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CALIFORNIA LAND USE™
LAW & POLICY Reporter

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LAND USE NEWS

CONGRESS INTRODUCES BILL TO COORDINATE RIVER RESTORATION EFFORTS BETWEEN THE UNITED STATES AND MEXICO AND TO PROTECT THE SALTON SEA

On January 25, 2021, U.S. House of Representatives Members Raul Ruiz (CA -36) and Juan Vargas (CA-51) introduced HR 491, the "California New River Restoration Act of 2021," which would direct the administrator of the U.S. Environmental Protection Agency (EPA) to establish a federal restoration program for the California New River that flows from Mexico to the Salton Sea.

Background

The Salton Sea is California's largest lake, situated along the San Andreas Fault in southern California, between Imperial and Riverside counties. In addition to its size, the Salton Sea is notable for its low elevation (226 feet below sea level) and high salinity (25 percent higher than the Pacific Ocean). The Salton Sea serves as an important stopover for hundreds of species of migratory birds traversing the 5,000-mile Pacific Flyway, and has been identified by the National Audubon Society as a bird area of global significance. It provides habitat for numerous listed species, including the desert pupfish, the brown pelican, and the Yuma clapper rail. The Salton Sea started as a freshwater lake formed by Colorado River floods in the early 20th Ccntury, but became saline over time due to declining water levels and the steady inflow of agricultural tailwaters high in salts and nutrients from the Imperial, Coachella, and Mexicali valleys.

While it was once regarded as one of California's most productive fisheries, the Salton Sea has become less hospitable to wildlife, due in part to reduced inflows, climate fluctuations, and a lack of natural outlets beyond evaporation and seepage. Over the past few decades, deteriorating conditions in the Salton Sea have led to fish and bird die-offs, a reduction in overall bio-diversity, and an increased threat of harmful dust storms due to reduced water levels and exposed lake bed. Numerous programs and initiatives have been developed to address conditions in the Salton Sea, including one of its primary pollutant sources, the New River.

The New River originates near the City of Mexicali, Mexico and flows north through agricultural lands in the Imperial Valley, to the Salton Sea. Once regarded as one of the most polluted rivers in the country, the New River contributes nearly 400,000 acre-feet of water to the Salton Sea each year, constituting approximately 10-15 percent of the annual inflow. As such, the discharge of urban runoff, agricultural tailwater, treated municipal waste, and partially treated industrial waste in the New River affects the water quality and habitat conditions in the Salton Sea, as well as human health and economic development in the Imperial Valley.

New River Restoration

The California-Mexico Border Relations Council (CMBRC) was created in 2006 to coordinate interagency programs, initiatives along the California-Mexico border between California agencies and their counterparts in Mexico. In 2010, the CMBRC formed a New River Technical Advisory Committee to oversee the development of a New River Strategic Plan to monitor, study, and address prevailing water quality concerns in the New River. The Technical Advisory Committee released a Strategic Plan to the public in 2012, which it revised based on community input in 2016. The revised Strategic Plan delivered to the California legislature included recommendations to construct a trash screen, disinfection facility, and associated conveyance structures in Calexico to remove pollutants from the New River. California's legislature appropriated $1.4 million to provide grants and contracts to implement the planning, design, and permitting work needed for the recommended project components.

Citing a need for coordination of federal and non-federal funding and resources to assist restoration efforts in the New River, Representatives Ruiz and Vargas introduced HR 491 to direct the EPA to form the California New River Restoration Program (Program). Under the Program, the EPA adminis-

trator would facilitate restoration and protection activities for the New River among Mexican, federal, state, local, and regional agencies and groups. The objectives of those activities include the enhancement of habitat restoration and protection activities, the improvement of water quality to support fish and wildlife, enhancement of water and flood management, and increased opportunities for public access to, and recreation in, the New River.

The EPA administrator would coordinate and consult with representatives of the Mexican government, the United States Department of the Interior, Department of Agriculture, and Department of Homeland Security, the California Natural Resources Agency, California Environmental Protection Agency, State Water Resources Control Board, and Department of Water Resources, as well as local government agencies and other stakeholder groups, to implement the Program.

HR 491 also calls for the provision of federal grants and technical assistance to state and local governments and other stakeholders, both in the U.S. and in Mexico, to carry out the aforementioned purposes of the Program. These grants would incorporate criteria developed to ensure that the activities are aligned with and accomplish the goals of the Program, and include a federal cost-sharing allotment of up to 55 percent. While HR 491 does not directly involve projects in the Salton Sea, the New River restoration activities would reduce the volume of pollutants entering the Salton Sea and work to improve overall water quality.

Conclusion and Implications

House Resolution 491 declares federal coordination and funding is needed to build on and support activities already in motion to restore conditions in the New River. However, similar federal legislation introduced in 2016, 2017, and 2019, was unsuccessful. After its introduction, HR 491 was referred to the House Committee on Transportation and Infrastructure, the Committee on Natural Resources and the Subcommittee on Water Resources and Environment for review and consideration.

A copy of HR 491, the California New River Restoration Act of 2021, is available at: https://www.congress.gov/bill/117th-congress/house-bill/491/text?r=24&s=1

(Austin C. Cho, Meredith Nikkel)

REGULATORY DEVELOPMENTS

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS NEW ORDER ESTABLISHING STATEWIDE WASTE DISCHARGE REQUIREMENTS FOR WINERIES

On January 20, 2021, the State Water Resources Control Board (SWRCB or Board) voted unanimously in favor of the adoption of a resolution that will establish waste discharge requirements for wineries throughout the state. With the adoption of this new Winery Order, the SWRCB is seeking to protect California's surface and ground water sources while streamlining and improving permitting consistency, but the Order has so far seen a mixed reception by industry members.

Statewide General Waste Discharge Requirements for Wineries

Up until the adoption of the Winery Order, waste discharge requirements and permitting has been handled by Regional Water Quality Control Boards (RWQCBs) on a case-by-case basis. Because of this, many large wineries spanning multiple counties had been subject to the permitting and discharge requirements of multiple RWQCBs.

Furthermore, the utilization of the regional water boards in handling these matters led to most wineries remaining outside the purview of the Board's permitting requirements. Of California's roughly 3,600 bonded wineries, only 589 wineries held permits from RWQCBs to protect water quality.

The new system—adopted in the Board's Winery Order—would implement statewide rules for waste discharge from wineries. Specifically, the SWRCB developed general Waste Discharge Requirements for winery process water for wineries and similar facilities that generate winery waste and discharge it to land for reuse or disposal.

A Tiered System by Size

Classifying wineries by size, the Winery Order uses a tiered system which exempts wineries generating less than 10,000 gallons of processed water discharge annually and imposes the most stringent requirements on wineries producing over 1,000,000 gallons annually.

Among the requirements introduced by the Winery Order, winery operators can expect to see reporting requirements established or increased for process water discharges and new requirements for water treatment systems and ponds. Winery operators will also see caps to the amount of processed water they can dispose of through land applications and subsurface disposal. Additionally, the state's largest wineries—those producing more than 1,000,000 gallons in processed water discharges annually—will also be subject to groundwater monitoring requirements.

Over 2,000 wineries that apply winery process water to land for reuse and disposal will be affected by the new regulation once implementation by regional water boards begins, which will likely occur sometime after the state board adopts a fee schedule for the statewide order at its meeting scheduled for March 9.

Conclusion and Implications

The State Water Resources Control Board has given wineries a three-year window for permitting under the Winery Order, with an additional five-years to come into compliance, meaning the ultimate aim of this new system won't fully come to fruition for nearly a decade.

With that said, critics on both sides have issues with the Order at the outset. On one side of the aisle, smaller winery owners have expressed concerns that the implementation of more strict discharge and reporting requirements will impose a financial burden these wineries are not in the position to endure—especially in a time like now where wineries are seeing increased challenges from both Covid-19 and California's increasingly common wildfires.

On the other hand, the Order has been attacked as not going far enough. The California Coastkeeper Alliance, in a recent news release on the Winery Order, expressed their concerns with the Order's limited groundwater monitoring and absence of stricter spill prevention requirements. Just last January, for example, Sonoma County had one of the worst spills in

state history when a local winery's tank failed, spilling nearly 97,000 gallons of wine into Reiman Creek, a tributary to the Russian River.

For better or worse, the new statewide system will at least serve as a step in the for seeking to protect California's groundwater and surface water resources.

The final Resolution and Winery Order documents will be available soon on the State Water Resources Control Board's website at: https://www.waterboards.ca.gov/water_issues/programs/waste_discharge_requirements/winery_order.html
(Wesley A. Miliband, Kristopher T. Strouse)

RECENT FEDERAL DECISIONS

D.C. CIRCUIT VACATES FEDERAL EASEMENT AWARDED TO DAKOTA ACCESS PIPELINE, FINDING U.S. ARMY CORPS VIOLATED NEPA BY FAILING TO PREPARE AN EIS

Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 985 F.3d 1032 (D.C. Cir. 2021).

