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CALIFORNIA LAND USE™
LAW & POLICY Reporter

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LAND USE NEWS

TRUMP ADMINISTRATION UNDERTAKES HISTORIC ROLLBACK OF ENVIRONMENTAL PROTECTIONS FOR NATIONAL PARKS

Since January 2017, the Trump administration has undertaken over 100 actions that have the potential to threaten America's National Parks. From rollbacks of the federal Clean Air Act and Clean Water Act to exemptions allowing drilling and mining within previously protected lands. As of July 2019, the Trump administration has opened more than 18.3 million acres of public land up for drilling and mining activities. Even the Fourth of July celebration on the National Mall resulted in reducing the budget for National Park repairs and may result in lower staffing at several National Parks going forward.

Background

The history of preservation in the United States is a constant pattern of one step forward and two steps back. In 1892, less than two years after Yosemite was established, Congress authorized wagon road and turnpike construction in Sequoia National Park. A little over a decade later, in 1905, Congress decreased the acreage of Yosemite by nearly a third to permit forestry and mining. The competing goals of preservation and industry have traded blows for well over a century. Yet the issue of natural resources has taken increasing prominence as researchers warn of the dangers of climate change.

The Trump administration reduced the 1.35 million-acre Bears Ears National Monument by 85 percent roughly a year after it was established, in order to allow drilling on much of the previously protected land. The administration also opened Arctic National Wildlife Refuge to oil and gas development in 2017. Such rollbacks appear to be increasing, according to a study published in *Science* in May. For the study, a group of international researchers gathered and examined roughly 3,700 cases in 73 countries over the past 150 years in which legal protections for natural areas such as parks and preserves were downgraded, downsized, or removed entirely. Perhaps more surprisingly, the study found that roughly two-thirds of those rollbacks have occurred since 2000, and that a majority of them were used to permit industrial-scale resource extraction or infrastructure projects, including roads, dams, and pipelines.

Trump Administration Rollbacks

Three actions undertaken by the Executive Branch in July 2019 alone offer a good glimpse of the systemic rollbacks occurring across the federal government. On July 30, 2019, the U.S. Environmental Protection Agency (EPA) withdrew proposed protections for Alaska's Bristol Bay in order to allow the Pebble Mine project to move forward. Earlier that week, the Bureau of Land Management released a final plan to manage the remaining acreage of Bear Ears National Monument (after the removal of over 1 million acres from protection), pushing out the final implementation of a Recreation Area Management Plan for at least five years, during which period inevitable damage and degradation to the monument will occur. And the Department of the Interior diverted nearly $2.5 million in National park fee revenue to pay for President Trump's Fourth of July celebration on the National Mall. That funding, collected from park visitor fees, is a significant funding source for national park maintenance and service projects.

All of that occurred within just one month. Yet in June, the EPA released its final replacement for the Clean power Plan, the Affordable Clean Energy Rule, which no longer requires power plants to reduce carbon dioxide emissions. The Clean Power Plan, unveiled by the Obama administration in 2015, established national limits on carbon dioxide pollution, yet the Trump administration's replacement rule strips domestic efforts to limit carbon dioxide emissions from the power plant sector. The EPA's own analysis indicates that Americans will face more premature deaths, asthma attacks, and respiratory diseases as a result of the Affordable Clean Energy Rule. Any one of these actions, in isolation, would have negative effects on National Parks and on the environment more broadly. Collectively, they reveal a pattern and

practice of ignoring environmental protections in order to assist the energy industry.

Conclusion and Implications

The push and pull of environmental protections and industry deregulation is not a new story in America. But the breadth of the rollback under the current administration is especially worrisome, given how crucial this period is in the global effort to combat climate change. National Parks not only preserve scenic vistas and natural resources, they also protect endangered species and sustain at-risk ecosystems. Efforts to undermine existing protections are frequently opposed individually, but only through a look at the collective toll the Trump administration's environmental policies are taking on protected lands can the full scope of the issue come to light.
(Jordan Ferguson)

REGULATORY DEVELOPMENTS

NEW BIOLOGICAL OPINIONS ANTICIPATED TO IMPACT THE COORDINATED OPERATION AND WATER SUPPLY OF THE STATE'S LARGEST WATER PROJECTS

In August 2016, the U.S. Department of the Interior, the U.S. Bureau of Reclamation (Bureau) and the California Department of Water Resources (DWR) requested reinitiation of the Endangered Species Act (ESA) § 7 consultation with the United States Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) on the Coordinated Long-Term Operation of the federal Central Valley Project (CVP) and State Water Project (SWP). It is anticipated that pursuant to this consultation process, FWS and NMFS will soon issue new Biological Opinions for the coordinated long-term operation of the CVP and SWP. The new Biological Opinions may have significant implications for the operations and water supplies of the CVP and SWP—the two largest water storage and delivery systems in the State of California.

Background

The CVP is the largest water storage and delivery system in California and provides water to irrigate approximately 3.25 million acres of farmland and supplies water to more than 2 million people through long-term water contracts. The SWP is the largest state-operated water supply project in the United States. The CVP and SWP have been operated pursuant to a series of cooperative operating agreements between the Bureau and DWR.

The Bureau's operation of the CVP is subject to numerous laws, including the federal ESA, 16 U.S.C. § 1531 *et seq*. Under the ESA, since the early 1990s, the Bureau has engaged in what are referred to as "Section 7" consultations (16 U.S.C. § 1536) with the FWS and the NMFS. At the conclusion of these Section 7 consultations, FWS and NMFS have issued Biological Opinions regarding the potential effects of the coordinated long-term operation of the CVP and SWP on certain species listed under the ESA and those species' critical habitat.

The coordinated long-term operations of the CVP and SWP are currently subject to two Biological Opinions issued pursuant to § 7 of the ESA—a 2008 Biological Opinion issued by FWS and a 2009 Biological Opinion issued by NMFS. The 2008 Biological Opinion concluded that the proposed coordinated operations of the CVP and SWP were likely to jeopardize the continued existence of the ESA-listed delta smelt and included a Reasonable and Prudent Alternative (RPA) designed to allow continued operations through various operating prescriptions. Likewise, the 2009 Biological Opinion concluded that the proposed coordinated operations of the CVP and SWP were likely to jeopardize the continued existence of certain ESA-listed salmonid species and included a RPA with several operating restrictions. The prescriptions in those two Biological Opinions have been estimated to have reduced the long term average annual combined deliveries by the CVP and SWP by about one million acre-feet.

Anticipated New Biological Opinions

In August 2016, the Bureau and DWR jointly requested reinitiation of ESA Section 7 consultation with FWS and NMFS on the Coordinated Long-Term Operation of the CVP and SWP, and FWS and NMFS accepted the reinitiation request. According to the Bureau, it requested reinitation of consultation based upon the apparent decline in the status of several listed species, new information related to recent multiple years of drought, and the evolution of best available science. The new Biological Opinions are nearing completion and are anticipated to be released within the next few months.

Meanwhile, on July 11, 2019, the Bureau issued a Draft Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*.:

> . . .evaluating the potential long-term direct, indirect, and cumulative impacts on the environment that could result from implementation of modifications to the continued long-term operation of the CVP and SWP. (Draft EIS at p. 1-2.)

According to the Bureau, the:

> . . .EIS evaluates alternatives to maximize water supply deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements and to augment operational flexibility by addressing the status of listed species. (*Id.* at p. 1-1.)

The Draft EIS was available for public review, and the Bureau was accepting comments on the draft until August 26, 2019. The Bureau is not expected to decide on changes to CVP operations until late in 2019 or early 2020. The conclusions of the new Biological Opinions will certainly inform that decision.

Conclusion and Implications

If the new Biological Opinions conclude that the proposed coordinated operations of the CVP and SWP are likely to jeopardize the continued existence of ESA-listed species, they will contain RPAs designed to modify proposed operations so as to avoid a jeopardizing effect. The impact of the biological opinions' prescriptions on CVP and SWP water supply, whether it will increase or decrease, cannot be determined until the Biological Opinions issue.

NEPA requires that the Bureau analyze any new operating requirements contained in the Biological Opinions' RPAs for potentially significant environmental impacts. If the RPAs included in the new Biological Opinions impose new requirements that fall outside of the range of alternatives for operations analyzed in the Bureau's Draft EIS, the Bureau may be required to supplement its NEPA analysis. The coming months will therefore be very important in determining what new rules will govern CVP and SWP operations, and how CVP and SWP water supplies will be affected.

The only certainty is that litigation will follow. The final word on the next set of ESA rules governing CVP and SWP operations likely will not be known for a couple of years or more.
(Rebecca Harms, Dan O'Hanlon)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES FINAL CALIFORNIA WATER PLAN UPDATE 2018

The California Department of Water Resources (DWR) publishes a California Water Plan Update every five years as required by the California Water Code. DWR recently released its latest update—the Final California Water Plan Update for 2018 (Plan). The Plan outlines the state's strategy for sustainably managing and developing California's water resources for current and future generations. It also presents the status and trends of California's water-dependent natural resources, water supplies and agricultural, urban and environmental water demands.

Background

DWR updates the California Water Plan Update every five years to incorporate the latest information and science. The Plan and the updating process provide a way for stakeholder groups to collaborate on findings and recommendations and make informed decisions regarding California's water resources. Policy makers, elected officials, government agencies, tribes, water and resource managers, businesses, academia, stakeholders and the general public all look to the Plan to inform decision-making.

