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CONTENTS

LAND USE NEWS

REGULATORY DEVELOPMENTS

RECENT FEDERAL DECISIONS

Continued on next page

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LAW & POLICY Reporter

RECENT CALIFORNIA DECISIONS

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LAND USE NEWS

GOVERNOR NEWSOM ISSUES EXECUTIVE ORDER TO CONSERVE 30 PERCENT OF CALIFORNIA LANDS

On October 7, 2020, California's Governor, Gavin Newsom, issued Executive Order N-82-20 to combat climate change by conserving 30 percent of California's lands and resources by 2030 (30 by 30 or Order). The order: 1) establishes the California Biodiversity Collaborative (Collaborative) comprised of governments, California Native American Tribes, leaders, and stakeholders; 2) sets a goal of the state to conserve at least 30 percent of California's land and coastal waters by 2030 with the Collaborative to submit conservation strategies to the Governor no later than February 1, 2022; 3) promotes biodiversity and stem extinction by relying on ecological knowledge and tribal expertise; and 4) develops a Natural and Working Lands Climate Smart Strategy to achieve the State's goal of carbon neutrality.

The October 7, 2020 Executive Order

30 by 30 follows Governor Newsom's prior Executive Order N-79-20 issued on September 23, 2020, which requires that by 2035, all new cars and passenger trucks sold in California be zero-emission vehicles. Both orders aim at fighting climate change and meeting the state's goal of carbon neutrality by 2045 by reducing demand for fossil fuel and encouraging conservation within the state. 30 by 30 has also been supported internationally by the United Nations as well as the International Chamber of Commerce, whose members wrote a letter on June 15, 2020 calling upon CEOs to push governments to include ambitious climate change focused policies. Support stems from fear over economic loss due to climate change; the World Economic Forum recently calculated that $44 trillion of economic value generation is at risk as a result of climate change and the economy will benefit from green policies.

California Biodiversity Collaborative

First, 30 by 30 directs the California Natural Resources Agency, the California Department of Food and Agriculture, the California Environmental Protection Agency and other state agencies to establish the California Biodiversity Collaborative. The Collaborative shall be comprised of governmental partners, California Native American tribes, experts, business and community leaders, and other stakeholders from across California. The Collaborative will serve as the entity tasked with establishing a baseline assessment of California's biodiversity, project the impact of climate change, and engage stakeholders across California's diverse communities to create climate change strategies.

Natural Resources Agency Must Develop Strategies by February 2022

Second, The California Natural Resources Agency and other relevant state agencies, in consultation with the Collaborative, are directed to develop and report such strategies to the Governor no later than February 1, 2022. The strategies should prioritize economic sustainability, food security, protection of biodiversity, and building climate resistance.

Strategies to Protect Native Plans and Animals

Third, 30 by 30 specifically focuses on biodiversity by directing the California Natural Resources Agency to implement strategic efforts to protect California's native plants and animals from invasive species and pests that threaten biodiversity by relying on scientific observation technology and partnering with tribal experts to use tribal expertise and traditional ecological knowledge. The Order also directs the California Department of Food and Agriculture to streamline the State's process to approve and facilitate projects that will increase the pace and scale of environmental restoration and land.

Carbon Neutrality

Fourth, the Order focuses on reaching carbon neutrality. The California Natural Resources Agency, the California Department of Food and Agriculture,

the California Environmental Protection Agency, the Governor's Office of Planning and Research, and other state agencies, shall identify and implement actions to accelerate natural removal of carbon. Within one year of the Order, the California Natural Resources Agency, in consultation with the California Environmental Protection Agency, the California Department of Food and Agriculture, the California Air Resources Board (CARB), Governor's Office of Planning and Research OPR), the California Strategic Growth Council and other state agencies, shall develop a Natural and Working Lands Climate Smart Strategy (Strategy) that serves as a framework to advance the State's carbon neutrality goal. The California Air Resources Board shall take into consideration the Strategy and the California Department of Food and Agriculture shall work with farmers and ranchers to inform the next Scoping Plan process. The Scoping Plan was first approved by CARB in 2008 and must be updated at least every five years. Each of the Scoping Plans includes policies to help the state achieve its greenhouse gas emissions targets.

Conclusion and Implications

The Executive Order sets broad policy goals and identifies several state agencies to address these goals. However, it remains to be seen how the Order will be implemented as it leaves much of the detail to the agencies. While the Order takes a broad approach to steps that California will take, it confirms California's ability to fight climate change and engage with international entities, without reliance on the federal government. The Executive Order is available online at: https://www.gov.ca.gov/wp-content/uploads/2020/10/10.07.2020-EO-N-82-20-.pdf (Madeline Weissman, Darrin Gambelin)

GOVERNOR NEWSOM SIGNS BILL GRANTING CEQA EXEMPTION FOR DISADVANTAGED WATER SYSTEM PROJECTS

Governor Gavin Newsom has signed Senate Bill No. 974 (SB 974), simplifying the approval process for qualifying water infrastructure projects in low-income and disadvantaged communities by creating a new exemption under the California Environmental Quality Act (CEQA). With bipartisan support, SB 974 was enacted to reduce the financial and regulatory hurdles that may hinder small water systems endeavoring to improve their communities' access to clean and safe drinking water.

Background

It is the established policy of the state that all people have a right to "safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes." (Wat. Code, § 106.3.) However, some rural and economically disadvantaged communities throughout California have struggled to maintain access to safe and reliable drinking water due to aging infrastructure or limited customer bases.

Drinking water systems in California are subject to federal and state Safe Drinking Water Acts, under which the State Water Resources Control Board (SWRCB) adopts and enforces drinking water standards for contaminants. (Health & Saf. Code, § 116365.) Small water systems can lack the capacity or resources to construct needed water treatment facilities or secure alternative water supplies. The costs of these projects are increased by the regulatory review processes prescribed by CEQA.

CEQA requires public agencies and local governments to evaluate the environmental impacts of proposed discretionary projects and to limit or avoid those impacts where possible. (Pub. Resources Code, § 21000, *et seq.*) Environmental review under CEQA generally entails the preparation of a negative declaration, mitigated negative declaration, or environmental impact report, depending on the significance of potential impacts and the degree to which those impacts can be mitigated. The purpose of CEQA review is to inform decisionmakers and the public about potential project impacts, identify feasible alternatives, and disclose the measures to be taken to minimize those impacts that are unavoidable. Nevertheless, such review can be quite costly, involving years of preparatory work and tens of thousands of dollars—even for relatively small projects—before a project may commence.

CEQA already includes a number of statutory and categorical exemptions for certain projects, including exemptions for emergency repairs, replacement of existing facilities, and minor pipeline maintenance and installation projects, but according to Senator Hurtado, the sponsor of SB 974, such exemptions are not necessarily available for many of the small water system projects that are inordinately hampered by the additional costs and delays associated with environmental review.

Senate Bill No. 974

SB 974 creates a new CEQA exemption for drinking water infrastructure projects that primarily benefit small, disadvantaged community water systems, in furtherance of the declared statewide policy of ensuring the right to safe, clean, affordable, and accessible water for all people in the state. The legislation specifically targets small water system projects serving communities with fewer than ten thousand people, and water projects for schools that serve disadvantaged communities with annual median household incomes below 80 percent of the statewide annual median household income. The SB 974 exemption applies to projects that improve a system's water quality, supply or reliability; encourage water conservation; or provide safe drinking water via groundwater wells, drinking water facilities or storage, service lines, and drinking water system appurtenances such as hydrants, meters, and monitoring stations. The exemption would allow lead agencies engaged in such projects to avoid the delays and costs of CEQA review and more readily address their water supply needs.

Qualifying for an Exemption

To qualify for the CEQA exemption, a project must first satisfy a number of substantive criteria, including complete mitigation of construction impacts, and avoidance of adverse effects to wetlands and other sensitive habitats. Projects may not involve unusual circumstances that would result in substantial adverse effects, be located on hazardous waste sites, or have reasonably anticipated cumulative impacts. SB 974 also imposes labor requirements for qualifying projects, including criteria for prevailing wages, skilled and trained workforce certifications, which must be documented throughout the duration of a project. Prior to claiming the exemption, the lead agency must also coordinate with the SWRCB and confirm that the exemption will not disqualify the serviced community from receiving federal financial assistance. Finally, if a lead agency approves or carries out a project under this exemption, it must file a notice of exemption with the Office of Planning and Research, pursuant to CEQA guidelines.

Conclusion and Implications

Senate Bill 974 carves out a narrow exemption for CEQA that is intended to save disadvantaged communities significant time and money in meeting drinking water standards. One of its sponsors, the Rural Community Assistance Corporation, hailed the bill's passage as a huge win for rural California. Opponents of the bill argue that the bill will actually increase costs to comply with the skilled and trained workforce mandate.