In *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, the U.S. Court of Appeals for the D.C. Circuit found that the U.S. District Court did not abuse its discretion in vacating an easement granted by the U.S. Army Corps of Engineers (Corps) for the Dakota Access oil Pipeline to cross under a federally-regulated reservoir that provided Native American tribes with water resources. The appellate court agreed that the Tribes' concerns about the pipeline's oil leak detection system presented an unresolved controversy that required the Corps to prepare an environmental impact statement, but reversed the District Court's order directing the pipeline to shut down and be emptied of oil.

Facts and Procedural Background

In 1958, the Corps constructed Lake Oahe and the Oahe Dam on the Mississippi River, between North and South Dakota. To construct the dam and reservoir, the Corps flooded over 160,000 of lands owned by the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe. Since its creation, Lake Oahe provides successor tribes of the Great Sioux Nation with water for drinking, agriculture, industry, recreation, and sacred religious and medicinal practices.

The Dakota Access Pipeline (DAPL) stretches nearly 1,200 miles and moves more than half a million gallons of crude oil per day from North Dakota to Illinois. In June 2014, pipeline operator, Dakota Access, sought an easement from the Corps under the Mineral Leasing Act to construct a portion of the pipeline's pathway under the federally-owned Lake Oahe. In December 2015, the Corps published a draft Environmental Assessment (EA) for the easement, which found that it would yield no significant environmental impacts. Tribes and federal agencies submitted comments on the EA, which contended the Corps insufficiently analyzed the risks and consequences of an oil spill on water resources.

In July 2016, the Corps published its Final EA and a Mitigated Finding of No Significant Impact (FONSI), concluding that with mitigation measures, the Lake Oahe crossing would not significantly affect the quality of the human environment. Several Tribes sued for declaratory and injunctive relief under the National Environmental Policy Act (NEPA). Though the court did not enjoin the project, the Departments of Justice, Interior, and Army immediately issued a joint statement in September 2016, explaining the Corps would not issue the easement and that construction could not move forward until the Army reconsidered its previous decisions.

In January 2017, the Corps published a notice of intent to prepare an EIS for the pipeline easement. Two days later, the Trump administration took office and directed the Corps to expedite the DAPL approvals and consider whether to rescind the notice of intent. The Corps ultimately decided not to prepare an Environmental Impact Statement (EIS), and granted the DAPL easement in early February 2017. After the District Court denied their renewed requests for a preliminary injunction and temporary restraining order, the Tribes moved for summary judgment. The District Court remanded the Corps' easement decision to address deficiencies in its NEPA analysis, including whether the project's effects were likely to be "highly controversial."

In February 2019, the Corps completed its remand analysis and maintained an EIS was unnecessary. The Tribes again moved for summary judgment on grounds that the Corps failed to remedy its NEPA violations. In March 2020, the District Court concluded that, in light of comments pointing to serious gaps in the Corps' analysis, the easement's effects were likely to be highly controversial. The court directed the Corps to complete an EIS, and finding that vacatur was warranted, ordered Dakota Access to shut down the

pipeline and empty it of all oil by August 2020. Both parties appealed.

The D.C. Circuit's Decision

The D.C. Circuit Court of Appeals partially upheld the District Court's decision that the Corps violated NEPA by failing to prepare an EIS and affirmed the vacatur of DAPL's easement, but reversed the lower court's injunction ordering Dakota Access to shut down and empty the pipeline of oil.

The Court of Appeals first considered whether the District Court abused its discretion in finding the Corps violated NEPA. Under the statute, consideration of a project's potentially significant impacts depends on its "context" (regional, locality) and "intensity" (severity of impact). In assessing a project's "intensity," NEPA's operative regulations set forth ten factors that should be considered—triggering any one of the ten requires preparation of an EIS. Here, the Corps' easement grant concerned whether the "degree to which the effects on the quality of the human environment are likely to be highly controversial."

'Highly Controversial' Agency Decisions and the *National Parks* Decision

Per the District Court's separate opinion in *National Parks Conservation Association v. Semonite*, an agency's decision is "highly controversial" if "a substantial dispute exists as to the size, nature, or effect of the major federal action." For example, extensive and repeated criticism from specialized government agencies and organizations suggests a "substantial dispute" exists. In such circumstances, the lead agency must resolve, rather than merely confront, outside criticism; failure to do so will leave a project's effects uncertain, and thus warrant preparation of an EIS.

The Corps and Dakota Access argued that the District Court applied the wrong legal standard by relying on *National Parks*. The Corps also contended that it adequately addressed comments that had rendered its easement decision "highly controversial." The D.C. Circuit rejected both claims. Contrary to the Corps' summation, the appellate court properly looked at only at whether the agency succeeded in resolving the controversies raised. Here, the Corps' responses to comments failed to materially address and resolve serious objections to its analysis. The appellate court also rejected the Corps' position that opposition to the project only came from Tribes and their consultants, rather than from disinterested public officials. Because Tribes are sovereign nations that possess stewardship responsibility over the natural resources implicated by the Corps' analysis, they are not merely "quintessential…not-in-my-backyard neighbors." Tribes' unique role and their "government-to-government" relationship with the United States demands that their criticism be treated with appropriate solitude. For these reasons, the District Court appropriately applied the legal standard set forth in *National Parks*.

Unresolved Scientific Controversies

Under this lens, the appellate court considered whether four disputed facets of the Corps' analysis involved unresolved scientific controversies that triggered NEPA's "highly controversial" factor: 1) DAPL's leak detection system; 2) DAPL's operator safety record; 3) impacts of winter conditions on oil spills; and 4) the worst-case-discharge estimate used in DAPL's spill-impact analysis.

As to each issue, the Tribes had submitted credible expert reports that raised concerns about the efficacy of the Corps' analysis. Agreeing with the District Court, the D.C. Circuit found that the Corps had failed to adequately respond to the Tribes' criticism in a manner that actually resolved the controversies raised. For example, by claiming that leaks would "eventually be found," the Corps failed to adequately address the Tribes' expert report that found the detection system DAPL intended to use would not detect "pinhole leaks," which can result in substantial oil spills. Similarly, the appellate court found that the Corps failed to validly explain why it relied on general pipeline safety data, rather than DAPL's operatory safety record, which Tribes noted was significantly worse than industry averages. As such, the court held that several serious scientific disputes existed, thereby rendering the effects of the Corps' easement decision "highly controversial."

The Remedy and Requisite Findings

As to the remedy, the D.C. Circuit agreed that the District Court properly ordered the Corps to prepare an EIS. The appellate court rejected the appellants' contention that the District Court abused its discretion in vacating the pipeline's easement in the in-

terim. The Court of Appeals explained that a *vacatur* was appropriate because the Corps was unlikely to resolve the controversies on remand, having failed to do so on previous remands without *vacatur*. The District Court also properly considered the disruptive nature of the *vacatur*, but reasoned that vacating the easement did not yield the same effect as shutting down the project.

While vacating the easement was proper, the D.C. Circuit found that the District Court failed to make requisite findings to issue an injunction ordering the pipeline be shut down and emptied of oil. The District Court's characterization that an injunction is simply a "consequence of vacatur" subverts Supreme Court precedent requiring an injunction to issue under the traditional test. Here, vacating the easement did not necessitate the shutdown of the pipeline. For these reasons, the appellate court affirmed the order vacating DAPL's easement and directing the Corps to prepare an EIS, but reversed the District Court's order directing the pipeline be shutdown.

Conclusion and Implications

Notwithstanding the controversial nature of the Dakota Access Pipeline, coupled with a new administration, the D.C. Circuit's opinion reaffirms an agency's responsibilities under NEPA, particularly when a project is "highly controversial." An agency that receives significant criticism from highly specialized agencies and interested parties must do more than simply responding. Rather, the agency must make concerted efforts to resolve the controversies by amply explaining its decision and the information upon which it relied. The court's opinion also reaffirms the appropriate remedy for a NEPA violation—an order directing preparation of an EIS and, in certain cases, a *vacatur* of the agency's decision. However, a *vacatur* does not automatically necessitate injunctive relief. For an injunction to issue, the court must employ the traditional test to determine whether such relief is appropriate. The D.C. Circuit's opinion is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/3FEF9DA2426A1904852586690056212 1/$file/20-5197-1881818.pdf
(Bridget McDonald)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT ADDRESSES ECONOMIC ANALYSIS PERFORMED BY STATE AND REGIONAL WATER BOARDS WHEN ISSUING NPDES PERMITS MORE STRINGENT THAN FEDERAL STANDARDS

City of Duarte v. State Water Resources Control Board, ___Cal.App.5th___, Case No. 30-2016-00833614 (4th Dist. Jan. 28, 2021).