While the Plan itself cannot mandate actions or authorize spending for specific actions, and while it does not make project or site-specific recommendations, it does require policy and lawmakers to take definitive steps to authorize the specific actions proposed and appropriate funding needed for their implementation. The ultimate goal for the Plan and each update is to receive broad input and support from Californians, meet California Water Code requirements, guide state investments and advance integrated regional water management and regional sustainability.

The Need for a Visionary Plan Moving Forward in California

The 2018 Plan update states that California has experienced significant effects of climate change since the last Plan update in 2013. Devastating drought, widespread flooding, sea level rise and historic wildfires have all been challenges California has faced

over the past several years. In the past decade alone, California weathered the deepest drought and wettest period on record. These two extremes provide a good picture of the volatility and uncertainty of California's hydrology. The 2018 Plan update recognizes the need to adapt to these challenges by encouraging a greater collaborative and coordinated statewide water management throughout the state.

The Revisions and California's Water Roadmap to 2024

The most significant change in the 2018 Plan update is DWR's awareness and sensitivity to climate change and its anticipated impact on water use in California. Within this context, the 2018 Plan update focuses on six primary goals and recommends many specific priority actions within those goals:

•Improve Integrated Watershed Management
Priority actions include: strengthen state support for vulnerable communities, support the role of working landscapes, and promote flood-managed aquifer recharge and sustainable groundwater management policies. The Plan recommends that DWR provide technical, planning and facilitation assistance for local and regional entities to evaluate opportunities and implement projects using flood flows and alternative water supplies for managed aquifer recharge.

•Strengthen Infrastructure Resiliency
The primary priority action for this goal is improving infrastructure and promoting long-term management. It prioritizes utilizing natural infrastructure and promoting partnerships, and strongly supports local and regional efforts to build water supply resilience across California.

•Restore Ecosystem Functions
Priority actions include: addressing legacy impacts, facilitating multi-benefit water management projects, and quantifying natural capital.

•Empower Under-Represented Communities
Priority actions include: expanding tribal involvement in regional planning efforts and engaging proactively with disadvantaged community liaisons. The Plan addresses California's vulnerable communities that lack access to a safe and reliable water supply and suggests that the state work with disadvantaged community liaisons to provide technical, managerial and financial expertise to prepare proposals for infrastructure and operations and maintenance improvement programs.

•Improve Inter-Agency Alignment and Address Regulatory Challenges
Priority actions include: incorporating ecosystem needs into water management infrastructure planning and implementation, streamlining ecosystem restoration project permitting, and addressing regulatory challenges.

•Support Adaptive Management and Long-term Planning
Priority actions include: facilitating comprehensive water resource data collection and management, coordinating climate science and monitoring efforts, improving performance tracking, developing regional water management atlas, reporting on outcomes of projects receiving state financial assistance, expanding water resource education, and exploring ways to develop stable and sufficient funding. It stresses the importance of the state assisting local agencies with their development of long-term solutions for infrastructure management, including water supply reliability, flood risk reduction, aquifer replenishment and remediation, and surface and groundwater storage. The Plan also underscores that effective water management requires access to reliable data and information, and as a result, recommends that state agencies should maintain data management best practices and work with local agencies to improve data gathering, accessibility, quality and related decision-support tools.

Conclusion and Implications

In April 2019, Governor Newsom signed an executive order calling for state agencies to work together to form a comprehensive strategy for building climate-resilient water systems through the 21st Century. The Plan's focus on regional and local partnerships reflects a timely response to that executive order and its important role in informing and better aligning state and local agencies, water suppliers and stakeholders on the best ways to build California's water resilience strategy as we enter a new decade. (Chris Carrillo, Michael Duane Davis)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT DELIVERS MAJOR PROPERTY RIGHTS VICTORY

Knick v. Township of Scott, Pennsylvania, ___U.S.___, 139 S.Ct. 2162 (U.S. June 21, 2019).

On June 21, 2019, the United States Supreme Court delivered a major property rights victory by giving property owners a direct path to federal court that had been closed since 1985. In a 5-4 decision in *Knick v. Township of Scott, Pennsylvania*, the Supreme Court held that a property owner has an actionable federal claim under the Takings Clause of the Fifth Amendment, "when the government takes his property without paying for it" and may "bring his claim in federal court under [42 U.S.C] § 1983 at that time."

This decision overrules *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, (1985) (*Williamson County*) where the Supreme Court held that a property owner had not suffered a Fifth Amendment violation unless his claim for just compensation was first denied by a state court under state law. The decision also eliminates its 2005 decision in *San Remo Hotel, L. P. v. City and County of San Francisco*, 545 U.S. 323 (2005) (*San Remo*), which caused the most difficulties in takings jurisprudence.

The majority opinion and the minority opinion both paint different pictures of the impact of this decision. The majority minimizes the impact of its holding, stating that it:

> . . .will not expose governments to new liability [and] will simply allow into federal court takings claims that otherwise would have been brought as inverse condemnation suits in state court.

While the dissent states:

> Today's decision sends a flood of complex state-law issues to federal courts. It makes federal courts a principal player in local and state land-use disputes.

Both are, in part, correct.

Background

In *Knick v. Township*, Scott Township in Pennsylvania (Township) passed an ordinance in 2012 requiring all cemeteries to be kept open and accessible to the public during daylight hours. In 2013, a Township officer notified Rose Mary Knick (Knick) that "several grave markers" were on her property and that she was violating the Township's ordinance by failing to open her land to the public during the day. Knick sought declaratory and injunctive relief in state court claiming a "taking." The state court did not rule on Knick's request because "she could not demonstrate the irreparable harm necessary for equitable relief" as a result of the Township's withdrawal of its violation notice pending the court proceedings.

Knick then filed an action in the U.S. District Court for the Middle District of Pennsylvania under 42 U.S.C. § 1983. Knick alleged that the ordinance violated the Fifth Amendment's Takings Clause. The District Court, following *Williamson County*, dismissed Knick's claim and the Third Circuit Court of Appeals affirmed (also following *Williamson County*). The U.S. Supreme Court granted review to:

> . . .reconsider the holding of *Williamson County* that property owners must seek just compensation under state law in state court before bringing a federal takings claim under Section 1983.

The Supreme Court's Decision

The Majority Identifies a 'Catch-22' and Overrules *Williamson County*

The majority's decision to overrule Williamson County was based in part on the widely accepted premise that takings plaintiffs were faced with a "Catch-22" as a result of *Williamson County* and the Supreme Court›s 2005 decision in *San Remo*. In San

Remo, the Supreme Court held that "a state court's resolution of a claim for just compensation under state law generally has preclusive effect in any subsequent federal suit." Thus, a takings plaintiff:

> . . .cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court.

The majority and dissent also had opposing interpretations on the text of the Takings Clause: "nor shall private property be taken for public use, without just compensation." Specifically, they disagreed on what action gives rise to a federal claim. According to the majority, it is the taking itself that gives rise to a federal claim. The dissent, however, opined that a Fifth Amendment violation only occurs if: 1) there is a taking *and* 2) there is a failure to provide just compensation, with the second condition only satisfied "when the property owner comes away from the government's compensatory procedure empty-handed." The disagreement between the majority and dissent is highlighted by the following exchange.

The majority decision stated:

> . . .[the Takings Clause] does not say: 'Nor shall private property be taken for public use, without available procedure that will result in compensation.'

Meanwhile, the minority position was as follows:

> [H]ere's another thing the [Takings Clause] does not say: 'Nor shall private property be taken for public use, without advance or contemporaneous payment of just compensation, notwithstanding ordinary procedures'

The majority ultimately opined that *Williamson County* was wrong and that its "reasoning was exceptionally ill founded and conflicted with much of our takings jurisprudence." As a result, the majority held that *Williamson County's*:

> . . .state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled.

The majority clarified that a government need not provide compensation in advance in order to protect its activities from injunctive relief as "long as the property owner has some way to obtain compensation after the fact." But even with such a procedure in place, "the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation" and may file his claim in federal court at that time.

Conclusion and Implications

What about the potential impacts of the decision in California? Only time will tell how California plaintiffs and California federal courts will apply inverse condemnation claims. For example, will plaintiffs first seek to adjudicate ancillary claims for invalidation of land use regulations before seeking federal court relief? How will the federal courts apply the California courts' requirements that to avoid the chilling effect of inverse condemnation claims on planning, plaintiffs must first seek to invalidate challenged land use regulations? While invalidation of the challenged land use regulations is not a prerequisite to an inverse condemnation claim in federal courts, it is possible that lack of an attempt at invalidation might have an impact on the claim.

Plaintiffs suing in state court first, will have to reserve their federal claims to have a "second bite" at the apple if they lose in California. Thus, due to the many state court claims a plaintiff can bring, will federal courts stay the federal claims and remand the state law claims to state court? There are a number of procedural issues that now have to be addressed.

