Volume 29, Number 11
August/September 2020

CALIFORNIA LAND USE™
LAW & POLICY Reporter

CONTENTS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

CALIFORNIA LAND USE™
LAW & POLICY Reporter

Publisher's Note: Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher; 530-852-7222; schuster@argentco.com.

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $845.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

 CLU

FEATURE ARTICLE

CALIFORNIA COURT OF APPEAL REJECTS CLAIMS THAT THE CITY OF LOS ANGELES' APPROVAL OF MULTI-USE DEVELOPMENT PROJECTS VIOLATED FAIR HOUSING AND FAIR EMPLOYMENT AND HOUSING ACTS

By James Purvis

An affordable housing organization brought suit against the City of Los Angeles (City), alleging that the City's approval of four multi-use development projects had a disparate impact on *African American and Hispanic residents and thus violated the federal Fair Housing Act and the state Fair Employment and Housing Act. [**Editor's Note*: The Court of Appeal uses the terms "Black" and "Latino" in its opinion and we adopt the court's descriptive terms in the article, below.] The City and real parties in interest (the projects' owners and developers) demurred, which the trial court sustained without leave to amend. Following an appeal, the Court of Appeal for the Second Judicial District affirmed the trial court's ruling. The court's decision is *AIDS Healthcare Foundation v. City of Los Angeles*, 50 Cal.App.5th 672 (2nd Dist. 2020).

Factual and Procedural Background

This case concerned four multi-use development projects within a one-mile radius along Sunset Boulevard in Hollywood: 1) the "Palladium Project;" 2) the "Sunset Gordon Project;" 3) the "Crossroads Project;" and 4) the "6400 Sunset Project." After filing unsuccessful petitions for writs of mandate challenging the approval of some of these projects, the AIDS Healthcare Foundation (Foundation) sued the City based on alleged violations of the Fair Housing Act and the Fair Employment and Housing Act. The Foundation is a nonprofit organization based in Los Angeles that provides medicine and advocacy to over 1,250,00 people in 43 countries. Many of the Foundation's clients are at risk of homelessness and are in extremely low to moderate income households.

In its complaint, the Foundation asserted that the City's approval of these projects would cause housing prices to rise and disproportionately displace Black and Latino residents who no longer would be able to afford to live in the area.

In support of its claims, the Foundation alleged that approval of the projects, including the conditions of approval, constituted City "policies" that would disparately impact Black and Latino residents through gentrification of the community, and that the City's determination about what community benefits should be included in development agreements likewise were "policy determinations." The Foundation also alleged that the City made findings that the projects were consistent with certain City plans and policies, which would have the effect of displacing lower income Black and Latino residents by providing amenities like "high quality" restaurants, retail, and entertainment options that would make the neighborhood more attractive to higher income residents, while providing housing that is unaffordable to the vast majority of current Black and Latino residents. All of this, the Foundation concluded, would lead to rising rents and increase the likelihood that current residents would be displaced from their nearby homes.

Although these stated City policies were facially neutral, the Foundation claimed that they would have an unjustified discriminatory effect on members of minority communities and perpetuate segregated housing patterns because or race, color, or national origin. This, the Foundation contended, violated the Fair Housing Act and the Fair Employment and Housing Act.

The City and real parties in interest filed demurrers to the complaint. Following oral argument, the trial court sustained the demurrers without leave to amend, finding that the complaint failed to state a cause of action against the City or real parties. The trial court also found that the causes of action as to three of the projects were barred by the statute of limitations, and the case as it relates to all four projects was barred on res judicata (or related) grounds. The trial court then entered judgment in favor of the City and real parties, and the Foundation appealed.

The Court of Appeal's Decision

Disparate Impact Claims under the FHA and the FEHA

The Foundation alleged a "disparate impact" theory under the Fair Housing Act and the Fair Employment and Housing Act, which is used to challenge policies or practices that—while facially neutral—have a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale. Although courts have recognized disparate impact theories, they have cautioned that such theories are not instruments to force housing authorities to reorder priorities. Consistent with that finding, the U.S. Supreme Court recently stated that challenged policies or practices are not contrary to the disparate impact requirement unless they create some artificial, arbitrary, and unnecessary barrier to fair housing. At that same time, the Supreme Court explained that a disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a policy or practice causing the disparity. This is to ensure that racial imbalance does not, on its own, establish a *prima facie* case of disparate impact:

> Although the Supreme Court in *Inclusive Communities* recognized disparate-impact liability under the FHA, it cautioned that the 'FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.' (*Inclusive Communities, supra*, 135 S.Ct. at p. 2522.). . . .The Court also explained, 'a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create.' (*Inclusive Communities, supra,* 135 S.Ct. at p. 2523.) The Supreme Court directed courts to 'examine with care whether a plaintiff has made out a prima facie case of disparate impact . . . . A plaintiff who fails to allege facts at the pleading stage or produce statistical evidence demonstrating a causal connection cannot make out a prima facie case of disparate impact.'

Foundation Sufficiently Alleged City Policy—but the Policy Was No Barrier to Fair Housing

On the merits, the Court of Appeal found that the Foundation had sufficiently alleged the existence of a City policy. However, the court disagreed that the City's implementation of this policy through its approval of the projects created an artificial, arbitrary, and unnecessary barrier to fair housing. To the contrary, and distinguishing from caselaw cited by the Foundation, the court found that the approvals neither prohibited the construction of affordable housing in the area nor physically removed affordable housing to make way for more expensive housing or other uses:

> In other words, in all of these cases [cited by the Foundation in support of its argument] the defendant's policy *affirmatively* prevented the building of or removed affordable housing in areas where minority residents were disproportionately affected. The City's approval of the Projects here does not.

The court also found that Foundation did not allege, for instance, that the City had restricted the building of affordable housing in the area as part of its approval of the projects. Nor did it allege what other restrictions the City's approval would have placed on access to affordable housing. The projects themselves, the court noted, do not impose higher rents, do not physically reduce the number of available affordable housing units, and do not preclude the development of affordable housing units. Even assuming the

projects would cause a rise in surrounding rents and disparately impact Black and Latino residents, the court found that the Foundation did not allege that the City's project approvals or implementation of its land use plan were the barriers to affordable housing.

The Court of Appeal further found that, even if Black and Latino residents might be unable to afford most of the new housing, the new housing would not eliminate existing housing. Thus, again, the City's policy could not be classified as a barrier to housing.

Lawsuit Cannot Be Used As a Tool to Force Change in City's Development Prioritites

Ultimately, the court concluded that what the Foundation essentially sought in its lawsuit was to force the City to reorder its development priorities by requiring, for example, additional affordable housing to be built within or near the projects, as opposed to some other area. But, the court noted, in the absence of some policy that actually limits the availability of affordable housing, the Foundation's remedy was to petition the City or the California Legislature to enact laws or policies to counteract the future effects of gentrification:

> Finally, as we have noted, the 'FHA is not an instrument to force housing authorities to reorder their priorities.' (*Inclusive Communities, supra*, 135 S.Ct. at p. 2522.) Here, the remedy [the Foundation seeks]—the halting of the Projects until the City initiates measures to mitigate the effects of gentrification—is precisely the type of remedy *Inclusive Communities* explained the FHA was not intended to impose. AHF would have the court force the City to 'reorder' its development priorities by requiring, for example, additional affordable housing to be built within or near the Projects, as opposed to some other area. . . .Eliminating the City's alleged 'offending' policy—its approval of the Projects—would not make affordable housing more available to minorities, however. As we have discussed, the Projects add affordable housing units to the area's existing supply. Thus, declaring the City's approval of the Projects void will serve only to *reduce* the number of existing income-restricted housing units, rather than provide greater access to affordable housing, as contemplated by the FHA.

The court concluded its thoughts on the Foundation's allegations and remedy sought as follows:

> No one disputes the existence of gentrification or its potential ill effects. But, in the absence of a policy that actually limits the availability of affordable housing, AHF's remedy is to petition the City or the Legislature to enact laws or policies to counteract the future effects of gentrification. The FHA and FEHA, however, were designed not to *impose* land use policies on public and private actors, but rather to *eliminate* those policies that are barriers to fair housing. AHF has not alleged such a policy exists here.

