Volume 28, Number 10
July 2019

CALIFORNIA LAND USE™ LAW & POLICY Reporter

CONTENTS

FEATURE ARTICLE

REGULATORY DEVELOPMENTS

RECENT FEDERAL DECISIONS

RECENT CALIFORNIA DECISIONS

Continued on next page

CALIFORNIA LAND USE™
LAW & POLICY Reporter

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

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $845.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

 CLU

CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

U.S. SUPREME COURT TO DECIDE IF DISCHARGES OF POLLUTANTS TO GROUNDWATER HYDROLOGICALLY CONNECTED TO SURFACE WATERS REQUIRE A CLEAN WATER ACT PERMIT

By Nicole E. Granquist and Meghan Quinn

For decades, the debate whether discharges of pollutants to ground water that is hydrologically connected to federally jurisdictional surface waters requires a federal Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit has been raging in federal courts throughout California and the nation. To state that "splits" in authority have occurred would be an underwhelming description of the battles being waged on this topic in both the judicial and administrative arenas.

However, on February 19, 2019, the U.S. Supreme Court simultaneously served hope and struck fear within those in the trenches of the debate when it granted *certiorari* and agreed to hear the *Hawaii Wildlife Fund v. County of Maui* case emanating from the Ninth Circuit Court of Appeals, 881 F.3d 774; http://cdn.ca9.uscourts.gov/datastore/opinions/2018/02/01/15-17447.pdf

The Supreme Court's determination in the *County of Maui* case has the potential to definitively answer this long-standing thorny permitting question and provide regulatory certainty to a variety of water storage and supply, recycled water, agricultural, and land disposal projects here in California.

Background of NPDES Permitting Program

Per the Clean Water Act, in the absence of an NPDES permit, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §1311(a). The term "discharge of a pollutant" is defined as:

> . . .any addition of any pollutant to *navigable waters* from any point source [or] any addition of any pollutant to the waters of the *contiguous zone* or the *ocean* from any point source. . . . 33 U.S.C. §1362(12) (emphasis added).

"Navigable waters" is defined as "waters of the United States, including the territorial sea." 33 U.S.C. §1362(7).

The term "waters of the United States" another oft-litigated area of CWA jurisprudence, is currently defined by regulation, and includes:

- (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

- (b) All interstate waters, including interstate "wetlands;"

- (c) All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such water:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for indus-

trial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition; and

(e) Tributaries of waters identified in paragraphs

(a) through (d) of this definition. *See* 40 C.F.R. § 122.2; *see also* 33 C.F.R. §328.3(a)).

While groundwater has not been included in the definition of "waters of the United States" or amongst the waters to which the "discharge of a pollutant" is prohibited without an NPDES permit, in 2006, on the heels of the separate "significant nexus" test proffered in the U.S. Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715, 126 S. Ct. 2208, 165 L.Ed.2d 159 (2006); https://www.supremecourt.gov/opinions/05pdf/04-1034.pdf (to establish whether a surface water is a "waters of the U.S."), the Ninth Circuit Court of Appeals utilized the theory to find for the first time in California that an NPDES permit was required for the discharge of a pollutant to groundwater which was hydrologically connected to the Russian River. *See, Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 – 03 (9th Cir. 2006).

Statutory Language of the Clean Water Act and Congressional Legislative History

Though the facts of the *Northern California River Watch* case created a particularly susceptible environment for such a finding, some observed that the determination by the Ninth Circuit seemingly fell out of step with the plain language of the CWA and Congressional legislative history on the topic. Within the four corners of the CWA, Congress identified four different and distinct types of water bodies addressed by various provisions of the CWA: 1) navigable waters, 2) groundwater, 3) the contiguous zone, and 4) oceans. *See, e.g.*, 33 U.S.C. §§ 1251(a), 1254(a), 1256(e), 1288(b), 1314(a), and 1314(e). However, when establishing the NPDES permit program, only "navigable waters," the "contiguous zone," and the "oceans" were included within the definition of "discharge of a pollutant," and thereby require an NPDES permit to discharge to these waters. 33 U.S.C. §1362(12). Those advocating that the NPDES permit program is inapplicable to discharges of pollutants to hydrologically connected groundwater assert that the omission of "groundwater" from the definition of "discharge of a pollutant" or "waters of the United States" indicates that Congress did not conclude discharges to groundwater trigger the need for an NPDES permit. Those advocating for application of the NPDES permit program assert that *any* "discharge of any pollutant" (to waters of the United States) from "any point source" must secure an NPDES permit irrespective of whether the pollutant first migrates through groundwater. 33 U.S.C. §§ 1342(a), 1362(12).

Legislative history of the CWA was, and continues to be, a flash point for those who disagree with the outcome of the *Northern California River Watch* case, and other cases that have made similar conclusions. While the CWA was being drafted, attempts were made by various members of the House of Representatives and the Senate to expressly include groundwater within the NPDES permitting requirements of CWA § 402 (33 U.S.C. §1342); all failed. For example, the report accompanying the Senate's version of the CWA stated:

> Several bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil and other surface formations. Because the jurisdiction regarding groundwaters is so complex and varied from state to state, the Committee did not adopt this recommendation. S. Rep. No. 414, 92d Cong., 1st Sess. 73 (1971), U.S. Code Cong. & Admin. News 1972, pp. 3739 (emphasis added). Instead, the Senate Committee recognized the role of state pollution prevention programs to regulate discharges to groundwater. *Id.*

Additionally, in 1972, the House of Representatives specifically rejected an amendment that would have brought groundwater within the jurisdiction of the NPDES permitting requirements of the CWA. When the amendment was introduced, Representative Aspin stated:

> Groundwater is that water which lies below the surface of the earth. It is in reservoirs and pools,

> it is well water, it is drinking water. In other words, it is subsurface water.

The amendment does two things, two very simple things. First, the amendment brings groundwater into the subject of the bill, into the enforcement of the bill. Groundwater appears in this bill in every section, in every title except title IV. It is under the title which provides EPA can study groundwater. It is under the title dealing with definitions. But when it comes to enforcement, title IV, the section on permits and licenses, then groundwater is suddenly missing. That is a glaring inconsistency which has no point. If we do not stop pollution of ground waters through seepage and other means, groundwater gets into navigable waters, and to control only the navigable water and not the groundwater makes no sense at all. 118 Cong. Rec. 10666-10667, 1 Leg. Hist. 589 (1972). After considerable debate, the amendment was rejected. *Id.*

Splits in U.S. District Courts and Circuit Courts of Appeals

Prior to the *Northern California River Watch* case (and now the *County of Maui* case as discussed below), U.S. District Courts within the Ninth Circuit disagreed on whether discharges to groundwater that is hydrologically connected to a navigable surface water falls within the purview of the CWA. Some District Courts held that the CWA's jurisdiction extends to discharges into ground water that is hydrologically connected to surface waters, as the "discharge of a pollutant" to ground water from a "point source" ultimately reaches a navigable surface water. *See, e.g., Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F.Supp. 983, 989-90 (E.D. Wash. 1994); *Idaho Rural Council v. Bosma,* 143 F.Supp.2d 1169, 1180 (D. Idaho 2001); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F.Supp. 1182, 1196 (E.D. Cal. 1988). Other District Courts within the Ninth Circuit Court of Appeals held that even hydrologically connected ground water is not subject to the NPDES permitting requirements of the CWA. *See, Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc.*, 962 F.Supp. 1312 (D. Or. 1997); *Woodward v. Goodwin*, 2000 U.S. Dist. LEXIS 7642, *43 (N.D. Cal. 2000). The District Courts that determined such discharges are not within the purview of the CWA found a strong indication in the legislative history, partially cited above, that Congress considered ground water to be entirely distinct from navigable waters for purposes of the NPDES permit program, notwithstanding some site-specific connectivity.

