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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

ENVIRONMENTAL JUSTICE IN GENERAL PLANS: STRATEGIC CONSIDERATIONS FOR PLANNING AND LAND USE PROFESSIONALS

By Michele A. Staples

The California Governor's Office of Planning and Research (OPR) updated its General Plan Environmental Justice Element Guidelines in June 2020 to address the Environmental Justice (EJ) requirements of Senate Bill 1000 of 2016, The Planning for Healthy Communities Act. (General Plan Guidelines Chapter 4: Environmental Justice Element (ca.gov).) The following is an overview of the EJ goals, requirements, procedures and tools, as well as insights into how they can inform diligence investigations for property acquisition and guide development project conceptualization.

The General Plan as the Planning and Land Use Framework

Every California city and county must have a General Plan, a long-term vision for their future growth and development. The California Supreme Court has characterized the General Plan as the "constitution" for a city's or county's growth and development. Like the state and federal constitutions, the General Plan sets the policy framework for the city or county which is then implemented through programs, ordinances and regulations. Virtually every land use decision in California is based on the city's or county's General Plan, including development project approvals. Development projects consistent with the General Plan can benefit from streamlined review while those inconsistent with the General Plan can be denied or their approvals overturned. In jurisdictions where the General Plan is found to be inadequate, courts have temporarily halted development project approvals until a legally valid General Plan is approved. As a result, the General Plan is the jurisdiction's critical community planning document as well as the starting point for planners and land use practitioners evaluating property acquisitions, conceptualizing development projects and crunching projects *pro forma*.

General Plans are required to include seven "Elements": Land Use, Housing, Transportation, Conservation, Open Space, Safety and Noise. (Gov. Code § 65302(a)-(g).) Each element has certain requirements that have evolved over time. Increased study and awareness of societal effects of unjust planning practices lead to Senate Bill (SB) 1000. SB 1000 requires cities and counties with identified disadvantaged communities in their jurisdictions to include an EJ Element or incorporate EJ policies in other General Plan elements. (Gov. Code, § 65302(h).) SB 1000 aims to correct the inequity to minority and low-income communities resulting from California's history of discriminatory land use policies by reducing the pollution experienced by these communities and ensuring their input is considered in planning decisions that affect them.

Environmental Justice and Disadvantaged Communities Defined

EJ is defined as:

> . . .the fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies. (Gov. Code, section 65040.12(e).)

Cities and counties with an identified "disadvantaged community" that revise two or more General Plan Elements concurrently are required to incorporate EJ into their General Plans. OPR strongly encourages jurisdictions without formally-defined

disadvantaged communities to consider creating an optional EJ Element in order to promote equity and protect health and wellness in their communities.

Local jurisdictions have discretion to identify a disadvantaged community based on three identification methods in SB 1000. The first method of defining a disadvantaged community is based on the score calculated by the California Communities Environmental Health Screening Tool (CalEnviroScreen) developed by CalEPA's Office of Environmental Health Hazard Assessment as a mapping tool to identify environmentally burdened and vulnerable communities for investment opportunity under the state's Greenhouse Gas Reduction Fund Cap-and-Trade program. 25 percent of the proceeds from the fund must be spent on projects located in disadvantaged communities. Known as California Climate Investments, these funds are aimed at improving public health, quality of life and economic opportunity in identified disadvantaged communities while reducing greenhouse gas emissions.

The CalEnviroScreen model scores each of California's 8,000 census tracts based on 12 types of pollution burden such as pesticide use, drinking water contaminants and proximity to hazardous waste generators and facilities, and eight socioeconomic and health-related characteristics indicators related to pollution including low-income, asthma and cardiovascular disease. The census tracts that score the highest are the most burdened and most vulnerable to pollution. Under the first method for identifying disadvantaged community, an area is a disadvantaged community if it scores 75 percent or higher on CalEnviroScreen. (Gov. Code, § 65302, subd. (h)(4)(A).)

The other two definitions of disadvantaged community in SB 1000 are based on low-income areas having a disproportionate pollution burden or other hazards that can lead to negative health effects, exposure or environmental degradation. SB 1000 defines a "low-income area" as: 1) an area with household incomes at or below 80 percent of the statewide median income, or 2) an area with household incomes at or below the threshold designated as low income by the Department of Housing and Community Development's list of state income limits. If the local jurisdiction identifies low-income areas, it must then evaluate whether these areas are disproportionately affected by environmental pollution that can lead to negative health impacts, pollution exposures or environmental degradation. The CalEnviroScreen mapping tool displays its individual data layers that cities and counties can use as part of their examination of whether low-income areas may be disproportionately burdened by pollution. Tiffany Eng, the California Environmental Justice Alliance's Green Zones Program Manager, suggests that jurisdictions can identify disadvantaged communities within their boundaries by layering available data such as air quality data, local tribal areas, ethnicity, and other socio-economic demographic information to create a composite map.

OPR recommends that jurisdictions conduct early community engagement, particularly with low-income communities, communities of color, sensitive populations, tribal governments, and organizations focused on public health and EJ during the disadvantaged communities screening process. This can help to ensure that the location of disadvantaged communities is accurately identified and the nature of their environmental burdens, concerns and needs are specifically defined.

The OPR Guidelines encourage cities and counties to go beyond the SB 1000 statutory definition when identifying disadvantaged communities within their jurisdiction and also consider issues unique to areas within their jurisdiction which might not be reflected in the statewide data sets, such as a high pollution burden for one type of pollutant even when the overall CalEnviroScreen score is less than 75 percent, or the regional cost of living. For example, OPR suggests that, depending on the data and information available, local governments should consider whether there are disadvantaged communities in geographic units smaller than a census tract to ensure that all disadvantaged communities are recognized.

In addition to helping cities and counties define the presence, location and needs of disadvantaged communities within their jurisdiction for purposes of General Plan EJ policies, the CalEnviroScreen mapping tool provides a wealth of information that can help identify project opportunities and constraints such as identified pollutants, groundwater threats, noise and other environmental hazards in the project site vicinity, as well EJ policies that discourage or promote certain types of development projects within areas identified as disadvantaged communities.

The Environmental Justice Process

Upon completion of the screening process, the city or county is required to include detailed information in the General Plan identifying and clearly defining the disadvantaged communities within the area covered by the General Plan, including their location and the nature of their environmental burdens, health risks and needs. The General Plan's EJ topics include information such as pollution exposure including air quality, water quality and land use compatibility; public facilities; accessibility to public transit, employment and services; health risks such as high fire threat and seismic risk areas; civic or community engagement; and prioritization of improvements.

Once the needs are clearly defined, local agencies are to develop draft goals, objectives, policies and programs to reduce health risks and associated issues with the aim to ensure fair treatment and meaningful involvement of people of all races, cultures, incomes and national origins. Government Code § 65302(h) requires the General Plan to identify specific EJ objectives and policies that do at least the following:

- Reduce exposure to pollution including improving air quality in disadvantaged communities. The OPR Guidelines suggest this could include land use and project siting, transportation improvements, tobacco smoke, pesticide drift and water quality, accessibility and affordability.

- Promote public facilities in disadvantaged communities. Examples include equitable access and connections to public services and community amenities.

- Promote food access in disadvantaged communities. Examples include streamlining project approvals for grocery stores in underserved areas, promoting community gardens and improving connectivity and transportation to provide access to grocery stores and farmer's markets.

- Promote safe and sanitary homes in disadvantaged communities. Examples include siting new housing near transportation and amenities, enforcing code requirements and providing and preserving affordable housing.

- Promote physical activity in disadvantaged communities. Examples include prioritizing park improvements in underserved areas; shared use agreements with schools, places of worship and other private properties; and planning connected bike and pedestrian routes and pathways.

- Reduce any unique or compounded health risks in disadvantaged communities not otherwise addressed above. The OPR Guidelines discuss is some depth the example of disadvantaged communities' heightened risk and increased sensitivity to climate change with less capacity and fewer resources to cope with, adapt to or recover from climate impacts.

- Promote civic engagement in the public decision-making process in disadvantaged communities. Examples given in the OPR Guidelines include partnering with community-based organizations, advocacy groups, and trusted leaders that work within the identified disadvantaged communities, and continuing to engage disadvantaged communities in General Plan implementation including review of new development projects, capital improvement plans, and other programs.

According to Ms. Eng, effective community outreach efforts have involved the participation of neighborhood schools, churches, housing justice organizations and environmental justice groups. One real measurement of EJ adequacy is whether community recommendations and feedback are incorporated into the final policies.

OPR's guidance on the EJ process puts a premium on community engagement in defining needs and developing and vetting policies. Likewise, the California Attorney General's comments on several cities' and counties' proposed EJ policies (posted at SB 1000 - Environmental Justice in Local Land Use Planning | State of California - Department of Justice - Office of the Attorney General) are particularly focused on robust community engagement to identify EJ needs within each city and county, and incorporating clear and actionable requirements responsive to community comments in General Plans to accomplish EJ goals.

It is critical that the affected communities support the policies and programs intended to address their specific issues and needs. Those living in disadvan-

taged communities often have not participated in city and county decision-making processes, so staff and governing boards tasked with formulating objectives and policies to resolve environmental inequities might not have been made aware of specific community needs and the day-to-day barriers in the particular disadvantaged communities needing solutions. Ms. Eng points out that any investment in a disadvantaged community can lead to unintended consequences like rising housing prices and displacement. Proactive community engagement also provides opportunities for trust building, open communication and education between developers (who have knowledge and resources for housing and infrastructure) and residents (who have knowledge about the neighborhood that the developer may not otherwise have access to).

The City of Placentia Example

The City of Placentia's (City) Health, Wellness, & EJ Element is considered by OPR to be an example of a successful EJ process and garnered state and local awards for Opportunity and Empowerment from the American Planning Association California Chapter's Award of Merit and Orange County Section of the California Chapter of the American Planning Association's Award of Excellence. The City's EJ community outreach program included collaboration with a local nonprofit organization located in one of the disadvantaged communities, LOT #318, to engage with local residents in their neighborhoods through community meetings and surveys. The City provided outreach materials in Spanish and other appropriate languages, and provided a translator or translation headsets at public meetings to enable residents to engage firsthand with the meeting content. Because of the City's effective community outreach efforts, its EJ Element was able to detail residents' concerns and specifically address those concerns through the goals and policies.

