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FEATURE ARTICLE

THE SLOW MARCH OF PROGRESS—DESPITE FAILING TO SECURE SWEEPING HOUSING LEGISLATION, THE ENACTMENT OF SB 330 IN NEWSOM'S FIRST YEAR IS AN IMPORTANT STEP FORWARD

by Travis Brooks

In 2017, when Governor Newsom was campaigning for his job, he outlined a string of audacious goals to tackle California's housing crisis. "Our solutions must be bold as the problem is big"; Newsom wrote in a blog post as he revealed a sweeping plan of legislative action and investments to develop 3.5 million new housing units by 2025. Newsom's 3.5 million figure was based off of a 2016 study by the McKinsey Global Institute that concluded 3.5 million new homes are needed by 2025 to put a meaningful dent in the state's housing crisis. The same study found that in-state housing production occurred at an anemic rate of 308 units for every 1000 new residents between 2005 and 2015, a rate that must be ramped up threefold to meet Newsom's 3.5 million new home goal.

As recent articles in national newspapers like the *New York Times* have detailed, much of the blame for the crisis can be directed at an inherent bias by local decisionmakers in favor of the interests of resident voters and against those of potential future residents. Well-founded or not, resident voters often have a strong Not-In-My-Backyard (NIMBY) attitude towards new multi-unit housing projects that they fear will destroy the character of the areas where they settled. Too often this gives rise to insurmountable political barriers and opposition to much-needed residential projects. These projects must often be approved through discretionary approval procedures in the hands of local, elected decisionmakers.

We are now more than a year into Newsom's first term, and while the Governor has failed to secure the type of paradigm-shifting legislation likely needed to tackle the housing crisis, he can point to some important strides that will combat local approval roadblocks. One of the most prominent successes in this regard was the passage of Senate Bill 330, the most significant of several new, albeit incremental new laws, passed in 2019 to promote new housing production. Senate Bill 330, seeks to bolster housing supplies in three major ways: 1) by adding new measures to streamline the permitting process for new housing, 2) by limiting localities' ability to prevent new housing in the face of local opposition or based on subjective objections to such housing, and 3) prohibiting cities and counties from reducing the intensity of prospective residential development in urban areas.

This article will discuss Senate Bill 330 (SB 330) and existing law that serves to counter balance the inherent pro-NIMBY bias of many local jurisdictions. Ultimately it will conclude that, although SB 330 is an important incremental step forward, a legislative paradigm shift relative to existing zoning laws, and new subsidies and incentives for new housing are obviously still needed.

Pre-Existing Anti-NIMBY Laws

As noted, SB 330 will provide a needed boost to an existing framework that constrains cities' and counties' ability to deny or delay new housing projects in the face of local opposition. This framework exists primarily within the Housing Accountability Act (Gov. Code § 65589.5.) and the Permit Streamline Act (*Id.* at 65920 *et seq.*), both enacted in their original forms decades ago.

The Housing Accountability Act

In 1982, the California Legislature passed the Housing Accountability Act (HAA), also known by some as the "anti-NIMBY" law. The HAA applies to all new residential projects, transitional and

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supportive housing, and mixed-use projects with at least two-thirds of their square footage dedicated to residential use. At its core, the HAA constrains local jurisdictions' ability to reduce density or deny new housing projects to varying degrees depending upon whether such projects qualify as affordable housing or satisfy objective development standards. The HAA applies to all general law and charter cities and counties in the state.

The HAA's strongest protections apply to new housing projects that qualify as affordable housing for very low, low-, or moderate-income households or an emergency shelter. For qualifying affordable housing projects, the HAA prohibits local jurisdictions from disapproving or conditioning approval of such projects on reductions in density unless the locality determines that, subject to certain caveats and exceptions: 1) it has adopted a housing element and has met or exceeded the regional housing need allocated to it for the applicable planning period, 2) the housing development as proposed would have a specific, adverse impact on public health or safety, and there is no feasible measure to satisfactorily mitigate or avoid the impact without rendering the development unaffordable to low and moderate income households, 3) the housing development must be denied to comply with state or federal law and there is no way to feasible way to comply without rendering the units unaffordable to low and moderate-income households, 4) the housing development project is proposed on land zoned for preservation that is surrounded on at least two sides by land being used for agricultural or resource preservation purposes, or which does not have adequate water or wastewater facilities to serve the development, or 5) the housing development project is inconsistent with both the zoning ordinance and general plan land use designation for the project site and the site is not identified as a suitable location for affordable housing in the jurisdiction's housing element.

The HAA also limits local agencies' ability to deny or reduce proposed densities for all proposed housing projects, including market rate projects, when such projects comply with a local agency's objective development standards. When a proposed housing development project complies with such objective standards and criteria, a local agency can typically only reduce the project's proposed density or deny the project in one instance—when a local agency determines that the project would have a "specific adverse impact" on public health & safety that cannot be mitigated any other way. The HAA also provides that a project is still consistent jurisdiction's objective development standards if the project is consistent with the jurisdiction's general plan, but the site's zoning designation is inconsistent with the general plan.

Key terms under the HAA are defined in such a way to constrain a local agency's ability to deny a proposed housing project. For example, the HAA defines objective development standards as any applicable "general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete." The HAA defines a "specific adverse impact" as a:

> . . .significant, quantifiable, direct, and unavoidable impact, based upon written public health or safety standards, policies, or conditions as they existed on the date that the application was deemed complete.

Essentially, this means that a local agency cannot rely on a subjective idea of what constitutes a specific adverse impact. Instead a local decisionmaker must point to specific, objective, and established literature already in existence when denying a qualifying project.

The HAA also includes forceful enforcement mechanisms. For example, if a housing project applicant believes that a local agency violated the HAA, that applicant can bring a lawsuit on an expedited basis. In such lawsuits, local agencies bear the burden of proving that challenged decisions conformed with the HAA. A prevailing project applicant is entitled to recover reasonable attorney's fees and costs. If the local agency fails to comply with section the HAA after an adverse judgment in an HAA lawsuit within 60 days, significant monetary fines may be imposed.

The Permit Streamlining Act

Enacted in 1977, the Permit Streamlining Act (PSA) establishes deadlines for local agencies as they process development applications. The PSA does this in two main ways: (1) by setting time limits within which state and local agencies must either approve or deny a project applications and (2) by providing that most of these time limits can only be extended once by agreement between the parties. If an applicant invokes the PSA and provides sufficient notice, and the local agency still fails to approve or disapprove a

permit within the PSA's timelines, the application is subject to being "deemed approved." In practice, the PSA is often enforced through traditional *mandamus* actions, and projects "deemed approved" pursuant to the PSA are rare. Also, not all development approvals subject to the PSA. Excluded approvals include any legislative land use decisions, such as amendments to the zoning code or General Plan, any ministerial projects that do not involve any discretion, approval of final subdivision maps, and administrative appeals.

Outside of the new "preliminary application" mechanism created by SB 330 and discussed in detail below, the PSA's traditional timelines begin applying when an applicant submits what it purports to be a complete development application (*i.e.* a conditional use permit application, tentative subdivision map application, *etc.*). A local agency then has 30 days to inform the applicant whether the project application has been determined to be complete. If no such notice is provided, the development application is automatically "deemed complete," even if the application itself is deficient. If a local agency notifies the applicant that an application is incomplete, the 30-day timeline for the local agency to confirm completeness of the application begins again with each re-submittal of the application. As discussed below, SB 330 creates some additional obligations for local agencies when informing applicants that an application is incomplete during this process.

The PSA establishes a number of deadlines related to review under the California Environmental Quality Act (CEQA). Thirty days after an application for a private development application is determined to be complete, the lead agency must complete its initial environmental study that determines whether to require an Environmental Impact Report (EIR), a Negative Declaration, or if an exemption to CEQA applies. This 30 day window can be extended for an additional 15 days if the applicant consents. Negative declarations and mitigated negative declarations must be adopted 180 days after a project application is determined complete, although additional time can be allowed by ordinance or resolution if justified by the circumstances and the applicant consents. Within 60 days after the adoption of a negative declaration, the lead agency is required to approve, conditionally approve, or deny the project. This period can be extended for 90 days with the applicant's consent.

