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CALIFORNIA LAND USE™ LAW & POLICY Reporter

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FEATURE ARTICLE

THE 2019 CALIFORNIA YEAR-END LAND USE LEGISLATIVE WRAP UP

By Paige Gosney, Esq.

The 2018-2019 Legislative Session has now come to a close and a number of bills related to land use have been signed into law or vetoed by Governor Newsom. Each year, at the end of each Legislative Session, we provide a year-end summary of bills that the *California Land Use Law & Policy Reporter* has been tracking over the course of the session. As indicated, some of the bills, for one reason or another, never even made it to the Governor's desk. Nonetheless, for purposes of providing our readers with a comprehensive breakdown we continue to present those bills here. In addition, some of these "stuck" bills have either been converted to two-year bills or will resurface in a "new and improved" form.

As for those bills that did reach the Governor's desk, several impact primary land use areas such as the California Environmental Quality Act, California Coastal Act and Subdivision Map Act, as well as issues such as air quality, greenhouse gas emissions and water, housing and redevelopment reform. As with the close of any Legislative Session it will interesting to watch the impact, if any, of these laws on land use practitioners, and how they translate into new bills for the future.

Unless otherwise noted, each of the laws signed by the Governor will go into effect on January 1, 2020.

Coastal Resources

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

AB 65 was introduced in the Assembly on December 3, 2018, and, most recently, on September 27, 2019, was approved by the Governor and chaptered by the Secretary of State at Chapter 347, Statutes of 2019.

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

AB 552 was introduced in the Assembly on February 13, 2019, and, most recently, on August 30, 2019, was held under submission in the Committee on Appropriations.

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

AB 1011 was introduced in the Assembly on February 21, 2019, and, most recently, on August 30, 2019, was approved by the Governor and chaptered by the Secretary of State at Chapter 185, Statutes of 2019.

Environmental Protection and Quality

•**AB 202 (Mathis)**—This bill would extend the operation of the California State Safe Harbor Agreement Program Act, which establishes a program to encourage landowners to manage their lands voluntarily, by means of state safe harbor agreements approved by the Department of Fish and Wildlife, to benefit endangered, threatened, or candidate species, of declining or vulnerable species, without being

subject to additional regulatory restrictions as a result of their conservation efforts, indefinitely.

AB 202 was introduced in the Assembly on January 14, 2019, and, most recently, on June 6, 2019, had its hearing in the Committee on Natural Resources and Water cancelled at the request of its author, Assembly Member Mathis.

•**AB 231 (Mathis)—**This bill would exempt from the California Environmental Quality Act (CEQA) a project: 1) to construct or expand a recycled water pipeline for the purpose of mitigating drought conditions for which a state of emergency was proclaimed by the Governor if the project meets specified criteria; and, 2) the development and approval of building standards by state agencies for recycled water systems.

AB 231 was introduced in the Assembly on January 17, 2019, and, most recently, on May 9, 2019, was sent from the Committee on Natural Resources and held without further action pursuant to Joint Rule 62(a).

•**AB 296 (Cooley)—**This bill would establish the Climate Innovation Grant Program, to be administered by the Climate Innovation Commission, the purpose of which would be to award grants in the form of matching funds for the development and research of new innovations and technologies to address issues related to emissions of greenhouse gases and impacts caused by climate change.

AB 296 was introduced in the Assembly on January 28, 2019, and, most recently, on October 2, 2019, was vetoed by the Governor.

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

AB 394 was introduced in the Assembly on February 6, 2019, and, most recently, on October 2, 2019, was vetoed by the Governor.

•**AB 430 (Gallagher)—**This bill would exempt from the California Environmental Quality Act projects involving the development of new housing in the County of Butte.

AB 430 was introduced in the Assembly on February 7, 2019, and, most recently, on October 11, 2019, was approved by the Governor and chaptered by the Secretary of State at Chapter 745, Statutes of 2019.

•**AB 454 (Kalra)—**This bill would amend the Fish and Game Code to make unlawful the taking or possession of any migratory nongame bird designated in the federal Migratory Bird Treat Act as of January 1, 2017, any additional migratory nongame bird that may be designated in the federal act after that date.

AB 454 was introduced in the Assembly on February 11, 2019, and, most recently, on September 27, 2019, was approved by the Governor and chaptered by the Secretary of State at Chapter 349, Statutes of 2019.

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

AB 490 was introduced in the Assembly on February 12, 2019, and, most recently, on April 22, 2019, had its hearing in the Committee on Natural Resources cancelled at the request of its author, Assembly Member Salas.

•**SB 25 (Caballero)—**This bill would amend the California Environmental Quality Act to establish specified procedures for the administrative and judicial review of the environmental review and approvals granted for projects located in qualified opportunity zones that are funded, in whole or in part, by qualified opportunity funds, or by moneys from the Greenhouse Gas Reduction Fund and allocated by the Strategic Growth Council.

SB 25 was introduced in the Senate on December 3, 2018, and, most recently, on July 8, 2019, had its hearing in the Committee on Natural Resources postponed by the committee.

•**SB 62 (Dodd)—**This bill would make permanent

the exception to the California Endangered Species Act for the accidental take of candidate, threatened, or endangered species resulting from acts that occur on a farm or a ranch in the course of otherwise lawful routine and ongoing agricultural activities.

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

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

SB 226 was introduced in the Senate on February 7, 2019, and, most recently, on August 30, 2019, was held under submission in the Committee on Appropriations.

SB 621 (Glazer)—This bill would require any action or proceeding brought under the California Environmental Quality Act to attack, review, set aside, void, or annul the certification of an environmental impact report for an affordable housing project or the granting of an approval of an affordable housing project, to require the action or proceeding, including any potential appeals therefrom, to be resolved, to the extent feasible, within 270 days of the filing of the certified record of proceeding with the court.

SB 621 was introduced in the Senate on February 22, 2019, and, most recently, on July 8, 2019, had its hearing in the Committee on Natural Resources cancelled at the request of its author, Senator Glazer.

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

SB 632 was introduced in the Senate on February 22, 2019, and, most recently on October 2, 2019, was approved by the Governor and chaptered by the Secretary of State at Chapter 411, Statutes of 2019.

Housing / Redevelopment

•**AB 11 (Chiu)—**This bill, the Community Redevelopment Law of 2019, would authorize a city or county, or two or more cities acting jointly, to propose the formation of an affordable housing and infrastructure agency that would, among other things, prepare a proposed redevelopment project plan that would be considered at a public hearing by the agency where it would be authorized to either adopt the redevelopment project plan or abandon proceedings, in which case the agency would cease to exist.

AB 11 was introduced in the Assembly on December 3, 2018, and, most recently, on April 25, 2019, was re-referred to the Committee on Appropriations.

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

AB 68 was introduced in the Assembly on December 3, 2018, and, most recently, on October 9, 2019, was approved by the Governor and chaptered by the Secretary of State at Chapter 655, Statutes of 2019.

•**AB 69 (Ting)—**This bill would require the Department of Housing and Community Development to propose small home building standards governing accessory dwelling units and homes smaller than 800 square feet, which would be submitted to the California Building Standards Commission for adoption on or before January 1, 2021.]

AB 69 was introduced in the Assembly on December 3, 2018, and, most recently, on September 5, 2019, was ordered to the inactive file at the request of Senator Skinner.

•**AB 168 (Aguiar-Curry)—**This bill would amend existing law, which allows for the ministerial

approval of multi-family housing projects meeting certain objective planning standards, to require that the standards also include a requirement that the proposed development not be located on a site that is a tribal cultural resource.

AB 168 was introduced in the Assembly on January 9, 2019, and, most recently, on September 9, 2019, was ordered to the inactive file at the request of Senator Weiner.

•**AB 191 (Patterson)**—This bill would, until January 1, 2030, exempt homes being rebuilt after wildfires or specified emergency events that occurred on or after January 1, 2017, from meeting certain current building standards.

AB 191 was introduced in the Assembly on January 10, 2019, and, most recently, on April 1, 2019, was re-referred to the Committee on Housing and Community Development.

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

AB 1279 was introduced in the Assembly on February 21, 2019, and, most recently, on June 12, 2019, was re-referred to the Committees on Housing, Environmental Quality and Governance and Finance.

•**SB 50 (Wiener)**—This bill would require a city, county, or city and county to grant upon request an equitable communities incentive when a development proponent seeks and agrees to construct a residential development, as defined, that satisfies specified criteria, including, among other things, that the residential development is either a job-rich housing project or a transit-rich housing project, as those terms are defined; the site does not contain, or has not contained, housing occupied by tenants or accommodations withdrawn from rent or lease in accordance with specified law within specified time periods; and the residential development complies with specified additional requirements under existing law.

SB 50 was introduced in the Senate on December 3, 2018, and, most recently, on June 4, 2019, was re-referred to the Committee on Appropriations.

•**SB 330 (Skinner)**—This bill would make numerous changes to the Permit Streamlining Act and the Housing Accountability Act, and establish the Housing Crisis Act of 2019, in conjunction with, and as part of, the Governor's pledge to create 3.5 million new housing units by 2025. Among other things, SB 330 would limit local laws regulating housing developments, shorten the timeframe for housing development approvals under the Permit Streamlining Act and preclude local agencies from changing existing residential land use designations to remove housing as a permitted use or reduce the intensity of residential uses permitted under the general plan and zoning codes that were in place as of January 1, 2018.

SB 330 was introduced in the Senate on February 19, 2019, and, most recently, on October 9, 2019, was approved by the Governor and chaptered by the Secretary of State at Chapter 654, Statutes of 2019.

Public Agencies

•**AB 485 (Medina)**—The bill would prohibit a local agency from signing a nondisclosure agreement regarding a warehouse distribution center as part of negotiations or in the contract for any economic development subsidy.

AB 485 was introduced in the Assembly on February 12, 2019, and, most recently, on October 12, 2019, was approved by the Governor and chaptered by the Secretary of State at Chapter 803, Statutes of 2019.

