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FEATURE ARTICLE

CALIFORNIA COURT OF APPEAL ISSUES EXTENSIVE OPINION FINDING A COUNTY ORDINANCE FOR MINISTERIAL OIL AND GAS WELL PERMITS RAN AFOUL OF CEQA ON MULTIPLE FRONTS

By Collin McCarthy and Christina Berglund

On February 25, 2020 (and modified on March 20, 2020), the Fifth District Court of Appeal issued a *partially* published opinion in *King and Gardiner Farms, LLC v. County of Kern*. [*King and Gardiner Farms, LLC v. County of Kern et al.*, ___*Cal.App.5th*___, *Case No.* F077656 (5th Dist. Feb. 25, 2020)] (*KG Farms*) in which the Court of Appeal held that Kern County (County) must rescind its certification of an Environmental Impact Report (EIR) and the adoption of a new ordinance intended to establish a streamlined review and ministerial permitting process for new oil and gas wells in the county. In the *published* portion of the 150-page opinion, the Court of Appeal held that: 1) the EIR improperly deferred formulation of specific mitigation measures for significant water supply impacts; 2) the EIR's discussion of the effectiveness of the water supply mitigation measures was inadequate; 3) the County's finding that the conversion of agricultural lands resulting from the ordinance would be mitigated to a less-than-significant level was not supported by substantial evidence because, among other things, the ordinance allowed for the use of agricultural conservation easements to offset impacts from conversion; and 4) the County inappropriately applied a single cumulative noise level threshold for determining the significance of the project's noise impacts, as opposed to also analyzing noise increases over ambient levels in different areas. As a result of these violations, the Court of Appeal held, the County must rescind its certification of the EIR and adoption of ordinance until the County complies with the California Environmental Quality Act (CEQA).

In the *unpublished* portions, the court further held that the EIR inadequately addressed certain air quality impacts resulting from the implementation of air quality mitigation measures; that a mitigation measure for particulate matter (PM2.5) emissions was not enforceable, and that the board of supervisors made no finding that mitigation of PM2.5 emissions was infeasible; and that a cumulative health risk assessment prepared after circulation of the draft EIR constituted significant new information that must be addressed in a revised and recirculated EIR.

Factual and Procedural Background

In January 2013, representatives of three oil and gas industry associations—the Western States Petroleum Association, California Independent Petroleum Association, and the Independent Oil Producers' Agency—approached the County with a proposal to amend its zoning ordinance to establish a streamlined, ministerial permitting process for new oil and gas wells in the County. At the time, the County did not have a permitting process in place except for a requirement to obtain a conditional use permit in certain residential and commercial zoning districts. Following the preparation and circulation of a draft EIR, in November 2015, the Kern County Board of Supervisors certified the Final EIR as being completed in compliance with CEQA and adopted the ordinance. Because some of the impacts of the ordinance would be significant and unavoidable, the board of supervisors also adopted a statement of overriding considerations upon finding that the ordinance's benefits outweighed its significant environmental impacts.

Following the adoption of the ordinance, a private farm (King and Gardiner Farms) and several environmental organizations, including the Sierra Club, Natural Resources Defense Council, and Center for Biological Diversity, among others, filed petitions for

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writ of mandate challenging the EIR and ordinance on the grounds that that County violated CEQA and the State Planning and Zoning Law. After a trial on the consolidated petitions, the trial court largely rejected the petitioners' CEQA claims but held that the County's EIR violated CEQA by failing to analyze impacts on rangelands and from road paving as a mitigation measure to reduce dust emissions and other air quality impacts. Petitioners King and Gardiner Farms and Sierra Club appealed, arguing that the County violated CEQA in several additional respects. The Court of Appeal affirmed in part and reversed in part the trial court's ruling after finding that several of the petitioners' other CEQA claims also had merit.

The Court of Appeal's Decision

The EIR Water Supply Analysis

Relying on the Supreme Court's decision in *Vineyard Area Citizens v. City of Rancho Cordova,* 40 Cal.4th 412 (2007), the petitioners first argued that the EIR failed to include an analysis of water supplies and related impacts "to the extent possible." As relevant here, as much as 75 percent of the municipal and industrial water supply in Kern County relied on groundwater extraction. Moreover, the Kern County sub-basin of the San Joaquin Valley Groundwater Basin, which includes most of the project area, is among the state's most-impacted groundwater basins, and has been in critical overdraft since 1980. As such, under the recently-enacted Sustainable Groundwater Management Act (SGMA), a Groundwater Sustainability Plan was required to be adopted by January 31, 2020. Pointing to these conditions, the thrust of the petitioners' argument was that the EIR failed to adequately analyze project impacts to water supplies at a sufficiently localized-level, and instead contained only an analysis of impacts in three large regional subareas. In addition, the petitioners argued, the EIR failed to include an adequate discussion of water supplies in light of the state's recent historic drought.

Finding that factual questions predominated regarding whether the EIR analyzed water supplies "to the extent possible," the court applied the substantial evidence standard of review to petitioners' claim that a more localized analysis was required. The court rejected the petitioners' claim holding that substantial evidence in the record supported the County's approach. Specifically, the court held that information in the record about the data available and uncertainty in future water supplies, created in part by SGMA and the future implementation of Groundwater Sustainability Plans, provided substantial evidence to support the determination that a more localized analysis would be speculative. Accordingly, the court held, the EIR did not violate the requirement to analyze water supply impacts to the extent reasonably possible at the time the analysis was prepared.

Next, turning to the legal question of whether the EIR adequately addressed drought conditions, the Court of Appeal concluded that the discussion was adequate in that it facilitated informed agency decision-making and public participation. The court rejected petitioners' argument that the EIR failed to include timely data, in violation of CEQA Guidelines § 15064, subdivision (b), requiring that the determination of impact significance be "based to the extent possible on scientific and factual data." According to the court, consistent with the former CEQA Guidelines § 15125, subdivision (a), the EIR included the information that was available at the time the Notice of Preparation was published and, therefore, was consistent with CEQA's reequipments. The court further rejected an argument that the County was required to update its analysis and recirculate the draft EIR in light of more recent drought-related information. According to the court, petitioners failed to meet their burden to show the County's decision not to recirculate the EIR was not supported by substantial evidence.

Water Supply Mitigation Measures

Petitioners also challenged the adequacy of the EIR's mitigation measures for water supply impacts. The EIR concluded that the ordinance would have a significant and unavoidable impact on water supplies because implementation of the ordinance would deplete the County's municipal and industrial water supplies. To mitigate this impact, the EIR proposed several water supply-related mitigation measures. One such mitigation measure provided that, to the extent feasible, applicants for permits under the ordinance shall increase or maximize the re-use of well "produced water." Produced water is groundwater that naturally occurs in oil and gas reservoirs brought to the surface with the extracted oil and gas and separated from the hydrocarbons after extrac-

tion. The Court of Appeal held that the requirement for applicants to increase or maximize their use of produced water violated CEQA's prohibition on the deferral of formulating mitigation measures because it merely set forth a generalized goal to be assessed based on future water usage, rather than establishing specific performance standards that must be met. The court noted that there is an exception to the general rule prohibiting the deferral of mitigation measures, but that to qualify for the exception the agency must commit itself to a specific performance standard for evaluating the efficacy of the measures to be implemented. The court opined that were it to hold such a measure satisfied CEQA, lead agencies and project proponents—aware of the court's precedent—would have scant incentive to define mitigation measures for other projects in specific terms. Instead, planning documents or ordinances adopted by local governments could merely state that permit applicants must reduce environmental impacts to the extent feasible. Allowing such an approach, the court reasoned, would undermine CEQA's purpose of "systematically identifying" feasible mitigation measures that will reduce environmental impacts. (Citing Pub. Resources Code, § 21002, subd. (b)(3).)

The court then turned to another water supply mitigation measure which required that the five biggest oil industry users of municipal and industrial water work together to develop and implement a plan identifying new measures to reduce municipal and industrial water use by 2020. The court held that this mitigation measure—which unquestionably deferred formulation of more specific mitigation—violated CEQA because it lacked specific performance standards for reduction to include in the plan. Moreover, the measure did not commit *the County* to the measures ultimately included in the plan. Rather, the court explained, it assigned the duty to implement the measure to unidentified third parties who may or may not agree to participate in the task or who might not act in good faith. Yet another flaw with this mitigation measure, according to the court, was that the plan was not required to be developed until 2020, whereas the ordinance took effect in 2015. Thus, the measure allowed permits for oil and gas activities to be issued without having to comply with the measures contained in the yet-to-developed plan. Accordingly, the measure violated CEQA's principle against delayed implementation of mitigation measures.

Another mitigation measure adopted by the County specified that:

> . . .[i]n the County's required participation for the formulation of a Groundwater Sustainability Agency [pursuant to the Sustainable Groundwater Management Act (Senate Bill 1281)], the Applicant shall work with the County to integrate into the Groundwater Sustainability Plan for the Tulare Lake-Kern Basin, best practices from the oil and gas industry to encourage the re-use of produced water from oil and gas activities.

The mitigation measure set a re-use "goal" of 30,000 acre-feet per year. The Court of Appeal held that this mitigation measure also violated CEQA because the Groundwater Sustainability Plan mentioned in the measure must be adopted by January 31, 2020—four years after the ordinance was approved. Therefore, the measure was improperly deferred in another way—it improperly delayed implementation of the mitigation measure. Furthermore, the goal of re-using 30,000 acre-feet per year of produced water was merely a goal, and not an enforceable commitment, as required by CEQA.

Finally, the Court of Appeal held that because the water supply mitigation measures were of unknown effectiveness, in order for the County to properly adopt a statement of overriding considerations under CEQA, the EIR must:

> (1) describe the mitigation measures that are available (i.e., currently feasible) and (2) identify and explain the uncertainty in the effectiveness of those measures.

The court reasoned that such a requirement is mandated by the general rule that an EIR must alert the public and decisionmakers of the significant problems a project would create and must discuss currently feasible mitigation measures. Here, the court held, the County's lack of information about how future applicants would reduce water usage or otherwise comply with the EIR mitigation measures constitutes a lack of sufficient detail to enable the public and decisionmakers to understand and meaningfully consider the information presented in the EIR.