Multiple cities challenged an order by the State Water Resources Control Board (SWRCB or Board) and Regional Water Quality Control Boards (RWQCB) (collectively: the Boards) that updated a federal Clean Water Act, National Pollutant Discharge Elimination System (NPDES) permit for 86 Municipal Separate Storm Water Systems (MS4s) in Los Angeles County. The order adopted more stringent, numeric water quality based effluent standards (WCBELs) than required under the U.S. Clean Water Act. The cities alleged the Water Boards failed to sufficiently analyze economic considerations of the order as required by state Water Code § 13241 and the trial court agreed. The Fourth District Court of Appeal overturned the trial court, ruling that the Water Boards were not required to consider the costs of compliance in precise detail for each municipal water system, the Water Boards' more general analysis of economic considerations was sufficient.

Factual and Procedural Background

In November 2012, the Los Angeles RWQCB issued a NPDES permit to 86 localities in Los Angeles County that set water quality-based effluent limitations to restrict the amount of pollutants that could be discharged from each localities' MS4 (Permit). The Permit defined the measures that each locality needed to take to reduce the amount of pollution discharged from MS4s and included numeric effluent limitations.

Petitioner, the City of Duarte owns and operates a MS4 subject to the Permit. In June of 2015, the SWRCB upheld the Permit with modifications. Modifications to the Permit required all MS4 discharges to reduce pollutants to the maximum extent practicable. The Board also approved a permit modification to adopt numeric WQBELs rather than less stringent best management practices (BMPs).

In July 2015, petitioner filed a petition for writ of mandate and complaint for injunctive and declaratory relief. Petitioner alleged that the Water Boards failed to proceed as required by law and abused their discretion in imposing the numeric effluent limitations in the Permit. After motions for judgment on the pleadings, the trial court dismissed Petitioner's claims for traditional *mandamus*, declaratory relief, and injunctive relief, leaving only claims for peremptory writ of mandate under Code of Civil Procedure § 1094.5.

In April of 2019, the Trial court issued a detailed ruling granting the petition for writ of mandate. Specifically, the trial court found that: 1) the Permit's numeric effluent limitations were more stringent than required by federal law; and 2) the state and federal water control boards failed to comply with Water Code § 13241 when adopting the numeric effluent limitations after failing to adequately analyze each locality's costs of compliance. The trial court ordered the water control boards to set aside each provision in the Permit relating to numeric effluent limits and reconsider the permit.

The Court of Appeal's Decision

The court began by noting that under state Water Code § 13241, the case turned on two issues: 1) whether the numeric effluent limitations in the Permit require more out of permittees than is required under the federal Clean Water Act, and 2) if so, did the Water Boards sufficiently consider the *economic* considerations factor required by Water Code § 13241 before issuing the permit.

Section 13241 Analysis

For the purposes of its decision, the court assumed but did not decide that the Permit's terms were more stringent than federal law. To impose NPDES permit conditions that are more stringent than federal law, a Water Board must first consider the factors set forth in Water Code § 13241. Section 13241 requires Water Boards to consider five factors, one of which includes "economic considerations," when establishing water quality objectives for permits that include restrictions more stringent than under federal law. Regarding this economic factor "a regional board must consider the cost of compliance when setting effluent limitations in a wastewater discharge permit." However, there is no case law defining "economic considerations" or laying out how an agency complies with its obligations to analyze such "economic considerations." As a result, a Water board has discretion to determine how it will consider and apply Water Code § 13241.

Economic Considerations Analysis

Petitioners argued that the Water Boards failed to meet their statutory requirements because they did not provide estimates of the costs that would be incurred by individual permittees due to Permit modifications. The court disagreed, finding that such a specific, detailed analysis was not required. The court noted that the Water Boards did make a number of economic findings when issuing the Permit, including eleven specific findings that generally analyzed the economic impacts, average cost of compliance for each municipality, and the amount that local households were willing to pay for necessary water system upgrades.

As the court noted:

> . . .[t]he Water Control Boards' analysis of the economic considerations identified in the Permit satisfied their obligation to consider the subdivision (d) factor of Water Code section 13241. Among other things, the Water Control Boards explained that the cost of regulating MS4 discharges is "highly variable" among the Permittees, provided ranges and averages of cost data and economic impacts in several categories, considered how much the Permittees' costs might be under the Permit's terms, identified potential sources of funds to cover the costs of the Permit, and concluded the failure to regulate would increase health-related expenses. The Water Control Boards' analysis of economic considerations was well within its discretion.

The court noted that every case arising under § 13241 will differ in what economic considerations must be evaluated. Here the court noted the record showed that the water control boards explained their reasoning sufficiently and acted in their discretion with regard to § 13241's economic considerations factor.

Conclusion and Implications

The court's provides somewhat helpful guidance to Regional Water Quality Control Boards and the State Water Resources Control Board when adopting NPDES permits that are more stringent than required under the federal Clean Water Act. Although the level of detail required will vary in each situation, a detailed analysis of economic considerations for each operator of a point source may not be required under Water Code § 13241. The court's decision can be found at the following location: https://www.courts.ca.gov/opinions/documents/G058539.PDF
(Travis Brooks)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

SECOND DISTRICT COURT AFFIRMS TRIAL COURT DENIAL OF CEQA CHALLENGE TO CATEGORY 3 EXEMPTION FOR CONSTRUCTION OF NEW HOMES

Concerned Citizens of Beverly Hills/Bel Air v. City of Beverly Hills, ___Cal.App.5th___, Case No. B297931 (2nd Dist. Jan. 14, 2021).

The Second District Court of Appeal in *Concerned Citizens of Beverly Hills/Bel Air v. City of Beverly Hills* held that a notice of exemption under Class 3 of the categorical exemptions from environmental review under the California Environmental Quality Act (CEQA) applied to the construction of two large homes at the end of a cul-de-sac in connection with the approval by the City of Beverly Hills (City) of a ministerial building permit for the homes and an easement for fire access. The Court of Appeal held that there was substantial evidence that exceptions to the Class 3 exemption did not apply because the homes were neither unusual nor located in surroundings particularly impacting the environment.

Factual and Procedural Background

The Project consists of two residencies to be constructed on two properties at the end of a cul-de-sac on Loma Linda Drive. The properties are zoned R-1 residential and are at the end of a cul-de-sac on Loma Linda Drive, a single-lane residential street that is currently 22 feet wide. At some point prior to 2013, one single family one and one guest house stood on the properties, but were removed by the developer, Loma Linda Trust.

In 2013, the developer submitted an application to build a 23,632 square feet home with an attached office and guest house. Because construction of the home would have involved the export of more than 3,000 cubic yards of earth that would have required an R-1 permit and also a tree removal permit, the City prepared a negative declaration to mitigate potential environmental impacts.

The developer in 2016 changed its application to the Project to two separate two-story homes approximately 8,000 square feet in size with basements. The City's ordinance was amended in 2016 to reduce the amount of export from 3,000 cubic yards to 1,500 cubic yards that would require a R-1 permit, and the plans for the homes were modified to fit within that limit for export. The developer also agreed as part of its application to dedicate an easement for fire truck turnaround from its property and to construct street improvements required for the turnaround.

Hearings on the easement dedication and construction of the street improvements were held by the City's planning commission and city council, both of which resulted in unanimous approval of the cul-de-sac changes in connection with the contemplated building permits for the homes. The City determined that the Project, including the street improvements and the anticipated homes construction was exempt either under the CEQA categorical exemptions for either Class 2 (structure replacement construction) or Class 3 (small construction including less than 3 homes).

Petitioner argued that the Class 2 exemption did not apply because there were no longer any existing structures on the properties and because the Project structures would not have the same purpose and capacity as the structures they were replacing. Petitioner also argued that the Class 3 exemption did not apply because the Project properties were purportedly adjacent to Franklin Canyon Park and within a habitat block for the Santa Monica Mountains Conservancy and on a visually prominent ridgeline between Franklin Canyon and lower Coldwater Canyon.

The city planner rejected the arguments of Petitioner regarding the Class 2 exemption, finding that the Project homes would replace two prior homes that had been located on the properties. The city planner rejected petitioner's arguments regarding the Class 3 exemption, finding that there were no unusual circumstances regarding the Project that would justify an exception to the exemption, because the properties were previously developed and already disturbed. The city planner also found that there was no location exception to the exemption, because the properties were not directly adjacent to Franklin Park and not within a habitat block. The City filed a notice of exemption.

Petitioner filed a writ of mandate challenging

the City's exemption determination. The trial court ruled that the City had properly found that the Class 2 exemption applies because, even though the new structures would be larger, there was no evidence that the structures do not serve the same purpose and capacity as those they were replacing.

The trial court also ruled that the City had properly found that the Class 3 exemption applies, rejecting petitioner's attempts to equate proximity to a protected habitat zone to presence within a protected habitat zone. There was no evidence that the Project located on a ridge above the park may impact the habitat environmental resource.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court decision, finding that substantial evidence supports the City's findings that the Project qualifies for the Class 3 exemption and the City's findings that the unusual projects and project surroundings exceptions to that exemption did not apply. Because substantial evidence supported application of the Class 3 exemption, the Court did not address the City's findings regarding the Class 2 exemption.