•**AB 637 (Gray)**—This bill would prohibit the State Water Resources Control Board or a Regional Water Quality Control Board from adopting or implementing any policy or plan that results in a direct or indirect reduction to the drinking water supplies that serve a severely disadvantaged community, as defined.

AB 637 was introduced in the Assembly on February 15, 2019, and, most recently, on May 16, 2019, was held under submission in the Committee on Appropriations.

•**AB 1483 (Grayson)**—This bill would require a city or county to compile a list that provides zoning and planning standards, fees imposed under the

Mitigation Fee Act, special taxes, and assessments applicable to housing development projects in the jurisdiction. In addition, this bill would require each city and county to annually submit specified information concerning pending housing development projects with completed applications within the city or county, the number of applications deemed complete, and the number of discretionary permits, building permits, and certificates of occupancy issued by the city or county to the Department of Housing and Community Development and any applicable metropolitan planning organization.

AB 1483 was introduced in the Assembly on February 22, 2019, and, most recently, on October 9, 2019, was approved by the Governor and chaptered by the Secretary of State at Chapter 662, Statutes of 2019.

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

AB 1484 was introduced in the Assembly on February 22, 2019, and, most recently, on September 9, 2019, was re-referred to the Committee on Rules pursuant to Senate Rule 29.10(b).

•**SB 47 (Allen)**—This bill would amend the Elections Code provisions relating to initiatives and referendums to require, for a state or local initiative, referendum, or recall petition that requires voter signatures and for which the circulation is paid for by a committee, as specified, that an Official Top Funders disclosure be made, either on the petition or on a separate sheet, that identifies the name of the committee, any top contributors, as defined, and the month and year during which the Official Top Funders disclosure is valid, among other things.

SB 47 was introduced in the Senate on December 3, 2018, and, most recently, on October 8, 2019, was approved by the Governor and chaptered by the Secretary of State at Chapter 563, Statutes of 2019.

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

SB 53 was introduced in the Senate on December 10, 2018, and, most recently, on August 30, 2019, was held under submission in the Committee on Appropriations.

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

SB 295 was introduced in the Senate on February 14, 2019, and, most recently, on August 30, 2019, was held under submission in the Committee on Appropriations.

Zoning and General Plans

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

AB 139 was introduced in the Assembly on December 11, 2018, and, most recently, on Septem-

ber 26, 2019, was approved by the Governor and chaptered by the Secretary of State at Chapter 335, Statutes of 2019.

•**AB 148 (Quirk-Silva)—**This bill would, among other things, require each sustainable communities strategy set forth in a Regional Transportation Plan prepared by a local planning agency in accordance with existing law to identify areas within the region sufficient to house an eight-year projection of the emergency shelter needs for the region.

AB 148 was introduced in the Assembly on December 13, 2018, and, most recently, on January 24, 2019, was referred to the Committees on Transportation and Natural Resources.

•**AB 180 (Gipson)—**This bill would amend the Planning and Zoning Law to require those references to redevelopment agencies within General Plan housing element provisions to instead refer to housing successor agencies.

AB 180 was introduced in the Assembly on January 9, 2019, and, most recently, on May 16, 2019, was held under submission in the Committee on Appropriations.

•**SB 182 (Jackson)—**This bill would amend the Planning and Zoning Law to require the safety element of a General Plan, upon the next revision of the housing element or the hazard mitigation plan, on or after January 1, 2020, whichever occurs first, to be reviewed and updated as necessary to include a comprehensive retrofit plan.

SB 182 was introduced in the Senate on January 29, 2019, and, most recently, on September 13, 2019, was held at the desk in the Assembly.

Conclusion and Implications

It was another very busy Legislative Session for the California Legislature related to land use bills—especially in the areas of Environmental Protection—often within the confines of the California Environmental Quality Act—and Housing—especially affordable housing, which remains a thorny problem in the Golden State.

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LAND USE NEWS

SCRIPPS INSTITUTE REPORT INDICATES CLIMATE CHANGE MAY SHIFT SANTA ANA WINDS, WORSENING FIRE RISKS

The hot, dry gusts that plague California in the fall are not a new phenomenon. Known as the Santa Anas in southern California and the Diablos in northern California, they have been part of life in the state for centuries. Yet recent research suggests that as the climate warms, these winds may become less frequent, especially at the edges of their traditional October through April season. This change may shift wildfire season in the region from fall into winter, creating longer and more intense fires later in the year.

Background

New research by Dr. Janin Guzman-Morales at the Scripps Institute of Oceanography at the University of California, San Diego supports the idea that the warming climate may reduce the frequency of the Santa Ana and Diablo winds. Alongside changes in patterns and frequency of precipitation that are also anticipated due to climate change, this suggests a longer and more intense fire season, with the worst fires potentially occurring during drier winters.

Currently, most of California's worst wildfires occur in the fall, when vegetation is driest and winds start to pickup. The Santa Anas originate east of California, in the Great Basin and the high desert which includes Nevada and the western half of Utah. Cold and dry high-pressure air systems develop over the basin and circulates clockwise. The air spills into California and, because it is denser than warmer air, it descends and becomes compressed, warming significantly.

What begins as cold, dry, slow-moving air descends and gains in pressure until it becomes warm, drier, fast-moving air that can travel at speeds approaching 100 miles an hour and can pull moisture from already-dry shrubs and trees. This creates drier brush which can turn even the smallest bit of burning vegetation into a full-blown wildfire.

Efforts to Monitor

Because the path of Santa Ana winds are well known, they can generally be forecast. The Santa Anas in the fall are generally given the most attention, because they create a high risk of fires. Yet Santa Anas are actually more active during wet winter months. In the research published by Dr. Guzman-Morales, a variety of climate models are analyzed to determine the potential effects on the winds. While they determined that global warming will weaken the high-pressure systems over the Great Basin and decrease the frequency of Santa Ana events, that decrease is unlikely to be uniform. Rather, the winter months are projected to still see significant Santa Ana activity, with the decreases concentrated closer to October on one end and April on the other. A shorter season may result, but significant Santa Ana activity is still anticipated.

Effects on Fire Season

Prominently, this shift in the season would likely mean a later wildfire season, as independent studies have shown that precipitation patterns in California will shift with warming, leading to rains coming later in the season. This could mean, for example, a strong Santa Ana event could occur in a drier December, which would drastically increase the risk of a later fire season.

The closest example to this projection is already history: in 2017, winter winds came late, and December remained relatively dry. Santa Ana winds fueled the Thomas fire in Ventura and Santa Barbara counties, which began on December 4 and burned for over a month. This is something of an anomaly in the history of California fires, but if these projections are realized, it could become the norm.

Conclusion and Implications

Fires have been worsening in California over the last several years, growing in number and severity. The possibility of pushing fire season into the winter months could have catastrophic effects on large portions of the state, which are already facing increased

evacuation orders, higher property insurance costs, and a lowered sense of safety and security. Fires cost California billions, and those costs are not anticipated to decrease if global warming trends continue at their current projections.
(Jordan Ferguson)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF LAND MANAGEMENT FINDS NEGLIGIBLE RISK TO WATER RESOURCES POSED BY HYDRAULIC FRACTURING IN PORTIONS OF CALIFORNIA

On November 1, the U.S. Bureau of Land Management (BLM) issued a final Supplemental Environmental Impact Statement (EIS) relating to environmental impacts of hydraulic fracturing (fracking) in areas within western Kern, Kings, and nearby counties. In its supplemental impact statement, the BLM concluded that hydraulic fracturing posed negligible risks to surface and groundwater resources in the planning area subject to BLM jurisdiction.

Background

The Bureau of Land Management manages 400,000 acres of public lands, and 750,000 acres of federal mineral estate, within 17 million acres of public land in Kings, San Luis Obispo, Santa Barbara, Tulare, Ventura, Madera, Fresno, and Kern counties.

The surface and subsurface acreage managed by the BLM encompasses sensitive ecological resources and biodiversity. For instance, nearly one third of the threatened or endangered animal species in California may be found within the BLM's management area, and subsurface acreage includes a variety of groundwater systems that form part of the water supplies used by agricultural and municipal users in the area.

In September 2011, the BLM made available a draft Resource Management Plan (RMP) for the management area, which replaced an existing plan. The BLM also made available its draft Environmental Impact Statement under the National Environmental Policy Act (NEPA), which provided five alternatives to managing the public lands and mineral estate under BLM's jurisdiction.

In 2013, the BLM issued its final EIS, and subsequently commissioned an independent assessment of hydraulic fracturing (fracking) in California by the California Council of Science and Technology (CCST). CCST's study was designed to assess the available published scientific and engineering information associated with fracking in California, and was released in 2014. However, the BLM concluded that CCST's report did not provide significant new information to warrant supplementing its EIS. In 2015, the BLM selected Alternative B as the operative RMP, which would open slightly more than 1 million acres to oil and gas exploration while closing nearly 150,000 acres.

Shortly after the BLM adopted Alternative B as its Resource Management Plan, several environmental groups filed a lawsuit in federal court challenging the sufficiency of the BLM's EIS, contending that the BLM failed to adequately consider the environmental impacts of fracking under NEPA on the roughly 1.2 million surface and subsurface acreage managed by BLM. In September 2016, the court granted most of the environmental parties' claimed relief, catalyzing a settlement agreement between the parties.

The settlement agreement conditioned dismissal of the case on the BLM preparing a supplemental EIS assessing the environmental impacts of fracking on the managed area. The settlement agreement also provided that the court would no longer have jurisdiction over the case within 14 days of the BLM issuing its supplemental EIS, provided any motions for attorneys' fees and costs on the part of the environmental groups had been resolved. The BLM issued its supplemental EIS (SEIS) on November 1, 2019.

