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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

WEED, WATERS AND WILDLIFE: THE ENVIRONMENTAL PERMITTING OF CANNABIS CULTIVATION IN CALIFORNIA— PART 2: STATE WATER RESOURCES CONTROL BOARD PERMITTING

By Clark Morrison, Esq., and Morgan Gallagher, Esq.

This article is the second of a two-part series describing California's environmental regulatory structure for cannabis cultivation as implemented by the California Department of Fish and Wildlife (Department) and the State Water Resources Control Board (SWRCB). Part 1 addressed the Department's permitting program for cannabis cultivation. This part addresses the requirements of the SWRCB.

Introduction

As discussed in Part I of this series, California's legalization measure, the Adult Use of Marijuana Act (AUMA), or Proposition 64, was passed in 2016. In 2017, the Legislature Passed Senate Bill (SB) 94, which integrated AUMA with the state's existing Medical Cannabis Regulation and Safety Act (MCRSA) to establish a single regulatory system to govern both medicinal and adult-use cannabis in California. These measures include a number of provisions calling on the State's environmental agencies, particularly the Department and the State Water Resources Control Board, to develop programs for the regulation of cannabis cultivation.

At a fundamental level, Business and Professions Code § 26060.1(b) requires the California Department of Food and Agriculture (CDFA) to include in any license for cultivation conditions requested by the Department or the SWRCB to:

- Ensure that the effects of diversion and discharge associated with cultivation do not affect the instream flows needed for fish spawning, migration and rearing, and the flows needed to maintain natural flow variability;
- Ensure that cultivation does not negatively impact springs, riparian habitat, wetlands or aquatic habitat; and
- Otherwise protect fish, wildlife, fish and wildlife habitat, and water quality.

With respect to the SWRCB specifically, § 13276 of the Water Code authorizes or directs the board, and the nine Regional Water Quality Control Boards (RWQCBs), to address discharges of waste from cultivation, including by adopting a general permit or establishing waste discharge requirements. In so doing, the boards must include conditions addressing a dozen different considerations including, for example, riparian and wetland protection, water storage and use, fertilizers, pesticides and herbicides, petroleum and other chemicals, cultivation-related waste and refuse and human waste. The boards' actions in response to this requirement are set forth below.

The State Water Resources Control Board's Cannabis Cultivation Policy and General Order

In October 2017, the SWRCB promulgated its Cannabis Cultivation Policy (Cannabis Policy or Policy) and Cannabis General Order 2019-0001-DWQ (General Order or Order). The Policy and Order were adopted in October 2017. The Policy covers a variety of areas, including requirements for cannabis cultivation, activities to protect water quality and instream flows, implementation, means of compliance, and enforcement. The General Order implements the requirements of the Cannabis Policy, specifically those that address waste discharges associated with cannabis cultivation. The Cannabis Policy and the

General Order were both updated and adopted by the SWRCB in February 2019, which updates became effective on April 16, 2019.

Originally, the Policy and General Order allowed the RWQCBs to adopt their own regional orders to regulate cannabis cultivation. Two RWQCBs, the North Coast Regional Water Quality Control Board and the Central Valley Regional Water Quality Control Board, adopted such regional orders. The 2019 Policy and General Order, however, were made to supersede all such regional orders. Therefore, enrollees previously covered by the North Coast Regional Order were required to either apply to transition their permit coverage to the Order or request termination of coverage under the Regional Cannabis Order by July 1, 2019.

The Central Valley Regional Cannabis General Order was rescinded in June 2019, and applicants have since been required to apply through the Statewide Cannabis General Order.

It should be noted that, although the new SWRCB's Order supersedes all regional orders, the General Order vests certain powers in the RWQCBs. For example, RWQCBs are allowed to issue site-specific waste discharge requirements for discharges from a cannabis cultivation site if the RWQCB determines that coverage under the General Order is not sufficiently protective of water quality.

The purpose of the Cannabis Policy is to ensure that the diversion of water and discharge of waste associated with cannabis cultivation do not negatively impact water quality, aquatic habitat, riparian habitat, wetlands, and springs. The Policy applies to the following cultivation activities: 1) Commercial Recreation, 2) Commercial Medical, and 3) Personal Use Medical. It does *not* apply to recreational cannabis cultivation for personal use (six or fewer plants in a contiguous cultivation area less than 1,000 square feet with no slopes over 20 percent), because personal use cultivation activities are not considered commercial activities and are therefore exempt from CDFA cultivation license requirements. Indoor commercial cultivation activities are conditionally exempt from the requirements, and outdoor commercial cultivation activities that disturb less than 2,000 square feet may be conditionally exempt under certain circumstances.

Tier and Risk Values

The General Order assigns tier and risk values to each cultivation site based on the site's threat to water quality. The threat to water quality for any site is based on three factors:

- Disturbed area: Threat levels are based in part on the area of disturbed soil, the amount of irrigation water used, the potential for storm water runoff, and the potential impacts to groundwater (*e.g.*, the use of fertilizers or soil amendments, the possible number of employees on site, *etc.*).

- Slope of disturbed areas: The General Order recognizes that increased slopes may be associated with decreased soil stability, especially when associated with vegetation removal. Storm water and excess irrigation water are more likely to runoff and discharge off-site from sloped surfaces.

- Proximity to surface water body: The General Order also recognizes that riparian setbacks from surface water bodies generally reduce impacts to water quality. Disturbed areas within the riparian setbacks are more likely to discharge waste constituents to surface water; therefore, sites that cannot meet riparian setback requirements are considered to be high risk sites.

Based on these factors, cultivation sites are characterized as either "Tier 1" or "Tier 2" sites, and the risk level of each site is characterized as low, moderate, or high. Tier 1 sites are characterized as sites with disturbed area between 2,000 square feet and one acre. Tier 2 sites are those equal to or greater than one acre. Low risk level sites are those with no slope greater than 30 percent that are not within a state riparian setback. Moderate risk level sites are those with slopes between 30 percent and 50 percent that are not within a state riparian setback. High risk sites are sites where any portion of disturbed area is within a state riparian setback. The assessment of the risk level of the cultivation site occurs through an online self-certification process established by the SWRCB, not unlike the self-certification process established by the Department under § 1600 of the Fish and Game Code (and described in Part 1 of this article).

Specific Substantive Requirements of the Policy

Consistent with its primary purpose of broadly protecting water quality, aquatic habitat, riparian

habitat, wetlands, and springs, the Policy contains an exhaustive list of detailed performance measures specific to cultivation activities. Although they are too numerous to cover in detail here, examples of these measures include:

- General erosion control measures;
- Regulations for stream crossings and installations, culverts, and road development;
- Management of fertilizers, pesticides, and petroleum;
- Cleanup, restoration, and mitigation on existing sites;
- Proper soil, cultivation, and human waste disposal;
- Irrigation runoff control;
- Methods of water diversion and storage;
- Winterization.

Generally speaking, the performance standards contained in the Policy fall into the following three categories:

General Requirements and Prohibitions

The Policy's "General Requirements and Prohibitions" apply to all cannabis cultivators and include general measures to prevent discharges during construction and operation of cultivation activities, manage onsite pollutants, and protect on and off-site species. For example: The Policy requires cultivators to obtain coverage under the SWRCB's Construction Storm Water Program during construction of cannabis cultivation operations. Cannabis cultivators must apply for a Lake and Streambed Alteration Agreement or consult with CDFW to determine if a Lake and Streambed Alteration Agreement is needed prior to commencing any activity that may substantially:

- Divert or obstruct the natural flow of any river, stream, or lake;
- Change or use any material from the bed, channel, or bank of any river, stream, or lake; or
- Deposit debris, waste, or other materials that could pass into any river stream or lake.

Cultivators cannot take any action that would result in the taking of Special-Status Plants, Full Protected species, or a threatened, endangered, or candidate species under the California Endangered Species Act.

During land disturbance activities, cultivators must review the daily weather forecast and maintain records of the weather forecast for each day of land disturbance activities. If there is a 50 percent or greater chance of precipitation greater than 0.5 inches per 24-hour period during any 24-hour forecast, cultivators cannot disturb land.

Cultivators are required to immediately report any significant hazardous material release or spill to the California Office of Emergency Services, their local Unified Program Agency, the RWQCB, and CDFW.

Requirements Related to Water Diversions and Waste Discharge

The Policy includes requirements that apply specifically to any water diversion or waste discharge related to cannabis cultivation. By way of example:

- Cannabis cultivators cannot conduct grading activities on slopes exceeding 50 percent grade.
- Cannabis cultivators cannot drive or operate vehicles or equipment within riparian setbacks or within waters of the state unless authorized under a § 404 or § 401 Clean Water Act Permit, a CDFW Lake and Streambed Alteration Agreement, coverage under the Order, or site-specific water discharge restrictions issued by a RWQCB.
- Cannabis cultivators must control all dust related to cannabis cultivation activities to ensure dust does not produce sediment-laden runoff. Erosion control measures must be used to minimize erosion of disturbed areas, potting soil, and bulk soil to prevent waste discharges.
- Cannabis cultivators must comply with winterization requirements, which, among other things, prevent cultivators form operating heavy equipment during the winter period unless: 1) authorized by

the RWQCB via a site management plan or 2) if emergency repairs are required and authorized by the SWRCB or another agency with jurisdiction over the cultivation activity.