The CEQA exemption shall remain in effect until its sunset date of January 1, 2028. The full text and legislative history of Senate Bill No. 974 can be found at: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB974
(Austin C. Cho, Meredith Nikkel)

REGULATORY DEVELOPMENTS

CALIFORNIA PUBLIC UTILITIES COMMISSION ADOPTS DECISION TO RE-START 'REMAT' PROGRAM

On October 8, 2020, the California Public Utilities Commission (Commission or CPUC) adopted Decision 20-10-005, *Decision Resuming and Modifying the Renewable Market Adjusting Tariff Program*. The Renewable Market Adjusting Tariff, or "ReMAT" program is a feed-in tariff for small renewable energy projects located in the service territories of California's largest investor-owned utilities (IOUs). The program was enjoined in 2017 by the U.S. District Court in *Winding Creek Solar LLC v. Peevey* as violative of the Public Utility Regulatory Policies Act (PURPA). ((N.D. Cal. 2017) 293 F.Supp.3d 980, aff'd sub nom, *Winding Creek Solar LLC v. Carla Peterman, et al.* (9th Cir. 2019) 932 F.3d 861). The CPUC Decision revises the ReMAT program to bring it into compliance with PURPA. Pacific Gas & Electric (PG&E) and Southern California Edison (SCE) will revise their tariffs implementing the ReMAT program in accordance with Decision 20-10-005.

ReMat Program History

The initial incarnation of the ReMAT program was launched in 2007 to implement Assembly Bill (AB) 1969 (2006). AB 1969 amended the California Public Utilities Code to establish a feed-in tariff for small renewable energy projects at public water and wastewater facilities. The major IOUs—PG&E, SCE, and San Diego Gas & Electric (SDG&E)—were required to provide a standard contract to all eligible facilities, up to the state-wide cap of 250 MW. The program was expanded through legislation in 2008, 2009, and 2011, opening the tariff to all renewable energy generators and increasing the maximum capacity of eligible facilities from 1.5 MW to facilities of not more than 3 MW. The state-wide cap on procurement under the program was increased to 750 MW.

With the amendments, the tariff price was changed from the market price referent, that is, the presumptive cost of electricity from a new 500 MW natural gas-fired combined cycle power plant, to a price set by the Commission based on delineated factors. In setting the price for electricity under the tariff, the Commission was required to consider: 1) the long-term market price for fixed price products determined by the utilities' general procurement activities; 2) the long-term ownership, operating, and fixed-price fuel costs for fixed-price electricity from new generation facilities; and 3) the value of different products, including baseload, peaking, and as-available electricity. The Commission developed a pricing mechanism under the ReMAT program that adjusted bi-monthly for each of the three electricity products (baseload, peaking, and as-available non-peaking), based on demand for ReMAT contracts in each of the IOUs' territories. To moderate subscription levels and price, each IOU instituted a 5 MW cap on subscriptions for each bi-monthly period, for each type of electricity product.

The *Winding Creek Solar* Decision

In 2013, Winding Creek Solar LLC filed suit in the U.S. District Court for the Northern District of California alleging the ReMAT program violated PURPA. Winding Creek contended that the ReMAT program's caps on procurement violated PURPA's mandatory purchase obligation. It also argued that the adjustable pricing mechanism violated PURPA because it was not based on the utilities' avoided costs. In 2017, the District Court granted Winding Creek's motion for summary judgment and enjoined further implementation of the ReMAT program. In 2019, the Ninth Circuit affirmed the District Court decision.

The CPUC Decision 20-10-005

The CPUC Decision modifies the ReMAT program to "both make [it] compliant with federal law and give effect to [California Public Utilities Code] § 399.20." The Commission explained in the Decision that the ReMAT program must be implemented pursuant to PURPA because the Commission is setting the wholesale price for the purchase of electricity. While the Federal Energy Regulatory Com-

mission has exclusive jurisdiction to set rates for wholesale sales and purchases of power, the Federal Power Act allows one exception to this in permitting states to set or approve wholesale prices for purchases of electricity from qualifying facilities of 20 MW or less pursuant to PURPA. California Public Utilities Code § 399.20 requires the Commission to establish a methodology to determine the market price of electricity considering certain enumerated factors, to offer to ReMAT facilities.

Administrative Determination of Price

The Decision replaces the ReMAT adjusting price mechanism with an administrative determination of price. The new pricing methodology is based on a weighted average of the most recent long-term contracts for renewable energy facilities sized 20 MW or less executed by the IOUs. The price will initially reflect contracts executed by the IOUs from 2014 to 2019. The price will also incorporate a value for the different electricity products—baseload, as-available peaking, and as-available non-peaking—to reflect time of delivery. The CPUC's Energy Division will annually update the ReMAT prices in May of each year to reflect pricing in the most recent contracts. The Energy Division may use an expanded set of contracts to adjust the price, by including a complete set of data from Community Choice Aggregators and Electric Service Provider contracts, if available. The Energy Division may also increase or decrease the lookback period to reflect the most recent RPS contracts, as long as the confidentiality of market-sensitive price information is maintained. The Commission decided to utilize recently executed RPS contracts as the basis for the new tariff pricing because "actual market-based energy prices are better indicators of the utilities' avoided costs" given that they represent a range of eligible renewable technologies, project sizes, and dispatchability, reliability, and other factors that the PURPA regulations outline for consideration when setting avoided cost rates. The Commission also found that use of executed contracts has the benefit of greater transparency and verifiability.

In the public proceeding to adopt the new ReMAT pricing mechanism, project developers argued that the price would be too low and ineffective at stimulating project development and achieving the mandate of the legislation establishing the program. The Decision noted that PURPA is not designed to ensure prices support a qualifying facility's cost of production, but instead provide a guarantee that the utilities will purchase electricity offered by a qualifying facility at a price that the utilities would otherwise pay for the next increment of generation.

Conclusion and Implications

The Decision also eliminates the bi-monthly program periods and limits on procurement for each bi-monthly period. The bi-monthly program periods, along with the related procurement caps, facilitated bi-monthly price adjustments under the prior ReMAT pricing mechanism. With the avoided-cost rate now administratively set, the program periods are not necessary.

The Decision does not affect ReMAT contracts that have already been executed. The CPUC declined to consider re-opening the ReMAT program to facilities in SDG&E's territory at this time. The ReMAT rules permitted SDG&E to close its ReMAT program in 2016, despite the utility having only procured about 65 percent of its allocated program capacity.

(Allison Smith)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT REJECTS NEPA LAWSUIT CHALLENGING EIS FOR SHEEP GRAZING PLAN IN GRIZZLY BEAR HABITAT

Cottonwood Environmental Law Center v. U.S. Sheep Experiment Station, *Unpub.*, Case 19-35511. (9th Cir. Oct. 28, 2020).

In an *unpublished* decision, the U.S. Court of Appeals for the Ninth Circuit rejected environmental plaintiffs' arguments that an Environmental Impact Statement (EIS) prepared for a sheepherding plan in Montana's Centennial Mountains, a grizzly-bear habitat, violated the National Environmental Policy Act (NEPA). Plaintiffs pointed to factual inconsistencies in the Final Environmental Impact Statement (FEIS) prepared for the decision where parts of the FEIS noted there were no grizzly-bear and human interactions, but other parts of the FEIS and record detailed at least one such interaction. The court relied on the "rule of reason" to note that despite these inconsistencies, the FEIS still contained sufficient information and analysis for the federal agency to make an informed decision to approve the sheep grazing plan and examine project alternatives.

Factual and Procedural History

In 2017, environmental plaintiffs filed their third lawsuit challenging domestic sheep grazing by the federal Agricultural Research Service (ARS) in portions of the Centennial Mountains in southwestern Montana. The area is part of the Greater Yellowstone Ecosystem which is an important habitat linkage for the endangered grizzly bear population in and near Yellowstone National Park. The environmental groups alleged the presence of sheep in the area increased the likelihood of threats to the grizzly bears resulting from interactions between the bears and sheep and humans.

Plaintiffs' alleged specifically that ARS violated NEPA by conducting a flawed environmental review that was arbitrary and capricious. Specifically, Plaintiffs alleged that the FEIS was self-contradictory. The FEIS claimed that there had not been any human, grizzly-bear interactions, however there were documents in the record indicated that at least one encounter occurred between grizzly bears and sheep herders. ARS responded that the FEIS disclosed this grizzly bear encounter, and noted that the species of bear involved in the incident was unknown at the time of the encounter. ARS noted that the bear encounter was consistent with natural bear behavior, and that the bear had not lost its natural wariness of humans, and the incident was resolved by moving the sheep to a different pasture.

Plaintiffs filed a motion for summary judgment, which the district court denied. Instead, the court entered a judgment for defendants, which plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit's Decision

In an *unpublished memorandum* decision, the Court of Appeals rejected plaintiffs' arguments. The court noted that it reviews administrative agency decisions under the abuse of discretion standard. Under this standard, an agency action is arbitrary and capricious if the agency has:

> . . .relied on factors which congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The 'Hard Look' Standard of Review

The court rejected plaintiffs' contention, noting that NEPA does not impose "substantive environmental" obligations on federal agencies, but instead prohibits "uninformed—rather than unwise—agency action." All that is required is that an agency take a "hard look" at environmental consequences of the agency's proposed actions. Despite plaintiffs' claims regarding internal inconsistencies in the FEIS, the

court was convinced that the ARS took a hard look at the consequences of continued sheep grazing in Montana's Centennial Mountains. In reaching its decision, the court differentiated the instant matter from prior cases where unexplained, conflicting findings in an EIS rendered the analysis therein arbitrary and capricious. Those cases involved federal agencies that changed their decision based on the same factual record without providing a reasoned explanation for its change in course. Here, ARS did not change its course and merely characterized bear encounters differently in different parts of the FEIS.