Mitigation for the Conversion of Agricultural Lands

The court next considered the petitioners' challenge to the County's mitigation measures for the conversion of agricultural lands. The County's EIR found that, without mitigation, implementation of the ordinance had the potential to convert farmland throughout the County, including Prime Farmland, Unique Farmland, and/or Farmland of Statewide Importance, to non-agricultural use as a result of allowing oil and gas activities to occur on agricultural lands. The EIR concluded, however, that, with mitigation, the impact would be reduced to less than significant. The mitigation measure adopted by the County for this impact would have allowed permit applicants to adopt just one of four different mitigation options (discussed below). The court rejected this approach and held that because not all of the options constituted adequate mitigation under CEQA, the County lacked substantial evidence to support its conclusion that the impacts of the ordinance on the conversion of agricultural lands would be mitigated to a less-than-significant level.

As the court explained, option "a" under the EIR's agricultural mitigation measure authorized the use of agricultural conservation easements at a 1:1 ratio. That is, a conservation easement providing for the conservation of one acre of agricultural land for every one acre converted to non-agricultural uses. The court held that conservation easements do not constitute adequate mitigation because they do not create new agricultural land to replace the agricultural land being converted to other uses. Rather, conservation easements simply prevent the future conversion of the agricultural land. In other words, conservation easements do not actually offset a project's impacts on agriculture. Accordingly, the court held, the inclusion of option "a" in the agricultural mitigation measure was fatal as the option rendered the mitigation measure ineffective.

Option "b" of the agricultural mitigation measure allowed for the purchase of conservation credits from an established agricultural mitigation bank. While the court found that this mitigation approach could be sufficient to mitigate conversion impacts in theory, the court agreed with the petitioners that there was no evidence in the administrative record that such banks actually existed. Thus, the court held that the record lacked substantial evidence to support a finding that this option would actually mitigate agricultural impacts; therefore, option b was not sufficient mitigation under CEQA.

Lastly, the Court of Appeal concluded that the County had failed to adequately respond to comments suggesting a mitigation measure that would require the clustering of oil and gas wells so that fewer acres of agricultural lands would be converted under the ordinance. The County's response to comments explained that the County's General Plan contains a policy generally requiring the clustering of wells, however, the response did not specifically address the feasibility of adopting a mitigation measure requiring well clustering. The Court concluded that the County's responses to comments failed to comply with the requirements of § 15088, subdivision (b) of the CEQA Guidelines, which require a "reasoned analysis" in response to comments raising "significant environmental issues."

Analysis of Noise Impacts

Finally, the addressed court the adequacy of the EIR's noise impact analysis. To determine whether implementation of the ordinance would cause significant noise impacts, the County used a quantitative threshold of 65 dBA CNEL, meaning that the ordinance would not cause a significant noise impact if cumulative noise levels stayed below that threshold. The court held that the County's use of a single threshold violated CEQA because the threshold did not measure the increase in noise levels over ambient levels. Notably, comments on the EIR, as well as the County's own noise technical report suggested using an increase of 5 dBA over ambient levels to determine whether the increase in noise levels constituted a significant impact. For unexplained reasons, however, the County did not do so. Instead, the County argued that it was entitled to substantial deference in selecting the significance thresholds. While the court agreed that the County is entitled to deference in its choice of significance thresholds under CEQA, the court held that the County's use of an absolute noise threshold for evaluating all ambient noise impacts violated CEQA in this instance because it did not provide a "complete picture" of the noise impacts that may result from implementation of the ordinance.

The Remedy

With regard to the appropriate remedy following the court's invalidation of the EIR, the County requested the court to exercise its equitable powers to preserve the status quo and allow the ordinance to remain in effect while the County corrects the deficiencies in the EIR and mitigation measures. The court declined to do so. The court reasoned that the usual remedy in a CEQA case is to order the respondent to rescind its approvals, and it saw no reason not to do so in this case. Unlike other "extraordinary cases" that allowed an ordinance or similar action which benefited the environment to remain in place, the court found that the oil and gas permitting ordinance was not adopted for the benefit of the environment. Rather, the primary purpose of the ordinance, according to the court, was to accelerate oil and gas development in the County and its associated economic benefits.

In addition to directing the County to rescind the EIR certification and approvals the court also directed that the new EIR prepared by the County include updated baselines for the water supply and air quality analyses because conditions have changed since the County issued the notice of preparation of the original draft EIR that warrant updating the baseline.

Conclusion and Implications

The Fifth District Court of Appeal's substantial decision is notable for the breadth of the areas of CEQA analysis and the detail in which each is addressed. The case provides significant and useful guidance on issues including water supply, noise, and air quality analyses, among others. Perhaps most significant is the Fifth District Court of Appeal's analysis of the EIR's mitigation measures and, more specifically, its discussion of the principles governing the deferral of mitigation measure formulation and the development of adequate performance standards.

The court's decision is available at: https://www.courts.ca.gov/opinions/documents/F077656.PDF.

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LAND USE NEWS

SALTON SEA SPECIES MANAGEMENT PROGRAM REPORT OUTLINES PROGRESS AND THE PATH FORWARD

In February 2020 the Salton Sea group of various state agencies issued an annual report on the state of the management program.

Background

The Salton Sea Management Program (SSMP) is a comprehensive plan developed in response to the state's obligations under the Salton Sea Restoration Act of 2003 aimed at the protection of wildlife habitats in the Salton Sea ecosystem and public health in surrounding communities, which have been imperiled as a result of progressively declining water levels over the past several decades. The SSMP is a joint effort of government agencies at the local, state and federal levels, spearheaded by a "State Team" consisting of the California Natural Resources Agency (CRNA), Department of Water Resources (DWR) and California Department of Fish and Wildlife (CDFW). In February 2020, the State Team released its 2020 Annual Report on the Salton Sea Management Program (Report), describing the status of the implementation of the SSMP and outlining the program's goals and expectations for future progress.

The Salton Sea and the SSMP

The Salton Sea is a shallow terminal lake situated primarily in the Imperial and Coachella Valleys. Overflows of Colorado River water caused by a breach of an irrigation canal in 1905 created the sea, filling the lakebed over a period of almost two years. Lacking any connection to the ocean, water in the sea lost by evaporation is primarily replenished by agricultural runoff. Salt leftover from evaporated water, along with the generally high salinity of the agricultural inflows, have resulted in a sea over 50 percent more saline than the Pacific Ocean.

Steadily declining water levels in the sea over the past several decades are largely attributed to shifts in agricultural water use practices, which, over time, have significantly reduced the agricultural runoff into the sea that historically replenished water lost through evaporation. Resulting increases in salinity concentration in the Salton Sea and particulate air pollution from wind erosion of newly exposed lakebed, or "playa," create conditions that threaten the wildlife inhabiting the sea ecosystem as well as the public health of surrounding communities. For wildlife, reduced water levels degrade and destroy habitats relied upon by fish and birds as critical sources of food, shelter and nesting grounds. For human populations, breathing the fine dust introduced into the air from the erosion of exposed lakebed, some of which contains toxic elements like arsenic and selenium from past inflows, can give rise to a variety of respiratory illnesses over time.

The SSMP represents perhaps the most comprehensive state effort to revitalize the Salton Sea in the wake of the Salton Sea Restoration Act. Developed primarily by the CRNA in accordance with a 2015 directive of former Governor Brown, the SSMP features a comprehensive, two-pronged approach focused on habitat restoration and dust suppression projects covering tens of thousands of acres in and around the sea to be implemented in multiple phases. Currently, the State Team is working with local, state and federal stakeholders to carry out the Phase 1: 10 Year Plan (Phase 1 Plan). Overseeing the effort is the State Water Resources Control Board (SWRCB), as described in SWRCB Order WR 2017-134 (Order) detailing the board's role and setting forth parameters for the accomplishment of key SSMP initiatives. Additionally, the Order includes a requirement that the State Team submit an annual report that outlines major SSMP activities over the previous year, sets forth plans for moving forward with SSMP and provides an update on the program's funding status.

The 2020 Annual Report

The February 2020 Annual Report prepared by the State Team pursuant to the Order describes activities for the past year under four primary categories including project delivery, planning, partnership develop-

ment and community outreach efforts. Project delivery achievements include the completion of the first SSMP project in January 2020, the small 112-acre Bruchard Road Dust Suppression Project involving surface roughening techniques to control erosion of playa and limit the resulting spread of dust. The first major habitat project of the SSMP and centerpiece of the Phase 1 Plan, the Species Conservation Habitat Program (SCHP) is set to begin construction in the fall of 2020. The SCHP encompasses approximately 3,770 acres of exposed playa at the southwest end of the Salton Sea near the mouth of the New River, a tributary to the Salton Sea. The SCHP will cultivate sustainable fish and avian habitats through the construction of a variety of components, which include water management ponds, berms, islands, pump stations, river crossings and intake, access corridors, pipelines and dust suppression elements. A design-build contract is expected to be awarded in summer 2020, with construction is scheduled to be completed by the end of 2023.

The two remaining elements of the four-part Phase 1 Plan include the Dust Suppression Action Plan (DSAP) and completion of a detailed environmental document prepared in accordance with the National Environmental Policy Act (NEPA). The DSAP involves the identification and prioritization of approximately 8,200 acres of dust suppression projects on emissive lakebed around the sea. Identification of projects for the DSAP will be determined in part by the State Team's ability to secure required land access agreements, as well as soil conditions and requirements of federal and state environmental law applicable to proposed project locations and completion of identified projects is to occur by end of 2022. The final component of the Phase 1 plan, the environmental document required by NEPA, is being undertaken in collaboration with the U.S. Army Corps of Engineers (Corps) and is expected to be finalized in spring 2021. The joint effort will focus on the facilitation of ongoing permitting needs for the large number of Phase 1 Plan projects to be constructed on areas within the jurisdiction of the Corps.