Denying Leave to Amend

Finally, the Court of Appeal addressed the Foundation's claim that the trial court abused its discretion when it sustained the demurrers without leave to amend. The court rejected this claim, finding that the Foundation bore the burden of proving a reasonable possibility of amendment, and that it had only set forth vague or conclusory factual allegations to satisfy this burden. Finding these efforts insufficient, the Court of Appeal affirmed the trial court's decision:

> When a demurrer is sustained without leave to amend, the plaintiff bears the burden of proving there is a reasonable possibility of amendment. To satisfy that burden on appeal, a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. (*Citations Omitted*) The assertion of an abstract right to amend does not satisfy this burden. (*Citations omitted*) Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. (*Citations Omitted*) Allegations must be factual and specific, not vague or conclusory. (*Citations Omitted)* Here, the Foundation] has set forth vague or conclusory factual allegations to satisfy its burden of showing that there is a reasonable possibility that it can amend the legal effect of its complaint.

Conclusion and Implications

The case is significant because it contains a substantive discussion of disparate impact theories under

federal and state fair housing laws, particularly with respect to what constitutes an artificial, arbitrary, and unnecessary barrier to the provision of fair housing. Municipalities throughout California will most certainly take notice of this decision out of the Second District Court of Appeal. Issues of racial inequality coupled with affordable housing shortages in the state have, as of late, been a key focus of the Legislature and the courts. This decision sheds light on (at least within the court's jurisdiction) the outer limits of the Fair Housing Act and Fair Employment and Housing Act, as a tool to review actions on the part of municipalities throughout the state. Ultimately, the decision addresses procedural matters but the court also takes the time to discuss what it would take for a plaintiff to succeed substantively. The Court of Appeal's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B303308.PDF.

James Purvis is an Associate at the law firm of Cox, Castle & Nicholson, LLP, resident in the firm San Francisco office. James focuses on land use and environmental law and litigation across a wide range of industries. James' practice covers, among other things, the California Environmental Quality Act, State Planning and Zoning Law, the Endangered Species Act, the Clean Water Act, and other laws related to species and wetlands issues in California. James also regularly works on projects within the California coastal zone and advises clients on issues pertaining to the California Coastal Act.

REGULATORY DEVELOPMENTS

COUNCIL ON ENVIRONMENTAL QUALITY PUBLISHES FINAL RULE UPDATING NEPA'S IMPLEMENTING REGULATIONS

The Council on Environmental Quality (CEQ) recently published a final rule updating the National Environmental Policy Act's (NEPA) implementing regulations. Among other things, the updated regulations are intended to promote a more timely and efficient NEPA review process, streamline the development of federal infrastructure projects, and promote better federal decision-making. The new regulations, however, have also prompted concerns voiced by some in the environmental community.

Background

NEPA was signed into law by President Nixon on January 1, 1970. The purpose of NEPA is to:

> . . .foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. (42 U.S.C. § 4331(a).)

To that end, NEPA requires that federal agencies undertaking a "major" federal action that significantly affect the quality of the human environment to prepare detailed statements on their actions' environmental effects, any such adverse effects that cannot be avoided if the proposed action is implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. (*Id.* at § 4332(C).)

NEPA does not, however, mandate specific outcomes, rather it requires "Federal agencies to consider environmental impacts of proposed actions as part of agencies' decision-making processes." (85 Fed. Reg. 43304-01, 43306.) Thus, in very general terms, federal agencies comply with NEPA by: 1) preparing an Environmental Assessment of their proposed actions; and 2) preparing an Environmental Impact Statement if the Environmental Assessment concludes that the action may have significant effects on the environment. (*See generally*, 40 C.F.R. § 1501.4(c).)

NEPA also established the CEQ and empowered it to administer the implementation of the statute. (42 U.S.C. §§ 4332(B), 4342, 4344.) In 1977, President Carter directed the CEQ to issue implementing regulations for NEPA, and the CEQ did so in 1978. (85 Fed. Reg. 43304-01, 43307. Since then, the CEQ has only once issued substantive amendments to those regulations. (*Id.*)

President Trump Directs the CEQ to Make Changes

In 2017, President Trump directed the CEQ to issue such regulations as it deemed necessary to, among other things, enhance interagency coordination of environmental review and authorization decisions, ensure that interagency environmental reviews under NEPA are conducted efficiently, and require that agencies reduce unnecessary burdens and delays in applying NEPA. (*Id.* at 43312.) In accordance with this directive, CEQ issued an advance notice of proposed rulemaking on June 20, 2018. (*Id.*) The CEQ's notice of proposed rulemaking was published in the *Federal Register* on January 10, 2020.

Discussion and Summary of Key Elements of the Final Rule

The Final Rule published on July 16, 2020, contains numerous changes to NEPA's implementing regulations. (*See generally,* 85 Fed. Reg. 43304-01.)

Definitions

Among the most significant are changes to the regulatory definitions of "Effects," "Cumulative Impacts," and "Major Federal Action." Under the new definition of "Effects," effects must be "reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives[.]"

(*Id.* at 43343.) Thus, under the definition, a but-for causal relationship will be insufficient to make an agency responsible for the environmental effects of a major federal action under NEPA. (*Id.*) CEQ's explanation of this definition indicates that it is similar to the test of proximate causation applied in tort law. (*Id.*) The Final Rule also completely eliminates the definitions of, and references to, "cumulative impacts" from NEPA's implementing regulations. CEQ has explained that it has eliminated this definition to:

> . . .focus agency time and resources on considering whether the proposed action causes an effect rather than on categorizing the type of effect. . .[and because]. . .cumulative effects analysis has been interpreted so expansively as to undermine informed decision making, and led agencies to conduct analyses to include effects that are not reasonably foreseeable or do not have a reasonably close causal relationship to the proposed action or alternatives. (*Id.* at 43343-43344.)

Finally, the new regulations clarify that "Major Federal Actions" do not include projects where, due to "minimal Federal funding or minimal Federal involvement" the agency lacks control over the outcome of a project. (*Id.* at 43347.)

Deadlines and Page Limits

The new regulations also set deadlines and page limits that govern the development of environmental documents. Under the Final Rule, federal agencies must issue Environmental Assessments within one year of deciding to prepare such a document, and Environmental Impact Statements must be issued within two years. (*Id.* at 43327.) Similarly, the Final Rule now sets a 75-page limit for Environmental Assessments, a 150-page limit for typical Environmental Impact Statements, and a 300-page limit for Environmental Impact Statements of "unusual" scope or complexity. (*Id.* at 43352.) However, all of these deadlines and page limits may be extended if approved by a senior agency official. (*Id.*)

Prohibition on 'Irreversible and Irretrievable' Commitments of Resources

Finally, while NEPA prohibits the "irreversible and irretrievable" commitment of resources which would be involved in a proposed action before the environmental review process is complete (42 U.S.C. § 4332(C)(v), the Final Rule clarifies that non-federal entities may take actions necessary to support an application for federal, state, tribal, or local permits or assistance. (85 Fed. Reg. 43304-01, 43336.) Such actions may include, but are not limited to, the acquisition of interests in land and the purchase of long lead-time equipment. (*Id.* at 43370.)

Conclusion and Implications

The CEQ's Final Rule is more than 70-pages along and contains many more changes in addition to those described above. Although interests such as the U.S. Chamber of Commerce support the new regulations, numerous environmental groups have already challenged the CEQ's adoption of the Final Rule on both substantive and procedural grounds. These lawsuits filed in the U.S. District Courts for the Western District of Virginia (*Wild Virginia, et al. v. Council on Envtl. Quality, et al.*, Case No. 3:20-cv-00045) and the Northern District of California (*Alaska Comty. Action on Toxics, et al. v. Council on Envtl. Quality, et al.*, Case No. 20-cv-05199) are in the earliest stages of litigation, and it is unclear if they will succeed. For more information on the changes to NEPA, *see:* https://www.whitehouse.gov/ceq/nepa-modernization/ (Sam Bivins, Meredith Nikkel)

CALIFORNIA FISH AND GAME COMMISSION TO CONSIDER LISTING WESTERN JOSHUA TREE AMID POTENTIAL IMPACTS ON WATER INFRASTRUCTURE PROJECTS

In August, the California Fish and Game Commission (Commission) continued its vote on whether to accept for consideration a petition submitted by the Center for Biological Diversity to list the western Joshua tree as "threatened" under the California Endangered Species Act (CESA) following significant public commentary on both sides of the issue. If the Commission accepts the petition for consideration

at a later public meeting, the western Joshua tree would temporarily receive the prohibitions against "take" and other protections available under CESA for about a year while the California Department of Fish and Wildlife (CDFW or Department) evaluates whether the species should be permanently listed as a threatened species. Public opposition to the petition has focused on potential economic, development-related and infrastructure impacts, if the western Joshua tree is ultimately listed as threatened.