If one is required, an EIR for a private project must be prepared within one year from the date that a project application is determined complete. An additional 90 day period may be allowed by ordinance or resolution if justified by compelling circumstances and if the applicant consents. Non-residential development projects must be approved, conditionally approved, or denied within 180 days from the date that the EIR was certified (note, for residential projects SB 330 reduces this deadline from 120 to 90 days, and qualifying affordable housing projects must be approved within 60 days of certification of an EIR, down from 90 days). Again, with the consent of the applicant, these time periods can be extended once for a period of up to an additional 90 days.

If a lead agency fails to adopt a negative declaration or an EIR within the prescribed time limits, the project is still not deemed approved in the absence of these environmental documents. The PSA cannot be used to force an agency to make a CEQA determination. However, case law has established that the duty to prepare an EIR within one year, is a ministerial duty, enforceable by traditional mandamus.

The PSA also applies to approvals under the subdivision map act, although a tentative map may not be deemed approved under any circumstances unless the map satisfies all applicable subdivision map requirements and due process requirements have been met.

In jurisdictions where planning commissions have approval authority over tentative subdivision maps, the planning commission must disapprove, conditionally approve, or deny the map within 50 days after the adoption of a negative declaration, determination that a project is exempt, or certification of an EIR. If the planning commission has only been delegated authority to make recommendations to a city council or county board of supervisors, it must make its recommendation within 50 days after adopting a negative declaration, certifying an EIR or making a determination that a project is exempt from CEQA review. Then, at the next regular meeting following the planning commission's recommendation, the city council or board of supervisors must fix a date in which to approve, disapprove, or conditionally approve the map. This date must be within 30 days of the board or council's receipt of the planning commission's recommendation.

Enter the Housing Crisis Act of 2019

The above anti-NIMBY provisions, although helpful, clearly needed a boost as the housing cri-

sis deepened. The Housing Crisis Act of 2019—SB 330—applies to all cities and counties with additional restrictions that apply to "affected cities and counties," which generally include all urban areas. SB 330 will remain in effect until January 1, 2025.

Early Vesting Rights Created Through New Preliminary Application

For residential development projects in all cities and counties, SB 330 creates a new "preliminary application" mechanism. Under this new mechanism, an application is automatically "deemed complete" when an applicant submits a "preliminary application" that contains each of 17 statutorily prescribed materials required by the SB 330. Unlike the traditional PSA provisions discussed above, which reset a local jurisdiction's initial 30 day application processing timeline every time that an initially incomplete application is resubmitted, a preliminary application is "deemed complete" automatically as long as all required items are submitted. The local agency does not need to affirmatively determine that an application is complete before the vesting provisions of SB 330 are triggered. Housing projects for which complete preliminary applications are submitted, are then only subject to the ordinances, policies, development standards, and fees (except automatic annual adjustments to account for inflation) in effect when the applicant submitted the preliminary application.

Modifications of PSA Timelines for Housing Development Projects

Once a preliminary application is submitted, and the above vested rights are established, the full application process continues in much the same way that it did under the before enactment of SB 330. Therefore, the applicant must still put together a complete development application, although SB 330 now requires the applicant to submit a complete development application within 180 days after a preliminary application is submitted.

If a development application is incomplete, SB 330 now requires the city or county to provide an "exhaustive list" of all deficiencies in the applicant's development application. This "exhaustive list" must be provided by the city or county within 30 days after a the development application is submitted. A city or county cannot request any additional information that it did not include in an exhaustive list sent by to the applicant in its initial response. Unlike other provisions of SB 330, this "exhaustive list" requirement applies to all new development projects, not only residential development projects.

Until 2025, SB 330 will also shorten timelines for cities and counties to process housing project applications under CEQA. Thus, after an EIR is certified for a housing project, a City or County is required to deny or approve the project within 90 days instead of 120 days. For projects that qualify as affordable housing projects under Government Code § 65950(a)(3)(A) the time within which a city or county must approve or deny an application after certification of an EIR is reduced from 90 to 60 days.

Also important, after a full development application is deemed complete and the project complies with objective zoning and development standards, SB 330 prohibits cities and counties from holding any more than five hearings on the proposed project, including any continuances. SB 330 defines hearings as including any public hearing, workshop, or similar meeting held by the local agency .

Finally, SB 330 requires any necessary determinations as to whether a housing project site is a historic site to be made as soon as a full development application is determined to be complete. Except in limited circumstances, this determination lasts throughout the approval process.

Additional Provisions Constrain Cities and Counties from Reducing Housing Densities in Urban Areas

In addition to the above, SB 330 creates new provisions that prohibit "affected" cities and counties from taking various other actions that would have the effect of reducing the potential number of housing units that can be built under pre-existing development regulations. "Affected" cities and counties are those cities and counties determined by the state Department of Housing and Community Development (HCD) as being in an urbanized area or urban cluster as designated by the United States Census Bureau.

SB 330 outlines a number of new restrictions on actions that may be taken by these "affected" cities and counties for land where housing is an allowable use. Under SB 330, "affected" localities cannot change the land use designation of parcels to a less intensive use or reduce the intensity of land that was allowed under the locality's general or specific plan

that was allowed as of January 1, 2018. SB 330 defines "reductions in intensity" as:

> reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, or new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or anything that would lessen the intensity of housing.

SB 330 does allow cities and counties to reduce the intensity of development in particular areas if changes to land use or zoning designations elsewhere ensure there is no net loss of residential capacity in the locality.

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

SB 330 also seeks to protect the existing housing stock by prohibiting cities and counties from approving any housing projects that would require the demolition of residential dwellings unless the project will at least replace each demolished unit at a one-to-one ratio. In addition, SB 330 prohibits "affected" Cities and Counties from approving a housing development that requires the demolition of protected housing units (affordable or rent-controlled) unless certain requirements are met. Specifically, demolition of such units cannot be approved unless the developer: 1) replaces all demolished protected units, 2) allows tenants to stay in their homes until 6 months before construction begins, 3) provides relocation assistance to tenants, and 4) offers tenants a first right of return at an affordable rent.

Conclusion and Implications

Senate Bill 330's provisions are an important, albeit, incremental step towards lowering some of the troublesome barriers that arise during discretionary local approval process required for many new housing projects. Until January 1, 2025, housing developers and project applicants should be aware of SB 330's provisions and take full advantage of them when applicable.

The new early vesting provisions created by SB 330's "preliminary application" mechanism will provide housing developers with much needed certainty as to which development standards will apply to housing development applications as they pass through the approval process. The early vested rights created by this "preliminary application" mechanism begin as soon as a preliminary application is submitted that includes all of the information now listed in statute, which must be made available in an application form prepared by cities and counties. A city or county has no discretion to make a subjective determination whether or not such "preliminary application" is complete—it either is or is not.

Another powerful tool is SB 330's establishment of a five-hearing limit for all housing development projects. Without doubt, this will help prevent scenarios where controversial housing development projects, that qualify for approval under the HAA, languish in repeated contentious public hearings.

SB 330's prohibitions on city and county actions in urban areas that would downzone or further restrict new housing versus 2018 standards will also be helpful to prevent backsliding that would threaten already anemic in-state housing production.

Taken together, SB 330 should stem future losses and reductions to the housing stock, and help streamline processing of future housing development projects. However, to have a fighting chance at ending the current crisis, a more significant paradigm shift is needed. This needed paradigm shift would come in the form of a multi-pronged attack. This attack should include significant changes to existing zoning codes that would require local jurisdictions to allow higher density residential development in suitable areas, as well as significant new subsidies and financial incentives for new housing.

Travis Brooks, Esq. is an Associate with the law firm of Miller Starr Regalia. He represents private and public entity clients in a wide range of land use and environmental matters throughout the State of California. Travis also has significant experience related to school site development, construction law, and public bidding and contracting.

Travis serves on the Editorial Board of the *California Land Use Law & Policy Reporter*.

