was the obvious: that Government Code § 65906—the statute prohibiting use variances—did not apply to charter cities such as Los Angeles, by its express terms. The court also found that with Government Code § 65803, the California Legislature expressly exempted charter cities from the general zoning framework except when the statute was expressly made applicable to charter cities.
(Giselle Roohparvar)

SIXTH DISTRICT COURT FINDS SCHOOL DISTRICT THAT ADOPTS PROSPECTIVE, DISTRICTWIDE IMPACT FEES, ESTABLISHES REASONABLE RELATIONSHIP WHEN FOLLOWING NEEDS ANALYSIS

Tanimura & Antle Fresh Foods, Inc. v. Salinas Union High School District, ___Cal.App.5th___, Case No. H045470 (6th Dist. Apr. 26, 2019).

The Sixth District Court of Appeal overturned a decision of the trial court granting the petition for a writ of mandate seeking a refund of the School Impact Fees paid under protest by petitioner Tanimura & Antle Fresh Foods, Inc. (petitioner) to the Salinas Union High School District (District) for a 100-unit agricultural employee housing complex (Project). The Court of Appeal, in construing Government Code § 66001, subdivision (a), determined that the District need not establish a reasonable relationship between a particular project and the need for school impact fees where the fees are applied district-wide and adopted prospectively through quasi-legislative action.

Factual and Procedural Background

In 2015, petitioner applied to develop the Project with Monterey County (County). The conditions of approval described the Project's use as residential for "agricultural employees only without dependents."

The conditions also required petitioner to enter into a development agreement with the County, which was recorded, wherein petitioner agreed to adhere to the conditions of approval. Also in 2015, the District's governing board adopted a school impact fee to be levied on new residential construction in its service area. As required by statute, the District had its consultant prepare a school facilities needs analysis (SNFA). The SNFA projected enrollment growth due to the construction of new residential units in the service area over the next five years, based the student generation rates of residential units (similar to those anticipated to be constructed) in the previous five years, and relevant planning agency information. The SNFA concluded, based on the District's need, that it was authorized to collect fees of $3 per square foot of residential development. Petitioner disputed the applicability of the fee to its project, but paid the fee under protest.

In its legal challenge to the school impact fee, petitioner argued that there was no reasonable relationship between the fee and the Project because the Project was intended to house agricultural workers only, without dependents, meaning no new students would be generated by the Project. Petitioner argued that the District's SNFA did not, but should have, considered residential developments that do not allow children in calculating the District's projected need. The District argued that the SNFA did not need to calculate need based on individual projects' actual student generation rates, and that the Government Code contained statutory exemptions for certain types of residential development, which the Project did not qualify for. The trial court agreed with petitioner and found that there was no reasonable relationship between the fee and Project because "no children would live in this type of development." The District appealed.

The Court of Appeal's Decision

The Mitigation Fee Act

The Court of Appeal construed the Mitigation Fee Act to require the District to determine that the use of the fee and the need for public facilities are reasonably related to the type of development on which the fee is imposed. Specific to school impact fees, the District must show that it (through the SNFA) projected the total of new residential units expected to be built in its service area, determined student generation based on that total, and estimated the cost of providing school facilities to those new students. The District's analysis must reasonably relate the need and fee to districtwide estimates of classes of development projects, and need not evaluate the impacts of any particular development.

Standard of Review

The court found the standard of review to be whether the District's legislative act in adopting the fee was arbitrary, capricious, or entirely lacking in evidentiary support. Specific to the adoption of school impact fees, the District had the initial burden of showing that its adoption of the fee was valid and that there was a reasonable relationship between the fee charged and the burden created by the development. The burden then shifts to the challenger to show that the District's record "clearly did not support" a determination of reasonableness.

Adults Only Project and School Impact Fees

The parties disputed whether petitioner's stated intent to build "adults only" housing was a determining factor in whether there was a reasonable relationship between the fee and the "burden" created by the development. The court determined that the "intent" of individual developers was not a factor that the District needed to consider in its SNFA for legislative fee enactments. Instead, the District should consider the terms and conditions adopted by an approving body, which establish the "type" of development for the purposes of justifying the fee.

The parties also disputed the proper construction of the word "type" in Government Code § 66001. Petitioner argued that the "adults only" Project was a "type" of development within the meaning of that section, and a "type" which the district should have considered and excluded from its SNFA in adopting the fee because an "adults only" residential project would not generate new students.

The District argued that 66001 does not require the consideration of residential development "subtypes" and that the mitigation fee act explicitly stated which "types" of development were excluded from school impact fees through statutory exemptions. Though the trial court agreed with petitioner, the

Court of Appeal found that the statutory framework did not support an "as applied" challenge because Government Code § 66001, subdivision (a) did not require the District to establish a "reasonable relationship" between the prospective and legislative adoption of a districtwide fee and any actually developed residential project. In contrast, subdivision (b) of that statute governs imposing fees on individual projects, and requires establishment of a reasonable relationship between the fee and the actual project.