The National Environmental Policy Act and Litigation

As interpreted by the Ninth Circuit in prior cases, NEPA obligates a federal agency to consider every significant aspect of the environmental impact of a proposed action, and ensures the agency will inform the public that it has indeed considered environmental concerns in its decision-making process. In reviewing the adequacy of an EIS, courts apply a "rule of reason" standard to determine whether the EIS contains a reasonably thorough discussion of the significant aspects of probable environmental

consequences. Accordingly, judicial review of an EIS consists only of ensuring that the agency took a "hard look."

The U.S. District Court faulted BLM for failing to meaningfully discuss fracking in its EIS, instead only mentioning fracking three times throughout the report. The court concluded that the agency failed to take the requisite hard look required by NEPA, particularly where, under the RMP, a quarter of new wells in BLM's managed area were expected to use fracking. The court also focused on the CCST study that identified several potential concerns and calls for additional information and analysis, such as potential impacts to surface and groundwater posed by fracking.

The SEIS recognizes that fracking may have an impact on surface and groundwater resources. In the SEIS, BLM assumed that between zero and four wells under any new lease would be drilled per year over the ten-year planning period (totaling 40 wells per lease). BLM estimates that approximately 400 wells per year would be fracked in California, resulting the consumption of roughly 246 acre-feet per year, based on an annual average use of 200,000 gallons per fracked well. According to BLM, that consumption would be negligible for zero to four wells drilled per year over the planning period, compared to the more than 2 million acre-feet of water used per year in Kern County, mostly for agriculture. Additionally, BLM concluded that, while spilled fracking fluids and materials could pose a risk to groundwater, the relatively small number of wells likely to use fracking meant the risk was negligible, as was the risk from flowback fluids used during the well drilling and fracking process.

In the SEIS, BLM generally recognized that injecting fracking fluids into wells poses contamination risks to groundwater. According to BLM, there are two major pathways through which fracking fluids may impact groundwater. These are: 1) a breakdown in barriers designed to prevent leakage of fluids from the well, and 2) migration of fractures outside of the target producing formation. Addressing the former, the SEIS relies on the concept of well integrity, and state regulations designed to ensure it, in support of its conclusion that the impact of drilling zero to four new wells per year would cause negligible risks to groundwater. Similarly, BLM concluded that the risk of migrating fractures for zero to four wells per year posed a negligible risk of groundwater contamination. However, BLM noted that an interagency partnership called the California Oil, Gas, and Groundwater Program has been formed to study the problem posed by oil and gas activities to groundwater.

Conclusion and Implications

With respect to the impact posed by fracking on water resources, the SEIS generally concludes that the risks of fracking in the planning area managed by BLM are negligible. The SEIS includes reference to a variety of studies and reports, and thus appears to consider more information about fracking than the original EIS. However, it is unclear whether environmental groups will bring suit over the SEIS, and whether the information and analyses relied by BLM will stand up to the "hard look" standard required by NEPA. The BLM Supplemental Environmental Impact Statement, is available online at: https://eplanning.blm.gov/epl-front-office/projects/nepa/100601/20006500/250007620/FINAL_Bakersfield_Hydraulic_Fracturing_SEIS_10-25-19.pdf
(Miles Krieger, Steve Anderson)

ADVOCACY GROUPS PETITION THE NATIONAL MARINE FISHERIES SERVICE TO LIST SPRING-RUN OREGON COAST CHINOOK SALMON UNDER THE FEDERAL ENDANGERED SPECIES ACT

On September 24, 2019, the Native Fish Society, Center for Biological Diversity, and Umpqua Watersheds (petitioners) petitioned the National Marine Fisheries Service (NMFS) to initiate a status review of spring-run Oregon Coast chinook salmon under the federal Endangered Species Act (ESA). Currently, they are included with their fall-run cousins as part of the Oregon Coast Chinook Evolutionarily Significant Unit (ESU). Petitioners assert that spring Oregon Coast chinook form a distinct ESU that qualifies independently for listing under the ESA. They request NMFS initiate a status review to determine whether spring Oregon Coast chinook constitute an ESU, and if so, whether they should be listed

as threatened or endangered under the ESA.

Spring-Run Oregon Coast Chinook

Chinook are the largest Pacific salmon, typically reaching three feet long and 30-40 pounds as adults. Like other salmonids, spring chinook migrate from the ocean to the freshwater streams of their birth to reproduce. But unlike many other salmonids that run in the summer or fall, spring chinook migrate upstream in the spring while still sexually immature, pass the summer in freshwater, and spawn in early fall.

Spring Oregon Coast chinook historically inhabited nine river systems between Tillamook Bay and the Coquille River: Tillamook River and tributaries, Nestucca River, Siletz River and tributaries, Alsea River and tributaries, Siuslaw River, North Umpqua River and tributaries, South Umpqua River and tributaries, Coos River, Coquille River and tributaries, and Salmon River. Spring Oregon Coast chinook have been extirpated from several of these rivers; other rivers support tiny but dwindling populations. The North Umpqua River is home to the only significant spring Oregon Coast chinook population; it sees returns of 2,500 to 16,000 spawners annually.

NMFS Evolutionarily Significant Unit Policy

The ESA defines a "species" eligible for listing under the ESA to include:

> . . .any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. 16 U.S.C. § 1533(16). However, the ESA does not define the term "distinct population segment." In 1991, NMFS developed the ESU Policy, which provides that a population or collection of populations of Pacific salmonids must meet two criteria to qualify as an ESU:
>
> •The population must be substantially reproductively isolated from other nonspecific population units; and
>
> •The population must represent an important component in the evolutionary legacy of the species.

In 1998, NMFS delineated the Oregon Coast Chinook ESU, which included both spring- and fall-run chinook. At that time, NMFS decided not to list Oregon Coast chinook under the ESA.

According to petitioners, new evidence shows that spring Oregon Coast chinook qualify as a separate ESU and are thus eligible for listing under the ESA distinct from fall Oregon Coast chinook. It has been presumed that spring- and fall-run Oregon Coast chinook were genetically similar, but petitioners assert that several recent studies on the:

> . . .genomic basis for premature migration in salmonids demonstrate[ ] significant genetic differences underlie the phenotypic distinctions.

In other words, spring Oregon Coast chinook run earlier because they are genetically different from chinook that run in the fall. As petitioners explain:

> A main benefit of the spring-run phenotype is that it allows access to exclusive temporal and/or spatial habitat that is partially or wholly inaccessible, or in some cases, less suited to fall-run Chinook salmon….A profound benefit to the species (as well as to the fisheries and ecological relationships that depend on the species) is the spreading of ecological risk by increased spatial diversity, behavioral and life history diversity, productivity, and population size afforded by the presence of the spring run form.

ESA Listing Process

If NMFS agrees with petitioners that spring Oregon Coast chinook should now be considered a distinct ESU, the ESU will be potentially eligible for listing under the ESA. When considering whether a species or subspecies, including an ESU, is endangered or threatened, NMFS must consider:

> •The present or threatened destruction, modification, or curtailment of its habitat or range;
>
> •Overutilization for commercial, recreational, scientific, or educational purposes;
>
> •Disease or predation;

•The inadequacy of existing regulatory mechanisms; or

•Other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(l).

The species shall be listed where the best available data indicates that the species is endangered or threatened because of any one or more of these factors. 50 C.F.R. § 424.11(c). Petitioners addressed all five factors in varying detail, but this article will focus on habitat destruction and the threat of human-caused hybridization between spring- and fall-run chinook.

Habitat Destruction and Degradation

Petitioners assert spring Oregon Coast chinook are threatened by habitat destruction caused by logging, dams and irrigation diversions, climate change, and other human activities. Logging and related road construction reduces stream shade, increases fine sediment levels, reduces instream large wood, and alters watershed hydrogeology, leading to sedimentation and warming that decrease salmonid access to the deep, cold pools they require for summer holding. Removal of water for irrigation and climate change also contribute to stream warming.

Lack of physical access to historic habitat is another threat to the spring Oregon Coast chinook. There are nine dams and reservoirs in the North Umpqua River, and passage barriers exist on the South Umpqua and other waterways within the spring Oregon Coast chinook's historic range. The 77-foot Soda Springs Dam is the first barrier to passage on the North Umpqua. It was relicensed for 35 years in 2001 amid a decades-long battle between PacifiCorp and environmental groups. As required by the relicensing agreement, fish passage was completed in 2012, but a large coalition of advocacy groups continue to call for removal of the Soda Springs Dam.

Artificial Propagation and Hybridization

Petitioners identify artificial propagation (hatcheries) as another anthropogenic factor endangering the spring Oregon Coast chinook. Intentional or inadvertent hybridization of spring- and fall-run coastal chinook in hatcheries is a newly documented phenomenon that petitioners assert presents "a major, imminent man-made threat to the spring run population." As petitioners explain, hybridization likely harms both spring-and fall-run chinook by producing:

> . . .intermediate phenotypes that typically migrate later than the indigenous spring-run fish, but earlier than the fall run. Such intermediate phenotypes are almost certainly maladapted to long-term survival in natural habitats, consistent with their absence from indigenous wild chinook salmon populations.

In other words, summer-run chinook do not naturally occur, and there is probably a reason for that.

Conclusion and Implications

Petitioners request the National Marine Fisheries Service designate critical habitat for spring Oregon Coast chinook, to include "all known and potential freshwater spawning and rearing areas, migratory routes, estuarine habitats, riparian habitats and buffers, and essential near-shore ocean habitats." Such designation, should it come to pass, could have far-reaching implications for Oregon's forest products, agriculture, and fishing industries. Final resolution may be several years in the offing, but the first test of petitioners' claims will be NFMS' decision whether to initiate a status review.
(Alexa Shasteen)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT REJECTS CLAIM THAT APPROVAL OF INDUSTRIAL-SCALE WIND FACILITY VIOLATED THE APA, NEPA, AND BALD AND GOLDEN EAGLE PROTECTION ACT

Protect Our Communities Foundation v. Lacounte, 939 F.3d 1029 (9th Cir. 2019).