Narrative and Numeric Instream Flow Requirements

Finally, the Policy contains narrative instream flow requirements that apply to all diversions of surface water and groundwater for cannabis cultivation. Within the umbrella of narrative instream flow requirements, there are requirements for surface water instream flow requirements, which apply to anyone diverting water for cannabis cultivation from a waterbody, as well as requirements specific to groundwater diversions and springs. An example of the Policy's narrative instream flow requirements follows:

> Cannabis cultivators cannot divert surface water between April 1 and October 31 unless the water diverted is delivered from storage and the cultivator has a permit/license and a claim of right to the stored water. From November 1 through March 31, cultivators can only divert surface water when water is available for diversion under the cultivator's priority of right.

Numeric instream flow requirements apply when a site discharges to a SWRCB compliance gauge. The compliance gauges have Numeric Flow Requirements and the SWRCB has an online mapping tool to assist cultivators in determining which compliance gage applies to them and whether they may divert water. For example, the following requirement applies:

> From November 1 through March 31, cultivators can divert water as long as the Numeric Flow Requirement is met at the compliance gauge assigned to the cannabis site. From November 1 through December 14 of each year, the surface water diversion period does not begin until after seven consecutive days in which the surface waterbody's real-time daily average flow is greater than the applicable Numeric Flow Requirement.

Updates to Policy and Order in 2019

The 2019 Policy and Order included four primary changes:

Tribal Buffers

Prior to acting on a cultivator's request to cultivate cannabis within 600 feet of tribal lands, the Water Boards will notify any affected California Native American Tribe and if any affected tribe rejects the proposed cultivation within 45 days, the cultivator is prohibited from cultivating cannabis on or within 600 feet of the land.

Onstream Reservoirs

Cultivators with pre-existing onstream reservoirs can now obtain water rights for cannabis cultivation if the reservoir existed prior to October 1, 2016 and both the Deputy Director for the Division of Water Rights and CDFW determine that removal of the reservoir and installation of off-stream storage would cause more environmental damage than continuing to use the onstream reservoir for diversion and storage. Cultivators with onstream reservoirs must install and maintain a measuring device that is installed and calibrated and is capable of recording the volume of diverted water year-round. Onstream reservoirs that do not qualify for ongoing operation must either be removed or otherwise rendered incapable of storing water.

Requirements for Indoor Cultivation Sites

Regarding requirement for indoor cultivation, cultivators with a building permit and certificate of occupancy for indoor cultivation sites that discharge waste to a permitted wastewater collection system are exempt from the Policy's riparian setbacks and tribal buffer requirements.

Winterization Requirements

Prior to the 2019 updates to the Policy and Order, cultivators were prohibited from operating any heavy equipment during the winter period, except for emergency repairs. The 2019 change to winterization requirements allows the RWQCB's Executive Officer or designee to approve a site management plan to permit the use of heavy equipment for routine cultivation soil preparation or planting during the winter period if both the following conditions are met: 1) all soil preparation and planting activities occur outside of the riparian setbacks; and 2) all soil preparation and planting activities are located on an average slope equal to or less than 5 percent.

State Water Resources Control Board Enforcement Mechanisms

Regarding any enforcement action taken by the SWRCB, the board has primary enforcement responsibility for the regulations in the Policy, and is required to notify CDFA of any enforcement action that is taken. The SWRCB has a variety of enforcement tools for correcting noncompliance with the Policy and Order. In particular, the board may initiate an informal enforcement action, including a Notice of Violation letter if a violation is observed or reported. For formal violations, the SWRCB can issue a Notice to Comply, Administrative Civil Liability to assess monetary penalties, a Cease and Desist Order, or a Cleanup and Abatement Order, among other enforcement mechanisms. The SWRCB also has the authority to revoke any water right permit, license, or registration under the Water Code.

Conclusion and Implications

Compliance with the complex requirements of the Policy is a prerequisite for obtaining a CDFA Cannabis Cultivators license. Cultivators must provide evidence of compliance (or certification that a permit is not necessary) as part of their application for a CDFA cannabis cultivation license. As noted above, Business and Professions Code § 26052.5(b) requires the CDFA to consult with the State Water Resources Control Board on the source or sources of water the cultivator will use for cultivation, and Business and Professions Code § 26060.1(b) requires that CDFA include conditions requested by the SWRCB (including the principals and guidelines of the Policy) in any license.

The State Water Resources Control Board's Cannabis Cultivation General Order can be found at: https://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2019/wqo2019_0001_dwq.pdf

The State Water Resources Control Board's Cannabis Cultivation Policy can be found at: https://www.waterboards.ca.gov/water_issues/programs/cannabis/docs/policy/final_cannabis_policy_with_attach_a.pdf

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LAND USE NEWS

GOVERNOR NEWSOM SIGNS INTO LAW SB 330, THE HOUSING CRISIS ACT OF 2019

On October 10, 2019, California Governor Gavin Newsom signed the Housing Crisis Act of 2019 (Act) into law, further restraining California cities and counties in their ability to restrict new housing projects. The Act passed as Senate Bill 330, Skinner (D-Berkeley).

Background

Existing law includes several provisions aimed at boosting housing supply in the state. For example, every city and county must adopt a General Plan that includes a housing element intended to provide for the housing needs of its inhabitants. Moreover, the Housing Accountability Act (HAA) prohibits local agencies from disapproving or conditioning approval of affordable housing projects in a manner that renders those projects infeasible unless the local agency makes certain specific findings supported preponderance of evidence. Gov. Code, § 65589.5 (d). The HAA further provides that regardless of affordability components, when a proposed housing development complies with applicable, objective development standards, a local agency cannot deny or require the project to be developed at a lower density unless similar findings are made. Gov. Code, § 65589.5 (j). Last, the Permit Streamlining Act (Gov. Code, § 65920 *et seq.*) sets forth various rules and timelines intended to expedite review of development applications.

Unfortunately, these provisions have not succeeded in ensuring an adequate housing supply. Housing costs continue to increase year-to-year and the housing supply crisis deepens. The Housing Crisis Act notes that California now ranks 49th in the nation in the number of housing units per capita, and is home to 33 of the 50 most expensive cities for rental units. California needs an estimated 180,000 new homes annually to just to keep up with population growth, and Governor Newsom has called for 3.5 million new homes in the next seven years to quell the growing shortage.

The Housing Crisis Act

In support of this goal and until January 1, 2015, the Housing Crisis Act of 2019 will: 1) prevent application of new ordinances, policies, development standards and fees (with the exclusion of automatic annual adjustments) to housing development projects after a developer submits a newly established "preliminary application"; 2) prohibit local agencies from holding more than five hearings on a proposed housing project so long as the project complies with the applicable, objective General Plan zoning standards in effect when a housing development application is complete; 3) prohibit the vast majority of cities and counties in urbanized areas from changing general or Specific Plan designations, or downzoning parcels of land where housing is an allowable use, to a less intensive use than allowed on January 1, 2018; and 4) restrict urbanized cities and counties from approving housing development projects that would demolish existing affordable or rent-controlled units unless certain protections are provided to existing tenants.

Provisions Impacting all Cities and Counties

The Housing Crisis Act of 2019 will impact all cities (including charter cities) and counties in California. The Act will also place additional restrictions on certain "affected " cities and counties, which generally includes all urban areas and urban clusters in the state.

For all cities and counties, the Act provides that new housing projects will only be subject to the ordinances, policies, development standards, and fees (except automatic annual adjustments to account for inflation) in effect when the applicant submitted a complete, "preliminary application" for the development. Gov. Code § 65589.5(o).

The Act establishes a list of 17 application requirements that constitute a complete "preliminary application." After submitting a complete preliminary application, the applicant must submit a complete development application within 180 days. The Act

also establishes procedures and timelines by which a local agency may request additional information to complete a preliminary application.

After a full development application is deemed complete and the project complies with objective zoning and development standards, the Act prohibits cities and counties from holding any more than five hearings on the proposed project, including any continuances. The Act defines hearings as including any public hearing, workshop, or similar meeting held by the local agency.

Provisions Impacting 'Affected' Cities and Counties

In addition to the above, the Act prohibits "affected" cities and counties from taking various other actions. "Affected" cities and counties are those cities and counties determined by the state Department of Housing and Community Development (HCD) as being in an urbanized area or urban cluster as designated by the United States Census Bureau.

The Act outlines a number of restrictions on actions that may be taken by "affected" cities and counties for to land where housing is an allowable use. For example, "affected" localities may not change general or Specific Plan land use designation, or downzone such land in a manner that reduces the intensity of land use allowed as of January 1, 2018.

The Act defines such reductions in intensity as increased restrictions on height, density, floor area ratio, new or increased open space requirements, and others. It should be noted that cities and counties *can* limit a parcel to less intensive uses if changes to land use or zoning designations elsewhere ensure there is no net loss of residential capacity in the locality.

With limited exceptions, affected cities and counties also may not not impose any moratoriums or limits on local population or on the number of housing approvals or permits. Affected cities and counties also may not impose any non-objective design review standards established after January 1, 2020.

In addition, the Act prohibits "affected" cities and counties from approving a housing development that requires the demolition of protected housing units (affordable or rent-controlled) unless certain requirements are met. Specifically, demolition of such units cannot be approved unless the developer: (1) replaces all demolished protected units, (2) allows tenants to stay in their homes until six months before construction begins, (3) provides relocation assistance to tenants, and (4) offers tenants a first right of return at an affordable rent.

