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CONTENTS

LAND USE NEWS

California Governor Newsom Aims to Use Pension and Road Funds to Fight Climate Change 99

Pacific Gas and Electric Announces Settlement Agreement with Wildfire Victims, But Has More Work to Do 100

RECENT FEDERAL DECISIONS

District Court:
District Court Holds U.S. Army Corps Is Not Obligated under the Clean Water Act or Other Laws to Dredge Channels on Annual Basis 102
San Francisco Bay Conservation and Development Commission v. U.S. Army Corps of Engineers, et al., ___F.Supp.3d___, Case No. 16-cv-05420-RS (N.D. Cal. Nov. 4, 2019).

RECENT CALIFORNIA DECISIONS

District Court of Appeal:
Sixth District Court Rules that the State's Surplus Land Act Prevails over a Charter City's Surplus Land Policy 104
Anderson v. City of San Jose, ___Cal.App.5th___, Case No. H045271 (6th Dist. Nov. 26, 2019).

Third District Court Denies Writ of Mandate—Leaves Intact City's Environmental Impact Report and General Plan 105
Citizens for Positive Growth & Preservation v. City of Sacramento, ___Cal. App.3d___, Case No. C086345 (3rd Dist. Dec. 18, 2019).

First District Court Affirms Judgment Finding that Evidence Was Insufficient to Establish Implied Dedication at Martin's Beach 107
Friends of Martin's Beach v. Martins Beach 1, LLC, Unpub., Case No. A154022 (1st Dist. Dec. 2019).

Continued on next page

Fourth District Court Upholds Application of 'Class 32' Infill Development Exemption under CEQA for Residential Development Project 109
Holden v. City of San Diego, ___Cal.App.5th___, Case No. (4th Dist. Dec. 3, 2019).

Third District Court Finds CalTrans Environmental Impact Report for Highway Project Adequate . . . 111
Jamulians Against the Casino v. The California Department of Transportation, *Unpub.*, Case No. C086184 (3rd Dist. Dec. 3, 2019).

Fourth District Court Upholds Referendum Petition that Did Not Attach Interrelated General Plan Provisions 113
Molloy v. Vu, ___Cal.App.5th___, Case No. DO75593 (4th Dist. Oct. 31, 2019).

Fifth District Court Finds Zoning Ordinance Requiring Cooperation Between Owners of Surface Rights and Mineral Rights a Legitimate Public Purpose 115
Vaquero Energy, Inc. v. County of Kern, ___Cal. App.5th___, Case No. F079719 (5th Dist. Nov. 19, 2019).

Superior Court:
Superior Court Rules in Favor of Los Angeles in Battle over Ordinances Passed to Battle Homelessness After Legislature Exempts the Ordinances from CEQA Review 116
Fight Back Venice! v. City of Los Angeles, Case No. BS1735666 (L.A. Super. Ct. Dec. 5, 2019).

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LAND USE NEWS

CALIFORNIA GOVERNOR NEWSOM AIMS TO USE PENSION AND ROAD FUNDS TO FIGHT CLIMATE CHANGE

Governor Gavin Newsom has issued Executive Order N-19-19 (Executive Order), directing California's Transportation Agency, pension funds, and the Department of General Services to reconsider how they spend public money with an eye towards investing in projects to help Californians prepare for climate change. The executive order has created much confusion among state agencies, instructing the government to use its $700 billion investment portfolio to "advance California's climate leadership."

Background

The executive order makes clear Newsom prioritizes climate change and wants to focus California's asset allocation towards ameliorating the adverse effects of global warming. The order references funds that taxpayers generally consider restricted—money earmarked for road improvements and pension systems that have a financial obligation to earn profits to provide retirement security for government employees—and asks those funds to invest in climate change solutions.

Highways and Roads

Newsom's order will not change restrictions lawmakers put in place in 2017 levying new taxes and fees on fuel and vehicle registrations to pay for road repairs, which are expected to raise roughly $5 billion a year for road work. The executive order may lead the Transportation Agency to adjust plans for other funds, steering money to public transportation and to projects in dense communities in an effort to reduce vehicle miles traveled across the state. Any changes in allocation of funds will first be presented in public meetings expected early next year.

Any allocation which removes funding from more rural areas of California is sure to create great controversy, and lawmakers are already jockeying to oppose moving funds away from freeways and towards public transportation.

Public Pensions

California's three state public pension systems—The California Public Employees' Retirement System, the California State Teachers' Retirement System, and the University of California Retirement Plan—are among the largest in the world, and each has investment strategies which account for climate change. Both CalPERS and CalSTRS, which have a combined portfolio worth more than $634 billion, prefer to use their size to press corporations to account for climate risk. For example, CalSTRS launched a climate review in October to account for risks. The University of California Retirement Plan, meanwhile, announced that it will pull its roughly $80 billion out of fossil fuel companies entirely.

These decisions arise in a moment where all three systems are underfunded, meaning they owe more in benefits to workers and retirees than they have in cash on hand. This created controversy around the executive order, which seems geared towards controlling investments on policy grounds at a time when maximizing profits may be crucial to the retirement of public employees.

Governor Newsom has argued the executive order is not a directive to CalPERS and CalSTRS to divest from oil companies, but rather aims to help the funds spot opportunities and avoid mistakes as the economy shifts to low-carbon or no-carbon alternatives for energy.

The Immediate Effects

The most immediate effect of the executive order is Newsom's announcement that the state government will stop purchasing gas-powered vehicles immediately. In January, the state also plans to cease buying cars from General Motors, Toyota, FiatChrysler, and any other carmakers that opt to fight California's authority to set clean air and vehicle emission standards that are more rigorous than that of the federal government.

The state has 36,692 passenger vehicles, roughly 14,000 of which were made by Ford. It is unclear whether this position will increase costs of maintaining the fleet.

Conclusion and Implications

From his inauguration, Newsom has made climate change one of the central focuses of his governorship. State pension funds are inevitably controversial, and shifts which may reduce economic gains in the short-term come in for severe criticism. However, if California's economy—one of the world's largest—is shifting away from fossil fuels and towards carbon neutrality, asking pension funds to correct in anticipation of these changes may be a logical course of action to ensure long-term viability. The full text of the Executive Order is available online at: https://www.gov.ca.gov/wp-content/uploads/2019/09/9.20.19-Climate-EO-N-19-19.pdf.
(Jordan Ferguson)

PACIFIC GAS AND ELECTRIC ANNOUNCES SETTLEMENT AGREEMENT WITH WILDFIRE VICTIMS, BUT HAS MORE WORK TO DO

On December 6, 2019, wildfire victims reached a $13.5 billion settlement with Pacific Gas & Electric, Company (PG&E) to resolve the nearly 700,000 legal claims stemming from the 2018 Camp Fire, the 2017 Northern California fires, the 2017 Tubbs Fire, the 2016 Ghost Ship warehouse fire in Oakland and the 2015 Butte Fire. The settlement proposal was approximately $23 billion less than the initial $36 billion estimate from counsel for wildfire victims, and the announcement of the settlement proposal sent PG&E's stock price up in the markets.

Background—The Settlement

As part of the settlement, PG&E would pay wildfire victims $5.4 billion in cash and $6.75 billion in PG&E stock. The settlement also includes a $1 billion payout to cities and counties that were affected by the fires.

Federal bankruptcy judge Dennis Montali approved the settlement agreement on December 17, 2019.