Plaintiffs challenged the decision of the U.S. Bureau of Indian Affairs (BIA) to approve an industrial-scale wind facility in southern California, raising arguments under the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the Bald and Golden Eagle Protection Act (BGEPA). The U.S. District Court granted summary judgment, finding that the environmental analysis was sufficient to satisfy NEPA, and BIA's decision not to require the wind developer to obtain a BGEPA permit was justified. Following appeal, the Ninth Circuit affirmed.

Factual and Procedural Background

Tule Wind, LLC (Tule) intends to construct 85 wind turbines about sixty miles east of San Diego, California. During the planning and approval process, the project was split into two phases. Phase I concerned 65 turbines constructed on federal land in a valley, which required approval from the Bureau of Land Management (BLM), which is responsible for granting rights-of-way for use of federal lands. Phase II concerned 20 turbines on the Ewiiaapaayp Band of Kumeyaay Indians (Tribe) reservation on ridgelines above the valley. Phase II required approval from BIA, which serves as a trustee for federally recognized Indian tribes.

Before approving the respective project phases, the BLM and BIA were required to conduct environmental review under the National Environmental Policy Act. BLM prepared an Environmental Impact Statement (EIS) that covered both phases. Among other environmental impacts, the EIS expressly identified an "unavoidable adverse impact" to golden eagles from collisions with the turbines and loss of breeding territory. The EIS also considered five project alternatives, including one that would eliminate 63 turbines, including all of the Phase II turbines, from the 128 turbines that were originally proposed.

For Phase I, Tule drafted a Project-Specific Avian and Bat Protection Plan (Protection Plan), which described possible means of mitigating bird and bat impacts in detail. Relying on that plan and the EIS, the BLM approved Phase I. That approval was then upheld following judicial review. *See, Protect Our Communities Foundation v. Jewell*, 825 F.3d 571 (9th Cir. 2016).

For Phase II, Tule drafted a Supplemental Project-Specific Avian and Bat Protection Plan (Supplemental Protection Plan), which included updated eagle surveys and described measures to document and avoid bird impacts. The Supplemental Protection Plan concluded that, with mitigation measures, Phase II could "meet the current no-net loss standard for local breeding eagle populations." The BIA made the Supplemental Protection Plan available for public comment. The U.S. Fish and Wildlife Service (FWS), among other entities, criticized the Supplemental Protection Plan's methodologies and conclusion.

The BIA approved Phase II in a Record of Decision (ROD) that relied on BLM's EIS and Tule's Supplemental Protection Plan. The ROD adopted several mitigation measures designed to avoid impacts to golden eagles. These mitigation measures included a requirement that before operating, Tule had to apply for an eagle take permit under the Bald and Golden Eagle Protection Act.

Plaintiffs challenged the BIA's approval in the District Court, asserting three alleged errors. The District Court granted defendants' motion for judgment on the pleadings on two of the claimed errors and granted defendants' motions for summary judgment on the third. Plaintiffs then timely appealed.

The Ninth Circuit's Decision

BIA's Decision to Rely on BLM's EIS

The Ninth Circuit first addressed plaintiffs' claim that the BIA improperly relied on BLM's EIS to satisfy its NEPA obligations because the BIA did not explain its decision to not implement one of the EIS' listed mitigation measures. Contrary to this claim, however, the Ninth Circuit found that the BIA had in fact followed the mitigation measure. The Ninth Circuit also rejected plaintiffs' related argument that the BIA should have explained why its Record of Decision found no significant impact to eagles, even though the EIS had concluded that the entire project would impact eagles. The court found no such discrepancy, noting that the EIS considered whether the entire project would have any impact on eagles, whereas the Supplemental Protection Plan considered whether Phase II would have significant impacts, taking into account the Supplemental Protection Plan's mitigation measures and analysis.

The EIS' Analysis of Alternatives

The Ninth Circuit next addressed plaintiffs' claim that the EIS's alternatives analysis was deficient because it did not consider an alternative where only some of the Phase II turbines were authorized. After first rejecting the BIA's contention that plaintiffs failed to preserve the issue for judicial review, the Ninth Circuit found that the alternatives analysis was sufficient when viewed in light of the project as a whole. Although no mid-range alternative was considered as to the 20 Phase II turbines, the EIS's fifth alternative did consider a mid-range alternative for the project as a whole—construction of 63 out of 128 turbines. In addition, BLM ultimately only approved a configuration with fewer turbines that had been initially proposed. While the court noted that analysis of a larger project may not always be sufficient to satisfy NEPA for a smaller portion of the project, it found the alternatives analysis to be sufficient in this instance.

BIA's Decision Not to Prepare a Supplemental EIS

The Ninth Circuit then addressed plaintiffs' contention that the BIA should have prepared a supplemental EIS to analyze information that arose after the original EIS had been published. Plaintiffs raised five grounds in support of their argument, including claims that: information in the Supplemental Protection Plan constituted new and significant information; the EIS had "rejected" the Phase II turbines; certain information met the criteria for "significance" requiring further review; the BIA did not adequately respond to comments from FWS and the California Department of Fish and Wildlife; and the BIA failed to assess the significance of new information. The Ninth Circuit rejected all of these claims, finding that there was not any significant new information, and that the BIA had taken the requisite "hard look" required under the APA.

BIA's Decision Not to Require Tule to Obtain a BGEPA Permit

Finally, the Ninth Circuit rejected plaintiffs' challenges to BIA's decision not to require Tule to obtain a Bald and Golden Eagle Protection Act permit from the FWS. Instead, the BIA only required Tule to apply for a permit before it began operation of the turbines. The Ninth Circuit found this to be appropriate, concluding that, while the BIA only required Tule to apply for a permit, it nonetheless required Tule to comply with all applicable laws, and the BIA's decision not to condition its approval on prior acquisition of a permit from another agency was not arbitrary or capricious.

Conclusion and Implications

The case is significant because it analyzes a variety of NEPA concerns in the context of phased environmental review and provides a substantive analysis of issues in connection with Bald and Golden Eagle Protection Act. The decision is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2019/09/23/17-55647.pdf.
(James Purvis)

U.S. ARMY CORPS OF ENGINEERS' 2017 NATIONWIDE PERMIT FOR COMMERCIAL SHELLFISH AQUACULTURE SET ASIDE BY THE DISTRICT COURT

Coalition to Protect Puget Sound Habitat v. U.S. Army Corps. of Engineers, ___F.Supp.3d___, Case No. 17-1209RSL (W.D. Wash. Oct. 10, 2019).

The U.S. District Court for the Western District of Washington recently found that the U.S. Army Corps of Engineers (Corps) violated the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the federal Clean Water Act (CWA) in issuing the 2017 Nationwide Permit for commercial shellfish aquaculture activities (NWP 48). The District Court held NWP 48 unlawful with respect to activities in the waters of the State of Washington. the court heavily considered vacating NWP 48 outright, but agreed to accept additional briefing from the Swinomish Indian Tribal Community before issuing a final remedy.

Background

The CWA authorizes the Corps to issue permits for discharges of dredge or fill material into navigable waters of the United States. If the Corps determines activities involving discharges of dredged or fill material are similar in nature and will cause only minimal adverse environmental effects both separately and cumulatively, the CWA allows the Corps to issue general permits on a nationwide basis for that set of activities. Nationwide permits last five years before the Corps must renew them.

In 2017, the Corps reissued NWP 48, authorizing: 1) the cultivation of nonindigenous shellfish species as long as the species had previously been cultivated in the body of water at issue, 2) all shellfish operations affecting half an acre or less of submerged aquatic vegetation, and 3) all operations affecting more than half an acre of submerged aquatic vegetation if the area had been used for commercial shellfish aquaculture activities any time in the last 100 years.

In addition to the CWA requirement that the Corps find minimal adverse environmental effects before issuing a general permit, NEPA requires that the Corps analyze the environmental impact of its actions through an Environmental Assessment (EA). If the Corps is unable to state that the proposed action "will not have a significant effect on the human environment" after conducting the EA, the Corps must complete a comprehensive Environmental Impact Statement (EIS).

Ultimately, the Corps determined that issuing NWP 48 would not result in significant impacts on the human environment for the purposes of NEPA, and would result in no more than minimal individual and cumulative adverse effects on the aquatic environment for purposes of the CWA. Plaintiffs, on motion for summary judgment, asked the District Court to vacate NWP 48 under the APA because the Corps' conclusions regarding environmental impacts were arbitrary and capricious and unsupported by evidence from the record. Plaintiffs also argued the Corps failed to comply with the CWA, NEPA, and the Endangered Species Act (ESA) in reissuing NWP 48.

The District Court's Decision

Corps' Evidence and Analysis Regarding Environmental Impacts

The court began by analyzing the Corps' scientific evidence and findings regarding environmental impacts. Under the APA, a reviewing court must set aside agency actions that are arbitrary and capricious. Agency action is arbitrary and capricious if the agency has entirely failed to consider important aspects of the problem, offered an explanation that runs counter to the evidence before the agency, or offered an explanation that is completely implausible. The court noted that agency predictions *must* have a substantial basis in fact.

Here, the District Court found there was insufficient evidence in the record to support the Corps' conclusion that reissuance of NWP 48 would have minimal environmental impacts. The Corps acknowledged multiple times that commercial shellfish aquaculture activities could have adverse environmental effects, but it did not provide sufficient evidence that the effects were minimal.

First, the court found the Corps improperly shifted

the scale of impact evaluation to a landscape-scale analysis, rather than using the site-specific analysis that the CWA required. Second, the court found that the Corps broadly concluded that impacts would be minimal because the relevant ecosystems were resilient, relying on one scientific paper that lacked evidence to support the Corps' broad conclusion. The paper only studied effects of shellfish aquaculture on seagrass; it lacked any discussion of impacts on other types of vegetation, the benthic community, fish, birds, water quality/chemistry/structure, substrate characteristics, the tidal zone, or impacts of plastic use. The court found that the paper's limited findings did not support the Corps' broad conclusion that entire ecosystems are resilient to the disturbances caused by shellfish aquaculture, or that the impacts of those operations were minimal.