Furthermore, the removal of the *Williamson County* procedural hurdle may not be a panacea for all takings claims. For example, California court precedent under rent control laws as to what is meant by a constitutional "fair return" may significantly impact whether there is a taking of property rights. As another example, California court precedent under the Coastal Act may limit whether mistaken assertion of Coastal Commission jurisdiction under the Coastal Act constitutes a taking. The substantive aspects of each particular inverse condemnation claim should be considered before filing in federal court.
(Boyd Hill, Nedda Mahrou)

TRIBE INTERVENES AS REQUIRED PARTY AND CASE DISMISSED BASED ON TRIBAL SOVEREIGN IMMUNITY

Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs, ___F.3d___, Case No. 17-17320 (9th Cir. July 29, 2019).

In *Dine Citizens Against Ruining Our Environment v. Bureau of Indian Affairs*, the Ninth Circuit Court of Appeals affirmed a U.S. District Court for the District of Arizona decision to dismiss an action because a tribal corporation was a required party, but could not be joined because of tribal sovereign immunity. Similar assertions of tribal immunity and indispensable party status may arise in disputes over rights to surface and groundwater, in light of tribes' increasingly active assertion of their water rights.

Background

The Navajo Mine (Mine) is located on tribal land of the Navajo Nation, a federally recognized Indian tribe. The U.S. Department of Interior's Office of Surface Mining Reclamation and Enforcement issued a surface mining permit to the Mine pursuant to the Surface Mining Control and Reclamation Act of 1977. The Mine produces coal that the Four Corners Power Plant (Power Plant), also located on Navajo Nation tribal land, uses to generate electricity. Electric transmission lines run from the Power Plant to lands reserved to the Navajo Nation and Hopi Tribe.

In 2013, the Navajo Nation Council created the Navajo Transitional Energy Company (NTEC) to purchase the Mine from the private company that owned and operated it. The Power Plant is owned by several utility companies and operates subject to a lease agreement with the Navajo Nation. The agreement provides that the Mine sells coal only to the Power Plant, and the Power Plant buys coal only from the Mine. The Navajo Nation authorizes rights-of-way easements over Navajo lands for the Power Plant, and the Navajo Nation and Hopi Tribe authorize rights-of-way easements for transmission lines across tribal lands.

In 2011, the lease for the Power Plant operations was extended, causing the previous Mine owner to seek to renew the existing surface mining permit and apply for a new surface mining permit to expand operations. The lease amendment and its rights of way, and the permits were dependent on approvals from the federal defendants, who eventually granted them. NTEC, after taking ownership of the Mine, proceeded to make "significant financial investments" in its operations. At issue in the case were the federally approved leases and permits that permitted Mine and Power Plant operations expected to generate an estimated $40-60 million of annual revenue for the Navajo Nation.

Procedural History

In April 2016, plaintiffs Dine Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Amigos Bravos, Sierra Club, and Center for Biological Diversity (plaintiffs) sued the Bureau of Indian Affairs (BIA), the U.S. Department of Interior, the U.S. Department of Interior's Office of Surface Mining Reclamation and Enforcement (OSMRE), the U.S. Bureau of Land Management (BLM), the U.S. Fish and Wildlife Service, and David Bernhardt, the Secretary of the U.S. Department of the Interior, (federal defendants) challenging federal defendants' approvals that allowed the Mine and Power Plant to continue operations.

Plaintiffs alleged that: 1) the U.S. Fish and Wildlife's Biological Opinion violated federal Endangered Species Act (ESA) requirements; 2) the BIA, OSMRE, and BLM violated the ESA by relying on the flawed Biological Opinion; and 3) federal defendants violated the National Environmental Policy Act (NEPA) because they crafted "an unlawfully narrow statement of purpose and need for the project in the EIS," did not consider reasonable alternatives, and did not take the required "hard look" at mining complex impacts.

Plaintiffs requested that the court declare that the federal defendants violated the ESA and NEPA, order U.S. Fish and Wildlife to set aside its Biological Opinion, and order federal defendants to set aside their Record of Decision and Environmental Impact Statement (EIS) and remand for the agencies to further analyze their decisions. Plaintiffs' also sought injunctive relief, including stopping federal defendants from approving mining operations until they complied with NEPA.

NTEC filed a motion to intervene "for the limited purpose" of filing a motion to dismiss pursuant to Federal Rules of Civil Procedure §§ 19 and 12(b)(7). NTEC argued it was a required party because of its financial interest in the Mine and, because it could not be joined based on its tribal sovereign immunity, the action must be dismissed. The district court granted both motions. Plaintiffs appealed.

The Ninth Circuit's Decision

NTEC Was a Required Party That Could Not Be Joined Because of Its Tribal Sovereign Immunity

The Ninth Circuit agreed with NTEC that it was a required party and joinder was mandatory because NTEC had a legally protected interest in the lawsuit's subject matter and NTEC's interests would be impaired if the lawsuit proceeded without it. Plaintiffs' lawsuit, if successful in vacating the federal defendants' approvals of the Biological Opinion and related environmental documents, could have retroactive effects that would impair NTEC's interests in the lease, rights-of-way, and surface mining permits relied on to operate the Mine and Power Plant. The court determined that:

> . . .without the proper approvals, the Mine could not operate, and the Navajo Nation would lose a key source of revenue in which NTEC has already substantially invested.

The Ninth Circuit determined that under Rule 19, NTEC could not feasibly be joined as a party to the litigation because of tribal sovereign immunity. The court considered the Rule 19(b) factors and a "wall of circuit authority" that favors "dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity" and concluded that the litigation could not continue without NTEC.

The "public rights" exception, which allows litigation to continue without a necessary party when litigation "seeks to vindicate a public right," did not apply. The court focused on "the practical effect" of the litigation on NTEC's rights. "[T]he question at this stage must be whether the litigation *threatens* to destroy an absent party's legal entitlements." Even though plaintiffs sought to require a redo of the NEPA and ESA process, it was with the implication that federal defendants should not have approved the mining activities, which presented a threat to NTEC's rights.

The Ninth Circuit noted that by not applying the public rights exception, it:

> . . .arguably 'produce[s] an anomalous result' in that '[n]o one, except [a] Tribe, could seek review of an environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on [that tribe's] lands.'

The court, however, concluded that:

> . . .[t]his result … is for Congress to address, should it see fit, as only Congress may abrogate tribal sovereign immunity.

Conclusion and Implications

How *Dine Citizens* will be applied in other contexts, including water rights disputes, remains to be seen. *Dine Citizens* favors tribes' assertion of sovereign immunity and Rule 19 to halt litigation where that suits their interests. The Ninth Circuit relied on a "wall of circuit authority" favoring dismissal of actions under the Rule 19(b) factors when a tribe asserts its immunity. As the *Dine Citizens* court noted, the practical effect of its decision to not apply the "public rights" exception to avoid dismissal of the case may mean only a tribe may seek judicial review of some federal agency decisions. But, the court noted, any disagreement with that outcome is best addressed to Congress, which has granted tribes sovereign immunity.

(Jenifer Gee, Dan O'Hanlon)

EIGHTH CIRCUIT DENIES PRIVATE RIGHT OF ACTION UNDER NEPA AGAINST STATE AGENCY REGARDING PROPOSED LIGHT RAIL TRANSIT PROJECT

Lakes & Parks Alliance of Minneapolis v. Federal Transit Administration, 928 F.3d 759 (8th Cir. 2019).

The Eighth Circuit Court of Appeals reversed a U.S. District Court's decision to *imply* a private right of action against a state agency under the National Environmental Policy Act (NEPA). This decision affirmed the sole remedy for alleged NEPA violations in the Eighth Circuit to be judicial review under the Administrative Procedure Act (APA).

Factual and Procedural Background

The Metropolitan Council (Council) is a regional transportation agency in Minnesota tasked with planning and constructing the proposed Southwestern Light Rail Transit Project (Transit Project). The Transit Project proposed a transit line connecting downtown Minneapolis to the southwestern Twin Cities suburbs. The Lakes Park and Alliance of Minneapolis (LPA) is a not-for-profit group of residents who live in or frequently use the area near the proposed construction site, including the Kenilworth Corridor. Minnesota state law requires the Council to seek approval of each city and county along the Transit Project's route before commencing construction. Further, because the SWLRT is partially funded by the Federal Transit Administration (FTA), NEPA requires the Council to prepare an Environmental Impact Statement (EIS) of the project before it is completed.

The Council first took actions to prepare an EIS for the Transit Project in 2008. In early 2014, the Council began seeking municipal consent for a plan that routed the Transit Project through the Kenilworth Corridor. While the environmental review was ongoing, the LPA sued the Council and the FTA alleging violations under NEPA, the Minnesota Environmental Policy Act, and Minnesota municipal consent statutes.

The LPA filed a motion for summary judgment, which was denied by the District Court. Then after, both the FTA and the Council filed motions to dismiss. The District Court granted the FTA's motion based on sovereign immunity, and dismissed most claims against the Council but preserved a narrow cause of action against it under NEPA. The LPA's narrow claim alleges that the Council pursued a single politically expedient course for the Transit Project in violation of NEPA's environmental review requirements.

In 2016, the Council released the final EIS and the FTA issued a record of decision (ROD), determining that the EIS satisfied the requirements under NEPA. The parties then filed competing motions for summary judgment. The LPA re-asserted the same narrow claim. The Council's argument was two-fold: 1) it complied with NEPA; and 2) and the issuance of the ROD mooted the LPA's claim. The District Court denied the LPA's motion and granted the Council's motion on the merits.