The 'Rule of Reason'

The court relied on the "rule of reason standard" which:

> . . .requires a pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation.

In the instant case, the discrepancies in the FEIS's description of grizzly bear encounters did not render the FEIS so misleading that the agency and the public could not make an informed comparison of alternatives. Accordingly the court ruled that the project's analysis did not violate NEPA.

Conclusion and Implications

This latest *Cottonwood* decision is the culmination of several years of litigation challenging federal sheep grazing programs in the Centennial Mountains. While efforts to reintroduce grizzly bears, wolves, and other native species throughout the west continue, disputes and litigation between grazing interests and conservationists are sure to follow. The Ninth Circuit's *unpublished memorandum* opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/memoranda/2020/10/28/19-35511.pdf
(Travis Brooks)

NINTH CIRCUIT DENIES EN BANC REHEARING OF ITS PANEL DECISION IN *PAKDEL*, WITH DISSENTING JUDGES ARGUING THE ORDER VIOLATES THE RECENT KNICK 'TAKINGS' DECISION

Pakdel v. City and County of San Francisco, ___F.3d___, Case Number 17-17504 (9th Cir. Oct. 13, 2020).

On October 13, the majority of non-recused judges on the Court of Appeals for the Ninth Circuit refused to rehear the court's March 17 panel decision that a federal takings plaintiffs' claims were not ripe for federal review because plaintiffs failed to secure a "final decision" from the City of San Francisco. Although the U.S. Supreme Court's October 2019 decision in *Knick v. Township of Scott* eliminated the prior requirement that federal takings plaintiffs exhaust state court remedies before seeking relief in federal court, the March 17 decision held that plaintiffs failed to meet a still intact "finality requirement" for federal takings plaintiffs. Effectively, this prevented plaintiffs from bringing suit in federal court, which judges dissenting from the October order argued was an unlawful application of an exhaustion requirement to the plaintiffs in the case.

Factual and Procedural History

In 2009, plaintiffs purchased an interest in a tenancy-in-common property in San Francisco, where the couple hoped to move upon retirement. In the meantime, plaintiffs rented their unit to a tenant. The tenancy-in-common agreement for the property required owners to take all steps necessary to convert the building into condominiums. When plaintiffs purchased their property in 2009, the City of San Francisco was operating a severely backlogged conversion lottery that allowed conversion of tenancies-in-common. In 2013, the City and County of San Francisco (City) adopted an Expedited Conversion Program (ECP) that allowed owners who held interests in multi-unit tenancies in common to convert jointly owned buildings into individually owned condominiums. In 2015, plaintiffs and other tenants-in-common in their building submitted an

ECP application. Plaintiffs then signed an agreement with the city to offer a lifetime lease to their tenant and then did offer such a lease.

Instead of signing the lease, plaintiffs sought to challenge the City's requirement of a lifetime lease, however they missed administrative deadlines to appeal or seek an exemption to the lifetime lease requirement. Plaintiffs then filed a federal lawsuit alleging a taking under 42 U.S.C. § 1983. The U.S. District Court for the Northern District of California granted the city's motion to dismiss, finding that plaintiffs' suit was not ripe because they had not sought compensation in state court, as required under the 1985 U.S. Supreme Court decision *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*. *Williamson County* established two procedural requirements that federal takings plaintiffs had to meet before filing a lawsuit in federal court: 1) plaintiffs must first seek relief in state court, and 2) reach a final administrative decision as to the application of the regulations to the property at issue.

In October of 2019, while the District Court's order was on appeal to the Ninth Circuit, the U.S. Supreme Court decided *Kinick v. Township of Scott*, 588 U.S. 139 (June 21, 2019). In *Knick*, the Supreme Court eliminated the first *Williamson* requirement above, finding that this was an unlawful exhaustion requirement, which was prohibited for § 1983 claims. Rather than remand the *Pakdel* decision to the district court for a ruling consistent with *Knick*, a three judge panel for the Ninth Circuit affirmed the district court's decision on the ground that plaintiffs failed to meet *Williamson County's* separate ripeness or finality requirement. According to the panel majority, the plaintiffs in *Pakdel* failed to meet this finality requirement because they did not avail themselves of all available administrative challenges to the ECP program before filing a federal lawsuit. Accordingly, the three judge panel ruled two to one that the second *Williamson*, "finality" requirement had not been met.

Plaintiffs then filed a petition for a rehearing *en banc* under 42 U.S.C. § 1983.

The Ninth Circuit's Decision

In response to plaintiffs' request for a hearing *en banc*, a majority of non-recused active judges voted to deny a hearing, leaving the court's March 17 decision intact. However eight judges joined a dissent written by Judge Daniel P. Collins that seems to portend a petition for a writ of certiorari, and possible consideration by the U.S. Supreme Court.

Judge Collins' Dissent

Judge Collins' dissent argued that the court's March 17 decision effectively ignored the Supreme Court's *Knick* decision, by making the finality of the city's decision turn on whether the plaintiffs failed to pursue procedural options at administrative appeal. This amounted to an exhaustion requirement that *Knick* had deemed unlawful.

As the dissent noted, application of *Williamson County's* finality was straightforward in *Pakdel* and the finality requirement is only intended to ensure that "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual concrete injury." Here, the City had definitively imposed the ECP's lifetime lease requirement on plaintiffs' property and there was no further avenue under local law to avoid the requirement.

As the court noted:

> [t]he panel majority's holding that Plaintiffs' failure to pursue an earlier administrative process bars their takings claim is an exhaustion requirement, and it is flatly precluded by *Knick*… By applying procedural-default rules to bar a takings claim concerning an unquestionably final decision, the panel majority's decision imposes an impermissible exhaustion requirement, not a finality requirement.

Conclusion and Implications

The Ninth Circuit order refusing a rehearing *en banc* and Judge Collins' dissent set the stage for what could be a strong candidate for a grant of *certiorari* and consideration by the U.S. Supreme Court. Refinement of federal takings jurisprudence following the landmark *Knick* decision will surely continue. (Travis Brooks)

NINTH CIRCUIT REVERSES DISTRICT COURT'S DISMISSAL OF CONSTITUTIONAL CHALLENGE TO SIMI VALLEY'S ORDINANCE PROHIBITING MOBILE BILLBOARDS

Bruce Boyer v. City of Simi Valley, 978 F.3d 618 (9th Cir. 2020).

In *Bruce Boyer v. City of Simi Valley*, the Ninth Circuit Court of Appeals reversed a U.S. District Court judgment upholding the constitutionality of a city ordinance prohibiting the parking of mobile billboard advertising displays on any public street, alley or public lands within the city. The Ninth Circuit found that the District Court had not analyzed an exemption contained in the ordinance for emergency and construction vehicles as a content-based choice under the strict scrutiny standard.

Factual and Procedural Background

In June 2016, the City of Simi Valley (City) adopted the mobile billboard ordinance (Ordinance), authorizing peace officers and City officials to impound mobile billboard advertising displays parked illegally under the Ordinance.

Certain authorized vehicles are exempt from the ban on mobile billboard advertising displays, namely emergency vehicles and vehicles used for "construction repair or maintenance of public or private property."

Boyer alleged that he utilizes various vehicles for speech and expression, including trailers attached and detached from motor vehicles and other non-motorized vehicles that may qualify as mobile billboard advertising displays. Boyer parks his mobile displays in locations where parking of most any other vehicle is permitted. On various occasions the City has impounded or threatened to impound his vehicles and displays.

Boyer sued the City in December 2018 in state court, claiming the Ordinance violates his First Amendment of the U.S. Constitution's right to freedom of speech and preemption by California state law. The City removed the case to federal court. After the City answered, Boyer filed a First Amendment Complaint, and the City moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

The District Court granted the City's motion, concluding that the City's Ordinance was content-neutral and that its restrictions were reasonable as to time, place and manner; therefore, not in violation of the First Amendment. It also dismissed Boyer's state law claims, declining his request to remand the state law claims to state court. The District Court subsequently dismissed the case, and Boyer's appeal followed.

The Ninth Circuit's Decision

The Ninth Circuit reversed the District Court's dismissal of the First Amendment claim. The City's mobile billboard regulations favor certain speakers because the City favors the likely speech of those speakers. Therefore, the District Court erred in concluding the regulations are not content based. The District Court did not err in declining Boyer's request to remand his state law claims to state court.

Content Neutrality under the First Amendment

The First Amendment prohibition against abridgment of free speech applies to state and local laws under the Fourteenth Amendment. Content-based regulations--those that target speech based on its topic, idea, or message--are presumptively invalid. (*Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1197 (9th Cir. 2016).)

Content-based regulations must pass struct scrutiny. (*Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015).) The government must prove that such regulations are narrowly tailored to serve compelling state interests. Even content-based regulations that seem entirely reasonable may fail strict scrutiny.

Speaker-based regulations are often content-based regulations in disguise. (*Reed*, p. 170.) When a regulation makes a speaker-based distinction, if the speaker preference reflects a content preference, it is treated the same as any other content-based regulation and strict scrutiny is applied.