Joe Lambert, Director of Development Services for the City, purposely structured community meetings as talking with neighbors. The City learned through those discussions about physical barriers to health and wellness such as inadequate sidewalks and street lights making residents feel unsafe walking their children to school alongside traffic or walking 20 minutes from the nearest parking space to their apartment after dark. A lack of public transportation prevented residents from accessing healthy food choices located too far away at the farmers market and grocery stores. Renters put up with subpar living conditions because they were afraid of the potential ramifications if they asked the landlord to make repairs. Obtaining such specific community input enabled Placentia to develop EJ policies that directly address the concerns raised by the community relating to improved pedestrian lighting and code enforcement, increased access to green spaces to encourage physical activity, and expanded hours and locations for food distribution programs.

Involve and Engage Disadvantaged Communities in General Plan Implementation

OPR suggests that local jurisdictions should continue to involve and engage disadvantaged communities in General Plan implementation activities on an ongoing basis after adoption of the General Plan update. For example, civic engagement should be included in reviewing proposed development projects and associated entitlements, proposals for amending zoning or other implementing codes or standards, local neighborhood-level Specific Plan or revitalization efforts, and capital improvement plans or facility master planning. Public outreach should address barriers to participation such as language and transportation to foster transparency and enable community input to influence the planning process. The OPR Guidelines further suggest that all cities and counties, not just those with disadvantaged communities, implement such a holistic planning approach in their General Plan or other local planning documents to promote equity and protect human health from environmental hazards.

For development projects within identified disadvantaged communities, the city's or county's EJ outreach program may provide a template for how public review and comment on project entitlements will be handled.

Examples of Environmental Justice Policies

OPR has developed Model EJ Policies for General Plans to accompany the OPR Guidelines (Model EJ Policies for General Plans (ca.gov)). The OPR Guidelines also provide links to EJ Elements and policies in city and county General Plans as examples.

Many EJ policies are familiar land use and plan-

ning topics, such as promoting transit-oriented development and encouraging water- and energy-conserving features in new development projects. Some EJ policies such as the following city General Plan policies are tailored specifically to community barriers to health, wellness and engagement in order to address the unique and compounded health risks to EJ communities as required by SB 1000:

•Consider environmental justice issues as they are related to potential health impacts associated with land use decisions, including enforcement actions, to reduce the adverse health effects of hazardous materials, industrial activities, and other undesirable land uses, on residents regardless of age, culture, ethnicity, gender, race, socioeconomic status, or geographic location (National City HEJ-1.2)

•Consider any potential air quality impacts when making land use or mobility decisions for new development, even if not required by California Environmental Quality Act (Placentia HW/EJ 10.9)

•Conduct City Council visits to disadvantaged neighborhoods to encourage discussion on items that affect the residents and businesses. Have Council accompanied by representatives from Police, Code Enforcement, Development and Community Services, and other departments. Host an annual community walk with the Mayor and other Council members (Placentia HW/EJ 15.6)

•Promote capacity-building efforts to educate and involve traditionally underrepresented populations in the public decision-making process (Inglewood EJ-1.9)

•Encourage the development of healthy food establishments in areas with a high concentration of fast -food establishments, convenience stores, and liquor stores. For example, through updated Zoning regulations, tailor use requirements to encourage quality, sit down restaurants, in areas that lack them (Inglewood EJ-4.2)

•Prioritize projects that significantly address social and economic needs of the economically vulnerable populations. Address and reverse the underlying socioeconomic factors and residential social segregation in the community that contributes to crime and violence in the city (Richmond HL-33)

•Ensure that contaminated sites in the city are adequately remediated before allowing new development. Engage the community in overseeing remediation of toxic sites and the permitting and monitoring of potentially hazardous industrial uses. Develop a response plan to address existing contaminated sites in the city. Coordinate with regional, state, and federal agencies. Include guidelines for convening an oversight committee with community representation to advise and oversee toxic site cleanup and remediation on specific sites in the city. Address uses such as residential units, urban agriculture, and other sensitive uses (Richmond HL-40).

The information in an EJ Element can inform private planning and land use decisions, such as whether the local jurisdiction considers certain locations appropriate for new residential, commercial or industrial projects and whether there may be additional procedural steps in the entitlement review process. For development projects located within an area identified as a disadvantaged community, the EJ policies help identify on- and off-site infrastructure, amenities and services that may be required in connection with project development, and provide a ready source of information to help analyze the compatibility of a proposed project, the potential extent of California Environmental Quality Act review and mitigation measures, and community organizations that should be consulted in the project conceptualization process.

Environmental Justice Resources

Helpful EJ resources appear below:

•The Attorney General's SB 1000 webpage (SB 1000 - Environmental Justice in Local Land Use Planning | State of California - Department of Justice - Office of the Attorney General) includes helpful links to EJ resources including the Attorney General's EJ-related comments on several city and county draft General Plans, example EJ Elements and policies, a link to CalEnviroScreen and links to each of the 12 pollution indicator maps, CalEPA's Disadvantaged Communities Mapping

Tool, and several other regional, state and federal environmental mapping tools.

•The OPR Guidelines (https://opr.ca.gov/docs/20200706-GPG_Chapter_4_EJ.pdf) include a list of several scientific based tools developed by other agencies and academia that provide information relevant to EJ considerations, as well as links to EJ Elements and policies in General Plans adopted by several jurisdictions throughout the state. The following OPR email address is dedicated to SB 1000 questions: SB1000@OPR.CA.GOV.

•Background information detailing the root causes of California's environmental inequities is included in the OPR Guidelines and in the 2017 book, *The Color of Law: A forgotten History of How Our Government Segregated America*, by Richard Rothstein.

•The California Environmental Justice Alliance (one of the SB 1000 co-sponsors) prepared the "CEJA SB 1000 Implementation Toolkit" to provide guidance on implementing SB 1000's mandates: https://www.caleja.org/sb1000-toolkit

Conclusion and Implications

Environmental Justice-related tools will help guide more equitable planning policies while providing valuable resources to inform property acquisition and development project conceptualization. Perhaps EJ's greatest value will be the beneficial results of fostering communication with residents who have not been involved in the decision-making processes affecting them and the societal and economic benefits resulting from reversing the negative effects of pollution and environmental degradation that have burdened the most vulnerable for too long.

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REGULATORY DEVELOPMENTS

U.S. FISH AND WILDLIFE SERVICE ISSUES FINAL EIS FOR CHANGES TO MIGRATORY BIRD TREATY ACT

On November 27, 2020, the U.S. Fish and Wildlife Service (FWS or Service) published a final Environmental Impact Statement (EIS) analyzing a proposed rule change to the Migratory Bird Treaty Act (MBTA) that would significantly reduce potential liability under the statute, including for water agencies. Specifically, the proposed rule would adopt a regulation exempting activities that incidentally result in "take" of protected bird species from the scope of the MBTA's prohibitions, meaning that the MBTA would only reach, and create potential civil or criminal liability for, actions designed to intentionally kill or harm migratory birds, their nests, or their eggs. [U.S. Department of the Interior Fish & Wildlife Serv., *Regulations Governing Take of Migratory Birds: Final Environmental Impact Statement* (November 2020).]

Background

The FWS is the federal agency delegated the primary responsibility for managing migratory birds consistent with four international migratory bird treaties (between the United States and Canada, Mexico, Japan, and Russia) and implementing the MBTA. The MBTA was enacted in 1918 to help fulfill the United States' obligations under the 1916 "Convention between the United States and Great Britain for the protection of Migratory Birds." The goal of the MBTA was to stop the unregulated killing of migratory birds at the federal level.

On December 22, 2017, the Principal Deputy Solicitor of the Department of the Interior (Solicitor), exercising the authority of the Solicitor pursuant to Secretary's Order 3345, issued a legal opinion, M-Opinion 37050, "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take." M-Opinion 37050 concluded that the MBTA's prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to actions intentionally or purposefully "taking" migratory birds, their nests or their eggs. In response to this opinion, several environmental groups took legal action in federal court, alleging that the proposed interpretation would severely rollback the ability of the federal government to prosecute industries for violations of the MBTA.

The FWS sought to adopt the Solicitor's opinion, publishing a proposed rule codifying M-Opinion 37050 on February 3, 2020. Following the administrative process required by the National Environmental Policy Act (NEPA), the Service released a draft Environmental Impact Statement on June 5, 2020. After the issuance of the proposed rule and draft EIS, a U.S. District Court vacated M-Opinion 37050. (*See, Natural Resources Defense Council v. U.S. Department of the Interior*, ___F.Supp.3d___, Case 18-cv-4596(S.D. N.Y. Aug. 11, 2020); *see:* https://www.biologicaldiversity.org/species/birds/pdfs/Migratory-Bird-Treaty-Act-Ruling.pdf)

In response to the court's *vacatur* of the M-Opinion, the FWS continued to proceed through the NEPA process. On November 27, 2020, the Service published the final EIS, providing responses to comments received throughout the process. The final EIS is available for public review for 30 days, after which the Service will issue a Record of Decision (ROD). *See*: https://www.fws.gov/regulations/mbta/.

After the ROD is issued, the final step of the rulemaking process will be the publication of a final rule.

The Migratory Bird Treaty Act and 'Takings'

The MBTA makes it unlawful to, among other things, take individuals of many bird species found in the United States, unless that taking is authorized by a regulation promulgated under 16 U.S.C.§ 704. 16 U.S.C. § 703. "Take" is defined in the Service's general wildlife regulations as "to pursue, hunt, shoot, wound, kill, trap, capture, collect, or attempt to hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R § 10.12. Prior to M-Opinion 37050, § 703 of the MBTA was interpreted as a strict liability provision, meaning that no criminal intent is required for a violation to have taken place, any act that takes or kills a bird must be covered as long as the act results in the death of a bird. M-Opinion 37041 at 2 (January 10, 2017). Instead, the FWS relied on enforce-

ment discretion to determine when to pursue alleged incidental take violations. *Id.* at 12.

However, federal courts have adopted different views on whether the MBTA prohibits the "incidental take" of migratory birds. Some Courts of Appeal and District Courts have held that the MBTA criminalizes certain activities that incidentally take migratory birds, generally with some form of limiting construction, while others have indicated that it does not. For instance, the FWS did not enforce incidental take of migratory birds within the jurisdiction of the Fifth Circuit Court of Appeals because that court held the MBTA does not prohibit incidental take. *See: United States v. CITGO Petroleum Corp.*, 801 F.3d 477 (5th Cir. 2015).