The LPA appealed the District Court's decision on the merits, and requested the appeals court to affirm the District Court's recognition of an implied cause of action under *Limehouse*, 549 F.3d 324 (4th Cir. 2008), but reverse the court's analysis, and instead find that the Council violated NEPA. The Council asserted that the District Court erred in implying a private right of action under NEPA.

The Eighth Circuit's Decision

The Eighth Circuit determined that NEPA alone does not provide a right of action. Rather, a court's jurisdiction is limited to judicial review under the APA, which provides for review of final agency action for which there is no other adequate remedy in court:

> Because "private rights of action to enforce federal law must be created by Congress," we must "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). . . ."the Eighth Circuit, along with other circuits, has repeatedly held that NEPA's statutory text provides no right of action." *Lakes & Parks*, 91 F.Supp.3d at 1120; see, e.g., *Sierra Club v. Kimbell*, 623 F.3d 549, 558-59 (8th Cir. 2010). . . .

The Circuit Court also determined the District Court circumnavigated Eight Circuit Court precedent by relying on the Fourth Circuit's decision in *Limehouse* to *imply* a right of action under NEPA. In *Limehouse*, there was still a federal agency party to the suit, the final EIS and ROD had been issued, and Fourth Circuit precedent supported a NEPA claim against a state defendant to preserve environmental status quo pending federal review. The Eighth Circuit reasoned that *Limehouse* was inapposite to the present case. Unlike in *Limehouse*, the Council was the sole defendant, LPA filed suit prior to any final agency action, and Eighth Circuit precedent expressly rejected the viability of a NEPA cause of action outside the APA framework, especially when the only defendant is a state agency. Finally, the Circuit Court reasoned that even if a *Limehouse*-like action had been appropriate, such action was moot. Without the FTA in the present action, the Council cannot invalidate the ROD and conduct the environmental review again. The Eighth Circuit reversed and remanded the lower court's decision with instructions to dismiss the case.

Conclusion and Implications

This case affirms the Eighth Circuit's position that the National Environmental Policy Act does not recognize an implied private right of action. In so doing, the court affirmed that the sole remedy for alleged NEPA violations in the Eighth Circuit to be judicial review under the Administrative Procedure Act. https://ecf.ca8.uscourts.gov/opndir/19/07/181686P.pdf (Nathalie Camarena, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

CALIFORNIA SUPREME COURT HOLDS LOCAL ORDINANCE REGULATING CANNABIS ACTIVITY MAY BE SUBJECT TO CEQA REVIEW

Union of Medical Marijuana Patients, Inc. v. City of San Diego, ___Cal.5th___, Case No. S238563 (Cal. Aug. 19, 2019).

On August 19, 2019, the California Supreme Court issued a unanimous 38-page opinion, authored by Chief Justice Cantil-Sakauye, in *Union of Medical Marijuana Patients, Inc. v. City of San Diego*, holding that while zoning amendments are not, as a matter of law, always a project under the California Environmental Quality Act (CEQA) the City of San Diego's ordinance regulating the siting and operations of certain cannabis-related activity was potentially subject to CEQA review under *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (*Muzzy Ranch*). Concluding the Fourth District Court of Appeal misapplied the *Muzzy Ranch* test for determining whether a proposed activity has the potential to cause an environmental change as described in Public Resources Code § 21065, the Supreme Court remanded the case for further consideration.

The San Diego Ordinance Regulating Cannabis Dispensaries

In 2014, the City of San Diego (City) enacted Ordinance No. O-20356 (Ordinance) authorizing medical cannabis dispensaries to be established within the City. Pursuant to the authority granted to local jurisdictions under Health and Safety Code § 11362.83—a provision of the California Uniform Controlled Substances Act's Medical Marijuana Program—the City imposed certain restrictions on the siting and operation of the dispensaries by amending the City's zoning ordinances.

Under the Ordinance, dispensaries were restricted to two of six types of commercial zones, two of four types of industrial zones, and certain planned districts. Dispensaries were prohibited in residential and agricultural zones, within 1,000 feet of parks and schools, and within 100 feet of residential zones. Furthermore, the City limited the number of dispensaries to four in each of the City's nine districts. The zoning restrictions had the effect of limiting two districts to a maximum of three dispensaries and foreclosed one district from having any dispensaries. In addition to these locational limits, the Ordinance imposed restrictions on signage and hours of operation.

The Patient Advocacy Group's Appeal for CEQA Review

Prior to the adoption of the Ordinance, patients' rights group, Union of Medical Marijuana Patients (UMMP), submitted two comment letters to the City requesting a CEQA review of the then-proposed Ordinance because of its potential impacts on the environment. UMMP's letters alleged potential impacts on the environment including: 1) increased emissions from medical cannabis users having to travel further due to the siting restrictions, 2) an increase in the "inherently agricultural practice" of medical cannabis users growing their own cannabis as a result of the siting restrictions, and 3) the "unique development impacts" and intensification of impacts because of the limited permissible dispensary locations.

The City adopted the Ordinance with the finding that the Ordinance was not a "project" under CEQA and that:

> . . .adoption of the ordinance does not have the potential for resulting in either a direct physical change in the environment, or reasonably foreseeable indirect physical change in the environment.

UMMP then challenged the adoption of the Ordinance under CEQA.

The Supreme Court's Decision

Zoning Amendments Are Not Necessarily CEQA Projects as a Matter of Law

CEQA review is required for "projects" contem-

plated by a public agency. "Project" is defined in Public Resources Code § 21065 as an activity that is undertaken by, funded by, or requiring the approval of a public agency that:

> . . .may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.

UMMP argued that in addition to this definition, zoning amendments are "projects" per se because they are one of the types of "discretionary projects" enumerated in Public Resources Code § 21080. The Supreme Court rejected this theory that zoning amendments and other types of activities listed in Public Resources Code § 21080 are subject to CEQA as a matter of law. To support this conclusion, the Court looked to the CEQA Guidelines' interpretation of what constitutes a "project" for purposes of CEQA. CEQA Guidelines § 15378 interprets a "project" to be made up of two distinct elements: 1) an activity undertaken by a public agency, that 2) has an actual or potential to cause a change to the environment.

The Supreme Court found that interpreting Public Resources Code § 21065 to mean that all activity listed thereunder to always be a project as a matter of law ignored the two-step analysis of whether an activity is a "project" under Public Resources Code § 21080. Based on this, the Court determined that not all activities listed in Public Resources Code § 21065, including zoning amendments, always require CEQA analysis.

The Supreme Court Affirmed the *Muzzy Ranch* Test as Proper Means to Determine Whether a Project Has a Potential to Cause a Change in the Environment

Under the *Muzzy Ranch* decision [*Muzzy Ranch Co. v. Solano County Airport Land Use Commission*, 41 Cal.4th 372 (2007)], when determining whether an activity is a project under CEQA, the public agency must consider the potential environmental effects of the activity without considering whether the activity will actually have that environmental effect. The Court restated this test as follows:

> A proposed activity is a CEQA project if, by its general nature, the activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment. This determination is made without considering whether, under the specific circumstances in which the proposed activity will be carried out, these potential effects will actually occur.

The Supreme Court found that this abstracted analysis of the potential for impacts was consistent with the preliminary nature of a public agency determining whether an activity was a project as a first step in determining whether CEQA's analysis is warranted. The Court also noted that the specific type of activity contemplated by the public agency is irrelevant to the analysis of the potential for a significant environmental effect, so long as one of the triggering conditions listed in Public Resources Code § 21065(a)-(c) was met.

In applying the *Muzzy Ranch* test, the Supreme Court considered hypothetical impacts that *could* result from the adoption of the ordinance. The Court hypothesized that because the Ordinance would permit a new type of business in the City where previously there were no legally permitted dispensaries, the Ordinance could:

> . . .result in new retail construction to accommodate the businesses. . . .[and could]. . .cause a citywide change in patterns of vehicle traffic from the businesses' customers, employees, and suppliers.

The Court agreed with UMMP's argument that these potential impacts were:

> . . .sufficiently plausible to conclude that the Ordinance's adoption may cause a reasonably foreseeable indirect physical change in the environment.

Therefore, the Court concluded that the City erred in adopting the Ordinance without evaluating its environmental impacts.

Conclusion and Implications

The Court's conclusions in this case are significant for several reasons. First, the Court's determination that zoning amendments are not necessarily CEQA projects as a matter of law reaffirms a long-followed practice by land use agencies of determining whether a particular zoning amendment is subject to CEQA

on a case-by-case basis based on the considerations laid out in Public Resources Code § 21065.

Second, the Court's holding that the City's ordinance regulating dispensaries necessitated CEQA review has the potential to broaden the scope of activities that may be subject to CEQA's environmental analysis. The generic hypothetical impacts laid out by the Court as sufficiently plausible to raise potential significant effects caused by the Ordinance leave open the door for project opponents to raise the potential of such impacts where a public agency is considering taking an action without CEQA review. To minimize the risk of this, public agencies and project proponents should ensure that any determination by the public agency that an activity is not a project under CEQA and therefore not subject to environmental review is based only on clear findings supported by the specific facts surrounding the decision. The Supreme Court's decision is available online at: http://www.courts.ca.gov/opinions/documents/S238563.PDF
(Andreas L. Booher)

FOURTH DISTRICT COURT RULES ON DISCUSSION OF PROJECT ALTERNATIVES FOR SOLAR ENERGY PROJECT IN ZONING CASE

City of Hesperia v. Lake Arrowhead Community Services District, 37 Cal.App.5th 734 (4th Dist. 2019).