LAND USE NEWS

PROPOSED LEGISLATION WOULD CREATE CEQA EXEMPTION FOR HOMELESS SHELTERS

A new piece of proposed California legislation, introduced on January 8, 2020 and authored by Assemblymember Miguel Santiago (D-Los Angeles), would create an important new exemption under the California Environmental Quality Act (CEQA). Assembly Bill 1907 (AB 1907) would exempt from environmental review under CEQA certain activities approved by or carried out by a public agency in furtherance of providing emergency shelters, supportive housing, or affordable housing. The new exemption under AB 1907 would stay in effect until January 1, 2029, and will require lead agencies that approve qualified projects to file notices of exemption with the Office of Planning and Research.

Background

By way of background, CEQA provides a process for evaluating the environmental effects of a proposed project, and the act includes statutory exemptions, as well as categorical exemptions in the CEQA guidelines. If a project is not exempt from CEQA, an initial study is prepared to determine whether a project may have a significant effect on the environment. If the initial study shows that there would not be a significant effect on the environment, the lead agency must prepare a negative declaration. Finally, if the initial study shows that the project may have a significant effect on the environment, the lead agency must prepare an Environmental Impact Report (EIR).

Assembly Bill 1907

If AB 1907 is approved, the bill would allow certain homeless shelters and affordable housing projects to avoid CEQA review:

> This bill would, until January 1, 2029, exempt from environmental review under CEQA certain activities approved by or carried out by a public agency in furtherance of providing emergency shelters, supportive housing, or affordable housing, as each is defined. The bill would require a lead agency that determines to carry out or approve an activity that is within this CEQA exemption to file a notice of exemption, as specified.

The exemption would confer a major benefit for such projects because CEQA review can become a very costly, lengthy and complicated process. Projects that are subject to CEQA review may go through multiple rounds of review and could be challenged, which often results in legal challenges that can put an entire project's future in jeopardy. Having a CEQA exemption under AB 1907 will allow shelters to bypass environmental review, which will result in quicker approvals. This, in turn, will hopefully speed up construction of low-income housing in California.

The CEQA exemption is also significant because affordable projects and homeless shelters have faced strong opposition from residents who don't want such projects in their neighborhoods and communities. This has allowed homelessness to become a growing issue in California. According to a 2018 report by the State Auditor:

> . . .based on 2017 information from the U.S. Department of Housing and Urban Development, California leads the nation with both the highest number of people experiencing homelessness—about 134,000, or 24 percent of the nation's total—and the highest proportion of unsheltered homeless persons (68 percent) of any state. In contrast, New York City and Boston shelter all but 5 percent and 3 percent, respectively, of their homeless populations.

By having this type of CEQA exemption, the ultimate goal behind AB 1907 is to build supportive housing and emergency shelters as quickly as possible, without having to deal with roadblocks from opponents in the community.

Assemblymember Santiago also authored a similar bill last year—Assembly Bill 1197 (AB 1197). The

key difference with AB 1907 is that AB 1197 only created an exemption from CEQA for emergency shelter and supportive housing projects approved by the City of Los Angeles. AB 1907 expands the scope of AB 1197 by applying it to the entire state. The CEQA exemption under AB 1197 will remain in place until January 1, 2025.

Emergency Shelters, Supportive Housing or Affordable Housing

As currently drafted, AB 1907 applies to any activity approved by or carried out by a public agency in furtherance of providing emergency shelters, supportive housing, or affordable housing, including, but not limited to, any action to lease, convey, or encumber land owned by that agency, any action to facilitate the lease, conveyance, or encumbrance of land owned by that agency, or any action to provide financial assistance in furtherance of providing emergency shelters, supportive housing, or affordable housing.

Conclusion and Implications

The bill goes hand in hand with other recent bills passed by the Legislature to streamline the CEQA process for affordable housing projects. One of the most notable of those bills was SB 35, which created a ministerial approval process for certain multi-family affordable housing projects proposed in jurisdictions that have not met their regional housing needs. AB 1907 has garnered the support of Assemblymembers Sharon Quirk-Silva (D-Fullerton) and Mike A. Gipson (D-Carson), and more recently, the Los Angeles Business Council.

Information and status on Assembly Bill 1907 can be found online at the following link: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1907
(Nedda Mahrou)

PROPOSED LEGISLATION LOOKS TO EMINENT DOMAIN AND VACANT HOUSES TO ADDRESS AFFORDABLE HOUSING

On February 19, 2020, California State Senator Nancy Skinner introduced Senate Bill 1079 (SB 1079), related to residential property warehousing. The bill is aimed at reducing the number of vacant homes in California by targeting vacant residential properties owned by corporations. The proposed legislation would allow cities and counties to acquire such properties through eminent domain proceedings, or alternatively, to fine corporations that keep properties vacant for more than 90 days. SB 1079 also includes provisions that would offer tenants a right of first refusal to buy properties facing foreclosure.

Senate Bill 1079

As it is currently written, SB 1079 would give cities and counties the right to acquire certain residential property within their jurisdictions by exercising the power of eminent domain. The authority arises if a residential property is owned by a corporation or a limited liability company, the property has been vacant for at least 90 days, and the local agency provides just compensation to the owner based on the lowest assessment obtained for the property by the local agency. The bill applies to any real property that contains at least one residential dwelling unit. In addition, a property is considered "vacant" if it is not owner-occupied or lawfully occupied by a tenant.

Eminent Domain, Affordable Rentals and Sales

The proposed bill would require the local agency that obtains residential property pursuant to eminent domain proceedings to maintain the property and make it available at affordable rent to persons and families of low or moderate income, or sell it to a community land trust or housing sponsor. SB 1079 also authorizes local jurisdictions to adopt ordinances that impose civil penalties or fines on the corporate owners of residential properties that have remained vacant for at least three months. As drafted, there is no limit on how much these fines could end up costing. However, proceeds from imposition of the fines would be earmarked for homeless diversion, rental assistance, and other affordable housing purposes.

Right of First Refusal

SB 1079 also has a right of first refusal component. The bill would require corporate owners of residential property that has been vacant for at least 90 consecu-

tive days to offer the property to a community land trust, or housing sponsor, referred to collectively as "priority entities," before offering the residential real property for sale on the open market. A priority entity would be required to provide a notice of interest within five business days of receiving an offer or of receiving a specified notice, as applicable, and to make an offer for purchase within 90 calendar days. If the seller determines that the offer is a competitive offer, the bill would require the seller to accept that offer and sell the residential real property to the priority entity. The bill defines a "competitive offer" as an offer for the purchase of a parcel of residential real property that is reasonably commensurate with the sales price that the seller would expect on the open market.

Goal of Making Use of Vacant Homes

Senator Skinner hopes the bill will provide local governments with tools they need to ensure that property is put to use as housing, rather than remaining vacant. According to her website, Senator Skinner was inspired to introduce the bill by a Bay Area activist group known as Moms 4 Housing. "Moms 4 Housing shined a light on the fact that while over a 150,000 Californians are now homeless, right now in our own neighborhoods, there are more than 1 million vacant homes," Senator Skinner said. "Many of these affordable homes were snatched up during a foreclosure by corporations who then kept the houses vacant or flipped them for hefty profits."

Conclusion and Implications

To date, bills in California aimed at redressing the housing have not succeeded in getting from the legislature to enactment. Senator Wiener's SB 50 is an example of such a large and comprehensive bill that failed. Perhaps incremental change is the path to change. Senate Bill 1079 was announced just before Governor Gavin Newsom's second State of the State address, which largely focused on the critical and growing issue of homelessness in California. Senator Skinner applauded the Governor's continued commitment to resolve the housing crisis by addressing the state's housing supply shortage, saying, "The governor is right: 'It's time for California to say yes to housing' and to end homelessness."

Additional information about SB 1079 can be found online at the following link: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB1079
(Nedda Mahrou)

REGULATORY DEVELOPMENTS

U.S. ARMY CORPS AND EPA ADOPT THE NAVIGABLE WATERS PROTECTION RULE TO REVISE THE DEFINITION OF 'WATERS OF THE UNITED STATES' AS APPLIED UNDER THE CLEAN WATER ACT

On January 23, 2020, the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) adopted the Navigable Waters Protection Rule, which sets forth a revised definition of "waters of the United States" for purposes of establishing federal jurisdiction under the federal Clean Water Act. The final rule replaces another rule adopted in late 2019, which itself repealed an earlier 2015 rule defining "waters of the United States" and re-codified the regulatory language that existed prior to the 2015 rule. This new Navigable Waters Protection Rule will become effective 60 days after publication in the Federal Register.