The Fish and Wildlife Service's Proposed Rule

By its most recent action, the Service proposes to develop a regulation in 50 C.F.R part 10 that defines the scope of the MBTA to exclude incidental take, claiming that the adoption of the regulation is necessary to provide legal certainty for the public regarding what actions are prohibited under the MBTA.

In the proposed rule, the FWS seeks to interpret the MBTA to prohibit only actions directed at migratory birds, their nests, or their eggs, clarifying that incidental take is not prohibited. With the proposed rule, the Service proposes to adopt a regulation defining the scope of the MBTA's prohibitions to reach only activities expressly directed at killing migratory birds, their nests, or their eggs. In other words, take of a migratory bird, its nest, or eggs that is incidental to another lawful activity does not violate the MBTA, and the MBTA's criminal provisions do not apply to those activities. Only deliberate acts intended to take a migratory bird are prohibited under the MBTA. As a result, this interpretation would significantly reduce the activities that would result in liability under the MBTA, including activities undertaken by water agencies that may inadvertently lead to take of migratory birds.

Conclusion and Implications

The Record of Decision for the proposed rule is due to be issued at the end of December, after which the final rule will be published. Given the controversy surrounding this issue and previous litigation attempts, it remains to be seen if there will be any last-minute legal challenges. Ultimately, the proposed rule will significantly change current enforcement of the MBTA. However, with a Biden administration coming to office in January 2021, it is possible that these changes to the MBTA may be reversed. (Geremy Holm, Steve Anderson)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT HOLDS THAT SAN FRANCISCO TAXI ORDINANCE IS NOT A 'PROJECT' FOR CEQA PURPOSES

San Francisco Taxi Coalition v. City and County of San Francisco, 979 F.3d 1220 (9th Cir. 2020).

The Ninth Circuit Court of Appeals had occasion to analyze what constitutes a "project" under the California Environmental Quality Act (CEQA) in a decision published on November 9, 2020. In 2018, the City and County of San Francisco adopted an ordinance granting preferred access to fares at San Francisco International Airport (SFO) to taxi drivers that paid upwards of $250,000 for taxi medallions in 2010 or later. These recently medallioned drivers found themselves in dire financial straits after the surge in popularity of ride sharing services like Uber and Lyft. Taxi drivers who purchased taxi medallions before 2010 filed suit alleging multiple federal and state claims, including a claim that the city violated CEQA by not analyzing the 2018 ordinance's potential environmental impacts. The Ninth Circuit rejected each of plaintiffs' claims, and held that the city's adoption of the 2018 ordinance did not violate CEQA because plaintiffs failed to allege any non-speculative environmental impacts that could result from the 2018 ordinance. The 2018 ordinance was therefore not a project requiring review under CEQA.

Factual and Procedural Background

The recent growth of Uber and Lyft have decimated the demand for taxi drivers. In the City of San Francisco (City), this hit taxi drivers that paid $250,000 for taxi medallions in 2010 or after especially hard. In 2018, to ameliorate the financial strain on these drivers, the San Francisco Municipal Transportation Authority (SFMTA) enacted changes to the city's taxi medallion structure which favored those that purchased medallions after 2010. Specifically, the City created three classes of taxi medallion holders, those who purchased medallions before 1978, those who purchased medallions between 1978 and 2010, and those who purchased medallions after 2010. Those in the first group above were prohibited from picking up fares at San Francisco International Airport (SFO), the second group were disfavored from pickups at SFO, and the third group was given priority access to fares at SFO.

Plaintiffs, a group representing taxi drivers in the first and second groups above, claimed that the 2018 ordinance violated: 1) the doctrines of substantive due process and equal protection under the state and federal constitutions, 2) state anti-age discrimination laws, and 3) CEQA for not analyzing the 2018 ordinance as a "project."

The City removed the case to federal court, and filed a motion for judgment on the pleadings. The U.S. District Court granted the city's motion and dismissed the case. Specifically, the District Court rejected plaintiffs' non-CEQA claims, and also held that the city's 2018 ordinance was not a "project" under CEQA, and thus did not require CEQA review.

The Ninth Circuit's Opinion

Equal Protection and Due Process Claims

Regarding the plaintiffs' non-CEQA claims, the Ninth Circuit Court of Appeals determined that plaintiffs' equal protection and substantive due process claims lacked merit because the city's taxi-medallion ordinance bore a rational basis to multiple legitimate state interests. Here, aggrieved taxi medallion holders were not a suspect class, and the city's interests in adopting the 2018 ordinance—reducing airport traffic, encouraging drivers to service the city, and mitigating economic hardship on recent purchasers of taxi medallions were legitimate. The court also rejected plaintiffs' age discrimination claims because the 2018 ordinance was not funded by the state, a prerequisite to application of relevant state anti-age discrimination laws.

The CEQA Claim and What Constitutes a 'Project'

Plaintiffs also alleged that the 2018 ordinance was a "project" for CEQA purposes, and that the city violated CEQA by not conducting some level of CEQA review before adopting the ordinance.

In its analysis, the Ninth Circuit set out the three tiered analysis under CEQA whereby a local agency must: 1) first determine that a proposed activity is subject to CEQA, 2) if CEQA applies, the local agency must determine whether a project is exempt, and 3) if no exemption applies, the local agency must undertake environmental review of the project.

In undertaking the first step in the analysis, an agency looks to the "general nature" of a proposed governmental action to determine whether a government activity "is capable of causing a direct or reasonably foreseeable indirect physical change in the environment." An indirect effect is not reasonably foreseeable for CEQA purposes if the "postulated causal mechanism connecting the activity and the effect is so attenuated as to be speculative." An action that does not meet the definition of a "project" is not subject to CEQA at all.

Plaintiffs argued that the 2018 ordinance was a project because it could potentially impact the environment by increasing "deadhead trips" to SFO. Specifically, plaintiffs alleged that the taxi drivers not receiving favored treatment under the 2018 ordinance would still transport passengers to the airport, but would then return to the City without passengers. Favored drivers would make trips to SFO without passengers to obtain high-paying fares shuttling drivers back to the City. Plaintiffs argued this could cause an environmental impact by resulting in "hundreds of additional trips on Highway 101 daily."

The court rejected these claims based on the evidence presented in the pleadings, finding that plaintiffs had not "plausibly alleged that the [2018 ordinance] increase the number of taxis in circulation or authorize more fares." Ultimately, all plaintiffs did in their pleadings was allocate existing fares among classes of taxi-medallion holders. Under the challenged ordinance, the same number of taxis would continue to operate and produce emissions and traffic regardless of whether they are driving to and from SFO or elsewhere in the City. Based on the facts plead by plaintiffs, the court therefore found that any assertion of potential environmental impacts appeared to rest on speculation, thus not qualifying the 2018 ordinance as a project subject to CEQA review.

Distinguishing the *Union of Medical Marijuana Patients* Decision

In a footnote, the court rejected plaintiffs' analogy between the 2018 ordinance to the 30 marijuana dispensaries involved in the 2019 California Supreme Court's *Union of Medical Marijuana Patients, Inc. v. City of San Diego*. In *Union of Medical Marijuana Patients* the Court recognized that the increased traffic resulting from new dispensaries may implicate CEQA, however that was largely a result of the resulting increase in retail construction to accommodate those businesses. The Ninth Circuit noted that unlike *Union of Medical Marijuana Patients*, plaintiffs failed to allege such compounding traffic problems in their complaint.

Conclusion and Implications

San Francisco Taxi Coalition presented a fairly rare circumstance where the Ninth Circuit had occasion to interpret CEQA under state law. From a CEQA standpoint, whether plaintiffs fare any better on remand will depend on whether they are able to allege any actual possibility of an increase in overall traffic or emissions, and not simply re-allocate existing trips. A copy of the court's decision can be found here: http://cdn.ca9.uscourts.gov/datastore/opinions/2020/11/09/19-16439.pdf
(Travis Brooks)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT FINDS SCHOOL DISTRICT WAS NOT REQUIRED TO DETERMINE WHETHER DORMITORY WOULD GENERATE NEW STUDENTS TO JUSTIFY SCHOOL IMPACT FEES

AMCAL Chico LLC v. Chico Unified School District, 57 Cal.App.5th 122 (3rd Dist. 2020).

A developer of a private dormitory for state university students brought an action seeking a refund of school impact fees that had been imposed by the local school district, alleging that the project would not generate new students. The trial court granted the Chico Unified School District's motion for summary judgment, the developer appealed, the Court of Appeal, in turn, affirmed.

Factual and Procedural Background

Plaintiff AMCAL Chico LLC (AMCAL) constructed a private dormitory complex to house college students within the boundaries of the Chico Unified School District. The project contains over 600 beds to be leased to students at the local state university. Renters must be 18 years old and enrolled in a degree program. While the project was tailored for college students, not the general rental market, AMCAL could not refuse to rent to families with children.

Based on a fee justification study, the School District assessed the project at a residential fee rate, citing the project's zoning as a multi-family residential structure that was not otherwise entitled to an exemption. AMCAL paid the fees under protest and filed suit, alleging three causes of action: the School District failed to comply with the Mitigation Fee Act; the fee constituted an invalid special tax because the fee exceeded the cost of the school facilities needed to mitigate the impact of the project; and the imposition of the fee constituted an invalid 'taking' because there was no nexus between the fee imposed and the impact of the project. The trial court found in favor of the School District. AMCAL then appealed.

The Court of Appeal's Decision

Education Code § 17620 authorizes public school districts to levy fees against new residential development projects to fund the construction or reconstruction of school facilities in order to accommodate the increase in students likely to accompany the new developments. In order to impose the fee, a district must comply with Government Code § 66001, which requires a determination that: 1) there is a reasonable relationship between the fee's use and the type of development on which the fee is imposed; and 2) there is a reasonable relationship between the need for the school facilities for which the fees will be used and the residential development upon which the fee is imposed.

AMCAL argued that it was entitled to a refund of the fee because the School District failed to comply with § 66001. According to AMCAL, its building is a separate class of residential development that does not generate School District students. The School District, AMCAL contended, was required to determine whether a residential development will generate new students in order to justify imposition of the fee.