The Class 3 Categorical Exemption and its Exceptions

The Class 3 categorical exemption to environmental review under CEQA is entitled "New Construction or Conversion of Small Structures" and it "consists of construction and location of limited numbers of new, small facilities or structures." (14 Cal. Code Regs., § 15303.) Among the nonexclusive list of projects qualifying under this exemption are up to three single family residences in urbanized areas.

Categorical exemptions are subject to exceptions. If an exception applies, the exemption is lost. The relevant exceptions to a Class 3 exemption are: 1) if there is a reasonable possibility of a significant effect on the environment due to "unusual circumstances;" and 2) if the project will have impacts on a uniquely sensitive or hazardous environment [location]. (14 Cal. Code Regs., § 15300.2.)

Courts have clarified that the unusual circumstances exception may be established by showing that the project has some feature that distinguishes it from others in the exempt class such as its size or location. (*Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal.4th 1086, 1105 (2015).)

The CEQA guidelines have clarified that the location exception applies only where the project may impact on an environmental resource of "hazardous or critical concern" and where that resource is "designated, precisely mapped and officially adopted" pursuant to law by government agencies. (14 Cal. Code Regs., § 15300.2.)

There are two exceptions to the Class 3 categorical exemption

Standard of Review for Exceptions to Class 3

The standard of review for each of the exceptions is mixed. The court first reviews whether there is an unusual circumstance or a uniquely sensitive or hazardous environment under the substantial evidence standard. (*Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1105, 1114.) Under the substantial evidence standard of review, if there is substantial evidence that there is no unusual circumstance and substantial evidence that there is not uniquely sensitive or hazardous environment, then no further inquiry is required.

If such substantial evidence does not exist to negate either ground for exception, and there is evidence of either unusual circumstance or uniquely sensitive or hazardous environment, then the fair argument standard applies to whether there is a reasonable possibility of a significant effect on the environment due to the unusual circumstances or uniquely sensitive or hazardous environment. (*Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1115.) Under the fair argument standard, if there is substantial evidence supporting a fair argument of a reasonable possibility of significant environmental effects, then it would be an abuse of discretion to apply the exemption.

Substantial Evidence Rendering the Exceptions Inapplicable

With regard to the unusual circumstance exception, there was substantial evidence from the city planner that there was no viable habitat on the properties and no linkage to nearby trails with respect biological circumstances. There was evidence in the record of grading of the property following the 2013 application that demonstrated that there was no unusual slope and evidence in the record of a geotechnical report that there was no unusual soils or geologic conditions.

With regard to the location exception, there was substantial evidence that the properties for the Project were not located within a uniquely sensitive or hazardous environment, but instead were located outside of the Franklin Park, which is designated as an environmental resource of critical concern. Indeed, the properties are separated from the park by another residential property. The nearby habitat block map does no show linkage trails going through the properties. Anecdotal statements in letters about wildlife nearby the properties was insufficient to establish a mapped and designated resource of critical concern.

The location of the properties in a fire hazard area did not establish the location exception because the exception does not apply to hazards, but instead to resources of hazardous concern. Resources are a natural source of wealth or revenue or a natural feature of phenomenon that enhances the quality of life. Fire zones are not resources for purposed of the exception to the Class 3 exemption.

Conclusion and Implications

This opinion by the Second District Court of Appeal is important because it demonstrates how even in situations where a Class 3 exemption to CEQA review may apply, it is important to have substantial evidence in the record pertaining to the exemption. In contested situations, it may even be beneficial to conduct precursory environmental review, including studies of resource areas and geotechnical studies to support to counter any potential evidence of a location or resource exception. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/B297931.PDF
(Boyd Hill)

SECOND DISTRICT COURT REJECTS PROPERTY OWNER'S ATTEMPT TO INVALIDATE 1974 PARCEL MAP BASED ON LACHES DOCTRINE

Decea v. County of Ventura, ___Cal.App.5th___, Case No. 56-2018-00519378 (2nd Dist. Jan. 15, 2021).

The Second District Court of Appeal has rejected a plaintiff's petition for "exclusion" to declare a 1974 parcel map void that was prepared and recorded under prior ownership so that plaintiff could subdivide and develop his property. Ultimately, both the trial court and Second District Court of Appeal rejected plaintiff's petition on the basis of laches. There was evidence that a prior property owner was aware of an improper lot line in the 1974 parcel map in 1985. However the prior owner failed to take the steps to correct the map for decades. The court concluded that under the doctrine of laches, it would be inequitable to re-awaken such issues now, more than 35 years after the prior owner had the opportunity to correct alleged errors.

Factual and Procedural Background

Plaintiff bought a house in the Lake Sherwood Community in Ventura County (County). The house sat on a parcel that was originally part of a larger tract of land south of Lake Sherwood that was subdivided into quarter-acre parcels in a 1923 tract map, with the resulting parcels sold to several parties. Speirs, a previous landowner, purchased five of these quarter-acre parcels totaling 1.04 acres of land. In 1974, Speirs hired a surveyor who prepared and recorded a map depicting his parcels as a single parcel that he labelled "Parcel A."

In 1985, the County initiated a parcel merger process. In related hearings, Speirs identified an incorrect lot line on the 1974 map prepared by his surveyor. At the hearing, a county official told Speirs that the county's "hands [were] tied" because the 1974 map was the official county record for the property in question. The county encouraged Speirs to contact his land surveyor and ask him to correct the record. Speirs took no further action.

Plaintiff purchased Parcel A and in 2017 sought to subdivide the property into two half-acre buildable lots. He began this process by requesting certificates of compliance for five lots and disputing that the five lots had been merged into a single lot in 1974. Plaintiff argued that Speirs did not consent to the recording of the final map in 1974. The county disagreed, responding that there was only one "single discrete parcel" created by the 1974 map.

Plaintiff then petitioned to exclude his property from the 1974 map under Government Code § 6499.21 *et seq*, part of the Subdivision Map Act. The Subdivision Map Act's exclusion procedure allows local jurisdictions to redraw or discard a recorded map in certain circumstances. The petition must describe the property to be excluded, the reasons justifying the exclusion, and include a new map showing the new boundary lines being requested. The court clerk then publishes notice of the petition and indicates the deadline for filing objections. If the court receives "material" objections, it hears those objections. If the court does not receive objections, it can proceed with hearing the petition for exclusion. If a court is presented with "satisfactory evidence of the necessity of the exclusion" it can "order the alteration or vacation of the recorded map."

Plaintiff's petition sought an order voiding the 1974 map, arguing that Speirs did not consent to the surveyor's recording of it. The county objected to the petition and asserted the validity of the 1974 map. The County pointed to hearing transcripts indicating that Speirs knew officials considered Parcel A one legal lot but failed to contest that interpretation. The county asked the court to dismiss the petition under the doctrine of laches.

The trial court agreed, dismissing the petition on the ground of laches.

The Court of Appeal's Decision

On appeal, plaintiff contended that the equitable doctrine of laches could not apply to his petition because exclusion is a remedy provided for in statute. The Court of Appeal rejected this argument noting that laches was appropriately applied because Plaintiff sought and could only receive equitable remedies under the Subdivision Map Act.

Turning to the county's laches claims, the court highlighted the trial court's finding that "a reasonable person in the position of Mr. Speirs would have taken action if he or she wished to have the original lot lines restored." The court also agreed with the trial court's statement that:

> . . .it would be patently unfair to rely upon indirect evidence that is subject to conflicting reasonable interpretations when direct evidence was once available and could have been provided in the absence of needless delay.

The court found that substantial evidence supported the trial court's finding that Speirs knew the 1974 map included at least one error that could be fixed by submitting a corrected parcel map. Despite this, Speirs acknowledged the 1974 map's validity and knew what to do to correct any errors. Speirs did nothing for decades.

The court did not reach the issue the 1974 map's validity, rejecting Plaintiff's claims on the basis of laches. The court concluded:

> . . .[t]he time to address the map's purported errors passed 35 years ago. It would be inequitable to awaken the issues now.

Conclusion and Implications

The *Decea* case highlights the importance that property owners and developers promptly address and make known any known map errors to a local agency. When such errors are identified, the exclusion process in the Subdivision Map Act provides an avenue to file a petition to change or vacate such map. The court's decision can be found at the following address: https://www.courts.ca.gov/opinions/documents/B302086.PDF

(Travis Brooks)

FOURTH DISTRICT COURT UPHOLDS CEQA CATEGORICAL EXEMPTION FOR LEASE OF SPORTS PARK FACILITY ALONG SAN DIEGUITO RIVER VALLEY

Friends of the San Dieguito River Valley v. City of San Diego, Unpub., Case No. D075654 (4th Dist. Jan. 29, 2021).

In an *unpublished* decision, the Fourth District Court of Appeal in *Friends of the San Dieguito River Valley v. City of San Diego*, upheld the City of San Diego's approval of a long-term lease for a major sporting complex, finding that the city properly determined the project was categorically exempt from the California Environmental Quality Act (CEQA) review.