Background

Joshua trees occur in desert grasslands and shrub lands in hot, dry sites on flats, mesas, bajadas, and gentle slopes in the Mojave Desert. Soils in Joshua tree habitats are silts, loams, and/or sands and variously described as fine, loose, well drained, and/or gravelly, while the plants can reportedly tolerate alkaline and saline soils. Populations are discontinuous and reach their highest densities on well-drained sandy to gravelly alluvial fans adjacent to desert mountain ranges.

On October 21, 2019, the Center for Biological Diversity submitted a petition to the California Fish and Game Commission to list the western Joshua tree as "threatened" under the California Endangered Species Act. The petition describes severe and immediate threats to the Joshua tree primarily attributable to climate change. For instance, the petition warns of increasing mortality among adult Joshua trees at the hotter and lower-elevation edges of their geographic range; increased risk from invasive native grass-fueled fires that pose, and recently resulted in, significant Joshua tree mortality; and the continued emissions of greenhouse gases that are largely attributed to the negative effects of climate change.

CESA prohibits any person from taking or attempting to take a species listed as endangered or threatened. (Cal. Fish & Game Code, § 2080.) The term "take" is defined as attempting to or actually hunting, pursuing, catching, capturing, or killing any listed species. (Cal. Fish & Game Code, § 86.) Unlike the ESA, CESA does not include harming or harassing in its definition of take. Also, unlike FESA, CESA does not include habitat modification in its prohibitions.

Modeled after the federal Endangered Species Act (FESA), CESA is intended to provide additional protection to California endangered and threatened species. FESA and CESA operate in conjunction and a species may be listed under just one act or under both. However, in spring 2019, the federal government declined to add the western Joshua tree to the federal list.

The Commission is responsible for adding, removing, and changing the status of species on the state endangered and threatened species list. The Department of Fish and Wildlife enforces CESA in all other respects. Unlike under FESA, CESA provides the protections of state law, on a temporary basis, to those species officially designated by the Fish and Game Commission as candidate species.

The Listing Process

Several procedural steps are undertaken to determine if a species is added to the CESA endangered or threatened species list. Any person may submit a petition to list a species to the Commission on the approved form. The petition must provide sufficient scientific information to show that a listing is warranted. The Commission has ten days to review the petition for completeness. To be complete, the petition must be on the proper form, incorporate information required by each category in California Fish and Game Code, § 2073.3, and contain a detailed species distribution map. If the petition is complete, the Commission will refer it to the Department for review. The Department has 90 days to provide a report to the Commission recommending that the Commission either reject or consider the petition. If the Commission rejects the Department's recommendation, it must publish a "notice of findings" explaining the reasons it found the petition insufficient. If the Commission accepts the recommendation, it must also publish and indicate the species is considered a "candidate species" for listing.

Once the Commission formally accepts a petition for consideration and the species is given candidate status, the Department must conduct a one year status review of the species and provide the Commission with a report that includes the following information: 1) whether the listing is warranted; 2) a preliminary identification of habitat that may be essential to the species' continued existence; and 3) a recommendation to assist the species' recovery. During this one-year review, the Department must make

reasonable efforts to notify interested parties and solicit comments from independent and competent peer reviewers.

If the Commission determines the listing not warranted, it must remove the species from the list of candidate species. If it determines the listing warranted, the Commission must publish a proposed rule to add the species to the endangered or threatened list in the California Regulatory Notice Register. Once the Commission decides to list a species it must adopt a final rule and obtain approval from the Office of Administrative Law within one year of the published proposed rule. At least once every five years, the Department reviews the status of species as endangered or threatened under CESA. The Department's findings are then reported to the Commission and treated as recommendations to add or remove species from the list of endangered and threatened species.

The Center for Biological Diversity's petition is awaiting the Commission's vote on whether to accept the petition for consideration. The Department, in February of this year, recommended that the Commission consider the petition. In June and then in August, the Commission decided to delay its vote on whether to give the western Joshua tree candidate status until September 2020. The Commission was originally scheduled to vote on the petition in June, but in light of substantial public commentary, staff recommended the vote be continued until August.

Opposition to the Listing

Under CESA, a person may not "take" a threatened or endangered species unless authorized by the California Department of Fish and Wildlife through a permitting process, subject to any special terms and conditions it prescribes. Accordingly, listing the Joshua tree as "threatened" under CESA, or even designating the species as a candidate species, could have a variety of resulting implications for public and private development projects, including wind, solar, and water development projects.

Opposition to the Joshua tree petition has focused on the impacts the listing could have on local economic growth and associated infrastructure projects, including wind, solar, and water projects. A number of local, state and federal officials oppose listing on the basis that the species is not at imminent risk of extinction and is adequately protected by existing law—for instance, by ordinances requiring permits to remove Joshua trees from private property and the presence of Joshua trees in state and national parks. Additionally, local officials have raised concerns that listing would have negative impacts on housing, energy diversification, civil infrastructure, and local governments. In particular, local municipalities and public agencies have also voiced strong opposition to the listing. For instance, the Town of Yucca Valley, Hi-Desert Water District, Victor Valley Transit Authority, High Desert Joint Powers Authority, San Bernardino County, Mohave Desert Air Quality Management District, and QuadState Local Governments Authority submitted a comment letter to the Commission opposing the petition on the grounds that the Joshua tree is not currently imperiled, that existing protections are adequate, and that listing would hamper construction of infrastructure, affordable housing, and alternative energy projects.

Additionally, local agencies in the Yucca Valley area also expressed concerned that listing could halt progress on a wastewater collection and treatment infrastructure currently being constructed under requirements issued by the Regional Water Quality Control Board, Colorado River Basin Region. According to the Town of Yucca Valley, property owners in Phase I of the project agreed to tax themselves approximately $19,000 per single family residential unit to deliver this critical infrastructure to the community. Phase I was completed in approximately December 2019. Preliminary estimates for Phase II of the wastewater project place single family residential units' costs at approximately $28,000. The town expressed concern that numerous property owners will be unable to connect to the state-mandated wastewater collection system without removal of Joshua trees due to increased costs listing the species would impose on the project.

Conclusion and Implications

While it is unclear whether the Commission will vote to accept the petition for consideration, thus potentially leading to listing the western Joshua tree as threated under CESA, opposition from public officials and local government and public agencies emphasizes that increased costs associated with listing the species could compromise future and in-development infrastructure projects that may hamper development in already infrastructure-deficient areas of the state. Whether industry and economic interests can

be aligned with preservation and protection of the western Joshua tree in the future, particularly if the species is listed under CESA, remains to be seen. The Petition is available online at: https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=175218&inline. (Miles Krieger, Steve Anderson)

RECENT FEDERAL DECISIONS

DISTRICT COURT HOLDS EPA HAS AN ONGOING NONDISCRETIONARY DUTY UNDER THE CLEAN WATER ACT TO UPDATE THE NATIONAL CONTINGENCY PLAN

Earth Island Institute, et al., v. Andrew R. Wheeler, et al.,
___F.Supp.3d___, Case No. 20-CV-00670-WHO (N.D. Cal. 2020).

The U.S. District Court for the Northern District of California denied defendants Andrew Wheeler and the U.S. Environmental Protection Agency's (collectively: EPA) motion to dismiss plaintiffs' cause of action for violation of the federal Clean Water Act (CWA). On an issue of first impression, the court considered whether the CWA imposes a nondiscretionary duty on EPA to update or amend the National Contingency Plan (NCP), a plan for responding to oil and hazardous substance contamination that was last updated over 25 years ago. District Court Judge William H. Orrick determined EPA's duty to update is nondiscretionary, such that the environmental plaintiffs could bring a cause of action pursuant to the CWA's citizen-suit provision. The court also denied the American Petroleum Institute's motion to intervene, ruling that the lawsuit concerned EPA's procedure, but not any substantive decision.

Factual and Procedural Background

Plaintiffs Earth Island et al., sued EPA on January 30, 2020, alleging causes of action under the CWA and the Administrative Procedure Act (APA), claiming that the current NCP is "obsolete and dangerous." Plaintiffs alleged that because the current plan permits the use of chemical dispersants proven harmful to humans and the environment, EPA is required under the CWA to amend or update the plan. Plaintiffs further alleged that EPA violated its duties under the APA to conclude a matter presented to it within a reasonable time. EPA filed a motion to dismiss, and the American Petroleum Institute filed a motion to intervene, which EPA did not oppose. Plaintiffs opposed both motions.

The District Court's Decision

The CWA requires the President to prepare and publish a National Contingency Plan for removal of oil and hazardous substances and to minimize damage from oil and hazardous substance discharges, including containment, dispersal, and removal of oil and hazardous substances. The CWA also provides that the NCP "may, from time to time, as the President deems advisable" be revised or otherwise amended.