Looking to the *Tanimura* Decision for Guidance

In rejecting AMCAL's claims, the Court of Appeal relied heavily on the recently issued decision in *Tanimura & Antle Fresh Foods, Inc. v. Salinas Union High School District*, 34 Cal.App.5th 775 (2019), which was issued while AMCAL's appeal was pending. There, the Sixth District Court of Appeal upheld a school district's decision to impose school impact fees on a new residential project intended to house only adult seasonal farmworkers. In doing so, it found that state law does not require school districts to analyze individual projects or anticipate specific subtypes of residential development. Instead, the statutes only require a reasonable relationship between the need for the school facilities and the broad type of development project (in that case, residential). To construe the designation of agricultural employee-only housing

as a distinct "type" of housing, the Court of Appeal concluded, would contravene the Legislature's intent "to include virtually all construction except that [expressly] exempted."

Employing that same logic, the Court of Appeal likewise concluded that the Mitigation Fee Act does not support a claim that a school district must make an individualized determination for each particular project. Instead, as the School District did in this case, a district must make findings based on the general type of construction, such as residential construction. Here, the School District conducted a fee study analyzing new residential construction. As the trial court found, that fee study conclusion was reasonable and the mitigation fee was proper.

Special Tax Argument Rejected

The Court of Appeal also rejected AMCAL's arguments that the fee imposed constituted an invalid special tax, finding that the fee was reasonable and complied with the Mitigation Fee Act, and therefore did not constitute an invalid tax. For this same reason, the Court of Appeal also rejected AMCAL's claim that the fee constituted a taking without payment of just compensation.

Conclusion and Implications

The case is significant because it contains a substantive discussion of school impact fees and the Mitigation Fee Act, including the relationship between fees and any particular project. The decision is available online at: https://www.courts.ca.gov/opinions/documents/C087700.PDF
(James Purvis)

FIRST DISTRICT COURT FINDS PUBLIC RESOURCES CODE SECTION 22531 UNCONSTITUTIONALLY LIMITS JUDICIAL REVIEW OF ENERGY COMMISSION LICENSING DECISIONS

Communities for a Better Environment et al. v. Energy Resources Conservation and Development Commission, 57 Cal.App.5th 786 (1st Dist. 2020).

On November 20, 2020 the First District Court of Appeal, in *Communities for a Better Environment v. Energy Resources Conservation and Development Commission*, held that Public Resources Code § 22531, which bars Superior Court and Courts of Appeal from reviewing Energy Commission (Commission) decisions on thermal powerplant licenses, unconstitutionally divests such courts of their original jurisdiction. The Court of Appeal also found the statute's prohibition on judicial review of the Commission's findings on questions of facts constituted an unconstitutional seizure of judicial power.

Factual and Procedural Background

California's Warren-Alquist Act "mandates simplified and expedited processing and review of applications to certify the siting, construction, and modification of thermal powerplants." The statute grants the Energy Commission with exclusive power to certify sites for thermal powerplants that generate 50 or more megawatts. Section 25531 of the Act sets forth the steps for judicially reviewing the Commission's issuance of a powerplant certificate. Subdivision (a) states that:

> . . .decisions of the Commission on any application for certification of a site and related facility are subject to judicial review by the Supreme Court of California.

This review is exclusive and no other state courts may hear these challenges. Subdivision (b) limits the Supreme Court's review to determining whether the Commission acted pursuant to its statutory authority—the Commission's findings and conclusions on questions of fact are final and not subject to review.

In May 2013, Communities for a Better Environment and the Center for Biological Diversity (plaintiffs) filed a complaint for declaratory and injunctive relief against the Energy Commission. Plaintiffs

advanced two facial challenges to the constitutionality of § 25531, alleging that subdivision (a) unconstitutionally restricts the jurisdiction of the superior and appellate courts to hear challenges to Energy Commission decisions, and subdivision (b) unconstitutionally restrict the Supreme Court's ability to review the facts of such challenges.

After finding that plaintiffs had established standing and that the constitutionality of the statute is the proper subject of a declaratory relief claim, the trial court granted plaintiffs' motion for summary judgment. The trial court held that § 25531, subdivision (a) is an unconstitutional legislative abridgment of the courts' jurisdiction, and subdivision (b) unconstitutionally abridges the courts' power to review agency findings.

The Court of Appeal's Decision

Under a *de novo* standard of review, the Court of Appeal upheld the Superior Court's decision, finding that § 25531 subdivisions (a) and (b) are facially unconstitutional.

Section 25531, Subdivision (a)

The First District Court held that § 25531, subdivision (a) unconstitutionally abridges the courts' original jurisdiction. The appellate court's holding rested on a two-prong inquiry: 1) whether the statute divests Superior Courts and Courts of Appeal of their original jurisdiction, conferred by Article VI, section 10 of the state constitution; and 2) if so, whether another constitutional provision, namely Article XII, § 5, empowers the Legislature to take such action in limiting courts' jurisdiction.

Article VI, § 10 of the California Constitution provides that the Supreme Court, Courts of Appeal, and Superior Courts all have "original jurisdiction" over extraordinary writ proceedings, and Superior Courts have original jurisdiction in all other causes. Based on a review of the Constitution's plain language and controlling case law, the First District concluded that § 10's directive is clear and unambiguous—nothing in the section suggests the California Legislature possesses the power to strip certain courts of their original jurisdiction. The court rejected the Commission's argument that the Article's silence regarding the Legislature's powers provides ambiguity as to whether the Legislature may enact statutes that limit a court's jurisdiction. The Court of Appeal explained that § 25531 unequivocally bars Superior Courts and Courts of Appeal from ever reviewing Commission siting decisions, which directly *conflicts* with Article VI, § 10 granting these courts original jurisdiction. Because the court found no ambiguity in the text of Article VI, § 10, it declined to fully consider the Commission's argument on the legislative history of Article VI, including a rejected amendment that would have prevented the Legislature from placing review of administrative decisions in the Supreme Court in the first instance.

The First District Court also held that Article XII, § 5, no longer authorizes § 25531, subdivision (a). Article XII vests the Public Utilities Commission (PUC) with the power to regulate public utilities under the auspices of the Legislature. Section 5 provides the Legislature with plenary power to establish the manner and scope of review of any PUC action. While courts have long recognized that the Legislature may permissibly limit judicial review of PUC decisions, the Court of Appeal rejected the Commission's argument that this plenary power also extends to Energy Commission decisions. While the original text of subdivision (a) subjected Energy Commission decisions to judicial review "in the same manner" as PUC decisions, the current statute did not equate Commission review with PUC review, such that Commission licensing decisions were only reviewable by the Supreme Court. Rather, the language of subdivision (a) applies to all Energy Commission site certificates, many of which no longer require PUC approval. Accordingly, Article XII, § 5 no longer justifies limiting judicial review of Energy Commission decisions.

Section 25531, Subdivision (b)

The First District further held that § 25531, subdivision (b), unconstitutionally violates the Judicial Powers Clause, under Article VI, § 1 of the Constitution. Article VI, § 1, vests the state's judicial powers in the Supreme Court, Courts of Appeal, and Superior Courts. The Constitution also creates and empowers some administrative agencies, including the PUC, to exercise judicial authority. Agencies that are not created by or vested with judicial powers from the Constitution may not exercise such authority.

To evaluate whether the Commission violated the Judicial Powers Clause, the First District Court ap-

plied the Supreme Court's guideline, which provides that:

> . . .an agency may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief only if the 'essential' judicial power (i.e., the power to make enforceable, binding judgments) remains ultimately in the courts, through review of agency determinations.

Under this standard, § 25531, subdivision (b) amounts to an unconstitutional seizure of judicial power by mandating that Commission findings and conclusions on questions of fact are final and not subject to review. The Court of Appeal held that this provision eschews courts' fundamental ability to review the Commission's findings under the substantial evidence or independent judgment standards.

The court rejected the Commission's claim that the canon of constitutional avoidance applies. Argument. The appellate court found that subdivision (b) did not contain any language that could be interpreted as subjecting the Commission's findings to substantial evidence review. The court also rejected the Commission's argument that it enjoys judicial authority analogous to that of the PUC under the Judicial Powers Clause because § 25531 subdivision (b) was modeled after certain sections of the Public Utilities Act. Unlike the PUC, the court explained that the Energy Commission was not created by the Constitution, thus, the Judicial Powers Clause does not vest the agency with independent judicial powers. Because subdivision (b) has not been amended to provide for substantial evidence review of the Commission's factual findings, the provision is not susceptible to any interpretation that could render it constitutional.

Conclusion and Implications

The Court of Appeal's decision reiterates a long-standing adherence to the separation of powers. Unless authorized by the California Constitution, the state Legislature may not limit judicial review of agency decisions. The court's holding may dissuade the Legislature from future attempts to limit Superior Court jurisdiction, particularly under analogous agency-review statutes such as the California Environmental Quality Act. The decision may also yield an increased number of legal challenges to Energy Commission siting approvals and other decisions. While this may result in longer approval timelines and costs, the opinion provides project applicants with an opportunity to seek judicial review of Commission actions. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A157299.PDF
(Bridget McDonald)

THIRD DISTRICT COURT FINDS BUILDING PERMIT CONDITIONS REQUIRING MAINTENANCE AND REPLACEMENT OF EXISTING VEGETATION ARE NOT AN EXACTION UNDER TAKINGS LAW

Erickson v. County of Nevada, ___Cal.App.5th___, Case No. C082927 (3rd Dist. Nov. 30, 2020).

The Third District Court of Appeal in *Erickson v. County of Nevada* held that building permit conditions for a residence and garage which improperly required maintenance and replacement of existing vegetation and trees, including a deed restriction for that purpose, did not amount to an exaction compensable under takings law.

Factual and Procedural Background

In March of 2011, appellants applied to the County of Nevada (County) for a permit to build a house and garage.

The County claimed that the proposed buildings would impact a "visually important ridgeline" within the meaning of the County's Visually Important Ridgeline ordinance (Ridgeline Ordinance). When applicable, the Ridgeline Ordinance required a management plan to:

> . . .delineate specific protective measures and impact controls necessary to minimize visual impact to the maximum extent possible.