Third, the court found that the Corps' minimal impact determination was inadequate under the CWA and NEPA because the Corps should have analyzed the impacts of the proposed activity against the environmental baseline, not as a percentage of the decades of degrading activities that came before. The Corps improperly compared the impacts of shellfish aquaculture to the impacts of the rest of human activity, noting that a particular environmental resource was degraded as a justification for further degradation.

Corps' Reliance on General Conditions Imposed under Nationwide Permits

The court then analyzed the Corps' use of the general terms and conditions imposed on all nationwide permits to make its environmental impact findings. Because the Corps relied on the general conditions imposed on all nationwide permits to find minimal impacts, without more evidence, the court found that the Corps did not satisfy the requirements of the CWA and NEPA. The general terms and conditions imposed on a nationwide permit can be relevant to minimal impact findings, but they are "simply too general to be the primary 'data' on which the agency relies when evaluating impacts."

Corps' Delegation of Impacts Analysis to Regional Corps Districts

Lastly, the court analyzed the Corps' finding that regional district engineers would review projects and bring their impacts to a minimal level. Generally, district engineers have the ability to modify a nationwide permit within particular classes of waters, add regional conditions to the nationwide permit, and impose special conditions on particular projects to safeguard against risks of greater than minimal impacts. Here, the Corps relied on these abilities of the district engineers in finding there would only be a minimal impact. The court found the Corps "effectively threw up its hands and turned the impact analysis over to the district engineers." It held the Corps' impact determinations were entirely conclusory, and the Corps abdicated its responsibility in violation of the CWA and NEPA.

The Remedy

The court held the U.S. Army Corps of Engineer's issuance of NWP 48 was arbitrary and capricious and not in accord with the CWA or NEPA. As a result, the court held unlawful and set aside NWP 48 insofar as it authorized activities in Washington. The court considered vacating NWP 48 outright but decided to accept briefing from the Swinomish Indian Tribal Community regarding the scope of the remedy before making a decision.

Conclusion and Implications

This case exemplifies the rule that agency actions must be supported by substantial evidence to be upheld under the APA. Practically, this case sets aside NWP 48 in the State of Washington.
https://ecf.wawd.uscourts.gov/doc1/19718788103
(William Shepherd IV, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT UPHOLDS APPROVAL OF BIG BOX STORE EXPANSION DESPITE CLAIM THAT IMPACT ANALYSIS FAILED TO CONSIDER LOSS OF 'CLOSE AND CONVENIENT' SHOPPING

Chico Advocates v. City of Chico, 40 Cal.App.5th 839 (2nd Dist. 2019).

In an opinion filed September 5, 2019, and *certified for partial publication* on October 3, 2019, the Third District Court of Appeal held that a project's Environmental Impact Report (EIR) was adequate even though it did not analyze the loss of "close and convenient" shopping as part of an urban decay analysis. Although the loss of close and convenient shopping might result in economic and psychological impacts, the court noted that the California Environmental Quality Act (CEQA) is only concerned with physical changes to the environment. The court further held that although the project EIR's urban decay analysis could be disputed by experts, the EIR's conclusions regarding Urban Decay were nonetheless supported by substantial evidence.

Factual and Procedural Background

Walmart® operates a 131,302 square foot store in a regional retail center that borders the east side of State Route 99. In 2009, Walmart proposed expanding the store by 97,556 feet with a 12-pump gas station and a 2.42-acre outparcel. The City of Chico (City) denied the 2009 proposal after declining to adopt a statement of overriding considerations when the EIR found that the project would have significant and unavoidable environmental impacts.

In 2015, Walmart returned with a scaled-back 65,000 square foot expansion project (Project). 49,000 square feet of the 65,000 square foot expansion would be dedicated to grocery sales, with remaining expansion space dedicated to general merchandise sales. An EIR prepared for the 2015 project included a 43-page urban decay analysis supported by a 123 page study prepared by ALH Urban & Regional Economics (ALH Study). The ALH Study sought to assess the economic impact of the Project and:

> . . .examine whether there is sufficient market demand to support the Project without affecting existing retailers so severely as to cause or contribute to urban decay.

The ALH Study defined "urban decay" as:

> . . .among other characteristics, visible symptoms of physical deterioration … that is caused by a downward spiral of business closures and long term vacancies. . .[and]. . .so prevalent, substantial, and lasting for a significant period of time that it impairs the proper utilization of the properties and structures, and the health, safety, and welfare of the surrounding community.

The ALH Study resulted from an extensive scope of work that estimated the potential economic impacts of the Project on retailers in the Project's market area, primarily in the form of diverted sales. Ultimately, the study concluded that the Project would have a negligible impact on sales of competitors, ranging from .8 to 3.1 percent, or:

> . . .within the range of normal market fluctuations and is not believed to be sufficient to cause existing stores to close.

Accordingly, the ALH Study concluded that the Project alone would not cause the type of "severe economic effects that could potentially lead to urban decay."

Regarding cumulative impacts, the ALH Study showed that the Project, combined with other planned retail projects in the market area could induce the closure of one existing, full-service grocery store. However, given the size of the market area's retail base, the ALH Study concluded that the:

> . . .cumulative impacts would only increase the city's market vacancy rate by about one percent, from 4.4 to 5.4 percent.

This was "well within the range of a robust, healthy commercial retail sector." The study thereby concluded that although economic impacts from the Project were likely:

> . . .the Project's potential cumulative economic impacts likely would not be sufficient to cause urban decay.

In September of 2016, the City released the final Project EIR. The final EIR contained revisions and written responses to public comments received. The final EIR concluded that even with mitigation, the Project would result in transportation impacts that would result in an unacceptable level of service on a section of State Route 99 at peak hour conditions. In October 2016, the City's planning commission voted to certify the EIR with a statement of overriding considerations and approved the Project. Chico Advocates for a Responsible Economy (CARE) then appealed the decision to the city council.

On November 15, 2016, the city council considered the appeal at a public hearing. At the end of the hearing, the city council voted to deny the appeal, certify the EIR, and approve the Project. The city also adopted a statement of overriding considerations for the significant and unavoidable transportation impacts on State Route 99.

In December of 2016, CARE filed a petition for writ of mandate, challenging the Project EIR and the City's statement of overriding considerations. On February 2018, the trial court entered judgment for the City and Walmart, after issuing a statement of decision rejecting each of CARE's arguments. CARE then appealed to the Third District Court of Appeal.

The Court of Appeal's Decision

In the published portion of the Third District Court of Appeal's decision, the court analyzed CARE's arguments that the Project EIR's urban decay analysis was inadequate. Specifically, CARE alleged that the Project's urban decay analysis was inadequate because: 1) it incorporated an "unnaturally constrained definition of urban decay" by failing to treat the loss of "close and convenient shopping" as a significant environmental impact; and 2) due to flaws in the urban decay analysis' methodology, the EIR's urban decay analysis was not supported by substantial evidence. The court rejected both arguments.

Urban Decay Analysis Was Not Required to Consider the 'Loss of Close and Convenient' Shopping

The court found that the EIR's definition of urban decay was not "unnaturally constrained," and that as a matter of law, the City was not required to treat "loss of convenient shopping" as a significant environmental impact.

In support of this finding, the court applied an independent standard of review. The court found that the issue:

> . . .present[ed] a predominantly legal question of whether the EIR includes sufficient detail to enable those who did not participate in the [EIR's] preparation to understand and consider meaningfully the issues raised by the proposed project.

On this issue, the court held that the City did not violate CEQA by failing to analyze the loss of close and convenient shopping:

> . . .because the potential loss of close and convenient shopping is not an environmental issue that must be reviewed under CEQA.

To the contrary, "CEQA is concerned with physical changes to the environment" and "social and economic changes" are not in-and-of-themselves recognized as environmental impacts. Thus, the court concluded that while the loss of "close and convenient" shopping:

> . . .could impact some Chico residents psychologically and socially, such impacts are not, by themselves, environmental impacts.

The court rejected CARE's reliance on the case *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal.App.4th 1184 (2004) because that case involved an EIR that completely failed to analyze potential urban decay impacts despite evidence that such impacts would occur. The court noted that although Bakersfield pointed to evidence of the loss of close and convenient shopping as an example of the types of social problems that could result from urban decay, it did not hold that the loss of close and convenient shopping was itself an environmental impact.

EIR's Methodology for Studying Urban Decay Was Supported by Substantial Evidence

The court also rejected CARE's argument that the Project EIR's conclusions related to urban decay were not supported by substantial evidence because they relied on the ALH Study, which CARE claimed was flawed.

The court noted that CARE's criticisms of the ALH Study essentially amounted to a disagreement among experts regarding the proper urban decay analysis methodology. As the court noted:

> . . .challenges to the scope of an EIR's analysis, the methodology used, or the reliability or accuracy of the data underlying an analysis, must be rejected unless the agency's reasons for proceeding as it did are clearly inadequate or unsupported. . . .The issue for us is not whether the studies are irrefutable or whether they could have been better.

Instead, the relevant issue is whether studies supporting an EIR's conclusions:

> . . .are sufficiently credible to be considered as part of the total evidence that supports the agency's findings.

Conclusion and Implications

The Court of Appeal's decision makes clear that the loss of close and convenient shopping is not, in-and-of itself an environmental impact that must be reviewed under the California Environmental Quality Act. CEQA is concerned with physical impacts to the environment, and social and economic impacts are only relevant to the extent that they cause physical environmental impacts. The decision also highlights the fact that courts will not reject analyses or methodologies used in supporting an EIR's conclusions simply because such analyses are subject to dispute among experts. All that is important is that such analyses and studies are sufficiently credible to be considered as part of the total evidence in support of the agency's findings. The court's decision is available online at: https://www.courts.ca.gov/opinions/documents/C087142.PDF
(Travis Brooks)

THIRD DISTRICT COURT UPHOLDS TRIAL COURT'S DENIAL OF DEMURRER ALLOWING ACTION FOR REFUND OF MITIGATION FEES TO PROCEED

County of El Dorado v. Superior Court of El Dorado County, ___Cal.App.5th___, Case No. C088409 (3rd Dist. Oct. 30, 2019).