The determination of content neutrality looks first at whether the regulation "upon its face" draws

distinction based on the messages a speaker conveys. (*Lone Star*, p. 1198.) If the regulation is facially neutral, it must then be determined whether it nevertheless is a content-based regulation of speech because it cannot be justified without reference to the content of the regulated speech.

The Ordinance as a Speaker-Based Content Regulation

The mobile billboard advertising prohibition of the Ordinance is content neutral, like the regulation in Lone Star. However, unlike in *Lone Star*, the Ordinance exempts certain authorized vehicles from the ban on mobile billboards. In exempting authorized emergency and construction repair or maintenance vehicles, the Ordinance prefers certain speakers above others.

In determining whether the exemption's speaker preference reflects a content preference, the Ordinance on its face is neutral—it does not expressly restrict the topic idea or message, whether political, public-safety, or commercial.

However, the exemption does not pass muster as justifiable without reference to the content of the speech. The City provides no express justification for allowing speech only from authorized emergency and construction repair or maintenance vehicles.

An inference that the exemption was designed to promote health safety and welfare is supported by language of the Ordinance. But that purpose, by assuming that the authorized vehicles would be more likely to spread public health and safety messages, demonstrates a content-based choice that triggers strict scrutiny, no matter how rational and sensible that choice may be.

The Government Speech Doctrine Does Not Apply

Government speech is not restricted by the First Amendment. Thus, a content preference for government speech is not a content-based restriction. (*Reed*, p. 175.) But the exemption for authorized vehicles cannot be justified by the government speech doctrine. The exemption does not limit authorized vehicles to displaying only messages made or controlled by the City.

Conclusion and Implications

When enacting facial bans on certain forums for speech for purposes of public health, safety and welfare, exemptions must be justifiable as content-neutral so as not promote certain categories of speakers without justifiable cause. Ironically, one such justifiable cause appears to be government control of the message, which could in a sense conflict with the ability to openly express ideas under First Amendment. The Ninth Circuit's opinion in this case is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/10/14/19-55723.pdf
(Boyd Hill)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT UPHOLDS DEVELOPMENT AGREEMENT, WHICH GRANTED AN EXCLUSIVE LICENSE TO TRANSPORT CANNABIS IN THE CITY

Cereceres v. City of Baldwin Park, Case No. BC697871, *Unpub.* (2nd Dist. Oct. 21, 2020).

In *Cereceres v. City of Baldwin Park*, an *unpublished* opinion out of the Second District Court of Appeal, respondent City of Baldwin Park (City) adopted an agreement granting Rukli, Inc. (Rukli) an exclusive license to transport cannabis in the City, promising that the City would require all other cannabis licensees to use Rukli for transportation within the City. Appellants, residents and parties with stakes in the legal cannabis business, contested this approval. They claimed that the exclusivity provisions constitute an expressly prohibitive monopoly and anticompetitive practices. The Court of Appeal affirmed the trial court's denial of appellants' petition and held that the City's decision did not exceed its zoning powers, did not violate the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA), and did not violate development agreement laws, or create impermissible "spot zoning."

Factual and Procedural Background

In 2016, California voted to approve Proposition 64, which led to the enacting of MAUCRSA. MAUCRSA established a comprehensive system for the control and regulation of a medicinal and recreational cannabis industry in the state. On August 16, 2017, the City adopted Ordinance No. 1400, which added Chapter 127 of Title XI to the City's Municipal Code and permitted cannabis operations in the City. The ordinance contained multiple safeguards ensuring cannabis operations are conducted safely.

Real party in interest, Rukli, Inc. (Rukli), applied for a cannabis transportation permit in September 2017. Rukli's application included various commitments to safety in its operations and a lengthy discussion of its safety measures. On December 18, 2017, the City granted Rukli the exclusive right to transport cannabis in the City (the Rukli Agreement). The next day, Rukli's CEO and its primary operations consultant donated a total of $8,800 to the 2018 state senate campaign of Monica Garcia, a councilmember who voted in favor of granting Rukli the exclusive license.

On March 15, 2018, appellants filed a petition for writ of mandate against the City. They challenged the approval of the agreement on procedural and substantive grounds. Following appellants' suit, the City approved another agreement with Rukli, correcting its initial procedural errors by acting in accordance with the proper procedures for approving development agreements. In July 2018, the City enacted Ordinance 1412, approving the Rukli Agreement, which again named Rukli as the exclusive distributor and transporter for cultivation and manufacturing permit holders within the City.

On October 26, 2018, appellants filed a first amended petition for writ of mandate against the City for creating a monopoly of cannabis distribution by approving the Rukli Agreement. Appellants sought injunctive and declaratory relief, as well as a writ of mandate ordering the City to set aside approval of the Exclusivity Provisions of the agreement and a writ of mandate or order overturning the City's approval of the Rukli Agreement, unless and until the exclusivity provisions were removed. In response, the City filed an answer and appellants filed a reply.

In January 2019, the Superior Court heard the petition, took it under submission after oral argument, and denied it two weeks later. In March 2019, the court entered judgment and appellants timely appealed the decision.

The Court of Appeal's Decision

City's Zoning Powers to Adopt an Agreement Granting a Monopoly

Appellants argued that the City's adoption of the exclusivity provisions violated the City's zoning

powers because: 1) the primary purpose of the provisions was to grant Rukli a monopoly for cannabis distribution and 2) the City's evidence was insufficient to support a conclusion that the purpose of the ordinance was to protect public safety. The court disagreed with both arguments.

First, the court stated that cities are permitted to regulate economic activity as long as the primary purpose is not the impermissible *private* anticompetitive goal of protecting or disadvantaging a particular favored or disfavored business or individual, but instead is the advancement of a legitimate *public* purpose. The ordinance must also reasonably relate to the general welfare of the municipality and constitutes a legitimate exercise of the municipality's police power.

Here, the court determined that appellants failed to prove the City's primary purpose was not a valid public purpose. Appellants contended that Rukli's contribution of $8,800 to the state senate campaign of a councilmember who voted in favor of both agreements reflected a *quid pro quo* arrangement. They argued this arrangement showed that the primary purpose of the exclusivity provisions was to grant a monopoly—an invalid private purpose. However, the trial court previously determined that this amount was insufficient to establish a *quid pro quo* situation. It also noted that the councilmember had made prior statements in support of having only one distributor for safety purposes. The Court of Appeal found this to be a reasonable conclusion, as the contributions rationally could have been made as an independent decision, demonstrating Rukli's appreciation of the councilmember's vote. Therefore, appellants had not shown sufficient evidence to support a claim that the City did not act with a primarily public purpose.

Second, the court determined that the City's need to present evidence of its valid public purpose was obviated by appellants' failure to satisfy their burden of proof. Although unnecessary, the City still provided evidence demonstrating its public safety purpose. This evidence included the staff report on the Rukli Agreement discussing Rukli's plans for safety, the councilmember's statement that she felt one distributor was safer, Rukli's permit application containing assurances of security and safety, and MAUCRSA's own additional safety requirements for cannabis distributors. The court determined that this evidence was minimal, yet adequate to support a finding that the City's decision was based on public safety.

Appellants attempted to counter this finding by claiming: 1) the exclusivity provisions do not further the purpose of a development agreement; and 2) public safety could not have been the reason for the approval of the exclusivity provisions because the City already adopted mandatory safety regulations by adding Chapter 127 to its municipal code. In response, the court stated that public purpose does not need to be related to the type of agreement in question for an ordinance regulating economic activity with anticompetitive effects to be valid. Additionally, enacting the mandatory safety regulations in Chapter 127 does not necessarily mean that the City did not have other public safety concerns, such as those related to accountability if there were multiple transportation companies. Thus, the court concluded that, based on substantial evidence, the City's approval of the exclusivity provisions was for a legitimate public purpose.

MAUCRSA

Appellants also contended that the exclusivity provisions conflicted with MAUCRSA's express intent to reduce barriers to entry into the legal cannabis market and prohibit monopolies and anti-competitive conduct. The court determined that §§ 26051 and 26052 of MAUCRSA only prohibit anticompetitive actions by "persons" and licensees," not "cities." The court reasoned that it must generally assume the California Legislature meant what it said and cannot supply its own words where there is an omission. Further, the court stated that the Legislature knew how to restrict municipal action when it intended to because other sections of MAUCRSA do restrict municipal action, such as § 26080, subdivision (b), which prohibits local jurisdictions from preventing transportation of cannabis products on public roads by a licensee acting in compliance with MAUCRSA. The Legislature thus did not intend to restrict cities from engaging in anti-competitive behavior. Therefore, MAUCRSA does not prohibit the City from approving the exclusivity provisions.

Development Agreement Laws

Appellants argued that cities are prohibited from including exclusivity provisions in development agreements because they have "no relationship" to the requirements for development agreements, which

are outlined in Government Code §§ 65864-65869.5. As a development agreement, the Rukli Agreement could therefore not contain the exclusivity provisions, according to appellants. The court disagreed and stated that the requirement of certain terms in development agreements does not mean that all other terms are prohibited. Further, the same provisions that appellants cited also state that development agreements "may include conditions, terms, restrictions, and requirements for subsequent discretionary actions . . . ." The court concluded that this statute regulating development agreements should be liberally construed, and thus the exclusivity provisions should fall under "conditions, terms, restrictions, and requirements" that are also permitted in development agreements. Therefore, appellants failed to demonstrate that the development agreement statute precludes the exclusivity provisions.