Appellants submitted a management plan with three mitigation measures: 1) the garage, the only structure having a potential negative visual impact, was "designed and oriented such that the height of various portions of the building and roof slope match the existing slope of the hillside," 2) "[e]xisting mature and healthy trees located directly south of the building will remain to help screen the building and establish the visual profile of the ridgeline," and 3) appellants planted native cedar "to provide further screening as they mature." The County added additional conditions to the management plan, over appellants' objections: 1) the house and ga rage could not exceed certain specified height limits; 2) the property owner must agree, in a recorded deed restriction, (a) to replace dead or dying trees that are removed from a designated part of the property and (b) not to remove or thin trees in this designated area unless a biologist concludes the tree is dead or dying or a fire district finds removal or thinning necessary for fire safety purposes; and 3) the "existing native vegetation located south of the proposed structures shall remain standing on the property," "[v]egetation removal shall not expose the structures as viewed from" a certain nearby road, and "[a]ll trees proposed for removal to accommodate the construction of the residence and garage shall be indicated on the construction site plans and evaluated by the architect."

Following an unsuccessful appeal of the second and third conditions to the County's board of supervisors, appellants filed a complaint and petition for writ of mandate in Nevada County Superior Court alleging that the County's conditions prohibiting them "from removing trees or vegetation growing on" parts of their property constituted an unlawful "exaction" in violation of the Fifth Amendment of the U.S. Constitution. Appellants asked the trial court to strike the County's tree maintenance conditions and award them compensatory damages and other costs of suit.

The trial court at the writ hearing found the County failed to establish that appellants' proposed home and garage would lie on a visually important ridgeline or that they would impact the ridgeline. The court also found that the negative deed restriction went beyond what was necessary to address the project's potential impacts and thus constituted an unconstitutional taking of property and was unconstitutionally vague. The court remanded the matter to the County and informed the parties that it would set the trial on the compensation issue at a later date.

On remand, the County reconsidered and reapproved appellants' application, subject to three conditions that in almost all respects mirrored the previous imposed conditions. The County's revised second condition, using language largely identical to that used in its earlier conditional approval, now covered an area that was about a third smaller from the previous restricted area. The County, in its reapproval, made several findings in support of its conclusion that appellants' buildings would impact a "visually important ridgeline."

After unsuccessfully appealing the new conditions to the board of supervisors, appellants filed a supplemental complaint and petition with the trial court. In their supplemental complaint, appellants claimed the County's conditional reapproval suffered from the same flaws the court found in the County's previous conditional approval.

The trial court disagreed, finding the County had "remedied substantially all of the defects found present in the initial writ hearing." However, the trial court found that the County's second condition, the deed restriction, was a conservation easement inconsistent with Civil Code § 815.3. Under § 815.3, counties may obtain conservation easements that are voluntarily conveyed, but they may not demand conservation easements as a condition to issuing a land use approval. The court thus directed the County to issue the building permit without this condition.

After further briefing from the parties, the court modified its reasoning and expanded its ruling on the petition to cover both the County's second and third conditions. Setting aside its finding based on Civil Code § 815.3, the court found that the Ridgeline Ordinance did not apply to individual building permits. Because the County thus had no authority to impose a management plan, the court struck the two conditions appellants had challenged.

Following the inverse condemnation trial on the complaint, the court issued its final statement of decision on appellants' petition and complaint. Agreeing with appellants, the court found the County's tree maintenance conditions "operate[d] as an exaction" and lacked the required "nexus" and "rough proportionality" to the effects of appellants' proposed land use because the County acted without authority.

But the court found that no unconstitutional taking of property had occurred because the court

eliminated those two conditions in the writ proceedings and because there was not "something more than mere delay in the permit process" or illegitimate motive in the County's conditions that would result in a compensable temporary taking under *Landgate, Inc. v. California Coastal Commission*, 17 Cal.4th 1006 (1998).)

Appellants appealed trial court's denial of compensation, claiming that the requirements of extraordinary delay or illegitimate motive do not apply to claims of improper exactions.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's decision denying compensatory damages, albeit on a different ground, finding that the conditions imposed without authority did not amount to exactions, because the conditions did not require appellants to convey anything.

Overview of Takings Law

The Court of Appeal explained that the takings clause of the U.S. Constitution Fifth Amendment, made applicable to the states by the Fourteenth Amendment, "provides that private property shall not `be taken for public use, without just compensation.'" (*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (*Lingle*).) The U.S. Supreme Court has identified two general categories of takings: "physical takings" and "regulatory takings." (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002).)

A physical taking, the classic type of taking, is based on the government's "direct appropriation of property, or the functional equivalent of a practical ouster of [the owner's] possession." [Citations.] (*Lingle, supra*, 544 U.S. at p. 537.) Government conduct that matches this description (*e.g.*, when the government seizes property under its condemnation power) will generally be deemed a taking based on "the straightforward application of per se rules." (*Tahoe-Sierra Preservation Council, Inc.*, *supra*, 535 U.S. at p. 322.)

A regulatory taking, in turn, is based on government regulation that, generally stated, goes "too far" in restricting a landowner's use of his or her property. (*Lingle, supra*, 544 U.S. at p. 537.) To determine whether a regulation has gone "too far," courts usually—rather than apply *per se* rules—consider:

> . . .a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617.)

Apart from these two general categories of takings, the Court of Appeal explained that the U.S. Supreme Court has also identified a "special" category of takings claims for "land-use exactions." (*Lingle, supra*, 544 U.S. at p. 538.) A land use exaction occurs when the government demands property from a land use permit applicant in exchange for permit approval. (*See*, *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 599 (2013) (*Koontz*).) The leading examples of "exactions" come from the Supreme Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (*Nollan*), *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (*Dolan*), and *Koontz*.

In *Nollan*, the California Coastal Commission had conditioned its grant of a permit to landowners who sought to rebuild their house on their agreeing to transfer to the public an easement across their property. (*Nollan*, *supra*, 483 U.S. at p. 827.) In *Dolan*, a city had conditioned its grant of a permit to a property owner who sought to increase the size of her existing retail business on her agreeing to dedicate a portion of her property to the city for use for a bike path and for flood control purposes. (*Dolan*, at p. 377.) And in *Koontz*, a water district had conditioned its grant of a permit to a landowner who sought to develop 3.7 acres of an undeveloped property on his agreeing to spend money to improve certain lands the water district owned. (*Koontz*, *supra*, 570 U.S. at pp. 599-602, 614.)

Unlike most takings claims, exaction claims are not necessarily premised on the taking of any property. As the Supreme Court explained in *Koontz*, the principles undergirding the court's exaction cases:

> . . .do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so. (*Koontz*, *supra*, 570 U.S. at p. 606.)

In both circumstances, the court found, the condition is improper if it lacks the requisite nexus and rough proportionality. But the court emphasized:

> . . .[t]hat is not to say . . . that there is no relevant difference between a consummated taking and the denial of a permit based on an unconstitutionally extortionate demand. Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this burdens a constitutional right, the Fifth Amendment mandates a particular remedy—just compensation—only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies. (Id. at pp. 608-609.)

Were the County Conditions an Exaction?

Appellants argued that because the trial court found that the County conditions "operated as an exaction," but lacked a "nexus" and "rough proportionality," appellants were entitled to just compensation, with having to establish either extraordinary delay or illegitimate motive. The County argued that the judgment denying compensation could be justified on another ground under Code of Civil Procedure § 906, without reaching the issue raised by appellants, because the County conditions did not amount to an exaction in the first place.

The Court of Appeal agreed with the County, relying on the California Supreme Court's refusal to characterize a condition of approval restricting use of property but not demanding the conveyance of an identifiable protected property interest (a dedication of property or the payment of money) as an "exaction" within the meaning of *Nollan*, *Dolan*, and *Koontz*. (*California Building Industry Assn. v. City of San Jose*, 61 Cal.4th 435, 460-461 (2015).

In a situation similar to this case, the Federal Circuit held that an U.S. Army Corps of Engineers condition for deed restrictions on wetlands located on ranch land being commercially developed was not a physical intrusion that resulted in physical intrusion of loss of exclusive possession so at to amount to an exaction. (*Norman v. United States*, 429 F.3d 1081, 1089 (Fed.Cir. 2005).)

The Court of Appeal in this case found no such demand in the conditions that appellants convey a specific property interest tor money to the public that, if carried out outside of the permitting process, would have involved "per se" takings of property from the landowner. The County's permit conditions essentially required appellants to maintain a tree screen to prevent the neighboring public from seeing their garage by maintaining the trees and vegetation located in a certain area of their property. There was no conveyance or interference with appellants' exclusive possession that would constitute an exaction.

Conclusion and Implications

This opinion by the Third District Court of Appeal is limited to whether compensation accrued based upon an unreasonable exaction taking claim. With no exaction, appellants were not entitled to compensation under the exaction claim. Perhaps appellants would have fared better seeking damages for an illegitimate motive temporary regulatory taking based upon the fact that the County was aware at the outset that the Ridgeline Ordinance did not apply to residential development. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/C082927.PDF
(Boyd Hill)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

FOURTH DISTRICT COURT ADDRESSES AN EIR WHICH DID NOT RELY ON CALIFORNIA'S CAP-AND-TRADE PROGRAM FOR ITS GREENHOUSE GAS IMPACTS ANALYSIS

Paulek v. City of Moreno Valley (*HF Properties*),
___Cal.App.5th___, Case No. E071194 (4th Dist. Nov. 24, 2020).

The Fourth District Court of Appeal in *Paulek v. City of Moreno Valley* (*HF Properties*) held that a revised Environmental Impact Report (EIR) which did not rely on the California Air Resources Board (CARB) Cap-and-Trade Program (C&T Program) for its analysis and mitigation of Greenhouse Gas (GHG) impacts of a major logistics warehouse center (Project) mooted an appeal challenging the Environmental Impact Report's (EIR) initial reliance on the C&T Program for analysis and mitigation of Project GHG emissions.

Factual and Procedural Background

The Project is the World Logistics Center to be built by 2031 on over 40 million square feet of undeveloped land in the City of Moreno Valley (City). The Project applicants (Highland Fairview) submitted their application for the Project in 2012. The city council certified a final EIR for the Project and approved its construction in 2015.