Facts and Procedural Background

In 1983, the City of San Diego (City) was issued a grant deed for a 114-acre parcel of land. Pursuant to the terms of the deed, the City approved a 26-year lease with the Fairbanks Polo Club in 1986 to construct and operate polo fields, an equestrian center, polo games and tournaments, and other affiliated uses. The City conducted CEQA review and issued a negative declaration, finding that most of the site would be preserved as natural open space for low-intensity activities, and development of future facilities would be subject to subsequent environmental review.

In 1992, the Polo Club contracted with Surf Cup to host soccer games and tournaments at the Polo Fields property. In 2002, the grant deed was amended to expand the property's allowed uses, and provided that the Polo Club could host events on no more than 25 cumulative days per year. In March 2012, the Polo Club's lease expired. Before soliciting requests for proposals, the City asked the successor grantor of the deed to expand the property's permissible uses. The City requested that the deed permit up to 25 events per year, with events being defined as consecutive-day sporting/athletic events. The provision would serve in lieu of the previous provision that authorized up to 25 days of events. Though the grantor initially agreed, it retracted the proposed provision and maintained that events could only be hosted on 25 days per year.

In 2016, the City approved a long-term lease with Surf Cup to operate the property. Surf Cup proposed maintaining the existing facilities for recreational activities, while also contemplating sports-related special events and other ancillary uses allowable under the deed. Surf Cup also sought to improve existing facilities, including irrigation, landscaping, fencing, roads, trailers, storage, and other structures. The City planning department's review of the lease found that although the property is within the San Dieguito River Valley and in close proximity to adjacent open space, none of the proposed renovations would affect sensitive biological resources. The department concluded that multiple categorical exemptions applied to the lease. In August 2016, the city council adopted a resolution determining that approval of the lease was categorically exempt and recorded a Notice of Exemption.

Friends of the San Dieguito River Valley filed a petition for writ of mandate, arguing that the City's approval of the lease violated CEQA and the City's municipal code. The court entered a final judgment in favor of the City and real party, Surf Cup. Friends timely appealed.

The Court of Appeal's Decision

The Fourth District Court of Appeal reviewed the trial court's denial of Friends' petition. Accordingly, the appellate court independently reviewed the City's actions for abuse of discretion. Under this standard, the appellate court reviewed the record for substantial evidence supporting the City's factual determination that approval of the lease fell within a categorical exemption or exception.

The appellate court agreed that the City's approval of the constituted a "project" under CEQA. As such, the City was required to consider the impacts of the project against the environmental conditions that existed at the time of environmental review. Existing conditions at the site included the ongoing level and intensity of operations and uses at the Polo Fields. The appellate court reaffirmed that CEQA does not require the City to compare the impacts of the project to those conditions that existed in 1986, when the City first issued a negative declaration for the lease to the Polo Club. Although there was

a significant increase in the intensity of uses at the Fields since then, the court could only consider the approval of the 2016 lease to the uses that existed at the Fields in 2016, even if the significant increase in uses was never reviewed for environmental impacts.

'Whole of an Action' and Current and Historical Uses Analysis

Because a project includes the "whole of an action," the court of appeal reviewed the City's "reasonable expectations" of how the property would be used during the entirety of the 28-year lease. Here, the City's preliminary review of the project appropriately included actions that Surf Cup actually intended to undertake at the property. Contrary to Friends' assertion, this did not amount to improper piecemealing—the City was not required to consider uncertain improvements beyond those proposed by Surf Cup. The appellate court also rejected Friends' assertion that Surf Cup will significantly expand use of the property. Citing a February 2016 letter sent by Surf Cup to the City, Friends contended that the Fields would no longer be used for events 25 days of the year, but instead, would host 25 events per year. Friends claimed that, because some of these events could last up to five days each, the Polo Fields would now host approximately 125 days of events per year, thereby resulting in increased impacts. The court dismissed this claim by observing that Surf Cup sent the letter during the City's negotiations with the deed grantor. However, as the court previously noted, those negotiations failed and the current deed maintained 25-event-days-per-year provision. Thus, the lease would not significantly expand the intensity of the property's use.

Categorical Exemptions

The court also concluded that substantial evidence supported the City's factual findings that approving the lease, with its current and historical uses of the property, was categorically exempt under CEQA. The City found the lease qualified for four categorical exemptions, including the "normal operations of facilities for public gatherings," "existing facilities," "minor alterations to land," and "accessory structures" exemptions. The court held that each of these exemptions were appropriate because they reflected the Fields' ongoing operations, as contemplated under the lease.

The court rejected Friends' assertion that the "unusual circumstances" exception applied to the City's categorical exemptions. Here, Friends bore the burden of demonstrating that the City's determination was not supported by substantial evidence in the record. Under this standard, the court held that Friends failed to support their claim that the zoning and surrounding land uses constituted an unusual circumstance. The court explained that evidence in the record indicated that the activities contemplated by the lease were allowed under the property's zoning.

Proximity to Sensitive Habitat

Similarly, Friends failed to establish that an unusual circumstance exists due to the presence of an environmental sensitive habitat. Although Friends established that a sensitive habitat exists on the property, they failed to establish that its proximity to developed and used areas is likely to cause a significant negative effect. Moreover, the City's environmental review acknowledged that, while the property is near open spaces and within the San Dieguito River Valley, the areas proposed for renovation did not support sensitive biological resources. Finally, Friends failed to show that, by way of the lease's approval, the proximity of potential resources to the site would cause significant environmental effects. In the absence of any substantial evidence in the record, Friends failed to satisfy their burden in establishing unusual circumstances exist.

For these reasons, the appellate court affirmed the lower court's holding and awarded costs on appeal to the City and Surf Cup.

Conclusion and Implications

The Fourth District's *unpublished* opinion reaffirms the traditional tenets of categorical exemptions under CEQA. Here, the City properly considered the terms of the lease against the current uses of the Fields. In doing so, substantial evidence supported the City's conclusion that approval of the lease was categorically exempt from CEQA review. The lease permitted continued normal operations of the property and would not result in significant environmental effects. Because courts defer to an agency's decision

to categorically exempt a project, petitioners, such as Friends, bear the burden of establishing an exception exists. Thus, to succeed in asserting that an unusual circumstance exists, petitioners must establish the certainty of a significant environmental effect. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/D075654.PDF (Bridget McDonald)

FIRST DISTRICT COURT UPHOLDS ADOPTION OF VOTER INITIATIVE, FINDING THE INITIATIVE DID NOT REQUIRE A TWO-THIRDS MAJORITY TO PASS

Howard Jarvis Taxpayers Association v. City and County of San Francisco, 60 Cal.App.5th 227 (1st Dist. 2021).

Plaintiffs sued to invalidate "Proposition C," an initiative entitled "Universal Childcare for San Francisco Families Initiative," on the ground that it required a two-thirds majority vote to pass. The initiative had passed by a simple majority of voters. The trial court rejected their claims and plaintiffs appealed. The Court of Appeal for the First Judicial District, on January 27, 2021, upheld the trial court decision, adopting the reasoning of *City and County of San Francisco v. All Persons Interested in the Matter of Proposition C*, 51 Cal.App.5th 703 (2020), and rejecting plaintiffs' contention that Proposition 13, Proposition 218, and the San Francisco City Charter compel a supermajority vote for passage.

Factual and Procedural Background

After gathering enough signatures to qualify, an initiative entitled the "Universal Childcare for San Francisco Families Initiative" was placed on San Francisco's June 2018 ballot as Proposition C. The initiative sought to impose an additional tax on certain commercial rents to fund early childcare and education. Approximately 51 percent of voters voted in favor of Proposition C.

Howard Jarvis Taxpayers Association, Building Owners and Managers Association of California, California Business Properties Association, and California Business Roundtable (collectively: Howard Jarvis) then filed the underlying action to invalidate Proposition C on the ground that it needed a two-thirds majority vote to pass. The parties filed cross-motions for summary judgment. The trial court granted San Francisco's motion and denied Howard Jarvis's motion, and subsequently entered judgment for San Francisco. An appeal then followed.

The Court of Appeal's Decision

The parties did not dispute that Proposition C imposed a tax that, if it had been submitted to the voters by San Francisco's board of supervisors would have needed a two-thirds majority vote to pass. The issue was whether a two-thirds majority vote also was required where the tax was presented to voters by way of a voter initiative. Howard Jarvis claimed that such a majority was required by: 1) Proposition 13, which added article XIII A to the California Constitution; 2) Proposition 218, which added article XIII C; and 3) the San Francisco Charter.

Analysis under the *All Persons Interested in Proposition* C Decision

The Court of Appeal began by noting that the same claims recently had been raised and rejected by the First Appellate District, Division Four, in *City and County of San Francisco v. All Persons Interested in the Matter of Proposition C*, 51 Cal.App.5th 703 (2020). That case had involved a challenge to a different Proposition C in a different San Francisco election. The Court of Appeal began with a discussion of *All Persons*, including several cases that *All Persons* itself relied on. It then found *All Persons* to be well-reasoned and sound, and it rejected Howard Jarvis' various claims that *All Persons* had erred in certain respects.

