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CALIFORNIA LAND USE™ LAW & POLICY Reporter

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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

RELIGIOUS ORGANIZATIONS AND REAL PROPERTY TAXES: THE FIRST DISTRICT COURT OF APPEAL REVERSES THE TRIAL COURT'S APPLICATION OF THE PROPERTY TAXATION EXEMPTION TO A CHURCH WITH RESPECT TO A 'SPECIAL TAX'

By Boyd Hill

The First District Court of Appeal in *Valley Baptist Church v. City of San Rafael* held that a church is not exempt under the property taxation religious exemption of the California Constitution from a special tax to defray the cost of paramedic services that is applied to the church on a square footage basis. The Court of Appeal held that only *ad valorem* property taxes for general revenue purposes are exempted by that provision. [*Valley Baptist Church v. City of San Rafael*, ___Cal.App.5th___, Case No. A156171 (1st Dist. Feb. 26, 2021).]

Factual and Procedural Background

The City of San Rafael's (City) Paramedic Tax was approved by voters in 1979 and initially only applied to residential properties. In 1988, the voters extended the Paramedic Tax to cover non-residential structures as well because the City's Business License Fees and Sales Tax funds only funded police and fire services, but not paramedic services. In 2010, the voters enacted Measure 1 that raised the Paramedic Tax up to a maximum of 14 cents per foot on all non-residential structures.

In 2015-2016, the City examined its tax rolls and realized that non-residential structures subject to exemption by the county assessor had been inadvertently omitted from the Paramedic Tax. The City rectified this oversight prospectively and sought also to collect a portion of the prior unpaid Paramedic Tax.

Valley Baptist is a nonprofit religious organization that operates a church on property within the City boundaries, using its two buildings exclusively for religious worship. The City sought to collect back taxes dating back to the 2013-2014 tax year in the amount of $13,644.

Valley Baptist objected to the City's imposition of the tax, claiming that it was exempt under the religious exemption from "property taxation" for religious buildings used exclusively for religious worship. (Cal. Const., art. XIII, § 3(f).) Valley Baptist paid the amount due under protest and sued the City for declaratory relief and damages in 2017. The lawsuit sought a declaration that the Paramedic Tax was unconstitutional as applied to Valley Baptist and that Valley Baptist was therefore exempt from payment of the special tax.

The City filed a motion for judgment on the pleadings in 2018, which the trial court denied, stating that it could not find any case addressing the issue of whether constitutional religious exemptions from property taxation applies to special taxes, thus finding no legal basis for concluding that the special tax at issue was not a form of property taxation.

Following bench trial, the trial court entered judgment for Valley Baptist, exempting it from payment of the Paramedic Tax. The trial court found that the tax was not an excise tax but instead a property tax because it was imposed on the mere ownership of property, not on the use of property. It reasoned that although the tax is clearly meant to fund a particular city service, it is imposed on owners regardless of whether they use those services or whether the structure is occupied by a tenant.

The trial court rejected the City's argument that the religious exemption applies only to *ad valorem* property taxes, reasoning that a special tax assessed

upon any parcel of property or person as an incident of property ownership falls within the plain meaning of "property taxation" for purposes of the article XIII exemptions.

The trial court observed that when the voters adopted Proposition 218 adding article XIIID to the California Constitution, the types of taxes were limited to either: 1) an *ad valorem* property tax; 2) a special tax; 3) an assessment; and 4) a fee or charge.

The City filed motions to vacate and for new trial. While the motions were pending, the City adopted an amendment to the Paramedic Tax by way of an ordinance "declaratory of existing law," which codified the City's process for exempting taxpayers from all or a portion of the Paramedic Tax based on low or non-occupancy of the property in questions.

The Court of Appeal's Decision

The Court of Appeal, applying the *de novo* standard of review, and strictly construing exemptions from taxation beyond the plain meaning of the language, reversed the trial court's decision. The Court of Appeal held that it was the nature of the tax as a special tax to pay for special purposes and not as an *ad valorem* tax to pay for general purposes, that prevented application of the "property taxation" exemption to the special Paramedic Tax, rather than the manner in which the tax was determined on the basis of property ownership.