Simultaneously, PG&E announced a $1.68 billion settlement with the Safety and Enforcement Division of the California Public Utilities Commission, settling an investigation launched by the Division regarding safety violations made by PG&E in managing and operating its utility infrastructure, which led to some of the 2017 and 2018 wildfires. This settlement agreement, if approved and adopted by CPUC Commissioners, would be the largest fine in CPUC history, and would require PG&E to set aside $50 million to invest in measures that would strengthen its utility infrastructure and to engage with local communities, including by holding Town Hall meetings and providing quarterly reports on maintenance work.

Governor Newsom Disagrees with the Settlement

Notwithstanding the approvals from the federal bankruptcy judge, Governor Gavin Newsom issued a statement and a letter to PG&E CEO Bill Johnson noting that the bankruptcy reorganization plan "falls woefully short." Newsom stated that:

> In my judgment, the amended plan and the restructuring transactions do not result in a reogranized company positioned to provide safe, reliable and affordable service to its customers. The state remains focused on meeting the needs of Californians including fair treatment of victims—not on which Wall Street financial interests fund an exit from bankruptcy.

Newsom's office issued a statement further elaborating:

> The governor has been clear about the state's requirements—a new and totally transformed entity that is accountable and prioritizes safety. Critically important to that is ensuring that the new entity has the flexibility to fund this transformation. These points are not negotiable.

Newsom's letter was widely supported by state legislators and advocacy groups such as The Utility Reform Network (TURN), who would like and expect

to see further term negotiation to ensure customer safety and reliability, rather than a quick exit that favors shareholders and the aim of qualifying for the state wildfire fund, before PG&E emerges from the bankruptcy dispute.

PG&E's stock fell 14 percent after the letter from Newsom, trading at $9.67. PG&E is operating under a June 2020 deadline to exit bankruptcy proceedings in order to qualify for California's recently enacted wildfire insurance fund under Assembly Bill 1054.

PG&E Diverted Undergrounding Funds

Meanwhile, a recent audit commissioned by the CPUC and conducted by the firm AzP Consulting found that from the period 2007 through 2016, PG&E diverted $123 million from funds allocated to the Commission's Rule 20 program, which is intended to increase the undergrounding of overhead electric lines.

The audit report concluded that its findings showed that:

> PG&E ratepayers not only paid more in rates than PG&E spent on the Rule 20A program, [but that] the project activity that was performed was done so in a manner that was inefficient and costlier than necessary.

The Rule 20A program was launched to facilitate undergrounding and to soften the high cost barrier associated with such work. For example, PG&E has estimated that it costs an average $2.3 million per mile to bury overhead power lines, whereas running the same lines above ground costs approximately $800,000 per mile.

The CPUC also recently rejected a request by both PG&E and SDG&E to increase its profit margins in a filing before the Commission.

Conclusion and Implications

Overall, PG&E still has a long road ahead in wrapping up its bankruptcy proceeding and numerous related investigations at the CPUC—and in planning for its future in supplying electricity, often above ground, in a California that increasingly burns. (Lilly McKenna)

RECENT FEDERAL DECISIONS

DISTRICT COURT HOLDS U.S. ARMY CORPS IS NOT OBLIGATED UNDER THE CLEAN WATER ACT OR OTHER LAWS TO DREDGE CHANNELS ON ANNUAL BASIS

San Francisco Bay Conservation and Development Commission v. U.S. Army Corps of Engineers, et al., ___F.Supp.3d___, Case No. 16-cv-05420-RS (N.D. Cal. Nov. 4, 2019).

On November 4, 2019, the U.S. District Court for the Northern District of California granted summary judgment in favor of the United States Army Corps (Corps) and its defense of plans to dredge two shipping channels in the San Francisco Bay. The ruling by Judge Seeborg in *San Francisco Bay Conservation and Development Comm'n v. U.S. Army Corps of Engineers* (the Judgment) reinforces the "final agency action" requirement under the Administrative Procedure Act (APA) and identifies potential complications that may occur at the interstice of federal and state laws.

Background

The San Francisco Bay is host to a number of federal and state endangered species, salmon fisheries, Dungeness crab, and millions of migrating waterfowl that stop along the Pacific Flyway. As such, the Bay is frequently implicated with regard to dredge and contaminant concerns under multiple regulatory schemes.

The Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.* (CZMA) is a federal statute that prompts coastal states to develop Coastal Zone Management Plans (CZMPs), which are then submitted to the National Ocean and Atmospheric Administration (NOAA) for review and approval. Once approved, the states hold federal authority to regulate the actions of federal agencies that might "affect[] any land or water use or natural resource of the coastal zone." *Id.*, citing 16 U.S.C. §1456(c)(1)(A). The resulting "federal-state partnership[s]" help "ensure water quality and coastal management" by incorporating the various state standards into the broader federal standards and requiring preparation of a "consistency determination" certifying the proposed action is consistent with the CZMP. *Id.*, citing 16 U.S.C. § 1456(c)(1)(C); 15 C.F.R. § 930.36(b)(1).

Upon submittal of a consistency determination, the state with regulatory oversight "may then concur, conditionally concur, or object." *Id.* at 5, citing 15 C.F.R. § 930.41(a). The federal agency is then required to comply with any conditional concurrence terms, unless it finds that the action is "fully consistent with the state CZMP notwithstanding the state's CZMP," or consistency "with the enforceable policies of the state's CZMP is legally prohibited." *Id.*, citing 15 C.F.R. § 930.43(d).

Similar to the CZMA, the California Clean Water Act, 33 U.S.C. § 1251 *et seq.* (CWA) requires each state to develop water quality standards which are subsequently approved and incorporated by the U.S. Environmental Protection Agency (EPA) to" become federally-enforceable standards under the CWA." Judgment, at 5, citing 33 U.S.C. § 1313(c)(3). Authority over the navigable waters under federally-approved state standards is provided by § 401 of the CWA. *Id.*, citing 33 U.S.C. § 1341. Any entity seeking to engage in activity that "may result in any discharge into navigable waters," a water quality certification is required. *Id.*

The District Court's Decision

The central dispute in the litigation was whether the Corps' maintenance dredging activities, which are subject to the CWA and CZMA, were required to comply with the Bay Conservation and Development Commission's (BCDC) conditional concurrence that specified additional requirements pertaining to dredging both channels in a given year.

The District Court found that Corps regulations for its dredging operations incorporate "CZMA, CWA, and other environmental laws." *Id.* at 6. Separately, the Corps historically followed a 20 percent

maximum sediment deposit goal in line with the Long-Term Management Strategy (LTMS) for the San Francisco Bay which did not impose hard requirements. *Id.* at 7. In 2015, the Corps contemplated new alternatives that reduced dredging in the shipping channels due to concerns over the federally-listed endangered Delta smelt and state-listed threatened Longfin smelt. The Corps issued a consistency determination in the spring of 2015 to pursue the reduced dredging alternative, under which it would deposit up to 48 percent of dredged sediment in the Bay.