Howard Jarvis in turn argued that the case was distinguishable from *All Persons* due to the involvement of an elected official in the voter initiative process. Specifically, it pointed to the undisputed facts that a member of the San Francisco board of supervisors was the proponent of Proposition C, submitted the written "Notice of Intent to Circulate Petitions" for

Proposition C, turned in the signed initiative petition pages, signed ballot arguments in favor of Proposition C, and used his "Supervisor" title and City Hall address for various related documents. In addition, two ordinances nearly identical to Proposition C were pending before the board in early 2018, around the time of Proposition C's qualification for the ballot. The board member withdrew his signature from one of these ordinances shortly after Proposition C qualified for the ballot.

Analysis under the *Boling* Decision

Howard Jarvis primarily relied on *Boling v. Public Employment Relations Board,* 5 Cal.5th 898 (2018), which concerned a statutory requirement for governing bodies "or other representatives" to meet and confer with unions on matters within the scope of representation prior to arriving at a determination of policy or course of action. There, a mayor (whose responsibilities included bargaining with city unions and complying with statutory meet and confer requirements) conceived the idea of a citizens' initiative pension reform measure and negotiated with other interested parties before any citizen proponent stepped forward. He also relied on this position of authority and employed his staff throughout the process. The California Supreme Court found that the statute applied, and that the mayor had failed to meet and confer "prior to arriving at a determination of policy or course of action" on matters affecting the terms and conditions of employment.

The Court of Appeal disagreed with Howard Jarvis, finding that *Boling* did not suggest that imposing a meet and confer requirement resulted in any restriction on the initiative power. It did not, for instance, impose a meet and confer requirement on the initiative process—which remained unchanged by the decision—but rather on the designated representative's pursuit of policy changes, regardless of the means chosen.

Analysis under the *Rider* Decision

Howard Jarvis also relied on *Rider v. County of San Diego,* 1 Cal.4th 1 (1991), which considered a local tax agency that had been created by legislative enactment solely for the purpose of avoiding the strictures of Proposition 13. But the Court of Appeal disagreed that a single official's sponsorship of or involvement in an initiative would give rise to the inference that a city or county intentionally circumvented Propositions 13 and 218 or otherwise demonstrates that the official effectively controlled the initiative. More significantly, the Court of Appeal also noted, neither the text nor ballot materials provide the requisite "unambiguous indication" that the enactors of Proposition 13 and 218 intended to constrain the initiative power when an elected official is involved in the initiative process. Absent such a clear indication, the Court of Appeal declined to construe the two-thirds requirement to apply to such initiatives.

Conclusion and Implications

The case is significant because it contains a substantive discussion of voter initiatives, particularly as they relate to tax matters, and requisite voting requirements—especially as it relates to Proposition 13 and 218. The decision is available online at: https://www.courts.ca.gov/opinions/documents/A157983M.PDF. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A157983.PDF
(James Purvis)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

FOURTH DISTRICT COURT FINDS EIR NEED NOT CONSIDER A SECOND OR ALTERNATIVE ACCESS ROAD AS A MITIGATION MEASURE BECAUSE THAT ALTERNATIVE WAS PRACTICALLY INFEASIBLE

Protect Our Homes and Hills v. County of Orange,
___Cal.App.5th___, Case No. G058229 (4th Dist. Jan. 27, 2021).

The Fourth District Court of Appeal in *Protect Our Homes v. County of Orange* held that an Environmental Impact Report (EIR) for a residential development project need not consider a second or alternative access road as a mitigation measure or project alternative because the selected access road was found to have no significant environmental impacts and because the alternative access road is practically infeasible because grading of that road would disrupt endangered species.

Factual and Procedural Background

The Project consists of residential development comprised of two offsetting somewhat rectangular shaped tracts of land connected at the edges, with the top tract abutting the Chino Hills State Park on the north. Access for the development would be through the southeast corner of the southern larger tract connecting to Stonehaven Drive through an easement on an adjoining property (Option 1). Stonehaven Drive is a semicircular road that connects to Yorba Linda Boulevard at both ends towards the south in the City of Yorba Linda (City). The developer, Yorba Linda Estates, LLC has a blanket easement that allows it to access Stonehaven Drive.

The Project does not involve a previously considered alternative or dual access at the eastern side of the larger tract through previously contemplated Aspen Way that would connect through adjoining property by means of a separate easement to the City's Antonia Road thoroughfare (Option 2).

Two previous EIRs for the Project (2015 EIR and 2016 First Revised EIR) were successfully challenged in court by the petitioner, Protect Our Homes and Hills. This case involves the 2018 Second Revised EIR for the Project.

The 2015 EIR was held by the trial court to fail to consider all feasible mitigation measures concerning the greenhouse gas impacts from the Project, but the EIR was otherwise held to be in compliance with the California Environmental Quality Act (CEQA). Among the issues considered in the 2015 EIR was a fire hazards analysis considering the safety of either Option 1 or 2.

The trial court decision on the 2015 EIR was challenged by petitioner on appeal on the grounds that it failed to describe the state park, it deferred mitigation of fire hazards, including evacuation planning, and it failed to address total projected water consumption of the Project. Petitioner won on those grounds, but significantly did not challenge the 2015 EIR finding that either Option 1 or 2 would provide adequate access for the Project from a public safety standpoint.

After the 2016 EIR was prepared, petitioner won on appeal challenging that EIR for failing to provide evidence that requiring solar panels on each home was infeasible. But the Court of Appeal held that the deficiency was severable, allowing the Project to go forward while a further revised EIR was being prepared.

Petitioner appealed the 2018 Second Revised EIR, claiming that it did not address the three deficiencies of the 2015 EIR. The Court of Appeal disagreed.

The present appeal again involved the 2018 EIR after it was certified in September 2018 without recirculation. The case does not describe how there were two separate challenges to the same 2018 EIR. This second challenge claimed that the 2018 EIR inexplicably dropped the Option 2 access previously considered in the 2015 EIR (as modified by the County Specific Plan of 2015) and failed to consider it as a mitigation measure without recirculation.

At trial, the judge held that because Option 1 had previously been found to not have any environmental impacts that needed mitigation, no further consideration of Option 2 as a mitigation measure was necessary because the 2015 EIR had already considered both options and a combination of the two options. While two roads would obviously have been better from a fire safety standpoint, it was not feasible to have two roads.

Evidence in the record showed that in 2016, the Option 2 route became even more infeasible due to the discovery of two separate endangered species in the path of grading for that road option in a site survey by the owner of the separate property to the west of the Project through which the Option 2 route would have to pass. The U.S. Fish and Wildlife Service told the separate property owner that there was no off-site mitigation available for those species.

The trial court also rejected an ancillary attack on the subdivision map approved with the 2018 EIR based on a claim that the developer did not own the property for the Option 1 route. The trial court held that there was sufficient evidence that the developer had a blanket easement over the Option 1 property and thus rejected that claim as well.

The Court of Appeal's Decision

The Court of Appeal held that the trial court was correct in holding that the 2018 EIR did not need to recirculate and consider the Option 2 route as an alternative or mitigation measure because Option 1 had no significant unmitigated environmental effects and because substantial evidence in the record of endangered species in its path showed that Option 2 was practically infeasible as an alternative route. The Court of Appeal also affirmed the trial court's finding of a blanket easement validating Option 1 access on the subdivision map.[1]

Alternatives Analysis under CEQA

Petitioner was unclear in whether its challenge was on the basis that Option 2 should have been considered as an alternative or mitigation measure. The Court of Appeal noted that CEQA requires both discussion of alternatives to the proposed project and mitigation measures proposed to minimize the project's significant effects to the environment. (Pub. Res. Code, § 21100.)

The Court of Appeal held that the Option 2 road configuration was not a "project" alternative under the accepted CEQA case law interpretation of that term, but instead was an alternative "facet" of the project that did not fit under the definition of a CEQA project alternative. (*See*, *Property Owners Assn. v Board of Supervisors*, 73 Cal.App.3d 218, 227(1977).)

Assuming, arguendo, the Option 2 road configuration could be considered a "project" alternative, the Court of Appeal held that the County finding of infeasibility because of two endangered species within that route rendered it unnecessary to consider that alternative. (14 Cal. Code Regs., 15126.6, subd. (a) [need not consider infeasible alternatives].) The Court of Appeal held that the finding of infeasibility was supported by substantial evidence in the record to the effect that it would take years of negotiation with the U.S. Fish and Wildlife and onerous requirements to negotiate an Option 2 roadway costing millions of dollars.

Mitigation Measure Analysis Under CEQA

Petitioner argued that the Option 2 road configuration was a mitigation measure that had to be considered in the 2018 Second Revised EIR and could not be dropped from the EIR without discussion in and recirculation of the EIR. A mitigation measure is defined as something that avoids or otherwise ameliorates the adverse environmental "impact" of a project. (14 Cal. Code Regs., § 15370.) However, as held by the Court of Appeal in previous review of the 2015 EIR, there are no adverse environmental impacts of the Option 1 access that need to be mitigated. The CEQA definition of "mitigation" thus does not require discussion of Option 2, even though in the vernacular sense of the word "mitigation" a two-road option would lessen traffic impacts, albeit insignificant impacts under CEQA.