Spot Zoning

Finally, Appellants claimed that the exclusivity provisions constitute "spot zoning" and are therefore invalid. "Spot zoning" occurs where a small parcel is restricted and given lesser rights than the surrounding property, which creates an "island" in the middle of a larger area devoted to other uses. This type of zoning is not always impermissible. It may be upheld where there is a "substantial public need" or "rational reason in the public benefit" for the zoning, even if a private owner will also benefit.

The court did not reach the issue of whether "spot zoning" existed in this case. Here, granting Rukli an exclusive license was in furtherance of public safety, with no support for a finding to the contrary. The court determined public safety is a sufficient "rational reason in the public benefit." Therefore, it held that whether spot zoning applied in this case is immaterial because it would not invalidate the exclusivity provisions.

Conclusion and Implications

The Court of Appeal affirmed the trial court's judgment. While *unpublished*, this case lends support to the idea that cities may grant exclusive licenses to transport cannabis for legitimate public purposes, such as public safety. The cannabis industry is relatively new and there may be more instances such as this one in the future. The court's decision is available online at: https://www.courts.ca.gov/opinions/nonpub/B296921.PDF
(Veronika Morrison, Christina Berglund)

SECOND DISTRICT COURT PANEL FINDS TENANTS ADEQUATELY PLEADED CLAIMS FOR VIOLATIONS OF UNFAIR COMPETITION AGAINST DEVELOPER

Los Angeles Tenants Union: Hollywood Local Action, et al. v. CRE-HAR Crossroads SPV, LLC, *Unpub.*, Case No. B305255 (2nd Dist. Oct 23, 2020).

In an *unpublished* opinion, a panel for the Second District Court of Appeal in *Los Angeles Tenants Union: Hollywood Local Action, et al. v. CRE-HAR Crossroads SPV, LLC*, held that the Superior Court erred in dismissing an entire action filed by a tenants-union against the developer and property owner of a large housing complex. The panel found that the plaintiffs had adequately pleaded claims alleging violations of California's Unfair Competition Law and § 151.31 of the Los Angeles Municipal Code. The court sustained the demurrer as to plaintiffs' claims for declaratory relief on grounds that they were not ripe for review.

Factual Background

In 2015, defendant CRE-HAR Crossroads SPV, LLC (CRE-HAR) petitioned the City of Los Angeles for an entitlement to develop an eight-building complex at the "Crossroads of the World" site in Hollywood (Project). Defendant and Real Party in Interest, Cross Roads Properties I, LLC (collectively: defendants), owned the property on which the Project was to be built (property).

Around March 2017, while their petition was pending, CRE-HAR hired an outside housing-consulting firm to incentivize renters to leave their

rent-controlled units. The firm provided offers such as "Tenancy Termination Agreements," which included free or discounted rent and advanced payment of relocation fees. Approximately half the tenants accepted these offers and vacated; approximately 50 tenants remained. In September 2018, the city planning commission approved developer's application for entitlements with 70 conditions of approval. Of those, condition 14 required defendants to provide existing tenants in rent-controlled apartment units with a right to return to a new unit in the proposed development at favorable rental rates.

In January 2019, a citizen's group appealed the commission's approval to the city council's planning and land use management (PLUM) committee. The PLUM Committee partially granted the appeal and recommended that the city council adopt the planning commission's findings and project approval, subject to conditions modified by the committee. Modified condition 14 provided that the developer shall coordinate with the department of city planning and the council office for the corresponding district to ensure that qualified tenants residing at the property "are given the right of first refusal to return to a new unit once the proposed development has been constructed." Further, the condition provided that qualifying tenants:

> . . .shall be offered a unit reserved for Very Low-Income Households; all qualified tenants shall be offered a new unit at a rate no higher than their last rent payment with allowable 3% increase per year.

In March 2019, defendants informed the remaining tenants that they would have the right to return to the property once the Project was complete. Defendants provided the tenants with a "Right to Return Agreement." Plaintiffs—individual tenants who lived in the property's rent-controlled apartments—refused to sign the agreement on grounds that it was never vetted by the local Council Office and contained terms that were inconsistent with the language and intent of condition 14. In August 2019, the city's housing and community investment department and attorneys for defendants notified tenants that they would be evicted pursuant to the Ellis Act. One month later, defendants notified tenants that they must accept the Right to Return Agreement by the end of October to avoid eviction. One day after the deadline, defendants served tenants with eviction notices. Three days later, defendants announced that tenants who exercised their right of return would be placed in units segregated from the rest of the building.

Procedural Background

In December 2019, individual plaintiffs and the Los Angeles Tenants Union—an unincorporated civic association comprised of Hollywood-area tenants—filed a complaint against the defendants for their alleged violations of condition 14 and § 151.31 of the Los Angeles Municipal Code. Plaintiffs amended their complaint in January 2020, alleging four causes of action: 1) a declaration that Defendants failed to comply with condition 14; 2) negligence per se; 3) violation of the Unfair Competition Law (UCL) (Business and Professions Code, § 17200 *et seq.*); and 4) damages and statutory penalties for the alleged violation of Municipal Code § 151.31.

Defendants' filed a demurrer to all causes of action. Defendants also filed a motion for a court order confirming that the case was subject to rule 3.2220 of the California Rules of Court, which governs challenges to environmental leadership development projects (ELDP), such as the contested Project. The trial court sustained the demurrer, concluding that the litigation was premature because the city had yet to complete its approval process for the development, thus Plaintiffs had not fully exhausted their remedies. Because the court could not decide upon this central claim, the trial court found it improper to decide upon plaintiffs' other causes of actions. The trial court also granted defendants' motion to apply the ELDP rules to the case. Plaintiffs timely appealed the dismissal.

The Court of Appeal's Decision

A panel for the Court of Appeal for the Second District reviewed the trial court's order sustaining defendants' demurrer under a *de novo* standard of review. In determining whether the trial court erred in sustaining the demurrer without leave to amend, the appellate court reviewed for abuse of discretion. Under these standards, the Court of Appeal upheld the trial court's determination as to plaintiffs' first and second causes of action, but found plaintiffs' adequately plead the third and fourth causes of action.

Declaratory Relief

As to plaintiffs' first cause of action for declaratory relief, the Court of Appeal sustained the trial court's finding that the claim was not ripe for review. Plaintiffs' claim sought a declaration that defendants failed to comply with condition 14, which required defendants to provide tenants with the right of first refusal to units in the new development at favorable rental rates. Defendants allegedly violated this by presenting tenants with agreements that purported to grant a right of first refusal, but the agreements were not approved by the city and imposed additional terms and conditions that conflicted with the language and intent of condition 14. The court held that the condition does not set forth the scope of the tenants' right of first refusal, but rather, contemplates a plan and process that defendants and the city must create to grant that right of first refusal. Accordingly, the court explained that ascertaining whether defendants' "Right to Return Agreement" complies with condition 14 must be assessed based against the city-approved plan, not with the condition itself. Because the city had yet to approve a plan (which plaintiffs conceded), the court found that there was nothing against which to judge the Right to Return Agreement or to determine plaintiffs' rights.

Alleged Violation of Los Angeles Municipal Code

As to plaintiffs' fourth cause of action, the appellate court overturned the trial court's determination and found that plaintiffs had adequately plead an action for defendants' violation of Los Angeles Municipal Code § 151.31. The section requires landlords to provide tenants with a "Disclosure Notice" of tenant rights before making a buyout offer to tenants (wherein the landlord offers to pay tenants money or other consideration to vacate a rent-stabilized apartment). The Court of Appeal found that the first cause of action's prematurity did not affect this claim because defendants' actions under § 151.31 are separate and unrelated to condition 14 or the city's final determinations regarding the Project. Though the court could not determine whether defendants' solicitations constituted offers, defendants conceded that the "tenancy termination agreements" referenced in the amended complaint constituted buyout offers. Accordingly, the court held that plaintiffs adequately plead their fourth cause of action for damages and statutory penalties.

Claim of Negligence

As to plaintiffs' second cause of action for *negligence per se*, the court found the demurrer should be sustained because plaintiffs failed to adequately allege an actionable claim. Plaintiffs alleged defendants' per se negligence caused plaintiffs to suffer damages from diminution in value of the leasehold, out-of-pocket expenses, emotional distress, and property damage. Though plaintiffs' negligence claim rested upon facts related to defendants' violation of § 151.31—not condition 14—plaintiffs still failed to plead facts that adequately alleged a common law violation of duty of care, independent of defendants' violation of the Municipal Code. In the absence of an independent duty of care, plaintiffs failed to state a cause of action for negligence per se, thus requiring defendants' demurrer to be upheld.

Alleged UCL Violations

Finally, the court found that plaintiffs adequately pleaded their third cause of action for violations of the UCL. Though plaintiffs' UCL claims related to condition 14 remained unripe, such prematurity did not extend to plaintiffs' claims related to § 151.31. Plaintiffs alleged that defendants conduct of failing to provide the requisite notices of rights to tenants before making buyout offers is forbidden under § 151.31, and thus unlawful under the UCL. In turn, Plaintiffs suffered economic injury from loss of a future leasehold in the Project due to defendants' unfair business practices. The court concluded that, when construed liberally, the complaint could support a finding of injunctive relief against defendants, which would bar them from making further buyout offers without the notice mandated by § 151.31.