The BCDC issued a conditional concurrence on the certification of determination under CZMA, stating the Corps could only move forward with its proposed dredging activity if it limited dredged sediment deposits to meet the LTMS goals. At the same time, the Regional Water Quality Control Board (RWQCB) issued a water quality certification of the Corps' proposed actions with the condition to implement the reduced dredging alternative in the environmental document. *Id.* at 9. The Corps' November 10, 2015 response to the BCDC objected to the imposed conditions and argued that it was obligated to pursue the "least costly," legally required alternative, opting instead to dredge in accordance with the RWQCB's water quality certification condition. *Id.* The Corps ultimately adopted a reduced dredging alternative, implementing the RWQCB's condition. *Id.*

Issue of "Final Agency Action"

As a threshold matter, the court first determined whether the Corps' November 10, 2015 letter to BCDC stating it would not comply with the conditional concurrence constituted a "final action" under the APA. *Id.* at 11. Because the letters merely set out what the agencies' views of the law were, the court held they did "not impose legal obligations, deny a right, or fix a legal relationship." *Id.* The actual adoption of the reduced dredging alternative in January 2017, on the other hand, was clearly a final action. *Id.*

Assessing Whether the Corps Was Obligated to Comply with BCDC Requirements

Second, the court analyzed whether the conditions set forth in BCDC's concurrence required compliance by the Corps. *Id.* at 12. Despite the lack of statutory requirements to perform additional dredging, BCDC argued the Corps should be bound to its previous prioritization of dredging both channels within a year, not just one. *Id.* at 13. The court held BCDC's reliance on *Ohio v. United States Army Corps of Engineers*, 259 F.Supp.3d 732 (N.D. Ohio 2017) was misplaced because unlike in the instant case, there the Corps was governed by statute dictating how available funds were spent. *Id.* at 14. Here, the Corps was not obligated by statute to comply with the BCDC's requirements. Rather, the Corps' plan did not violate the maximum limits on dredging set forth under the CZMA and CWA regimes—therefore the Corps was not required to comply with BCDC's conditions.

Conclusion and Implications

The District Court's ruling emphasized that a challenged agency decision must be a final action, notwithstanding stated intent in a letter. Additionally, while the Corps altered its prioritization of dredging activity, its plan did not violate the maximum limits on dredging imposed by the state agencies and incorporated into the CZMA and CWA. Absent a statutory violation, BCDC could not enforce its preferred regulatory scheme on the Corps. The U.S. District Court's ruling is subject to possible appeal to the Ninth Circuit.

(Austin C. Cho, Meredith Nikkel)

RECENT CALIFORNIA DECISIONS

SIXTH DISTRICT COURT RULES THAT THE STATE'S SURPLUS LAND ACT PREVAILS OVER A CHARTER CITY'S SURPLUS LAND POLICY

Anderson v. City of San Jose, ___Cal.App.5th___, Case No. H045271 (6th Dist. Nov. 26, 2019).

This appeal involved an action by low income renters and housing advocacy groups asserting that the City of San Jose's (City) policy for sale of surplus municipal property violated California's Surplus Land Act. The Court of Appeal had to decide whether a charter city's policy for the sale of surplus city-owned land is preempted by the state's affordable housing law. In reversing the trial court's decision, the Sixth District Court of Appeal ruled that the state law prevails over the City's surplus land policy, which conflicted with the Surplus Land Act.

Specifically, the matter involved the following question:

> [W]hether state constitutional authority granting charter cities plenary power over their municipal affairs allows the City of San Jose and its city council (together, the City or San Jose) in this case to adopt a policy for the sale of surplus municipal property that conflicts with the state law.

The trial court answered "yes," ruling that the state law—the Surplus Land Act (Gov. Code, §§ 54220-54233) (Act) "addresses a decidedly municipal affair, not a statewide concern." The Court of Appeal reversed, holding that the City's surplus land policy must yield to the Act.

The Court of Appeal's Decision

Charter City Law Versus State Law—The Four-Part Test

To reach its holding, the court set forth the following four-part test for determining whether a charter city law prevails over a state law in these types of cases (the test is from the California Supreme Court's holding in *State Building & Construction Trades Council of California v. City of* Vista, 54 Cal.4th 547:

- Does the city law regulate an activity that can be characterized as a "municipal affair"?
- Is there a conflict between the two laws?
- Does the state law address a matter of "statewide concern"?
- Is the state law reasonably related to resolution of the statewide concern and is it narrowly tailored to avoid unnecessary interference in local governance?

The parties to the case agreed that the City has a legitimate interest in how it disposes of property no longer needed for government use and that its regulation of such constitutes a "municipal affair."

The parties also agreed that there was a conflict between the City's policy and the Act. Some of the main areas of conflict included:

- For surplus land sold to a preferred entity to develop low- or moderate-income housing: the City's policy requires that no less than 25 percent of for-sale units must be made available at affordable prices *for rent by lower-income households* or *for sale to moderate-income households* for at least 55 years. The Act requires both rental and for-sale units to be affordable for *lower-income households*.
- For surplus land sold or leased on the open market which is then used to develop ten or more units of residential housing—the City's policy requires that no less than 15 percent of the units be sold at an affordable cost for households earning up to 120 percent of the area's median income—the Act targets a lower-income bracket by requiring that no less than 15 percent of the units be sold at an affordable cost to lower-income households.

Having passed the first two parts of the test, the court focused on the remaining parts—whether the Act addresses a matter of "statewide concern" and whether the Act's provisions were narrowly tailored to the resolution of that concern.

The Court's 'Statewide Concern' and 'Narrowly Tailored' Determinations

The court reviewed the Act's provisions and determined that the Act addresses a matter of statewide concern by requiring municipalities to prioritize surplus land for development of low- and moderate-income housing. Specifically, it found:

> . . .that as much as the City has a readily identifiable interest in the disposition of its real property, the well-documented shortage of sites for low- and moderate-income housing and the regional spillover effects of insufficient housing demonstrate 'extramunicipal concerns' justifying statewide application of the Act's affordable housing priorities.

Turning to the Act's application, the court held that the Act "narrowly tailors the restrictions on local government to avoid unnecessary interference in the locality's affairs" and that "while a city's process for disposing of surplus city-owned land is typically a municipal affair, San Jose's policy here must yield to the state law."

Conclusion and Implication

Housing remains a front-line issue in California. This is especially so for low and moderate-income housing. The court determined that the shortage of sites for low- and moderate-income housing and the regional spillover effects of insufficient housing is a matter of statewide concern. The charter city's policy for the sale of surplus city-owned land was trumped by the state's affordable housing law.

The court's opinion may be accessed online at: https://www.courts.ca.gov/opinions/documents/H045271.PDF.

(Nedda Mahrou, Eddy Beltran)

THIRD DISTRICT COURT DENIES WRIT OF MANDATE—LEAVES INTACT CITY'S ENVIRONMENTAL IMPACT REPORT AND GENERAL PLAN

Citizens for Positive Growth & Preservation v. City of Sacramento, Case No. C086345, ___Cal.App.3d___. (3rd Dist. Dec. 18, 2019).

The Third District Court of Appeal has affirmed the decision of the trial court denying the petition for writ of mandate and injunctive relief and complaint for declaratory relief against the City of Sacramento. The petition sought to set aside the city's certification of an Environmental Impact Report (EIR) and adoption of its 2035 General Plan.

Factual and Procedural History

In August 2014, the city released its draft 2035 General Plan and draft EIR for public review. On January 15, 2015, the planning commission voted to recommend certification of the EIR and adoption of the 2035 General Plan, including five supplemental changes to the 2035 General Plan and EIR. The city subsequently issued a "special reminder" that the city council would consider adopting the 2035 General Plan and certify the EIR—and also included a document containing a list of 13 supplemental changes, inclusive of the five changes previously considered by the planning commission. The city approved the 2035 General Plan and certified the EIR with the proposed changes.

Petitioner filed suit challenging both the adequacy of the 2035 General Plan, as well as the EIR. The trial court denied petitioner's claims in their entirety and this appeal followed.

The Court of Appeal's Decision

The 2035 General Plan

In its introductory paragraph, the 2035 General Plan provides, in part, that:

> . . .in making a determination of consistency the [c]ity may use its discretion to balance and harmonize policies with other complementary or countervailing polices in a manner that best achieves the [c]ity's overall goals.

Petitioner claimed the introductory language grants the city unfettered discretion to create a hierarchy of General Plan elements in violation of Government Code § 65300.5, which requires the policies in a general plan as written to be integrated, internally consistent, and compatible.