The Clean Water Act and 'Waters of the United States'

The Clean Water Act regulates "navigable waters," which are defined as "waters of the United States." Controversy over how "waters of the United States" is defined has existed for decades and has been the subject of a number of U.S. Supreme Court cases, including *United States v. Riverside Bayview Homes*, *Solid Waste Agency of Northern Cook County v. United States*, 474 U.S. 121; https://www.epa.gov/sites/production/files/2015-09/documents/riversidebayviewhomes_opinion.pdf; and *Rapanos v. United States*, 547 U.S. at 733; https://www.epa.gov/sites/production/files/2016-04/documents/rapanos_decision_2006.pdf.

While the Supreme Court has generally recognized that the definition includes at least some waters that are not navigable in the traditional sense, it is unsettled how far this concept extends. In *Rapanos*, in a concurring opinion, Justice Kennedy would have found that it extends to any waters that have a "significant nexus" to waters that are navigable.

In 2015, the Corps and EPA adopted a rule that relied on Justice Kennedy's articulation of the "significant nexus" test (2015 Rule). This rule was subject to a number of legal challenges, which essentially resulted in a patchwork regulatory regime. The rule was enjoined from implementation in 28 states, while it remained effective in the other 22 states. Shortly after inauguration, the Trump administration signaled its intent to revisit the 2015 Rule.

The Navigable Waters Protection Rule

The Navigable Waters Protection Rule is the second step in a two-step process to review and revise the definition of "waters of the United States" consistent with a Presidential Executive Order entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States.'" The first step was implemented in October 2019, when the Corps and the EPA published a final rule (Step One rule) to repeal the 2015 Rule defining "waters of the United States" and re-codify the regulatory text that existed prior to that Obama-era rule. This new Navigable Waters Protection Rule will replace the Step One rule.

According to the Corps and EPA, the new rule streamlines the definition of "waters of the United States" such that it includes "four simple categories of jurisdictional waters, provides clear exclusions for many water features that traditionally have not been regulated, and defines terms in the regulatory text that have never been defined." In so doing, the agencies purport to have relied on various U.S. Supreme Court cases, including the cases referenced above. It also has eliminated the "significant nexus" component set forth by Justice Kennedy in *Rapanos*.

Four Categories of Inclusion

Under this new rule, the Corps and EPA will assert jurisdiction over four basic categories of waters, as follows:

- Traditional navigable waters and territorial seas;
- Tributaries that have perennial or intermittent flow in a typical year;

- Lakes, ponds, and impoundments of traditional navigable waters;

- Wetlands that abut jurisdictional waters or are separated only by a natural berm or artificial barrier that allows a regular or continuous surface water connection.

Exclusions to Jurisdiction

The final rule also excludes any water features not described above. It also contains specific exclusions for:

- Groundwater;

- Ephemeral features that flow only in response to precipitation;

- Diffuse stormwater and sheet flow;

- Most ditches that are not constructed in jurisdictional wetlands;

- Prior converted cropland;

- Artificially irrigated areas that would revert to upland if irrigation ceases;

- Artificial lakes and ponds, and construction and mining pits, constructed in upland or non-jurisdictional waters;

- Stormwater control features constructed in upland to convey, treat, infiltrate, or store stormwater runoff;

- Groundwater, water reuse, wastewater recycling structures constructed in upland or non-jurisdictional waters;

- Waste treatment systems.

While several of the above-listed non-jurisdictional features, such as ditches and artificial ponds, have been refined (*i.e.*, to indicate that the features must be constructed in uplands or in non-jurisdictional waters to qualify for the exemption), the only new categories are: 1) ephemeral water features that flow only in direct response to precipitation; and 2) diffuse stormwater runoff and directional sheet flow over upland.

Terminology

In connection with this test, the agencies also have defined a number of terms, including for example "typical year," "perennial," "intermittent," and "ephemeral." The goal of this new rule, according to the Corps and EPA, is "to ensure that the agencies operate within the scope of the federal government's authority over navigable waters under the [Clean Water Act] and the Commerce Clause of the U.S. Constitution." This new Navigable Waters Protection Rule will become effective 60 days after publication in the Federal Register

Conclusion and Implications

The new rule is important because a definition of "waters of the United States" is an important component in delimiting the scope of federal jurisdiction under the Clean Water Act. As with the 2015 Rule, this new rule also may be subject to judicial challenge. In California, it also may shift permitting authority over many waters to the State Water Resources Control Board, which recently adopted a new program to regulate discharges to wetlands and other waters of the State. That new program will become effective in May. The Navigable Waters Protection Rule is available online at: https://www.epa.gov/nwpr/final-rule-navigable-waters-protection-rule
(James Purvis)

FEDERAL COUNCIL ON ENVIRONMENTAL QUALITY ANNOUNCES NOTICE OF PROPOSED RULEMAKING TO THE REGULATIONS IMPLEMENTING PROVISIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT

For the first time in over 40 years, the federal Council on Environmental Quality (CEQ) is proposing to modernize its National Environmental Policy Act (NEPA) regulations. According to the CEQ, the proposal aims "to facilitate more efficient, effective, and timely NEPA reviews." Given NEPA's applicability to major federal actions, these changes could have significant implications for projects throughout the country. If finalized, the proposed rule would comprehensively update and substantially revise the 1978 regulations.

Background

The National Environmental Policy Act, signed into law in 1970, is a procedural statute that requires federal agencies proposing to undertake, approve, or fund "major Federal actions" to evaluate the action's environmental impacts, including both direct and reasonably foreseeable indirect effects. Agencies typically comply with NEPA in one of three ways: 1) preparing an Environmental Impact Statement (EIS) for major federal actions significantly affecting the quality of the environment; 2) preparing an Environmental Assessment (EA) to determine whether an EIS is required or to document that an EIS is not required; or 3) identifying an applicable categorical exclusion for actions that do not individually or cumulatively have a significant effect on the environment.

The CEQ issued regulations for federal agencies to implement NEPA in 1978. Since that time, the CEQ has not comprehensively updated its regulations and has made only one limited substantive amendment in 1986. In 2017, President Trump issued Executive Order 13807 establishing a "One Federal Decision" policy, including a two-year goal for completing environmental review for major infrastructure projects, and directing the CEQ to consider revisions to modernize its regulations. In 2018, the CEQ issued an Advance Notice of Proposed Rulemaking requesting comments on potential updates to its regulations, in response to which over 12,5000 comments were received. This proposed rulemaking then followed.

Overview of the CEQ's Proposed Changes

The CEQ categorization and proposed changes follow in summary form.

Modernize, Simplify, and Accelerate the NEPA Process

The CEQ proposes to modernize, simplify and accelerate the process by the following:

- Establish presumptive time limits of two years for completion of EISs and one year for completion of EAs;

- Specify presumptive page limits;

- Require joint schedules, a single EIS, and a single record of decision (ROD), where appropriate, for EISs involving multiple agencies;

- Strengthen the role of the lead agency and require senior agency officials to timely resolve disputes to avoid delays;

- Promote use of modern technologies for information sharing and public outreach;

Clarify Terms, Application, and Scope of NEPA Review

The CEQ proposes to clarify terms, the application and the scope of the process as follows:

- Provide direction regarding the threshold consideration of whether NEPA applies to a particular action;

- Require earlier solicitation of input from the public to ensure informed decision-making by federal agencies;

- Require comments to be specific and timely to ensure appropriate consideration;

•Require agencies to summarize alternatives, analyses, and information submitted by commenters and to certify consideration of submitted information in the ROD;

•Simplify the definition of environmental "effects" and clarify that effects must be reasonably foreseeable and have a reasonably close causal relationship to the proposed action;

•State that analysis of cumulative effects is not required under NEPA;

•Clarify that "major Federal action" does not include non-discretionary decisions and non-Federal projects (those with minimal Federal funding or involvement);

•Clarify that "reasonable alternatives" requiring consideration must be technically and economically feasible.