Under the CWA's citizen suit provision, a citizen may bring suit against the EPA where there is alleged a failure to perform any act or duty which is not discretionary. To state a claim for relief, the citizen suit must allege "a nondiscretionary duty that is 'readily-ascertainable' and not 'only [ ] the product of a set of inferences based on the overall statutory scheme.'"

Mandatory Duty

The court first considered EPA's argument that the plain language of the CWA is permissive, not mandatory. The court rejected this argument, noting that EPA's permissive plain language argument appeared valid on first review "without context," however courts routinely note that "may" does not always indicate discretionary or permissive action. As it related to the CWA, the court also observed the cases interpreting EPA's obligations have held that EPA must review relevant guidelines for possible revision, and that formal revisions must comply with detailed statutory criteria. Here, the court noted that EPA's duty to promulgate the NCP in the first instance is nondiscretionary.

An Ongoing Duty

The court also analyzed the statute's context and found that the CWA requires EPA to take various actions related to the NCP, including: (i) to "prepare and publish the NCP;" (ii) to ensure the NCP provides "efficient, coordinated, and effective action;" (iii) to establish a Coast Guard strike team and

national center to assist in carrying out the NCP, a system of surveillance and notice to safeguard against discharges of oil and hazardous substances and imminent threats of such discharges, and a schedule of dispersants that may be used to carry out the NCP; and (iv) to ensure that removal of oil and hazardous substances "shall, to the greatest extent possible, be in accordance with" the NCP. The court concluded that the NCP requirements in the CWA contemplate an ongoing duty that in turn strongly suggests that the duty to update and revise the NCP is not discretionary, but required.

The also court rejected EPA's interpretation of the statute, because it would allow EPA to "fail to review, update, or amend the NCP for decades, despite scientific advances," incidences of oil and hazardous substances discharges, and "an internal report concluding that the NCP was outdated and inadequate." EPA's interpretation would frustrate the purpose of the statute to achieve an efficient response to pollution.

The Motion to Intervene

Finally, the court denied the American Petroleum Institute's motion to intervene because plaintiffs' complaint attacked only EPA's procedures with respect to amending or revising the NCP, not the substance of the regulations, citing several supporting cases. EPA's rule-making process adequately protected the intervening party's interests.

Conclusion and Implications

The current NCP is more than 25 years old. This decision will obligate EPA to update the NCP with new information related to the use of chemical dispersants proven harmful to humans and the environment. The court's opinion is available online at: https://ecf.cand.uscourts.gov/doc1/035119332281. (Rebecca Andrews, Patrick Skahan)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT HOLDS AGENCIES MUST RETAIN DOCUMENTS MANDATED FOR INCLUSION IN THE ADMINISTRATIVE RECORD UNDER CEQA

Golden Door Properties, LLC v. Superior Court of San Diego County, ___Cal.App.5th___, Case Nos. D076605, D076924, D076993 (4th Dist. July 30, 2020).

The Fourth District Court of Appeal in *Golden Door Properties, LLC v. Super. Ct. of San Diego County* largely overturned a discovery referee's recommendations, which were later adopted by the trial court, holding that a lead agency must retain writings subject to inclusion in the administrative record under Public Resources Code § 21167.6, and permitting discovery to identify documents that had been deleted from the county's files.

Factual and Procedural Background

The county has a policy whereby emails are permanently deleted after 60 days unless the email user determines that the email needs to be saved, in which case it is retained for at least two years.

In 2015, the project applicant proposed a mixed-use development in close proximity to petitioner's property. In June 2017, the county released a California Environmental Quality Act (CEQA), draft Environmental Impact Report (EIR) for the project. Shortly thereafter in July 2017, petitioner submitted a Public Records Act (PRA) (Gov. Code, § 6250 *et seq.*) request seeking the draft EIR's technical analyses. The county refused production claiming its consultants had possessory rights to the documents.

Petitioner submitted another PRA request in October 2017 requesting copies of the county's consultant contracts along with all documents and communications in the county's possession pertaining to the project. Despite that environmental review had been ongoing for nearly three years, the county produced only 42 emails covering only the 60-day period from September through October 2017. When questioned, San Diego County explained its 60-day auto-deletion program for emails. The county subsequently refused to produce copies of emails that may have been deleted held by its consultants.

In June 2018, the county released a second draft EIR for the project. Prior to certification of the EIR, petitioner filed a PRA lawsuit alleging, among other claims, that the county improperly destroyed official records and improperly withheld records under the PRA. In July 2018, the trial court issued a temporary restraining order directing the county to stop deleting project-related emails.

The county certified the EIR on September 26, 2018. petitioner, and others, filed lawsuits. The court consolidated all actions, including petitioner's PRA lawsuit for a single trial.

In January 2019, petitioner served discovery requests under the Civil Discovery Act for the documents it had already requested under the PRA in order to prepare the administrative record. Between January and May 2019, the county produced nearly 6,000 documents, but refused, in part, requests seeking documents pertaining to the county's compliance with petitioner's PRA requests. Attempting a different avenue, petitioners unsuccessfully attempted to obtain copies of deleted emails from the project applicant the county's environmental consultants. Petitioner also attempted to subpoena the county's environmental consultants for project-related emails, notes, studies and agreements between them and other parties. The consultants objected. Petitioner also filed motions to compel discovery and require a privilege log for withheld documents.

The parties stipulated to the appointment of a discovery referee and the county agreed to prepare a privilege log. The discovery referee denied petitioner's series of discovery motions on a number of grounds:

1) that the discovery requests improperly sought extra-record evidence;

2) failure to exhaust administrative remedies;

3) failure to prove documents were destroyed;

4) the county's 60-day email deletion policy was lawful;

5) discovery was not available under the PRA;

6) the county was not in constructive possession of consultant documents and therefore production was not required; and

7) the common interest doctrine applied. The trial court adopted the discovery referee's recommendations.

Petitioner filed a writ petition (the first of three) with the Court of Appeal seeking a writ of mandate directing the trial court to grant the motions to compel or otherwise rule that the county had violated Public Resources Code § 21167.6 by destroying documents subject to inclusion in the administrative record. The appellate court summarily denied the petition and petitioner filed a petition for review in the Supreme Court. Shortly thereafter, the county produced a privilege log, which petitioner alleged was inadequate.

When petitioner subpoenaed several of the county's environmental consultants for business records, the consultants refused production. Petitioner filed a motion to compel. Petitioner also noticed depositions for the county individual most knowledgeable about the document retention policies. In response, the county filed a motion to quash the deposition notice. The discovery referee denied the motion to compel and granted the county's motion to quash, awarding $7,425 in sanctions. The trial court adopted the discovery referee's ruling but struck the sanctions.

Petitioner filed a second writ petition with the appellate court challenging denial of its motions to compel and the order granting the motion to quash. Subsequently, the California Supreme Court granted the petitioner's petition filed earlier related to its initial discovery motions transferring the matter back to the appellate court with direction to issue an order to show cause regarding why the first writ petition should not be issued. The Fourth District Court of Appeal issued an order addressing the first writ petition and another showing cause regarding the second writ petition, consolidating the two writ proceedings.

In October 2019, petitioner filed a motion to augment the administrative record to add documents omitted by the county. The trial court denied the petition and petitioner filed a third writ petition with the appellate court. The court issued an order to show cause and consolidated the three petitions.

The Court of Appeal's Decision

County's Email Destruction Policy

As a threshold matter, the Fourth District first considered whether the writ petitions were moot because the county had rescinded and vacated its certification of the EIR and approval of some (but not all) associated land use entitlements. The court held that the petitions were not moot because the county did not rescind all project approvals and the applicant indicated its intent to proceed with the project.

Even if the issue was moot, the court stated that it had the discretion to retain a moot case on three bases: 1) the case presents an issue of broad public interest that is likely to recur; 2) the parties' controversy may recur; and 3) a material issue remains for the court's determination. The court stated that the California Supreme Court's actions in this matter implicitly determined that the county's 60-day email deletion policy was an issue of statewide significance. Thus, the court concluded that the writ petitions were not moot, but even if they were it exercised discretion to decide them.

In considering the issue of whether Public Resources Code § 21167.6 requires documents subject to inclusion in the administrative record to not be destroyed before the record is prepared, the court provided a recitation of § 21167.6, which has been interpreted to encompass any document that "ever came near a proposed development or to the agency's compliance with CEQA in responding to that development."

Using the plain and commonsense meaning of the language in the statute, the court found that to the extent county policies allow for the destruction of emails that § 21167.6 mandates be retained, § 21167.6 controls. The court next turned to the mandatory and broadly inclusive words in the statute, *e.g.*, § 21167.6 subdivisions (e)(7) and (e)(10), which call for:

> . . .all written evidence or correspondence. . .[and]. . .any other written materials relevant to the respondent public agency's compliance with this [CEQA] or its decision on the merits of the project.