The court disagreed. The court found that petitioner pointed to no inconsistencies between the policies in the 2035 General Plan as written and that nothing in the introductory language created an inconsistency between the policies either. The court reasoned that the introductory language concerned the city's future determinations of a project's consistency with the 2035 General Plan—which is a different issue from whether the policies of a 2035 General Plan are internally consistent. The court held the 2035 General Plan valid on its face.

The court further held that even if, as petitioner alleged, the introductory language created a hierarchy of General Plan elements, it would not render the 2035 General Plan invalid. Rather, any future decision would be subject to an as-applied challenge at the appropriate time.

The Traffic Analysis

In 2013, the California Legislature adopted Senate Bill 743, which added Public Resources Code section 21099 to the California Environmental Quality Act (CEQA). That section requires the Natural Resources Agency to certify new CEQA Guidelines regarding transportation impacts. Upon certification of the revised Guidelines, "automobile delay, as described solely by level of service or similar measure of vehicular capacity or traffic congestion shall not be considered a significant impact on the environment." In response, the Natural Resources Agency added CEQA Guidelines § 15064.3, which became effective in December 2018.

Petitioners challenged the EIR's traffic analysis claiming that the 2035 General Plan's impacts on level of service (LOS) in certain areas of the city constituted significant impacts under CEQA. The court requested supplemental briefing regarding the applicability and impact, if any, of CEQA Guidelines § 15064.3 on this issue.

The court clarified that in mandamus proceedings, "'the law to be applied is that which is current at the time of judgment in the appellate court.'" Under § 21099, existing law is that LOS is no longer considered a significant impact. Accordingly, the court held petitioner's traffic impacts argument moot. Further, because § 15064.3 is prospective, the court also rejected petitioner's argument that the city failed to analyze the 2035 General Plan's traffic impacts under the vehicle miles traveled criteria.

The Alternatives Analysis

Petitioner also criticized the EIR's alternatives analysis for failing to include quantified analysis for any of its proposed alternatives. The court characterized petitioner's claim as challenging only the city's rejection of the "no project" alternative. Applying the substantial evidence standard of review, the court upheld the EIR's alternatives analysis finding that the city rejected the "no project" alternative because the 2030 General Plan failed to further some of the city's objectives, generally resulted in greater impacts, and would not avoid any significant impacts associated with the 2035 General Plan.

Recirculation of the EIR

Petitioner contended that four of the supplemental changes to the required the city to recirculate the EIR—claiming that the changes created significant new CEQA impacts and significantly worsened already significant impacts. The court disagreed.

With respect to elimination of the volume-to-capacity ratios, which were deleted from the final EIR, the court found that the ratios themselves would have no physical impact on the environment because the ratios would not change the amount of traffic that would result from implementation of the 2035 General Plan. The court found that petitioner had forfeited any remaining arguments related to recirculation by failing to support their claims with reasoned analysis or citations to evidence in the record.

Greenhouse Gas Emissions Analysis

Petitioner asserted that the EIR's greenhouse gas (GHG) analysis was inadequate because it failed to consider the impacts from deletion of the volume-

to-capacity ratios. The court rejected this argument reiterating that the deletion of the rations did not result in environmental impacts. The court also rejected petitioner's argument that the GHG analysis was inadequate because it was based on a faulty traffic analysis as "unsupported and undeveloped" relying on the well-established principle that failure to lay out evidence favorable to the other side and show why it is lacking is fatal to an appellant's challenge to an EIR.

Cyclist Safety Analysis

Petitioner argues that the EIR failed to account for the requirement, found in Vehicle Code § 21760, that motorists maintain at least a three-foot distance from cyclists when passing. To the extent petitioner challenged the EIR's analysis, the court declined to consider this argument because again petitioner failed to support its argument with reasoned analysis or citations to evidence in the record.

Petitioner also asserted that the city failed to analyze traffic delays or dangerous conditions created by the three-foot cyclist law. The court found that petitioner failed to point to anything in the record to establish a factual foundation for the claim that the project would cause new or worsened impacts to cyclist safety—and therefore held the EIR adequate.

Conclusion and Implications

This is the first opinion that affirmatively holds that challenges to traffic impact analysis based on LOS are moot in the wake of Public Resources Code § 21099. It further makes clear that petitioner's burden is to cite to evidence in the record and provide a reasoned analysis to support its claims. Hurling undeveloped arguments against the wall in the hope that something will stick is not enough.

The court's decision is available online at: https://www.courts.ca.gov/opinions/documents/C086345.PDF.

(Christina Berglund)

FIRST DISTRICT COURT AFFIRMS JUDGMENT FINDING THAT EVIDENCE WAS INSUFFICIENT TO ESTABLISH IMPLIED DEDICATION AT MARTIN'S BEACH

Friends of Martin's Beach v. Martins Beach 1, LLC, *Unpub.*, Case No. A154022 (1st Dist. Dec. 2019).

Following a bench trial, judgment was entered against plaintiff Friends of Martin's Beach finding that evidence did not to show that road, parking area, and inland sand of Martin's Beach had been dedicated to public use. Plaintiffs appealed, and the Court of Appeal for the First District, in an *unpublished* decision, affirmed, finding, among other things, that the trial court did not err by considering the acts of the lessee in determining whether the public use was permissive, and that substantial evidence supported the trial court's findings.

Factual and Procedural Background

Martin's Beach is a crescent-shaped beach located just south of Half Moon Bay that is bounded to the north and south by high cliffs that extend into the water. Other than by water, the only means of access is via Martin's Beach Road, which runs across the property from Highway 1 to the beach. In 2012, plaintiff filed a lawsuit on behalf of the public to use the road, parking area, and inland dry sand of Martin's Beach. Defendants in turn filed a cross-complaint seeking to quiet title to the property.

While plaintiff initially asserted several theories, it ultimately narrowed down to two. The first was that a provision of the California Constitution (Art. X, § 4) prohibits owners of property fronting navigable waters from excluding the right of way to the beach and confers on the public a right of access over private property to all tidelands. The second was that under common law dedication the defendants' predecessors, the Deeney family, who owned the property from early in the 20th century until the defendants purchased it in 2008, through their words and acts offered to

dedicate portions of the beach property to public use over a period of decades, and the public accepted that offer by using those parts of the property.

The trial court initially granted summary judgment on behalf of defendants on all causes of action raised in plaintiff's complaint. The Court of Appeal affirmed in part and reversed in part. On remand, the parties conducted discovery and proceeded to trial on the common law dedication issues. Following a bench trial, the trial court rejected plaintiff's common law dedication claim and entered judgment in favor of defendants.

Among other things, the court found that the "Deeney family licensed daily use and access to the property on payment of a fee," and that the Deeneys' intent was "to allow licensed use and access only upon payment of a fee." It also concluded that plaintiff "failed to prove that defendants intended to dedicate their property to the public and that the public accepted the dedication" and did not meet its burden to prove:

> . . .defendants intended to dedicate the property to the public or that the public had continuous and unfettered public use for the prescriptive period without asking or receiving permission.

Following entry of judgment, plaintiff timely appealed.

The Court of Appeal's Decision

Common Law Dedication

Generally, a common law dedication may be established in three ways: 1) express dedication, where an owner's intent to dedicate is manifested in the overt acts of the owner (e.g., by execution of a deed); 2) implied in fact, where the acts or omissions of the owner afford an implication of actual consent or acquiescence to dedication; and 3) implied by law, where the public has openly and continuously made adverse use of the property for more than the prescriptive period. Plaintiff challenged the trial court decision on three grounds, the first two of which related to implied in law dedication.