Conclusion and Implications

The Housing Crisis Act of 2019 is intended to provide a needed boost to the state's housing supply. Continuing a trend reflected in recent amendments to the Housing Accountability Act, the Housing Crisis Act will further restrain local agencies in their ability to restrict or deny new housing projects. From a developer's perspective, the Act provides some clarity by ensuring that prospective housing development projects will be subject to existing development standards and restrictions. However, given the depth of the current housing crisis, calls for even stronger pro-housing legislation are likely. In the interim, only time will tell whether the Act has any meaningful impact on the current crisis. For more information on SB 330 text or history, *see:* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB330

(Travis Brooks)

GOVERNOR NEWSOM SIGNS INTO LAW STRONG STATEWIDE RENTER PROTECTION LEGISLATION ADDRESSING RENT INCREASES AND EVICTIONS

Governor Gavin Newsom has been making headlines recently for signing a series of bills into law that are specifically aimed at tackling California's housing affordability crisis. On October 8, 2019, the Governor kicked off a statewide tour by signing Assembly Bill (AB) 1482, which his office says is the nation's strongest statewide renter protection package. AB 1482, named the Tenant Protection Act of 2019 and co-authored by Assembly Member David Chiu, creates a statewide annual rent cap and eviction protections which are aimed at protecting against rent-gouging. Beginning in the new year, California landlords will

be restricted in their ability to raise rent and evict tenants.

Assembly Bill 1482

During the bill-signing ceremony for AB 1482, Governor Newsom said:

> No one thought this could be done . . .About a third of California renters pay more than half of their income to rent and are one emergency away from losing their housing.

The Governor explained that "One essential tool to combating this crisis is protecting renters from price-gouging and evictions." The bill is intended to provide 8 million California residents in nearly three million households with price stability, certainty, and protection against discriminatory and retaliatory evictions.

A Cap on Rent Increases

AB 1482 limits "rent-gouging" by placing an upper limit of 5 percent, plus the local rate of inflation (as measured by the Consumer Price Index), on annual rent increases. The bill analysis states that a rent cap of 5 percent plus inflation still enables a favorable return for a property owner compared to other business investments. Over the last decade, an annual rent increase of 5 percent plus inflation would have cumulatively increased rent four times faster than the actual regional median rent in California.

'Just Cause' to Evict Tenants in Occupancy for at Least One Year

The bill also requires landlords to have and state just cause before they can evict tenants who have occupied the premises for one year. Under AB 1482, landlords who want to evict tenants living in the property for 12 months have to make a satisfactory "just cause" showing—which may be "at-fault" or "no-fault" just cause. Reasons constituting at-fault just cause include actions taken by the tenant, such as: default in rent payments, material breach of the lease, criminal activity, or subletting/assigning the premises in violation of the lease. Examples of reasons justifying no-fault just cause include the following actions by the landlord: intent to occupy the residential property, withdrawal of the property from the rental market, or intent to demolish or substantially remodel the property. The just cause provisions are meant to strike a reasonable balance for landlords where they absolutely have no choice but to evict a tenant.

Exemptions to Rate Increases and 'Just Cause' Provisions

The rent cap and just-cause provisions imposed by AB 1482 are subject to certain exemptions. For example, the bill does not apply to homes built within the past 15 years (including accessory dwelling units) and single-family residences not owned by a real estate trust or corporation. Homes that are already restricted by some type of recorded document that limits affordability to low-or-moderate income households are also exempt from the bill's provisions.

Rent Control or Just Cause Ordinances Not Preempted by AB 1482

AB 1482 does not preempt any rent control or just-cause ordinances enacted by local jurisdictions. This means that existing just-cause ordinances are protected, while the bill allows local governments in the future to adopt new ordinances that are more protective of tenants that AB 1482. With new or amended ordinances, jurisdictions can go further than AB 1482 by limiting causes, providing greater relocation, assistance, or adding stronger tenant protections. However, new or amended local ordinances that are weaker than AB 1482 cannot be enforced.

Conclusion and Implications

Housing affordability remains, to many observers, in crisis mode in the Golden State. More and more, people turn to rentals in place of home ownership as a necessity. AB 1482 was designed to address the rising cost of rents. AB 1482 goes into effect January 1, 2020, and will sunset after ten years, on January 1, 2030. However, the bill's rent cap provisions are retroactive to March 15, 2019. The authors of AB 1482 hope that keeping these restrictions in place for a limited ten-year term will give the bill a chance to protect tenants while new units are being built to help relieve the overall pressure on the rental market. For more information on the full language of the bill or its history, *see:* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1482 (Nedda Mahrou)

HABITAT RESTORATION PROJECT TO BE COMPLETED IN LOWER AMERICAN RIVER

In October, work was scheduled to get underway on the Lower American River for a project referred to as the Gravel Augmentation Project at Sailor Bar (Project). The Project aims to protect salmon and steelhead habitats in the lower American River (River) area in the Sacramento region by compensating for the depletion of gravel spawning and rearing grounds that results from times of higher flows on the River. Multiple agencies at the state, local and federal levels partnered to plan, approve and implement the Project, which is the latest component of a larger effort undertaken in the region over the past 20 years to protect spawning grounds in the River. Restoration work is expected to continue in the River on an annual basis due to the ongoing nature of the threat to fish habitats in the area.

The Lower American River Gravel Augmentation Project

The Project supports fish spawning grounds in the lower River that have been depleted by high flows and other conditions that impact the River. Chinook salmon innately have used the loose rock in the riverbed to lay eggs upon their seasonal migration back to the River from the Pacific Ocean. Steelhead populations also nest in the gravel near the Project area, which is continually washed downstream by River flows. Because dams in the Project area, such as the Nimbus and Folsom dams, block the movement of sediment that would naturally replace the lost gravel, the protection of the fish requires human intervention, hence the partnership between federal, state and local agencies and environmental groups. As the fish use the area both for spawning beds and rearing to raise their young, the maintenance of the habitats is critical for the overall reproductive success of the affected salmon and steelhead populations.

To counter the degradation of the habitat, 14,000 tons of gravel taken from the floodplain was sorted and then added into the River to restore the spawning beds for use by the fish. Additionally, a new side channel was constructed in the area to create a protected area for juvenile fish to grow. The shallow and slow-moving water in the channel promotes the growth of insects and vegetation, providing important sources of food for the fish. The channel also provides the fish with some protection from larger predators. Organizers timed the implementation of the Project so that it would be completed prior to the seasonal spawning of the fish later in the fall. The Project's cost has been estimated at approximately $1 million, paid for through a combination of local and federal funding.

Restoration projects of this kind are important in the River on an ongoing basis due to regular erosion of the habitat. As such, investment in the restoration of habitats in the region has totaled more than $7 million since 2008. Previous work has created over 1.2 miles of side channels and 30 acres of spawning bed habitat.

Project Participants

The Project is the work of a partnership among the U.S. Bureau of Reclamation, U.S. Fish and Wildlife Service, Sacramento Area Flood Control Agency and Sacramento Water Forum (Water Forum). The Water Forum, a central organizer of the Project, was formed in 2000 by an agreement among 40 stakeholder organizations including various public agencies located within El Dorado, Placer and Sacramento counties to implement programs for the management and protection of water supply in the lower River area. The Water Forum has a track record of success spearheading successful habitat restoration projects of this nature over the last decade in the River, with eight prior gravel projects located along Sacramento Bar, Sailor Bar, River Bend Park and Nimbus Shoals. The Water Forum currently has plans for additional restoration sites at El Manto Access, Sunrise Recreation area and Ancil Hoffman Park. Other partner agencies involved in the Project have been a part of past projects and will likely be involved in future efforts as well.

Conclusion and Implications

The Gravel Augmentation Project at Sailor Bar continues the ongoing efforts by the Water Forum and others to combat the depletion of critical wildlife habitats in the River. Past successes with similar restoration work in the area bode well for the success of the Project. The return of the fish populations to

the area this fall for nesting, peaking in November, should provide an early indication of the effects of the Project. The Project and others of its kind are ultimately laudable not only for their support of wildlife populations in the River, but also for the coordinated efforts among government agencies and regional interests that make them possible.
(Wesley A. Miliband, Andrew D. Foley)

REGULATORY DEVELOPMENTS

FEDERAL AGENCIES RELEASE NO JEOPARDY BIOLOGICAL OPINIONS FOR THE CENTRAL VALLEY PROJECT

On October 21, 2019, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) each issued Biological Opinions under the federal Endangered Species Act (ESA) regarding proposed operations of the federal Central Valley Project (CVP) and the State Water Project (SWP). Both FWS and NMFS found that proposed CVP and SWP long-term operations through 2030 would not jeopardize federally listed threatened or endangered species, including delta smelt and listed salmon, nor adversely modify their designated critical habitats, including those in the Sacramento-San Joaquin River Delta and in upstream tributaries. The U.S. Bureau of Reclamation's (Bureau) proposed action includes significant investment in protection of endangered fish, more robust hatchery operations, changes to cold water pool operations and other actions at Lake Shasta, and increased management oversight in the Delta.

Background

The Central Valley Project is operated in close coordination with the State Water Project administered by the California Department of Water Resources (DWR). Together, the Projects provide water to more than 25 million California residents and millions of acres of farmland throughout California.