Assuming, arguendo, that Option 2 could be considered mitigation of Project impacts, it still did not need to be considered and discussed in a recirculated EIR because it is infeasible, as explained above. (14 Cal. Code Regs., § 15126.6, subd. (a); *Clover Valley Found. v. City of Rocklin* (2011) 197 Cal.App.4th 200, 244.) Option 2 was never considered as a mitigation measure in any prior EIR and thus cannot spring into existence as a mitigation measure for the 2018 Second Revised EIR. Thus Option 2 is distinguished from the dropped mitigation measures without explanation that were held in violation of CEQA in *Lincoln Place Tenants Assn. v. City of Los Angeles*, 130 Cal.App.4th 1491, 1509 (2003).

1 This note will not cover the Map Act issue, which was simply one of evidence of a blanket easement recognized by the County.

Conclusion and Implications

This opinion by the Fourth District Court of Appeal is important because many decision-makers are analyzing the ability of developments to safely evacuate due to the fire hazards on lands adjacent to development projects. The fire safety issue has been used in several recent developments to prevent the project from going forward at a reasonable cost.

The key takeaway from this case is that the developer provided a fire safety study demonstrating that only one access route was required in order to avoid significant environmental impacts. It also didn't hurt that the only available alternative access was rendered infeasible due to endangered species in the way of that access and to correspondence with the U.S. Fish and Wildlife to the effect that there was no available mitigation that would allow use of that access. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/G058339.PDF

(Boyd Hill)

FIRST DISTRICT COURT FINDS SOVEREIGN IMMUNITY BARS QUIET TITLE ACTION FOR PUBLIC EASEMENT FOR COASTAL ACCESS ON TRIBAL OWNED PROPERTY

Self v. Cher-Ae Heights Indian Community of the Trinidad Rancheria, 60 Cal.App.5th 209 (1st Dist. 2021).

Plaintiffs sought to quiet title to a public easement for vehicle access and parking on a coastal property owned by a federally recognized Indian tribe. Citing sovereign immunity, the tribe moved to quash service of process and dismiss the complaint for lack of subject matter jurisdiction. The Superior Court granted the motion and dismissed the case with prejudice, and the plaintiffs appealed. The Court of Appeal for the First Judicial District, on January 26, 2021, affirmed, finding that any common law exception to sovereign immunity, even if it might apply to states or foreign sovereigns, did not apply to tribes.

Factual and Procedural Background

The sole issue presented in this case was whether tribal sovereign immunity bars a quiet title action to establish a public easement for coastal access on property owned by an Indian tribe. Generally, as "separate sovereigns pre-existing the Constitution," Indian tribes possess common law immunity from suit traditionally enjoyed by sovereign powers. This immunity is subject to two exceptions: when a tribe has waived its immunity or Congress has authorized the suit.

Defendant Cher-Ae Heights Indian Community of the Trinidad Rancheria (Tribe) is a federally recognized Indian tribe. It purchased the coastal property at issue in the case in fee simple absolute. The Tribe then applied to the federal U.S. Bureau of Indian Affairs (BIA) to take the site into trust for the benefit of the Tribe. As part of the trust acquisition process, federal law requires a review of the Tribe's title and sets forth a process for resolving title issues.

Because the Tribe's acquisition involved coastal property, the federal Coastal Zone Management Act (Costal Act) required the BIA to certify that the Tribe's proposal was consistent to the maximum extent practicable with state coastal policies, including public access requirements in the state Coastal Act. The California Coastal Commission concurred with the BIA's determination. In particular, after securing commitments from the Tribe to protect coastal access and coordinate with the state on future development projects, the Coastal Commission concluded that the Tribe's proposal "would not interfere with the public's right to access the sea" and would be consistent with public access policies. In the future, if the Tribe violates the state's coastal access policies, the Coastal Commission may take appropriate remedial action.

According to the complaint, the plaintiffs use the Tribe's coastal property to access the beach for recreational and business purposes. They alleged that the prior owner of the property dedicated a portion of the property to public use, either expressly or impliedly. The complaint sought to quiet title to a public easement for vehicle access and parking on the property. The trial court quashed service of process

and dismissed the complaint for lack of subject matter jurisdiction based on sovereign immunity, and the plaintiffs then appealed.

The Court of Appeal's Decision

Plaintiffs argued that the Court of Appeal should recognize a common law exception to sovereign immunity. Specifically, they contended that, at common law, sovereigns such as states and foreign governments were not immune to property disputes under the "immovable property exception." While the Court of Appeal acknowledged that states and foreign sovereigns are not immune to suits regarding real property located outside of their territorial boundaries, it was not persuaded that this exception extends to tribes or that it otherwise should depart from standard practices of deferring to Congress to determine limits on tribal immunity.

In reaching this conclusion, the Court of Appeal first found that tribes retain a "special brand of sovereignty," both the nature and extent of which "rests in the hands of Congress." This is distinct, for instance, from states, which typically are subject to suit in other states for private undertakings, as opposed to sovereign activities. Lands acquired by one state in another state, therefore, typically are held subject to the laws of the latter state. The Court of Appeal also found it distinct from foreign sovereign immunity, to the extent such a common law exception exists. Tribes, the Court noted, are not foreign sovereigns, and the Supreme Court has rejected the notion that tribal sovereign immunity must be congruent with foreign sovereign immunity.

The Court of Appeal also noted three additional reasons to defer to Congress in deciding whether such an exception should apply to tribes. First, deferring to Congress has been the Supreme Court's standard practice for decades. Second, deference was warranted in this case because supporting tribal land acquisition is a key feature of modern federal tribal policy, which Congress adopted after its prior policy divested tribes of millions of acres of land. Deference, the Court of Appeal found, is particularly appropriate where Congress has been active in the subject matter at issue. Third, the Court of Appeal found the facts of this particular case made it a poor vehicle for extending the immovable property rule to tribes.

Conclusion and Implications

The case is significant because it contains a substantive discussion of issues pertaining to tribal sovereignty, including in particular immunity to suit in disputes regarding real property. The decision is available online at: https://www.courts.ca.gov/opinions/documents/A158632.PDF
(James Purvis)

LEGISLATIVE UPDATE

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

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

Coastal Resources

•**AB 1408 (Petrie-Norris)**—This bill would, at the request of an applicant for a coastal development permit, authorize a city or county to waive or reduce the permit fee for specified projects, and authorize the applicant, if a city or county rejects a fee waiver or fee reduction request, to submit the coastal development permit application directly to the Coastal Commission.

AB 1408 was introduced in the Assembly on February 19, 2021, and, most recently, on February 22, 2021, was read for the first time.

•**SB 1 (Atkins)**—This bill would include, as part of the procedures the Coastal Commission is required to adopt, recommendations and guidelines for the identification, assessment, minimization, and mitigation of sea level rise within each local coastal program, and further require the Coastal Commission to take into account the effects of sea level rise in coastal resource planning and management policies and activities.

SB 1 was introduced in the Senate on December 7, 2020, and, most recently, on February 17, 2021, was set for hearing in the Committee on Governmental Organization on March 16, 2021.

•**SB 627 (Bates)**—This bill would, except as provided, require the Coastal Commission or a local government with an approved local coastal program to approve the repair, maintenance, or construction of retaining walls, return walls, seawalls, revetments, or similar shoreline protective devices for beaches or adjacent existing residential properties in the coastal zone that are designed to mitigate or protect against coastal erosion.

SB 627 was introduced in the Senate on February 18, 2021, and, most recently, on February 22, 2021, was suspended pursuant to Joint Rule 55.

Environmental Protection and Quality

•**AB 1260 (Chen)**—This bill would exempt from the requirements of the California Environmental Quality Act (CEQA) projects by a public transit agency to construct or maintain infrastructure to charge or refuel zero-emission trains.

AB 1260 was introduced in the Assembly on February 18, 2021, and, most recently, on February 22, 2021, was read for the first time.

•**AB 1154 (Patterson)**—This bill would, until January 1, 2029, exempt from CEQA egress route projects undertaken by a public agency that are specifically recommended by the State Board of Forestry and Fire Protection that improve the fire safety of an existing subdivision if certain conditions are met.

AB 1154 was introduced in the Assembly on February 18, 2021, and most recently, on February 19, 2021 was printed and may be heard in Committee on March 21, 2021.

•**SB 7 (Atkins)**—This bill would reenact with certain changes (including changes to greenhouse gas reduction and labor requirements) the Jobs and Economic Improvement Through Environmental Leadership Act of 2011, which provides for streamlined judicial review of "environmental leadership development projects," including streamlining environmental review under CEQA by requiring lead agencies to prepare a master Environmental Impact Report (EIR) for a General Plan, plan amendment, plan element, or Specific Plan for housing projects where the state has provided funding for the preparation of the master EIR.