Various individuals and environmental organizations filed petitions for writ of mandate under the California Environmental Quality Act (CEQA) challenging the EIR in numerous respects. The trial court found the EIR faulty for five reasons: 1) lack of good faith analysis of potential sources of Project renewable energy; 2) improper description of an area near the Project as a "buffer zone"; 3) improper analysis of Project noise impacts; 4) lack of analysis and mitigation of Project impacts on farmland; and 5) lack of sufficient information and analysis of Project cumulative impacts.

The trial court thus granted the petition in part but rejected petitioners' remaining arguments, including that the EIR's analysis and mitigation of GHG impacts was improper. The trial court ordered the City to vacate its approval of the parcel map associated with the Project and to proceed consistent with the trial court orders in any subsequent CEQA review of the Project.

Petitioners appealed the trial court's upholding of the EIR's analysis and mitigation of GHG impacts, and the City cross-appealed the trial court's finding that the EIR violated CEQA in five respects.

In May 2020, the Court of Appeal issued a tentative opinion in which it held that the EIR's reliance on the C&T Program for its analysis and mitigation of GHG impacts violated CEQA but affirmed the judgment in all other respects except for the trial court's analysis of one other issue (not specified in the opinion).

In June 2020, the City adopted a resolution vacating the EIR and certifying a Revised EIR for the Project curing the five CEQA violations found by the trial court. In response to the Court of Appeal tentative opinion, the Revised EIR did not include the C&T Program in its analysis of GHG emission impacts and included a new mitigation measure which requires all of the Project's GHG emissions to be mitigated to "net zero." Thus, the developer will need to purchase "carbon offset credits" equal to the amount of the Project's entire GHG emissions, instead of relying on the C&T Program as mitigation to mitigate most of the emissions.

CARB thereafter submitted a letter stating that the Revised EIR nonetheless still relied on the C&T Program for its analysis and mitigation of GHG impacts, but not explaining in what manner the EIR does so.

In late July 2020, about two weeks before oral argument, the City moved to dismiss the appeal and cross-appeal as moot because: 1) the City vacated the EIR and adopted the Revised EIR which does not rely on the C&T Program for its GHG impacts analysis and mitigation, and 2) the City complied with the trial court's orders granting petitioners' writ petitions with respect to the five CEQA violations found by the trial court.

The Court of Appeal's Decision

The Court of Appeal dismissed petitioners' appeal as moot, holding that the only issue upon appeal was

whether the trial court erroneously found that the EIR's reliance on the C&T Program for its analysis and mitigation of GHG impacts violates CEQA, and that the Revised EIR analysis no longer relies on the C&T Program to analyze and mitigate GHG emissions. The Court of Appeal also used its discretion to dismiss the City's cross-appeal pursuant to California Rule of Court 8.244(c)(2) based on the City's evidence that it was filed as a protective appeal to preserve the City's rights in light of petitioners' appeal.

CARB'S C&T Program

The C&T Program was one of the strategies adopted by CARB as part of California's Global Warming Solutions Act of 2006 (AB 32). The C&T Program was promulgated by CARB regulations in 2011. The C&T Program is a market-based approach where the Cap is the limit on total amount of assigned or auctioned Allowances (allowed emissions) from a regulated source. Trade of Credits (for reduced emissions below Allowances) creates incentives among source emitters to reduce emissions.

California Code of Regulations § 95811 lists the source emitting "covered entities" which receive Allowances and are subject to the C&T Program, including various production facilities, suppliers of natural gas, fuel importers, and electricity generating facilities. Those industrial facilities and suppliers can spread the costs of compliance broadly among large numbers of consumers.

The EIR Greenhouse Gas Analysis

For GHG analysis, the South Coast Air Quality Management District (SCAQMD) uses a project "significance threshold" of 10,000 metric tons for GHGs. The EIR found that the Project's expected annual GHG emissions would exceed 127,000 metric tons in 2014 and by 2022 would reach about 665,000 metric tons of carbon dioxide equivalent, levelling off to approximately 416,000 metric tons at buildout in 2031. The EIR found that about 40 percent of the Project's GHGs would be emitted by trucks coming to and from the Project site in 2014, increasing to 55 percent in 2022.

The EIR found that use of the C&T Program to reduce Project GHG emissions was not likely for individual logistics warehousing such as the Project, given that the Project was not a covered entity under AB 32. Regardless, the EIR categorized the Project's GHG emissions as 95 percent "Capped" emissions (mostly from fossil fuels by miles traveled from off-site mobile sources such as trucks and autos; but also, from on-site electricity, construction fuel, yard trucks, natural gas, generators, forklifts) and 5 percent as "Uncapped" emissions (waste, land use, construction, refrigerants).

The EIR reasoned that because covered entities under AB 32 for C&T Programs include natural gas suppliers, transportation fuel importers and electricity generators, the EIR did not need to consider Capped emissions from covered entity types of energy sources in determining whether the Project would have a significant impact under CEQA and in mitigating Project GHG impacts. The EIR thus only analyzed and provided for mitigation of the Project's Uncapped Emissions, finding that the "mitigated uncapped emissions" would not exceed the SCAQMD significance threshold.

Mootness under the Revised EIR GHG Analysis

An appeal is moot if events while the appeal is pending render it impossible for the appellate court to grant the appellant effective relief. (*La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles*, 2 Cal.App.5th 586, 590 (2016).) The Court of Appeal held that because the Revised EIR no longer relies on the C&T Program, which is not a program applicable to Project emissions, the Revised EIR now addresses and mitigates all Project GHG emissions through a Project-specific mitigation measure, which is precisely the result sought by petitioners on appeal. The Court of Appeal rejected the letter submitted by CARB as evidence in opposition to mootness, because it fails to explain how the Revised EIR still relies upon the C&T Program.

Petitioners nonetheless argued that the issue of whether an EIR can rely on the C&T Program to dismiss the significance of GHG emissions for projects not subject to the C&T Program is an issue that fits within one of three recognized discretionary exceptions to mootness. Those exceptions are: 1) an issue of broad public interest that is likely to recur; 2) a recurrence of the controversy between parties; or 3) a material question remains for court determination. (*Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga*, 82 Cal.App.4th 473, 479 (2000).)

With respect to the first exception, while the Court of Appeal agreed that the issue is one of broad public interest, it concluded that the issue was not likely to recur because no entity currently relies or intends to rely on C&T Program analysis for projects not subject to the Program.

The Court of Appeal also concluded that there is no evidence in the record to suggest likely recurrence of the controversy because discussion in the EIR regarding the South Coast Air District and San Joaquin Valley Air Pollution Control District not counting the C&P Program against the SCAQMD significance threshold concerned GHG emissions that are subject to the Program.

Conclusion and Implications

This opinion by the Fourth District Court of Appeal adheres firmly to the mootness doctrine to avoid deciding the issue of whether an EIR can rely on the C&T Program to dismiss the significance of GHG emissions for projects not subject to the C&T Program. While there is a colorable argument that additional project-specific mitigation should not be required for GHG impacts that have been programmatically addressed through the C&T Program, with the City's withdrawal of the argument, there is no pending attempt or intent to raise the issue in a well-developed context that would allow the Court of Appeal to thoroughly consider the merits of the argument. The Court of Appeal wisely decided to forbear from adjudicating the issue until such a time and occasion as the argument might gain further traction. https://www.courts.ca.gov/opinions/nonpub/E071184.PDF
(Boyd Hill)

SIXTH DISTRICT COURT AFFIRMS RESIDENTS TO A RENT CONTROL PETITION ARE 'NECESSARY' PARTIES, BUT REMANDS TO DETERMINE IF THEY ARE 'INDISPENSABLE'

Pinto Lake MHP LLC v. County of Santa Cruz, 56 Cal.App.5th 1006 (6th Dist. 2020).

The Sixth District Court of Appeal in *Pinto Lake MHP LLC v. County of Santa Cruz* held that the trial court did not abuse its discretion in finding that residents constitute "necessary" parties to a rent control action under Code of Civil Procedure § 389, subdivision (a). The appellate court remanded the action, however, because the trial court's inquiry failed to consider whether the residents were also "indispensable" under § 389, subdivision (b), such that litigation could proceed without them.

Factual and Procedural Background

Santa Cruz County Code permits a mobile home park owner to make an annual general rent adjustment without notice to the County. If the owner believes that the rent adjustment does not provide for a "just and reasonable return on the owner's property," the owner may petition the County for a special rent increase.

Pinto Lake MHP LLC (Pinto Lake) owned a 177-space mobile home park in Santa Cruz County (County). Pursuant to the County Code, Pinto Lake applied to the County for a special rent increase of approximately 47 percent. Pinto Lake provided notice to the mobile home park's residents and appended their names to the petition, as required by County ordinance. The County appointed a hearing officer, who considered objections from residents and engaged in an extensive discovery process regarding the proposed rent increase. After the parties failed to settle the matter, the hearing officer considered post-hearing briefs and ultimately denied Pinto Lake's petition for the proposed increase.

Pursuant to the County Code's judicial review provision, Pinto Lake filed a petition for administrative *mandamus* and complaint for declaratory and injunctive relief. Pinto Lake's petition named the County and the hearing officer as respondents. The County demurred to the petition, claiming that Pinto Lake failed to join the mobile home park residents as indispensable parties. The County argued that the residents were "necessary parties" to the lawsuit under Code of Civil Procedure § 389, subdivision (a), because they claimed an interest in the matter during

the administrative proceeding. For these reasons, the County reasoned that adjudicating the lawsuit in their absence would impair the residents' ability to protect their legal interests in the matter.

Pinto Lake opposed, arguing the residents were neither indispensable nor proper parties to the litigation because they were not responsible for the outcome of the administrative proceeding. The trial court sustained the County's demurrer for failing to join the residents as parties, but allowed Pinto Lake leave to amend the complaint to add the residents. Instead of amending the petition, Pinto Lake filed a notice of election to stand on the original pleadings. The County moved to dismiss for failure to file an amended pleading, and the trial court entered a judgment of dismissal. Pinto Lake appealed.

The Court of Appeal's Decision

The Sixth District Court of Appeal considered whether the trial court abused its discretion in finding the residents necessary parties under Code of Civil Procedure § 389. Abuse of discretion is proper because the joinder of parties involves a two-part inquiry that requires trial courts to weigh practical realities and considerations in making its determination. Specifically, § 389, subdivision (a)(2) charges the trial court with determining "whether the person is one whose rights must necessarily be affected by the judgment in the proceeding." If a necessary party cannot be joined under subdivision (a), the trial court must proceed to subdivision (b), wherein it must:

> . . .determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable.