In this action, the Lake Arrowhead Community Services District (District) tried to nullify the City of Hesperia's (City) zoning ordinances when building a solar energy project (Project). The City brought an action against the District seeking a writ of mandate and declaratory and injunctive relief alleging that the District: 1) did not have the authority to build the Project and 2) violated the City's zoning ordinances.

The trial court ruled for the City and the District appealed. The Court of Appeal held that the District did have the authority to build the Project. The court also held, however, that the District violated the City's zoning ordinances because the administrative record did not support the District's finding that there was no feasible alternative to the proposed location of the Project.

Factual Background

The District is a community services district organized under the authority of and governed by Government Code § 61100 *et seq*. The District wanted to locate its Project on a portion of land it owned, which was located in the City in an area known as Hesperia Farms (Site).

The Site was zoned as "Rural Residential" and designated as "Rural Residential 0-0.4 units per acre" under the City's General Plan. Under the City's municipal code, solar farms like the Project are only allowed on nonresidential and nonagricultural designated properties with approval of a conditional use permit by the City's planning commission. For relevance in this case, solar farms are not allowed within 660 feet of any agriculturally designated property.

Commenting on the Site selected by the District, the City informed the District that the Project would require a General Plan amendment and a zone change and also violated the City's municipal code because the Project was located within 660 feet from an agriculturally designated property. The District moved forward and its board of directors adopted a resolution rendering the City's zoning ordinances inapplicable to the Project. The resolution provided, in part:

> 2. The Board finds and determines that the Project constitutes facilities for the generation of electrical energy, and therefore meets the criteria for exemption from ... City of Hesperia zoning ordinances under Government Code section 53091, subdivision (e)…
>
> 5. Based on the above-findings, the Board finds and determines that pursuant to Government Code section 53096, there is no feasible alternative to the location of the Project at the Hesperia Farms site, by four-fifths vote of the Board, City of Hesperia zoning ordinances, including but not limited to, City of Hesperia Ordinance No. 2012-07, are rendered inapplicable to the Project.

The Court of Appeal's Decision

Zoning and Government Code § 53090

The heart of the case is the interplay between the City's zoning ordinances and the relief from zoning granted to local agencies like the District by Government Code § 53090 *et seq*. The court's decision includes the following instructive summary of the competing interests in this case:

> …Our analysis begins with the statutory requirement that, for purposes of a proposed solar energy project, a local agency must comply with the zoning ordinances of the city and county in which the project's facilities are to be constructed or located. (Gov. Code, § 53091, subd. (a); further undesignated statutory references are to the Government Code.) Then, as potentially applicable here, section 53091, subdivision (e) (§ 53091(e)), and section 53096, subdivision (a) (§ 53096(a)), each provides the agency with an exemption for the location and construction of certain types of facilities. Section 53091(e) provides an *absolute exemption* for 'the location or construction of facilities ... for the production or generation of electrical energy'—unless the facilities are 'for the storage or transmission of electrical energy,' in which event the zoning ordinances apply. Section 53096(a) provides a *qualified exemption* for an agency's proposed use upon, first, a showing that the development is for facilities 'related to storage or transmission of water or electrical energy' and, second, a resolution by four-fifths of the agency's members that 'there is no feasible alternative to [the agency's] proposal.'

The court ruled that the District could not use the absolute exemption in § 53091(e) because the Project would transmit electrical energy. The court then reviewed the qualified exemption in § 53096(a) and ruled that the administrative record did not contain substantial evidence to support the District's finding that there is no feasible alternative to installing the Project at any location other than the Site.

Looking for guidance on the term "feasible" in § 53096(a), the court reviewed an identical "feasible" definition in the California Environmental Quality Act, Public Resources Code § 21000 *et seq*. (CEQA). The court pointed out that CEQA cases require consideration of a range of alternatives under a "rule of reason," which requires only an analysis of those alternatives necessary to permit a reasoned choice. In this case, the court ruled that the record did not contain evidence of alternatives or evidence that no alternative exists.

At the end of its opinion, the court provided a roadmap for the District:

> …On the present record, in order for the District to have properly determined that 'there is no feasible alternative' to the proposed location of the Solar Project for purposes of section 53096(a), the District was required to have: (1) considered alternative locations; (2) taken into account economic, environment, social, and technological factors associated with both the Project Site and the alternative locations; and (3) determined—*i.e*., exercised discretion based on substantial evidence in the administrative record—that, at the alternative locations, the proposal was not capable of being accomplished in a successful manner within a reasonable period of time.

Conclusion and Implications

The Court of Appeal's thorough discussion of the alternative analysis required under Government Code § 53096(a) will likely serve as a resource for local agencies seeking to use property for facilities related to storage or transmission of water or electrical energy.

The opinion may be accessed online at: https://www.courts.ca.gov/opinions/documents/D075100.PDF
(Eddy Beltran, Nedda Mahrou)

FOURTH DISTRICT COURT OVERTURNS TENTATIVE MAP APPROVAL GIVEN FAILURE TO COMPLY WITH WILLIAMSON ACT AND MAP ACT PROVISIONS

Cleveland National Forest Foundation v. County of San Diego, ___Cal.App.5th___, Case No. D073744 (4th Dist. July 25, 2019).

San Diego County (County) approved a landowner's tentative map for subdivision on land subject to a Williamson Act contract, and plaintiffs brought suit. The Superior Court denied the petition for writ of mandate, but the Fourth District Court of Appeal reversed, finding that the evidence was insufficient to support the board of supervisors' finding that residential development from the subdivision would be "incidental" to the existing commercial agricultural enterprise of cattle grazing.

Factual and Procedural Background

Genesee Properties, Inc. sought a tentative map approval from the County of San Diego for a 24-lot subdivision on 1416.5 acres of land in an unincorporated area of San Diego County known as the "Hoskings Ranch," approximately one mile southwest of the town of Julian. The property is located within a county-designated agricultural preserve, and a majority of the site is subject to a Williamson Act contract (The California Land Conservation Act of 1965; Gov. Code, § 51200 *et seq*.) requiring that the land be restricted to agricultural and compatible uses. The Williamson Act contract requires 40-acre minimum lot sizes on all but 161 acres and 160-acre minimum lots on the remaining acres.

Broadly, the Williamson Act is intended to conserve agricultural land by having local government establish and regulate agricultural preserves and execute land conservation contracts with landowners that restrict uses. In return for accepting restrictions, a landowner is guaranteed a relatively stable tax base, founded on the value of the land for open space use only and unaffected by its development potential. For land subject to a Williamson Act contract, a legislative body:

> . . .shall deny approval of a tentative [subdivision] map . . . if it finds that either the resulting parcels following a subdivision of that land would be too small to sustain their agricultural use or the subdivision will result in residential development not incidental to the commercial agricultural use of the land. (Gov. Code, § 66474.4.)

In October 2016, the County board of supervisors conditionally approved a tentative map for the proposed subdivision, finding that the resulting parcels, which ranged from 40.1 to 196 acres, would not be too small to sustain their agricultural use. Among other things, the proposal included a grazing management plan in which grazing and breeding would be managed by a qualified rancher and an agricultural easement condition (which, among other things, would allow cattle to roam across all lots and portions of the site) benefitting the County to preserve agricultural uses within the site.

The board also found that the subdivision would not result in a residential development not incidental to the commercial agricultural use of the land. While the board noted that the Williamson Act does not define the term "incidental" for purposes of applying Government Code § 66474.4, it observed that the common definition of the term is: "subordinate to something of greater importance, having a minor role." Relying on that definition, the board found that the predominate feature of the project would be the establishment in perpetuity of extensive natural resources in open space, the continuing agricultural grazing and breeding operations facilitated by the project design, as well as areas established on each parcel intended to support small scale agricultural and farming operations.

Plaintiffs Cleveland National Forest Foundation and others petitioned for a writ of mandate, challenging the legality of the board's approval. In particular, plaintiffs contended that the County's approval of the tentative map violated Government Code § 66474.4 and undermined the Williamson Act by permitting a residential, rather than agricultural, subdivision on the property and giving the property developers a

valuable residential entitlement while they were still receiving taxpayer subsidies intended for those who maintain the land in agricultural and other compatible uses. After the superior court denied the petition, plaintiffs appealed, and the Court of Appeal ultimately reversed.

The Court of Appeal's Decision

Exhaustion of Administrative Remedies and Waiver

The Court of Appeal first rejected the County's waiver and exhaustion arguments, finding that the trial court's exhaustion ruling was specific and narrow: it ruled that plaintiffs had failed to exhaust their administrative remedies only as to challenges to the Draft EIR, the Draft Environmental Impact Report's (EIR's) supporting appendices and the lot by lot analysis, as well as any argument that the EIR "admits" that the project would be residential. By contrast, the court noted that plaintiffs' sole argument on appeal was that the board's approval of the tentative map violated Government Code § 66474.4, and the trial court did not rule that plaintiffs had failed to exhaust as to that point. Indeed, plaintiffs had submitted to both planning and development services and the board raising the Map Act issues before the board's October 2016 hearing.