This same split of authority has occurred at the national level. For example, the Fourth Circuit Court of Appeals recently concluded in *Upstate Forever, et al. v. Kinder Morgan Energy Partners, L.P., et al.*, 887 F.3d 637 (4th Cir. 2018); http://www.ca4.uscourts.gov/opinions/171640.P.pdf, that the federal court possessed jurisdiction to preside over a third-party citizen suit alleging violation of the CWA for an underground gasoline pipeline spill that, via subsurface transit, allegedly entered two nearby tributaries of the Savannah River, Browns Creek, and Cupboard Creek, and their adjacent wetlands. *Id.* at 649. The Fourth Circuit held that an indirect discharge of a pollutant through ground water, which has a direct hydrological connection to navigable waters, can support a theory of liability under the CWA. *Id.* at 647 – 48. Defendants in that case requested review by the U.S. Supreme Court, and the Solicitor General responded seeking a stay of any action pending resolution of the *County of Maui* case. *Id.* Other Circuit Courts of Appeals have disagreed, concluding that discharges to hydrologically connected groundwater are not subject to the permitting requirements of the CWA for the reasons noted above. *See, e.g., Town of Norfolk v. U.S. Army Corps of Engineers*, 968 F.2d 1438, 1451 (1st Cir. 1992); *Rice v. Harkin Exploration Co.*, 250 F.3d 264, 272 (5th Cir. 2001); *Oconomowoc Lake v. Dayton Hudson Co.*, 24 F.3d 962, 965 (7th Cir. 1994); *Ky. Waterways All. v. Ky. Utils. Co.*, 905 F.3d 925 (6th Cir. 2018); *Tenn. Clean Water Network v. Tenn. Valley Auth.*, 905 F.3d 436 (6th Cir. 2018), *reh'g denied*, 913 F.3d 592 (6th Cir. 2019).

The Ninth Circuit Court of Appeals' Decision in *County of Maui* Case

The County of Maui (County) operates the Lahaina Wastewater Reclamation Facility (Facility). The Facility receives approximately 4 million gallons of municipal sewage each day. After treatment, the facility releases three to 5 million gallons of effluent into four on-site injection wells. *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 742 (9th Cir. 2018). The discharge then travels into a shallow groundwater aquifer and ultimately to the Pacific Ocean through the seafloor at points known as "submarine

springs." *Id.* The U.S. Environmental Protection Agency (EPA), the Hawaii Department of Health, and others conducted a tracer-dye study that confirmed this pathway for at least two of the injection wells. According to the study, it took the leading edge of the dye 84 days to go from the two wells to the Pacific Ocean. The parties did not dispute that the dye's appearance in the ocean "conclusively demonstrated that a hydrogeologic connection exists." *Id.* at 742 – 43.

Upholding the District Court's decision, and in accord with an EPA *amicus* brief, the Ninth Circuit Court of Appeals concluded that the County's four discrete wells were "point sources" from which the County discharged "pollutants" in the form of treated effluent into groundwater, through which the pollutants then entered a "navigable water," the Pacific Ocean. The wells, therefore, were subject to NPDES permit regulation.

Focusing its analysis on supporting predecessor cases, while avoiding entirely the issue of the CWA's legislative history, the panel held that the CWA does not require that the point source itself convey the pollutants directly into the navigable water, concurring with the "indirect discharge" theory espoused by the Second Circuit Court of Appeals in *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 113, 119 (2d Cir. 1994). Ultimately, the Ninth Circuit found the County liable under the CWA because: 1) it discharged pollutants from a point source, 2) the pollutants were fairly traceable from the point source to a navigable water such that the discharge was the functional equivalent of a discharge into the navigable water, and 3) the pollutant levels reaching navigable water were more than *de minimis*. The court also rejected the argument that because the County's injections were disposals of pollutants into wells, they were exempt from the NPDES permitting program and, instead, only subject to state law requirements. *Id.* at 750 – 51.

Proposed 'Interpretative Statement' by EPA Contradicts Position Taken by the Agency in Earlier Permitting Actions and Brief Submitted in *County of Maui* Case

One of the most fascinating developments during the ongoing deliberation of the *County of Maui* case is EPA's recently-issued "Interpretive Statement on Application of the Clean Water Act National Pollutant Discharge Elimination System Program to Releases of Pollutants From a Point Source to Groundwater" (Interpretative Statement), which departs significantly in several respects from the *amicus curiae* brief the EPA submitted to the Ninth Circuit in May 2016 (Amicus Brief). 78 Fed. Reg. 16810 (February 20, 2018). In its Amicus Brief, EPA supported the position that an NPDES permit was required for the County of Maui's discharges to groundwater due to the direct hydrological connection that exists between the groundwater to which the County of Maui discharges and the Pacific Ocean. *See,* Brief for the EPA as Amicus Curiae, pp. 11 - 12, *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018).

In the Interpretative Statement, EPA now concludes that:

> . . .the CWA is best read as excluding all releases of pollutants from a point source to groundwater from NPDES program coverage and liability under [§] 301 of the CWA, regardless of a hydrologic connection between the groundwater and a jurisdictional surface water. 78 Fed. Reg. 16810 at 16811.

Notably, the EPA states that the Interpretative Statement does not apply in the Ninth or Fourth Circuits, *i.e.*, those circuits that have held that an NDPES permit is required for discharges to groundwater. Thus, the Interpretative Statement provides guidance to the rest of the nation until the U.S. Supreme Court determines the appropriate scope of the NPDES permit program.

The Interpretative Statement's conclusion appears to be a significant deviation from the "longstanding position" EPA expressed in its Amicus Brief ("It has been EPA's longstanding position that discharges moving through groundwater to a jurisdictional surface water are subject to CWA permitting requirements if there is a "direct hydrological connection" between the groundwater and the surface water."). Brief for the EPA as Amicus Curiae, p. 12, *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018). However, as the Interpretative Statement points out, the opinion expressed in the Amicus Brief is anything but "longstanding." Rather:

> . . .there have in fact been a range of prior statements by the Agency, some of which align with

> th[e] Interpretive Statement, that the Agency has now considered in its analysis for the first time. 78 Fed. Reg. at 16820.

Regardless of the EPA's expressions of the steadfastness of its position on discharges to groundwater, the discrepancy between the positions in the Interpretative Statement and the Amicus Brief (along with a list of permitting actions described more fully in the Interpretative Statement) will likely be viewed by many practitioners as a significant deviation in EPA's interpretation of the NPDES program's scope.

In most instances, regulatory agencies are afforded deference in their interpretation of an ambiguous provision of law where Congress has delegated authority to administer the law to the agency. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 - 43 (1984). However, the deference afforded an agency is not limitless. Changes in regulatory interpretation require a more searching analysis. Consequently, while agencies have the latitude to alter their regulations and interpretations of the law as a result of an administration's policy changes, agencies must meet additional requirements in order to do so.

An agency can only significantly depart from a settled interpretation of a law or one of its regulations, where the agency provides a reasoned analysis of the departure. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance"). While the level of analysis required for a changed interpretation to survive judicial challenge is determined on a case-by-case basis (*Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)), something more than a conclusory statement about changing priorities is required. *See, e.g., Int'l Union, United Mine Workers of Am. v. U.S. Dep't of Labor*, 358 F.3d 40, 43- 44 (D.C. Cir. 2004).

In some instances, an explanation of how a new policy or interpretation would be a more proper interpretation of a statute is a sufficient rationale for a change in direction. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991). EPA seems to be striving to meet this specific criterion in the preamble to its Interpretative Statement.

The Interpretative Statement acknowledges that the EPA is departing from the interpretation of the NPDES permitting program expressed in its Amicus Brief. According to EPA, the position expressed in the Amicus Brief:

> . . .improperly rel[ies] on the broad goals of the Act to justify applying the definition of 'discharge of a pollutant'- which exclusively addresses point source discharges to navigable, ocean, and contiguous zone waters—to releases of pollutants to groundwater. 78 Fed. Reg. at 16820.

To justify its changed interpretation, EPA indicates that:

> . . .views about the general purpose of the Act should not override Congress's evident intent not to regulate discharges to groundwater of any kind. *Id.*

Protecting the validity of the Interpretative Statement under the Administrative Procedures Act, EPA indicates that:

> . . .[w]hile [it] disagrees with the reasoning of the Ninth Circuit's decision in *County of Maui*, as well as the reasoning of the Fourth Circuit in its *Kinder Morgan* decision, for reasons discussed [in the Interpretative Statement], it will nonetheless apply the decisions of those courts in their respective circuits until further clarification from the Supreme Court. 78 Fed. Reg. at 16812.