As described in the Annual Report, the State Team has cultivated numerous working relationships with key agencies and stakeholders in the Salton Sea region, including the Imperial Irrigation District (IID), Audubon California, the Salton Sea Authority, and the counties of Imperial and Riverside. In particular, the state has extensively worked with IID as a partner in SSMP mitigation efforts, including the formation of critical land use agreements such as the easement agreement reached in May 2019 that gave the State Team the access necessary to move forward with the SCHP. Such agreements are intended to serve as templates for future land and water access needs of the SSMP. Federal partners include the Corps, the Bureau of Reclamation and the U.S. Fish and Wildlife Service, with whom the State Team is coordinating regarding NEPA requirements as well as the implementation and funding of additional mitigation projects. In addition to coordination with other government agencies, the Annual Report describes a concerted community outreach effort by the State Team to increase transparency and establish a permanent physical presence at the sea by opening a local office.

The Annual Report indicates that the SSMP is receiving significant funding from the state, including appropriations of $298 million, over $200 million of which is allocated to the SCHP. The state budget for 2021 proposes an additional $220 million allocation of potential bond proceeds, subject to the passage a measure to be included on the November 2020 ballot. Notwithstanding the state's commitment to support the SSMP, the Annual Report claims that additional funding will be necessary to implement acreage requirements set forth in the Order, and the State Team is pursuing federal funding opportunities and other arrangements with its partners to make up this shortfall.

According to the State Team, the Annual Report will serve as a guide with respect to the development of SSMP stages following the implementation of the Phase 1 Plan. This effort is slated to begin in the first quarter of 2021 and be completed by the end of 2022.

Conclusion and Implications

The 2020 Report describes a SSMP moving full steam ahead as of February 2020, and specifically credits efforts to remedy institutional capacity issues that had previously limited progress as a primary reason. Under Governor Newsom, the state continues to support the program financially, though it remains to be seen whether and to what extent the ripple effects of the massive economic disruption caused by the Covid-19 outbreak in California that began shortly after

the release of the Annual Report will impact SSMP funding and overall progress in the future. Nonetheless, the State Team appears committed to aggressively moving forward with the SSMP and according to the Annual Report, has laid much of the groundwork necessary to meet the program's lofty goals.
(Wesley A. Miliband, Andrew D. Foley)

SENATOR WIENER INTRODUCES LEGISLATION TO STREAMLINE AFFORDABLE HOUSING ON PROPERTIES OWNED BY RELIGIOUS INSTITUTIONS AND NONPROFIT HOSPITALS

California State Senator Scott Wiener (D - San Francisco) recently introduced Senate Bill 899 (SB 899), which would allow faith institutions and nonprofit hospitals to build affordable housing on their properties regardless of local zoning law. In other words, nonprofit hospitals and religious institutions (such as churches, synagogues, and mosques) will have a "by right" ability to build affordable housing, even if local zoning prohibits the use. However, the legislation would only apply to 100 percent affordable housing for low-income residents.

Background

The impetus behind SB 899 is the fact that many faith and charitable institutions have excess property, such as large surface parking lots, on which they could build affordable housing. Indeed, California has seen faith communities in various jurisdictions partner with nonprofit housing developers to build affordable housing on their land. Yet current zoning laws in many cities prohibit the building of multifamily apartment buildings—or any housing at all—on these properties. Further, getting such land rezoned and getting a project through the approval process can be difficult and incredibly expensive.

Senate Bill 899

SB 899 ensures that churches, faith institutions, and nonprofit hospitals will be able to build up to 150 units of affordable housing on their land without having to go through a costly and complex rezoning and discretionary approval process.

Any organization building this type of streamlined affordable housing must maintain the affordability of these homes for a minimum of 55 years for rental properties and 45 years for for-sale units. Additionally, density and height restrictions will depend on the location of the property and its proximity to major roads and commercial corridors. In low-density residential neighborhoods, affordable housing may be streamlined for projects up to 40 units and three stories in height (36 feet). Whereas, in mixed-use areas or commercial corridors, affordable housing may be streamlined for projects up to 150 units and five stories in height (55 feet).

As we all know, California is dealing with a severe housing crisis caused by a shortage of approximately 3.5 million homes. This shortage drives up housing costs, making California the most expensive state in which to rent or buy a home. In addition, the state's homelessness crisis is worsening at an alarming rate. In order to help alleviate these problems, SB 899 would allow churches, hospitals, and other nonprofit institutions to provide affordable housing by building it on their own properties.

SB 899 is co-sponsored by the Non-Profit Housing Association of Northern California (NPH) and the Southern California Association of Nonprofit Housing (SCANPH), and will complement Assemblymember Buffy Wicks' bill, AB 1851, which eliminates residential parking requirements on qualifying housing development projects on faith based properties. Together, SB 899 and AB 1851 are meant to make it easier and less expensive to build affordable housing on eligible properties.

Senator Wiener issued a statement saying:

> California desperately needs housing of all kinds, including affordable housing for our low income residents. Churches and other religious and charitable institutions often have land to spare, and they should be able to use that land to build affordable housing and thus further their mission. SB 899 ensures that affordable housing can be built and removes local zoning

and approval obstacles in order to do so.

Assemblymember Buffy Wicks echoed the Senator's sentiment, saying that:

> Our community faith leaders see how our housing crisis impacts lives every day, and they want to be a part of the solution by building affordable housing on their property. The State needs to consider all options for alleviating our housing crisis, and removing roadblocks for the faith community is a critical step in the right direction.

Conclusion and Implications

Housing is expensive in California. Efforts at the legislature to address affordable housing have faced stiff resistance to date. Senator Wiener's comprehensive SB 50 is an example of this. Now, Senator Wiener is trying to address housing in more piecemeal fashion to gain some traction. SB 899 is one of those efforts.

The text of SB 899 is accessible online at the following link: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB899 (Nedda Mahrou)

SENATOR WIENER PROPOSES HOUSING LEGISLATION TO PROVIDE CITIES WITH TOOLS FOR VOLUNTARY UPZONING

California State Senator Scott Wiener (D - San Francisco) has introduced Senate Bill 902 (SB 902), which automatically zones for two, three or four units per parcel depending on a city's size. The bill also provides cities with a new option for streamlining, that allows for upzoning of non-sprawl areas to as many as ten units per parcel. This latter rezoning action will be exempt under the California Environmental Quality Act (CEQA).

Senate Bill 902

Under the first element of SB 902, a city's population will determine how many units can be allowed per parcel:

- Cities with fewer than 10,000 people and unincorporated counties must allow two units as of right;

- Cities between 10,000 and 50,000 people must allow three units as of right; and

- Cities with over 50,000 residents must allow four units as of right.

By legalizing up to four units of housing per parcel as-of-right, guaranteeing ministerial, non-discretionary approvals and protecting projects from delays or appeals, SB 902 hopes to help alleviate California's housing shortage with light density increases. The bill will also help cities that want to increase density even further (up to ten units per parcel) by allowing cities to avoid the timely, costly and sometimes complicated rezoning process to effectuate this change.

Opt-in Provision

As for SB 902's provision that allows cities to opt-in to higher-density zoning, local governments can choose whether and where to increase residential zoning up to ten units per parcel (subject to avoiding urban sprawl). Cities and counties wishing to take advantage of this aspect of the proposed bill can do so by passing a resolution approving the plan. In order to avoid sprawl, the ten unit per parcel zoning under SB 902 will be limited to infill areas as defined by SB 35, a streamlining law authored by Senator Wiener in 2017, and to areas near high quality public transportation or job centers.

No Change to Setbacks, Height Limits and Other Design Standards

SB 902 would not change local height limits, setbacks, objective design standards, historic standards, or demolition restrictions. Rather, the bill is meant to offer minimal, but meaningful changes to California's zoning laws and allow for more housing density where it is most needed. The bill provides baseline zoning reform and encourages collaboration with local governments by giving cities and counties the ability to go beyond that baseline zoning in order to meet

their housing goals. Of critical importance is the fact that SB 902 would not have any impact on accessory dwelling unit (ADU) requirements under California law, because ADUs are secondary units limited in size. This proposed bill is focused on base zoning and is meant to complement current ADU zoning law.

Rent Protection Provisions

SB 902 also contains renter protections which prohibit affordable housing and rent-controlled properties to be demolished for a SB 902 project. Additionally, if a renter has lived at a property at any point in the past seven years, or if an Ellis Act eviction has occurred in the past 15 years, the property may not be demolished in order to allow a SB 902 project to be constructed.

Conclusion and Implications

According to Senator Wiener "SB 902 is a thoughtful and balanced approach to California's housing crisis, and it will make a significant difference. To tackle California's severe housing shortage, we must all pitch in. By authorizing two, three and four units per parcel statewide, and by giving cities a powerful new tool to increase density even more, SB 902 recognizes that we're all in this together and makes it easier for cities to do the right thing."

Senator Wiener hopes that by allowing cities to increase density in a sensible and streamlined way, SB 902 will help ease California's housing crisis, spurred by a statewide shortage of 3.5 million homes.

The text of SB 902 is accessible online at the following link: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB902
(Nedda Mahrou)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT REJECTS 'TAKINGS CLAIM' AFTER STATE LAND COMMISSION TEMPORARILY REVERTS PROJECT SITE FROM URBAN TO AGRICULTURAL ZONING

Bridge Aina Le'A, LLC v. State of Hawaii Land Use Commission, ___F.3d___, Case Nos. 18-15738, 18-15817 (9th Cir. Feb. 19, 2020).

A three judge panel of the Ninth Circuit Court of Appeals has rejected a "takings" claim under the *Lucas* and *Penn Central* decisions after the Hawaii Land Use Commission (Commission) reverted a project site from urban to an agricultural zoning designation after the developer failed to meet several entitlement deadlines. Before reaching the Ninth Circuit, the Hawaii Supreme Court overturned the reversion on procedural grounds, making the reversion temporary. The Ninth Circuit ruled that a *Lucas* taking did not occur because the property still retained significant value while the reversion was effective. The court also rejected a *Penn Central* type taking claim because the reversion was only temporary and the result of the developer's own failures to meet entitlement deadlines.