The court specified that these sections cannot be reasonably interpreted to mean:

> . . .all written materials, internal agency communications, and staff notes except those emails the lead agency has destroyed.

The court further found that interpreting § 21167.6 to require documents within its scope be retained is consistent with core CEQA policies, *i.e.*, information and disclosure. The court rejected the county's argument that § 21167.6 only lists documents to be included in the administrative record, but does not mandate retention of those documents. The court questioned the inherent futility in enumerating mandatory record components, only to allow a lead agency to delete writings not to its liking to keep them out of the record. Based on the plain language of the statute, the court held "that a lead agency may not destroy, but rather must retain writings § 21167.6 mandates for inclusion in the record of proceedings.

The county also argued that a lead agency should only be required to retain those writings that the CEQA Guidelines or a statute designates. For example, certain provisions of the CEQA Guidelines identify retention periods for particular documents, *e.g.*, EIRs, notices of determination, or notices of exemption. The court disagreed. The court held that CEQA Guidelines regarding document retention are not exclusive adding that the provisions addressing document retention timelines generally serve to inform the public of which documents trigger limitation periods, further underscoring the importance that these documents be made publicly available. The court held that it was "inconceivable" that in adopting § 21167.6 the California Legislature intended only the handful of documents identified in the CEQA Guidelines be retained to serve the dual purpose of providing the public with information and ensuring meaningful judicial review of a lead agency's decision.

Next the Court of Appeal held that the trial court erred in applying the rules for extra-record evidence. The documents sought by petitioner were already mandated for inclusion in the record under the statute. The court held that the discovery referee failed to first determine if the documents qualified for inclusion in the record pursuant to § 21167.6, subdivision (e). Only if the item does not fall within the scope of the statute is its admissibility determined under the rules applicable to extra-record evidence.

The court next discussed the inapplicability of a string of authorities relied on by the discovery referee as the basis for his ruling that the county's email destruction policy was lawful finding that none of them supported the discovery referee's ruling.

The court further found that the referee had inappropriately equated non-official emails with preliminary drafts in determining that "[n]on-official emails and other preliminary drafts" are not included under § 21167.6. The court noted that to describe a communication as a non-official record email does not speak to whether it is final or instead a preliminary draft.

The county's argument that its policy is consistent with other agencies' practices and recommendations failed to persuade the court. The court noted that whether the county's policy complied with CEQA was not "based on a popularity poll" but must be determined based on the statutory language interpreted in light of CEQA policies and goals.

The court also rejected several alternative grounds relied on by the referee in denying petitioner's discovery motions. Regarding exhaustion, the court pointed out that the record establishes that petitioner preserved the document destruction issue in a letter delivered to the county board three days before the notice of determination was issue. The referee, however, refused to consider this argument because petitioner submitted it for the first time in their reply papers. The court, however, highlighted the exception to prohibiting new evidence presented with reply papers for evidence that is strictly responsive to arguments made for the first time on opposition—concluding that the referee's ruling constituted an abuse of discretion because he applied the incorrect legal standard.

Motions to Compel

With respect to the referee's recommendation to deny petitioner's motions to compel because petitioner failed to:

> . . .make a timely request of the [c]ounty to retain non-essential emails, the court pointed out that such requirement is antithetical to the underlying purpose of CEQA, which is government accountability.

Discovery in CEQA Matters

The court also rejected the county's contention that discovery is generally not permitted in CEQA matters as incorrect relying on cases where courts have allowed discovery in CEQA proceedings. In response to the county's argument that allowing discovery conflicts with CEQA's legislative goals that such actions be decided expeditiously, the court noted that the delay was caused by the county's failure to abide by § 21167.6 and that discovery would not be necessary had the county complied with the mandatory and broad inclusive language found therein.

In response to the county's argument that it would cost $76,000 per month for email storage, the court clarified nothing in § 21167.6 or the opinion requires retention of emails having no relevance to the project or the agency's compliance with CEQA with respect to the project. For example, email equivalents to "sticky notes, calendaring faxes, and social hallway conversations" are not within the scope of § 21167.6, subdivision (e) and do not need to be retained. Similarly, the court emphasized that relevant emails do not need to be retained indefinitely stating that CEQA's famously short statutes of limitation is a relevant consideration in determining whether a document retention policy is consistent with CEQA.

Discovery Requests Propounded on Project Applicant and Consultants

The court found the referee's ruling to deny petitioner's motion to compel discovery on the project applicant and consultants erroneous. The discovery referee recommended denying the motion to compel because it was too late to enlarge the administrative record. The court reiterated that petitioner was not attempting to enlarge the record, but instead attempting to compile the record as provided in § 21167.6.

The court also found the discovery referee's recommendations denying petitioner's motions to compel production of documents on the county's consultants were also erroneous.

Common Interest Doctrine

In May 2019, petitioner filed a motion to compel the county to produce a privilege log after the county objected to production of documents on several grounds, including the common interest doctrine. The county produced a privilege log identifying 3,864 withheld documents, and later produced an amended privilege log identifying 1,952 documents.

Petitioner asserted that the common interest doctrine did not apply to the documents shared between the project applicant and the county prior to October 10, 2018, the date the county board adopted the last project approval. The court disagreed holding that the referee correctly determined the common interest doctrine applied pre-project approval. The court distinguished *Ceres for Citizens v. Super. Ct.*, 217 Cal. App.4th 889 (2013), by pointing out that petitioner had already sued the county twice prior to project approval, each time seeking orders to kill the project and creating the common interest between the lead agency and the applicant to defend the project pre-approval.

PRA Exemptions

The county relied on both the preliminary draft exception and the deliberative process privilege to withhold approximately 1,900 documents from discovery. The referee upheld all 1,900 claims without analyzing any of the underlying documents or even referring to generic categories of documents. In contrast, the court held that the county had made an insufficient showing to support its claims that these documents were privileged or exempt.

The court discussed the difficult balance the county must trike between not giving away the information it seeks to protect while also providing enough information to give a requester "a meaningful opportunity to contest" the basis upon which an agency withholds documents and for the court to determine whether the exemption applies. The court found that the declaration offered by the county to support its privilege claims offered only "broad conclusory claims" that "merely echo public policies underlying claims of privilege generally." The court held that the county had failed to carry its burden to establish that the public interest in withholding the documents clearly outweighed the public interest in disclosure.

Remedy

The court found that the trial court's order denying petitioner's motion to augment must be vacated because the county's long-standing email retention policy is unlawful. It held that petitioner should be afforded a reasonable period of time to bring a new motion to augment after discovery is completed.

Conclusion and Implications

Going forward, CEQA practitioners may see more and more petitioners relying on this case to request discovery to prepare the administrative record. Moreover, as the county argued that their 60-day automatic deletion policy "comports with other agencies' practices and recommendations," this decision may have far reaching implications on lead agencies' document retention policies. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/D076605.PDF.
(Christina Berglund, Mina Arasteh)

FOURTH DISTRICT COURT FINDS DEVELOPMENT AGREEMENTS CAN ABRIDGE VESTED RIGHTS ESTABLISHED IN APPROVED VESTING TENTATIVE MAPS

North Murrieta Community, LLC v. City of Murrieta et. al., 50 Cal.App.5th 31 (4th Dist. 2020).

In a June 8, 2020 decision, the Fourth District Court of Appeal provided some clarity on previously undecided issue regarding the interplay between vesting tentative and development agreements that purport to extend the vested rights established by the vesting tentative map. Ultimately, the Fourth District agreed with the trial court that despite the vested rights established by an applicant with an approved a vesting tentative map, that applicant can contractually agree to alter the scope of his or her vested rights in a subsequently agreed upon development agreement with a local agency.

Factual and Procedural Background

In 1999, petitioner North Murrieta, LLC (Developer), applied for a vesting tentative map in association with the Golden City Project in the City of Murrieta (City) which the city approved. Consistent with the Subdivision Map Act, approval of the vesting tentative map precluded the city from imposing regulations, conditions, and imposing fees not in effect at the time it approved the map for two years, with the possibility of a one-year extension.

On March 6, 2001, the City and the Developer entered into a development agreement which extended the term of the vesting tentative map for a period of 15 years. The development agreement froze many of the terms and conditions that could be placed by the City on development of the Golden City Project. However, the agreement expressly allowed the City to impose new fees, not in effect at the time the vesting tentative map was approved, to mitigate the effects of the development, provided that the new fees were generally applicable throughout the City and were designed to address project impacts that were not fully mitigated by existing fees or exactions at the time of the City's approval of the development agreement.