This manner of proceeding may allow EPA to avoid a challenge to the Interpretative Statement while providing guidance outside the Fourth and Ninth Circuits until the U.S. Supreme Court's decision.

Conclusion and Implications

In California, the state has effectively implemented Congress' intent by adopting a robust regulatory program for discharges to waters of the state, which includes groundwater. *See,* California's Porter-Cologne Water Quality Control Act, Cal. Water Code §§ 13000, *et seq.* Projects that must secure permit-

ting under state law include groundwater recharge, water storage and supply, recycled water, agricultural, and land disposal projects. Until now, these projects, which often involve direct or indirect discharges to groundwater, have been regulated pursuant to state law, via the issuance of state only, non-federal, Waste Discharge Requirements and/or Water Reclamation Requirements.

If the *County of Maui* decision is upheld, the scope of the CWA's NPDES permitting program will greatly expand in California (and the nation), which might overwhelm EPA and state permitting agencies. While many water quality standards are shared between the CWA and the state's water quality program, the CWA's focus on protecting the most sensitive aquatic species (that do not exist in groundwater) can result in CWA discharge standards being more stringent than state standards adopted to protect municipal drinking supplies. As such, some projects will certainly feel the effects of such a regulatory change. The shift to NPDES permits also introduces third party citizen enforcement, where none exists under California's state regulatory program.

Nicole E. Granquist is a Partner with the law firm of Downey Brand, LLP in Sacramento, and is currently the Chair of the firm's Natural Resources Department. Her practice is specialized in water quality regulation and litigation, including the negotiation of discharge permits and the defense of administrative and judicial enforcement actions.

Meghan Quinn is a Senior Associate at Downey Brand, LLP in San Francisco. Meghan has extensive experience in assisting clients with resolving issues related to the regulation of chemicals and toxics in a variety of media. Her remediation and redevelopment practice extends to assisting clients with obtaining permits, and assessing the presence and impact of onsite water features on the permitting process. She also assists clients with navigating Proposition 65 and evaluating the law's impact on their businesses.

Opinions expressed in this article are those of Ms. Granquist and Ms. Quinn alone and do not represent the views of Downey Brand, LLP or any of its clients.

REGULATORY DEVELOPMENTS

FACING SEA LEVEL RISE, CALIFORNIA COASTAL COMMISSION TESTS POWERS FOR 'MANAGED RETREAT' OF HOMES ALONG THE COASTLINE

The California Coastal Commission (Commission)is charged with protecting the state's beaches from the effects of overdevelopment. Yet with climate change projections predicting rising sea levels over the coming decades, the Coastal Commission is considering how best to approach the changing coastline in years to come. One option may result in the removal of beachfront residential homes, though the possibility may be at the limits of the Coastal Commission's authority.

Background

The Commission oversees development on over 1,100 miles of coastal land, possessing the authority (sometimes shared with local jurisdictions) to approve or deny the construction of any project within the Coastal Zone. Created in 1972 pursuant to Proposition 20, and endowed with this authority through the 1977 California Coastal Act, the Commission is charged with preserving public access to beaches. Recent estimates indicate that rising sea-levels could eliminate two-thirds of state beaches before 2100, with researchers for the U.S. Geological Survey describing rising oceans as a greater threat to the California economy than wildfires or extreme earthquakes. Effects are estimated to materialize as early as 2040.

In response, the Commission has expressed a desire for beach cities and coastal counties to create proactive plans to address climate impacts. One such plan could force homeowners to abandon beachfront homes. In addition to single-family residences, coastal infrastructure including wastewater treatment facilities, pipelines, highways and railroads may be at risk from rising sea levels. Yet the ability for the Commission to mandate that homes be abandoned to accommodate public access to changing coastlines has yet to be tested in the courts. The full authority of the Commission will need to be litigated to determine whether the agency can put limits on seawalls, and how far it may be able to go with actions that could undermine property values or render some homes unlivable in the medium term.

Upcoming Coastal Commission Hearings

The agency plans to hold hearings in July on proposed language for managing sea-level rise in residential areas, and expects to adopt a "Residential Adaptation Guidance" by the end of the year. The most recent draft details several options, including "managed retreat" which would remove homes so beaches can migrate inland rather than disappearing under the rising water. The "managed retreat" proposal already faces fierce opposition from local governments, homeowners, and the real estate industry, with the California Association of Realtors opposing the suggestion that cities create hazard zones as a first step towards a "managed retreat." Those zones would likely negatively impact property values, and could make obtaining insurance more difficult for homeowners. It may even make selling the homes more difficult.

"Managed retreat" is only one of the options being included in the upcoming Guidance, though it has understandably taken much of the focus leading up to the hearings. The Commission does not claim the authority to force the removal of any private homes, but instead hopes to encourage local governments to create and implement plans that will protect beaches against the encroaching ocean.

Cities and counties with land in the Coastal Zone have oversight authority as well under the Coastal Act, and are intended to create local coastal programs to manage development near the coastline. Cities with approved plans have primary authority to decide whether to issue new permits for development, though the Commission can challenge permits if it believes they do not comply with the Coastal Act.

Opponents of the "managed retreat" strategy argue it would amount to a taking of private property, and should be accomplished through eminent domain

rather than any local or statewide policy harming the property value of coastal residences. Yet taking a property through eminent domain requires paying the homeowner fair market value, and the value of a home which may soon be harmed due to rising sea levels may be increasingly questionable in the years to come.

Yet other options favored by local governments to date—including dumping sand on beaches to combat higher ocean levels—only work in the short term and serve only to delay the inevitable. The Commission's first guidance on sea-level rise was released in 2015, and told cities and counties of the need to address the issue in planning and permitting decisions. To date, local efforts have not been sufficient to assuage the Commission's concerns.

Sea Walls Reduce Access but Fail to Combat Sea-Level Rise

One of the primary issues in recent years has been the propagation of sea walls. In 1971, walls existed on roughly 7 percent of beaches in Ventura, Los Angeles, Orange and San Diego counties. By 1998, that number grew to 33 percent, and in 2018 it reached 38%, based on research conducted by California State University, Channel Islands. In response, the Commission has tightened policies permitting sea walls, now limiting walls to homes built before 1977, when the Coastal Act took effect. Homes built before that year which undergo major redevelopment are also considered new and must waive their right to a sea wall to obtain Commission approval.

Conclusion and Implications

The California Coastal Commission faces great opposition to its proposed "managed retreat" policies in the forthcoming "Residential Adaptation Guidance." While pushback is inevitable, the limits to the Commission's authority remain unknown until challenged in court. Rising sea levels also alter the Commission's jurisdiction, which covers the Coastal Zone, or the area extending inland roughly 1,000 yards from the mean high tide line. As sea levels rise, the Coastal Zone will move further inland, and the Commission's authority will travel with it. As the ocean moves inland, public access is required to do the same, with inevitable effects on private property. How the Commission, and the local jurisdictions it must work alongside, will handle these shifts may completely alter the way we think about public access to beaches and private property along the coastline.
(Jordan Ferguson)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT RULES ACCESS REGULATION UNDER LABOR RELATIONS ACT IS NOT AN UNCONSTITUTIONAL PERMANENT PHYSICAL INVASION OF PRIVATE PROPERTY

Cedar Point Nursery v. Shiroma, 923 F.3d 524, Case No. 16-16321 (9th Cir. May 8, 2019).

In an action by agricultural employers (Plaintiff Growers) involving the Agricultural Labor Relations Act, the Ninth Circuit was tasked with deciding whether an access regulation was unconstitutional as applied to the Plaintiff Growers. The employers challenged the regulation, which allows union organizers access to agricultural employees as an effort to encourage collective bargaining. The Growers argued that allowing union organizers access to their private property constituted a taking in violation of the Fifth Amendment and also effected an unlawful seizure of their property in violation of the Fourth Amendment. In May 2019, the Ninth Circuit affirmed the U.S. District Court's decision to dismiss the case.

The Agricultural Labor Relations Act

The Agricultural Labor Relations Act (ALRA) is a regulation that allows union organizers access to agricultural employees at employer worksites under certain circumstances. The enumerated rights of agricultural employees under ALRA include:

> . . .the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support. (Cal. Code Regs. tit. 8, § 20900(e).)