Validity of the County's Tentative Map Approval

The Court of Appeal next addressed the merits of plaintiffs' claims on appeal. At the outset, the court discussed the Williamson Act and the Government Code § 66474.4 at length. With respect to the word "incidental," and in turn the clause "residential development not incidental to the commercial agricultural use of the land," the court found that this language is susceptible to more than one reasonable interpretation, and that the plain meaning of the statute's text therefore is not decisive. Accordingly, the court looked to:

> . . .a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history including ballot pamphlets, public policy, contemporaneous administrative construction and the overall statutory scheme.

Following this analysis, the court found that:

> . . .the broad legislative policy underlying § 66474.4 is to prohibit subdivision of Williamson Act land for 'residential purposes.'

As such:

> . . .[t]he division of Williamson Act land is permissible only under conditions where the land remains *exclusively* in agricultural or other compatible use, which the Legislature perceived would be the case where any proposed residential development is 'incidental' to commercial agricultural production.

The court went on to state that:

> These policies and the Williamson Act's general objectives for long term conservation of agricultural and open-space land, . . .are best promoted by defining the word 'incidental' in its legal sense, to mean not just subordinate or minor in relation to the primary use, but also to include the concept of an association or dependency on the primary use so that the residential development is concomitant with and functionally necessary to the agricultural use.

Applying that definition, the court concluded that the board's findings were not supported by the record. In particular, the court found that the tentative map proposed rural residential development that would not have the requisite association with the only presently viable agricultural use of the property: managed low-density cattle grazing and breeding. To the contrary, the court found that the project would parcel the land into 24 homesite lots—including related infrastructure improvements:

> . . .for future sale to any member of the public who wishes to reside on rural land and who appreciates the rural 'feel' of having cattle graze on it.

There was no basis in the record, the court concluded, to find that the residential improvements

would be necessary for the managed grazing and breeding of 40 to 60 head of cattle or that the subdivision would otherwise continue to produce agricultural commodities for commercial purposes. Accordingly, the Court of Appeal reversed the superior court ruling and remanded with directions to issue a writ of mandamus requiring the County to vacate its approval.

Conclusion and Implications

The case is significant because it provides a robust discussion of the Williamson Act, its legislative history, and related public policy concerns. The decision is fact specific but offers guidance on a broader application. The decision is available online at: https://www.courts.ca.gov/opinions/documents/D073744.PDF. (James Purvis)

SECOND DISTRICT COURT UPHOLDS CITY'S DETERMINATION THAT EIR NOT REQUIRED TO EVALUATE POPULATION OR HOUSING IMPACTS FOR HOTEL PROJECT

Hollywoodians Encouraging Rental Opportunities v. City of Los Angeles, ___ Cal.App.5th___, Case No. B285553 (2nd Dist. July 22, 2019).

In an opinion certified for *partial* publication, the Second District Court of Appeal affirmed a trial court judgment holding that the City of Los Angeles was not required to prepare an Environmental Impact Report (EIR) to assess alleged housing-related impacts from a boutique hotel project on the site of a vacant former apartment building in Hollywood. In the published portion of the opinion, the Court of Appeal upheld the city's mitigated negative declaration finding that the city properly evaluated the project's impacts using the vacant building as the environmental "baseline," as opposed to the former tenant-occupied apartment building. The court further held that because there was no substantial evidence of potentially significant housing or population impacts from the project individually, the city was not required to further evaluate the project's cumulative impacts in these areas.

Factual and Procedural Background

The project at issue involved the conversion of a vacant residential building into a 24-room boutique hotel in the Hollywood area of Los Angeles. For many years the building was an 18-unit apartment building that was subject to the city's rent stabilization ordinance. In 2009, the owner of the property applied to the city to demolish the building to construct condominiums on the site. The city adopted a Mitigated Negative Declaration (MND) and approved the condominium project. Following approval of the condominium project, in 2013, the owner filed a notice of intent to withdraw all 18 units from the rental housing market pursuant to the Ellis Act, and the apartments were vacated later that year.

In 2014, the project developer was forced to abandon the condominium project due to a lack of financing. The following year, in July 2015, the owner of the property submitted a new application to the city, this time seeking approval to convert the building into a 24-room boutique hotel. The city prepared an initial study for the hotel project. The initial study identified potentially significant impacts to aesthetics, biological resources, noise, and public services but concluded that all impacts could be mitigated to a less than significant level. As relevant here, with respect to population and housing impacts specifically, the initial study concluded that the project would not displace any housing units or residents because the apartments had been lawfully withdrawn from the rental market under the Ellis Act and the building had been vacant for nearly two years.

The city's zoning administrator adopted an MND for the hotel project and conditionally approved the requested entitlements. A local resident subsequently appealed the decision to the planning commission and later to the city council—but in each case the MND and project approvals were upheld.

Following the city council's approval, three petitioners, including a resident of a nearby building, a former tenant of the apartments, and an unincorporated association, Hollywoodians Encouraging Rental Opportunities (HERO), filed a petition for writ of

mandate challenging the MND and project approval. Among other claims, the petitioners argued that the city was required to prepare an EIR to analyze the project's direct, indirect, and cumulative impacts on the supply of rent-stabilized housing and the displacement of tenants. (In its petition for writ of mandate, some of petitioners' challenges concerned the City's administrative process. These challenges are discussed in the unpublished portion of the decision.) The trial court denied the writ petition in full, holding that the city properly concluded the project would have no impact on housing or population because the units had been removed from the rental market and vacated long before the hotel project was even proposed. As the trial court explained, project impacts under the California Environmental Quality Act (CEQA) must be measured against a baseline, which normally consists of:

> . . .the physical environmental condition in the vicinity of the project as they exist at the time the environmental analysis is commenced.

The trial court further concluded that, aside from the baseline issue, the petitioners failed to demonstrate that the project would have a significant effect on the physical environment, and not just socioeconomic impacts.

The Court of Appeal's Decision

On appeal, HERO asserted two CEQA arguments. First, the petitioners argued that the city was required to prepare an EIR because substantial evidence supported a fair argument that the cumulative effect of the project and other similar projects would be to eliminate rent-stabilized housing units in Hollywood and displace residents that depend on such housing. Second, HERO argued the initial study was deficient because it failed to evaluate the project's cumulative housing and population related impacts.

With regard to the first issue, the Court of Appeal rejected the petitioners' claims and held that the proper baseline against which the project's impacts must be assessed is a vacant building, not the former tenant-occupied rental property. As the court explained, at the time the environmental analysis for the project commenced in 2015, the property did not include rent-stabilized apartments. Rather, as noted above, all 18 units had been withdrawn from the rental market in 2013 and the building sat uninhabited since that time. Because these events occurred prior to the project proposal and initial study, the court explained, they were not attributable to the project. The court dismissed as speculation the petitioners' argument that the building could be returned to the rental market. The court also rejected an argument that the hotel project should be analyzed as an extension of the 2009 condominium project, noting there was nothing in the record to suggest that the 2015 hotel project was a reasonably foreseeable consequence of the initial condominium project for which the apartments were originally removed from the rental market. In sum, the court concluded, the record did not support a fair argument the project would have a significant impact on the city's stock of rent stabilized units or on the displacement of residents.

Second, turning to the issue of the city's cumulative impact analysis, the Court of Appeal held that the city was not required to prepare an EIR to inquire into the cumulative impact of the project on housing and population. As the court explained, because there was no substantial evidence of a project-specific potentially significant impact in these areas, the city properly determined that the effects of the project would not be cumulatively considerable, and no further analysis was required.

Conclusion and Implications

The court's holding reaffirms the important principle that, in most instances, the appropriate "baseline" against which to compare a project' s environmental impacts is the physical conditions existing at the site at the time environmental review commences. In this case, the Second District Court panel expressly rejected the petitioners' argument that because the former apartment building still existed and could theoretically be returned to the rental market that the residential units should have been included in the baseline. As the opinion makes clear, speculation regarding uses of a site based on historical conditions, without more, is insufficient to require a lead agency to consider such historical conditions as a part of the environmental setting or baseline. The court's decision is available online at: http://www.courts.ca.gov/opinions/documents/B285553.PDF
(Collin McCarthy and Christina Berglund)

THIRD DISTRICT COURT UPHOLDS CITY'S APPROVAL OF INFILL PROJECT IN THE FIRST OPINION TO ADDRESS SUSTAINABLE COMMUNITIES ENVIRONMENTAL ASSESSMENT

Sacramentans for Fair Planning v. City of Sacramento,
___Cal.App.5th___, Case No. C086182 (3rd Dist. July 18, 2019).

The Third District Court of Appeal upheld the City of Sacramento's reliance on a Sustainable Communities Environmental Assessment (SCEA), a relatively new method for conducting streamlined review under the California Environmental Quality Act (CEQA) for certain projects that help the state meet its greenhouse gas (GHG) reduction targets. (*See*, Pub. Resources Code, § 21155.2, subd. (b).) The decision is the *first published opinion* addressing the propriety of an SCEA. The court held that the transit priority project at issue was consistent with the region's Sustainable Communities Strategy and therefore the city's reliance on the SCEA complied with CEQA.