Factual and Procedural Background

Plaintiffs owned a 1,060 acre parcel on the island of Hawaii that for decades and under the ownerships was planned as a residential development project. The subject property was initially part of a larger 3,000 acre parcel zoned for agricultural use, which restricted the landowner to certain specified agricultural and low-density residential uses.

In 1987, a prior owner decided it would seek to develop a mixed residential community on the 1,060 acres as the first phase of a development project that would occur on the entire 3,000 acres. In order to do so, the prior owner petitioned the Commission to reclassify the 1,060 to an urban zoning designation. In January 1989, the Commission approved the petition with multiple conditions, including a requirement that the developer designate most of the new units as affordable. Subsequently, the property changed hands to a second property owner. In 1991, the new owner petitioned the Commission to develop a less dense community with fewer affordable units than previously proposed. The Commission approved this second petition with a reduced affordable housing component although it noted that a failure to construct the development in "substantial compliance" with the proposals in the development proposal for the property, "may result in reversion of the property to its former zoning classification."

The property remained undeveloped through 2005 when plaintiffs Bridge Aina Le'a Pu purchased it (Bridge). Bridge subsequently petitioned the commission to allow a housing development on the property that allowed for a lower percentage of affordable housing units than previously proposed. With this third approval, the Commission added a condition that Bridge needed to complete the affordable units proposed as part of the project, or 385 units, by November 17, 2010, with an additional condition that 16 of the affordable units be completed by March 31, 2010.

By June 10, 2010, Bridge had made little progress and only completed some work on 16 affordable housing units—they were still not connected to water, sewer, electricity, or roads. In July of 2010, the Commission instituted an Order to Show Cause and entered a finding that a condition precedent (that 16 affordable housing units be constructed by March 16, 2010) had not been satisfied and re-stating the condition that 385 units be constructed by November 2010. On April 25 2011, after Bridge failed to construct 385 affordable units, the Commission issued a final reversion order reverting the property back to an agricultural zoning designation.

At the Hawaii Supreme Court

Bridge appealed the Commission's reversion order and prevailed in state Circuit Court. On appeal, the Hawaii Supreme Court acknowledged that the Commission had authority to revert the land use classification to agricultural, it ruled in favor of Bridge after determining that the Commission's reversion order

violated state procedural requirements. The Supreme Court's ruling had the effect of lifting the reversion order 365 days after it was issued.

Removal to the Federal District Court

Bridge brought a number of federal claims in its state court action that the state successfully removed to federal court. After proceedings in both state and federal court, only a federal regulatory takings claim survived in federal court. Specifically, Bridge alleged that the Commission's reversion of the property from urban to a rural designation effected a regulatory taking under the U.S. Supreme Court cases *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). After a jury trial in the U.S. District Court for the District of Hawaii, the District Court entered a Judgment as a Matter of Law (JMOL) that Bridge was entitled to only nominal damage, but did not grant a JMOL as to takings liability. Following the court's jury instruction, the jury found that the Commission was liable for a taking under both *Lucas and Penn Central* in the amount of $1.

The Ninth Circuit's Decision

The court analyzed Bridge's takings claims under both the *Lucas* and *Penn Central*, ultimately finding that as a matter of law, Bridge failed to establish a taking under either.

Lucas Taking Analysis

As the court noted, a taking under the *Lucas* line of cases involves a *per se* taking where "a regulation denies all economically beneficial or productive use of land." The court reviewed the development of Supreme Court cases after the *Lucas* decision as giving rise to three core observations:

> First. . .[i]n the *Lucas* context. . .the complete elimination of a property's value is the *determinative* factor. . . .Second, although value is determinative, use is still relevant [*i.e.* if a landowner still has *some beneficial use* such the ability to maintain a residence on the property]. . . .Finally. . .a token interest will not defeat a takings claim.

Regarding the first factor above, the Ninth Circuit found that even though the Commission's reclassification of the property as agricultural could result in an 83 percent reduction in value, the property still retained substantial residual value in an agricultural use classification. Because the diminution in value resulting from the reversion was not a total deprivation of value, *Lucas* did not provide relief. The court further noted that a $6.36 million remaining value in an agricultural use classification was neither *de minimis*, nor did the value derive from noneconomic uses.

Regarding the second factor, the court recognized that the agricultural use classification for the property provided for an array of uses, including an opportunity to obtain a permit for "unusual and reasonable uses" not otherwise delineated in the agricultural zoning designation. The court noted that although Bridge offered evidence suggesting that many of the permitted uses at the property were not economically feasible, the court noted that some of the permitted and "specially permitted" uses at the property would be "especially suited" for the property.

Ultimately the Ninth Circuit found that the notion underlying Bridge's *Lucas* theory was fundamentally flawed.

Penn Central Taking Analysis

The court turned to Bridge's *Penn Central* claims, which can succeed against some regulatory actions that result in less than a total diminution in value. The analysis began by reviewing the three *Penn Central Factors*: 1) the economic impact of the regulation on the claimant, 2) the extent to which the regulation interfered with distinct investment-backed expectations, and 3) the character of the governmental action. As the court noted, their function in reviewing the three factors is to determine whether a regulatory action is functionally equivalent to a classic taking.

Regarding the first *Penn Central Factor* the court noted that there is no "litmus test" in the economic impact, however the court's aim is to:

> . . .identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owners from his domain.

Regarding the economic impact of the order, the court was particularly persuaded by the fact that the reversion only lasted a year the Hawaii Supreme Court overturned it. *Penn Central's* economic impact analysis does not take into account hypothetical or threatened diminution in value, and considering the one year period of reversion, the actual diminution in value of the property was *at most* $6.72 million. In the Ninth Circuit's opinion, this 16.8 percent reduction in value was not sufficient to establish an actionable economic impact under *Penn Central*.

The court noted with reference to this factor, the court must "use an objective analysis to determine the reasonable investment-backed expectations of the owners." The court's focus is on the government action's interference with reasonable expectations of the owner. The court noted that "what is relevant and important" when judging reasonable expectations is looking at the regulatory environment at the time the property was purchased.

Here, the when the property was purchased by Bridge, the realization of the property's sought after value required a change in approval of prior housing development projects by the Commission. One of the conditions to obtain this change in entitlements was Bridge's commitment to build 385 affordable housing units by November 2010. Bridge repeatedly represented that it would succeed at this. Ultimately, Bridge's failure to meet the conditions that it agreed to "dispelled the notion that Bridge could reasonably expect that the Commission would not enforce the conditions" by reverting the property back to agricultural.

Finally the court reviewed the Reversion Order's character:

> . . .for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good. . . .

Here, the court found that the Commission's action reverting the property to agricultural was not clearly arbitrary and unreasonable given the project's long history, the various representations made to the Commission and Bridge's failure to meet deadlines. Because the Commission only acted after Bridge failed to meet these deadlines, the court was not persuaded that the character of the government action weighed in favor of finding a taking.

Ultimately, in weighing the above factors the court found that no reasonable jury could find that Bridge's evidence satisfied the *Penn Central Test*.

Conclusion and Implications

Even with recent U.S. Supreme Court decisions like *Knick* providing an easier procedural path to takings claims in federal court, it is still difficult to succeed with takings claims in many instances. This is especially true when a challenged government action is temporary, does not totally destroy a property's economic value, and when a property owner is him or herself partially responsible for the challenged regulatory action. The court's decision is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2020/02/19/18-15738.pdf.
(Travis Brooks)

COURT OF FEDERAL CLAIMS REJECTS TAKINGS CLAIMS RELATED TO HURRICANE HARVEY DOWNSTREAM FLOODING CASES

In re Downstream Addicks and Barker (Texas) Flood-Control Reservoir, ___F.Supp.3d___, Case No. 17-9002 (Fed. Cl. Feb. 18, 2020).

The U.S. Court of Federal Claims dismissed U.S. Constitutional Fifth Amendment takings claims related to "Hurricane Harvey" for failure to state a claim upon which relief could be granted. The ruling comes as a result of the court's determination that the Fifth Amendment only protects legally recognized property rights created by states or the federal government.

Factual and Procedural Background

This litigation was brought by residents of Harris County, Texas (plaintiffs). Plaintiffs suffered from

flooding that damaged their property during Hurricane Harvey in 2017. Plaintiffs alleged that economic and emotional damages occurred as a result from imperfect flood control from two dams created by the U.S. Army Corps of Engineers (Corps or federal government) to mitigate against floods in their area.

The Corps created the Barker Dam and Addicks Dam between February of 1942 and December of 1948, respectively. The dams' reservoirs provided flood protection along the Buffalo Bayou. Plaintiffs acquired their respective properties between 1976 and 2015. All properties fell within the Buffalo Bayou watershed and all properties were built after the erection of the dams.

On August 25, 2017, Hurricane Harvey made landfall on the coast of Texas. To mitigate against downstream flooding, the Corps closed the flood gates on both the Addicks and Barker dams. By August 28, the volume of water in the reservoirs exceeded capacity and the Corps began releasing waters downstream. Despite the controlled releases, uncontrolled water was reported to be flowing around the north end of the Addicks Dam.

In September of 2017, property owners began to file claims with the court. Plaintiffs alleged that the flooding caused by Hurricane Harvey and the dams was an unconstitutional taking of their property. The claims were consolidated and then bifurcated into an Upstream Sub-Docket and a Downstream Sub-Docket. The federal government filed a motion to dismiss under Rule 12(b)(6) of the United States Court of Federal Claims for failure to state a claim upon which relief could be granted. The federal government alleged that the government cannot take a property interest that plaintiffs do not possess.

The Court of Federal Claims Decision

The Takings Clause of the Fifth Amendment protects against private property being taken for the public without just compensation. Accordingly, courts implement a two-step analysis of takings claims. First, a court determines whether plaintiffs possess a valid interest in the property affected by the government action. If the court determines that the plaintiffs do have a property right, then it must decide whether the governmental action at issue constituted a violation of the property right.

The Court of Federal Claims referenced that for a Fifth Amendment takings claim to succeed, plaintiffs must first establish a compensable property interest. For a property right to be recognized, it must have a legal backing, such as a state or federal law protecting the interest.