The right is not unlimited, however; it is subject to certain restrictions relating to time, place, number of organizers, purpose, and conduct.

Plaintiff Growers in this case are agricultural employers who challenged ALRA on the grounds that the regulation amounts to a *per se* taking in violation of the Fifth Amendment because it is a permanent physical invasion of their property without just compensation. They also argued the regulation effects an unlawful seizure of their property in violation of the Fourth Amendment.

The Ninth Circuit's Decision

Permanent Physical Invasion of Property Claim

Plaintiff Growers based their Fifth Amendment argument on the theory that the access regulation constitutes a permanent physical invasion of their property and therefore constitutes a *per se* taking. In rejecting this argument, the Ninth Circuit relied on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), which was a free-speech case involving a privately-owned shopping center open to the public that had a policy forbidding visitors from engaging in public expressive activity unrelated to commercial purposes. In *PruneYard*, the U.S. Supreme Court concluded that requiring a privately owned shopping center:

> . . .to permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional taking of [the PruneYard's] property rights under the Takings Clause.

The Ninth Circuit also relied on *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), to discredit Plaintiff Growers' theory that the access regulation amounted to a permanent physical invasion. In *Nollan*, the Supreme Court concluded that a permanent physical occupation occurs:

> . . .where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

That was not found to be the case here.

Additionally, the Plaintiff Growers did not suffer a permanent invasion that would constitute a *per se* taking because the sole property right affected by the regulation was the right to exclude, which the Ninth Circuit concluded is just one of the "essential sticks in the bundle of property rights." Thus, because no other property rights were affected by the access regulation, there could be no *per se* taking.

Conclusion and Implication

As for the Fourth Amendment, the court rejected that claim as well because the access regulation only allows "controlled, non-disruptive visits that are limited in time, place, and number of union organizers."

Like other cases involving constitutional issues and property rights, this decision is not very clear-cut. Although the majority concluded that the ALRA's access regulation was not a permanent physical taking or an unconstitutional seizure of property, the dissent believed that the Plaintiff Growers' complaint sufficiently alleged that the ALRA's access regulation was an unconstitutional taking. In the dissent's view, allowing ongoing access to private property, multiple times a day for 120 days a year constitutes a physical occupation. The dissent also disagreed that Plaintiff Growers needed to allege that the access regulation affected more property rights than the "right to exclude," which is a fundamental property right on its own.

The opinion may be accessed online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/05/08/16-16321.pdf
(Nedda Mahrou)

NINTH CIRCUIT ADDRESSES HOW THE NATIONAL HISTORIC PRESERVATION ACT APPLIES TO DELAYED MINING PROJECT

Havasupai Tribe v. Provencio, 906 F.3d 1155 (9th Cir. 2019)

In *Havasupai Tribe v. Provencio*, the Havasupai Tribe, along with several environmental groups (plaintiffs), challenged a mining operation (Mining Project) near the Grand Canyon, claiming the federal government failed to properly review the Mining Project pursuant to the National Historic Preservation Act (NHPA). The Mining Project was initiated in 1984 and, after a long delay, restarted in 2011. As explained below, plaintiffs made several arguments, all of which related to the contention that the steps to comply with NHPA when the Mining Project first started should not apply with the same force in 2011. The Ninth Circuit Court of Appeals upheld the lower court's finding that the Mining Project could proceed as compliant with NHPA. On May 20, 2019, the U.S. Supreme Court declined to address plaintiff's petition. Thus, the Ninth Circuit's decision can be used to provide guidance as to how the NHPA should be applied to mining projects, and perhaps other projects, that span several years and, therefore, exist throughout changes to the NHPA.

Background

The NHPA generally requires an environmental review by the federal government on any "undertaking," defined as"

> . . .a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a Federal permit, license, or approval[.] 54 U.S.C § 300320(3).

This NHPA review requirement applies to mining operations by requiring the U.S. Forest Service (USFS) to complete an Environmental Impact Statement (EIS) to address potential environmental impacts and specifically consider input from federally recognized Indian tribes. However, the NHPA creates a vast web of requirements and associated legal requirements that have changed significantly throughout the years. Further, mining operations often go through various stops and starts and therefore, such projects could begin under one set of requirements and then continue several years after, when new laws may apply. A summary of the project at issue, conducted by Energy Fuels Nuclear, Inc. and its successor entities (Developer), helps illustrate this situation.

History of the Developer's Project

In October 1984, the Developer submitted a proposed plan to operate a canyon mine in Northern Arizona (Mining Project) to mine uranium to the benefit of the USFS. In accordance with the applicable requirements of the NHPA at the time, the USFS completed an EIS regarding the Project, which considered input from federally recognized Indian Tribes. Based on this analysis, the USFS approved the Project in 1986. Thus, the Developer began construction of the mine in 1991 but stopped in 1992 due to drops in uranium pricing. The Project remained on "standby status" until August 2011, when the Developer informed the USFS that it planned to resume construction of the mine based on USFS' 1986 approval.

In response to the Developer's notification, USFS conducted three actions to ensure compliance with the NHPA: 1) a "Valid Existing Rights Determination" (VER Determination) which concluded that the Developer had a valid existing mineral right at the property based on the Developer's 1986 actions, 2) a "Mine Review" which determined that operations of the Mine could resume pursuant to the original approval, and 3) a "Reduced Historical Review" pursuant to the National Historic Preservation Act to determine the effect of the Project on Traditional Cultural Property (TCP), as determined by the National Register of Historic Places. Based on these actions, the USFS determined that the Project could commence as requested by the Developer. In response, plaintiffs filed court action, claiming USFS' review did not comply with the various NHPA requirements. Thus, the courts reviewed each legal requirement along with the USFS' analysis to determine if the Developer could proceed with the Project.

The Ninth Circuit's Decision

The VER Determination

Plaintiff's challenged the VER Determination on two points. First, plaintiffs claimed the VER Determination failed to consider all relevant cost facts and therefore violated the requirements of the NHPA. In response, USFS claimed that the plaintiff's lacked standing because the VER Determination is tied to the Mining Law of 1972, which sets forth the process by which miners establish valid rights to mineral deposits. 30 USC 30 U.S.C. §§ 22–54. The court agreed with USPS, cited to case law finding that the Mining Law is designed to address competing interests in the mining of uranium. While other statues specifically address environmental and historical concerns, the Mining Law does not and therefore, cannot be used to make an environmental challenge by an entity that does not have a claim to the mine, as plaintiffs attempted to do. *Nevada Land Action Ass'n v. U.S. Forest Service,* 8 F.3d 713, 716 (9th Cir.1993).

In addition to challenging the sufficiency of the VER Determination, plaintiffs also claimed that its completion constituted a "major federal action" and therefore, required USFS to complete a new EIS for the Project. The court also rejected this argument, following case law suggesting that an EIS is not required when the federal action does not change the "status quo." *San Luis & Delta–Mendota Water Auth. v. Jewell,* 747 F.3d 581, 646 (9th Cir.2014). Since the VER Determination did not change the Mining Project as originally approved, it did not require a new EIS.

The Reduced Historical Review

Section 106 of the NHPA requires federal agencies that issue federal licenses for an "undertaking" to evaluate the potential effects on TCPs and consult with Indian tribes that attach religious or cultural significance to areas that may be affected by the undertaking. 36 C.F.R. §§ 800.2–800.7. However, § 106 establishes multiple review processes, including what is known as a "Full Section 106 Review" and a "Reduced Section 106 Review." Because the USFS completed a Full Section 106 Review when the Project was initially assessed in 1986, the USFS concluded that a Reduced Section 106 Review was sufficient. In sum, this process included sending letters to tribe leaders in the area and offers to discuss the Project during a two-day consultation meeting.

Plaintiffs claimed that the Project required a new Full Section 106 Review because the Developer's plan to resume operations of a mine constituted a "undertaking" pursuant to the NHPA. The court rejected this claim, finding that the resumption of the mine was not an undertaking because it did not change the plan originally approved by USFS, which was subjected to a Full Section 106 Review. Thus, the court update the USFS's decision to proceed with a Reduced Section 106 Review.