First, plaintiff argued that the trial court erred by relying on the acts of the Deeneys' lessee, Watt, to find the use by the public permissive rather than adverse, and that there was no evidence that the Deeneys themselves took steps to prevent public use prior to 1990. Citing *Gion v. City of Santa Cruz* (the seminal case on implied in law dedication), the Court of Appeal found that:

> . . the question is whether the public's use was free from interference or objection by the fee owner or persons acting under his direction and authority.

Thus, the question for purposes of the case was whether the Deeneys' lessee, Watt, acted under the Deeneys' direction and authority. Reviewing the record, the Court of Appeal found that there was substantial evidence to support a finding that Watt had the Deeneys' authority to do what he did.

Second, plaintiff contended that, even if Watt's actions could be considered, the evidence was insufficient to show the public use was pursuant to a license so as to defeat plaintiff's showing of an implied in law dedication. The court found it undisputed, however, that even early in time, Watt had consistently charged people a fee, and that those who visited the beach understood they needed to pay the fee to access the property. Paying a fee to gain admission to the beach, the court reasoned, was tantamount to obtaining permission or a license. Implicit in charging a fee is that the right to use the beach is conditional on payment. "We do not believe," the court concluded, "that this is the kind of unfettered use the court referred to in *Gion-Dietz*."

Third, plaintiff claimed that, pursuant to the Court of Appeal's prior direction on remand, it had established an express dedication as a matter of law. In particular, plaintiff relied on statements in the prior opinion, reversing the grant of summary judgment, that the facts plaintiff had alleged were "sufficient to establish the elements of common law dedication, if they can be proven at trial," and that the complaint alleged:

> . . .acts on the part of the owners that could manifest an intent to dedicate to the public, coupled with public use over many years that could establish acceptance.

Claim of Error as a Matter of Law

Plaintiff contended that it provided evidence at

trial to support every allegation in its complaint, and that the prior ruling thus means that as a matter of law plaintiff met its burden of proof at trial.

The Court of Appeal found that this argument misconstrued the prior ruling, which was simply a determination that plaintiff had alleged enough to get beyond what was in effect a motion for judgment on the pleadings. This was not tantamount, the Court of Appeal noted, to finding that if plaintiff provided some evidence supporting its allegations it would be entitled to judgment as a matter of law, even if there had been no contrary evidence. Rather, whether the elements of a common law dedication ultimately could be established would "depend on all of the circumstances, as shown by the evidence the parties offer at trial." Consistent with this rule, the Court of Appeal found that the trial court had properly considered the evidence presented at trial, and that substantial evidence supported the trial court's conclusion that the owners' acts did not reflect an intent to dedicate to public use and instead reflected only an intent to allow paid use.

Conclusion and Implications

The *unpublished* case remains significant, not only given the considerable attention that issues related to Martin's Beach have received, but also because it contains a thorough discussion of the law regarding implied in law dedication. The decision is available online at: https://www.courts.ca.gov/opinions/nonpub/A154022.PDF.
(James Purvis)

FOURTH DISTRICT COURT UPHOLDS APPLICATION OF 'CLASS 32' INFILL DEVELOPMENT EXEMPTION UNDER CEQA FOR RESIDENTIAL DEVELOPMENT PROJECT

Holden v. City of San Diego, ___Cal.App.5th___, Case No. (4th Dist. Dec. 3, 2019).

Plaintiffs challenged the decision of the City of San Diego to approve a residential development project pursuant to CEQA's "Class 32" infill development exemption. The Superior Court denied the petition for writ of mandate, finding that substantial evidence supported the city's finding to approve the Project pursuant to the exemption and that a General Plan amendment was not otherwise required. The Court of Appeal for the Fourth Judicial District affirmed.

Factual and Procedural Background

In 2014, IDEA Enterprise, Inc. (IDEA) submitted an application to the City of San Diego (City) for the demolition of two existing single-family houses on adjacent parcels and construction of seven detached residential condominium units on a 0.517-acre aggregate site in the City's North Park community (Project). The Project site is located on the western hillside of a canyon with a 35- to 41-degree down slope, and the site is considered to be environmentally sensitive land. Altogether, the Project would cover approximately 42 percent of the site.

In 2015, the City's planning staff initially informed IDEA that the Project did not comply with the minimum density required for development of the site under its General Plan and its Greater North Park Community Plan (Community Plan). Specifically, planning staff told IDEA that a minimum of 16 residential units would be required under Policy LU-C.4 of the General Plan and the housing element of the Community Plan. In late 2015, however, staff informed IDEA that the Project could be approved with seven residential units, citing the site's environmental sensitivity, which made a reduced density of seven residential units appropriate.

In November 2015, the North Park Community Planning Group voted to recommend approval of the Project without conditions. In 2016, a preliminary review by City staff concluded that the Project was categorically exempt from the California Environmental Quality Act (CEQA) under the "Class 32" infill development exemption. The City issued an environmental determination finding the same, and the city council then denied an appeal challenging that determination. On January 19, 2017, the planning commission voted to recommend approval of

the Project's tentative map and site development permit. On April 18, the City Council unanimously voted to approve the tentative map and site development permit for the Project. The City then filed a notice of exemption declaring that the Project was categorically exempt.

In May 2017, plaintiffs filed a petition for writ of mandate challenging both the City's determination that the Project was exempt from CEQA and its approval of the Project. In particular, plaintiffs claimed that the Project provided for less residential density than required by the General Plan, and therefore did not satisfy the requirements for an infill development exemption. The trial court denied the petition, finding that substantial evidence supported the City's finding to approve the Project pursuant to the exemption and that a General Plan amendment was not otherwise required. Plaintiffs appealed.

The Court of Appeal's Decision

In order for a project to qualify as an infill development project under the Class 32 categorical exemption, it must, among other things, be "consistent with the applicable General Plan designation and all applicable General Plan policies." (14 C.C.R. § 15332.) Generally, a project is deemed consistent with a General Plan if it will further the objectives and policies of the General Plan and not obstruct their attainment. Perfect conformity is not required, however, and it is enough that the proposed project will be compatible with the objectives, policies, and general land uses and programs specified in the applicable General Plan. A court will give "great deference" to a public agency's finding of consistency with its own General Plan.

In contending that the Project was inconsistent with the General Plan, plaintiffs primarily relied on General Plan Policy LU-C.4, which provides that one of the General Plan's policies for community planning is to:

> . . .[e]nsure efficient use of remaining land available for residential development and redevelopment by requiring that new development meet the density minimums of applicable plan designations.

Applying the applicable density designations set forth in the Community Plan's housing element, the Project ordinarily would have been required to have 16 to 23 dwelling units per acre.

Due to site development constraints, however, including a heavily vegetated urban canyon and environmentally sensitive steep hillsides, the City ultimately found that a lower density of seven units represented a more sensitive approach. In support of this finding, the City cited to a note on Figure 6 of the Community Plan, which provides that "[t]he residential density recommendations may be subject to modification during implementation of this plan." The Community Plan further provided that modifications to recommended densities may be incorporated into implementing legislation. Among other things, the City's implementing legislation includes its regulations for development of environmentally sensitive lands, which restrict development on steep hillsides.

In ultimately approving the Project and finding it exempt from CEQA, the City found that it was consistent with the policies, goals, and objectives of the General Plan. In particular, it found that although Policy LU-C.4 generally requires new development to meet the density requirements of the Community Plan, which ordinarily would require 16 to 23 dwelling units on the Project site:

> . . .due to the existing site development constraints with a heavily vegetated urban canyon and environmentally sensitive steep hillsides on the premises, a lower density of seven units at this site represents a more sensitive approach to this unique area and Policy LU-C.4 can be supported for the proposed density related to canyon and hillside preservation in the community.