Addressing a demurrer on the merits, the Third District Court of Appeal upheld the trial court's denial. The court concluded that claims for the refund of payments made pursuant to the Mitigation Fee Act are subject to a one-year statute of limitations.

Factual and Procedural Background

Thomas and Helen Austin filed an action in December 2015, alleging the County of El Dorado and its community development agency failed to make the required nexus findings under Government Code § 66001. The Austins alleged they were entitled to a refund of eight fee payments made to the county pursuant to the Mitigation Fee Act.

In December 2016, the Austins filed a first amended complaint which alleged entitlement to 11 mitigation fees. The county demurred based on three assertions: 1) a one-year statute of limitations period applied and the Austins therefore could not bring any of their claims because some of the fees were paid over a year prior to the litigation; 2) the Austins were required, but had failed to, allege prejudice in the complaint; and 3) the Austins failed to name necessary parties as defendants to the litigation.

The trial court overruled the county's demurrer for the following reasons: 1) each fee collected constituted a new breach of the statute (regardless of what limitations period applied), and therefore at least some of the payments occurred within the statute of limitations; and 2) the requirement to plead prejudice does not apply to actions brought under Government

Code § 66001. The trial court sustained the demurrer with leave to amend on the limited ground that the Austins failed to name indispensable parties.

The Austins filed a second amended complaint in January 2018. The county filed another demurrer and reiterated its arguments on which the trial court had already ruled regarding the limitations period and the need to plead prejudice. The trial court reached the merits and again overruled the demurrer "for the same reasons in the analysis and rulings on the prior demurrer[]."

The county then filed the petition for writ of mandate at issue here, requesting the Court of Appeal to overturn the trial court's denial of the demurrer. The Court of Appeal explained that courts:

> . . .should exercise discretion to review rulings on pleadings with *extreme reluctance*, confining it 'to instances of such grave nature or of. . .significant impact.'

Here, the court said, there was no risk of "floodgates" opening to challenges of mitigation fees, nor did the county distinguish itself from other defendants unsuccessful on a demurrer in an action involving a large prayer for relief. Regardless, the Court of Appeal addressed the demurrer on its merits.

The Court of Appeal's Decision

On plenary review, the Third District Court of Appeal denied the county's petition for writ of mandate. The court addressed three issues raised in the demurrer, *but only certified for publication its discussion of the applicable statute of limitations*.

The Statute of Limitations

The court concluded that, although Government Code § 66001 does not specify a statute of limitations, a one-year period applies. California law provides for a one-year limitations period for forfeiture or penalty statutes. Section 66001, the court said, provides that where a local agency does not make the required nexus findings, the agency shall refund mitigation fee payments to the current record owner of the property, regardless of whether the agency could have demonstrated that the basis for nexus findings existed. The statute therefore, the court found, is not a remedy statute, but instead focuses on coercing particular conduct from the party held liable. Thus, the court concluded that litigation pursuant to Government Code § 66001 is subject to a one-year statute of limitations.

Ongoing Accrual and Prejudice

In the *unpublished* portion of the opinion, the court explained that where there is an ongoing severable wrong, the limitations period generally runs at the time of each breach, even if earlier breaches are untimely. The court walked through and rejected arguments from the Austins and the county—ultimately concluding that the trial court correctly overruled the demurrer because there was at least some portion of the Austins' cause of action that is timely.

The court also rejected the county's argument that the Austins were required to plead prejudice. Section 65010 directs courts to apply the doctrine of harmless error to agency proceedings under Title 7 of the Government Code, but the court explained that it does not require a litigant to *plead* harmless error when an agency fails to comply with an express statutory directive to make findings. The Austins therefore were not required to plead prejudice and substantial injury in their complaint.

Conclusion and Implications

While this opinion was reached on the basis of a petition for writ of mandate to overrule a demurrer, it reinforces that agencies should not take for granted their authority to exact mitigation fees and should ensure careful compliance with statutory obligations.

The opinion is available at: https://www.courts.ca.gov/opinions/documents/C088409.PDF.
(Christina Berglund, Elizabeth Pollock)

FIRST DISTRICT COURT FINDS REMEDY FOR GENERAL PLAN RENDERED INTERNALLY INCONSISTENT BY INITIATIVE WAS FOR CITY TO CURE THE INCONSISTENCY

Denham, LLC v. City of Richmond, ___Cal.App.5th___, Case No. A154759 (1st. Dist. Oct. 25, 2019).

This action arose from a challenge by several property owners to the city council's adoption of an initiative amending the General Plan to prohibit residential development on a stretch of hillside land. The General Plan amendment made the General Plan internally inconsistent because the land use element of the General Plan authorized considerable residential development in the initiative area, while the initiative forbade it. The First District Court of Appeal reversed the trial court's decision to vacate the city's adoption of the initiative, finding that the proper remedy was to bring the General Plan into compliance with the General Plan statute.

Factual Background

In 2017, the city council for the City of Richmond adopted an initiative that was passed by the city's voters in the November 2016 election. The initiative purported to amend the city's General Plan by limiting development and land uses in the "Richmond Hills Initiative Area," much of which includes property designated as "Hillside Residential" in the General Plan. The Hillside Residential classification is a residential land use classification allowing attached and detached single family housing. The initiative added provisions to the open space element of the General Plan to prohibit all residential development in the initiative area, unless a court finds the prohibition unconstitutional. However, no changes were made to the land use element's definition of "Hillside Residential" or to the maps applying this classification to most of the initiative area.

Property owners in the initiative area filed a writ of mandate and complaint for damages challenging the initiative on various grounds. The trial court concluded that the initiative rendered the city's General Plan internally inconsistent, and directed the city to vacate its adoption of the initiative. This appeal followed.

The Court of Appeal's Decision

General Plan Amendments and the Initiative Process

The Court of Appeal began by noting that General Plan amendments made through the initiative process, such as the one here, do not have the benefit of procedures that are normally followed when a city amends its General Plan. The initiative process bypasses procedural steps such as public hearings, consultation with public agencies, and written findings. Nevertheless, a General Plan amendment adopted by initiative is still subject to the same constitutional limitations and rules of construction as are other statutes. Thus, a General Plan amendment adopted by initiative may not be internally inconsistent, and like any other General Plan amendment, it must not cause the General Plan itself to become internally inconsistent.

The court agreed that the General Plan was rendered internally inconsistent by the initiative. Here, the initiative on its face created an inconsistency in the General Plan because the land use element maps placed the property at issue in the Hillside Residential classification, which it still defined as including single family housing on subdivided parcels. But the initiative by its terms amended a different element of the General Plan—the open space element—to prohibit residences in the initiative area. The initiative did not amend either the text or the maps in the General Plan's land use element to show a different designation for the property at issue, or to describe the Hillside Residential designation in a way that was consistent with the initiative. So, the land use element authorized considerable residential development in the initiative area, whereas the initiative did not allow any such residential uses. Thus, different elements of the General Plan described incompatible uses for the same property.

The Remedy

The Court of Appeal disagreed with the trial court's ruling that directed the city to vacate its adoption of the initiative. The court held that once the lower court found that the amended General Plan violated Government Code § 65300.5's requirement of internal consistency, it should have ordered the city to bring its General Plan into compliance with the statutory requirements. The court noted that the parties did not cite any case deciding whether a court may direct a city to correct inconsistencies in its General Plan when the inconsistency is created by an initiative amending the existing plan. Here, the city could for example, amend the land use element of the General Plan in a manner consistent with the initiative, or could submit a measure to the voters to rescind or amend the initiative as to cure the inconsistency.

Therefore, the Court of Appeal reversed the trial court's judgment and ordered the lower court to issue a new writ of mandate directing the city to cure the inconsistency in its General Plan in a manner consistent with the Court of Appeal's ruling.

Conclusion and Implications

Land use law places the highest level of importance on General Plan consistency—a General Plan must be internally consistent because virtually every local land use decision must be consistent with the General Plan and each of its elements. Accordingly, any General Plan amendments must be such that they do not cause any part of the General Plan to become inconsistent with other parts. However, when a General Plan is rendered internally inconsistent as a result of an initiative, the proper remedy is for the city that adopted the initiative to take appropriate action to correct the inconsistency. This opinion clarifies that the initiative is not considered void ab initio or required to be vacated.

The opinion may be accessed online at the following link: https://www.courts.ca.gov/opinions/documents/A154759.PDF
(Nedda Mahrou)

FIRST DISTRICT COURT UPHOLDS MITIGATED NEGATIVE DECLARATION FOR WINERY EXPANSION DESPITE CONTRARY EXPERT OPINION

Maacama Watershed Alliance v. County of Sonoma, 40 Cal.App.5th 1007 (1st Dist. 2019).

On September 9, 2019 the First District Court of Appeal rejected a petition challenging a Mitigated Negative Declaration (MND) adopted by Sonoma County (County) for a winery expansion and wine cave project. The decision was certified for publication on October 7. Although petitioners in the action submitted multiple expert opinions challenging the Mitigated Negative Declaration, such opinions did not point to evidence sufficient to rise above speculation and meet the "fair argument" standard.

Factual and Procedural Background

Knights Bridge Vineyards sought to construct a two-story, approximately 5,500 square foot winery building, with an adjacent 17,500 square foot wine cave, and related improvements on a 2.4-acre area (Project). The Project was located in a rural part of Sonoma County on property zoned Land Extensive Agriculture, which allows for wineries and tasting rooms with a conditional use permit. Two residences and 46 acres of vineyards already existed on the Project site. Bidwell Creek, which is nearby, is possibly home to steelhead populations listed by the federal government as threatened species.

In 2015, the County's board of zoning adjustments (Board) considered various reports analyzing the Project's effect on geological, groundwater, wastewater, and biological resources. After considering these reports, the Board adopted a Mitigated Negative Declaration and approved a conditional use permit for the Project along with a mitigation monitoring program.