Under this standard, the Sixth District Court held that the trial court did not abuse its discretion in ruling finding that the residents were "necessary parties," under § 389, subdivision (a). The administrative record demonstrated that the residents claimed an interest in the subject matter of the action by participating as parties in the special rent adjustment administrative hearing, which included engaging legal counsel, filing formal objections, engaging in discovery and settlement discussions, and presenting expert testimony. Accordingly, the appellate court found that judicial review of the County's administrative decision in the residents' absence would impede their ability to protect the interests they advanced during the administrative proceedings.

In upholding the trial court's decision, the Court of Appeal rejected Pinto Lake's argument that the residents' interests would not be impaired by a disposition in their absence because the petition only sought a remand for a new administrative hearing, which the residents could participate in. The appellate court reasoned that the petition's prayer for relief sought a peremptory writ directing the County to conduct a new hearing. A new hearing would arguably infringe upon the residents' existing interest in preserving the hearing officer's decision, which denied the rent increase. The Sixth District Court also rejected Pinto Lake's argument that the residents' interests would not be impaired if the lawsuit proceeded in their absence because they shared the same goal as the County's in the litigation. Finding Pinto Lake's authority unpersuasive, the court reasoned that the County is a neutral adjudicative body, and thus, does not have an interest in the particular outcome of the proposed special rent increase. For these reasons, the County's interest does not align with that of any party to the proceeding, including the residents.

Remand Order to Address the Issue of 'Indispensable' Parties

Though the Sixth District upheld the trial court's determination that the residents constituted "necessary" parties under section 389, subdivision (a), the appellate court remanded the decision to permit the trial court to determine whether the residents are also "indispensable" under § 389, subdivision (b). The court concluded that the determination of whether the parties are "necessary" does not also resolve whether they are "indispensable." This inquiry is necessary because, in the event that the residents could not be made parties, the court must determine whether the matter should be dismissed or proceed in the residents' absence. Because this inquiry calls for a decision based on practical considerations, based on particular facts and equities, it must be undertaken by the trial court in the first instance.

Conclusion and Implications

Petitioners who seek judicial review of an administrative decision must ensure all parties with a protect-

ed interest in the matter are made parties to the litigation. Petitioners should review the judicial review provisions of the corresponding municipal code to clarify whether a party may possess a legally protected interest. Moreover, respondents who move to join a necessary party must explain to the trial court why the party is not only necessary, but also indispensable, such that the court can determine whether the litigation can proceed in the party's absence. The court's October 30, 2020 opinion is available online at: https://www.courts.ca.gov/opinions/documents/H045757.PDF
(Bridget McDonald)

THIRD DISTRICT COURT HOLDS AN EMINENT DOMAIN DEFENDANT NEED NOT BE 'PHYSICALLY DISPOSSESSED' OF PROPERTY TO QUALIFY FOR DAMAGES

San Joaquin Regional Transportation Authority v. Superior, Unpub., Case No. C084755 (3rd Dist. Dec. 1, 2020).

Under Code of Civil Procedure § 1268.620, if a landowner "moves from property" under the threat of condemnation, but the condemning agency subsequently dismisses the eminent domain lawsuit, the owner/business may be able to recover payment of all damages proximately caused by the proceeding and its dismissal. The Third District Court of Appeal's *unpublished* decision in *San Joaquin Regional Transit District v. Superior Court* clarifies whether the right to recover damages under this provision applies when a business/landowner is in the process of moving—but has not yet fully relocated—at the time that the condemning agency formally abandons the condemnation.

Background

In 2005, the San Joaquin Regional Transit District (District) initiated attempts to acquire property in Stockton upon which Sardee Industries, Inc. (Sardee) operated a manufacturing facility. This eventually led to an eminent domain suit in 2010 and an order of prejudgment possession in 2011. The order of possession gave legal possession of the property to the District, but permitted Sardee to occupy a portion of the property until July 31, 2012, while paying rent, in order to wind down its operations. During this period, Sardee attempted in good faith to relocate its facilities and concluded that combining with a preexisting facility in Illinois would be the most feasible option.

On April 24, 2012, the District adopted a resolution abandoning its condemnation of the improved portion of the property where Sardee operated its business. At that time, Sardee had nearly finished moving all of its operations to the Illinois facility and adapting that facility to handle the specific manufacturing that had previously occurred only in Stockton; however, a few of its machines still remained on the property. On April 17, 2013, District adopted a resolution abandoning its condemnation of the unimproved portion of the property.

As a result of the foregoing, Sardee sought damages under Code of Civil Procedure § 1268.620, which provides:

> If after the defendant moves from property in compliance with an order or agreement for possession or in reasonable contemplation of its taking by the plaintiff, the proceeding is dismissed with regard to that property for any reason . . . the court shall: [¶] (a) Order the plaintiff to deliver possession of the property to the persons entitled to it; and [¶] (b) Make such provision as shall be just for the payment of all damages proximately caused by the proceeding and its dismissal as to that property. (Code Civ. Proc., § 1268.620.)

The District took the position that Sardee was not entitled to damages under § 1268.620 because it had not completely moved from the property at the time the condemnation was abandoned. The District, citing the Court of Appeal decision in *Los Angeles Unified School Dist. v. Trump Wilshire Associates*, 42 Cal.App.4th 1682 (1996) argued that the language of the statute "after the defendant moves from" required

complete physical dispossession of the property.

At trial, the court found in favor of Sardee and concluded that complete physical dispossession was not a requirement to recover damages under § 1268.620 since legal dispossession had already occurred under the order of prejudgment possession and that § 1268.620 itself never qualified "moves" to mean physical dispossession.

The District subsequently filed a petition for writ of mandate and stay of trial. Sardee filed a return by answer.

The Court of Appeal's Decision

The Court of Appeal agreed with the trial court's findings, concluding that the term "physically dispossessed" as used by the District does not exist in § 1268.620, and thus the plain language governed the interpretation and effect of the statute. The Court of Appeal acknowledged and agreed that the decision in *Los Angeles Unified School Dist. v. Trump Wilshire Associates*, 42 Cal.App.4th 1682 (1996) (*Trump Wilshire*), was factually distinguishable on the grounds that unlike with Sardee, the property owner in *Trump Wilshire* never had to move from the subject property but instead just put its development plans on hold (which the Court of Appeal found inadequate to support a finding that the owner had "moved" from the property. Nor did the property owner in *Trump Wilshire* ever change its position throughout the litigation by buying other property or developing the remainder of the parcel not subject to the taking, such as occurred with Sardee.

The court's analysis then focused on the issue of whether Sardee had "moved" from the property, taking into account both the legislative history of § 1268.620 discussed in the *Trump Wilshire* decision and the underlying facts and circumstances. Noting the extensive efforts put forth by Sardee to relocate and move from the Stockton facility, the Court of Appeal agreed with the trial court that Sardee qualified as having "moved" for purposes of recovering damages under § 1268.620. As such, the requirement that a property owner "moves from property" for purposes of recovery under § 1268.620 does not require physical dispossession or ultimate completion of a move, but rather sufficient engagement and efforts in the moving process.

Conclusion and Implications

Although an *unpublished* decision, the Court of Appeal's decision provides a reminder that public agencies should be cognizant of all potential costs when deciding whether and when to abandon an eminent domain action, as courts are likely to take note of the efforts of property and business owners to find suitable relocation options. Conversely, it also provides guidance to landowners subjected to the threat of condemnation to thoroughly document their efforts to relocate notwithstanding the condemning agency's delays in completing the taking of their property as the right to recover damages under § 1268.620 depends significantly on the facts supporting whether the landowner has undertaken a good faith effort to relocate.
(Paige Gosney)

IN SPLIT WITH OTHER COURTS OF APPEAL, FIFTH DISTRICT AGAIN HOLDS THAT CEQA DOES NOT ALLOW PARTIAL EIR DECERTIFICATION

Sierra Club v. County of Fresno, ___Cal.App.5th___, Case No. F079904 (5th Dist. Nov. 24, 2020).

In a *partially published* decision, issued on November 24, 2020, the Fifth District Court of Appeal issued its latest decision in a long running dispute related to Fresno County's 2011 approval of a master planned community near the San Joaquin River. The case reached the Fifth District a second time after a California Supreme Court judgment rejecting portions of the project's final Environmental Impact Report (EIR). A dispute arose over whether the trial court's writ complying with the California Supreme Court's judgment should fully or partially de-certify the EIR associated with the project. In a divergence from decisions in the Second and Fourth Districts Court of Appeal, the Fifth District held that the Cali-

fornia Environmental Quality act (CEQA) requires full decertification of an EIR that is found lacking in any part. As an alternative basis to reject the developer's claims, the Court of Appeal found that even if partial decertification were somehow allowed, the defects in the instant EIR could not be severed from the County's project approvals, thus requiring full decertification of the EIR.

Factual and Procedural History

A developer proposed 2,500 new units, and 250,000 square feet of commercial space in a master planned community on a 942-acre site near the San Joaquin River. On February 1, 2011, Fresno County's board of supervisors approved the proposed project, consisting of an amendment to the county general plan, update to a community plan, and adoption of a new specific plan, and certification of a final EIR.

In March of 2011, plaintiff environmental and public interest groups filed a petition for peremptory writ of mandate and a complaint for declaratory relief alleging causes of action under the Planning and Zoning Law and the California Environmental Quality Act. The trial court denied plaintiffs' claims, issuing judgment for the developer and county. In its first consideration of the case, the Fifth District Court of Appeal rejected plaintiffs' claims under the Planning and Zoning Law, and some CEQA claims, however the court determined that the project EIR's discussion of issues related to air quality impacts was inadequate and the developer appealed.

On appeal, the California Supreme Court addressed a significant question regarding the applicable standard of judicial review for CEQA claims challenging the adequacy of an EIR's discussion of a specific topic. The Court rejected the developer's argument that the substantial evidence standard applied to such decisions, holding instead that the relevant inquiry is:

> . . .whether the EIR includes enough detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.

On the other hand, although issues of facts and law were involved, where factual questions predominate, a more deferential standard of review was warranted than a purely independent review.