Enhance Coordination with States, Tribes, and Localities

The CEQ is promoting the coordination of states, tribes and localities as follows:

•Reduce duplication by facilitating use of documents required by other statutes or prepared by State, Tribal, and local agencies to comply with NEPA;

•Ensure appropriate consultation with affected Tribal governments and agencies;

•Eliminate the provisions in the current regulations that limit Tribal interest to reservations.

Reduce Unnecessary Burdens and Delays

The CEQ is attempting to reduce "unnecessary burdens" and delays, as follows:

••Facilitate use of efficient reviews (*i.e.*, categorical exclusions, environmental assessments);

•Allow agencies to establish procedures for adopting other agencies' categorical exclusions;

•Allow applicants/contractors to assume a greater role in preparing EISs under the supervision of an agency.

Conclusion and Implications

The proposed regulations were open for public comment through March 10, 2020. The CEQ also will host two public hearings in Denver, Colorado, and Washington, D.C. The CEQ will then review public comments and may revise the proposed regulations based on comments.

The proposed rule is important because it is the first time that the CEQ has made substantive revisions to its regulations in decades and these changes will impact federal actions throughout the country. The proposed rule is available here: https://www.govinfo.gov/content/pkg/FR-2020-01-10/pdf/2019-28106.pdf
(James Purvis)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES NOTICE OF PREPARATION OF EIR FOR DELTA CONVEYANCE PROJECT

On January 15, 2020 the California Department of Water Resources (DWR) released its Notice of Preparation of Environmental Impact Report (EIR) for the Delta Conveyance Project (NOP). The NOP details a familiar plan to update reliability in water deliveries to the State Water Project (SWP), this time under the name Delta Water Project (Project). Previously, the plan of action described by the Delta Water Project was laid out in DWR's California WaterFix. WaterFix was put on hold and went away, however, after Governor Gavin Newsom took office, rejecting the plan's use of a two-tunnel conveyance system proposed by WaterFix and stating that the project would better utilize a single-tunnel system.

Background

After the issuance of Executive Order N-10-19, directing the agencies of the state to focus on the implementation of this single-tunnel system, the

Delta Water Project was created. Under this new title, the Project seeks to utilize water from the Sacramento River north of the Delta in coordination with its current conveyance systems to optimize water deliveries to the SWP. In doing so, the Project plans to implement a dual-intake system to convey water from the Sacramento River to a system of forebays near the SWP's existing Banks Pumping Plant. There, the water will be diverted to the pumping plant and used for the SWP accordingly.

Project Description

In addition to the existing points of diversion and conveyance systems, the SWP in the Delta area contains the Clifton Court Forebay and the nearby Banks Pumping Plant. Water diverted here is then lifted into the California Aqueduct for its use down the line. The Delta Conveyance Project seeks to expand upon this infrastructure by adding another point of diversion north of the Delta on the Sacramento River to "restore and protect the reliability of SWP water deliveries . . . consistent with the State's Water Resilience Portfolio." Additionally, the NOP addresses the potential for connecting the federal Central Valley Project (CVP) as an added beneficiary of the Project.

Following the flow of the water, the Project begins north of the Delta with several locations as possible points of diversion for the proposed dual-intake system. This system will utilize two on-river intakes at two of three potential sites near Clarksburg, Hood, and Courtland. From here, the NOP describes the meeting of these tunnels at a 100-acre Intermediate Forebay just north of Thornton, where a single-tunnel is then used to send the water south.

As written, the NOP describes two potential routes for the single tunnel. First, the Central Tunnel Corridor takes a direct route from the Intermediate Forebay to the Project's proposed 900-acre Southern Forebay near Discover Bay. Alternatively, the Eastern Tunnel Corridor is routed due south until reaching the Holt area before cutting westward for the Southern Forebay. In either case, the water will be received by a Pumping Plant before being released into the Southern Forebay. From here, the water may be diverted via newly constructed canals and two tunnels running under Byron Highway to either the SWP's Banks Pumping Plant and/or the CVP's Jones Pumping Plant if the CVP is ultimately involved in the Project.

The NOP's Details

In its current state, the Notice of Preparation of Environmental Impact Report for the Delta Conveyance Project proposes conveyances of up to 6,000 cubic-feet per second (cfs), or 3,000 cfs per intake, to SWP and potentially CVP facilities. Throughout the Delta Conveyance Project's operation, DWR is said to do so as to "not reduce DWR's current ability to meet standards in the Delta to protect biological resources and water quality for beneficial uses."

That being said, the Project's initial operating criteria are set to be determined after the development of a Draft Environmental Impact Report (EIR). Furthermore, final operating criteria and/or operating plans are set to develop only after the review process pursuant to the California Environmental Quality Act (CEQA) has been completed, all water rights approvals have been cleared by the State Water Resources Control Board, and the consultation and review processes required by the federal and California Endangered Species Acts have been completed.

In discussing alternatives to the Project as required by CEQA, the NOP notes that varying levels of conveyances are being considered, ranging from 3,000 cfs to 7,500 cfs. As noted earlier, another alternative being considered is the inclusion—or not—of the CVP as a beneficiary to the Project.

Finally, with respect to the potential environmental impacts of the Project, the NOP simply provides a laundry-list of the resource categories listed in Appendix G of the CEQA Guidelines. Without going into much detail, the NOP notes one by one the potential impacts for each category ranging from potential impacts on river flows in the Delta to the impact of operation facilities on water quality constituents and concentrations.

Conclusion and Implications

The Delta Water Project affords an opportunity for south of the Delta water users to increase the resiliency of the SWP and potentially CVP by providing additional security in water conveyances for deliveries. To be successful, the Project cannot violate the rights of water right holders, which means the Project and all supporting environmental and regulatory approvals need to adequately demonstrate that the Project will not infringe on existing water rights or related water quality. In addition, the Project is a massive

undertaking – with construction times estimated at 13 years for completion—after all of the environmental review and regulatory approvals are properly completed.

The period for comments on the NOP is being held open by DWR until 5p.m. on March 20, 2020. In reaching the DWR, the NOP directs commenters to submit such comments via the following ways: 1) Email: DeltaConveyanceScoping@water.ca.gov; 2) Mail: Delta Conveyance Scoping Comments, Attn: Renee Rodriguez, Department of Water Resources, P.O. Box 942836, Sacramento, CA 94236
(Wesley A. Miliband, Kristopher T. Strouse)

LAWSUITS FILED OR PENDING

CITY OF CORCORAN FILES LAWSUIT AGAINST DAIRY, ALLEGING NITRATE CONTAMINATION OF GROUNDWATER WELLS

In 2018, the City of Corcoran (City) filed a lawsuit against the Curtimade Dairy (Curtimade) alleging that the dairy was responsible for contaminating the City's municipal groundwater wells with nitrates from liquid animal manure. The City seeks $65 million for costs associated with repairing the City's wells and mitigating the presence of nitrates in the City's water supply. The matter was recently set for trial. [*City of Corcoran vs. Curtimade Dairy Inc.*, Case No. VCU276661 (Tulare Super. Ct. Dec. 18, 2018).]

Background

Based in California's Central Valley, the City of Corcoran is located in one of California's most productive agricultural regions. In particular, the City is situated near a significant number of dairy and agriculture operations, including Curtimade, a dairy that has been operating next to the City for over a hundred years. However, significant water use in the region, including substantial groundwater production, has led to concerns relating to the depletion of groundwater supplies and water quality impacts. A frequently occurring problem in the region has been the presence of nitrate in groundwater.

Nitrate, an essential nutrient for crops, occurs naturally in soil and can dissipate over the course of agricultural operations. To combat nitrate dissipation, agricultural operations apply nitrogen fertilizers to replenish lost nitrate. Dairies, for instance, may use manure produced by livestock as a natural fertilizer for other crops associated with the dairy. In the Central Valley, fertilizer use is common and may reach surface and groundwater bodies through runoff or leaching into soil.

According to the City's complaint, human populations may be impacted through ingestion of nitrate, with high nitrate levels potentially affecting human respiratory and reproductive systems, kidneys, and the spleen and thyroid. High nitrate levels may also affect the ability of red blood cells to carry oxygen to body tissues. In May 2017, the Central Valley Regional Water Quality Control Board (RWQCB) sought to create a solution to mitigate and address nitrate contamination issues in the City's wells. Serving as an intermediary, the Regional Board invited the City and landowners in close proximity to the City's wells to begin discussing and potentially negotiating a resolution to nitrate contamination concerns. However, in December 2018, the City filed a lawsuit against Curtimade Dairy in Tulare County Superior Court, seeking $65 million in damages and alleging that Curtimade was responsible for contaminating the City's municipal wells with nitrates.