Rules of Court

Separately, the court found that plaintiffs' claims were not subject to the Rules of Court (rule 3.2220 *et seq.*) that govern ELDPs. The court rejected defendants' contention that plaintiffs forfeited this claim by failing to include the trial court's ELDP order in the notice of appeal. The appellate court held that a notice of appeal from a judgment encompasses non-

appealable orders prior to that judgment, and thus, do not have to be specified in the notice.

Conclusion and Implications

While *unpublished* and procedural the case is worth reading. With the amount of infill development and particularly the number of apartment conversions in the City of Los Angeles, this case serves as a reminder of the importance of compliance with local housing-related regulations in displacing existing tenants. The court's *unpublished decision* is available online at: https://www.courts.ca.gov/opinions/nonpub/B305255.PDF
(Bridget McDonald, Christina Berglund)

SECOND DISTRICT COURT REVERSES DISMISSAL OF RATE STRUCTURE CHALLENGE UNDER PROPOSITION 218 FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Lucinda Malott v. Summerland Sanitary District,
___Cal.App.5th___, Case No. B298730 (2nd Dist. Oct. 19, 2020).

The Second District Court of Appeal in *Lucinda Malott v. Summerland Sanitary District* held that a Proposition 218 challenge to a wastewater disposal rate structure in connection with a rate increase does not require exhaustion of administrative remedies and permits the introduction of extra-record evidence.

Factual and Procedural Background

Malott owns a 30-unit apartment building within the Summerland Sanitary District (District). The District provides wastewater collection, treatment and disposal services for commercial and residential property in its service area and charges service rates to its customers.

In 2017, the District provided notice to Malott and other property owners of a service rate increase. The rate increase was considered at a public hearing in February 2018, and a 3.5 percent rate increase was adopted. Malott did not file a written protest and did not attend the hearing.

On April 17, 2018, Malott filed a petition for a writ of administrative *mandamus* against the District. Malott alleged that she was excused from exhausting the administrative remedy of the public hearing because it was an inadequate remedy.

Malott further alleged the District uses a classification for service rates "for all residential parcels" that are "based upon a "Schedule of Equivalent Dwelling Units" (EDUs). She claimed that the District schedule of EDUs arbitrarily assigns EDU values without regard to: 1) actual wastewater discharged from a parcel; 2) proportional cost of providing wastewater service to a parcel. She also claimed the District's calculation of rates "based solely on EDUs without regard to the proportional cost of the service attributable to a parcel" violates article XIIID, § 6, subdivision (b)(3) of the California Constitution.

In September 2018, Malott filed a notice of motion and motion for judgment on a writ of administrative *mandamus*. The motion included a declaration of Lynn Takaichi, an expert on utility and wastewater service rates. The Takaichi declaration contained facts and an assessment that: 1) the District's calculation of fees did not comply with current law; 2) the District improperly placed all residential users, whether single family homes or residents in muti-unit apartment buildings, within a single rate EDU category; 3) apartment buildings containing multiple units use 40 percent lower amounts of water than the actual water use of single family homes; and 4) the District was overcharging apartment buildings and undercharging single-family residences.

The District filed a motion to strike Tachaichi's declaration because it had not been filed at the public hearing. The trial court granted the motion to strike, finding the declaration was "improper extra-record evidence" under the administrative remedy exhaustion doctrine because it had not first been presented at a District public hearing on a rate increase. The trial court subsequently denied the petition, finding that the District's single "uniform per-EDU rate for residential customers" was valid.

The Court of Appeal's Decision

The Court of Appeal reversed the trial court's judgment. The Court of Appeal held that Malott's pleading was, in essence, a complaint for declaratory relief, and not a writ of administrative mandate, because it was not challenging the rate increase percentage, but instead was challenged the basic underlying rate structure. Thus, the doctrine of exhaustion of administrative remedy did not apply. The Court of Appeal remanded the case to the trial court so that Malott may present evidence to support her contentions.

Proposition 218

Nearly two decades ago, Proposition 13 sharply constrained local governments' ability to raise property taxes, the mainstay of local government finance. Proposition 13 also specified that any local tax imposed to pay for specific governmental programs—a "special tax"—must be approved by two-thirds of the voters.

Since that time, many local governments have relied increasingly upon *other* revenue tools to finance local services, most notably: assessments, property-related fees, and a variety of small general-purpose taxes (such as hotel, business license, and utility user taxes). It is the use of *these* local revenue tools that is the focus of Proposition 218.

In general, the intent of Proposition 218 is to ensure that all taxes and most charges on property owners are subject to voter approval. In addition, Proposition 218 seeks to curb some perceived abuses in the use of assessments and property-related fees, specifically the use of these revenue-raising tools to pay for general governmental services rather than property-related services.

Under Proposition 218, before a local government agency may impose or increase certain property related fees and charges, it must notify affected property owners and hold a public hearing. (Cal. Const., Art. 13D, §. 6(a)(2); *Plantier v. Ramona Municipal Water Dist.* (*Plantier*), 7 Cal.5th 372, 376 (2019).) Among other Proposition 218 requirements, a governmental imposed fee "shall not exceed the proportional cost of the service attributable to the parcel." (Cal. Const., Art. 13D, §. 6(b)(3); *Plantier*, at p. 382.)

When challenging an increase in fees on the basis that the fee structure itself "does not property allocate costs among the parcels served," there is no need to exhaust administrative remedies because the hearing does not provide an adequate remedy to challenge the method used to allocate the fee burden. (*Plantier*, at p. 387.) In *Plantier*, the plaintiffs, who did not participate in the Proposition 218 rate increase hearing either by submitting a written protest or speaking at the hearing, brought their challenge by way of an action for declaratory relief.

Administrative *Mandamus*

The Court of Appeal's focus was on whether the reasoning in *Plantier* applied also to a similar factual situation when the relief sought is by way of writ of administrative mandate, rather than by way of declaratory relief, as in *Plantier*. In determining that the type of action filed did not make a difference, the Court of Appeal noted that Proposition 218 specifically states that its provisions "shall be liberally construed to effectuate" its purposes of limiting local government revenue and enhancing taxpayer consent. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority*, 44 Cal.4th 431, 448 (2008).)

The Court of Appeal held that Malott's styling the complaint as one for administrative *mandamus* was permitted by Proposition 218, which does not specify the type of action. The Court of Appeal also held that common law does not deny declaratory relief when allegations of an administrative writ of mandate cause of action are sufficient to support declaratory relief. (*Woods v. Superior Court*, 28 Cal.3d 668, 672-674 (1981).) Thus, the Court of Appeal held that, as in *Plantier*, there is no requirement to exhaust administrative remedies in a Proposition 218 challenge to the underlying rate structure, regardless of the type of action filed.

Relevant and Admissible Evidence

Similar to its holding that the exhaustion of administrative remedies rule did not apply, the Court of Appeal also held that the extra-record exclusion doctrine did not apply, because the administrative hearing did not create a record relevant to the challenge to the underlying structure of the fee. Applying the exclusion doctrine when there is an inadequate administrative record would create an injustice by improperly elevating an exclusionary rule over the

right to have a forum to litigate claims in a mandamus action. (*Ogo Associates v. City of Torrance*, 37 Cal.App.3d 830, 834-835 (1974).) Relevant admissible evidence in support of a petition for writ of mandate can be produced by affidavit. (*Hand v. Board of Examiners*, 66 Cal.App.3d 605, 615 (1977).) The Takaichi declaration was clearly relevant to whether the District's method to calculate residential service rates was proper.

Conclusion and Implications

This opinion by the Second District Court of Appeal reaffirms the holding in *Plantier* allowing challenges to rate structures of fees at the time of fee increases, without strict limitations that would be applied to administrative mandamus proceedings, because the Proposition 218 fee increase hearings do not focus on the underlying rate structure. Courts are following the constitutional mandate to broadly construe Proposition 218 limitations on fees. Although it is conceivable that a government agency at a Proposition 218 fee increase hearing could present all of the evidence regarding the underlying rate structure in order to avail itself of the exhaustion of administrative remedies and extra-record exclusion doctrines, it may be expensive to do so and could unnecessarily encourage challenges to the rate structure. For those seeking to challenge fee increases, it certainly would be prudent to hire a consultant who can advise whether the rate structure is appropriate, as an additional challenge under Proposition 218 to any fee increase. https://www.courts.ca.gov/opinions/documents/B298730.PDF
(Boyd Hill)

SIXTH DISTRICT COURT FINDS APPELLANT FAILED TO TIMELY APPEAL FROM AN ORDER GRANTING ANTI-SLAPP MOTIONS

Reyes v. Kruger, 55 Cal.App.5th 58 (6th Dist. 2020).

A commercial tenant brought a malicious prosecution action against a property owner and the property owner's attorney for what the tenant alleged was a wrongful eviction. The trial court granted the defendants' motions to dismiss under California's "anti-SLAPP" statute, and the tenant ultimately appealed. On appeal, the Court of Appeal for the Sixth Judicial District found that the tenant had failed to timely appeal from the order granting the anti-SLAPP motions, and that a motion for new trial likewise had been untimely. The Court of Appeal then dismissed the appeal.