The Endangered Species Act imposes requirements for protection of endangered and threatened species and their ecosystems, and makes endangered species protection a governmental priority. For marine and anadromous species (like salmon), the Secretary of Commerce acting through NMFS may list any species, subspecies, or geographically isolated populations of species as endangered or threatened. In addition to listing a species as endangered or threatened, the Secretary must also designate "critical habitat" for each species, to the maximum extent prudent and determinable. For species other than marine or anadromous species, such as for terrestrial species, the Secretary of the Interior acting through FWS may list and otherwise regulate the take of such species.

At its most basic level, a Biological Opinion evaluates whether an agency action is likely to either jeopardize the continued existence of a listed species or result in the destruction or adverse modification of such species' designated critical habitat. Opinions concluding that the proposed action is likely to jeopardize a species' continued existence or adversely modify its critical habitat are called "jeopardy opinions," and must suggest "reasonable and prudent alternatives" that the Secretary believes will minimize the subject action's adverse effects. However, "no jeopardy" opinions do not require reasonable and prudent alternatives, but may still set forth reasonable and prudent measures that the action agency must follow if it is to obtain "incidental take" coverage, i.e. legal protection for incidentally taking a protected species.

The Bureau's Plans for New Long-Term Operations

In 2008 and 2009, FWS and NMFS, respectively, issued "jeopardy" Biological Opinions regarding ongoing operations of the CVP and SWP. These opinions included reasonable and prudent alternatives that effectively compelled the Bureau and DWR to operate many aspects of their water projects according to the direction of the federal wildlife agencies, rather than in compliance with the proposed operating plans offered by the Bureau and DWR. Many years of litigation followed which ultimately concluded with the Ninth Circuit Court of Appeals upholding the opinions.

Beginning in 2016, the Bureau began developing a new long-term operations plan for the CVP and SWP, in close coordination with DWR. As part of the review process, the Bureau and DWR undertook review of the effects the new plan might have on listed species under the ESA, including delta smelt, green sturgeon, and salmon and steelhead (aka "salmonid") species, many of which are considered keystone species in the Sacramento-San Joaquin Delta.

In 2018, the White House directed that the Bureau complete its Biological Assessment (BA) regarding

its new proposed action (*i.e.*, the updated long-term coordination operations plan) no later than January 2019. The Bureau completed the original version of its BA on January 31, 2019 and submitted it to FWS and NMFS.

In June 2019, FWS and NMFS provided portions of their draft Biological Opinions to the Bureau. Those draft chapters suggested FWS and NMFS preliminarily believed the new proposed CVP and SWP operations would continue to have potential jeopardizing impacts on listed species, and thus lead to the issuance of another round of reasonable and prudent alternatives. Thereafter, the Bureau worked with DWR, NMFS and FWS to more closely examine the proposed operations plan in view of the most recent available science. This coordinated effort resulted in the issuance of the "no jeopardy" Biological Opinions.

Investment to Support Fish

The proposed operations plan will include an estimated $1.5 billion in investment to support threatened and endangered fish survival and recovery through research and restoration actions over a ten-year period, including for delta smelt and salmonid species. For instance, the Bureau will implement a program to supplement Delta smelt in the wild by using the existing U.C. Davis Fish Conservation and Culture Laboratory (FCCL). The Bureau will fund a process to supplement the wild delta smelt population with captive-bred fish from FCCL within three-five years following expansion, through additional funding, to increase rearing capacity up to approximately 125,000 adult Delta smelt within three years. Additionally, the operations plan will manage Old and Middle River reverse flows for limiting larval and juvenile delta smelt entrainment based on modeled recruitment estimates. The Bureau will also provide up to $700,000 for reconstruction of the Knights Landing Outfall Gates, to reduce the potential for fish entrainment in the Colusa Basin Drain.

Shasta and Cold Water Management Tiers

The operations plan also provides a detailed description of Shasta Dam operations and Cold Water Management Tiers for the benefit of salmonid species. The operations plan also sets performance metrics for incubation and juvenile production of salmonids under a proposed "Shasta Cold Water Pool Management" strategy. Similarly, the operations plan sets performance metrics for managing Old and Middle River reverse flows to limit salmonid loss to similar levels observed under the previous Biological Opinion through explicit reductions in export pumping. Condition-appropriate actions will occur after two years of low winter-run chinook salmon egg-to-fry survival.

Fish Passage

Additionally, the Bureau will provide up to $1,000,000 towards a collaborative project to construct fish passage downstream of the Deer Creek Irrigation District Dam, which will provide spring-run chinook salmon and Central Valley steelhead with access to 25 miles of spawning habitat. The Bureau will additionally provide up to $14,500,000 over ten years to reintroduce of winter-run chinook salmon to Battle Creek. This includes accelerating the reestablishment of approximately 42 miles of salmon and steelhead habitat on Battle Creek, and an additional six miles on its tributaries.

Conclusion and Implications

The newly released Biological Opinions are controversial in some arenas. Interested parties, including environmental groups, have suggested they may file 60-day notices under the ESA and lawsuits to challenge the Biological Opinions. The FWS Biological Opinion is available at: https://www.fws.gov/sfbaydelta/CVP-SWP/documents/10182019_ROC_BO_final.pdf; *and* the NMFS Biological Opinion available at: https://www.fisheries.noaa.gov/resource/document/biological-opinion-reinitiation-consultation-long-term-operation-central-valley
(Miles B. H. Krieger, Steve Anderson)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS SANTA MONICA ORDINANCE AGAINST SHORT-TERM VACATION RENTALS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

Rosenblatt v. City of Santa Monica, ___F.3d___, Case No. 17-55879 (9th Cir. Oct. 3, 2019).

Recently, the Ninth Circuit Court of Appeals addressed a city ordinance that has become common in California—namely, one that addresses short term housing rentals—that companies such as VERBO® and AirBnb® have made popular throughout the world. The court was faced with the claim that such ordinances, which often mandate rental periods of 30 days or more which are much less common with those type of services, violates the Dormant Commerce Clause. The Ninth Circuit held that they do not.

Background

The Ninth Circuit Court of Appeals summarized this case best, referring to it as involving:

> . . .the perennial clash between a city's exercise of traditional police powers in regulating land use and the rights of property owners to use their property as they see fit.

This class action lawsuit was filed by a Santa Monica resident (plaintiff) against the City of Santa Monica (City) and the city council, alleging that the City's vacation rental ordinance violated the Dormant Commerce Clause. The City's ordinance, passed in 2015, prohibited property rentals of 30 days or less (*i.e.*, vacation rentals and sometimes referred to as transient housing), unless a primary resident remained in the dwelling. Plaintiff was impacted by the ordinance because she used to rent out her house on the popular online marketplace Airbnb when she went out of town. Plaintiff filed this appeal after the U.S. District Court dismissed her complaint and amended complaint for failure to state a claim.

The Ninth Circuit's Decision

The Dormant Commerce Clause

The Dormant Commerce Clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." The clause's primary purpose is to prohibit statutes that discriminate against interstate commerce by providing benefits to in-state economic interests while burdening out-of-state competitors. The court explained that in order for plaintiff to success on her facial challenge under the Dormant Commerce Clause, she must establish that there is no set of circumstances under which the ordinance would be valid. Because of this high burden, the court was required to construe the ordinance narrowly and to resolve any ambiguities in favor of the interpretation that most clearly supports constitutionality.

Complaint Failed to Allege *Per Se* Violation of Dormant Commerce Clause

Plaintiff advanced several reasons to support her claim that the ordinance constituted a *per se* violation of the Dormant Commerce Clause. First, plaintiff argued that the ordinance directly regulated interstate commerce. A local law directly regulates interstate commerce where it directly affects transactions that take place across state lines or entirely outside of the state's borders. The court found that the ordinance's prohibition on vacation rentals for homes within the City did not directly regulate interstate commerce because it only penalizes conduct within the City, regardless of whether the visitors originate from inside or outside the state.

Next, plaintiff argued that the ordinance unconstitutionally discriminated against interstate commerce because it favors in-state interests over out-of-state interests. The most common form of discrimination against interstate commerce is disparate impact—the differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. The court rejected plaintiff's claims that the ordinance discriminates against out-of-state inter-

ests by precluding out-of-state travelers from accessing residential neighborhoods. Such travelers could still access the City's neighborhoods by staying at the many reasonable alternatives to vacation rentals. And, insofar as the ordinance could favor owners by allowing them to live in residential neighborhoods, it did not discriminate against persons outside the City, who stand on equal footing with City residents in their ability to purchase property and reside in Santa Monica. Also, the ordinance's ban on vacation rentals applies in the same manner to persons nationwide—including City residents who may be interested in renting a vacation home from another City resident.

Claim of Undue Burden on Interstate Commerce through Incidental Effects

The court also considered whether the ordinance unduly burdened interstate commerce through its incidental effects. Although the ordinance does not directly regulate or burden interstate commerce, it does (as the City conceded), implicate interstate commerce through its incidental effects. If an ordinance regulates evenhandedly with only incidental effects on interstate commerce, then the second step of the dormancy Commerce clause analysis under the *Pike* test applies. Under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the ordinance will be upheld if it effectuates a legitimate local public interest, unless the burden imposed on interstate commerce is *clearly excessive* in relation to the putative local benefits. The court determined that at most, the ordinance suggested "some negligible burden" on the City's local economy. Therefore, the complaint failed to satisfy the difficult standard established in *Pike*.