City's Balancing of Competing Policies and Regulations Was Reasonable—Conformed with General Plan

Based on its review of the record, the Court of Appeal found that the City had acted reasonably and did not abuse its discretion by balancing the competing policies and regulations and finding that the Project's reduced density conformed to the General Plan, the Community Plan, and the City's steep hillside development regulations. In so deferring to the City's own construction, the court noted the City's "unique competence" to interpret the policies set forth when applying them in its adjudicatory capacity. Because

substantial evidence supported the City's finding that the Project would be consistent with its General Plan, the court concluded that there was also substantial evidence to support the City's finding that the Class 32 categorical exemption applied. For all of these same reasons, the court also rejected plaintiffs' claim that the City was required to amend the General Plan before approving the Project.

Conclusion and Implications

The case is significant because it contains a robust analysis of the legal principles applicable in reviewing a local agency's interpretation of its own General Plan policies. The decision is available online at: https://www.courts.ca.gov/opinions/documents/D074474.PDF.
(James Purvis)

THIRD DISTRICT COURT FINDS CALTRANS ENVIRONMENTAL IMPACT REPORT FOR HIGHWAY PROJECT ADEQUATE

Jamulians Against the Casino v. The California Department of Transportation, *Unpub.*, Case No. C086184 (3rd Dist. Dec. 3, 2019).

In an *unpublished* decision, the Third District Court of Appeal upheld a decision of the trial court denying the petition for writ of mandate and injunctive relief and complaint for declaratory and injunctive relief relief against the California Department of Transportation (Caltrans). The petition alleged that Caltrans failed to certify a legally adequate Environmental Impact Report (EIR) prior to approval of highway improvements on State Route 94 (Project) designed to mitigate traffic impacts resulting from operation of a casino on tribal land in unincorporated San Diego County.

Factual and Procedural History

In 1999, the Jamul Indian Village (JIV) entered into a compact with the State for the construction and operation of a casino. Despite being exempt from California Environmental Quality Act (CEQA) review, JIV nevertheless agreed to take appropriate actions to determine whether the casino would have any significant adverse impacts on off-tribal lands and to make good faith efforts to mitigate those impacts.

In 2012, JIV prepared an environmental document assessing the potential off-reservation environmental impacts associated with the proposed casino. Among other things, the study concluded that the operation of the casino would have significant off-reservation traffic impacts at six intersections on State Route 94 (SR-94) and identified various improvements to mitigate those impacts. In order to implement the traffic mitigation measures, JIV needed Caltrans approval and an encroachment permit.

Caltrans prepared an EIR analyzing the highway improvements along SR-94. The draft EIR identified four proposed project alternatives, identified and compared the impacts of each alternative in detail, and discussed the proposed avoidance, minimization, and/or mitigation measures. The document indicated that Caltrans would select a preferred alternative after fully analyzing and considering the project alternatives. In March 2016, Caltrans certified the EIR.

Jamulians Against the Casino (JAC) filed suit alleging multiple CEQA violations including failure to provide an adequate project description and failure to consider a reasonable range of project alternatives. The trial court denied JAC's petition. This appeal followed.

The Court of Appeal's Decision

Project Description

On appeal, JAC contended that the EIR failed to provide an accurate, stable, and finite description of the Project. Specifically, JAC asserted that the EIR did not identify any specific and proposed project and instead listed numerous potential roadway improvements as possible projects giving conflicting signals to decisionmakers and the public about the nature and scope of the Project. The court disagreed.

The Third District distinguished this case from *Washoe Meadows Community v. Dept. of Parks & Recreation*, 17 Cal.App.5th 277 (2017) where the court concluded that the draft EIR violated CEQA because it did not describe a project on which the public could comment because it set forth a range of five alternatives and declined to identify a preferred alternative. In contrast, here, the court found that the draft EIR clearly identified a highway improvement project that involved improvements to five specific intersections—not a broad range of possible projects. Moreover, the draft EIR did not require a commenter to offer input on "vastly different" alternatives as the small number of alternatives presented in the draft EIR were closely-related and did not result in an undue burden on members of the public wishing to comment. Viewing the draft EIR as an informational document, the court held that it included enough detail about the Project to enable members of the public to understand and meaningfully consider the environmental impacts of the proposed project.

The court further rejected JAC's related claim that the project description precluded informed decision making by impeding the public's comparison of the Project with its alternatives because the draft EIR identified and compared the environmental impacts of each project alternative, which were analyzed at an equal level of detail, and discussed proposed mitigation measures.

Project Alternatives

JAC also alleged that Caltrans failed to consider a reasonable range of alternatives because it did not evaluate project alternatives proposed by the public during the public comment period—in particular alternatives that would reduce traffic-related impacts south of the casino.

The court articulated that an agency's selection of alternatives is afforded great deference, which is only overcome if petitioners demonstrate that the chosen alternatives are "manifestly unreasonable"—and concluded that JAC's claim lacked merit.

As a threshold matter, the court found that JAC (or any member of the public) failed to exhaust their administrative remedies as to this issue therefore forfeiting the claim. Although various commenters pointed out the need for roadway improvements south of the casino, the remarks reflected only general concerns about traffic impacts, not that the alternatives analysis was lacking.

Regardless, the court found that the claim failed on the merits as well. The court noted that the Project is not intended to mitigate all casino-related traffic impacts. Rather it seeks to mitigate only those direct traffic impacts caused solely by the casino. The court further noted that it is the casino, not the Project that would cause traffic-related impacts south of the casino and therefore Caltrans was not required to consider alternatives involving those impacts.

Conclusion and Implications

While the opinion is *unpublished*, it reinforces the scope of the California Environmental Quality Act. For example, the impacts related to the casino were not at issue. Rather, only the impacts of the SR-94 improvements were subject to CEQA. Interesting, was the court's distinction between this case and *Washoe Meadows* with respect to the project description—which if published could have been the source of confusion with respect to this issue. Finally, the opinion reiterates CEQA's strict exhaustion requirement and the considerable deference given to agencies with respect to alternatives analyses.

The court's decision is available online at: https://www.courts.ca.gov/opinions/nonpub/C086184.PDF.

(Christina Berglund)

FOURTH DISTRICT COURT UPHOLDS REFERENDUM PETITION THAT DID NOT ATTACH INTERRELATED GENERAL PLAN PROVISIONS

Molloy v. Vu, ___Cal.App.5th___, Case No. DO75593 (4th Dist. Oct. 31, 2019).

The Fourth District Court of Appeal held that a referendum petition that incorporated all of the text of a General Plan amendment that it sought to prevent did was not required to include relevant portions the General Plan not expressly incorporated by reference into the General Plan amendment resolution. The court also held that the referendum was not unlawful although it did not challenge two additional legislative acts, including a Specific Plan adoption, and zoning classification change, that were dependent upon the General Plan amendment.

Factual and Procedural Background

In 2015, developer Newland Sierra sought to develop a 1,985 acre site north of San Marcos into a mixed-use community with 2,135 homes, 81,000 square feet of commercial space, a six-acre school site and other amenities. In 2011, San Diego County (County) adopted a new General Plan that designated the site "rural" and also as adopted the North County Metropolitan Subregional Plan, which included the site and implemented the General Plan's goals and land use designations.

Under the General Plan's housing element, the "rural" land use designation had the lowest densities in the County, allowing for one dwelling for every 20 to 80 gross acres. This density limit was prohibitive of the planned development, meaning that at a minimum, Newland Sierra would need to seek amendment of the San Diego County General Plan to complete the project.