Plaintiffs also argued that, even if a Reduced Section 106 Review was allowed for the Project, the review conducted by the USFS did not meet the specific requirements of the NHPA. The court first noted that USFS' decision to proceed with the Reduced Section 106 Review is entitled to deference and therefore, can only be overturned if it is deemed an arbitrary or capricious decision. The court then reviewed the USFS actions with respect to the Reduced Section 106 Review and found that it complied by the NHPA because USFS: 1) provided immediate notice of its decision, 2) initiated consultation with tribes and environmental groups, and 3) planned and attended meetings to discuss cultural and environmental impacts over several months.

Conclusion and Implications

Based on the foregoing analysis, the Ninth Circuit Court of Appeals found that USFS' process with respect to the Mining Project complied with the NHPA and the Supreme Court, without an explanation, refrained from taking up plaintiff's appeal. Although the NHPA creates a number of requirements whose application will likely depend on the specifics of the project at issue, the court's decision can provide some guidance for similar projects. Specifically, the approval process used for projects at the time of initiation may be used if the project is delated or otherwise extends over a long period of time. Unless the project at issue changes, USFS is authorized to rely heavily on the approvals provided in the past. However, it is important to note that USFS did take many additional steps to review the Mining Project once it was renewed in 2011. Thus, this case does not suggest that a delayed project can rely solely on prior approvals. Developers, as well as potential challengers to developments, can use the court's analysis to determine how NHPA may be applied to delayed projects. (Stephen M. McLoughlin, David D. Boyer)

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT STRIKES DOWN CITY'S PARK IMPACT FEES AS VIOLATING THE MITIGATION FEE ACT

Boatworks, LLC v. City of Alameda, ___Cal.App.5th___, Case No. A151063 (1st Dist. May 15, 2019).

This case involves a developer's challenge to the City of Alameda's (City) development impact fee ordinance, based on the argument that the proposed fees for park facilities lacked a reasonable relationship to the burden of future development and therefore violated the Mitigation Fee Act.

Factual Background

In 2014, the City commissioned a development impact fee nexus study as the basis for fees the City later authorized as part of its updated development impact fee ordinance. The only part of the ordinance at issue in this case relates to parks and recreation. The ordinance included a finding that there was a reasonable relationship between the need for new and improved park and recreation facilities and the type of development on which the fee would be imposed, since new residents would use parks and recreational facilities throughout the City. The park impact fees were approximately $11,000 for single-family homes and $9,000 for multifamily units. Boatworks challenged the fee, alleging that the nexus study inflated the amount of parkland fees necessary to maintain current levels of service. The trial court agreed that the City's ordinance violated the Mitigation Fee Act.

The Court of Appeal's Decision

The Mitigation Fee Act was passed in response to developers' concerns that local agencies were imposing development fees for purposes unrelated to development projects. The act requires the agency to:

> . . .identify the purpose of the fee,. . .dentify the use to which the fee is to be put,. . .determine how there is a *reasonable relationship* between the fee's use and the type of development project on which the fee is imposed,. . .[and]. . .determine how there is a *reasonable relationship* between the need for the public facility and the type of development project on which the fee is imposed. (Gov. Code, § 66001(a), italics added.)

In other words, facilities fees are justified only to the extent that they are limited to the cost of increased services made necessary by virtue of the development.

Here, the City already possessed most of the land needed for new park and recreation facilities, because some of these facilities would be on land the City acquired from the Navy at no cost. The City did not need to, nor did it plan to, use the fees to purchase new parkland; rather, it planned to use the fees to improve existing assets. Yet almost three quarters of the impact fee for parks and recreation was justified by the supposed cost of acquiring new land for parks (the nexus study estimated $28.5 million of the $39 million total). The court concluded that a fee based in significant part on costs the City would not incur, because it already had acquired ample land at no cost, does not have a "reasonable relationship to the cost of the public facility attributable to the development."

However, the court did not read the Mitigation Fee Act so broadly as to prohibit the City from imposing fees to maintain its current level of service. The new residents would not only use new parks and fields, but would also use existing park facilities, which they did not pay to build. At the same time, they would also increase the demand on the City's parklands; to the extent that new athletic fields and other facilities are necessary to maintain the existing level of service, the cost of building them is attributable to the increased demand from new residents, not to existing deficiencies in public facilities, as Boatworks argued.

Conclusion and Implications

It's always critical that a local jurisdiction is able to prove an adequate basis for its fees. Otherwise, a challenge under the Mitigation Fee Act is likely to happen. Here, the City already owned most of the land it intended to develop into new park and recreation facilities. The court determined that this important

fact meant the impact fee imposed by the updated ordinance was not reasonably related to the burden posed by anticipated new development because the City was charging fees above what it actually needed.

The opinion may be accessed online at: https://www.courts.ca.gov/opinions/documents/A151063.PDF
(Nedda Mahrou)

THIRD DISTRICT COURT UPHOLDS PROGRAMMATIC EIR ANALYZING HYDRAULIC FRACTURING AND OTHER WELL STIMULATION TREATMENTS THROUGHOUT THE STATE

Center for Biological Diversity v. California Department of Conservation, ___Cal.App.5th___, Case No. C083913 (3rd Dist. May 16, 2019).

The California Department of Conservation, Division of Oil, Gas, and Geothermal Resources (DOGGR) prepared a programmatic Environmental Impact Report (EIR) studying the environmental impacts of hydraulic fracturing and other well stimulation treatments throughout the state. After the Center for Biological Diversity (CBD) sued, the Court of Appeal upheld the EIR, finding that DOGGR had complied with Senate Bill No. 4 and the California Environmental Quality Act (CEQA).

Factual and Procedural Background

This case regards the use of hydraulic fracturing (fracking) and other well stimulation techniques to enhance oil and gas production by increasing the permeability of an underground geological formation. Finding that these techniques had not been subject to systematic study, the California Legislature passed Senate Bill No. 4 in 2013. Senate Bill No. 4 added a number of new statutory provisions to the Public Resources Code. Among various other requirements, it contemplated that DOGGR would prepare an EIR:

> . . .to provide the public with detailed information regarding any potential environmental impacts of well stimulation in the state.

The bill clarified, however, that notwithstanding the requirement that DOGGR prepare an EIR, local agencies would not be prohibited from preparing their own EIRs.

The Environmental Impact Report

DOGGR issued a notice of preparation of an EIR in November 2013, released a draft EIR in January 2015, and certified a final EIR in July 2015. For the most part, the EIR is a "programmatic" analysis of well stimulation treatments statewide. However, the EIR also includes a "programmatic level analysis" of three specific oil and gas fields: the Wilmington and Inglewood oil fields in Los Angeles County and the Sespe oil field in Ventura County.

The Certification Statement

A certification statement signed by the State Oil and Gas Supervisor accompanied the EIR. The certification statement discussed Senate Bill No. 4 and explained as follows:

> The EIR mandated by Senate Bill [No.] 4 is not an ordinary EIR, but rather is a rare, and possibly unique, CEQA document in that it was mandated by statute without any accompanying 'proposed project' requiring action by [DOGGR] or any other public agency. The subject of the EIR, 'well stimulation in the state,' is not a pending 'project' in any ordinary sense. Rather, the subject of the EIR is a set of ongoing activities likely to continue to be carried out throughout some parts of a huge and very diverse [s]tate.

Procedural History

CBD filed a petition for writ of mandate and complaint for declaratory and injunctive relief in July 2015. The operative petition asserted five causes of action: 1) violations of CEQA for approving or carrying out a program of well stimulation in the State of California in reliance on an inadequate EIR; 2) violations of Senate Bill No. 4 for failing to prepare an EIR

that meets CEQA requirements; 3) declaratory relief for CEQA violations seeking a judicial declaration that the EIR cannot be used for subsequent project approvals; 4) declaratory relief for violations of Senate Bill No. 4 seeking a judicial declaration that the EIR cannot be used to approve subsequent projects without preparing a subsequent or supplemental EIR incorporating the information contained in the study; and 5) injunctive relief.