State Recognized Property Rights

The Court of Federal Claims reviewed over 150 years of Texas flood-related decisions and determined that the State of Texas has never recognized perfect flood control in the wake of an "act of God," such as a hurricane, as a protected property interest. In fact, the court determined that Texas had specifically excluded the right to perfect flood control when the occurrence was an act of God.

Under Texas law an act of God is the result of an event that was "so unusual that it could not have been reasonably expected or provided against." Here, the court determined that Hurricane Harvey was an event that occurred only every 200 years, and that the Houston area could not have reasonably expected or provided against its damages. Therefore, the federal government could not be held responsible for plaintiff's injury because Texas law specifically limits liability in takings and tort contexts when the operator of a water control structure fails to perfectly mitigate against flooding caused by an act of God.

The court then looked to the Texas state Constitution, which specifically enumerates that police power is an exception to takings liability and that property is owned subject to the pre-existing limits of the state's police power. The court highlighted the fact that Texas courts have consistently recognized efforts by the state to mitigate against flooding as a legitimate use of police power.

The court also looked to the Texas Supreme Court's holding that governments cannot be expected to insure against every misfortune on the theory that they could have done more. The reasoning behind that conclusion was the fact that extending takings liability on such instance would encourage governments to do nothing to prevent flooding instead of trying to address the problem.

Finally, under Texas case law when an individual purchases real property, the individual acquires that property subject to the property's pre-existing conditions and limitations. The court noted that each of the plaintiffs in this case acquired their property after the construction of the Addicks and Barker dams. Therefore, plaintiffs acquired their property subject

to the right of the Corps and federal government to engage in flood mitigation.

Federally Recognized Property Rights

Because the court did not find a property right recognized by the State of Texas, it examined whether federal law provides plaintiffs with protected property interest. Plaintiffs advanced two legal theories to allege that federal law recognized their property rights. First, plaintiffs alleged that because their property only experienced minimal flooding before Hurricane Harvey, they had a reasonable investment-backed expectation that they would always remain free from flooding. Second, plaintiffs alleged that because the water ran through the Corp's reservoir, it was the Corps' water and not flood water.

First, the Court of Federal Claims determined that plaintiffs did not have a reasonable expectation to be free from flooding simply because the federal government erected a dam to mitigate floods. The court determined that:

> . . .an unintended benefit could not create a vested property interest, and that '[i]n certain limited circumstances, the [federal government] can eliminate or withdraw certain unintended benefits resulting from federal projects without rendering compensation under the Fifth Amendment.'

The court highlighted the notion that government projects rarely provide an individual with a property interest because government projects are intended to benefit the community as a whole.

Second, the court determined that the Flood Control Act of 1928 (FCA) defines water impounded behind dams because of a natural disaster as flood waters. Additionally, the court determined that the FCA does not confer owners a vested right in perfect flood control simply for owning property that benefits from a flood control system. The court determined that when the federal government undertakes efforts to mitigate against flooding, it does not become liable for a taking because the efforts failed.

The court concluded that there exists no cognizable property interest in perfect flood control against waters resulting from an act of God. The court refused to extend liability to the federal government because it failed to protect against waters outside of its control. Therefore, the court granted the federal government's motion to dismiss for failure to state a claim upon which relief could be granted.

Conclusion and Implications

The court's decision closely tracked state law and federal law in an attempt to harmonize its decision. In the end, the Court of Federal Claims found that the failure of a federal flood control project to control flood waters may not constitute a Fifth Amendment taking without a state-created property right to be free from the type of flooding at issue. The implication of that analysis would suggest that a different result might be possible on the same or similar fact in another state. In February 2020 we reported on the court's decision in the "upstream" portion of the flooding event. *See*: 30 *Envtl Liab Enforcement & Penalties Rptr* 74. The court' decision is available online at: https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2017cv9002-203-0.
(Marco Ornelas, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT FINDS CERTIFIED LOCAL COASTAL PLAN, NOT THE COASTAL ACT REGULATION, GOVERNS CITY'S COASTAL DEVELOPMENT OF HOUSING FACILITY

Citizens for South Bay Coastal Access v. City of San Diego, ___Cal.App.5th___, Case No. D075387 (4th Dist. Feb. 18, 2020).

A local interest group brought suit challenging the City of San Diego's (City) issuance of a Conditional Use Permit (CUP) allowing the City to convert a motel that it had purchased into a transitional housing facility for homeless misdemeanor offenders. The group alleged that the City was required to obtain a Coastal Development Permit (CDP) for the project. After the Superior Court granted a writ of mandate, the City appealed. The Court of Appeal for the Fourth Judicial District reversed, finding that the City's certified local coastal plan governed the City's coastal development, under which the project was exempt.

Factual and Procedural Background

The City acquired a property, which was operated as a motel, for the purpose of converting the motel into a transitional housing facility for homeless misdemeanor offenders. The City planned to rehabilitate the existing building on the property with interior and exterior improvements. The City's plan also reduced the existing 53 parking spaces in the parking lot to a total of 25 parking spaces and added passive open green spaces.

The property is located within the Coastal Overlay Zone as defined by the City. Generally, the City's Municipal Code provides that a Coastal Development Permit is required for all coastal development of properties within the Coastal Overlay Zone unless an exemption applies. When the City passed a resolution approving a CUP for the project in late 2017, the staff presentation stated that the facility was exempt under the City's municipal code.

Plaintiff Citizens for South Bay Coastal Access brought suit, claiming, among other things, that the project required issuance of a CDP. In particular, it asserted that the California Coastal Act and the regulations promulgated thereunder had the effect of preempting the City's municipal code and required the City to obtain a CDP. Plaintiff claimed two sections of the regulations triggered the CDP requirement: 1) a section requiring a CDP for any improvement to structures that change the intensity of use of the structure; and 2) a section requiring a CDP for any improvement made pursuant to a conversion of an existing structure from a visitor-serving commercial use to a use involving a fee ownership. (Cal. Code Regs., tit. 14, § 13253.)

Plaintiff did not dispute that the portion of the City's municipal code governing the requirement to obtain a CDP for development in the Coastal Overlay Zone contained an exemption for improvements to existing structures. It also did not dispute that none of the municipal code's exceptions to the existing-structure exemption for certain types of improvements were applicable. In particular, a section of the code set forth an exception for improvements that result in an intensification of use, which it defines as:

> . . .a change in the use of a lot or premises which, based upon the provisions of the applicable zone, requires more off-street parking than the most recent legal use on the property.

The City apparently had determined that this exception did not apply because its planned use of the property would require less parking, and the City planned to significantly reduce the number of parking spaces.

At the Superior Court

While the Superior Court rejected plaintiff's other arguments (*e.g.*, California Environmental Quality Act (CEQA) and Planning and Zoning Law claims),

it agreed with the argument that state law preempted portions of the existing-structure exemption. Among other things, the court found that the City municipal code exemption was applied in such a way that a CDP was not required because the project resulted in a lowered intensification of use (as evidenced by less required parking). This, the court found, was forbidden under state law, which requires a CDP for any change in intensity, not just a higher intensity. In addition, the Superior Court also found that the project would convert the motel from multiple unit commercial use to a use involving a fee ownership. This, the court found, also would be forbidden under state law without a CDP. After the Superior Court entered judgment in favor of plaintiff, the City appealed.

The Court of Appeal's Decision

The Court of Appeal began with a discussion of the legal principles applicable to a preemption analysis. Generally, a county of city may make and enforce within its limits local, police, sanitary, and other ordinance and regulations not in conflict with state law. Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. A local ordinance contradicts state law when it is inimical to or cannot be reconciled with state law.

The California Coastal Act

The Court of Appeal next addressed the California Coastal Act, the intent of which is to provide a comprehensive scheme to govern land use planning for the coastal zone of California. Given this broad geographic scope, the Coastal Act recognizes the need to "rely heavily" on local governments. To that end, it requires local governments to develop local coastal programs, which are comprised of a land use plan and a set of implementing ordinances. Local coastal programs must be submitted to the California Coastal Commission (Commission) for a certification of consistency, and, once certified, the Commission delegates authority over CDPs to the local government.

Notably, once the Commission certifies a local government's local coastal program, the Commission no longer exercises original jurisdiction over the issuance of a CDP. However, because the Commission still retains jurisdiction over the issuance of CDPs in certain circumstances (*e.g.*, when no local coastal program has been certified), the Coastal Act contains provisions governing the Commission's exercise of its original jurisdiction to issue CDPs. Consistent with these provisions, the Commission has promulgated regulations that apply to instances in which it is operating under its original jurisdiction to issue CDPs. Those regulations include, among other things, the regulations referenced by plaintiff and relied on by the Superior Court to conclude that state law contradicted the City's municipal code provisions governing whether a CDP was required for development of the property.

Preemption Analysis

Applying the above principles, the Court of Appeal found that the Superior Court's reasoning contained a fundamental flaw. As a basic premise, the Superior Court assumed that the Commission's regulations pertaining to its original jurisdiction were intended to apply to the City's decision whether a CDP is required for a proposed coastal development. Finding a contradiction between the Commission's regulations and the City's LCP, both of which the Superior Court assumed were applicable, it concluded that the Commission's regulations should prevail. However, because the Commission had certified the City's LCP, the Commission's regulations did not apply to the City's CDP decision. As such, there was no contradiction with state law, and preemption was not applicable. On that basis, the Court reversed the Superior Court's decision and remanded with direction to deny the petition.

Conclusion and Implications

The case is significant because it provides a substantive discussion of the relationship between the California Coastal Act and accompanying regulations, on the one hand, and local coastal programs, on the other. The decision is available online at: https://www.courts.ca.gov/opinions/documents/D075387.PDF.
(James Purvis)

THIRD DISTRICT COURT UPHOLDS DEVELOPMENT PROJECT EIR EVEN THOUGH LARGE COMPONENT OF THE PROJECT WOULD NOT LIKELY BE BUILT

Environmental Council of Sacramento et al., v. County of Sacramento et. al., ___Cal.App.5th___, Case No. C076888 (3rd Dist. Jan. 30 2020).