On February 4, 2003, the Murrieta city council adopted the Western Riverside County Transportation Uniform Mitigation Fee Program Ordinance (TUMF). The TUMF levied fees on developments throughout the city to mitigate the effects of such development on transportation.

In 2015, a home builder that purchased portions of the project paid nearly $550,000 in TUMF fees. Both the homebuilder and the Developer objected to the fees and the homebuilder assigned its rights to the Developer.

At the Superior Court

In January of 2018, the Developer filed a petition for writ of mandate seeking to recover the TUMF payments from the City. The Developer also sought a

declaratory judgment that the City could not require payment of TUMF payments until after, the city's extension of vested rights for the project expired pursuant to the development agreement in 2019.

The trial court rejected Developer's petition. Essentially the trial court concluded that, while the city agreed to extend most of the vested rights established by the tentative map in the development agreement, the also Developer agreed, that the city could impose additional generally applicable mitigation fees if mitigation fees in place were inadequate.

The Court of Appeal's Decision

On appeal, the Developer argued that the City was required to heed the limits on additional fees that were part of approval of the vesting tentative map in 1999 until the map formally expired pursuant to the development agreement in 2019.

The Fourth District rejected the Developer's claims and agreed with the trial court, holding that while the development agreement froze most of the regulations, conditions, and fees the city could impose on the Developer, the agreement did make two key changes to the initial vested rights. First, the agreement, by its terms changed the date upon which the Developer's rights vested, moving the vesting date from 1999 to March 5, 2001. Second, the development agreement reserved to the city the "power to impose additional fees or increase fees" so long as those fees were effective citywide for project impacts that were not fully mitigated by existing fees or exactions at the time of the City's approval of the development agreement. Here, because the TUMF met these criteria, the TUMF duly applied to the Golden City Project.

In discussing the interplay between vesting tentative maps and later development agreements that may extend some of the rights established by such vesting tentative maps, the court noted:

> . . .[the Developer] offers no authority—and really no reason for thinking vesting tentative maps impart a species of super rights that cannot be negotiated away. Nor do they offer any reason that development agreements should be treated differently than other contractual agreements. The law says development agreements are contracts, enforceable like normal contracts. . . .

The court referenced the development agreement statutes in the Government Code (Cal. Gov. Code § 65864 *et seq.*) as allowing:

> A city or county to freeze zoning and other land use regulation applicable to a specified property to guarantee that a Developer will not be affected by changes in standards for government approval during the period of development...It also permits municipalities to extract promises from the Developers concerning financing and construction of necessary infrastructure.

Conclusion and Implications

The *North Murrieta* decision is important because it provides clarity on a novel issue regarding vesting tentative maps and development agreements where a subsequent development agreement purports to alter the scope of vested rights established by an initial vesting tentative map. Based on this decision, the parties to a development agreement may negotiate and contractually alter vested rights obtained under a previously approved vesting tentative map when extending some of the vested rights established by that vesting tentative map. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/E072663.PDF.
(Travis Brooks)

SECOND DISTRICT COURT FINDS DEVELOPER OBTAINED STATUTORY VESTED RIGHTS PRIOR TO INITIATIVE THAT WOULD HAVE SUBSTANTIALLY CURTAILED PROJECT

Redondo Beach Waterfront, LLC v. City of Redondo Beach, 51 Cal.App.5th 982 (2nd Dist. 2020).

A developer filed a lawsuit against the City of Redondo Beach (City), claiming that it had obtained statutory vested rights for a waterfront development project prior to passage of an initiative by the voters that would have substantially curtailed the project. A group of local residents intervened. The trial court agreed with the developer, and the residents appealed. The Court of Appeal for the Second Judicial District then affirmed the judgment in favor of the developer.

Factual and Procedural Background

This case involves the proposed redevelopment of the Redondo Beach King Harbor Pier area. In 2010, a majority of the City's residents approved "Measure C" via the initiative process, which, among other things, authorized 400,000 square feet of new development. In order to facilitate these improvements, the City acquired leaseholds and other property interests within the waterfront area and sought out a private developer to assist with the project. In 2013, Redondo Beach Waterfront, LLC (Developer) and the City entered into an exclusive negotiating agreement for the project.

In June 2016, the Developer submitted a development application that included a vesting tentative tract map. The City notified the Developer in writing on June 23, 2016, that its application for approval of this vesting tentative tract map was "deemed complete." In August 2016, the Harbor Commission then certified an Environmental Impact Report (EIR) and approved a Coastal Development Permit, Conditional Use Permit, Harbor Commission design review, and a map for the project. That decision was in turn appealed to the city council, which approved the entitlements by way of resolution. Among other things, that resolution explicitly noted that the City's approval of the Map:

> . . .shall confer a vested right to proceed with development in substantial compliance with the ordinances, policies, and standards described in Section 66474.2 of the Government Code of the State.

Also, in June 2016, five days after the City deemed the vesting tentative tract map application to be complete, a group of residents submitted a "Notice of Intent to Circulate Petition" to the City, seeking to place an initiative on the ballot for the next general election. After sufficient signatures were gathered, Measure C was placed on the ballot for a March 2017 election. A majority of voters casting ballots in that election voted in favor of the initiative, and the Coastal Commission later approved the amendments to the City's local coastal program. If applied to the proposed waterfront project, the provisions of Measure C would substantially curtail the project.

The Developer filed a lawsuit, contending that Measure C was invalid, unconstitutional, and, in any event, inapplicable to the project. A group of residents who supported the initiative intervened. The Developer then filed a motion claiming that, as a matter of law, its rights had vested and therefore Measure C could not apply to the project. The City and residents opposed the motion, arguing that the project did not have vested rights and that, even if the City could not apply Measure C to the project, the Coastal Commission could. Following oral argument, the trial court found that the Developer had obtained statutory vested rights to proceed in accordance with the vesting tentative tract map. The court entered in judgment in favor of the Developer, and the residents then appealed.

The Court of Appeal's Decision

Statutory Vested Rights Claim

In a *partially published* opinion, the Court of Appeal addressed the issue of whether the Developer had obtained vested rights to proceed in accordance with the vesting tentative tract map and, if so, whether those rights vested before or after the passage of Mea-

sure C. The Developer's claim was based in Government Code § 66498.1, which provides that a local agency's approval of a vesting tentative map confers a right to proceed with development in substantial conformance with the ordinances, policies, and standards in effect at the time that a map is deemed complete.

Applying this statutory provision, the Court of Appeal found it undisputed that the Developer's application for a vesting tentative tract map had been deemed complete in June 2016. Thus, the Court of Appeal concluded, the Developer had a vested right to develop in conformance with the ordinances, policies, and standards in effect as of that time, well before Measure C was passed in March 2017. It also considered the intent of the Legislature to provide stability for the private sector, finding that it was reasonable for the Developer to be able to rely upon an approved vesting tentative tract map and to expend resources and incur additional liabilities without the risk of having the project frustrated by subsequent actions by the approving local agency.

The Court of Appeal also rejected the residents' claims that these vesting provisions would not apply within the coastal zone because: 1) a local agency's action is subject to review by the Coastal Commission; and 2) under Government Code § 66498.6, a developer that obtains statutory vested rights is not exempt from federal and state law. Essentially, the residents contended, that, where a development project implicates the Coastal Act, the Coastal Act in turn regulates the local agency's actions exclusively, rendering § 66498.1 inapplicable.

The foundation of the residents' argument, the Court of Appeal found, rested on an "untenable interpretation" of § 66498.1 and assumed that vested rights would exempt a developer from compliance with any and all conceivably applicable land use laws and regulations, regardless of the source. But the Developer did not contend as much; it only asserted that a local agency cannot change its own ordinances and policies after it approves a vesting tentative map and then apply those new ordinances and policies to the previously approved project. The Developer conceded that it was subject to the Coastal Act and the jurisdiction of the Coastal Commission. This, the Court of Appeal found, is what § 66498.1 and related statutory provisions contemplate.

Accordingly, the City was prohibited from applying subsequently amended local ordinances, standards, and policies—such as the amended ordinances contained in Measure C—to the project. This does not mean, however, that either the applicability of the Coastal Act or the oversight provided by the Coastal Commission is curtailed by the Developer's vested rights. It only means that the City's approval of the vesting tentative tract maps binds the City, which was the precise question presented in the appeal.