DOGGR demurred to the petition on grounds of ripeness, asserting that it was only an informational document, unconnected to any proposed project requiring discretionary approval by DOGGR (or any other agency). The Superior Court overruled the demurrer to CBD's second through fifth causes of action but sustained the demurrer to CBD's first cause of action. The Superior Court held a hearing on the merits in August 2016, after which it issued an order denying the petition. After judgment was entered, CBD timely appealed.

The Court of Appeal's Decision

Demurrer to the CEQA Cause of Action

The Court of Appeal first addressed the demurrer, agreeing with the Superior Court that the CEQA cause of action was unripe because there was no project before DOGGR requiring approval. The court also addressed CBD's claim that, though DOGGR may not have approved a project in reliance on the EIR, it was "carrying out" a program of regulating, overseeing, and permitting well stimulation in reliance on the EIR, and that program was itself a "project" within the meaning of CEQA. The court disagreed, finding that the fact that DOGGR regulates well stimulation activities in the state does not mean that DOGGR "directly undertake[s]" such activities.

Sufficiency of the EIR

The Court of Appeal next addressed the CBD's claims that DOGGR violated Senate Bill No. 4 and CEQA by: 1) failing to incorporate a scientific study required in other portions of Senate Bill No. 4 into the EIR; 2) failing to analyze indirect or secondary impacts of well stimulation treatments; 3); failing to adopt enforceable mitigation measures; 4) failing to make findings and adopt a mitigation monitoring and reporting plan; and 5) failing to adequately analyze the use of well stimulation treatments at the Wilmington, Inglewood, and Sespe oil fields.

First, regarding the scientific study, the court found that nothing in Senate Bill No. 4 suggests that the California Legislature intended to link the preparation of the study to the preparation of the EIR. Section 3160, for instance, which requires the completion of the study, says nothing about the EIR. Likewise, § 3161, which requires the preparation of an EIR, says nothing about the study. The court also rejected CBD's argument that the EIR failed to consider the first volume of the study, which was released before the EIR was certified, as well as CBD's contention that DOGGR should have issued a subsequent or supplemental EIR in light of the second and third volumes of the study.

Second, with respect to the EIR's analysis of indirect or secondary impacts, the court concluded that DOGGR was not required to analyze indirect impacts of well stimulation in the EIR, but nevertheless adequately analyzed them on a programmatic basis, properly deferring further analysis to later, project-level EIRs. While the court acknowledged that Senate Bill No. 4's reference to "any" potential environmental impacts signals an intent to encompass a broad range of potential impacts, the court found that CBD's argument gave "short shrift" to the rest of the statute, which reflects a legislative intent to limit the scope of the EIR to well stimulation treatments only.

Third, regarding mitigation measures, the court noted that, under the "peculiar circumstances" of the case, where DOGGR was direct by the Legislature to prepare an EIR for informational purposes only, in the absence of any particular project for approval, it did not believe that DOGGR had an obligation to adopt formal mitigation measures. Regardless, the court found that it need not reach this issue because: 1) DOGGR committed to specific performance criteria to mitigate the direct effects of well stimulation treatments in a Mitigation Policy Manual; and 2) DOGGR reasonably concluded that potential mitigation measures for the indirect effects of well stimulation treatments were infeasible.

Fourth, the court concluded that a mitigation monitoring and reporting plan was not required. The court noted that such a plan is required only where an agency approves or carries out a project. Because DOGGR was not carrying out a program of well stimulation treatments, there was no require-

ment that it make findings or adopt a mitigation and monitoring plan.

Finally, regarding the field-specific analyses of the Wilmington, Inglewood, and Sespe oil fields, the court found that CBD had not identified any evidence in the record showing that the EIR's analysis of environmental impacts was deficient. The court also noted that nothing in the record suggests that the field-specific analyses would be used to shield future well stimulation treatment projects from further environmental review.

Conclusion and Implications

The case is significant because it provides important context for hydraulic fracturing and well stimulation treatments, which are of interest statewide, and contains a robust analysis of the standards applicable to a programmatic level EIR analysis. The decision is available online at: https://www.courts.ca.gov/opinions/documents/C083913.PDF
(James Purvis)

THIRD DISTRICT COURT REVERSES SUPERIOR COURT DECISION DENYING COSTS AND FEES TO PLAINTIFF FOLLOWING PETITION FOR WRIT OF MANDATE

Friends of Spring Street v. Nevada City, ___Cal.App.5th___, 245 Cal.Rptr.3d 592 (3rd Dist. Apr. 4, 2019).

After its petition for writ of mandate was granted, a plaintiff filed a memorandum of costs and moved for an award of attorneys' fees under Code of Civil Procedure § 1021.5. The Superior Court denied costs and fees, but the Court of Appeal reversed, finding that the plaintiff had achieved its primary litigation objective, the action yielded the primary relief sought, and an important public right had been enforced, even if plaintiff had not prevailed on all causes of action.

Factual and Procedural Background

This case follows from the unpublished opinion in *Friends of Spring Street v. Nevada City* (March 10, 2017, C081195). There, a plaintiff filed a petition for writ of mandate and complaint for declaratory and injunctive relief in Superior Court to challenge a determination by Nevada City that real parties in interest had the right to resume operation of a bed and breakfast facility in a residential district. Years earlier, voters had passed an initiative measure repealing provisions in the local municipal code allowing such facilities. Plaintiff also challenged a 2015 city ordinance relating to the discontinuance of nonconforming uses. The Superior Court upheld the city's ruling with respect to the bed and breakfast use and upheld the 2015 ordinance. Plaintiff appealed.

The Court of Appeal concluded that, while the Superior Court did not err in upholding the 2015 ordinance, the court did err in upholding the city's ruling regarding the bed and breakfast use at the property. On remand, the Superior Court vacated its prior decision and entered judgment in favor of plaintiff with respect to the bed and breakfast issue. The Superior Court further directed the city to file a return to the writ, indicating it had set aside its challenged decision. The city complied.

Plaintiff then moved for costs under Code of Civil Procedure § 1032 and attorneys' fees under § 1021.5. The city and real parties opposed. The Superior Court granted the motion to strike the memorandum of costs and denied the motion for fees. With respect to costs, the court found that there was no prevailing party and that plaintiff had not achieved a "practical result," noting that plaintiff had not prevailed on all of its causes of action. With respect to attorneys' fees, the court found that plaintiff "was not successful in enforcing an important public right that resulted in a substantial benefit to the public or a large class of persons." Plaintiff then appealed.

The Court of Appeal's Decision

Costs and Prevailing Party

Code of Civil Procedure § 1032(a) provides that:

> . . .[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter

> of right to recover costs in any action or proceeding.
>
> A "prevailing party" is defined to include:
>
> . . .the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant. If any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not.

Under the "in situations other than as specified" prong, a Superior Court must exercise its discretion both in determining the prevailing party and in allowing, denying, or apportioning costs. To that end, a court will compare the relief sought with that obtained, along with the parties' litigation objectives as disclosed by their pleadings, briefs, and other such sources. Thus, the Superior Court determines whether the party succeeded at a practical level by realizing its litigation objectives and the action yielded the primary relief sought in the case.

Here, the Court of Appeal found that the Superior Court's "no practical result" finding was not supported by the record. To the contrary, plaintiff's litigation resulted in an order requiring the city to set aside its decision in favor of real parties. This was success at a practical level because plaintiff realized its primary litigation objective, as shown in the pleadings, briefs, and other such sources. Further, while plaintiff did not prevail in its claims regarding the 2015 ordinance, that ordinance had been adopted after plaintiff filed suit, and the subsequent amendments to plaintiff's complaint did not change the primary relief sought in the case. Reversing the Superior Court, therefore, the Court of Appeal remanded the matter to the trial court to determine a costs award.

Attorneys' Fees

Code of Civil Procedure § 1021.5 authorizes an award of fees to a "successful party" in:

> any action which has resulted in the enforcement of an important right affecting the public interest if: a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and c) such fees should not in the interest of justice be paid out of the recovery, if any.

When the statutory criteria have been met, fees must be awarded "unless special circumstances render such an award unjust."