Because the Court of Appeal could not determine whether "property taxation" under the exemption included special taxes assessed on the basis of property ownership rather than use, the Court of Appeal looked at various indicia of interpretation to reach its decision, including the history of application of tax exemptions, the exemption ballot materials, later enacted tax initiative measures, and legislative and administrative interpretation of the exemption.

The Religious Exemption

In 1974, California voters approved revisions to Article XIII of the California Constitution, which deals with the taxing powers of state and local government. Section 1 establishes the principle of uniform assessment and taxation and confirms the Legislature's power to tax all property.

Section 3(f) exempts from "property taxation" various forms of property including buildings used exclusively for religious worship. Section 3(f) does not address whether the exemption applies to special taxes because the special tax category did not come into existence until the passage of Proposition 13 in 1978. Thus, the Court of Appeal looked at extrinsic aids to interpret whether the exemption applies to special taxes that are applied on a property basis.

Historical Application of Exemptions

The Court of Appeal reviewed the history of exemptions from property taxation in California. The first California constitution in 1849 required property taxation to be equal and uniform. Thus, the California Supreme Court initially struck down a legislative exemption for churches and other organizations in 1868. The California Constitution was amended in 1879, striking the "equal and uniform" requirement. By 1894 a series of amendments exempted certain activities and properties from taxation, including by 1944 religious property used exclusively for religious purposes.

Reviewing California Supreme Court decisions concerning the applicability of the exemptions to various forms of taxes, the Court of Appeal was able to glean four principles of interpretation of the "property taxation" exemptions: 1) the exemptions to property taxation apply only to direct property taxes and not to other forms of taxation such as an excise or use tax; 2) the only form of "property taxation" since the first state constitution was the *ad valorem* property tax, a general tax levied in proportion to the assessed value of property; 3) other property related exactions such as special assessments for flood control purposes have not been considered "property taxes" subject to exemptions; and (4) exemptions from property taxation must be strictly construed against the right to the tax benefit and any intent to extend the tax exemption must be conveyed in "unmistakably clear language."

Proposition 8 Ballot Materials

The clarification of Article 13 provisions contained in the 1974 Proposition 8 did nothing to change the application of the "property taxation" religious exemption solely to *ad valorem* property taxes. There is nothing in Article XIII, either in the text of the article or in the ballot materials that indicates the exemption was intended to cover special property taxes.

Later Enacted Tax Initiative Measures

Since Proposition 8, voters have enacted a series of constitutional initiative measures to increase voter control over state and local authority to raise revenue.

Proposition 13 enacted in 1974 created Article XIII A which capped *ad valorem* real property tax rate increases and prohibited special taxes that are *ad valorem* taxes on real property but created a new type of non-*ad valorem* special property tax. Special property taxes are allowed that are a tax on mere ownership of property. Proposition 13 did not mention the property tax exemptions, but the ballot materials describe special taxes as distinct from the *ad valorem* property taxes subject to exemption.

Proposition 218 enacted by voters in 1996 created Articles XIII C and XIII D to curb abuses by local governments to raise revenue following Proposition 13. Article XIII C clarified that a special tax requiring two-third voter approval was any tax for specific purposes. Article XIII D limits the ability of local governments to impose or increase property-related taxes, assessments or fees. Thus, Proposition 218 confirmed that a special tax could be a property tax when imposed upon a parcel as an incident of property ownership.

Although Proposition 218 allows special taxes to be property taxes, it does not expressly extend the property taxation exemption to special taxes. The rule of strict construction against tax exemptions requires any intent to extend the benefits of the exemption to a new form of taxation be clearly expressed or strongly implied by the text of the provision or its legislative materials, with any doubt resolved against the insertion of the exemption. (*Cedars of Lebanon Hosp. v. County of Los Angeles, et al.*, 35 Cal.2d 729, 734 (1950).)

Legislative and Administrative Interpretation

Contemporaneous interpretation by the California Legislature provides further support for the conclusion that the Article XIII exemptions from property taxation apply solely to *ad valorem* property taxes. When in 1979 the Legislature adopted Government Code § 53978 allowing for special property taxes to fund police and fire protection services, but exempting government agencies from the tax, the Legislature affirmed that pre-existing constitutional property taxation exemptions only applied to ad valorem property taxes and did not apply to special property taxes, and that an express exemption would instead be required.