The court construed the word "type" in context to mean a "class" of development projects on which the District imposes the fee generally. The court found that the authorizing statute classifies development into three categories and that, at a minimum, "type of development" means either "residential, commercial, or industrial." Within these categories, the statutes classify short-term lodging (less than 30 days) as industrial or commercial, while lodging intended for longer than 30 days is residential. The statutes also exclude government owned/operated development (including government constructed agricultural employee housing) and development for purely religious purposes from the imposition of fees.

The court found support in the statute's calculus for setting fees based on the:

> . . .projected total square footage of assessable space of residential units anticipated to be constructed in the next five-year period… (Gov. Code, § 65995.5, subd. (c)(3).)

"Residential units" is defined to include a wide array of single- and multi-family dwelling types, and the Project met that definition. Next, the court looked to other cases dealing with school impact fees and determined that the Legislature, by creating the SNFA process had already determined that imposing districtwide fees based on projected residential growth established the "reasonable relationship" needed under the Mitigation Fee Act. The court also found that the legislature intended to "occupy the field" related to school impact fees, such that the statutory exemptions in the government code were the only means of establishing a "type" of development that could avoid the imposition of the fee. Lastly, the court determined that adopting petitioner's interpretation of "type" would be unreasonable as it would require the district to anticipate and consider "subtypes" of development, not defined by the statute, and, in essence, justify the fee based on the impacts of individual projects.

Finding that the District met its initial burden, the court shifted the burden to petitioner to show that the District's action was arbitrary, capricious or completely lacking in evidentiary support. Petitioner focused on the District's lack of consideration of "adults only" residential development, but the court dismissed this lack of analysis, as it had already determined such analysis unnecessary. The court also dismissed petitioner's evidence of its "intent" to develop an "adults only" residential project, as the court had already held that the District need not consider individual developer "intent" in determining the "reasonable relationship" between a fee and the need to be generated by prospective development.

Conclusion and Implications

The court concluded that the District, in adopting a prospective, districtwide school impact fee on residential development, establishes a reasonable relationship when it follows the SNFA procedures set forth in the governing statutes by projecting future residential development and school facility needs based on historic residential development and student generation data. The District need not consider or attempt to predict the "intent" of future developers or the "subtypes" of future residential projects beyond those types defined by the statutes. Nothing in the statute required the District, in adopting the prospective fee, to justify its action based on any individual project's actual impact on school facilities.

The court's review was deferential to the District as the adoption of the fee was a legislative act. The petitioner did not actually allege that the adoption of the fee itself, or the imposition of the fee districtwide was arbitrary, capricious, or completely lacking in evidentiary support. Instead, petitioner alleged that "as applied" to its project, the fee lacked a reasonable relationship because the project would not actually generate students. The court found that the statute did not require the District to consider or predict the actual impacts of individual projects in legislatively adopting a prospective, districtwide school impact fee. The court's use of the terms "type" and "subtype" was curious given that the gist of the court's holding was that the "classes" of development included (or excluded) in the statutes were controlling. In other words, it does not appear necessary to create the

somewhat confusing term "subtypes" to exclude from consideration when the court essentially found that petitioner's project met the definition of residential development in the statute and did not qualify for any of the exceptions. Imposing any additional considerations would be speculative and not supported by the statutory language.

The opinion is available at: https://www.courts.ca.gov/opinions/documents/H045470.PDF
(Nathan George and Christina Berglund)

FIRST DISTRICT COURT HOLDS NO BROWN ACT CLAIM EXISTS WHERE CITY COMMITS TO STOP ALLEGED WRONGFUL ACT

Transparentgov Novato v. City of Novato, ___Cal.App.5th___, Case No. A152324 (1st Dist. Apr. 10, 2019).

The First District Court of Appeal upheld the trial court ruling denying declaratory relief and petition for writ of mandate under the Brown Act (Gov. Code, § 54950 *et seq.*) relating to a city council's discussion of and action on items that had not been on the published agenda. The Court of Appeal determined that no justiciable controversy existed because the city had disavowed its past action and further amended its policies to ensure such action would not be repeated in the future.

Factual and Procedural Background

On December 15, 2015, at a city council meeting, councilmembers considered two public works projects: A solar-panel carport; and a bus-transfer facility. Most of the meeting was taken up with public comment. After which, the council discussed placing the projects on a future agenda—which at the time was allowed by council policy. Ultimately, the council voted to form a subcommittee to study the bus facility.

Several months later, on July 29, 2016, petitioner sent a cease-and-desist letter to the city claiming that the council had violated the Brown Act:

> . . .by discussing substantive aspects of the solar project and by voting to establish a subcommittee to further consider the project without first giving public notice that these activities might occur.

The city responded by agreeing not to establish council subcommittees in the future without first placing the issue on the meeting's posted agenda. The council also amended its policy to require councilmembers to request in writing anything they wished to be placed on a future agenda so that it would be included on the agenda.

Shortly after this new policy was adopted by council, petitioner filed a lawsuit for declaratory relief and seeking a writ directing council to only take action on items properly noticed on the agenda.