Conclusion and Implications

This case is one of many recent cases that challenge local ordinances that regulate the short-term or vacation rental industry. The City of Santa Monica is notoriously known as having one of the strictest ordinances prohibiting vacation rentals. Here, the Ninth Circuit's opinion means that for purposes of the Dormant Commerce Clause, the vacation rental industry is like the hotel industry, in that it represents local and out-of-state interests and is not unconstitutional. The court's decision may be accessed online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/10/03/17-55879.pdf

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT REJECTS CLAIMS FOR PROCEDURAL CEQA ERRORS IN UPHOLDING CITY APPROVAL OF PROPOSED RENOVATION AND RESTORATION PROJECT

AIDS Healthcare Foundation v. City of Los Angeles, et al., Case No. B292816, *Unpub.* (2nd Dist. Aug. 29, 2019).

In an *unpublished* decision issued on August 29, 2019, the Second District Court of Appeal affirmed the decision of the trial court denying a petition for writ of mandate brought by a neighboring landowner and held that the City of Los Angeles (City) did not prejudicially err in amending its General Plan, in approving the project, or in affording the neighboring property owner due process.

Factual Background

The Project and Relevant City Approvals

The Palladium theatre is a historic concert venue located in the heart of Hollywood. The Palladium faces Sunset Boulevard, and is flanked by two parking lots—one alongside the theatre (and to the west) that abuts Sunset Boulevard and Argyle Avenue (Sunset Parcel) and one behind the theatre (and to the north) that abuts Selma Avenue and El Centro Avenue (Selma Parcel). The Palladium site is referred to as "Palladium Parcel." The Sunset Parcel, Selma Parcel and Palladium Parcel all had different zoning classifications.

CH Palladium, LLC and CH Palladium Holdings, LLC (collectively: Developer) sought to transform the site into a residential, commercial and entertainment hub by: 1) converting the two parking lots into two, 28-story towers subdivided into a total of 731 condominiums, 2) preserving and restoring the Palladium theater as a concert venue in partnership with the Palladium's operator, and 3) building 24,000 square feet of ground level retail and restaurant space as well as 33,800 square feet of landscaped courtyards open to the public (collectively: Project).

In July 2013, the Developer applied to the City for a vesting tentative tract map (Tract Map) in order to merge all three separate parcels into a single parcel, and then re-subdivide the air space in the to-be-built towers so that individual condominiums could be sold. The tract map would be conditioned on the city council's amendment of the General Plan to alter the zoning classification of the parcels making up the project site.

On April 15, 2015, the director of planning and a hearing officer held a hearing on the Tract Map, zone change applications and underlying Environmental Impact Report (EIR). Plaintiff AIDS Healthcare Foundation (Foundation), which leases space in two buildings adjacent to the Project site and which owns a building a few blocks away, appeared at the hearing and voiced objections to the tract map, the re-zoning proposal, and the EIR.

In August 2015, the City conditionally approved the Tract Map. Shortly thereafter, in November 2015, the hearing officer issued a report recommending that: 1) the city planning commission (Commission) certify the EIR for the Project, and 2) the city council amend the General Plan and re-zone the parcels comprising the Project.

During two hearings held by the Commission, it was disclosed that certain planning commissioners had had ex parte communications with the Developer and its representatives; however, the commissioners generally averred that the ex parte communications would have no impact on their objectivity with respect to the Project. The Commission approved the Project and the Foundation appealed to the city council. Following a hearing, the City's planning and land use management subcommittee (Subcommittee) recommended that the city council: 1) deny the Foundation's appeal of the Tract Map; 2) certify the EIR; and 3) amend the General Plan and rezone the Project site, the city council.

In late March 2016, the city council at its regular meeting and without entertaining further oral comments on the project, voted to adopt the recommendations of the Subcommittee to deny the

Foundation's appeal of the tract map and to certify the EIR. The City then enacted an ordinance that amended the General Plan and re-zoned the Project site, thereby making the tract map approval no longer conditional.

The Foundation's Petition for Writ of Mandate

In April 2016, the Foundation filed a petition for a writ of *mandamus* challenging the City's approvals of the Project. In the operative First Amended Complaint, the Foundation challenged, in pertinent part: 1) the city council's amendment of the General Plan and re-zoning of the Sunset and Selma parcels, 2) the city council's certification of the EIR after the Advisory Agency had already approved the Tract Map, and 3) the totality of the City's administrative review process as violating the Foundation's right to procedural due process.

The Foundation, the City and the Developer filed cross-motions for judgment on the pleadings regarding the Foundation's claims that: 1) the city council's parcel-specific amendment to the General Plan violated the City Charter, and (2) the zoning administrator's interpretation of Los Angeles Municipal Code § 12.22.A.18(a) was incorrect. After full briefing and a hearing, the trial court ruled in favor of the City and the Developer on those arguments.

The Foundation's remaining claims proceeded to a bench trial. Following extensive briefing and another hearing, the trial court denied the Foundation's remaining claims, including its due process claims, and the Foundation timely appealed raising the following two broad categories of challenges to the trial court's denial of its writ petition: 1) that the City's actions vis-à-vis the Project were improper, and 2) the City denied the Foundation due process.

The Court of Appeal's Decision

Improper Sequencing of EIR Certification

Among other City Code and Charter specific arguments and claims that are not addressed in depth in this summary, the Foundation claimed that the City acted improperly vis-à-vis the Project by approving the EIR after the Tract Map had already been conditionally approved. The Foundation argued that, under the California Environmental Quality Act (CEQA), the EIR must be certified by the "lead [public] agency" evaluating the project prior to the agency taking any action to approve the project. (Pub. Resources Code, § 21090, subd. (a); Cal. Code Regs., tit. 14, § 15090, subd. (a).) The Foundation argued that the City did not follow this sequence because the advisory agency approved the Project (by approving the conditional tract map) before the city council certified the EIR for the Project (which, the Foundation continues, only the City Council could do because it was the only "decision-making body" with the power to amend the General Plan. (*California Clean Energy Committee v. City of San Jose*, 220 Cal.App.4th 1325, 1337-1338 (2013) [when project entails amendment of the general plan, only the agency with the power to amend the plan is the "'decision-making body'" for CEQA purposes]).).

The Court of Appeal rejected this argument noting that CEQA only requires the reversal of agency decisions where the error was prejudicial. In this case, the Court of Appeal reasoned, any error with the advisory agency approving the tract map before the city council certified the EIR was not prejudicial for the simple reason that the Foundation appealed the Tract Map approval all the way to the city council, such that the merits of the Tract Map's approval were pending before the city council at the same time as the merits of whether to certify the EIR. The city council went on to approve the tract map (by denying the Foundation's appeal) at the same time it certified the report, thereby eliminating any prejudice flowing from the earlier, out-of-order approval of the Tract Map.

Due Process

The Foundation argued that it was denied due process: 1) before the Commission because four Commissioners had *ex parte* communications with the Developer, 2) before the Subcommittee because it allowed the City's representative to speak after it and without the same time limits, and 3) before the city council because it did not allow it to argue in person and because the city council members did not state on the record that they had read and understood the administrative record.

The Court of Appeal rejected each of the Foundation's arguments. First, the Court of Appeal held that there was no evidence of actual bias by the Commissioners, as required to state a valid procedural due process claim. (*BreakZone Billiards v. City of Torrance*, 81 Cal.App.4th 1205, 1236 (2000).) The four com-

missioners who received *ex parte* communications from the Developer (and from the Foundation or its fellow objector) disclosed the substance of their ex parte communications and thereafter granted the Foundation an opportunity to respond to those disclosures. This was sufficient to dispel any bias arising from the ex parte communications.

Second, with respect to the subcommittee, the Court of Appeal noted that the administrative hearing was not a judicial proceeding where the party with the burden of proof has the right to a rebuttal argument. It is an administrative proceeding where neighbors are permitted to voice their views. In any event, the Court of Appeal held that constitutional due process does not require that each citizen be granted as much time to speak orally as the City itself.

Third, with respect to the city council, the Court of Appeal noted that the council did entertain oral comments from the Foundation (and anyone else) when it allowed them to speak before the subcommittee, and held that there is no due process right to address a decision-maker twice. (*See*, Gov. Code, § 54954.3, subd. (a) [requiring "legislative bod[ies]" to "provide an opportunity for members of the public to [directly] address the . . . body" "before or during the" "body's consideration of the item"]; *Kramer v. State Board of Accountancy,* 200 Cal.App.2d 163, 175 (1962) ["'Due process insists upon the opportunity for a fair trial, not a multiplicity of such opportunities.'"].) The Court of Appeal further held that the city council members were not required to reaffirm, on the record, that they had read the administrative record and understand it, as it is presumed that public agencies have regularly performed their official duties. (Evid. Code, § 664; *Freeny v. City of San Buenaventura,* 216 Cal.App.4th 1333, 1347 (2013).)

Conclusion and Implications

The Court of Appeal's *unpublished* decision remains significant in that reaffirms the principle that errors in following CEQA's procedures require reversal only if the error is "prejudicial." (Pub. Resources Code, § 21005, subd. (b); *Association of Irritated Residents v. County of Madera,* 107 Cal.App.4th 1383, 1391 (2003).) CEQA petitioners seeking to challenge a project based upon procedural CEQA errors should be mindful of this requirement in judging whether to bring suit. In addition, this case further illustrates the high bar necessary to sustain a claim for procedural due process against a public agency and highlights the clear distinction between rights afforded to the public in an administrative or quasi-adjudicative proceeding versus those afforded in a judicial proceeding. (Paige Gosney)

FIFTH DISTRICT COURT FINDS CEQA CHALLENGE TO HYDROELECTRIC DAM RELICENSING PROCESS IS PREEMPTED BY FEDERAL POWER ACT

County of Butte v. Department of Water Resources, 39 Cal.App.5th 708 (5th Dist. 2019).