Here, the Court of Appeal found that the Superior Court abused its discretion in finding these elements lacking. Relying in particular on *La Mirada Avenue Neighborhood Association of Hollywood v. City of Los Angeles*, ___Cal.App.5th___ (2018), the court observed that "zoning laws concern a vital public interest," and that the California Supreme Court has "consistently recognized the importance of preserving the integrity of a locality's governing general plan for zoning," including through judicial oversight. The court also found that the public interest was high in this case because the zoning regulation that prohibited bed and breakfast uses arose from the voters' exercise of their initiative rights. Finally, the Court of Appeal rejected the argument that plaintiff had a personal economic interest and subjective motivation in bringing the action, finding that these concerns were irrelevant to the "significant benefit" inquiry. Reversing the Superior Court, the Court of Appeal remanded the matter to the Superior Court to determine whether the necessity and financial burden of private enforcement made an attorneys' fee award appropriate and, if so, the amount to be awarded.

Conclusion and Implications

The case is significant because it contains a thorough analysis of plaintiff's costs and fees claims and provides important guidance for how such claims are to be analyzed, particularly where a plaintiff has not prevailed on all causes of action. The decision is available online at: https://www.courts.ca.gov/opinions/documents/C086563.PDF
(James Purvis)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

FIRST DISTRICT COURT INVALIDATES LOCAL ORDINANCE IMPOSING GROUNDWATER EXTRACTION LIMITS

Gomes v. Mendocino City Community Services District, ___Cal.App.5th___, Case No. A153078 (1st Dist. May 14, 2019).

On May 14, 2019, the California Court of Appeal for the First Judicial District concluded that the Mendocino Community Services District (District) was authorized to impose groundwater extraction limits, but nevertheless invalidated the ordinance at issue because it was not adopted with the proper statutory procedure.

Statutory Background

The District was created for the purpose of regulating wastewater, not groundwater. In 1987, the California Legislature amended the Water Code to allow the District to, by ordinance, establish programs for the management of groundwater resources (Act). To do so, the District is subject to a multi-step process, which involves two public hearings—the first to consider the groundwater management program and the second hearing to consider any objections to the implementation of the program. If more than 50 percent of voters file protests, the proposed groundwater management program must be abandoned and the District may not consider a new program for at least one year.

Factual and Procedural Background

In 1990, the District implemented a program, requiring property owners to obtain a groundwater extraction permit in certain circumstances generally involving new development, a new well, or a change in use. Extraction exceeding the permitted amount would be subject to daily fines. This program was adopted and implemented in compliance with the procedures specified in the Water Code.

In 2007, the District implemented a water shortage contingency plan. The plan describes four levels of water shortage criteria and corresponding measures to be taken for each level. Stage 4 is considered a water shortage emergency during which all property owners of developed parcels must obtain a groundwater extraction permit with allotment. While the water shortage contingency plan was the subject of a number of public hearings, the District acknowledges that it did not comply with the procedures set forth in Water Code in implementing the plan.

In February 2014, the District declared a Stage 4 water shortage emergency. In April 2014, the District sent petitioner a letter requiring him to obtain a permit. Petitioner appealed and, following a public hearing, the District concluded petitioner was required to acquire a permit. Subsequently, the District sent petitioner a notice of violation imposing a $100 per day fine, if he did not get a permit.

The District lowered the water shortage level to Stage 1 in December 2014, and to no water shortage condition in February 2015. Nevertheless, because of the Stage 4 declaration, the District found petitioner remained subject to the permit and extraction limits—and continued sending petitioner notices of violation. After issuing these notices, the District began imposing fines which eventually totaled more than $35,000.

Petitioner filed this action seeking to invalidate the ordinance implementing the water shortage contingency plan on the basis that the District lacked the authority to impose groundwater extraction limits and alleging violations of state and federal constitutional requirements. Petitioner later amended his petition to allege that the District did not follow the proper notice and hearing procedures set forth in the Water Code. The trial court upheld the plan finding that the District had provided appropriate notice and opportunities for citizen participation and that the District's decision to require all property owners to abide by groundwater extraction limits was rationally related to a legitimate governmental purpose.

The Court of Appeal's Decision

The First District Court of Appeal rejected petitioner's argument that in the absence of express authorization to impose extraction limits, the District was prohibited from doing so. Instead, the court agreed with the District's position that the authority to manage groundwater granted by the Act inherently includes the ability to limit the quantity of ground-

water that an individual user may extract. The court reasoned that the Act did not enumerate many of the powers that other groundwater management statutes include, such as, conferring powers to require conservation practices; regulate, limit or suspend extractions; impose spacing requirements on new extraction facilities; or impose reasonable operating regulations. The fact that the Act did not specifically provide for the power to limit groundwater extraction did not indicate that the District lacked the power to use other management tools articulated elsewhere with respect to groundwater management. Nor did petitioner cite any legal authority in support of his claim. The court therefore concluded that the District's authority to manage groundwater resources included the authority to impose groundwater extraction limits.

Nevertheless, the court held the water contingency plan to be invalid because the District had failed to comply with the specific procedures in the Act. The District argued, and the trial court agreed, that the notice and hearing requirements found in the Act applied only to the initial water management program, adopted in 1990, and that subsequent actions, such as the plan at issue, were amendments to the original program. The court found that the trial court's ruling disregarded the text of the Act. Relying on the plain language of the statute, the court reasoned that the Act authorizes the District to establish program**s**, plural, indicating that the District may establish more than one program and that each is not considered an amendment of the initial program. References to procedures for adopting **a** groundwater program, rather than *the* groundwater program indicated that each program must comply with the specified procedures.

The court further reasoned that the underlying policy of the Act was to permit property owners to participate meaningfully in the development of any groundwater management program and for the District to reject any proposed program unless more than half of the voters approved. The court noted that had the District followed the required procedures before implementing the water contingency plan at issue, changes to the plan may have been made or the plan may have been altogether abandoned. The court held that the measures were therefore invalid and void. The District, however, is not precluded from re-adopting such a program in accordance with the statutorily mandated procedures.

Conclusion and Implications

The court concluded that because the District failed to follow the proper statutorily mandated procedures, the water shortage program was void. The court reasoned that the underlying policy of the Act was to permit property owners to participate meaningfully in the development of any groundwater management program and for the District to reject any proposed program unless more than half of the voters approved. Had the proper procedures been followed, changes to the plan may have been made or the plan may have been altogether abandoned. The court, however, held that the District is not precluded from re-adopting the program in accordance with the mandated procedural requirements.

While the Water Code provisions at issue in this matter are specific to the Mendocino City Community Services District, the case provides an example of application of the rules of statutory interpretation. Moreover, the court's finding that management of groundwater necessarily implies the authorization to use a wide range of management techniques may serve to broaden other entities' statutory authority to manage groundwater.

The opinion is available at: https://www.courts.ca.gov/opinions/documents/A153078.PDF
(Christina Berglund)

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 the Prudler Project (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 approved the Prudler tentative subdivision map 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

Project Approval Challenges

The court 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 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).

Tentative Map Approval Challenge

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.

Writ of *Mandamus*

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 ultimately 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)

FIFTH DISTRICT COURT HOLDS IRRIGATION DISTRICT HAS AUTHORITY TO TERMINATE WATER DELIVERY TO ENFORCE EASEMENT RIGHTS

Inzana v. Turlock Irrigation District Board of Directors,
___Cal.App.5th___, Case No. 2014325 (5th Dist. May 16, 2019).

The Fifth District Court of Appeal held that the Turlock Irrigation District (TID) Board of Directors (Board) had the authority to refuse to deliver irrigation water to Inzana for planting pistachio trees in a manner that interfered with TID's easement.

Factual and Procedural History

In February 1988, the TID Board was granted irrigation easements on three parcels to maintain and operate a pipeline, and allow TID staff ingress and egress for the purposes of maintaining the pipeline. Inzana purchased one of these parcels in 2010 and subsequently planted approximately 2,400 pistachio trees on the property.