Similarly, the State Board of Equalization (SBE), the California agency with most experience in interpreting tax matters, held in 1980 that the City of Palmdale was not required to exempt a church from a special property tax enacted pursuant to Government Code § 53978. The SBE opinion held that long standing precedent under the Free Exercise Clause of the U.S. Constitution, First Amendment, allowed for taxation of churches to bear their fair share of a tax that is not exacted for the privilege of exercising their religion. Implicit in the SBE opinion is the conclusion that Article CIII exemptions do not extend to special property taxes. The Legislature did not take any action to overturn that administrative decision.

Conclusion and Implications

This opinion by the First District Court of Appeal demonstrates the perhaps unintended consequence of allowing special property taxes for specific governmental purposes in the wake of lessening the burden of *ad valorem* taxes under the 1974 Proposition 13. Where previously churches were exempt from the main source of revenue for government functioning, with the new sources of revenue from special property taxes, even with the two-thirds barrier to enact special property taxes, more of the tax burden is being imposed through special property taxes, from which churches are not exempt. Individual churches in local communities now find themselves in a minority position to protect against taxes which may disproportionately impact them, exacerbated by their lessened level of property use and limited ability to obtain income to pay for property-based taxation. Churches may need to organize, monitor and lobby for a reduced burden of existing and future special taxes. The resulting City ordinance that was enacted on appeal in this case allowing for special tax avoidance and reduction for underutilized church structures demonstrates how effective advocacy can result in reduction of that burden. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A156171.PDF.

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REGULATORY DEVELOPMENTS

COUNCIL ON ENVIRONMENTAL QUALITY RESCINDS TRUMP ADMINISTRATION DRAFT GUIDANCE THAT LIMITED THE CONSIDERATION OF GREENHOUSE GAS EMISSIONS DURING ENVIRONMENTAL REVIEWS UNDER NEPA

On February 19, 2021, the Council on Environmental Quality (CEQ) rescinded the Trump administration-issued draft guidance, which would have narrowed how federal agencies consider greenhouse gas (GHG) emissions and climate change impacts from development and infrastructure projects under the National Environmental Policy Act (NEPA). *See,* National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, 86 Fed. Reg. 10,252 (Feb. 19, 2021). Although the CEQ may develop and issue additional guidance on how agencies should consider GHG emissions and climate change impacts under NEPA, the CEQ's current action returns the use of Obama administration guidance that promotes a broader evaluation of GHG emissions and climate change impacts during the environmental reviews.

Background

The National Environmental Policy Act requires federal agencies to consider the effects and impacts from proposed actions or projects on the environment. 42 U.S.C. § 4321 *et seq.* In general, federal agencies satisfy this requirement by preparing environmental review documents such as Environmental Assessments or Environmental Impact Statements, which evaluate potential environmental effects from the proposed project.

NEPA also created the CEQ, which is the main federal agency overseeing NEPA implementation. The CEQ regulations set forth how federal agencies should comply with NEPA. Moreover, the CEQ has the authority to issue guidance regarding how agencies should satisfy NEPA's requirements. *See,* 40 C.F.R. § 1506.7.

As explained in the CEQ's recent notice, development and infrastructure projects that are reviewed and approved by federal agencies often have the potential to emit or sequester GHG emissions, and may otherwise impact climate change. In addition, federal courts have previously held that NEPA requires federal agencies to disclose and consider climate change impacts during the agency's project reviews under NEPA. *See, e.g.*, *Center for Biological Diversity v. National Highway Traffic Safety Administration*, 538 F.3d 1172 (9th Cir. 2008).