Positions on the Lawsuit

The City asserts a number of allegations in support of its damage claims. For instance, the City alleges that waste from Curtimade's dairy operation has led to excessive nitrate leakage into the City's water supply, thus contaminating local wells. Prior to filing its lawsuit, the City commissioned a water quality study to determine whether the City's wells were being affected by nitrates. The study, in turn, implicated dairy operations by concluding that some of the nitrates in the City's wells could be traced back to animal manure, which was allegedly used by Curtimade. Accordingly, the City alleges that Curtimade applies too much liquid manure on land located south of the City's wells, which causes nitrates to leach into the soil and the groundwater, eventually reaching the City's municipal wells.

The City also alleges that Curtimade's manure lagoons, the place where manure is stored, leaks into the groundwater. The City therefore seeks damages from Curtimade for the costs of repairing and mitigating nitrate impacts on the City's wells.

Curtimade, with support from the local community and other agricultural stakeholders, contends that the dairy has complied with all applicable regulations. Western United Dairies, an agricultural industry group, has publicly challenged the findings of the City's water quality study, arguing that the study was prepared by non-experts in the hydrology and groundwater fields in such a manner that would

encourage litigation, and contravenes the findings of the RWQCB regarding contaminant levels in local groundwater supplies. Additionally, Curtimade contends that the City's contamination claims are not hydrologically sound. Because Curtimade's operations are allegedly down gradient of groundwater that reaches the City's wells, Curtimade asserts that any nitrate or other contamination in the City's wells could not have originated from Curtimade's operations. Similarly, Curtimade argues that the City cannot prove that Curtimade was the sole contributor to the contamination of the City's municipal wells. In particular, even if the nitrates were traced back to animal manure, Curtimade alleges that it is impossible to determine their point or source of origin, because numerous dairies are located in the area near the City's wells.

Conclusion and Implications

Large animal and dairy operations, throughout the nation, have often been the focus of allegations of impaired water quality from seepage and runoff. California's Central Valley have many such operations. With trial slated for later in the year, it is unclear whether the City of Corcoran will be able to successfully prove its claims. The facts in this case are obviously key to its determination and its very likely that evidence proffered by experts in hydrology and water quality will play a large role. Further, it is unclear what impacts a win by the City may have on dairy and other agricultural interests that allegedly impact groundwater supplies, including for domestic purposes.
(Miles Krieger, Steve Anderson)

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT REVERSES LOWER COURT— FINDS COUNTY OPEN SPACE DISTRICT DID NOT VIOLATE CEQA IN APPROVING TRAIL PROJECT

Community Venture Partners v. Marin County Open Space District, Unpub., Case No. A154867 (1st Dist. Jan. 24, 2020).

In an *unpublished* decision, the First District Court of Appeal reversed the trial court's finding that the Marin County Open Space District had violated the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000) in approving a project that would allow bicycle use on an existing trail (Project).

Factual and Procedural History

In 2014, the Marin County Open Space District (District) finalized a Road and Trail Management Plan (RTMP)—a plan to establish and maintain a sustainable system of roads and trails, reduce environmental impacts of roads and trails on sensitive resources, and improve the visitor experience for all users, e.g., hikers, mountain bikers, and equestrians. Prior to adopting the RTMP, the District certified an Environmental Impact Report (EIR).

To implement the RTMP, the District considers road and trail project proposals submitted by the public. The RTMP includes a six-step process for screening and evaluating these proposals as follows: 1) District solicits proposals from the public; 2) proposals are screened for consistency with the District's policies and goals (including those specified in the RTMP); 3) proposals are evaluated for potential impacts on existing road and trail segments; 4) highest priority proposals are considered for possible inclusion in the District's budget; 5) staff presents proposed budget to County decisionmakers; and 6) County decisionmakers approve proposed budgets. The RTMP makes clear that all planning, design, environmental review and permitting requirements must be met prior to commencement of any construction work.

The Project

In November 2016, the District considered making improvements to an existing trail and opening it up to allow mountain bicycle use. After soliciting public comment, the District issued a memorandum indicating that the Project could be accommodated in a safe and sustainable manner and would not have significant effects to natural or cultural resources if recommended design and management modifications were implemented. It further identified the next steps for the Project, which included, in part, budget approval, environmental review, and biological surveys.

On May 11, 2017, the District prepared a documented entitled "Consistency Assessment" which compared potential impacts associated with the Project to those described in the previous RTMP EIR. The Consistency Assessment concluded that the Project would not result in new significant or substantially more severe impacts than those evaluated in the RTMP EIR. The District also approved the Project and certified that it conformed with the RTMP.

At the Trial Court

Petitioner challenged the District's approval of the Project on the basis that the District had approved the Project prior to its evaluation of the Project's environmental effects. Petitioner also alleged that the District failed to analyze potential user conflicts between hikers and equestrians and mountain bikers on the trail.

The trial court determined that the District approved the Project in November 2016 and that the District had violated the California Environmental Quality Act by failing to conduct an initial study prior to approving the Project. The trial court further found that even if the Consistency Assessment was construed as an initial study, the District violated CEQA by failing to address reasonably foreseeable social effects on existing users of the trail.

The Court of Appeal's Decision

Timing of Project Approval

Petitioner asserted that the memorandum issued in November 2016 constituted approval of the Project—and because this occurred prior to preparation of the Consistency Assessment the District had violated CEQA. The Court of Appeal disagreed.

In deciding when the District had approved the Project, the Court of Appeal looked to the seminal decision of the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116; https://resources.ca.gov/CNRALegacyFiles/ceqa/cases/2007/Save_Tara_v._City_of__West_Hollywood.pdf.

Under the standard established in that case, the key question is whether a conditional development agreement committed the agency to the project so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require be considered, including the alternative of not going forward with the project.

Applying *Save Tara*, the Court of Appeal found that standard had not been met. First, the court noted that although the November 2016 memorandum stated that the Project was "approved" that term was used in the context of staff recommendations and that the memorandum itself related to pending proposed projects. Moreover, the memorandum noted that the Project was subject to several contingencies, including additional design details, resources surveys, and environmental review, among others. The court also relied on emails between staff and members of the public that indicated that the Project had only been recommended and that CEQA review would need to be completed—noting that these emails weighed against finding that the District had committed to a definite course of action with respect to the Project. The court further found that the District had not committed or expended any financial resources for the Project in November 2016. At that point, the District had not yet considered whether to include the Project in the District's budget. The court therefore held that the District had expressly conditioned the Project's approval on CEQA review.

Subsequent Environmental Review

The Court of Appeal also rejected petitioner's argument that the District was required to proceed under Public Resources Code § 21094 and prepare a further EIR for the Project because the RTMP was only the first step of a tiered environmental review.

The court walked through the difference between a tiered environmental document and a program environmental document—finding that here, the RTMP EIR was a program EIR. The RTMP EIR addressed future road and trail projects within the geographical area where the Project was located and contemplated changes of use to existing trials, including adding mountain bike use. Even though the RTMP EIR called itself a "tiered program" EIR, that label was not definitive to triggering application of Public Resources Code § 21094 tier provisions. As a program EIR, the court held that Public Resources Code § 21166, regarding subsequent and supplemental environmental review, was applicable.

The court found that substantial evidence supported the District's decision to proceed under CEQA's subsequent review provisions in Public Resources Code § 21166 and CEQA Guidelines § 15162. The court held that Project was consistent with the RTMP because the RTMP EIR expressly contemplated future road and trail projects that involve changes in use, like the Project.

The court also found that the RTMP EIR had adequately addressed the Project's potential environmental impacts. Petitioner argued that the RTMP EIR failed to consider effects on wildlife, biological resources, aesthetics, erosion and trail damage, noise, and user conflicts. Nevertheless, with respect to each impact area, the court found substantial evidence supported that the RTMP EIR had addressed the Project's potential environmental impacts. It further held that the effects from bicycle use on other trail users were purely social effects that did not require CEQA analysis.