SB 7 was introduced in the Senate on December 7, 2020, and, most recently, on February 18, 2021, was read for a second time with the author's amendments

and then re-referred to the Committee on Environmental Quality.

Housing / Redevelopment

•**AB 345 (Quirk-Silva)**—This bill would require each local agency to, by ordinance, allow an accessory dwelling unit to be sold or conveyed separately from the primary residence to a qualified buyer if certain conditions are met.

AB 345 was introduced in the Assembly on January 28, 2021, and, most recently, on February 12, 2021, was referred to the Committees on Housing and Community Development and Local Government.

•**AB 491 (Gonzalez)**—This bill would require that a mixed-income multifamily structure that is constructed on or after January 1, 2022, provide the same access to the common entrances, common areas, and amenities of the structure to occupants of the affordable housing units in the structure as is provided to occupants of the market-rate housing units.

AB 491 was introduced in the Assembly on February 8, 2021, and, most recently, on February 18, 2021, was referred to the Committee on Housing and Community Development.

•**AB 617 (Davies)**—This bill would authorize a city or county, by agreement, to transfer all or a portion of its allocation of regional housing need to another city or county, and allow the transferring city to pay the transferee city or county an amount determined by that agreement, as well as a surcharge to offset the impacts and associated costs of the additional housing on the transferee city.

AB 617 was introduced in the Assembly on February 12, 2021, and, most recently, on February 13, 2021, was printed and may be heard in the committee on March 15, 2021.

•**AB 682 (Davies)**—This bill would require a city or county with a population of more than 400,000 people to permit the building of cohousing buildings, as defined, in any zone where multifamily residential buildings are permitted, and require that cohousing buildings be permitted on the same basis as multifamily dwelling units.

AB 682 was introduced in the Assembly on February 12, 2021, and, most recently, on February 13, 2021, was printed and may be heard in committee on March 15, 2021.

•**SB 6 (Caballero)**—This bill, the Neighborhood Homes Act, would provide that housing development projects are an allowable use on a "neighborhood lot," which is defined as a parcel within an office or retail commercial zone that is not adjacent to an industrial use, and establish certain minimum densities such projects depending on their location in incorporated/unincorporated areas and metropolitan and non-metropolitan areas.

SB 6 was introduced in the Senate on December 7, 2020, and, most recently, on January 28, 2020, had its referral to the Committee on the Judiciary rescinded because of the limitations placed on committee hearings due to ongoing health and safety risks of the COVID-19 virus.

•**SB 9 (Atkins)**—This bill, among other things, would (i) require a proposed housing development containing two residential units within a single-family residential zone to be considered ministerially, without discretionary review or hearing, if the proposed housing development meets certain requirements, and (ii) require a city or county to ministerially approve a parcel map or tentative and final map for an urban lot split that meets certain requirements.

SB 9 was introduced in the Senate on December 7, 2020, and, most recently, on January 28, 2020, had its referral to the Committee on Environmental Quality rescinded because of the limitations placed on committee hearings due to ongoing health and safety risks of the COVID-19 virus.

•**SB 15 (Portantino)**—This bill would require the Department of Housing and Community Development to administer a program to provide grants to local governments that rezone idle sites used for a big box retailer or a commercial shopping center to allow the development of workforce housing as a use by right.

SB 15 was introduced in the Senate on December 7, 2020, and, most recently, on January 28, 2020, was referred to the Committee on Housing.

•**SB 621 (Eggman)**—This bill would, among other things, authorize a development proponent to submit an application for a development for the

complete conversion of a structure with a certificate of occupancy as a motel or hotel into multifamily housing units to be subject to a streamlined, ministerial approval process, provided that the development proponent reserves an unspecified percentage of the proposed housing units for lower income households, unless a local government has affordability requirements that exceed these requirements.

SB 621 was introduced in the Senate on February 19, 2021, and, most recently, on February 22, 2021, was suspended pursuant to Joint Rule 55.

•**SB 765 (Stern)**—This bill would: (i) provide that the rear and side yard setback requirements for accessory dwelling units may be set by the local agency; (ii) authorize an accessory dwelling unit applicant to submit a request to the local agency for an alternative rear and side yard setback requirement if the local agency's setback requirements make the building of the accessory dwelling unit infeasible; and, (iii) prohibit any rear and side yard setback requirements established pursuant to this bill from being greater than those in effect as of January 1, 2020.

SB 765 was introduced in the Senate on February 19, 2021, and, most recently, on February 22, 2021, was suspended pursuant to Joint Rule 55.

Public Agencies

•**AB 571 (Mayes)**—This bill would prohibit affordable housing impact fees, including inclusionary zoning fees, in-lieu fees, and public benefit fees, from being imposed on a housing development's affordable units or bonus units.

AB 571 was introduced in the Assembly on February 11, 2021, and, most recently, on February 18, 2021, was referred to the Committees on Housing and Community Development and Local Government.

•**AB 1295 (Muratsuchi)**—This bill, beginning on or after January 1, 2022, would prohibit the legislative body of a city or county from entering into a residential development agreement for property located in a "very high fire risk area," which is defined to mean a very high fire hazard severity zone designated by a local agency or a fire hazard severity zone classified by the State Director of Forestry and Fire Protection.

AB 1295 was introduced in the Assembly on February 19, 2021, and, most recently, on February 22, 2021, was read for the first time.

•**AB 1401 (Friedman)**—This bill would prohibit a local government from imposing a minimum parking requirement, or enforcing a minimum parking requirement, on residential, commercial, or other development if the development is located on a parcel that is within one-half mile walking distance of public transit, as defined, or located within a low-vehicle miles traveled area, as defined.

AB 1401 was introduced in the Assembly on February 19, 2021, and, most recently, on February 22, 2021, was read for the first time.

•**SB 478 (Wiener)**—This bill would prohibit a local agency, as defined, from imposing specified standards, including a minimum lot size that exceeds an unspecified number of square feet on parcels zoned for at least two, but not more than four, units or a minimum lot size that exceeds an unspecified number of square feet on parcels zoned for at least five, but not more than 10, units.

SB 478 was introduced in the Senate on February 17, 2021, and, most recently, on February 22, 2021, was suspended pursuant to Joint Rule 55.

Zoning and General Plans

•**AB 115 (Bloom)**—This bill, notwithstanding any inconsistent provision of a city's or county's General Plan, Specific Plan, zoning ordinance, or regulation, would require that a housing development be an authorized use on a site designated in any local agency's zoning code or maps for commercial uses if certain conditions apply, including that the housing development be subject to a recorded deed restriction requiring that at least 20 percent of the units have an affordable housing cost or affordable rent for lower income households.

AB 115 was introduced in the Assembly on December 18, 2020, and, most recently, on January 11, 2021, was referred to the Committees on Housing and Community Development and Local Government.

•**AB 1322 (Bonta)**—This bill, commencing January 1, 2022, would prohibit enforcement of single-family zoning provisions in a charter city's charter if

more than 90 percent of residentially zoned land in the city is for single-family housing or if the city is characterized by a high degree of zoning that results in excluding persons based on their rate of poverty, their race, or both.

AB 1322 was introduced in the Assembly on February 19, 2021, and, most recently, on February 22, 2021, was read for the first time.

•**SB 10 (Wiener)**—This bill would, notwithstanding any local restrictions on adopting zoning ordinances, authorize a local government to pass an ordinance to zone any parcel for up to ten units of residential density per parcel, at a height specified in the ordinance, if the parcel is located in a transit-rich area, a jobs-rich area, or an urban infill site, and would prohibit a residential or mixed-use residential project consisting of ten or more units that is located on a parcel rezoned pursuant to these provisions from being approved ministerially or by right.

SB 10 was introduced in the Senate on December 7, 2020, and, most recently, on January 28, 2020, had its referral to the Committee on Environmental Quality rescinded because of the limitations placed on committee hearings due to ongoing health and safety risks of the COVID-19 virus.

•**SB 12 (McGuire)**—This bill would require the safety element of a General Plan, upon the next revision of the housing element or the hazard mitigation plan, on or after July 1, 2024, whichever occurs first, to be reviewed and updated as necessary to include a comprehensive retrofit strategy to reduce the risk of property loss and damage during wildfires.

SB 12 was introduced in the Senate on December 7, 2020, and, most recently, on January 28, 2020, had its referral to the Committee on Natural Resources and Water rescinded because of the limitations placed on committee hearings due to ongoing health and safety risks of the COVID-19 virus.

•**SB 499 (Leyva)**—This bill would prohibit the land use element of a General Plan from designating land uses that have the potential to significantly degrade local air, water, or soil quality or to adversely impact health outcomes in disadvantaged communities to be located, or to materially expand, within or adjacent to a disadvantaged community or a racially and ethnically concentrated area of poverty.

SB 499 was introduced in the Senate on February 17, 2021, and, most recently, on February 22, 2021, was suspended pursuant to Joint Rule 55.
(Paige Gosney)

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