Ripeness

The Court of Appeal also addressed the residents' claim that the lawsuit was not ripe. It again disagreed with the residents, finding that an actual controversy existed regarding the Developer's statutory vested rights. Following the passage of Measure C, for example, the City took the position that some of its obligations might be impacted by the initiative. The City also suggested that it believed that the project would be impacted by the amendments to the local coastal program contained in Measure C, which would necessarily conflict with the Developer's claim of a statutory vested right. That position, the Court of Appeal concluded, virtually guaranteed a future controversy relating to the legal rights and duties of the parties in light of Measure C. Accordingly, it agreed with the trial court that the matter was ripe for adjudication.

Conclusion and Implications

The case is significant because it contains a substantive analysis of statutory vested rights under Government Code § 66498.1 and a discussion such rights as they relate to issues of state and federal law, specifically within California's coastal zone. The decision from the Second District Court of Appeal, ordered *partially published*, is available online at: https://www.courts.ca.gov/opinions/documents/B291111.PDF. (James Purvis)

SECOND DISTRICT COURT FINDS CITY'S REAUTHORIZATION ORDINANCE WAS UNTIMELY UNDER EMINENT DOMAN LAW

Rutgard v. City of Los Angeles, ___Cal.App.5th___, Case No. B297655 (2nd Dist. July 30, 2020).

The Second District Court of Appeal in *Rutgard v. City of Los Angeles* affirmed the trial court's ruling granting a petition for writ of mandate holding that the city failed to timely adopt an ordinance reauthorizing the stated public use for property acquired pursuant to Eminent Domain Law (Code Civ. Proc., § 1230.010 *et seq.*)—which requires the city to use property acquired through eminent domain within ten years or adopt a new resolution reauthorizing the stated public use.

Factual and Procedural Background

In early 2007, petitioner owned a two-story building in the Highland Park neighborhood of Los Angeles. On May 29, 2007, the city enacted an ordinance (2007 Ordinance) authorizing the condemnation of the property to serve as a constituent service center for city residents. The mayor approved the 2007 Ordinance on June 8, 2007. The city proceeded with acquiring the property from petitioner. Due, however, to the 2008 economic downturn, the city never developed the property.

On June 23, 2017, the city council enacted an ordinance (2017 Ordinance) reauthorizing the use of the property for constituent services. The mayor approved the 2017 ordinance on June 27, 2017. The city calculated two different effective dates for the 2017 Ordinance—one based on a posting date of June 28, 2017 and one based on a posting date of June 29, 2017.

Petitioner filed a verified petition for writ of mandate alleging that the city had a legal duty to offer him first refusal to purchase the property because the city's reauthorization was untimely. The trial court agreed finding that the initial resolution of necessity was adopted on May 29, 2007, i.e., the day the city council initially adopted the 2007 Ordinance. The reauthorization resolution was not adopted until June 2017, more than ten years later, in violation of § 1245.245 of the Code of Civil Procedure.

The city appealed.

The Court of Appeal's Decision

Eminent Domain Law provides, in part, that when "[p]roperty acquired by a public entity [through eminent domain]…is not used for [its intended] public use…within [ten] years of adoption of the resolution of necessity [that authorized its taking]," the entity must allow the original property owner an opportunity to buy it back "unless the [entity's] governing body adopts" a new "resolution" "reauthorizing the existing state public use." (Code of Civ. Proc., § 1245.245, subds. (b), (f).)

As the appellate court is reviewing the trial court's interpretation of eminent domain law, the Second District Court of Appeal clarified that the appropriate standard of review was *de novo*.

Ten-Year Reauthorization

The Court of Appeal initially considered the threshold matter of whether § 1245.245 requires adoption of a reauthorization resolution within ten years of adoption of the initial resolution of necessity. The city argued that no time limit is imposed because the ten-year timeframe is only included in subdivision (b) in reference to how long the property has not been put to its designated use, not when the statute refers to adoption of a reauthorization resolution. The court disagreed. The court found that "the undisputed purpose" of subdivisions (b) and (f) of § 1245.245 is to prevent public entities from indefinitely retaining property acquired through eminent domain but not put to public use, and held that the only way to ensure that the purpose was achieved was to require a new resolution reauthorizing the stated public purpose be adopted within ten years of the original resolution.

'Adoption' Means Date of Adoption

Next, the appellate court considered how § 1245.245 defines when a resolution is "adopted"—when it is initially adopted, finally adopted, or when it becomes effective. As between adoption date and effective date, the court held that § 1245.245 refers

to the date of adoption, not when the ordinance becomes effective because the plain language of the statute refers to adoption. The court further reasoned that using the date a resolution is adopted is consistent with the approach taken throughout Eminent Domain Law.

In doing so, the court rejected the city's argument that such an interpretation could leave public entity's with less than ten full years to develop condemned property. The court acknowledged the concern was valid but pointed out that the city's interpretation could lead to entities' manipulating the date by advancing or delaying publication (oftentimes a prerequisite to an ordinance being effective). In fact, the court pointed out that the city, itself, had calculated the effective date of the 2017 Ordinance twice in order to select an effective date it thought complied with § 1245.245's deadline.

As between initial adoption and final adoption, the court held that § 1245.245 refers to the date that all necessary steps for enactment are completed, i.e., final adoption. Based on this interpretation, the court then needed to consider the definition of "final adoption"—concluding that § 1245.245 incorporates the local law definition of final adoption for two reasons. First, the statute itself did not provide for a definition of "adoption" and the court declined to fill in the gap. Second, other provisions in § 1245.245 looks to local law governing a public entity's process for adopting resolutions.

When is a Resolution 'Adopted'?

Finally, the court considered when a resolution is considered "adopted" under the city's charter. Under the city's charter the court concluded that an ordinance is "finally adopted" once it has passed the city council and either 1) been approved by the mayor or 2) if not approved, passed by an override vote by city council.

Applying its interpretation of § 1245.245, the Second District held that the 2017 Ordinance was not timely because it was adopted on June 27, 2017 more than ten years after the initial resolution of necessity was adopted on June 8, 2007.

Conclusion and Implications

This opinion by the Second District Court of Appeal clarifies the timeframe within which a public entity must either develop property acquired through eminent domain for its intended public use or adopt a reauthorization resolution. This is an important clarification, particularly in light of the situation created by COVID-19 and the resulting economic climate. Should the economy see another downturn, other public entities may be faced with similar situations. https://www.courts.ca.gov/opinions/documents/B297655.PDF.

(Christina Berglund)

FIRST DISTRICT COURT FINDS UNIVERSITY FAILED, IN ITS EIR, TO ANALYZE INCREASED ENROLLMENT AS PART OF A LONG-RANGE DEVELOPMENT PLAN

Save Berkeley Neighborhoods v. Regents of the University of California et al, 51 Cal.App5th 226 (1st Dist. 2020.)

In a June 25, 2020 decision, the First District Court of Appeal overturned held that the University of California at Berkeley's approval of student enrollment increases significantly above those contemplated in the University's 2005 Long Range Development Plan, analyzed in a 2005 Program Environmental Impact Report (EIR), constituted a "project" requiring subsequent California Environmental Quality Act (CEQA) review and mitigation. Accordingly, the district court overturned the trial court's grant of the University of California at Berkeley's demurrer.

Factual and Procedural Background

In 2005, the Regents of the University of California adopted a development plan to guide the U.C. Berkeley campus through 2020 and certified a Program EIR for the development plan pursuant to CEQA Guideline 15168. The 2005 development plan contemplated that, by the year 2020, Berkeley's student enrollment would increase by 1,650 students above 2001-2002 average enrollment (with a total head count between 31,800 and 33,450 students). Be-

ginning in 2007, the University made several discretionary decisions to increase enrollment beyond that contemplated in the 2005 development plan to the extent that by 2018, U.C. Berkeley's student enrollment had grown approximately 8,300, or five times that contemplated in the 2005 development plan.

In 2018, Save Berkeley's Neighborhoods filed a petition for writ of mandate and complaint for declaratory relief challenging the University's decisions to increase student enrollment without further CEQA review. Specifically, petitioners alleged that lower anticipated in enrollment through 2020, of 1,650 students, anticipated in the 2005, was part of the "project description" within the EIR for the 2005 development plan. Petitioners alleged that subsequent enrollment increases not outlined in the project description caused significant environmental impacts not analyzed in the 2005 EIR. Accordingly, petitioners claimed that CEQA required the University to prepare an EIR that analyzed these additional impacts and to adopt mitigation measures to reduce them.

The University responded to the petition by filing a demurrer that contended that Save Berkeley could not state a cause of action for violation of CEQA, because under Public Resources Code § 21080.09 [outlines CEQA process for state university development plans], enrollment increases are not a CEQA "project" or a project change requiring subsequent CEQA review. The trial court agreed with the University and granted its demurrer, reasoning that pursuant to § 21080.09, development plans are physical development and land use plans, and not enrollment plans. As trial court reasoned:

> . . .enrollment effects related to projected changes in enrollment levels are to be considered in the EIR prepared for the long-range development plan... but any discrepancies between the estimated changes in enrollment levels and the actual enrollment levels in subsequent years are not themselves project or program changes that require subsequent CEQA review.