The Third District Court of Appeal has rejected a laundry list of claims under the California Environmental Quality Act (CEQA) brought by the Environmental Council of Sacramento and the Sierra Club (Environmental Council) centered around an Environmental Impact Report's (EIR) inclusion of a university component of a project that was not likely to be built. The court found that, regardless of the uncertainty regarding the university component, project approvals included a number of provisions to entice a university to locate to the project area, which was adequate for purposes of the EIR and CEQA.

Factual and Procedural Background

The subject project would be located on an undeveloped 2,669 acre site in southeastern Sacramento County previously used for grazing. As part of the project, the county approved a wide range of uses for the project site including residential, office, retail, a university campus, schools, parks, and a network of trails. The project would add a total population of 25,519 to the county, or 21,379 without the university component. Pursuant to the county's General Plan criteria and principles for special planning areas (SPAs) in new growth areas, the project was required to include an affordable housing plan, urban services plan, fiscal impact analysis, public facilities financing plan, air quality mitigation plan, greenhouse gas plan, and a development agreement. The project also required approval of a General Plan amendment, zoning amendments, and a tentative subdivision map.

The county approved the project in January 2013 at the same time it certified a final EIR, along with findings of fact, and a statement of overriding considerations.

According to the EIR, the Cordova Hills SPA reserved 224 acres for a future unidentified university campus with 6,000 undergraduate and graduate students, 2,036 employees, and 1,870,000 square feet of facilities. Project proponents previously identified the University of Sacramento as likely to relocate to the project site, however the university withdrew and it was uncertain at project approval whether a university would ever occupy the site.

Despite this uncertainty, the development agreement for the project contained a number of provisions to promote development of a university at the project site. First, the development agreement required the project site to revert to the county if a university was not located there within 30 years. During this 30-year period, the project proponent was prohibited from applying for a change in land use designation for the prospective university site. The project owner was also required to provide the county with annual updates on its efforts to secure a university. The project owner was also required to set up a "university escrow account" where the developer would deposit millions of dollars for every thousand building permits issued for the project.

In March of 2013, the Environmental Council filed a petition for writ of mandate At its core, the petition alleged that the project EIR failed to analyze the impacts of the project buildout without the project's planned university component, because market factors made it unlikely that the university would actually be built. The Environmental Council's petition challenged the adequacy of the EIR's project description and analysis of environmental and land use impacts, the county's alleged failure to adopt feasible mitigation measures, and an alleged failure to re-circulate the EIR after the county learned that a university tenant was unlikely. The trial court rejected the petition on all grounds.

The Court of Appeal's Decision

The Third District Court of Appeal began by highlighting several general CEQA principles. As the court noted:

> An EIR project description should include reasonably foreseeable future activities that are the consequence of project approval. It should

address environmental effects of future action, if there is credible and substantial evidence that (1) it is a reasonably foreseeable consequence of the project, and (2) the future action will be significant in that it will likely change the scope and nature of the project and its environmental effects.

The court went on to reject each of the Environmental Council's arguments attacking the project EIR.

Project Description

First, the court found that the EIR's project description was not rendered inadequate merely because it contemplated a university that was not certain to be built. Attracting a university is a "daunting" task, and the difficulties in attracting a university were incorporated into the EIR. Specifically the EIR imposed several obligations on the developer and the county designed to attract a university, including $87 million incentives and commitments. Contrary to plaintiffs' claims, the county was *required* to assume that all phases of the project, including the university, would be built. The proposed university was not an illusory element of the project based on pure speculation and was not included only to minimize the project's likely environmental impacts.

Air Impacts Analysis

The court went on to dismiss Environmental Council's claims that the EIR failed to adequately analyze air quality impacts. The EIR found that the project would have significant and unavoidable impacts from Nitrogen (NOx) and reactive organic gas (ROG), however the EIR contained a statement of overriding considerations and included a mitigation measure that required the project to achieve an objective of a 35 percent reduction in overall total project emissions; all future amendments to the project's SPA were also required to be analyzed for their air quality impacts to insure they would not exceed the project's target air quality impact reductions.

The court also determined that recirculation of the EIR was not required after changes to the above mitigation measure occurred between publication of the draft EIR and final EIR. Though, without a university, the project may only reduce NOx and ROG emissions by 20 percent and not 35 percent, the court noted "it is debatable whether a 15 percent reduction in mitigation is a substantial increase in the severity of these particular environmental impacts." In any event, the court noted that revisions to the EIR's mitigation measures did not increase overall environmental impacts from the project.

Greenhouse Gas Emissions Analysis

The court also rejected the Environmental Council's claims that the EIR failed to adequately examine greenhouse gas impacts (GHG). As the court noted, the EIR included a mitigation measure requiring that all future specific planning area amendments analyze resulting GHG emissions. Pursuant to this measure, the project proponent needed to revise a GHG reduction plan for the project to ensure that any change in the project would not result in an exceedance of the project's area-wide 5.80 metric-tons-per-capita significance threshold.

Traffic Analysis

The Environmental Council also failed to establish that the EIR inadequately analyzed traffic impacts. As the court noted, plaintiffs made a number of mistaken assumptions with this claim, including an assumption that the non-automotive mode assumed by the EIR for university area trips had a larger than actual reduction on the overall mode-share in the SPA. The court also noted that plaintiffs failed to account for the fact that removing the university from the project would result in 9,000 fewer daily trips.

Project Consistency

The court also rejected the Environmental Council's claims that the EIR failed to address the project's consistency with the Sacramento Area Council of Government's Metropolitan Transportation Plan / Sustainable Communities Strategy (MTP/SCS). Nothing in Senate Bill 375 requires this type of consistency analysis, and plaintiffs did not cite any CEQA provision requiring such an analysis.

Phased Construction Schedule

Last, the court rejected plaintiffs' argument that the EIR needed to adopt a "phased" construction schedule to ensure that a university would be con-

structed. The Environmental Council did not cite any evidence in the record that such "phasing" was a feasible mitigation measure.

Conclusion and Implications

This case highlights the core functions underlying EIRs in the California Environmental Quality Act review process. EIRs are not required to be perfect, but are required to analyze the reasonably foreseeable impacts of a project at the time the application is considered to provide local agencies with detailed information about a project's likely impacts. Even if some project components are not ultimately completed because of market conditions and otherwise, an EIR that includes those components is not defective unless those components are purely illusory or included to mask a project's real-life impacts. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C076888.PDF. (Travis Brooks)

FIRST DISTRICT COURT FINDS CITY'S VIOLATION OF BROWN ACT DID NOT NULLIFY APPROVAL OF TENNIS CABAÑA PROJECT

Fowler v. City of Lafayette, ___Cal.App.5th___, 258 Cal.Rptr.3d 353(1st Dist. Mar. 11, 2020).

The City of Lafayette (City) approved an application to build a tennis cabaña on a residential property. A group of neighbors filed a petition for writ of mandate, alleging that the City improperly considered the application in closed sessions in violation of the Ralph M. Brown Act (Brown Act) and violated their right to a fair hearing. The Superior Court denied the petition, finding that there was no prejudice, and the Court of Appeal then affirmed.

Factual and Procedural Background

The owners of a property in Lafayette sought to build what they called a tennis cabaña next to a tennis court on their 2.38-acre property. The City's design review commission (DRC) approved the project, with conditions of approval requiring the applicants to record a landscape maintenance agreement and a deed restriction preventing the cabaña from being used a secondary dwelling unit.

Plaintiffs are neighbors who objected that the tennis cabaña was inconsistent with the neighborhood and too close to an adjacent home, such that it would subject the occupants to noise and loss of privacy. They appealed the DRC's action to the City's planning commission, asserting a number of objections. The planning commission then considered the matter at four meetings, during the course of which the applicants made additional changes to the project, and ultimately approved the project subject to conditions of approval. Plaintiffs appealed to the city council.

The city council ultimately considered the appeal at four meetings. At the final meeting, the city council denied the appeal and upheld the planning commission's approval of the application, subject to conditions, on a four-to-one vote.

While the matter was pending, however, the applicant's attorney had threatened to the sue the City if it denied the project, and the city council discussed the threat of litigation during closed sessions held before three city council meetings. The fact that a threat of litigation had been made was not noted in the agenda for any of the public meetings, and there was no mention of it in any of the packets of information (including, for example, staff reports and agenda attachments) that were made available to the public for inspection in City offices and on-line before the meetings. The agendas simply noted that the city council would confer with legal counsel in closed session about one case of anticipated litigation, without identifying the case.

In order to see a notation regarding the threat of litigation in this matter, a member of the public would have had to visit the City's planning counter, speak with a planner, and ask to see the project's "notes field." The computer network that provided that information was password-protected and there was no indication that the notes in the project's application database were printed out until after the city council reached its decision. Plaintiffs did not learn that the applicant had threatened litigation or that

the city council had discussed the matter in closed sessions under after the project had been approved.

Plaintiffs brought a petition for writ of mandate and complaint, alleging that the City violated the Brown Act by discussing the application in closed hearings, and that they were deprived of their right to a fair hearing. The Superior Court rejected all of the claims, and plaintiffs then appealed.

The Court of Appeal's Decision

The Brown Act

The Brown Act requires most meetings of a local agency's legislative body to open and public. One of the exceptions to this rule allows closed sessions for an agency to:

> . . .confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation. (Gov. Code, § 54956.9.)

Litigation is considered pending when, among other things:

> . . .[a] point has been reached where, in the opinion of the legislative body of the local agency on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency. (Gov. Code, § 54956.9(d)(2).)

That same section of the Brown Act, however, limits "existing facts and circumstances" in this context to five scenarios, two of which were potentially applicable to the case: 1) facts and circumstances, including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the agency and that are known to a potential plaintiff or plaintiffs, which facts or circumstances shall be publicly stated on the agenda; and 2) a statement threatening litigation made by a person outside an open and public meeting on a specific matter within the responsibility of the legislative body so long as the official or employee of the local agency receiving knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting, which record shall be available for public inspection pursuant to § 54957.5.