As such, the court held that the District was not required to prepare a subsequent or supplemental EIR for the Project—finding that petitioner's argument to the contrary was based on a "flawed assertion" that the District was required to consider the social effects of the Project in the EIR. The court found that the District's reliance on the Consistency Assessment in determining that the Project raised no new significant impacts that would require major revisions to the RTMP EIR was proper.

Conclusion and Implications

While an *unpublished* opinion, this case provides a comprehensive application and analysis of the Supreme Court's decision in *Save Tara*, as well as an explanation of the distinction between tiered and program-level EIRs and the procedural implications of each.

The court's decision is available online at: https://www.courts.ca.gov/opinions/nonpub/A154867.PDF
(Christina Berglund)

SECOND DISTRICT COURT DISMISSES PETITIONER'S CEQA CHALLENGES TO CITY PROJECT FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Golden State Environmental Justice Alliance v. City of Los Angeles, Unpub., Case No. B294231 (2nd Dist. Jan. 28, 2020).

In an *unpublished* decision, the Second District Court of Appeal held that petitioner's failure to exhaust administrative remedies with respect to its theories of non-compliance with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000) precluded the court from considering petitioner's arguments on the merits.

Factual and Procedural History

In April 2016, the City of Los Angeles (City) released a draft Environmental Impact Report (EIR) for public comment for a 34-story residential building containing 376 dwelling units, on a 2.8-acre site in West Los Angeles (Project). The draft EIR concluded that the greenhouse gas (GHG) emissions associated with the Project would have a less than significant impact on climate change.

Petitioner submitted comments on the draft EIR. Specifically, petitioner commented that the draft EIR's GHG analysis was inadequate in five respects: 1) it compared the Project's GHG emissions to the prior use on the site; 2) it amortized construction emissions over the life of the Project; 3) it failed to adequately explain the basis for its conclusion that the Project would result in a 16.5 percent reduction in emissions from mobile sources; 4) it double-counted some energy savings; and 5) it concluded that the Project would have less-than-significant GHG impacts because the Project complied with regulatory programs meant to reduce GHG emissions.

The City issued the final EIR, which was certified by the City's deputy advisory agency. Petitioner appealed the approval of the Project and certification of the EIR to the planning commission. On administrative appeal, petitioner contended that the EIR was inadequate because: 1) it miscalculated a reduction based on mobile sources; 2) calculated reductions based on the elimination of hearths and compliance with the "CalGREEN Code"; 3) assumed that the Project should be compared to AB 32 standards to determine a proper percentage reduction; and 4) failed to commit to using Energy Star appliances.

The City planning commission certified the EIR, denied petitioner's appeal, and granted other approvals for the Project. The city council subsequently certified the EIR and approved the Project.

Petitioner filed a petition for writ of mandate alleging, among other things, that the EIR did not comply with CEQA because the it failed to adequately address GHG impacts. The trial court denied the mandate petition with respect to GHG emissions. Petitioner appealed.

The Court of Appeal's Decision

On appeal, petitioner asserted three arguments: 1) the EIR erred by directly applying the state's 2030 and 2050 GHG emissions goals set forth in Executive Orders S-3-05 and B-30-15 to the Project; 2) substantial evidence did not support the EIR's conclusion that the Project would achieve the emission reduction goals set forth in the Executive Orders; and 3) the EIR was inadequate as an informational document with regard to compliance with 2030 and 2050 emission reduction goals. The City contended that petitioner failed to exhaust its administrative remedies because it did not assert in the administrative proceedings below the theories of CEQA noncompliance it raised on appeal. The Court of Appeal agreed.

Exhaustion of Administrative Remedies Doctrine

The court first walked through the requirement and rationale behind the "exhaustion of administrative remedies" doctrine. Requiring a project opponent to exhaust administrative remedies serves to allow the agency the opportunity to decide matters within its area of expertise prior to judicial review—and reduces the burden of an overworked court system. The court emphasized that to meet this purpose, the exact issue not merely generalized statements of environmental harm must be presented during the administrative proceedings. Furthermore, it is petitioner's burden to demonstrate that the issues raised in litigation were first raised at the administrative level.

Applying the exhaustion doctrine to this case, the court found that in contrast to petitioner's appellate arguments, which concerned the Project's compliance with the emissions reduction goals set forth in the Executive Order—petitioner's comments submitted during the administrative proceedings focused on other issues related to GHG emissions. The court rejected petitioner's argument that it had exhausted because its comments "specifically brought up" the Executive Orders. The court found that even though the comments cited to the Executive Orders they did not do so in reference to the GHG emissions reduction targets. Therefore, the court held that the comments were insufficient to exhaust petitioner's administrative remedies with regard to its appellate arguments.

The court further rejected petitioner's argument that citation to the Executive Orders was sufficient to put the City on notice of its claim that the emissions standards would not be met. In doing so, the court analogized this matter with *South of Market Community Action Network v. City and County of San Francisco*, 33 Cal.App.5th 321 (2019) and *Monterey Coastkeeper v. State Water Resources Control Bd.*, 28 Cal.App.5th 342 (2018), where commenters had raised general concerns about an impact area, but not the specific issues raised on appeal. Similar to those cases, here the petitioner commented on the EIR's failure to comply with the Executive Orders but did not raise the specific issue in front of the court—*i.e.*, failure to demonstrate compliance with GHG emissions reduction targets described in the Executive Orders.

Conclusion and Implications

As an *unpublished* opinion, this case holds no precedential value. It does, however, reinforce the importance of exhaustion of administrative remedies doctrine. Sometimes a court will find that an issue has not been properly exhausted but proceed to a decision on the merits anyhow. Exhaustion, however, is a jurisdictional prerequisite. Failure to exhaust, therefore, may obviate a petitioner's day in court altogether. At the administrative level, it is prudent to include all issues in order to preserve any potential issues for litigation.

The court's decision is available online at: https://www.courts.ca.gov/opinions/nonpub/B294231.PDF
(Christina Berglund)

LEGISLATIVE UPDATE

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

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

Coastal Resources

•SB 986 (Allen)—This bill would amend the California Coastal Act of 1975 to require that new development within the designated coastal zone take action to minimize greenhouse gas emissions.

SB 986 was introduced in the Senate on February 12, 2020, and, most recently, on February 13, 2020, was printed and may be heard in committee on or before March 14, 2020.

•SB 1100 (Atkins)—This bill would amend the California Coastal Act of 1975 to include, as part of the procedures the Coastal Commission is required to adopt, recommendations and guidelines for the identification, assessment, minimization, and mitigation of sea level rise within each local coastal program, as provided, and require the Commission to take into account the effects of sea level rise in coastal resource planning and management policies and activities.

SB 1100 was introduced in the Senate on February 19, 2020, and, most recently, on February 19, 2020, was read for the first time and sent to the Committee on Rules for assignment.

Environmental Protection and Quality

•AB 1839 (Bonta)—This bill would create the California Green New Deal Council with a specified membership appointed by the Governor, and would require the California Green New Deal Council to submit a specified report to the Legislature no later than January 1, 2022.

AB 1839 was introduced in the Assembly on January 6, 2020, and, most recently, on January 7, 2020, was printed and may be heard in committee on February 8, 2020.

•AB 1907 (Santiago)—This bill would, until January 1, 2029, exempt from environmental review under the California Environmental Quality Act (CEQA) certain activities approved by or carried out by a public agency in furtherance of providing emergency shelters, supportive housing, or affordable housing, as each is defined.

AB 1907 was introduced in the Assembly on January 8, 2020, and, most recently, on January 9, 2020, was printed and may be heard in committee for the first time on February 8, 2020.

•AB 2262 (Berman)—This bill would require each sustainable communities strategy included as part of a regional transportation plan required under existing law to also include a zero-emission vehicle readiness plan, as specified.

AB 2262 was introduced in the Assembly on February 14, 2020, and, most recently, on February 14, 2020, was printed and read for the first time.