Plaintiffs filed suit against the California Department of Water Resources (DWR) and others, alleging a failure to comply with the California Environmental Quality Act (CEQA) as part of a federal relicensing application to operate a hydroelectric dam. The Superior Court dismissed the complaint and the Court of Appeal affirmed. After the California Supreme Court granted the petition and transferred the case to the Court of Appeal with directions to reconsider the case in light of *Friends of the Eel River v. North Coast Railroad Authority*, 3 Cal.5th 677 (2017), the Court of Appeal found *Friends of the Eel River* to be distinguishable and re-affirmed.

Factual and Procedural Background

DWR applied to the Federal Energy Regulatory Commission (FERC) to extend its federal license to operate the Oroville Dam and related facilities as a hydroelectric dam. The Oroville hydroelectric facilities are operated for power generation, water quality improvement in the Sacramento–San Joaquin Delta, recreation, fish and wildlife enhancement, and flood management. In connection with this process, DWR filed a programmatic Environmental Impact Report (EIR) as the lead agency pursuant to CEQA.

Under the Federal Power Act (FPA), federal and

state licensing procedures are merged into a single procedure called an "alternative license process" (ALP), which combines the federal and state environmental review processes into a single process by which affected parties, federal and state agencies, local entities, and affected private parties agree to the terms of relicensing in a final "settlement agreement." The purpose of this process is to resolve all issues that have or could have been raised by the various participating parties in connection with FERC's order issuing a new project license. The settlement agreement then incorporates these requirements in to the license as condition of the license.

Here, some 52 parties including the plaintiffs and the Department of the Interior, representing all interested federal agencies, participated in the alternative license process. Plaintiffs, however, withdrew as parties and instead challenged the sufficiency of the EIR in state court, seeking to enjoin the issuance of an extended license until their environmental claims were reviewed. The Superior Court denied the petition on grounds that the environmental claims were speculative, and the Court of Appeal then held that the authority to review the EIR was preempted by the FPA, and that the superior court therefore lacked subject matter jurisdiction.

Plaintiffs petitioned for review to the California Supreme Court. Review was granted, and the matter ultimately was transferred back to the Court of Appeal with directions to reconsider the case in light of the Supreme Court's recent opinion in *Friends of the Eel River*. This opinion then followed.

The Court of Appeal's Decision

Federal Preemption

The Fifth District Court of Appeal began its analysis with a discussion of federal preemption principles. Generally, the FPA occupies the field of licensing a hydroelectric dam and bars environmental review of the federal licensing procedure in the state courts. The reason is that "a dual final authority with a duplicate system of state permits and federal licenses required for each project would be unworkable."

The only relevant exception is § 401 of the federal Clean Water Act, which requires the State Water Resources Control Board to issue a water quality certificate pursuant to § 401 of the Clean Water Act and the state Porter-Cologne Act before a FERC can issue a license to DWR. Preparation and certification of an EIR is required in connection with this process, although the FPA places various time limits and constraints on the state's power under § 401. However, any disputes regarding the FERC licensing process or the adequacy of "required studies" are generally subject to FERC's jurisdiction and review.

Federal Court Jurisdiction

After analyzing preemption, the Court of Appeal concluded that plaintiffs could not challenge the environmental sufficiency of the environmental review studies for the relicensing in state court because jurisdiction to review the matter lies with FERC, and plaintiffs did not seek federal review as required by 18 Code of Federal Regulations part 4.34(i)(6)(vii). Further, the plaintiffs did not challenge and could not have challenged the State Water Resources Control Board's certification in their pleadings because it did not exist at the time that the complaint was filed.

Analysis under *Friends of the Eel River*

As directed, the Court of Appeal then reviewed *Friends of the Eel River* and found that the Interstate Commerce Commission Termination Act (ICCTA), which was at issue in that case, is materially distinguishable from the FPA. The specific question in *Friends of the Eel River* was whether ICCTA preempted application of CEQA to a project to resume freight service on a stretch of rail line owned by the North Coast Railroad Authority. The California Legislature had created the North Coast Railroad Authority and gave it power to acquire property and operate a railroad, to be owned by a subsidiary of the state. For this reason, the California Supreme Court found that the purpose of the federal law was deregulatory, and the state as the owner of the railroad was granted autonomy to apply its environmental law.

Conclusion and Implications

The case is significant because it is an example of federal preemption being applied in the context of CEQA and it distinguishes the California's Supreme Court's recent decision in *Friends of the Eel River v. North Coast Railroad Authority*. The decision is available online at: https://www.courts.ca.gov/opinions/documents/C071785A.PDF.
(James Purvis)

SECOND DISTRICT COURT UPHOLDS COASTAL COMMISSION SETBACK REQUIREMENT DESPITE LACK OF INDICATION WHICH STAFF FINDINGS THE COMMISSION RELIED ON

Greene v. California Coastal Commission,
___Cal.App.5th___, Case No. B293301 (2nd Dist. Oct. 9, 2019).

The Second District Court of Appeal affirmed a trial court judgment that the California Coastal Commission's (Comission) requirement of an increased setback was supported by substantial evidence, despite the fact that the Commission did not identify which findings from the staff report it was relying on. Plaintiffs in the case, represented by the Pacific Legal Foundation, argued that the enhanced setback condition was not supported by substantial evidence and that the Coastal Commission's decision should be vacated so that the commission would make clear which findings it was relying on.

Factual and Procedural Background

Mark and Bella Greene hired an architect to remodel their beachfront residence. As proposed, the remodel would reduce the seaward setback from the residence from 15 feet to 1.5 feet. The subject property abutted the City of Los Angeles' planned "Ocean Front Walk," which would eventually provide the public with a concrete walkway along the beachfront property line of the residence.

The City of Los Angeles (City) is one of the few jurisdictions in California where the state and not the local agency is responsible for issuing coastal development permits. As a result, the Greene's had to apply for project approval from both the City and the Coastal Commission. The City approved a permit for the Greenes' remodel. The Greenes then submitted an application to the Coastal Commission.

The staff report for the Coastal Commission hearing on the application recommended approval of the project with several conditions, including a five-foot setback from the property line. In support of this increased setback, the report included several findings that a smaller setback would interfere with public access to the beach and the "Ocean Front Walk." Specifically, the 1.5-foot buffer would create an appearance that the area behind the residence was private property and would not allow adequate space for normal maintenance and repairs absent encroachment on public lands. In a separate section of the report, Commission staff discussed future sea level rises as another basis for requiring a five foot setback.

At the Coastal Commission hearing, the commission approved the Greene's permit, subject to the five foot setback condition. However, it was unclear which findings from the staff report the Coastal Commission was relying on when it approved the condition.

The Greenes filed a petition for writ of mandate under Code of Civil Procedure § 1094.5 seeking declaratory and injunctive relief to vacate the five foot setback requirement. The Greenes alleged that the Coastal Commission abused its discretion in requiring the increased setback because such requirement was not supported by substantial evidence. The Greenes also alleged that the setback amounted to an unconstitutional taking.

At the Trial Court

The trial court ultimately denied the petition. In doing so, the court concluded that substantial evidence supported the Coastal Commission's findings that a setback of less than five feet would effectively privatize the beach seaward of the property, necessitate intrusion into the public right-of-way for routine repairs, and create conflicts between the Greenes and the public. On the other hand, the trial court found that the commission's other finding related to the risk of sea-level rise, was not supported by substantial evidence. Finally, regarding the Greene's unconstitutional takings claims, the Superior Court found that the Greenes had not exhausted their administrative remedies on that point because it was not specifically argued in proceedings before the Commission.

The Court of Appeal's Decision

On appeal, the Greenes raised two arguments in support of their claim that the Coastal Commission's action was not supported by substantial evidence. First, the Greenes argued generally that there was

no substantial evidence on the record to support the Commission's finding that a 1.5-foot setback would interfere with public access to the beach. Next, the Greenes argued that even if some of the commision's findings regarding public beach access were supported by substantial evidence, the condition must still be vacated. This was justified because it was not clear which findings from the staff report the Coastal Commission relied on when approving the five foot setback. Specifically, the Greenes referenced multiple statements by commissioners at the hearing noting that a larger setback was justified by sea-level rise, a finding rejected by the trial court.

Substantial Evidence

The Second District Court of Appeals disagreed with both arguments. Regarding the first point, the court found there were multiple bases by which the Coastal Commission could find that a five foot setback from the seaward property line was necessary. Namely, it was reasonable for the commission to conclude that routine maintenance, such as painting, at the residence would physically intrude on the "Ocean Front Walk." It was also reasonable to conclude that a residence 1.5 feet from the seaward property line would create the appearance that:

> . . .the immediate vicinity of the seaward-facing side of the [residence] was private, when, in fact, it is public land.

Last, the court noted that the Coastal Commission analyzed prior approvals where small setbacks resulted in conflicts between homeowners and the public. The court held that these findings, in light of the Coastal Act's policies in support of maximized public access and recreation, provided substantial evidence to support the commission's approval of the five foot setback condition.