At the outset, the Court of Appeal found that the first of these scenarios did not apply, particularly given that the second scenario specifically addresses a public agency's obligations when a person has threatened litigation outside a public meeting. The court found, however, that even with respect to the second scenario, the City failed to meet its duty to make the record of the statement available for public inspection pursuant to § 54957.5, which directs public agencies to disclose agendas of public meetings and other writings that are distributed to members of a local agency in connection with open meetings.

The City contended that its obligation was limited to making the statement made by plaintiffs' counsel available for public inspection at its offices, and did not require that the statement be distributed in the agenda packet. The court disagreed, finding that under Government Code §§ 54956.9(e)(5) and 54957.5, a record of the threat should have been included in the agenda packet made available at City offices. The fact that the record was available for inspection in City offices upon request did not alter this analysis, as the court found that this availability would be illusory if an interested person would not know the question to ask.

Nullification of Agency Action

The Court of Appeal next considered whether the City's violation of the Brown Act required the project approval for the cabaña to be nullified. Generally, Government Code § 54960.1 authorizes a court to find null and void an action taken in violation of specified portions of the Brown Act. Here, the court found that the project approval occurred not in closed session but in an open session that was properly noticed, and at which the city council considered the matter fully after hearing from all interested parties. Thus, it found, the project approval itself did not fall within the terms of the statute, which authorizes nullification only of "an action taken . . . in violation of" specified portions of the Brown Act.

The Court of Appeal also found that the City's action did not result in prejudice. The project was considered at four open meetings at which the City Council considered plaintiffs' appeal. There was a thorough discussion by staff and council members as

well as extensive comments by members of the public. There was no reasonable argument, the court concluded, that the City failed to fully consider plaintiffs' appeal or that plaintiffs would have achieved a more favorable result if they had known the city council also was considering the litigation threat in closed session. On this basis, therefore, the Court of Appeal affirmed the Superior Court's decision.

Conclusion and Implications

The case is significant because it contains a discussion of the pending litigation exception under the Brown Act, as well as a substantive discussion of what is required to show prejudice under the Brown Act. The decision is available online at: https://www.courts.ca.gov/opinions/documents/A156525M.PDF. (James Purvis)

FIFTH DISTRICT COURT UPHOLDS DENIAL OF CHALLENGE TO CITY'S MUNICIPAL CODE ADDRESSING VOTING REQUIREMENTS FOR PROJECT APPROVALS

Lateef v. City of Madera, ___Cal.App.5th___, Case No. F076227 (5th Dist. Feb. 14, 2020).

Following denial of an application for approval of a neighborhood business and Conditional Use Permit to sell tobacco and alcohol products before the city planning commission, the applicant appealed to the city council. The appeal, under the city's municipal code, must be granted by five out of seven members. The problem, however, was that out of the seven council seats, one was vacant from office and one council member recused himself. The resulting vote of 4-1 to deny the appeal was, as alleged in the petitioner's lawsuit, a violation of the municipal code. The Court of Appeal for the Fifth District affirmed the Superior Court's ruling denying the challenge to the city's municipal code.

Background

In 2015, petitioner submitted an application to the planning commission seeking approval to operate a neighborhood convenience store and to obtain conditional use permits to sell tobacco and alcohol products. The planning commission denied the application.

Petitioner appealed. Municipal code § 10-3.1310(E) requires a:

> . . .five-sevenths vote of the whole of the Council shall be required to grant, in whole or in part, any appealed application denied by the Commission.

At the hearing, of the seven city council seats, one seat was vacant and one member recused himself due to a conflict of interest, leaving only five members to vote. At the close of the public hearing, the city council voted 4-1 to deny petitioner's appeal application.

Petitioner filed suit for writ of mandate against the city and city council alleging that the city had denied him a fair hearing and violated municipal code § 10-3.1310(E)—which petitioner argued requires only five-sevenths of the quorum of the city council to vote in favor of an appeal. The trial court rejected petitioner's interpretation determining that "whole of the Council" means all members of the council, therefore five affirmative votes were required for petitioner to prevail on his appeal. The trial court denied petitioner's petition for administrative *mandamus*.

This appeal followed.

The Court of Appeal's Decision

The issue on appeal, as framed by petitioner, is whether subsection 10-3.1310(E) requires an affirmative vote by: 1) five-sevenths of those councilmembers present and voting; or 2) five-sevenths of the seven members of the city council. In considering this, the appellate court employed the rules of statutory construction, which are also applicable to municipal ordinances.

The court found that subsection 10-3.1310(E) was straightforward and unambiguous. They rejected petitioner's argument that "whole of the Council" means only "those councilmembers present and voting."

Distinguishing the *Tidewater* Decision

The court distinguished the Supreme Court's decision in *Tidewater Southern Railway Company v. Jordan*, 163 Cal. 105 (1912), relied on by petitioner. In that case, the operative language required a "unanimous vote of its board of directors," which the court noted was different than if it had called for a "unanimous vote of all the directors" or a "unanimous vote of all members of the board." The point being, the provision at issue in *Tidewater* looked "to the body constituting the board of directors, rather than the individuals of whom that board is comprised." In contrast, here, the appellate court found that "five-sevenths vote of the whole of the Council" referred not to the city council body, but rather the individual councilmembers. The court explained that to avoid surplusage the word "whole" must mean something.

Even if the ordinance's language was ambiguous, the court found that the staff report prepared for the amendment of subsection 10-3.1310(E) confirmed the city intended "whole of the Council" to mean the seven-member council. According to the staff report, the amendment from four-fifths to five-sevenths was intended to reflect the transition from a five-member city council to a seven-member body.

Claim of 'Absurd' Results

Finally, petitioner pointed out that the city's interpretation of subsection 10-3.1310(E) creates an absurd result wherein an applicant appealing an adverse commission decision could be before the city council with only four councilmembers voting, which is sufficient for a quorum but the appeal would be denied because it is impossible to ever have five votes—leaving an applicant's right to appeal meaningless. The court, however, refused to rewrite the ordinance because doing so would be in contravention of the city's expressed intent to require a supermajority to allow for fair reevaluation of planning commission's decisions.

Denial of Fair Hearing Claim

Petitioner also contended that if the city's interpretation of its ordinance is correct, that he was deprived of a fair hearing—claiming that it is not fair to count a recused councilmember or a vacant council seat as all of the members. The court disagreed. Under California law, a vacant council seat is included in determining whether a quorum exists and therefore the court found it was proper to include the vacant council seat in determining whether petitioner had enough votes to grant his application. With respect to the councilmember who recused himself, the court found that there were five council members available to vote, and petitioner could have requested a continuance of the hearing until the vacant seat was filled to better increase his chance of prevailing. Even had the council excluded the recused councilmember from the calculation, petitioner would not have prevailed as five-sevenths of six councilmembers is a number greater than four. The court held that petitioner had not been denied a fair hearing.

Conclusion and Implications

While this case is specific to the City of Madera, it does offer food for thought when considering the number of decision-makers needed to determine an administrative appeal. It is a reminder to carefully review all local ordinances that may apply and think strategically about how those requirements may affect the merits of a particular project.

The court's decision is available online at: https://www.courts.ca.gov/opinions/documents/F076227.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

•**AB 2619 (Stone)—**This bill would establish the Program for Coastal Resilience, Adaptation, and Access for the purpose of funding specified activities intended to help the state prepare, plan, and implement actions to address and adapt to sea level rise and coastal climate change.

AB 2619 was introduced in the Assembly on February 20, 2020, and, most recently, on March 16, 2020, had its hearing postponed in the Committee on Natural Resources.

•**AB 3156 (Rivas)—**This bill would require the California Coastal Commission, on or before July 1, 2021, to adopt regulations to expedite the process of reviewing and acting upon applications for coastal development permits for projects that either include affordable housing units or in which 100 percent of the units will be affordable to households making 80 percent or below the median income.

AB 3156 was introduced in the Assembly on February 21, 2020, and, most recently, on March 9, 2020, was referred to the Committees on Natural Resources and Housing and Community Development.

•**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 March 18, 2020, had its scheduled March 24 hearing in the Committee on Natural Resources and Water postponed by the committee.

•**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 March 18, 2020, had its scheduled March 24 hearing in the Committee on Natural Resources and Water postponed by the committee.

Environmental Protection and Quality

•**ACA 22 (Melendez)—**This measure would prohibit a court, in granting relief in an action or proceeding brought under the California Environmental Quality Act (CEQA), from enjoining a housing project, as defined, unless the court finds that the continuation of the housing project presents an imminent threat to public health and safety or that the housing project site contains unforeseen important Native American artifacts or important historical, archaeological, or ecological values that would be materially, permanently, and adversely affected by the continuation of the housing project, and prohibit the State Legislature from enacting legislation to exempt projects from the requirements of CEQA unless the projects are housing projects, projects for the development of roadway infrastructure, or projects to address an emergency circumstance for which the Governor has declared a state of emergency.

ACA 22 was introduced in the Assembly on February 20, 2020, and, most recently, on February 21, 2020, was printed and may be heard in committee on March 20, 2020.

•**AB 1907 (Santiago)**—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.

AB 1907 was introduced in the Assembly on January 8, 2020, and, most recently, on January 30, 2020, was referred to the Committees on Natural Resources and Housing and Community Development.

•**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 24, 2020, was referred to the Committees on Transportation and Natural Resources.

•**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 March 2, 2020, was referred to the Committees on Natural Resources and Local Government.

•**AB 2706 (Fong)—**This bill would amend the California Environmental Quality Act to make the authorization for a plaintiff or petitioner to elect to prepare the record of proceedings or to agree to an alternative method of record preparation inapplicable in a proceeding challenging a project that will be exclusively located or implemented in a county with fewer than 1,000,000 residents and, if the project is located in a city within that county, the city has fewer than 500,000 residents.

AB 2706 was introduced in the Assembly on February 21, 2020, and, most recently, on March 12, 2020, was referred to the Committee on Natural Resources.

•**AB 2720 (Salas)—**This bill would amend the California Environmental Quality Act require the lead agency, for a groundwater recharge project on agricultural land fallowed as a result of management actions required by a groundwater sustainability plan, to prepare a negative declaration or a mitigated negative declaration if there is substantial evidence in the record that a project or a revised project would not have a significant environmental impact.