In 2016, the Maacama Watershed Alliance (MWA) appealed the Board's project approval to the Board of Supervisors. County staff reviewed the issues raised in the appeal and prepared a revised MND.

The County then received further comments on the revised MND related to groundwater and water quality.

In response, the County prepared a second revised MND. In 2017, the county approved the project subject to updated conditions and adopted the latest version of the MND for the Project.

MWA filed a petition for writ of mandate, which was rejected by the trial court, and then appealed to the First District Court of Appeal.

The Court of Appeal's Decision

Fair Argument Standard

The Court of Appeal began by outlining the "fair argument" standard applicable to challenges of Mitigated Negative Declarations when it is argued that a full Environmental Impact Report (EIR) should be prepared pursuant to the California Environmental Quality Act (CEQA). The question in such cases is:

> . . .whether there is substantial evidence in light of the record as a whole that it cannot be fairly argued that the project may cause a significant environmental impact.

In this context, the court noted that the word "may" means a reasonable possibility. The court went on to describe that the "fair argument" standard:

> . . .creates a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review. . . .[however]. . .if a project may have significant effects, but mitigation measures will make the effects insignificant, the agency may adopt a Mitigated Negative Declaration.

While determining whether a MND is appropriate, the court noted that it was required to give the county the benefit of the doubt on any "legitimate, disputed issues of credibility." Accordingly, the burden of proof lies with the petitioner to demonstrate:

> . . .by citation to the record the existence of substantial evidence supporting a fair argument of significant environmental impact.

While personal observations of local residents can qualify as substantial evidence supporting a fair argument:

> . . .mere argument, speculation, and unsubstantiated opinion, even expert opinion, is not substantial evidence for a fair argument. (Citing *Pocket Protectors v. City of Sacramento*, 124 Cal. App.4th 903, 928 (2004).) As the court articulated:
>
> . . .the question is not whether any argument can be made that a project might have a significant environmental impact, but. . .whether such an argument can fairly be made.

Guided by these principles, the court went on to analyze and reject each of the arguments raised by MWA.

Significant Geological and Erosion Impacts, Impacts to Fish Habitat, and Stormwater

MWA alleged that evidence supported a fair argument that construction of the Project's wine cave would result in slope instability. MWA further alleged that a fair argument existed that the Project's earthmoving and resulting erosion would have a significant impact on fish habitat in Bidwell Creek.

The court rejected these contentions. At the outset, the court highlighted that the MND's conclusions regarding geology and erosion were supported by a geotechnical investigation that was peer reviewed twice. The court noted that the county's consultants had some minor disagreements regarding the nature of soil and mineral deposits on the Project site. However, these consultants reached a consensus that the Project was geotechnically feasible, and that with adopted mitigation measures, the Project would not impact slope stability.

Regarding erosion impacts, the court examined a Biological Assessment prepared by a county consultant. This assessment concluded that the Project would not affect special status species on or offsite if the applicant implemented best management practices to control erosion and silting.

MWA's experts submitted multiple letters criticizing the county's expert reports, claiming that they were based on insufficient data, and lacked a plan for placement of spoils created from excavation of the Project's cave. The county's experts responded to this

criticism by submitting a detailed Stormwater Management Plan and creating plans for the placement of spoils extracted during cave construction. With these revisions to the Project approval, the county concluded that the risk of a landslide stemming from construction of the wine cave was very low. Through further peer review, the county also concluded that with the implementation erosion control measures, the Project would not cause significant erosion of cave spoils that would degrade water quality in Bidwell Creek.

Ultimately, the court was not persuaded that MWA's experts' "criticism of the data, findings, and conclusions of the county's consultants" was sufficient to support a fair argument." Although critical of the MND, MWA's experts did not point to "evidence that the project is reasonably likely to cause landslides or otherwise generate environmentally harmful release of debris" that would impact Bidwell Creek.

Significant Impacts to Groundwater Supply

MWA contended that substantial evidence supported a fair argument that the Project's groundwater use would significantly affect salmonids in Bidwell Creek, groundwater supply in neighboring wells, and fire suppression.

Again the appeals court rejected these contentions. The court first noted that Project modifications were incorporated to reduce water usage so that the Project would not result in any net increase in groundwater use over current conditions. The court then noted that although disagreement existed among experts about the interconnectedness of aquifers that would supply water to the Project and Bidwell Creek, even if such connection did exist, any impacts to groundwater supply would be "imperceptible." The court went on to conclude that the Project's conditions of approval, together with the county's expert reports, supported the conclusion that no fair argument existed that significant groundwater supply impacts might occur.

Significant Aesthetic Impacts

MWA next contended that a fair argument existed that the Project would result in significant aesthetic impacts. As evidence for this claim, MWA contended that an existing residence on a ridgetop on the property was "unsightly" and visible from a nearby highway.

The court rejected these claims. First, the court noted that the project site was not designated as a scenic resource, that the Project would be centrally located on an 86-acre parcel, and that unlike the existing residence, the new winery would be set into a hillside. The court also considered the Project's enforceable conditions of approval that required the new winery to "have a dark-colored exterior, a non-reflective rooftop, and landscaping."

With this information in mind, the court again upheld the County's conclusion that evidence in the record did not give rise to a fair argument that the Project would result in significant aesthetic impacts.

Significant Fire Hazards

Last, MWA contended that a fair argument existed that the Project would result in significant fire hazards.

Again the court rejected this contention. The court noted that the Project was "consistent with the Public Safety Element of the General Plan" and would "include fire protection features, including a fire engine turnaround, access road. . .and water storage." To the extent MWA argued that area fire protection services were already stretched thin:

> . . .the need for additional fire protection services is not an environmental impact that CEQA requires a project proponent to mitigate.

Conclusion and Implications

The First District Court of Appeal's decision highlights the fact that although the fair argument standard of review is a low bar, a petitioner challenging an MND must point to specific evidence in the record that a project may result in significant environmental impacts. Even when expert opinions are presented to challenge an MND, such opinions must be based on more than unsubstantiated speculation.

The decision also highlights that a MND can be strengthened during the administrative approval process through incorporation of concessions and mitigation measures that address criticism of the MND. These measures can reduce a MND's vulnerability to challenge down the road. The court's decision is available online at: https://www.courts.ca.gov/opinions/documents/A155606.PDF
(Travis Brooks)

FIRST DISTRICT COURT UPHOLDS CITY'S DESIGNATION OF APARTMENT BUILDING AS A LANDMARK UNDER THE CITY'S MUNICIPAL CODE

Rue-Ell Enterprises, Inc. v. City of Berkeley, *Unpub.*, Case A154050 (1st Dist. Oct. 31, 2019).

In an *unpublished* opinion, the First District Court of Appeal upheld the decision of the trial court denying a petition for a writ of mandate. The petition prayed for reversal of the City Council (City Council) of the City of Berkeley's (City) resolution to adopt a determination by the City's Landmarks Preservation Commission (LPC) designating an apartment building (the Bennington) as a Landmark pursuant to the City's Landmarks Ordinance. The owner of the Bennington, Rue-Ell Enterprises, Inc. (Rue-Ell) sought to set aside the designation on the grounds that there was no substantial evidence supporting two of the City's findings. Specifically, Rue-Ell alleged that there was no substantial evidence that the Bennington was a structure of architectural merit or had historic value. The Court of Appeal, in reviewing the City's decision for abuse of discretion under Code of Civil Procedure § 1094.5, closely followed the Second District Court of Appeal's published opinion in *Young v. City of Coronado*, 10 Cal. App.5th 408 (2017) (*Young*), as that case also dealt with administrative *mandamus* challenges to a city's landmark determination.

Factual and Procedural Background

In 1915, two separate single-family houses, built in 1893, were moved from their original locations and joined to create a multi-family apartment building known as the Bennington. The Bennington is located in Daley's Scenic Park, in the area of Euclid Avenue, just north of the University of California campus in the City. The timing is not stated in the opinion, but some time prior to the City's designation of the Bennington as a landmark, Daniella Thompson submitted historical information to the LPC regarding the Bennington. Based on Ms. Thompson's research, the LPC found that the Bennington is one of the two "oldest surviving structure[s] in Daley's Scenic Park"; "one of the three oldest known brown-shingle buildings in Berkeley"; with "a rare 19th-century Shingle Style street façade," and "Arts [and] Crafts elements" including a "two story-corner turret," which combine to give the Bennington a "hybrid style [] unique on the Northside and very likely in all of Berkeley." The LPC also found that the Bennington has many "notable" architectural features and historic value as "the only extant relic of 19th century Euclid Avenue" and its association with several prominent local individuals residing in the City at the turn of the twentieth century.

Rue-Ell appealed the LPC's designation to the City Council and hired an expert who argued that the City could not make a finding of "architectural merit" because the Bennington does not fit within any recognized architectural style and the LPC's description of the Bennington as "hybrid" was arbitrary. Rue-Ell also argued that the finding of "historic value" was unsupported because all the historic figures in Ms. Thompson's research were associated with the area around the Bennington, not the Bennington itself. The City Council denied Rue-Ell's appeal and adopted the LPC's landmark designation. Rue-Ell filed a petition for writ of mandate under Code of Civil Procedure § 1094.5, alleging that the City had abused its discretion by failing to support the "architectural merit" and "historic value" findings with substantial evidence. The trial court denied the petition and Rue-Ell appealed.

The Court of Appeal's Decision

Substantial Evidence Standard of Review and Burden of Proof

The First District Court of Appeal, quoted from the Second District Court of Appeal's decision in *Young*, *supra*, at length, and discussed the standard and scope of review under Code of Civil Procedure § 1094.5.

The court determined that, because the issues on appeal did not involve fundamental vested rights, appellate review was limited to whether the City's findings supported the landmark designation and whether substantial evidence supported the City's findings. The court noted that Rue-Ell's burden was to show

that the City's decision was invalid and that there is no substantial evidence to support the City's findings.