The Supreme Court affirmed in part and reversed the Court of Appeal's judgment in part and remanded for additional proceedings. The Court also issued a *remittitur* directing the trial court to formulate a writ of mandate consistent with the Court's decision. [6 Cal.5th 502]. The trial court issued a writ of mandate requiring the County to vacate its approval of the project and not to approve the project before preparing a revised EIR that provided an adequate discussion of health and safety impacts resulting from air pollution.

Developer and county filed a motion to vacate and reconsider judgment, arguing that the trial court was required to partially decertify the problematic portions of the EIR, not fully decertify the entire EIR. The trial court rejected this argument, holding that the air quality analysis of the EIR was not severable from the remainder of the EIR.

The Court of Appeal's Decision

In a continued split with decisions in the Second and Fourth District Courts of Appeal, the Fifth District Court of Appeal relied on its widely criticized decision in *Land Value 77, LLC v. Board of Trustees of California State University,* 193 Cal.App.4th 675 (2011), indicating it did not believe CEQA allows partial decertification of an EIR on remand.

The court began its analysis, by reviewing the relevant statutory and regulatory text found in Public Resources Code §§ 21100, 21151 and 21168.9. Public Resources Code §§ 21100 and 21151 required public agencies to "certify" the "completion" of the EIR. On the other hand, Public Resources Code § 21168.9, provides that if a court finds:

> . . .any determination, finding, or decision of a public agency has been made without compliance with [CEQA], the court shall enter an order that includes one or more of the following: … A mandate that the determination, finding, or decision be voided by the public agency in whole or *in part* (Italics added.)

Section 21168.9's granting a court authority to void an agency determination "in part" was the basis for the developer's argument that the writ in the matter should only require partial decertification of those portions of the EIR related to air pollution found to be inadequate.

Relying on the *Land Value 77* Decision

The court looked to its prior decision in *Land Value 77*, which reasoned that it is "an oxymoron to conclude" pursuant to §§ 21100 and 21151 that an agency can "partially certify the completion of" an EIR. The court acknowledged that both the Fourth District in *dicta* (*Preserve Wild Santee v. City of Santee*, 210 Cal.App.4th 260 (2012)) and the Second District (*Center for Biological Diversity v. Department of Fish & Wildlife*, 17 Cal.App.5th 1245 (2017)) Courts of Appeal concluded, contrary to the decision in *Land Value 77* that partial decertification was legally permissible. The Fifth District Court took issue with these contrary decisions for what it claimed was a lack of acknowledgement of § 21100 and § 21151's language that under CEQA an agency certifies "the completion" of the EIR, claiming that decisions to the contrary effectively rendered the phrase "the completion of an EIR in those sections surplusage."

In the first portion of its published analysis, the court adopted the reasoning from *Land Value 77* finding that "the concept of [EIR] completeness is not compatible with partial certification. In short, an EIR is either complete or it is not."

Ultimately the court found that the statutory interpretation in its 2011 Land *Value 77* decision provided one basis for rejecting the developer's contention that the trial court:

> . . .should have issued a limited writ ordering the County to rescind certification of the EIR's operational air quality analysis.

As a separate and alternative basis to deny the developer's claims, the court also noted that partial decertification was not appropriate under the Second District's conflicting statutory interpretation. That decision concluded that:

> [*Land Value 77*] does not prohibit partially setting aside an EIR, so long as a court makes severance findings under section 21168.9 subdivision (b).

The Unpublished Portion of the Court's Decision

In the *unpublished* portion of the court's decision, the court determined that severance was improper, based on those findings in the instant case.

The court also addressed claims by developer that its refusal to allow partial decertification would render portions of the EIR, already upheld by the trial court, susceptible to new legal challenges. Here, the court noted that the sufficiency and CEA compliance of most components of the EIR had already been litigated and resolved. This meant that new challenges to parts of the EIR that have already been upheld are not allowed in proceedings on remand. Accordingly the court found:

> . . .we conclude an order of partial decertification is not necessary to protect Developer from relitigating CEQA compliance of parts of the EIR not affected by the errors relating to air quality impacts. Instead, the Developer is protected by res judicata, collateral estoppel and the requirement for the exhaustion of administrative remedies.

The court then directed the trial court to issue a peremptory writ requiring the county to: (1) vacate its decision approving the developer's project, (2) void its decision to certify completion of the project EIR, and (3) not approve the project before preparing a revised EIR, circulating revised portions of the EIR, and certifying the completion of the revised EIR in its entirety.

Conclusion and Implications

This latest *Sierra Club v. County of Fresno* decision highlights the continued split of authority between the Fifth District Court of Appeal and other Courts of Appeal as to whether partial decertification of an EIR is a proper remedy. The court provided little direction as to how portions of a project could proceed, which seem to be clearly contemplated by § 21168.9, where total decertification of an EIR is required by its reasoning. A copy of the court's decision can be found here: https://www.courts.ca.gov/opinions/documents/F079904.PDF. The court's modified opinion is available online at: https://www.courts.ca.gov/opinions/documents/F079904M.PDF
(Travis Brooks)

FOURTH DISTRICT COURT FINDS GROUP LACKED STANDING TO SEEK FINES AGAINST COASTAL COMMISSIONERS

Spotlight on Coastal Corruption v. Kinsey, 57 Cal.App.5th 874 (4th Dist. 2020).

A nonprofit "watchdog" group brought an action against California Coastal Commissioners for allegedly violating provisions of the California Coastal Act that prohibit nondisclosure of certain *ex parte* communications and participation in matters without disclosing related *ex parte* communications. The trial court entered judgment for the nonprofit entity and the Coastal Commissioners appealed. The Court of Appeal for the Fourth Judicial District reversed, finding that the nonprofit lacked standing and that another section of the Coastal Act providing for fines does not apply to *ex parte* disclosure violations.

Factual and Procedural Background

This case pertains to "*ex parte* communications" under the California Coastal Act, which is defined to include:

> . . .any oral or written communication between a member of the [C]ommission and an interested person, about a matter within the [C]ommission's jurisdiction, which does not occur in a public hearing, workshop, or other official proceeding, or on the official record of the proceeding on the matter.

To ensure open decision-making within this system, the Coastal Act provides in § 30324 that a Commissioner must fully disclose and make public the *ex parte* communication by providing a full report of the communication to the executive director within seven days after the communication or, if the communication occurs within seven days of the next commission hearing, to the Commission on the record of the proceeding at that hearing.

Under Coastal Action § 30824, a violation of these provisions is subject to a civil fine, not to exceed $7,500. A Commissioner also is prohibited from participating in a matter about which he or she has knowingly had an unreported *ex parte* communication. Under § 30327, a Commissioner who knowingly violates this section may be fined up to $7,500, in addition to any other applicable penalty, including a civil fine imposed under § 30824. A court also may award attorneys' fees to a prevailing party in litigation.

The plaintiff in this case, Spotlight on Coastal Corruption (Spotlight), filed an action against five Coastal Commissioners. The complaint alleged a cause of action for "Violation of Laws Governing Ex Parte Communications," which the plaintiff divided into three counts. Count 1 alleged violations of the *ex parte* disclosure procedures; Count 2 alleged that each defendant knowingly attempted "to use his or her official position as a member of the Coastal Commission to influence a Commission decision about which each Defendant knowingly had an *ex parte* communication that was not reported;" and Count 3 alleged that each violation was separately punishable under Coastal Act § 30820(a)(2).

Following trial, the Superior Court determined that certain *ex parte* disclosure violations had occurred and imposed various fines against each of the five defendants. On cross-motions for attorneys' fees, the trial court then determined that Spotlight was the prevailing party. Although defendants defeated approximately 99 percent of Spotlight's monetary claims, the trial court found that Spotlight's "main litigation objective" was to shed light on "lax *ex parte* disclosure practices" and "create changes in those practices," and that this objective had been met.

The Court of Appeal's Decision

Standing

The Court of Appeal first addressed defendants' argument that Spotlight lacked standing to bring counts 1 and 2. Typically, to have standing, a plaintiff must have a "special interest" to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. However, in cases seeking a writ of mandate, the California Supreme Court has held that, where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, a petitioner need not show that she has

any legal or special interest in the result.

Here, defendants contended that, as a matter of law, such "public interest" standing applies only in mandamus actions, not actions like this case to impose civil fines. The Court of Appeal agreed and found that, contrary to Spotlight's contentions, the complaint lacked essential allegations for a writ of mandate. It also disagreed with the trial court's alternative ruling that public interest standing could be conferred by exercise of discretion, finding this to be erroneous as a matter of law.

Coastal Act Section 30820

The Court of Appeal next addressed Coastal Act § 30820(a)(2). Count 3 of the complaint alleged that each disclosure violation was separately punishable under § 30820(a)(2), which specifies fines of up to an additional $30,000 for "any violation" of the Coastal Act aside from certain development activity addressed in § 30820(a)(1). Unlike Counts 1 and 2, it was not disputed that Spotlight had standing to bring Count 3. Defendants, however, maintained that notwithstanding the general reference in the statute to "any violation" of the Coastal Act, § 30820(a)(2) does not apply to violations of the Act's specific *ex parte* disclosure statutes.

In particular, defendants contended that the phrase "any violation" could not be read in isolation because elsewhere in the Coastal Act (*i.e.*, §§ 30324 and 30327) the California Legislature addressed a unique type of Coastal Act violation—one that only a Commissioner can commit, and that involves the decision-making process. Defendants claimed that to interpret "any violation" in § 30820(a)(2) literally would ignore the legislative intent to essentially create two separate fine regimes: one for development-related violations, and the other for *ex parte* communication disclosure violations.

After analyzing the statutory language and conducting an in-depth review of the legislative history, the Court of Appeal agreed with the defendants, finding that § 30820(a)(2) does not apply to *ex parte* communication disclosure violations punishable under §§ 30324, 30327, and 30824. Thus, to the extent that the trial court judgment had been based on violations of these statutes under Count 3, the judgment was reversed. Further, because the judgment was reversed, the Court of Appeal also reversed the prevailing party attorneys' fee and cost award.

Conclusion and Implications

The case is significant because it contains a substantive discussion of the Coastal Act's *ex parte* disclosure requirements, including potential civil fines for violations. The decision is available online at: https://www.courts.ca.gov/opinions/documents/D074673M.PDF
(James Purvis)

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