Presumption of Commission Reliance on Staff Report

Regarding the Greenes' second point, the court noted that even though the Coastal Commission did not identify which findings it was relying on in its approval, in the absence of a statement to the contrary, the court must presume that it was relying on all of the findings in the staff report. Even if the finding related to sea-level rise was debunked by the trial court, it was enough that some findings adopted by the trial court were supported by substantial evidence.

Takings Claims

Last, the appeals court dismissed the Greene's unconstitutional takings claims because such claims were not specifically raised during proceedings before the Coastal Commission. To satisfy the exhaustion requirement, the Greene's were required to present the "exact issue" of unconstitutional takings before the commission so that the commission had the opportunity to evaluate the issue.

Conclusion and Implications

The Second District Court of Appeal's decision highlights the deference that courts will give to administrative agencies in upholding their decisions, even when it is not entirely clear which findings from staff reports the agencies are relying upon. Absent indication by the agency's decision-making body to the contrary, the agency is deemed to adopt all of the findings in the staff report if the agency takes the action recommended in the report. So long as enough, if not all, of these findings are supported by substantial evidence, courts will not vacate the agency's decision. The court's decision is also an important reminder of the importance raising all specific, potentially viable claims during the administrative process to avoid dismissal based on a failure to exhaust administrative remedies.
(Travis Brooks)

FOURTH DISTRICT COURT UPHOLDS CONDITIONS IMPOSED BY CALIFORNIA COASTAL COMMISSION ON COASTAL DEVELOPMENT PERMIT

Lindstrom v. California Coastal Commission, ___Cal.App.5th___, Case No. D074132 (4th Dist. Sept. 19, 2019).

The Fourth District Court of Appeal found the California Coastal Commission (Commission) did not abuse its discretion when it imposed special conditions on a coastal development permit. The court found three of four conditions were consistent with the City of Encinitas' local coastal program and within the Commission's authority. The court, however, rejected one condition because it was overbroad, unreasonable, and did not achieve the Commission's purpose for imposing it.

Factual and Procedural Background

In 2012, petitioner applied for a coastal development permit with the City of Encinitas (City) to build a 3,553 square-foot home atop a 70-foot high ocean-top bluff. Petitioner submitted a permit application pursuant to the City's Local Coastal Program (LCP) and hired an engineering firm to prepare a geotechnical report. The LCP required the report to: 1) certify that the development would not require coastal armoring in 75 years based on current erosion rates; and 2) calculate the project's setback distance, of no less than 40-feet, based off a 1.5 safety level. The report concluded the project would be safe from bluff failure with a 40-foot setback and no protective armoring in 75 years would be required.

In May 2013, the City's planning commission approved the development permit with conditions. One month later, two commissioners appealed the City's approval claiming it conflicted with the LCP. Petitioner requested the Commission delay its decision, and retained a new engineering firm to prepare a revised geotechnical report. The report was completed in October 2015 and concluded the slope would be safe with a 40-foot setback at a 1.29 safety level.

The Commission heard the appeal in July 2016. A staff geologist claimed the proper setback should be 60 to 62 feet because the report's analysis relied on an improper safety level. Counsel for petitioners claimed the LCP's statutory language did not explicitly require a safety level of 1.5 over the course of the entire 75-year projection. The Commission rejected the report's calculations and approved the permit with four conditions. The first condition (Condition 1.a) imposed a 60- to 62-foot setback. The second condition (Condition 3.a) prohibited all use of coastal armoring devices. The third condition (Condition 3.b) required removal of the home in the event a government agency deems occupancy unsafe due to natural hazards. The fourth condition (Condition 3.c) imposed mandatory remediation measures that the landowners must take in the event hazardous bluff conditions threaten the structure.

Petitioner filed a petition for writ of mandate challenging these conditions. The trial court partially granted the petition and found in favor of petitioner as to the first and second conditions (Conditions 1.a and 3.a), but found the Commission did not abuse its discretion in imposing the third and fourth conditions (Conditions 3.b and 3.c). The parties cross-appealed.

The Court of Appeal's Decision

The Court of Appeal for the Fourth Judicial District partially reversed the trial court's holding. Under a substantial evidence standard of review, the court found the Commission did not abuse its discretion by imposing the first, second, and fourth conditions (Conditions 1.a, 3.a, and 3.c), but held the third condition (Condition 3.b) was improperly broad and not reasonably related to achieving the LCP's purpose.

The Minimum Setback Requirement

As to Condition 1.a, which imposed a 60- to 62-foot development setback, the court found that the plain language of the statute supported the Commission's decision. Petitioner urged the court to defer to the City planning commission's interpretation of the statute because it was the agency charged with initially issuing the permit. The Commission urged the court to defer to its analysis because it certified the LCP and case law requires deference to the Commission's interpretation of local programs. The court declined deferring to either interpretation, instead

finding that a reasonable person could interpret the statute's plain language as requiring a safety factor of 1.5 from failure and erosion over 75 years. As such, the Commission's condition was proper because the geologist's 60- to 62-foot setback calculation conformed to the statute's methodology.

Waiver of Future Coastal Armoring

The court found the Commission properly imposed Condition 3.a because the agency may impose reasonable terms and conditions on permits, so long as they comport with the Coastal Act and local LCP. The condition, which waived the petitioner's future right to build a seawall, was consistent with the City's LCP and implemented a provision of the City's General Plan that banned coastal armoring structures on new developments. The court also petitioner's related takings claims, finding that the condition simply restricted use of the property, rather than exacting a fee or demanding conveyance of a property interest. Petitioner would not be deprived of all economically beneficial use of their land because they would continue to hold title to their property. Lastly, petitioner would not suffer a physical taking because future bluff rescission on their property would be caused by forces of nature, not an unconstitutional government invasion.

Mandatory Structure Removal

The court held the Commission abused its discretion in imposing Condition 3.b, which would require petitioner to remove the home in the event a government agency deems it at risk of a natural hazard. Contrary to petitioner's argument, the court found that the Commission may impose permit conditions not expressly authorized by the LCP, so long as they are reasonable. Here, however, Condition 3.b was not reasonable because it was overly broad. As drafted, the condition's language could be interpreted to require petitioner to remove their home under unreasonable circumstances, including natural hazards that have nothing to do with blufftop instability. Because this failed to reasonably relate to the LCP, the court issued a writ of mandate requiring the Commission to delete or revise and clarify the condition.

Bluff Rescission Management

Finally, the court rejected petitioner's argument that Condition 3.c unconstitutionally infringed on their substantive and procedural due process rights. The condition required petitioner to prepare a geotechnical report if the bluff erodes to within ten feet of the development and obtain an amended coastal development permit or remove any structures that are deemed unsafe. The court found the condition properly comported with the Commission's inherent authority because it aligned with the LCP and Coastal Act and did not unreasonably restrict use of the land.

Conclusion and Implications

The Court of Appeal's decision reiterates the Coastal Commission's inherent authority to impose special conditions on coastal development permits. The Coastal Act grants the Commission with oversight over local coastal programs and permitting. As such, the Commission may impose additional conditions of approval to protect bluff stability, including mandatory setback requirements, waivers on coastal armoring, and future retreat management measures. Mere restrictions on land use that do not exact a fee or deprive owners of all use do not violate the unconstitutional conditions doctrine. However, conditional language should not be so expansive that it could be interpreted in a manner that yields unreasonable results. Thus, conditions that are overly broad or inconsistent with a city's local coastal program are impermissible.

The opinion is available at: https://www.courts.ca.gov/opinions/documents/D074132.PDF
(Bridget McDonald, Christina L. Berglund)

FIRST DISTRICT COURT FINDS PUBLIC AGENCY'S FAILURE TO ACT IS NOT AN ACTIVITY THAT CONSTITUTES A 'PROJECT' UNDER CEQA

The Lake Norconian Club Foundation v. Department of Corrections and Rehabilitation, 39 Cal.App.5th 1044 (1st Dist. 2019).

A foundation petitioned for a writ of mandate, alleging that the California Department of Corrections and Rehabilitation (Department) failed to comply with the California Environmental Quality Act (CEQA) by allowing the "demolition by neglect" of a former hotel owned by the Department and listed on the National Register of Historic Places. The Superior Court found that the agency's actions were a "project" under CEQA but denied the petition on statute of limitations grounds. The Court of Appeal affirmed on different grounds, finding that an agency's failure to act is not an activity that constitutes a "project" under CEQA.

Factual and Procedural Background

The Lake Norconian Club is a former hotel owned by the Department and listed on the National Register of Historic Places. The hotel currently sits unoccupied on the grounds of a medium-security prison owned and operated by the Department. When first opened in 1929, the hotel was a luxury resort catering to Hollywood stars and sports celebrities. In 1941, following the depression and with the advent of World War II, the hotel was closed and the building transferred to the United States Navy. The building was used as a military hospital until 1962, when it was transferred to the State of California. Since 1963, the Department has operated a prison adjacent to the former hotel.

In November 2014, the Lake Norconian Club Foundation (Foundation) filed a petition for writ of mandate, alleging that the Department and its director had abused their discretion and failed to act in the manner required by law through their ongoing "demolition by neglect" of the Lake Norconian Club. Years of neglect and lack of security, for instance, had left gaping holes in the club roof and extensive damage from wildlife and water intrusion. These actions, the Foundation alleged, constituted a discretionary action with significant environmental impacts and effectively amounted to the de facto issuance of ongoing demolition permits without first having complied with CEQA.