On January 30, 2014, TID sent a letter to Inzana informing him that he was in violation of the easement, and ordering him to relocate any trees within 12 feet from the center of the pipeline. On July 9, 2014, TID sent a Notice and Order to Inzana, demanding that he remove the trees within the right-

of-way of the easement, or the District would do so at his expense. Inzana appealed the tree removal order, suggesting instead that the parties enter an agreement indemnifying TID for any actual damages that may occur, or TID pay the amount of loss for the removal of the trees. TID denied the appeal, stating that Inzana must comply with the original tree removal order, or TID may resort to enforcement measures under § 10 of its Irrigation Rules, including termination of water deliveries and removal of the trees at Inzana's expense. On February 6, 2015, Inzana appealed the decision to the Board, which was denied after a hearing. TID subsequently withheld irrigation water pursuant to their Irrigation Rules for service. Inzana filed a petition for writ of administrative mandate challenging the tree removal order and termination of water service, pursuant to Code of Civil Procedure § 1094.5 on April 29, 2015.

The Court of Appeal's Decision

Standard of Review

Inzana argued that the trial court erred by applying a substantial evidence standard of review, and that he was entitled to de novo review because the Board's decision affected a fundamental vested right. The Court of Appeal affirmed the trial court's application of the substantial evidence standard of review. The court stated that a right is a fundamentally vested right if it is possessed by and vested in the individual, rather than merely sought by the individual. A court is not likely to conclude a right is fundamental and vested if it affects purely economic interest. Inzana argued that the Board's decision to uphold the tree removal order affected his vested property right to use his land for any use not precluded by the easement. The court disagreed and stated that the Board's decision involved enforcing TID's right, and had nothing to do with any right that Inzana held. At most, Inzana incurred a reduction in profits or an increase in cost of doing business, and did not hold a fundamental vested right. Consequently, the Court of Appeal upheld the trial court's application of the substantial evidence standard of review.

Unreasonable Interference with Easement

Inzana also contended that there was no substantial evidence that he had interfered with the easement. The court disagreed and stated that:

> . . .[a]ctions that make it more difficult to use an easement, that interfere with the ability to maintain and repair improvements built for its enjoyment, or that increase the risks attendant on exercise of rights created by the easement are prohibited.

Here, the court determined the evidence showed that the trees interfered with TID's ability to maintain and repair the pipeline because they would impede the access of trucks or equipment necessary for repairs. Further, the proximity of the trees to the pipeline created a risk of future root damage.

Inzana contended that the Board failed to balance the interests of the parties in a way that maximized overall utility of the property, consistent with the easement. The court determined that the Board could not possibly have reached a middle ground in this way because the trees interfered with TID's ingress and egress rights. Thus, the court concluded that Inzana unreasonably interfered with the easement.

Validity of Irrigation Rules

TID issued the tree removal order pursuant to § 2.3.1 of its Irrigation Rules, which prohibits encroachments to TID's conduits or rights-of-way. Section 10.1 allows TID to terminate water delivery for violation of any of the Irrigation Rules.

Inzana argued that these rules exceeded the scope of TID's rulemaking authority. The court disagreed, stating that administrative agencies are accorded great weight and respect in construing statutory schemes. The Irrigation District Law affords irrigation districts authority to take any action "necessary to furnish sufficient water in the district for any beneficial use" and "put to any beneficial use any water under its control." This includes both express and implied powers necessary to carry out the main purposes of the Irrigation District Law and the irrigation district.

The court determined that while § 2.3.1 does not directly involve the distribution and use of water, it allows TID to protect its facilities, which is in accordance with TID's power to execute the Irrigation District Law for the preservation of the District, protection of its properties, and distribution of water to irrigable lands within the District. This rule allows TID to protect its rights of ingress and egress so it can maintain its property, and thereby ensure the equitable distribution of water.

As to § 10, the court stated that enforcement is also reasonably necessary to carry out the objectives of the Irrigation District Law. Terminating water services is a tool that allows TID to ensure the orderly distribution of water without resorting to litigation, and is not an inequitable means of enforcement. Additionally, the court determined TID did not abuse its discretion in terminating Inzana's water service, as an irrigation district must have inherent discretion to apply its enforcement rules. Thus, the court held that the rules were within TID's authority and were not contrary to the statute.

Conclusion and Implications

The Court of Appeal affirmed the trial court' judgment. This case clarifies that an irrigation district may refuse to deliver irrigation water to a landowner who refuses to comply with its rules of service. The court's decision is available online at: https://www.courts.ca.gov/opinions/documents/F075810.PDF (Veronika Morrison, Christina Berglund)

THIRD DISTRICT COURT REJECTS PETITIONER'S 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. 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 Court of Appeal 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, 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

Use Variances Challenge

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.

Notice Challenge

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.

Unlawful Participation in Execution of City's Laws Challenge

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.

Alleged Unlawful Termination of City Commissioners Challenge

In his fourth cause of action, McQuiston alleged that the mayor 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.

Alleged Misconduct by the City Attorney Challenge

In his fifth cause of action, McQuiston alleged that the city attorney was failing in his duty to the public to prosecute violations of the City Charter concerning the variance process and also failed to advise properly, thereby causing commissions to commit prosecutable offenses, causing court actions by injured residents and/or landowners like McQuiston. The court affirmed the demurrer to the fifth cause of action on the grounds that the city attorney's client is the City, not McQuiston. Further, that while the city attorney prosecutes crimes on behalf of the People, for the city attorney to act an underlying wrong must exist. Since the court determined that the City was not prohibited as a matter of law from issuing variances, the city attorney could not have committed misconduct or violated any duty by failing to intercede to stop the issuance of variances or by defending the City's power to do so in court.

Excessive Fees Challenge

Finally, 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 Third District Court of Appeal ultimately rejected each of McQuiston's claims. As such, McQuiston failed to state a cause of action on all six of its claims. The Court of Appeal therefore affirmed the trial courts determination and granted the City its costs on appeal.
(Giselle Roohparvar)

LEGISLATIVE UPDATE

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

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

Coastal Resources

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

AB 65 was introduced in the Assembly on December 3, 2018, and, most recently, on June 13, 2019, was amended, re-referred to the Committee on Environmental Quality and ordered to the consent calendar.

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 29, 2019, was referred to the Committee on Natural Resources and Water.

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 June 13, 2019, was re-referred to the Committee on Appropriations.

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 June 6, 2019, had its first hearing in the Committee on Natural Resources and Water cancelled at the request of its author, Assembly Member Mathis.

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 June 12, 2019, was referred to the Committees on Environmental Quality and Governance and Finance.

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

AB 394 was introduced in the Assembly on February 6, 2019, and, most recently, on June 13, 2019, was read for a second time, amended and re-referred to the Committee on 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 June 10, 2019, was read for a second time, amended and re-referred to the Committee on Housing.

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 June 6, 2019, was referred to the Committee on Natural Resources and Water.

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 June 6, 2019, was referred to the Committees on Natural Resources and Labor and Employment.

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 June 11, 2019, was re-referred to the Committee on Natural Resources.

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 June 6, 2019, was referred to the Committees on Natural Resources and the Judiciary.

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

SB 632 was introduced in the Senate on February 22, 2019, and, most recently, on May 30, 2019, was referred to the Committee on Natural Resources.

Housing / Redevelopment

AB 68 (Ting)—This bill would amend the law relating to accessory dwelling units to, among other things, i) 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, ii) 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 June 12, 2019, was read for a second time, amended and then re-referred to the Committee on Housing.

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 29, 2019, was referred to the Committee on Housing.

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 30, 2019, had its hearing postponed by the committee.

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 June 12, 2019, was referred to the Committees on Housing, Environmental Quality and Governance and Finance.

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 June 4, 2019, was read for a second time, amended and then re-referred to 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 June 11, 2019, had its hearing in the Committee on Governance and Finance postponed by the committee.

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 June 11, 2019, had its first hearing cancelled at the request of its author, Assembly Member Grayson.

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 29, 2019, was referred to the Committee on Governance and Finance.

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 June 3, 2019, was referred to the Committee on Elections and Redistricting.

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 24, 2019, was referred to the Committee on Local Government.

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: i) the number of emergency shelter beds currently available within the jurisdiction and the number of shelter beds that the jurisdiction has contracted for that are located within another jurisdiction; and ii) 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 (iii) 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 June 6, 2019, was referred to the Committee on Housing.

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 June 13, 2019, was re-referred to Committees on Housing and Community Development and Local Government pursuant to Assembly Rule 96.
(Paige Gosney)

CALIFORNIA LAND USE™
LAW & POLICY Reporter

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

CHANGE SERVICE REQUESTED

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