AB 2720 was introduced in the Assembly on February 20, 2020, and, most recently, on March 12, 2020, was referred to the Committee on Natural Resources.

•**AB 2991 (Santiago)—**This bill would extend the authority of the Governor to certify a project 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 under the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 from January 1, 2020, to January 1, 2025, and provide that the certification expires and is no longer valid if the lead agency fails to approve a certified project before January 1, 2026.

AB 2991 was introduced in the Assembly on February 21, 2020, and, most recently, on March 5, 2020, was referred to the Committee on Natural Resources.

•**AB 3054 (Salas)—**This bill would amend the California Environmental Quality Act to: 1) require a plaintiff or petitioner, in an action or proceeding brought pursuant to CEQA, to disclose the identity of a person or entity that contributes $1,000 or more toward the plaintiff's or petitioner's costs of the action or proceeding; 2) identify any pecuniary or business interest related to the project or issues involved in the action or proceeding of those persons or entities; 3) authorize a court to, upon request of the plaintiff or petitioner, withhold public disclosure of a contributor if the court finds that the public interest in keeping that information confidential clearly outweighs the public interest in disclosure; and 4) authorize a court to use the disclosed information to determine

whether the financial burden of private enforcement supports the award of attorneys' fees.

AB 3054 was introduced in the Assembly on February 21, 2020, and, most recently, on February 24, 2020, was read for the first time.

•**AB 3279 (Friedman)—**This bill would amend the California Environmental Quality Act to, among other things: 1) require that a court, to the extent feasible, commence hearings on an appeal in a CEQA lawsuit within 270 days of the date of the filing of the appeal; 2) reduce the time in which the petitioner must file a request for a hearing from within 90 to within 60 days from the date of filing the petition; 3) reduce the general period in which briefing should be completed from 90 to 60 days from the date that the request for a hearing is filed; and, 4) authorize a plaintiff or petitioner to prepare the record of proceedings only when requested to do so by the public agency.

AB 3279 was introduced in the Assembly on February 21, 2020, and, most recently, on February 24, 2020, was read for the first time.

•**AB 3335 (Friedman)—**This bill would amend the California Environmental Quality Act provisions allowing for limited CEQA review of certain transit priority projects to require that all parcels within the project have no more than 50 percent, rather than 25 percent, of their area farther than 1/2 mile from the transit stop or corridor.

AB 3335 was introduced in the Assembly on February 21, 2020, and, most recently, on February 24, 2020, was read for the first time.

•**SB 974 (Hurtado)—**This bill would exempt from the California Environmental Quality Act certain projects that benefit a small community water system that primarily serves one or more disadvantaged communities, or that benefit a nontransient noncommunity water system that serves a school that serves one or more disadvantaged communities, by improving the small community water system's or nontransient noncommunity water system's water quality, water supply, or water supply reliability, or by encouraging water conservation.

SB 874 was introduced in the Senate on February 11, 2020, and, most recently, on March 18, 2020, had its April 1 hearing in the Committee on Environmental Quality postponed by the committee.

•**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 March 18, 2020, had its April 1 hearing in the Committee on Environmental Quality postponed by the committee.

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 27, 2020, was referred to the Committees on Housing and Community Development and Local Government.

•**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 24, 2020, was referred to the Committee on Housing and Community Development.

•**AB 2345 (Gonzalez)—**This bill would amend the Density Bonus Law to, among other things, authorize an applicant to receive: 1) 3 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 March 16, 2020, had its hearings postponed in the Committees on Housing and Community Development and Local Government.

•**AB 2470 (Kamlager)—**This bill would authorize a development proponent to submit an application for a development to split one or more dwelling units within a multifamily housing development to create additional smaller dwelling units to be subject to a streamlined, ministerial approval process, provided that development proponent reserves at least 10 percent of the proposed housing units for persons and families of low or moderate income, and require a local government to notify the development proponent in writing if the local government determines that the development conflicts with any of those objective standards within 30 days of the application being submitted; otherwise, the development is deemed to comply with those standards.

AB 2470 was introduced in the Assembly on February 19, 2020, and, most recently, on March 17, 2020, was referred to the Committee on Housing and Community Development.

•**AB 2580 (Eggman)—**This bill would authorize a development proponent to submit an application for a development for the conversion of a structure with a certificate of occupancy as a motel, hotel, or commercial use into multifamily housing units to be subject to a streamlined, ministerial approval process, provided that development proponent reserves at least 20 percent of the proposed housing units for persons and families of low or moderate income.

AB 2580 was introduced in the Assembly on February 20, 2020, and, most recently, on March 12, 2020, was referred to the Committees on Housing and Community Development and Local Government.

•**AB 3107 (Bloom)—**This bill, notwithstanding any inconsistent provision of a city's or county's General Plan, specific plan, zoning ordinance, or regulation, would require that a housing development in which at least 20 percent of the units have an affordable housing cost or affordable rent for lower income households be an allowable use on a site designated in any element of the General Plan for commercial uses.

AB 3107 was introduced in the Assembly on February 18, 2020, and, most recently, on March 16, 2020, had its hearings postponed in the Committees on Housing and Community Development and Local Government.

•**AB 3148 (Chiu)—**This bill would require a city, county, special district, water corporation, utility, or other local agency, except a school district, to reduce an impact fee or other charges imposed on the construction of a deed restricted affordable housing unit that is built pursuant to a density bonus, to amounts that are, depending on the affordability restriction on the unit, a specified percentage of the impact fee or other charge that would be imposed on a market rate unit within the development.

AB 3148 was introduced in the Assembly on February 21, 2020, and, most recently, on March 9, 2020, was referred to the Committees on Housing and Community Development and Local Government.

•**AB 3155 (Rivas)—**This bill would amend the Subdivision Map Act to, among other things, authorize a development proponent to submit an application for the construction of a small lot subdivision that meets certain specified criteria, including that the subdivision is located on a parcel zoned for multifamily residential use, consists of individual housing

units that comply with existing height, floor area, and setback requirements applicable to the pre-subdivided parcel, and that the total number of units created by the small lot subdivision does not exceed the allowable residential density permitted by the existing General Plan and zoning designations for the pre-subdivided parcel.

AB 3155 was introduced in the Assembly on February 21, 2020, and, most recently, on March 9, 2020, was referred to the Committees on Housing and Community Development and Local Government.

•**AB 3234 (Gloria)—**This bill would amend the Subdivision Map Act to specify that no tentative or final map shall be required for the creation of a parcel or parcels necessary for the development of a subdivision for a housing development project that meets specified criteria, including that the site is an infill site, is located in an urbanized area or urban cluster, and the proposed site to be subdivided is no larger than five acres, among other requirements.

AB 3234 was introduced in the Assembly on February 21, 2020, and, most recently, on February 24, 2020, was read for the first time.

•**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 March 18, 2020, had its March 31 hearing in the Committee on Housing postponed by the committee.

•**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 March 18, 2020, had its March 24 hearing in the Committee on Housing postponed by the committee.

•**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 27, 2020, was referred to the Committee on Governance and Finance.

•**SB 1410 (Gonzalez)—**This bill would establish a Housing Accountability Committee within the Housing and Community Development Department and set forth the committee's powers and duties, including reviewing appeals regarding multifamily housing projects that cities and counties have denied or subjected to unreasonable conditions that make the project financially infeasible, vacating a local decision if the committee finds that the decision of the local agency was not reasonable or consistent with meeting local housing needs, and directing the local agency in such case to issue any necessary approval or permit for the development.

SB 1410 was introduced in the Senate on February 20, 2020, and, most recently, on March 12, 2020, was referred to the Committees on Governance and Finance, the Judiciary and Housing.

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 March 16, 2020, was re-referred to the Committee on Local Government.

•**AB 2894 (McCarty)—**This bill would amend the Planning and Zoning Law to require, upon the next revision of the General Plan land use element on or after January 1, 2022, the land use to be revised and updated to address the need for early childhood facilities and to include, among other things, information regarding the location and capacity of existing early childhood education facilities and the barriers to locating and increasing the capacity of existing and any needed future early childhood education facilities.

AB 2894 was introduced in the Assembly on February 21, 2020, and, most recently, onMarch 5, 2020, was referred to the Committees on Local Government and Education.

•**AB 2988 (Chu, Chiu)—**This bill would amend the Planning and Zoning Law to make supportive housing a use by right in zones where emergency shelters are permitted and, by expanding the locations in which, and sizes of, supportive housing that qualify as a use by right, would expand the exemption for the ministerial approval of projects under the California Environmental Quality Act.

AB 2988 was introduced in the Assembly on February 21, 2020, and, most recently, on February 24, 2020, was read for the first time.

•**AB 3122 (Santiago)—**This bill would amend the Planning and Zoning Law to, among other things, (i) require the General Plan inventory of land available for residential purposes to include an analysis of potential sites available for the development of emergency shelters, temporary housing, and supportive housing necessary to provide shelter to the locality's homeless population; and (ii) require a locality develop a comprehensive plan for making emergency shelters, temporary housing, and supportive housing available to the locality's homeless population, with the goal of transitioning individuals housed in emergency shelters into supportive housing and require the plan to address the types of supportive services that the locality will provide to individuals housed in emergency shelters, temporary housing, and supportive housing.

AB 3122 was introduced in the Assembly on February 21, 2020, and, most recently, on March 16, 2020, had its hearings postponed by the Committees on Local Government and Housing and Community Development.

•**AB 3153 (Rivas)—**This bill would amend the Planning and Zoning Law to require a local jurisdiction, as defined, notwithstanding any local ordinance, General Plan element, specific plan, charter, or other local law, policy, resolution, or regulation, to provide, if requested, an eligible applicant of a residential development with a parking credit that exempts the project from minimum parking requirements based on the number of nonrequired bicycle parking spaces or car-sharing spaces provided subject to certain conditions.

AB 3153 was introduced in the Assembly on February 21, 2020, and, most recently, on March 9, 2020, was referred to the Committees on Local Government and Housing and Community Development.

•**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 March 18, 2020, had its March 31 hearing in the Committee on Housing postponed by the committee.
(Paige Gosney)

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