The trial court denied the petition and entered judgment in favor of the city. This appeal followed.

The Court of Appeal's Decision

The court began by providing a comprehensive discussion of the necessary elements that must be met to obtain declaratory relief for a legislative body's allegedly wrongful past actions under the Brown Act. In addition to procedural requirements, the Brown Act provides for dismissal with prejudice any case seeking relief for any past action if the court concludes that the legislative body has responded "with an unconditional commitment to cease, desist from, and not repeat the past action." (Gov. Code, § 54960.2, subd. (c)(1), (3).) Ultimately, the court concluded that not only must petitioner meet all the procedural requirements under the Brown Act, it must also show the existence of a justiciable controversy under Code of Civil Procedure § 1060.

In applying the law, the court found that the city's written response to petitioner's cease-and-desist letter was precisely the type of "unconditional commitment" contemplated to protect a legislative body from litigation under the Brown Act. The court found petitioner's argument that its demand letter was meant to achieve a larger purpose, *i.e.*, to limit all future discussions and action on items not properly noticed, irrelevant to its claim involving the estab-

lishment of subcommittees. The city unconditionally committed to stopping its practice of establishing subcommittees without first putting the issue on the agenda. The trial court had therefore properly rejected petitioner's claim of violation regarding the vote to create a subcommittee.

Next the court considered whether a justiciable controversy remained. The court agreed with the city that the relief requested was moot because the council had amended its rules and there was no justiciable controversy entitling petitioner to relief. The court rejected petitioner's argument that the council's unilateral rule change did not comply with the response required under the Brown Act because the requirement of an actual controversy exists separate and apart from the Brown Act's procedural requirements. The court distinguished case law cited by petitioners because, here, the new policy was adopted before litigation was filed—"which is less suggestive of any likelihood the [c]ouncil will return to its prior practice." The court found there was no reasonable basis to believe that the city's prior action would be repeated. The abstract possibility that the city could repeal its policy in the future did not create a justiciable controversy.

Conclusion and Implications

This case provides a useful example of the Brown Act operating as it was intended. It further demonstrates a court's willingness to give public agencies a chance to fix their mistakes. Where a legislative body fixes a problem on its own, there's no reason for the additional expenditure of time and money from judicial intervention.

The opinion is available at: https://www.courts.ca.gov/opinions/documents/A152324.PDF
(Christina Berglund)

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 May 1, 2019, was referred to the Committees on Water, Parks and Wildlife and Environmental Quality.

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 May 20, 2019, was read for a second time and ordered to a third reading.

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 24, 2019, was referred to the Committee on Natural Resources and Water.

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 April 24, 2019, was referred to the Committee on Natural Resources and Water.

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 May 9, 2019, was held without further action pursuant to Joint Rule 62(a).

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 May 20, 2019, was read for a second time and ordered to a third reading.

AB 394 (Obernolte)—This bill would exempt from the California Environmental Quality Act proj-

ects 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 May 1, 2019, was referred to the Committees on Environmental Quality and Natural Resources and Water.

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 May 20, 2019, was in the Senate where it was read for the first time and then sent to the Committee on Rules for assignment.

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 May 20, 2019, was read for a second time and ordered to a third reading.

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 20, 2019, had its second hearing cancelled at the request of its author, Assembly Member Salas.

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 May 14, 2019, was read for a second time and ordered to a third reading.

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 May 16, 2019, was referred to the Committee on Water, Parks and Wildlife.

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 May 20, 2019, was read for a second time and ordered to a third reading.

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 May 14, 2019, was read for a second time and ordered to a third reading.

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 May 20, 2019, was in the Assembly where it was read for the first time and then held at the desk.

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 25, 2019, was re-referred to the Committee on Appropriations.

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 May 20, 2019, was read for a second time and ordered to a third reading.

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 May 20, 2019, was read for a second time and ordered to a third reading.

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

AB 168 was introduced in the Assembly on January 9, 2019, and, most recently, on May 14, 2019, was in the Senate where it was read for the first time and sent to the Committee on Rules for assignment.

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 May 20, 2019, was read for a second time and ordered to a third reading.

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 May 16, 2019, was held under submission following its hearing in the Committee on Appropriations.

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 May 16, 2019, was referred to the Committee on Governance and Finance.

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 May 16, 2019, was held under submission following its hearing in the Committee on Appropriations.

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 May 20, 2019, was read for a second time and ordered to a third reading.

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 May 16, 2019, was in the Senate where it was read for the first time and sent to the Committee on Rules for assignment.

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 May 7, 2019, was read for a second time and ordered to a third reading.

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 May 6, 2019, was referred to the Committee on Governmental Organization.

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

SB 295 was introduced in the Senate on February 14, 2019, and, most recently, on May 9, 2019, was in

the Assembly where it was read for the first time and held at the desk.

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; 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 May 20, 2019, was read for a second time and ordered to a third reading.

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 May 16, 2019, was held under submission in the Committee on Appropriations.

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 May 16, 2019, was read for a second time and ordered to a third reading. (Paige Gosney)

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