The court also upheld the city's reliance on a unique provision in its General Plan that allows the city to approve projects that are inconsistent with the city's height and density limits if the projects offer significant community benefits.

Sustainable Communities and Climate Protection Act

The Sustainable Communities and Climate Protection Act (SB 375) was created to integrate transportation and land use planning to reduce GHG emissions. SB 375 directed the California Air Resources Board (CARB) to develop regional targets for automobiles and light trucks to reduce emissions. In turn, federally designated metropolitan planning organizations (MPOs) must now include a Sustainable Communities Strategy (SCS) in their regional transportation plans/ metropolitan transportation plan (MTP). (Gov. Code, § 65080, subd. (b)(2)(B).) MTP/SCSs direct the location and intensity of future land use developments on a regional scale to reduce vehicle emissions. The Sacramento Area Council of Governments (SACOG) is the MPO for the Sacramento area. SACOG adopted an MTP/SCS for the region in 2012 and certified an EIR for the MTP/SCS at that time.

Under SB 375, the mandated reductions may be achieved through a variety of methods, including "smart growth planning." The Legislature determined that one type of development that can help reduce vehicular GHG emissions is a "transit priority project." As defined in the statute, this type of project contains at least 50 percent residential use, has a minimum density of 20 units per acre, and is located within one-half mile of a major transit stop.

To boost development of transit priority projects, SB 375 allows for streamlined CEQA review through an SCEA if the project: 1) is consistent with the general use designation, density, building intensity, and applicable policies specified for the project area in the strategy; and 2) incorporates all feasible mitigation measures, performance standards, and criteria set forth in the prior applicable environmental impact reports and which were adopted as findings. (Pub. Resources Code, §§ 21155, subd. (a), 21155.2, subds. (a), (b).)

Factual and Procedural Background

The "Yamanee" project at issue in *Sacramentans* is a proposed 15-story multi-use building made up of one floor of commercial space, three levels of parking, residential condominiums on ten floors, and one floor of residential amenities. The building is proposed to be located near public transit in Sacramento's growing "Midtown" area, adjacent to the city's downtown. The project is located in the MTP/SCS's central city subarea of a "Center and Corridor Community." Under the MTP/SCS, Center and Corridor Communities are typically higher density and more mixed than surrounding land uses. SAGOG organized the MTP/SCS in such a way that policies for reducing GHG emissions were embedded in the MTP/SCS's growth forecast assumptions. Thus, projects that are consistent with the MTP/SCS's growth forecasts are automatically consistent with the MTP/SCS's emission-reduction policies.

The city determined that the Yamanee project qualified as a transit priority project and that the project was consistent with the general land use designation, density, building intensity, and applicable

policies in the MTP/SCS. Therefore, the city used an SCEA to review the project under CEQA. The SCEA explained that, as a transit priority project, the Yamanee project would increase housing options near high quality transit and reduce vehicle miles traveled. It also explained that the project is consistent with the MTP/SCS's forecast of low to high-density residential and mixed uses in the center subarea of the Center and Corridor Community.

The development proposed by the project is also denser and more intense than what would ordinarily be allowed under the city's General Plan and zoning code. The city approved the project, however, under a provision in its General Plan that allows the city to approve more intensive development when a project's "significant community benefits" outweigh strict adherence to the density and intensity requirements. The city determined that the project would have several significant community benefits, including helping the city to achieve its goal of building 10,000 new residential units in the central city by 2025, and reducing dependency on personal vehicles. The city found that these, and other benefits, outweighed strict adherence to the city's density and intensity limits.

The city council upheld the city planning and design commission's approval of the project and rejected the petitioner's appeal of that decision. The petitioner sought a writ of mandate in the superior court, claiming that the city's approval of the project violated CEQA and the State Planning and Zoning Law. The superior court denied the petition and this appeal followed.

The Court of Appeal's Decision

The California Environmental Quality Act

The Court of Appeal rejected the petitioner's claim that the city erred by relying on SACOG's MTP/SCS to justify using an SCEA. The petitioner argued that because the MTP/SCS lacked specific density and building intensity standards, the city could not rely on it as a basis for an SCEA. Further, petitioner claimed that the MTP/SCS undermined the city's General Plan because it treats the city's center as "higher density," whereas the General Plan sets forth a more nuanced approach under which building intensities and densities increase the closer a development gets to the downtown. These arguments, concluded the court, were premised on a misunderstanding of the MTP/SCS's role. An MTP/SCS does not regulate land use. The purpose of an MTP/SCS is to establish a *regional* development pattern, not site-specific zoning. SB 375 authorized the city to review the project in an SCEA if the project was consistent with the regional strategy. Because it was, the city was allowed to rely on an SCEA. Although, as the petitioner contended, reliance on an SCEA could mean that certain projects receive less environmental review than traditionally required under CEQA, the court advised that the petitioner should take this concern to the California Legislature, not the courts.

The court also rejected the petitioner's claim that the city erred by relying on previous EIRs for the General Plan and MTP/SCS to avoid analyzing the project's cumulative impacts. In particular, the petitioner claimed that streamlined review was inappropriate in this case because no prior environmental analysis had considered the cumulative impacts of high-rise development in Sacramento's midtown. The court explained that CEQA required the city to prepare an Initial Study (IS) before drafting the SCEA. The city's IS for the project concluded that cumulative effects had, in fact, been adequately addressed and mitigated, and therefore did not need to be analyzed further in the SCEA. Additionally, the project included all applicable mitigation measures recommended in the prior EIRs. The petitioner failed to show that the city's analysis was not factually supported. Accordingly, the city did not err by relying on prior cumulative impact analyses.

Planning and Zoning Law

The petitioner argued that the city's decision to allow the project to exceed the General Plan and zoning code's intensity and density standards constituted unlawful "spot zoning." The court explained that spot zoning occurs where a small parcel is restricted and given fewer rights than the surrounding property (*e.g.*, when a lot is restricted to residential uses even though it is surrounded by exclusively commercial uses). This case, explained the court, is not a spot-zoning case in that the property was not given lesser development rights than its neighboring parcels. The petitioner argued that the neighboring parcels had, in fact, been given lesser development rights through the city's approval of the project, but there was no evidence in the record that any neighboring owner

sought and was denied permission to develop at a greater intensity or that the city would arbitrarily refuse to consider an application for such development.

The petitioner also argued that the phrase "significant community benefit" as used in the city's General Plan was unconstitutionally vague. The court disagreed, explaining that zoning standards in California are required to be made "'in accord with the general health, safety, and welfare standard,'" and that the phrase "significant community benefit" was no less vague than the phrase "general welfare." Additionally, held the court, the phrase "significant community benefit" provides sufficient direction to implement the policy in accordance with the General Plan.

The court also held that the city had articulated a rational basis for the policy allowing the city to waive the density and intensity standards for projects that provide significant community benefits, which is all that the California Constitution required.

Conclusion and Implications

In this case, the City of Sacramento successfully employed CEQA's streamlined provisions for transit priority projects to expedite and simplify its environmental review of an infill project that will help the city meet its aggressive new housing goal and reduce GHG emissions. As California continues to combat the dual threats of a housing shortage and climate change, cities and counties are likely to increasingly rely on streamlined approaches to the approval process for mixed-use projects near public transit. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C086182.PDF (Caroline Soto and Christina Berglund)

FIRST DISTRICT COURT DENIES CEQA CHALLENGE TO A MIXED-USE REAL ESTATE DEVELOPMENT PROJECT IN SAN FRANCISCO

Save the Hill v. City and County of San Francisco, *Unpub.*, Case No. A153549 (1st Dist. July 22, 2019).

The City of San Francisco (City) certified a final Environmental Impact Report (EIR) for a mixed-use real estate development project in Potrero Hill and adopted findings regarding the infeasibility of a project alternative under the California Environmental Quality Act (CEQA). Plaintiffs petitioned for a writ of mandate, claiming that the City violated CEQA in various ways. The superior court denied the petition and the Court of Appeal for the First Judicial District, in an *unpublished opinion*, affirmed in full.

Factual and Procedural Background

The Eastern Neighborhoods Plan and Environmental Review

In 2007, in connection with its long-term planning for the "Eastern Neighborhoods," the City of San Francisco published a Draft Plan Environmental Impact Report, analyzing rezoning options for the "Eastern Neighborhoods." The options varied by the degree to which they permitted land zoned for industrial use to be converted to residential and mixed-use districts. After public comment, the City published a 2008 Final Plan EIR, which included a "preferred project." In August 2008, the City's planning commission (Commission) certified the Plan EIR and recommended approval of the preferred project. The Commission also adopted Findings and a Statement of Overriding Considerations under CEQA for the Plan's significant and unavoidable environmental impacts.

Beginning in December 2008 and continuing through early 2009, the City's board of supervisors approved, and the Mayor signed, the Eastern Neighborhoods rezoning and Planning Code amendments and new Area Plans for Central Waterfront, East South of Market, Mission, and Showplace Square/Potrero. As part of these approvals, the City rezoned the project site at issue in this case to Urban Mixed-Use (UMU) and amended the height and bulk districts governing the site.