Newland Sierra filed an application with the county to amend the General Plan, create a Specific Plan for the site, and change the site's zoning classification. Despite substantial public opposition, on September 26, 2018, the county board of supervisors performed the following legislative acts: 1) adopted a resolution approving a General Plan amendment, 2) adopted a resolution approving a Specific Plan for the site, and 3) adopted a change of the site's zoning classification.

Soon thereafter, a neighborhood group named Golden Door began circulating a referendum petition to prevent the General Plan amendment from taking effect. The referendum petition contained the entire 66-page General Plan amendment resolution, however it did not contain the land use designation descriptions from the General Plan that would remain in effect if the General Plan amendment was overturned. Moreover, the referendum petition did not seek to rescind the related Specific Plan and zoning designation change for the project. Within 30 days of the board's decision, Golden Door secured 95,000 "projected valid" signatures, well in excess of the of signatures required to place the General Plan amendment on a ballot.

At the Superior Court

Thereafter, Newland Sierra filed a petition in Superior Court challenging the referendum petition. Among other things, the petition alleged that Golden Door's referendum petition violated the full text rule in § 9147 of the Elections Code for failing to attach the land use designations from the General Plan. The petition also alleged that the referendum violated Government Code §§ 65454, 65860, and 65862 for repealing the General Plan amendment without repealing the related Specific Plan adoption and zoning classification change. The trial court denied the petition in its entirety.

On appeal, Newland Sierra raised the same allegations discussed above.

The Court of Appeal's Decision

The Full Text Rule

Regarding Newland Sierra's claims related to the full text rule, the court looked at the text of the statute and the case law interpreting it. Elections Code § 9147 subpart (b) generally requires that:

> . . .[e]ach section of [a] referendum petition shall contain the title and text of the ordinance or the portion of the ordinance which is the subject of the referendum.

Case law interpreting this provision provides that a valid referendum petition must contain the full, complete text of the challenged legislation, including documents and exhibits physically attached to the legislation when adopted. In addition, a valid referendum petition must contain documents expressly incorporated by reference into the challenged legislation.

The court was especially persuaded by a 2009 court of appeals case titled *Lin v. City of Pleasanton*, 176 Cal.App.4th 408 (2009). The *Lin* case held that the text of a law challenged by a referendum does not include documents referenced within the law but not physically attached to the ordinance or specifically incorporated by reference. Accordingly the court in this case noted:

> The Elections Code requires the text of the ordinance being challenged [to be included in a referendum petition], not the inclusion of additional information a conscientious voter might want to know before signing the petition.

The court noted that Elections Code § 9147 subpart (b) sets out a clear, objective rule requiring only the text of the ordinance, exhibits physically attached to the ordinance, or expressly incorporated by reference, be included with referendum petitions. This clear and objective rule protects citizens' rights of referendum and guides clerks in their ministerial duties to process such petitions.

Accordingly, the court rejected Newland Sierra's arguments, holding that Golden Door was not required to attach the General Plan's descriptions of land use designations. As the court noted:

> [T]he purpose of the full text requirement is to make sure that prospective signers have adequate information about the substance of the proposed law to make an informed decision about whether to sign the referendum petition. In all but the most extreme situations this purpose is fulfilled by construing the 'test' to include the language of the ordinance itself, pus any documents attached as exhibits or expressly incorporated by reference.

Legality of Challenging One of Several Legislative Acts

The court next addressed Newland Sierra's allegations that the referendum petition was legally invalid because it only challenged the board of supervisors' September 26, 2018 General Plan Amendment, and not the two related legislative acts on the same date. Newland Sierra argued that the referendum petition needed to challenge these actions, because the Specific Plan and zoning designation change would be inconsistent with the General Plan if the General Plan amendment was overturned.

The court noted that it could not find any authority to support Newland Sierra's argument. Instead, the court was persuaded by a 2018 state supreme court case *City of Morgan Hill v. Bushey*, 5 Cal.5th 1068 (2018). The *Bushey* case noted that there are reasons why supporters of a referendum and its electors may wish to protest one legislative act and not an associated legislative act.

Ultimately the court concluded:

> [A]dhering to our policy of liberally construing referendum petitions in favor of their sufficiency, we conclude that it was an acceptable course of action for proponents to challenge only the GPA resolution through referendum.

Due to ongoing related litigation, the court did not decide what would happen to the related Specific Plan adopted and zoning amendment if the General Plan Amendment is voted down when the referendum is placed on the ballot in March of 2020. However the court noted that:

> [T]he answer may be… that the specific plan resolution and rezoning ordinance were void ab initio because their adoption was neither conditioned on the effectiveness of the GPA resolution nor consistent with the General Plan in effect at the time.

Conclusion and Implications

The *Molloy* decision highlights state courts' policy of liberally construing referendum petitions in in favor of their legality. Referendum petitions challeng-

ing the legislative acts of a local legislative body must incorporate the text of the ordinance, or portion of the ordinance being challenged. Such referendums must also include any relevant exhibits attached to such ordinance, or other documents expressly incorporated by reference into the ordinance. A referendum petition is not necessarily invalid if it only seeks to invalidate one of multiple interrelated or interdependent legislative acts.
(Travis Brooks)

FIFTH DISTRICT COURT FINDS ZONING ORDINANCE REQUIRING COOPERATION BETWEEN OWNERS OF SURFACE RIGHTS AND MINERAL RIGHTS A LEGITIMATE PUBLIC PURPOSE

Vaquero Energy, Inc. v. County of Kern, ___Cal.App.5th___, Case No. F079719 (5th Dist. Nov. 19, 2019).

This case involved an action by an oil and gas activity permit applicant alleging that the County of Kern's (County) new zoning ordinance amounted to equal protection and due process violations. The ordinance created two procedural pathways for obtaining permits, depending on whether the applicant had obtained consent from the surface owner. The Court of Appeal affirmed the trial court's decision, finding that the different classifications were rationally related to promoting cooperation between surface owners and oil and gas operators. As such, there was no constitutional violation.

Factual Background

In 2015, the County's board of supervisors approved a new zoning ordinance requiring permits for new oil and gas exploration, drilling and production. The ordinance created two procedural pathways for obtaining permits when the proposed activity would be conducted on "split-estate land" (*i.e.*, land where the surface rights and mineral rights are held by different owners). An expedited seven-day pathway is available to permit applicants who obtain the surface owner's written consent to the site plan. In contrast, a more expensive 12-day pathway must be used when the applicant has not obtained the surface owner's signature. Plaintiffs filed a lawsuit contending that the new provisions violated their constitutional rights to equal protection and due process. The trial court entered judgment in favor of the County, and this appeal followed.

The Court of Appeal's Decision

The Due Process Claim

As to the due process claim, plaintiff argued that the County inappropriately delegated its permitting authority to private interests—specifically, the owners of surface rights—who could arbitrarily withhold their signatures, giving them effective control over how mineral rights owners use and enjoy their property rights. After significant review of state and federal precedent, the court concluded that the most significant factors in analyzing the constitutionality of a land use ordinance that transfers some authority to private property owners are: 1) the amount and type of control transferred, 2) whether the private property owners' action or inaction produces results that are binding on the other property owner, and 3) the presence or absence of standards dictating how that control must be exercised.

Here, the Court of Appeal determined that the ordinance did not violate due process because the County's delegation of some control to the surface owners did not give them the final authority to determine how the oil and gas operator would use its mineral rights. In other words, the ordinance avoids the due process problem of enabling surface owners:

> . . .to force an alteration in the legal regime without any discretion remaining in government and without any protection against their personal biases.

The County retained ultimate authority to issue the permit under the 120-day pathway, which provides permit applicants protection. Thus, the due process claim failed.