Factual and Procedural Background

Corinna Reyes operated a medical marijuana outlet on commercial premises leased by Kim Kruger and the Kim Kruger Trust. Kruger received complaints from neighbors about the operation and its customers, mostly related to parking issues, loitering, and littering. Kruger also stated that the city's code enforcement contacted her about violations on the premises and Reyes's noncompliance with requests for inspection. After an inspection confirmed the code violations and revealed other unpermitted alterations to the property, Kruger began eviction proceedings. After that faltered, she filed an unlawful detainer action.

The case was tried in October 2013, at the conclusion of which the trial court granted judgment in favor of Kruger. After unsuccessful attempts to vacate the judgment and to petition for relief from the judgment as it declared forfeiture of the lease, Reyes filed an appeal in the appellate division of the superior court, which reversed the judgment. Reyes then sued Kruger in July 2015 in a breach of contract action for wrongful eviction. The trial court granted Kruger's special motion to strike the complaint under the anti-SLAPP statute and dismissed the case.

Reyes then filed a malicious prosecution action against Reyes and her attorney, alleging that Kruger had engaged in fraud and perjury by falsely testifying at trial in the unlawful detainer action that she had returned $2,800 in cash to Reyes by handing an envelope to an employee at the medical marijuana dispensary. Kruger and her attorney both filed demurrers and special motions to strike the complaint under California's "anti-SLAPP" statute (Code Civ. Proc., § 425.16). The anti-SLAPP motions established that

the complaint's cause of action was based upon a protected activity and asserted that Reyes lacked the evidentiary showing required to demonstrate a probability of prevailing on the merits of the malicious prosecution case.

The trial court granted both anti-SLAPP motions, finding that Reyes had not established a probability of prevailing on the merits of each element of the malicious prosecution claim, and overruling the demurrers as moot based upon its ruling granting the special motions to strike. The trial court served a file-stamped copy of the order with proof of service in November 2016, and Kruger then served a notice of entry of judgment or order later that month. In January 2017, the trial court entered a judgment of dismissal and awarded reasonable attorneys' fees and costs. Kruger served a notice of entry of judgment or order later that same month.

In February 2017, Reyes filed a notice of intention to move for a new trial. In March, the trial court entered an order denying the motion for new trial and served a file-stamped copy with proof of service. Kruger served notice of entry of judgment or order denying a new trial in April 2017. Reyes then filed a notice of appeal later in April. The notice appealed from the judgment entered in favor of Kruger in January 2017 "and from all orders relating thereto, including and not limited to the" order denying the motion for new trial in March 2017.

The Court of Appeal's Decision

Challenge to Order Granting Anti-SLAPP Motions

The Court of Appeal first addressed Reyes's contention that the trial court erred in granting the anti-SLAPP motions on the grounds that the evidence in opposition to the motions was sufficient to establish a reasonable probability of prevailing on the malicious prosecution claim. The Court of Appeal found, however, that Reyes had failed to timely appeal from the order granting the anti-SLAPP motions, which itself was an appealable order under state law. Reyes had 60 days from the trial court's service of the file-stamped copy of the order (which was served on November 22, 2016), and therefore Reyes had until January 23, 2017, to file a notice of appeal. Because Reyes did not file a notice of appeal until April 2017, well after expiration of the appeal deadline, the Court of Appeal was jurisdictionally limited and constrained to dismiss the appeal.

Challenge to Order Denying Motion for New Trial

The Court of Appeal next addressed Reyes's claim that, even if the appeal as to the ruling on the anti-SLAPP motions was untimely, the Court of Appeal was not foreclosed from addressing the substantive issues raised in the motion for new trial. The Court of Appeal, however, found that the appeal from the January 2017 judgment did not enable review of the order denying a new trial because the motion for new trial itself had been untimely, and therefore the appeal likewise had been untimely. The Court of Appeal found that the November 2016 notice of entry of order (not the later judgment of dismissal in January 2017) had triggered the 15-day time limit to file a notice of the intent to move for a new trial. Reyes's filing and service of a notice of intention to move for new trial in February 2017 thus was untimely and could not serve to extend the time for the filing of an appeal under California Rule of Court 8.108, which generally extends the time to appeal where a party "serves and files a valid notice of intention to move for a new trial."

Conclusion and Implications

The case is significant because it contains a substantive discussion of issues pertaining to the appeal of orders regarding anti-SLAPP motions, as well as a discussion of jurisdictional issues relating to the filing of motions for new trial and appeals more broadly. The decision is available online at: https://www.courts.ca.gov/opinions/documents/H044661M.PDF (James Purvis)

FIRST DISTRICT COURT FINDS NEIGHBORHOOD ASSOCIATION FAILED TO PROVE AN IMPLIED DEDICATION OF TRAILS ON UNDEVELOPED PRIVATE PROPERTY

Tiburon/Belvedere Residents United to Support the Trails v. Martha Co., 56 Cal.App.5th 461 (1st Dist. 2020).

A local neighborhood association filed a complaint against a private landowner, alleging that certain trails had been impliedly dedicated to public use prior to March 1972. Following a bench trial, the Superior Court entered judgment in favor of the landowner, finding that the association had failed to prove sufficient evidence of public use, and that the landowner had made bona fide efforts to restrict any such use. The association appealed, and the Court of Appeal for the First Judicial District affirmed.

Factual and Procedural Background

The Martha Co. (owned and operated by the Reed family) owns 110 acres of undeveloped land on the Tiburon Peninsula in Marin County, near the communities of Tiburon and Belvedere. In 2017, Tiburon/Belvedere Residents United to Support the Trails filed a complaint against Martha Co., alleging that certain trails on Martha Co.'s private property had been impliedly dedication to public use through regular use prior to March 1972. At trial, plaintiff's witnesses testified that they and their occasional guests had used the trails for various forms of recreation. They also testified that they sometimes saw others using the trails in some manner.

Although a few of plaintiff's witnesses lived elsewhere in Tiburon and Belvedere, the vast majority lived in the neighborhoods immediately surrounding the property. Almost half of plaintiff's witnesses were under the age of 18 in 1967. Most testified that they never received permission to use the trails and that during the relevant period no one objected to their use. Some witnesses stated there had been no barriers blocking access to the trails, although the majority remembered that there had been gates or old fences of some kind. Most testified that they did not remember seeing "no trespassing" or "private property" signs on the property.

Martha Co.'s witnesses painted a different picture. They testified that, during the relevant years, fences, gates, and "no trespassing" signs were in place at trail access points across the property. They also testified that, although trespassers frequently cut wires in the fencing and removed signs, continual repairs were consistently made by the Reed family. Members of the Reed family also had used the property themselves during the relevant time period, gave permission to certain friends to access the property, and leased portions for grazing and corralling horses.

While Edgar Reed, who was the principal caretaker for the property during the relevant years, had died in 1989, his children and relatives testified that for decades he patrolled the property, posted "no trespassing" signs, maintained fencing, and asked trespassers to leave. Other members of the family assisted in those efforts, and photographs corroborated the existence of fencing and signs. Martha Co. also produced witnesses who used the property as children and recalled that Edgar Reed patrolled the property and, if he saw them, would kick them off.

Following a bench trial, the trial court concluded that plaintiff had failed to show that the public's use of the trails was sufficient "to make a 'conclusive and undisputable presumption of knowledge and acquiescence.' " While the trial court noted that there was some evidence of use, it found that any use was relatively light and that almost all of the witnesses were nearby neighbors and children, which did not constitute use by the general "public." The trial court also found credible evidence that, among other things, members of the Reed family had repaired fences, replaced "no trespassing" signs, asked unauthorized users to leave, and patrolled the property during the relevant years. Although these efforts had not successfully encountered every trespasser across the 110-acre parcel, the trial court found these actions to be reasonable under the circumstances. Judgment was entered in favor of Martha Co. and plaintiff appealed.

The Court of Appeal's Decision

Implied Dedication of Private Property

An implied dedication of private property may be shown when:

> . . .the public has used the land for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by anyone.
>
> The ultimate question is:
>
> . . .whether the public has engaged in 'long-continued adverse use' of the land sufficient to raise the 'conclusive and undisputable presumption of knowledge and acquiescence.'

Because the California Legislature abrogated the cause of action in 1972, the five-year period necessary to prove an implied dedication must now be shown to have occurred prior to March 1972.

Merits of the Lawsuit

On the merits, the Court of Appeal found that substantial evidence supported the trial court's finding that the trails were insufficiently used by the public. Among other things, the Court of Appeal found that substantial evidence suggests there was never more than a few people on the trails at any given time (and that in fact many people went to the property to be alone or to engage in activities that would have been dangerous in more crowded settings), that users were not diverse members of the public because they were primarily neighbors and their children, and that use by neighbors and children were insufficient to put Martha Co. on notice that it was at risk of losing its property to an implied dedication. There also were no actions by local governments to facilitate any such use by the public. The Court of Appeal also rejected plaintiff's claim that the trial court had improperly "discounted" the testimony of neighbors and individuals who were children during the relevant time frame.