The Proposed Project

The project site, totaling approximately 3.5 acres, consists of four adjacent lots in lower Potrero Hill. The proposed project would demolish all existing buildings other than an existing brick building and replace them with two mixed-use buildings total-

ing 395 residential units, 24,968 gross square feet of retail, and 388 off-street parking spaces. The project also includes 14,669 square feet of public open space; 33,149 square feet of common open space for residents; and 3,114 square feet of private open space.

Environmental Review

In February 2015, the City circulated a Notice of Preparation and Community Plan Exemption checklist for the project. In the checklist, the City concluded that transportation and historic resources impacts required further analysis in a focused EIR. For all other categories, the checklist determined that the project would not result in new or more severe environmental impacts than those identified in the Plan EIR. The City also concluded that aesthetic and parking impacts were exempt from CEQA because the project was a mixed-use residential project on an infill site located within a transit priority area.

The City circulated a Draft EIR in August 2015, which concluded that, with the exception of two significant and unavoidable impacts, traffic impacts would be less than significant, either with no mitigation or after implementing mitigation. Impacts to historic resources would be less than significant because only the brick office building qualified as a historic resource, and the project preserved and rehabilitated that building. The Draft EIR incorporated the Plan EIR's mitigation measures as identified in the Community Plan Exemption checklist and proposed additional mitigation and improvement measures to reduce transportation impacts. Following public hearing and receipt of written comments, the City released a Final EIR.

In May 2016, the Commission held a public hearing. In three separate motions, it certified the EIR; adopted CEQA findings, including findings related to the infeasibility of project alternatives; and approved the project by granting a Large Project Authorization under § 329 of the San Francisco Planning Code. Plaintiffs timely appealed to the board of supervisors, which denied the appeal. Following the City's filing of a Notice of Determination in July 2016, plaintiffs filed a petition for writ of mandate. After the Superior Court denied the petition, plaintiffs timely appealed to the Court of Appeal, which upheld the Superior Court's decision.

The Court of Appeal's Decision

Decision to Proceed under Public Resources Code § 21083.3

The court first addressed plaintiffs' claim that the City improperly proceeded under a Community Plan Exemption. Generally, under § 21083.3, streamlined review is required for projects that are consistent with development densities established by an existing community plan for which an EIR was previously certified. In such instances, CEQA review:

> . . .shall be limited to effects upon the environment which are peculiar to the parcel or to the project and which were not addressed as significant effects in the prior environmental impact report, or which substantial new information shows will be more significant than described in the prior environmental impact report. (§ 21083.3.)

Relying on *Friends of College of San Mateo Gardens v. San Mateo County Community College District*, 1 Cal.5th 937 (Cal. 2016), the court first concluded that the City's determination to proceed under § 21083.3 would be reviewed under the substantial evidence standard of review (neither party had briefed the issue). The court then found that the record contained substantial evidence that the proposed project was consistent with development densities established by the existing community plan for which a previous EIR had been certified. Among other things, the court noted that the parcel was zoned Urban Mixed-Use under the Eastern Neighborhoods and Potrero Plans (the rezoning of which had been studied in the previous EIR); the project was consistent with the City's bulk and height controls; at least 40 percent of units would contain two or more bedrooms, as required by the UMU district; and the project's commercial uses would be below the maximum allotted gross square feet per lot of retail uses permitted in the UMU district.

Issues Excluded from the Project EIR

Plaintiffs claimed that two issues not analyzed in the project EIR required further analysis: 1) cumulative impacts (other than traffic and historical resourc-

es); and 2) aesthetics. With respect to cumulative impacts, the plaintiffs argued generally that the project's cumulative impacts required further analysis because residential growth had exceeded that anticipated in the Plan EIR. At the outset, the court noted that the parties disagreed on the standard by which it should review whether the City complied with § 21083.3. Even if the less deferential "fair argument" standard applied, however, the court found that plaintiffs had not shown with substantial evidence that residential growth exceeded that studied in the Plan EIR.

Regarding aesthetics, the City determined that the project's aesthetic impacts were exempt from CEQA under Public Resources Code § 21099, which provides that aesthetic impacts:

> . . .of a residential, mixed-use residential, or employment center project on an infill site within a transit priority area shall not be considered significant impacts on the environment.

Rejecting plaintiffs' claims, the court concluded that "[t]here is little doubt that section 21099 applies to the project."

Adequacy of the Project EIR

Plaintiffs claimed that the project EIR inadequately addressed two issues: 1) the project's traffic impacts; and 2) purported inconsistencies between the project and other area plans. With respect to traffic, plaintiffs claimed that the project EIR's discussion of cumulative traffic impacts was inadequate and that the City failed to consider implementation of suggested mitigation measures. The court rejected all of these claims, finding that the City properly elected to proceed under a summary of projections approach for cumulative impacts, the City's methodology was appropriate, the decision to limit updated 2015 traffic counts to five intersections was supported by substantial evidence, the City properly accounted for the Warriors' arena project in its cumulative traffic impacts analysis, and the City's response to comments was legally adequate. Regarding mitigation, the court found that plaintiffs' claims were waived by failing to provide any specificity as to their claims. Even on the merits, however, the court found the claims lacking.

With respect to purported plan inconsistencies, plaintiffs listed 14 plan policies and objectives in bullet-point fashion with which they contended the project conflicted. For eleven of these, plaintiffs made only a conclusory statement regarding conflict, and the court found these arguments to have been waived. For the remaining three policies, the court rejected plaintiffs' claims.

Project Alternatives

Plaintiffs also challenged the City's findings rejecting the "Metal Shed Reuse" alternative as infeasible. The court first rejected the City's claim that plaintiffs had failed to exhaust their administrative remedies on this issue. With respect to the merits, however, the court found that the City's findings were supported by substantial evidence. In particular, the court analyzed plaintiffs' claim that the City improperly found the Metal Shed Reuse alternative to be economically infeasible, noting that this claim was supported by a financial feasibility analysis prepared by a qualified real estate consulting firm. This evidence, the court concluded, provided substantial evidence support for the City's conclusion that a reasonably prudent developer would not proceed with the Metal Shed Reuse alternatives.

Conclusion and Implications

Notwithstanding the fact based nature of the decision—perhaps leading the Court of Appeal to not certify the decision for publication—the case is still significant and offers guidance due to its lengthy discussion regarding the standards applicable to a lead agency's environmental review under Public Resources Code § 21083.3. The decision is available online at: https://www.courts.ca.gov/opinions/nonpub/A153549.PDF
(James Purvis)

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 August 19, 2019, was ordered to the second reading file pursuant to Senate Rule 28.8 and 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 August 19, 2019, was referred to the Committee on Appropriations' suspense file.

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 August 13, 2019, was in the Assembly where it was ordered to Engrossing and Enrolling.

Environmental Protection and Quality

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 August 12, 2019, was referred to the Committee on Appropriations' suspense file.

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 August 19, 2019, had its hearing in the Committee on Appropriations postponed by the committee.

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 August 19, 2019, had its hearing in the Committee on Appropriations postponed by the committee.

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 Febru-

ary 11, 2019, and, most recently, on August 13, 2019, was read for a second time and ordered to a third reading.

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 July 8, 2019, had testimony taken during a hearing in the Committee on Natural Resources that was subsequently postponed by the committee.

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

SB 62 was introduced in the Senate on January 3, 2019, and, most recently, on July 30, 2019, was chaptered by Secretary of State at Chapter 137, Statutes of 2019.

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 August 14, 2019, was placed on the Committee on Appropriations' suspense file.

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 July 8, 2019, had its second hearing canceled at the request of its author, Senator Glazer.

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 August 15, 2019, was read for a second time and ordered to a third reading.

Housing / Redevelopment

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

AB 68 was introduced in the Assembly on December 3, 2018, and, most recently, on August 12, 2019, was referred to the Committee on Appropriations' suspense file.

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 July 1, 2019,

was referred to the Committee on Appropriations' suspense file.

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 August 13, 2019, was read for a second time and ordered to a third reading.

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 August 19, 2019, was read for a second time and ordered to a third reading.

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 August 19, 2019, had its first hearing in the Committee on Appropriations continued at the request of the committee.

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 August 19, 2019, had its first hearing in the Committee on Appropriations continued at the request of the committee.

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 August 15, 2019, was read for a second time and ordered to a third reading.

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

SB 53 was introduced in the Senate on December 10, 2018, and, most recently, on August 14, 2019, was placed on the Committee on Appropriations' suspense file.

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 August 19, 2019, was re-referred to the Committees on Appropriations and Revenue and Taxation pursuant to Assembly Rule 77.2.

Zoning and General Plans

AB 139 (Quirk-Silva)—This bill would amend the Planning and Zoning Law to require the annual report prepared by local planning agencies regarding reasonable and practical means to implement the General plan or housing element to include: 1) the number of emergency shelter beds currently available within the jurisdiction and the number of shelter beds that the jurisdiction has contracted for that are located within another jurisdiction; and 2) the identification of public and private nonprofit corporations known to the local government that have legal and managerial capacity to acquire and manage emergency shelters and transitional housing programs within the county and region; and 3) to require an annual assessment of emergency shelter and transitional housing needs within the county or region.

AB 139 was introduced in the Assembly on December 11, 2018, and, most recently, on August 12, 2019, was referred to the Committee on Appropriations' suspense file.

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 July 11, 2019, was received at desk pursuant to Joint Rule 61(a)(10). (Paige Gosney)

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