The Superior Court issued an order denying the petition in April 2018. Specifically, the court found that, while the Department's failure to seek or allocate funding to the preserve the hotel was a "project" within the meaning of CEQA, the petition was untimely. Following entry of judgment and denial of its motion for a new trial, the Foundation appealed. The Department then filed a notice of cross-appeal on the grounds that the Superior Court erred in deeming the failure to act a "project."

The Court of Appeal's Decision

The California Environmental Quality Act applies to any "project" that a public agency proposes to carry out or approve that may have a significant effect on the environment. (Pub. Resources Code, § 21100(a).) Under CEQA, a "project" is defined as an activity that may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: 1) an activity directly undertaken by any public agency; 2) an activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies; or 3) an activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. (Pub. Resources Code, § 21065.) Any activity that does not meet the definition of "project" is not subject to CEQA.

Agency Failure to Act—With Environmental Consequences—May Not Constitute an 'Action' or 'Project' under CEQA

Applying these principles, the Court of Appeal found as a matter of first impression that an agency's failure to act is not itself an activity, even if, as may commonly be the case, there are environmental consequences resulting from the inactivity. Relatedly, it noted that the issues presented by application of statute of limitations further supported this conclusion, as

it would be unworkable to determine when inactivity sufficiently resulted in a "project" so as to trigger the limitations period. Surveying the record, the Court of Appeal observed that there were many times, over the course of many years, during which the limitations period might be found to have accrued, but that it would be unworkable to identify a single one.

The National Environmental Policy Act

The Court of Appeal also looked to the National Environmental Policy Act (NEPA), which applies to "major federal actions." Like "projects," federal "actions" include "activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals." (40 C.F.R., § 1508.18(a).) Federal courts, the Court of Appeal noted, have rejected the argument that an agency's inaction amounts to an action under the federal regulation. While the Court of Appeal acknowledged that, under NEPA, certain inactivity nonetheless may constitute federal "action" where an agency has an affirmative duty to act, it found no such circumstances in this case. In any event, it concluded, neither CEQA not its implementing regulations include a similar concept.

Conclusion and Implications

The case is significant because the question of whether an agency's failure to act may constitute a "project" is an issue of first impression. The decision is available online at: https://www.courts.ca.gov/opinions/documents/A154917.PDF.
(James Purvis)

FOURTH DISTRICT COURT HOLDS VIEW ORDINANCE IS THE EQUIVALENT OF A ZONING ORDINANCE SUBJECT TO 90-DAY SERVICE OF PETITION DEADLINE

Weiss v. City of Del Mar, 39 Cal.App.5th 609 (4th Dist. 2019).

The Fourth District Court of Appeal, in upholding the trial court's decision, unanimously found that the 90-day service of petition deadline in Government Code § 65009, which applies to challenges on zoning ordinances, applied also to a planning commission action on a municipal scenic view ordinance because it was the functional equivalent of a zoning ordinance. As a result, the court held that a petition for writ of mandate, served three months after the 90-day deadline, that challenged the planning commission's denial of an application under the ordinance for restoration of an ocean view was time-barred.

Factual and Procedural Background

In 2014, petitioner purchased a condominium in the City of Del Mar primarily because of its "white water ocean view." But within two years of her purchase, this view was obstructed by, in her words, "'wildly overgrown'" trees and vegetation on a neighboring property owned by Torrey Pacific Corporation. In August 2016, petitioner sought restoration of her view by submitting an application to the city under its Trees, Scenic Views and Sunlight Ordinance (Scenic View Ordinance or Ordinance). The Ordinance allows individuals, upon approval by the planning commission, to restore scenic views that have been "'unreasonably obstructed'" by vegetation growth within 300 feet of a property line to their former state at either the time of property purchase/occupation or sometime in the last ten years, "'whichever is shorter.'" At an April 2017 hearing held in part on this issue, "a divided" planning commission denied her application after petitioner acknowledged that Torrey Pacific had recently trimmed its vegetation and restored her view. Petitioner contended, however, that she was now entitled to a "'Preservation Plan,'" implemented at her expense that required Torrey Pacific to trim vegetation four times per year. Petitioner appealed the commission's decision to the city council that reviewed the application de novo review in July 2017 and issued a 2-2 split decision, thereby under city rules reinstating the planning commission's denial.

Petitioner filed a petition for writ of mandate against both the city and Torrey Pacific in September 2017 but failed to serve the city with the petition until December 2017—five months after the city issued its final ruling. Respondents jointly moved to dismiss under the 90-day "service rule set forth in § 65009, subdivision (c)(1)(E)" of the Government Code that requires service of petitions no more than 90 days after a final agency action for challenges to certain local zoning and planning decisions. Petitioner argued against their motion—stating § 65009 was "inapplicable" because it does not govern decisions made under the ordinance, which she claimed was neither a local zoning nor planning decision. The trial court, however, granted the motion and found that the § 65009 deadline applied and was undisputedly not met. On appeal from the trial court's decision, Petitioner recognized that she served the city more than 90 days after their denial of her appeal but still contended the § 65009 deadline did not apply.

The Court of Appeal's Decision

The Fourth District Court of Appeal began its inquiry with a traditional statutory interpretation of § 65009 by first focusing on the plain language within the context of the entire statute. Unquestionably, the court noted that § 65009, subdivision c, requires that a "challenger must file and serve the public entity within 90 days of the challenged decision." Subdivision c, the court explained, goes on to specify that decisions related to "adoption/amendment of general or specific plan, zoning ordinances, regulation attached to a specific plan, or a development agreement" are subject to the 90-day deadline, as well as all actions "'done or made prior to any of these decisions."

Additionally, § 65009 clearly states the 90-day deadline applies to "'any decision on the matters listed in §§ 65901 and 65903,'" which, germane here, include actions taken in relation to a zoning ordinance or "'any other powers granted by local ordinance'" as exercised by a zoning administrator. Section 65903 goes on to specify that decisions by a zoning administrator may be appealable to a board, "'if one has been created.'"

Respondents took the position that "[t]he planning commission's ruling under the authority of the Scenic View ordinance was an exercise of its 'powers granted by local ordinance' on a land use/zoning issue" pursuant to § 65901, thereby making applicable § 65009's 90-day deadline. In contrast, petitioner asserted that the Scenic View Ordinance is not a zoning ordinance because it is not housed within the city's municipal code zoning rules and regulations and, therefore, classifications set forth in §§ 65901 and 65903 did not apply. The court disagreed.

'Functionally Acting in a Zoning Board Capacity'

The planning commission, according to the court, was "functionally acting in a zoning board capacity" by undertaking zoning and planning responsibilities when it ruled on petitioner's application. And, that function—not where the ordinance is housed—controls. The court cited *Save Lafayette Trees v. City of Lafayette*, 32 Cal.App.5th 148 (2019) where a tree ordinance was held to be a zoning ordinance and noted that even if the ordinance were not a zoning or land use determination, the broadness of § 65901's "'any other powers'" clause encompasses "a range of issues outside" those listed in §§ 65901 and 65903.

General Statements of Statutory Purpose 'Do Not Override the Substantive Portion'

In the alternative, petitioner argued that §§ 65009 and 65901 may apply to planning or zoning decisions on individual projects or developments but not to enforcement of an ordinance. For support, petitioner cited the purpose of § 65009 that refers to owners and governments needing certainty on decisions regarding "'projects.'" But, the court clarified that general statements of statutory purpose "do[] not override the substantive portion," especially where the language is "clear and unambiguous." The court inferred that petitioner was inappropriately trying to "add words to the substantive portions of the statute" and again pointed to the broad language in § 65901.

Section 65009 Not Limited to a Single Project or Development

Weiss further asserted that the 90-day deadline had only ever been applied to individual projects/development and certainly never under these circumstances. The court acquiesced that "most courts interpreting section[s] 65009 [and 65901] have done so in the context of a…particular project or development," but no authority exists that would limit § 65009 to challenges to projects/developments. The court then

discussed various cases cited by petitioner and found that none of them "addressed the issue before us."

Remaining Arguments

Petitioner made several final arguments that the court summarily rejected. First, the court dismissed petitioner's "hypothetical" argument that application of the 90-day deadline here would have the unfortunate result of forcing application to "any decision by the [c]ity's planning commission." In doing so, the court pointed to limiting language within the statute that constrains the deadline to "zoning and similar land use determinations."

Second, petitioner claimed that the § 65009 deadline applies to projects only because expedience is required for development whereas in the current dispute there is a lack of urgency that precludes applicability. But the court again noted that petitioner was attempting to add language to the statute that does not exist and regardless, an issue like tree removal "should be resolved in a prompt manner."

Lastly, petitioner argued that because the Scenic View Ordinance expressly mentions Code of Civil Procedure § 1094.6 as governing judicial challenges, but does not expressly mention § 65009, therefore § 1094.6 prevails and the 90-time deadline cannot apply. The court debunked her *expressio unius* argument by noting § 1094.6 addresses filing deadlines but is silent on service of petition, therefore, as found by prior courts, the two regulations can harmonize.

Conclusion and Implications

By affirming the trial court's order in reasoned detail, the court accomplished two major things. First, and of most concern to the parties, it extended the 90-day service of petition deadline in Government Code § 65009 to a local ordinance that exists outside enumerated subject categories. Second, and more broadly, the court ostensibly determined that a local ordinance can be treated the same as a zoning ordinance if it is "essentially identical" in purpose. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/D074370.PDF. (Casey Shorrock, Christina Berglund)

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