The Court of Appeal's Decision

On appeal, the petitioner presented two relevant arguments: 1) that its petition stated a cause of action for a violation of CEQA by alleging that the University substantially increased enrollment without analyzing the environmental impacts of those decisions, and 2) that the trial court's interpretation of § 21080.09 is inconsistent with the plain language of the statute, its legislative history, and broader CEQA principles. The Court of Appeal reviewed the trial court's interpretation of CEQA *de novo*.

Distinguishing the Need for a Tiered or Supplemental EIR

The First District Court of Appeal recognized that there were two types of EIR documents that could possibly be required for the University's increases to enrollment. The first would be a tiered EIR, which is often appropriate after program EIRs have been adopted. Program EIRs such as that prepared for the 2005 development plan, examine a broad program or plan that will be followed by later more focused projects that may involve more focused "tiered EIRs" that examine later projects" more narrow and specific impacts. A tiered EIR is appropriate for a project that is consistent with an earlier program EIR, but will cause potentially significant environmental effects that were not examined in the program EIR:

> The 2005 EIR is a *program* EIR, which is a type of EIR that agencies often use to examine a broad program or plan that will be followed by more narrow, related projects, which can be analyzed in more focused CEQA documents that "tier" from the program EIR. (*See generally*, Guidelines §§ 15152 [tiering], 15168 [program EIRs].) "Tiering is proper 'when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports.' " (*Citations Omitted.*) A tiered EIR is required for a later project consistent with the larger program if the project may cause significant environmental effects that were not examined in the prior EIR. (*Citations Omitted)*

On the other hand, when an agency proposes changing the original project examined in an original program EIR, a tiered EIR is not appropriate if the changes to the project description would require major revisions to the program EIR, and in that instance, the agency either needs to prepare a subsequent or supplemental EIR:

> If the changes would require major revisions to the prior EIR, the agency must prepare either a subsequent or supplemental EIR, depending on the magnitude of the necessary revisions. (Pub. Resources Code, § 21166; Guidelines, §§ 15162, subd. (a)(1), 15163, subd. (a); *San Mateo Gardens*, *supra*, 1 Cal.5th at p. 943.) This standard is triggered by, among other things, changes to the project that would cause new or increased significant environmental effects. (Pub. Resources Code, § 21166; Guidelines, § 15162, subd. (a)(1).) When section 21166 applies, the agency must prepare a subsequent or supplemental EIR rather than a tiered EIR. (*Sierra Club v. County of Sonoma, supra,* 6 Cal.App.4th at pp. 1319-1320; § 21094, subd. (b)(3).)

Failing to Analyze the Environmental Impacts of Increased Enrollment

Looking to the language of Public Resources Code § 21080.09, the court was not persuaded by the University's arguments, noting that "we have no trouble concluding Save Berkeley has stated a valid cause of action." The court noted that the 2005 EIR included a plan to stabilize enrollment and projected a modest increase in enrollment of 1,650 students between 2005 and 2020. The court went on to explain that the University's later discretionary decisions to change the project, by increasing enrollment well beyond the 1,650 students contemplated in 2005, have caused, and would continue to cause significant environmental impacts not analyzed in the 2005 EIR. Accordingly, the University "failed to analyze the new impacts in a CEQA document and failed to adopt mitigation measures to reduce or avoid them as required by CEQA."

No Exemption under CEQA for Increased Enrollment

The court then rejected the University's argument that under § 21080.09 absent a development or a "physical development project," the section exempts the University from analyzing enrollment decisions in any kind of EIR:

> Although they avoid the term exemption, respondents argue in effect that, absent a development plan or a "physical development project," the statute exempts them from analyzing enrollment decisions in any kind of EIR, including a stand-alone, tiered, subsequent, or supplemental EIR. The statute does nothing of the kind.

Under CEQA, the court noted, the project itself determines which impacts must be analyzed in an EIR, and public agencies must construe projects broadly to capture the entire action and its environmental impacts. Thus, under § 21080.09, and consistent with broader CEQA principles:

> When a public university prepares an EIR for a development plan, § 21080.09 requires universities to expand the analysis to include a related feature of campus growth, future enrollment projections, which is entirely consistent with the traditional, broad definition of a CEQA project.

The court went on to note that § 21080.09 does not say that enrollment changes need only be analyzed in an EIR for a development plan or physical development. The statute does not create a new exemption for decisions resulting in increased enrollment of students at public universities.

Third, the court reasoned that only by requiring an EIR for decisions that increased enrollment could § 21080.09 be harmonized with the fundamental premise of CEQA:

> . . .to ensure informed decision-making and meaningful public participation by disclosing the environmental impacts of decisions *before* decisions are made... as well as CEQA's requirement for agencies to mitigate significant environmental effects when feasible.

The court also reviewed the legislative history behind the adoption of § 21080.09 and found that the legislature intended to require increases in student enrollment numbers to be reviewed in EIR documents.

In the face of an argument that the court's interpretation of CEQA was going to function as forcing a cap on enrollment, the District Court of Appeal stated:

> . . .our decision in no way caps enrollment at the University of California or obstructs the

Regents' authority. We are merely requiring the Regents to comply with CEQA. "[W]hile education may be [the University of California's] core function, to avoid or mitigate the environmental effects of its projects is also one of [its] functions." (*City of Marina, supra,* 39 Cal.4th at p. 360; Ed. Code, § 67504, subd. (b)(1).)

Conclusion and Implications

For public universities in the state, *Save Berkeley Neighborhoods* makes clear that when undertaking discretionary approvals to meaningfully increase student enrollment, those increases in student enrollment must be analyzed as part of the EIR prepared for a long-range development plan. Otherwise, later enrollment increases must be analyzed in subsequent CEQA documents. The court's decision provides an excellent guideline for public universities to follow as they envisage increased enrollments as part of long-term planning.

The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A157551.PDF.
(Travis Brooks)

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 refers to the California Legislature, and to the Governor, refers to Gavin Newsom.

Environmental Protection and Quality

•AB 2323 (Friedman; Chiu)—This bill would require, in order to qualify for the California Environmental Quality Act (CEQA) 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 August 18, 2020, was referred to the Committee on Appropriations suspense file.

•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 August 17, 2020, was referred to the Committee on Appropriations suspense file.

•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 non-transient non-community water system that serves a school that serves one or more disadvantaged communities, by improving the small community water system's or non-transient non-community water system's water quality, water supply, or water supply reliability, or by encouraging water conservation.

SB 974 was introduced in the Senate on February 11, 2020, and, most recently, on August 19, 2020, was passed in the Committee on Appropriations.

•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 August 18, 2020, was referred to the Committee on Appropriations suspense file.

Housing / Redevelopment

•AB 2345 (Gonzalez)—This bill would amend the Density Bonus Law to, among other things, authorize an applicant to receive: 1) three incentives or concessions for projects that include at least 12 percent

of the total units for very low income households; 2) four and five incentives or concessions for projects in which greater percentages of the total units are for lower income households, very low income households, or for persons or families of moderate income in a common interest development.

AB 2345 was introduced in the Assembly on February 18, 2020, and, most recently, on August 17, 2020, was referred to the Committee on Appropriations suspense file.

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

AB 2405 was introduced in the Assembly on February 18, 2020, and, most recently, on August 17, 2020, was referred to the Committee on Appropriations suspense file.

•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 July 21, 2020, was read for a second time, amended and then re-referred to the Committee on Housing.

•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 August 12, 2020, was read for a second time and then ordered to a third reading.

•SB 902 (Weiner)—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 August 18, 2020, was referred to the Committee on Appropriations suspense file.

•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 August 13, 2020, was read for a second time and ordered to a third reading.

•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 June 24, 2020, was read for a third time, passed and ordered to the Assembly.

•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 August 18, 2020, was referred to the Committee on Appropriations suspense file.

Public Agencies

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

AB 2028 was introduced in the Assembly on January 30, 2020, and, most recently, on August 19, 2020, was referred to the Committee on Appropriations suspense file.

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 August 13, 2020, was ordered to second reading pursuant to Senate Rule 28.8.

•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 non-required 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 June 23, 2020, was referred to the Committee on Governance and Finance.

•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 August 11, 2020, was referred to the Committee on Appropriations suspense file.

(Paige Gosney)

CALIFORNIA LAND USE™
LAW & POLICY Reporter

California Land Use Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108