Even assuming sufficient use had been shown, the Court of Appeal also found that substantial evidence supported the trial court's finding that the Martha Co. made *bona fide* efforts to prevent public use. In so doing, it deferred to the trial court's weighing of conflicting evidence and found the trial court's conclusions to be supported by evidence. While the Court of Appeal agreed that Martha Co.'s efforts had not been perfect, it noted that an owner's efforts to prevent public access need not be wholly effective, particularly if the area is undeveloped and public use is light. The Court of Appeal also rejected plaintiff's argument that the Reed family's own evidence of signs, fences, gates, and patrols should be disregarded as self-serving and not credible. The Court of Appeal then affirmed the decision in favor of Martha Co.

Conclusion and Implications

The case is significant because it includes a substantive discussion of the law relating to implied dedication of property, including an evaluation of efforts made to restrict public access. The decision is available online at: https://www.courts.ca.gov/opinions/documents/A157073.PDF

Editor's Note: The author represented the Martha Co. in this case.

(James Purvis)

LEGISLATIVE UPDATE

2020 LAND USE LEGISLATION YEAR-END WRAP UP

The 2019-2020 Legislative Session has now come to a close and a number of bills related to land use have been signed into law or vetoed by Governor Newsom. The following list of bills reflects each bill that the *California Land Use Law & Policy Reporter* has been tracking over the course of this year. As indicated, some of the bills, for one reason or another, never even made it to the Governor's desk. Nonetheless, for purposes of providing our readers with a comprehensive breakdown we continue to present those bills here. In addition, some of these "stuck" bills have either been converted to two-year bills or will resurface in a "new and improved" form.

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

Unless otherwise noted, each of the laws signed by the Governor will go into effect on January 1, 2021.

Coastal Resources

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

AB 2619 was introduced in the Assembly on February 20, 2020, and, most recently, on June 3, 2020, was held under submission in the Committee on Appropriations.

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

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

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

SB 986 was introduced in the Senate on February 12, 2020, and, most recently, on March 18, 2020, had its scheduled March 24 hearing in the Committee on Natural Resources and Water postponed by the committee.

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

SB 1100 was introduced in the Senate on February 19, 2020, and, most recently, on May 12, 2020, had its referral to the Committees on Environmental Quality and Governmental Organization rescinded due to the shortened 2020 Legislative Calendar.

Environmental Protection and Quality

•ACA 22 (Melendez)—This measure would prohibit a court, in granting relief in an action or proceeding brought under the California Environmental Quality Act (CEQA), from enjoining a housing project, as defined, unless the court finds that the continuation of the housing project presents an imminent threat to public health and safety or that the housing project site contains unforeseen important Native American artifacts or important histori-

cal, archaeological, or ecological values that would be materially, permanently, and adversely affected by the continuation of the housing project, and prohibit the State Legislature from enacting legislation to exempt projects from the requirements of CEQA unless the projects are housing projects, projects for the development of roadway infrastructure, or projects to address an emergency circumstance for which the Governor has declared a state of emergency.

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

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

AB 1907 was introduced in the Assembly on January 8, 2020, and, most recently, on May 13, 2020, had its hearings in the Committees on Natural Resources and Housing and Community Development cancelled at the request of its author, Assembly Member Santiago.

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

AB 2262 was introduced in the Assembly on February 14, 2020, and, most recently, on May 5, 2020, was re-referred to the Committee on Transportation.

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

AB 2323 was introduced in the Assembly as an urgency statute on February 14, 2020, and, most recently, on August 20, 2020, was held under submission in the Committee on Appropriations.

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

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

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

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

•AB 2991 (Santiago)—This bill would extend the authority of the Governor to certify a project for streamlining benefits provided by that act related to compliance with the California Environmental Quality Act and streamlining of judicial review of action taken by a public agency under the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 from January 1, 2020, to January 1, 2025, and provide that the certification expires and is no longer valid if the lead agency fails to approve a certified project before January 1, 2026.

AB 2991 was introduced in the Assembly on February 21, 2020, and, most recently, on June 2, 2020, had its first hearing in the Committee on Appropriations cancelled at the request of its author, Assembly Member Santiago.

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

AB 3054 was introduced in the Assembly on February 21, 2020, and, most recently, on April 24, 2020, was referred to the Committee on Natural Resources.

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 20, 2020, was held under submission in the Committee on Appropriations.

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

AB 3335 was introduced in the Assembly on February 21, 2020, and, most recently, on April 24, 2020, was referred to the Committee on Natural Resources.

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

SB 874 was introduced in the Senate on February 11, 2020, and, most recently, on September 28, 2020, was approved by the Governor and chaptered by the Secretary of State at Chapter 234, Statutes of 2020.

•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 31, 2020, was in the Senate with concurrence in the Assembly's amendments to the bill pending.

Housing / Redevelopment

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

AB 1934 was introduced in the Assembly on January 15, 2020, and, most recently, on January 23, 2020,

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

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

AB 2137 was introduced in the Assembly on February 10, 2020, and, most recently, on February 27, 2020, was referred to the Committees on Housing and Community Development and Local Government.

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

AB 2344 was introduced in the Assembly on February 18, 2020, and, most recently, on February 24, 2020, was referred to the Committee on Housing and Community Development.

•AB 2345 (Gonzalez)—This bill would amend the Density Bonus Law to, among other things, authorize an applicant to receive: 1) 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 September 28, 2020, was approved by the Governor and chaptered by the Secretary of State at Chapter 197, Statutes of 2020.

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

AB 2405 was introduced in the Assembly on February 18, 2020, and, most recently, on September 28, 2020, was vetoed by the Governor.

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

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

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

AB 2580 was introduced in the Assembly on February 20, 2020, and, most recently, on June 3, 2020, was held under submission in the Committee on Appropriations.

•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 afford-

able 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 20, 2020, was read for a second time, amended and then re-referred to the Committee on Housing.

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

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

•AB 3155 (Rivas)—This bill would amend the Subdivision Map Act to, among other things, authorize a development proponent to submit an application for the construction of a small lot subdivision that meets certain specified criteria, including that the subdivision is located on a parcel zoned for multifamily residential use, consists of individual housing units that comply with existing height, floor area, and setback requirements applicable to the pre-subdivided parcel, and that the total number of units created by the small lot subdivision does not exceed the allowable residential density permitted by the existing General Plan and zoning designations for the pre-subdivided parcel.

AB 3155 was introduced in the Assembly on February 21, 2020, and, most recently, on June 3, 2020, was held under submission in the Committee on Appropriations.

•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 5 acres, among other requirements.

AB 3234 was introduced in the Assembly on February 21, 2020, and, most recently, on September 30, 2020, was approved by the Governor and chaptered by the Secretary of State at Chapter 334, Statutes of 2020.

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

SB 902 was introduced in the Senate on January 30, 2020, and, most recently, on August 20, 2020, was held under submission in the Committee on Appropriations.

•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 September 28, 2020, was approved by the Governor and chaptered by the Secretary of State at Chapter 202, Statutes of 2020.

•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 August 31, 2020,

was in the Senate with concurrence in the Assembly's amendments to the bill pending.

•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 20, 2020, was held under submission in the Committee on Appropriations.

Public Agencies

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

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

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

AB 2028 was introduced in the Assembly on January 30, 2020, and, most recently, on September 1, 2020, was ordered to the inactive file by unanimous consent.

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

AB 2168 was introduced in the Assembly as an urgency statute on February 11, 2020, and, most recently, on May 5, 2020, was re-referred to the Committee on Local Government.

A•B 3145 (Grayson)—This bill would prohibit a city or county from imposing a specified fee or exaction on a housing development project if the total dollar amount of the fees and exactions that a city or county would impose on a proposed housing development is greater than 12 percent of the city's or county's median home price unless approved by the Department of Housing and Community Development.

AB 3145 was introduced in the Assembly on February 21, 2020, and, most recently, on March 9, 2020, was referred to the Committees on Local Government and Housing and Community Development.

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

SB 931 was introduced in the Senate on February 5, 2020, and, most recently, on April 2, 2020, was read for a second time, amended and then re-referred to the Committee on Governance and Finance.

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

SB 1060 was introduced in the Senate on February 18, 2020, and, most recently, on April 6, 2020, had

its April 14 hearing in the Committee on Natural Resources and Water postponed by the committee.

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 September 29, 2020, was approved by the Governor and chaptered by the Secretary of State at Chapter 255, Statutes of 2020.

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

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

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

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

•AB 3122 (Santiago)—This bill would amend the Planning and Zoning Law to, among other things, 1) require the General Plan inventory of land available for residential purposes to include an analysis of potential sites available for the development of emergency shelters, temporary housing, and supportive housing necessary to provide shelter to the locality's homeless population; and 2) require a locality develop a comprehensive plan for making emergency shelters, temporary housing, and supportive housing available to the locality's homeless population, with the goal of transitioning individuals housed in emergency shelters into supportive housing and require the plan to address the types of supportive services that the locality will provide to individuals housed in emergency shelters, temporary housing, and supportive housing.

AB 3122 was introduced in the Assembly on February 21, 2020, and, most recently, on May 20, 2020, had its first hearing in the Committee on Housing and Community Development cancelled at the request of its author, Assembly Member Santiago.

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

AB 3153 was introduced in the Assembly on February 21, 2020, and, most recently, on 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 September 1, 2020, was ordered to the inactive file. (Paige Gosney)

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