The Equal Protection Claim

On its equal protection challenge, plaintiff asserted that the two procedural pathways impose disparate treatment on similarly situated permit applicants, depending on whether the surface owner's written consent is obtained. According to Plaintiff, this the surface owner's consent does not further a legitimate governmental purpose. While the court agreed that the ordinance subjected similarly situation groups to disparate treatment, it found that the ordinance passed constitutional muster under the deferential rational basis test.

Under the rational basis test, a statute, regulation or ordinance will be upheld if there is any reasonably conceivable set of facts that provides a rational basis for the classification. So, it must be proven that there is some rational relationship between a disparity in treatment and some legitimate government purpose. The court reasoned that it is rational to conclude that when an operator qualifies for the seven-day pathway, there has been cooperation—specifically, an agreement about the site plan between the operator and the surface owner.

Conclusion and Implication

The Fifth District Court of Appeal, in the end, found that promoting cooperation between surface owners and mineral owners was a legitimate purpose. Therefore, the zoning ordinance's separate classifications rationally incentivize operators to attempt reaching an agreement with the surface owner about the specific details contained in the site plan.

The case may be accessed online at: https://www.courts.ca.gov/opinions/documents/F079719.PDF.

(Nedda Mahrou)

SUPERIOR COURT RULES IN FAVOR OF LOS ANGELES IN BATTLE OVER ORDINANCES PASSED TO BATTLE HOMELESSNESS AFTER LEGISLATURE EXEMPTS THE ORDINANCES FROM CEQA REVIEW

Fight Back Venice! v. City of Los Angeles, Case No. BS1735666 (L.A. Super. Ct. Dec. 5, 2019).

On December 5, 2019 the Los Angeles County Superior Court dismissed with prejudice a neighborhood group's petition for writ of mandate that challenged two City of Los Angeles (City) anti-homelessness ordinances. The petition was dismissed after Governor Newsom signed Assembly Bill 1197 (AB 1197), which exempted the City's ordinances from the California Environmental Quality Act (CEQA) review. AB 1197 thus completely undercut the CEQA arguments in the group's petition. The court also dismissed several constitutional claims raised by the neighborhood group against AB 1197.

Factual and Procedural Background

In April of 2018, the Los Angeles city council passed the Permanent Supporting Housing Ordinance (PSHO) and the Interim Hotel Conversion Ordinance (IMHCO). Both ordinances sought to provide the City and developers with streamlined approval methods and concessions for development projects that would provide shelter to the City's booming homeless population. From an environmental review standpoint, the City certified a Mitigated Negative Declaration (MND) and an addendum to a Programmatic Environmental Impact Report (EIR)for the PSHO and IMCO.

On May 11, 2018, a neighborhood group called Fight Back Venice! (FBV) filed a petition for writ of mandate alleging that the homelessness ordinances did not undergo adequate environmental review. Specifically, FBV alleged that the City should have prepared a full Environmental Impact Report that the City improperly analyzed each ordinance as separate actions, that the City improperly piecemealed its environmental review, and that the ordinances were unlawful for various procedural and substantive reasons. Unsurprisingly, developers were hesitant to

utilize the PSHO and IMCO while FBV's lawsuit was pending, thus delaying the construction of housing for the homeless and hindering the City's efforts to address its ongoing housing crisis.

The California Legislature stepped in and on September 26, 2019, Governor Newsom signed Assembly Bill 1197 that provided "[CEQA] does not apply to the adoption of [the PSHO and IMCO] by the City of Los Angeles in 2018." AB 1197 was urgency legislation that took effect immediately upon the Governor's signature. Armed with this authorization to sidestep further CEQA challenges from FBV, the City filed notices of exemption for the PSHO and IMCO.

Recognizing that its initial claims were likely moot, FBV sought leave to amend its petition to allege various constitutional claims challenging AB 1197. Specifically, FBV alleged that: 1) AB 1197 was unconstitutional as a special statute in violation of Article IV, § 16(b) of the California Constitution, 2) AB 1197 could not be applied retroactively because it grants a special privilege to the City in violation of Article IV, § 8(d) of the state constitution, (3) AB 1197 violates FBV's equal protection rights, and 4) AB 1197 violates FBV's due process rights.

Soon thereafter, the City filed a "motion to dismiss" FBV's petition, which the court noted served the same function as a general demurrer.

The Superior Court's Order

Mootness

In its order granting the City's motion to dismiss, the Superior Court concluded that FBV's claims related to CEQA were moot. AB 1197 exempted the PSHO and IMCO from CEQA review, meaning that the relief sought by the Petition was no longer available. In doing so, the court determined that none of the following exemptions to mootness were applicable: 1) the matter was not an issue of public interest that was likely to reoccur, 2) the matter was not a controversy between the parties that was likely to reoccur, and 3) there was no material issue remaining for the court's determination.

Constitutional Claims

The court moved on to address each of the constitutional issues raised by the parties in their briefing materials without formally granting FBV's motion for leave to amend its petition.

First, the court determined that AB 1197 was not a special statute in violation of Article IV, § 16(B) of the state constitution. Article IV, § 16(B) prohibits adoption of a special (*i.e.* tailored to specific entities) statute "if a general statute can be made applicable." The court noted that the state constitution does not prohibit the legislature from classifying certain entities (*i.e.* the City) differently than others. To avoid being deemed unconstitutional, such classifications must be based on differences "which are natural, and which will suggest a reason that might rationally be held to justify the diversity of the legislation". Such classifications must be based on "different conditions naturally requiring different legislation" for the separately classified entity. Here, the court reasoned that there were unique circumstances that justified AB 1197's limited application to the City ordinances. The City was unique because it has the second largest homeless population in the country, and had already set aside funding to address its homelessness problem.

The court also dismissed FBV's claims that the statute violated the equal protection clause of the state constitution. As the court noted, FBV failed to establish a "class of one" equal protection claim because it was unable to show that the state legislature acted through an improper motive, and there was a rational basis for singling out the City's ordinances under AB 1197 as discussed above. The court also rejected FBV's contentions that AB 1197 "impinges" on a fundamental right by noting:

> CEQA creates statutory rights that are neither fundamental nor vested... The rights derived from CEQA are not of constitutional dimension; the legislature granted them, and the legislature may take them away.

The court then rejected FBV's claims that AB 1197 granted a special privilege to the City in violation of Art. IV, § 8(d), of the state constitution, which provides that an urgency statute cannot grant any franchise or special privilege or create any vested right or interest. The court noted that AB 1197's creation of a CEQA exemption for the ordinances merely exempted the PHSO and IMCO from CEQA, and did not compel development of any homeless housing. Because AB 1197 did not confer any special property interest or other fundamental right to the City, it did not grant a special privilege.

The court then determined that AB 1197 did not violate FBV's due process rights. FBV did not have any vested right to pursue its CEQA lawsuit, although a court can apply a law retroactively, even to vested rights, even if supported by public policy. As noted above, FBV had no fundamental right to CEQA review of the ordinances and public policy factors favored retroactive application of AB1197—to "expedite the City's development of supportive housing."

The court then dismissed FBV's petition with prejudice.

Conclusion and Implications

At this juncture, it is unclear whether FBV will appeal the Superior Court's decision and FBV apparently still has an opportunity to file a motion to reconsider before January. Nonetheless, the City and California Legislature's efforts to alleviate homelessness in California's largest City are indicative of the proactive efforts that some localities and the state are undertaking to alleviate the state's deepening housing crisis. Only time will tell whether the City of Los Angeles' anti-homelessness ordinances, bolstered by AB 1197, will alleviate the booming homelessness crisis in Los Angeles. As the state continues to grapple with an affordable housing crisis, disputes between neighborhood groups and those trying to expedite approval and construction of affordable housing will doubtless continue.

(Travis Brooks)

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