Addressing the Terms 'Historic Value' and 'Style'

Turning to Rue-Ell's arguments, the court rejected Rue-Ell's argument that the term "historic value" had to be interpreted consistent with the criteria for listing on the National Register of Historic Places. The court found this to be an attempt to reframe the issue as one of legal interpretation rather than substantial evidence to obtain a de novo standard of review. In rejecting this argument, the court stated that the City's ordinance directs the LPC to consider the criteria for listing on the National Register among many other criteria before deciding whether to designate a structure as a landmark.

Rue-Ell also argued that the City's interpretation of the word "style" in the ordinance was arbitrary in this case because there was no recognized architectural "hybrid" style. According to Rue-Ell, the City had to limit any "architectural merit" findings to those structures that have "merit" in an officially recognized style. The court rejected this argument on two grounds. First, the ordinance did not contain the word "recognized." Second, the court noted the importance of subjectivity in the recognition and creation of new architectural "styles" particularly in local historic designations.

Addressing the Term, 'Region'

The court also rejected Rue-Ell's argument that the City interpreted the term "region" too narrowly—though the trial court had agreed with Rue-Ell on this point—because, even if the City did err, Rue-Ell failed to show any prejudice.

'Recognized Style'

Lastly, Rue-Ell argued that there was no substantial evidence that the Bennington was the "first, last, only or most significant architectural property of its type." The court rejected this argument for the same reasons as it rejected the "recognized style" argument, finding that "the record shows that the Bennington is really old and really unique." In other words, there was substantial evidence to support the City's findings, though Rue-Ell may disagree with the decision and the findings.

Conclusion and Implications

The court concluded by quoting the trial court's summary of decision, which outlined the findings made by the City and described the City's determination as "fact specific." The Court of Appeal agreed and held—again quoting *Young*, *supra*—that Rue-Ell had failed to show that no "reasonable person could … have reached the conclusion reached by" the City in designating the Bennington as a landmark.

The court's review was appropriately deferential to the City, as the City had relied on the expertise of a body whose mission it is to decide issues of historic preservation, and made an administrative decision based on the facts in the record before it. Recognizing the factual nature of the City's decision, the court was unpersuaded by Rue-Ell's attempts to reframe the issues as question of law. Though the court did interpret the City's ordinance, the interpretation was appropriately limited to the plain language of the ordinance.

The opinion, though unpublished, confirms the standard of review as described in *Young*, *supra*, 10 Cal.App.5th 408 for local agency administrative decisions adopting landmark designations. Similarly, though the opinion is uncitable, any future case dealing with similar legal issues can reference *Young*, as the court did here.

The opinion is available at: https://www.courts.ca.gov/opinions/nonpub/A154050.PDF.
(Nathan George, Christina Berglund)

FOURTH DISTRICT COURT UPHOLDS CALIFORNIA COASTAL COMMISSION'S CERTIFICATION OF SAN DIEGO UNIFIED PORT DISTRICT MASTER PLAN AMENDMENT

San Diego Navy Broadway Complex Coalition v. California Coastal Commission, 40 Cal.App.5th 563 (4th Dist. 2019).

A public benefit organization filed a petition for writ of mandate against the California Coastal Commission (Commission) and the San Diego Unified Port District (Port), challenging the Commission's certification of the port master plan amendment, which authorized coastal development permits for the proposed expansion of a convention center and adjacent hotel (Amendment), as consistent with the California Coastal Act. The developers intervened, and the organization amended its petition to add them as defendants. Following a bench trial, the superior court denied the petition. The Court of Appeal for the Fourth Judicial District then affirmed.

Factual and Procedural Background

This case involves the proposed expansion of the San Diego Convention Center (Convention Center) by the City of San Diego and of the adjacent Hilton San Diego Bayfront hotel by One Park Boulevard, LLC (One Park). The Convention Center is located in downtown San Diego, next to San Diego Bay, and the Hilton is across Park Boulevard, which is located nearby. As part of a proposed expansion, the Port circulated the Amendment and a draft Environmental Impact Report (EIR) for public review and comment in May 2012. Later that year, in September 2012, the Port adopted resolutions certifying the final EIR, approving the Amendment, and directing filing with the Coastal Commission for certification.

Port staff then communicated with Commission staff and revised the Amendment based on their input. In late 2013, the Commission held a hearing on the Amendment and, after the Port agreed to additional changes, unanimously certified it as consistent with the Coastal Act. In February 2014, the Commission adopted revised findings supporting its October 2013 approval. The Port adopted the certified Amendment, and the Commission then accepted the Port's adoption in mid-2015. As certified by the Commission, the Amendment provided for issuance of coastal development permits for the Convention Center and hotel expansions.

In November 2013, petitioner San Diego Navy Broadway Complex Coalition (Navy Broadway) filed its petition for writ of mandate against the Commission, the Port, and "Doe" defendants. It then filed a first amended petition, alleging that the Commission's approval of the Amendment violated the Coastal Act by, among other things, certifying it as consistent with the Coastal Act and the California Environmental Quality Act (CEQA). In 2014, Navy Broadway filed another petition, contesting the Commission's adoption of revised findings, which was consolidated with the first lawsuit. Navy Broadway later filed a third action after the Commission accepted the Port's approval of the certified Amendment, which was not consolidated with the first two cases.

In 2015, the City and One Park intervened, and Navy Broadway amended its petition to add them as defendants. Defendants then contended that the City and One Park were indispensable parties, and Navy Broadway had failed to timely sue them. The trial court agreed they were indispensable, but found after a bench trial that Navy Broadway had been genuinely ignorant of them. It therefore determined that the amendment related back and that equitable tolling also applied.

After a hearing in late 2016, the trial court denied the petition, finding that: 1) the Amendment was not improperly modified after submission; 2) the Commission did not err in finding the Convention Center expansion was not an appealable development under the Coastal Act; 3) substantial evidence supported the Commission's findings under the Coastal Act; and 4) the Commission did not err in making its CEQA findings. After an unsuccessful motion for new trial and to vacate the judgment, Navy Broadway appealed. Defendants cross-appealed based on the statute of limitations ruling.

The Court of Appeal's Decision

Statute of Limitations

The Court of Appeal first addressed the City and One Park's argument that the trial court erred in concluding the action was not time-barred based on a finding that Navy Broadway was genuinely ignorant of these parties. After reviewing the record, the Court of Appeal found that no reasonable trier of fact could find Navy Broadway was genuinely ignorant of the City and One Park and their roles in the project. During the Amendment adoption and certification process, for example, multiple documents identified the City and One Park as project applicants. Even if the Commission could be viewed as "admitting" the Port was the only proponent, as the trial court had concluded, the Court of Appeal found that such fact would not establish that Navy Broadway was genuinely ignorant of the City and One Park. For this same reason, the Court of Appeal also reversed the trial court's conclusion that Navy Broadway's claim had been equitably tolled.

Changes to the Amendment

Although it found that Navy Broadway's claims were barred by the statute of limitations, the Court of Appeal proceeded to address the merits of the appeal. It first addressed Navy Broadway's claim that the Commission violated Public Resources Code § 30714's bar on conditional approval by negotiating changes to the Amendment after the Amendment had been submitted. The Court of Appeal rejected this claim, finding that the Commission and the Port communicated about changes, and the Port then modified the Amendment prior to the certification vote. As such, the Commission did not conditionally certify the Amendment, and therefore it did not violate § 30714. The Court of Appeal further found that the Commission's regulations did not conflict with § 30714.

Appealability of the Convention Center Expansion

The Court of Appeal next addressed Navy Broadway's argument that the Commission erred by concluding that the Convention Center expansion was not appealable, and not subject to Chapter 3 of the Coastal Act. Appealability is governed by Public Resources Code § 30715, which, after a port master plan or amendment is certified, delegates permit authority over new development to the port governing body. One exception to this rule, however, is for "hotels, motels, and shopping facilities not principally devoted to the administration of activities within the port." Navy Broadway contended that the Convention Center would include at least some retail "shopping facilities," and thus should be subject to appeal.

The Court of Appeal rejected this claim, finding that the Commission's interpretation is consistent with § 30715 and warrants deference. Section 30715 addresses *developments* that fall into particular categories, not portions of such developments. The Commission, therefore, could reasonably determine that the development consisting of the Convention Center expansion was not appealable, notwithstanding its incorporation of ancillary retail facilities that might be appealable in isolation.

Findings under the Coastal Act

The Court of Appeal next addressed Navy Broadway's attacks on the Commission's various findings of consistency with the Coastal Act, including findings related to proximity to existing development, public access, recreation, parking, and views, as well as findings required under Chapter 8 of the Coastal Act. At the outset, the Court of Appeal noted that the Commission was not required to provide an explicit written finding on each statutory section. Instead, the findings only were required to—and did—"bridge the analytic gap between the raw evidence and ultimate decision or order." With respect to all of the required findings, the Court of Appeal found that the Commission adequately addressed the respective issues, and the record supported each of its findings.

Findings under CEQA

Finally, the Court of Appeal addressed Navy Broadway's claim that the Commission's certification violated CEQA because it made insufficient findings on mitigation and no substantial evidence supported its findings that a new pedestrian bridge was infeasible. Broadly, the Coastal Act required the Commission to "make any findings required pursuant" to CEQA in approving the Amendment. The Court of Appeal found that the Commission's find-

ings were sufficient for purposes of CEQA § 21081, and thus for its own regulations. With respect to the pedestrian bridge, the Court of Appeal found that a specific infeasibility finding was not required where the Commission found other measures effective, and in any event the record supported a conclusion that the proposed bridge was both economically and jurisdictionally infeasible.

Conclusion and Implications

The case is significant because it provides a detailed analysis of issues pertaining to statutes of limitation in writ proceedings, as well as a robust discussion of various Coastal Act provisions. The decision is available online at: https://www.courts.ca.gov/opinions/documents/D072568.PDF.
(James Purvis)

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