•AB 2323 (Friedman; Chiu)—This bill would require, in order to qualify for the California Environmental Quality Act exemption in Public Resources Code § 21155.4 for certain residential, employment center, and mixed-use development projects meeting specified criteria, that the project is undertaken and is consistent with either a Specific Plan prepared pursuant to specific provisions of law or a community plan. In addition, this bill would repeal Government Code § 65457, which provides, among other things, that an action or proceeding alleging that a public agency has approved a project pursuant to a Specific Plan without having previously certified a supplemental Environmental Impact Report for the Specific Plan, when required, to be commenced within 30 days of the public agency's decision to carry out or approve the project.

AB 2323 was introduced in the Assembly as an urgency statute on February 14, 2020, and, most recently, on February 14, 2020, was printed and read

for the first time.

•SB 995 (Atkins)—This bill would extend the authority of the Governor under the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 to certify projects that meet certain requirements for streamlining benefits provided by that act related to compliance with the California Environmental Quality Act and streamlining of judicial review of action taken by a public agency, and further provide that the certification expires and is no longer valid if the lead agency fails to approve a certified project before January 1, 2025.

SB 995 was introduced in the Senate on February 12, 2020, and, most recently, on February 13, 2020, was printed and may be heard in committee on or before March 14, 2020.

Housing / Redevelopment

•AB 1934 (Voepel)—This bill would authorize a development proponent to submit an application for a development to be subject to a streamlined, ministerial approval process provided that development meet specified objective planning standards, including that the development provide housing for persons and families of low or moderate income.

AB 1934 was introduced in the Assembly on January 15, 2020, and, most recently, on January 23, 2020, was referred to the Committees on Housing and Community Development and Local Government.

•AB 2137 (Wicks)—This bill would amend the Housing Accountability Act to remove the option of a court, when issuing a final order or judgment in favor of a plaintiff challenging the validity of a General Plan or mandatory element, to suspend the authority of the city, county, or city and county to issue specified building permits, to grant zoning changes or variances, and to grant subdivision map approvals, for housing development projects.

AB 2137 was introduced in the Assembly on February 10, 2020, and, most recently, on February 10, 2020, was printed and read for the first time.

•AB 2344 (Gonzalez)—This bill would require the owner or agent of an owner of a mixed-income multifamily residential structure to ensure that occupants of the affordable housing units within that structure are able to access the residential structure by the same common entrances to that structure as occupants of the market rate units and have access to any common areas in the structure, and prohibit the owner or agent of an owner from isolating the affordable housing units within that structure to a specific floor or area within the structure.

AB 2344 was introduced in the Assembly on February 18, 2020, and, most recently, on February 19, 2020, was printed and may be heard in committee on or before March 20, 2020.

•AB 2345 (Gonzalez)—This bill would amend the Density Bonus Law to, among other things, authorize an applicant to receive: (1) three incentives or concessions for projects that include at least 12 percent of the total units for very low income households; (2) four and five incentives or concessions for projects in which greater percentages of the total units are for lower income households, very low income households, or for persons or families of moderate income in a common interest development.

AB 2345 was introduced in the Assembly on February 18, 2020, and, most recently, on February 19, 2020, was printed and may be heard in committee on or before March 20, 2020.

•AB 2405 (Burke)—This bill would require local jurisdictions to, on or before January 1, 2022, establish and submit to the Department of Housing and Community Development an actionable plan to house their homeless populations based on their latest point-in-time count.

AB 2405 was introduced in the Assembly on February 18, 2020, and, most recently, on February 19, 2020, was printed and may be heard in committee on or before March 20, 2020.

•SB 902 (Wiener)—This bill would require a local planning agency to include in its annual report to the Department of Housing and Community Development outlining, among other things, the number of housing development applications received and the number of units approved and disapproved in the prior year, whether the city or county is a party to a court action related to a violation of state housing law, and the disposition of that action.

SB 902 was introduced in the Senate on January 30, 2020, and, most recently, on January 31 2020, was printed and may be acted upon on or after March 1, 2020.

•SB 1079 (Skinner)—This bill would authorize a city, county, or city and county to acquire a residential property within its jurisdiction by eminent domain if the property has been vacant for at least 90 days, the property is owned by a corporation or a limited liability company in which at least one member is a corporation, and the local agency provides just compensation to the owner based on the lowest assessment obtained for the property by the local agency, subject to the requirement that the city or county maintain the property and make the property available at affordable rent to persons and families of low or moderate income or sell it to a community land trust or housing sponsor.

SB 1079 was introduced in the Senate on February 19, 2020, and, most recently, on February 19, 2020, was read for the first time and sent to the Committee on Rules for assignment.

•SB 1120 (Atkins)—This bill would amend the Subdivision Map Act to extend the limit on the additional period for the extension for an approved or conditionally approved tentative tract map that may be provided by ordinance from 12 months to 24 months.

SB 1120 was introduced in the Senate on February 19, 2020, and, most recently, on February 19, 2020, was read for the first time and sent to the Committee on Rules for assignment.

Public Agencies

•AB 1924 (Grayson)—This bill would amend the Mitigation Fee Act to require that a fee levied or imposed on a housing development project by a local agency be proportionate to the square footage of the proposed unit or units.

AB 1924 was introduced in the Assembly on January 14, 2020, and, most recently, on January 23, 2020, was referred to the Committees on Housing and Community Development and Local Government.

•AB 2028 (Aguiar-Curry)—This bill would amend the Bagley-Keene Open Meeting Act, except for closed sessions, to require that a notice of a public meeting of a State agency, board or commission include all writings or materials provided for the noticed meeting to a member of the state body by staff that are in connection with a matter subject to discussion or consideration at the meeting, and require these writings and materials to be made available on the internet at least 10 days in advance of the meeting.

AB 2028 was introduced in the Assembly on January 30, 2020, and, most recently, on January 31 2020, was printed and may be acted upon on or after March 1, 2020.

•AB 2168 (McCarty, *et al*)—This bill would require an application to install an electric vehicle (EV) charging station to be deemed complete if, five business days after the application was submitted, the city, county, or city and county has not deemed the application to be incomplete, and require an EV charging station application to be deemed approved if, 15 business days after the application was submitted, the city, county, or city and county has not approved the application through the issuance of a building permit or similar nondiscretionary permit, and the building official has not made findings that the proposed installation could have an adverse impact and required the applicant to apply for a use permit.

AB 2168 was introduced in the Assembly as an urgency statute on February 11, 2020, and, most recently, on February 12, 2020, was printed and may be heard in committee on or before March 13, 2020.

•SB 931 (Wieckowski)—This bill would amend the Ralph M. Brown Act to require a legislative body to email a copy of the agenda or a copy of all the documents constituting the agenda packet if so requested.

SB 931 was introduced in the Senate on February 5, 2020, and, most recently, on February 6, 2020, was printed and may be acted upon after March 7, 2020.

•SB 1060 (Hill)—This bill would require the Department of Historic Resources to register, as state historical landmarks or points of historical interest, trails that the Department deems to be important historical resources.

SB 1060 was introduced in the Senate on February 18, 2020, and, most recently, on February 19, 2020, was printed and may be acted upon on or before March 20, 2020.

Zoning and General Plans

•AB 2421 (Quirk)—This bill would revise the definition of "wireless telecommunications facility," which are generally subject to a city or county discretionary permit and required to comply with specified criteria as distinguished from a "collocation facility," to include, among other equipment and network components listed, "emergency backup generators" to emergency power systems that are integral to providing wireless telecommunications services.

AB 2421 was introduced in the Assembly on February 19, 2020, and, most recently, on February 19, 2020, was printed and read for the first time.

•SB 1138 (Wiener)—This bill would amend the Planning and Zoning Law to, among other things, revise the requirements of the General Plan housing element in connection with identifying zones or zoning designations that allow residential use, including mixed use, where emergency shelters are allowed as a permitted use without a conditional use or other discretionary permit. If an emergency shelter zoning designation where residential use is a permitted use is unfeasible, the bill would permit a local government to designate zones for emergency shelters in a nonresidential zone if the local government demonstrates that the zone is connected to amenities and services that serve homeless people.

SB 1138 was introduced in the Senate on February 19, 2020, and, most recently, on February 19, 2020, was read for the first time and sent to the Committee on Rules for assignment.
(Paige H. Gosney)

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