Greenhouse Gas Guidance

Consistent with the above framework, the CEQ previously issued "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews" (2016 GHG Guidance), which attempted to provide a set of overarching recommendations for determining how to consider GHG emissions and climate change effects in NEPA reviews. *See,* 81 Fed. Reg. 51,866 (Aug. 5, 2016). Among other proposals, the CEQ's 2016 GHG Guidance recommended that agencies: 1) use projected GHG emissions as a proxy for assessing potential climate change effects when preparing a NEPA analysis for a proposed agency action; 2) quantify projected direct and indirect GHG emissions, taking into account available data and GHG quantification tools that are suitable for the proposed agency action; and 3) where agencies do not quantify the GHG emissions for a proposed agency action because tools, methodologies, or data inputs are not reasonably available, include a qualitative analysis in the NEPA document and explain the basis for determining that quantification is not reasonably available. *Id.*

However, on March 28, 2017, former President Trump issued Executive Order 13783, "Promoting Energy Independence and Economic Growth," which ordered the CEQ to rescind the 2016 GHG Guidance. On June 26, 2019, the CEQ then proposed "Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions"

(2019 Draft GHG Guidance). 84 Fed. Reg. 30,097. The CEQ never finalized the 2019 Draft GHG Guidance, but proposed to significantly narrow the scope of considering GHG emissions during the NEPA environmental review process. For example, the 2019 Draft GHG Guidance stated that federal agencies should assess effects from GHG emissions "when a sufficiently close causal relationship exists between the proposed action and the effect." In other words, a "but for" causal relationship should not be sufficient. Further, the 2019 Draft GHG Guidance directed agencies to quantify a proposed action's projected "direct and reasonably foreseeable indirect GHG emissions" only when the amount of those emissions is substantial to warrant quantification, and when it was practicable to quantify the GHG emissions using available data and GHG quantification tools. *See id*.

The CEQ's Action and Implications

On his first day in office, President Biden issued Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," which ordered the CEQ to rescind the 2019 Draft GHG Guidance. On February 19, 2021, the CEQ's notice rescinding the 2019 Draft GHG Guidance was published in the Federal Register and returned an agency's ability to use of the 2016 GHG Guidance.

Conclusion and Implications

As a result of the February 19, 2021 rescinding of the 2019 Draft Guidance, the CEQ reestablished the broader trend of accounting for greenhouse gas emissions during environmental reviews under NEPA. Indeed, while the CEQ clarified that it may issue updates to the 2016 GHG Guidance, the CEQ explicitly recommended that in the interim, federal agencies should consider all available tools and resources in assessing GHG emissions and climate change effects of their proposed actions, including through the use of the 2016 GHG Guidance. Accordingly, going forward project proponents should expect heightened consideration of GHG emissions and climate change impacts during NEPA reviews.
(Patrick Veasy, Hina Gupta)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD SEEKS STAKEHOLDER RECOMMENDATIONS FOR PROPOSED CHANGES TO DROUGHT ACTIONS

On the heels of a dry 2020 and continuing dry conditions, California water regulators are reassessing actions taken during the last drought as they anticipate how to more effectively manage the next one. After conducting interviews with individuals, urban water suppliers, irrigation districts, advocacy groups, non-governmental organizations, tribal governments, and others, the California State Water Resources Control Board, Division of Water Rights (SWRCB or Board) recently released a Water Rights Drought Effort Review report (Warder Report). The Warder Report seeks recommendations on how to improve regulation of water use—and water rights—during dry years. Topics such as urban water conservation, drinking water supply, and funding for replacement water are not addressed and will likely be addressed in different reports.

Background

The years 2012 through 2014 were the driest years on record in California, and occurred during the drought that spanned from 2011 through 2016. Over 9,000 Notices of Water Unavailability (or curtailment notices), were issued from 2012 to 2016, which required either reduction or complete cessation of diversion of surface water. These notices impacted thousands of square miles of property and thousands of diverters, and were often provided with short notice to water users. The Board also used emergency regulations to protect minimum instream flows. These actions not surprisingly drew significant opposition and reaction from water users, many of whom found that the short notice for curtailment meant that rights holders had limited ability to protest or to alter the SWRCB's determination by providing alternative

data. The Board also faced critical data limitations during the drought, including limited data for locally available water supplies, and limitations that initially rendered the Board unable to collect yearly water use information from certain users. Data limitations contributed to communication and curtailment inefficiencies.

Warder Report Recommendations Regarding Previous Drought Actions and Possible Modifications for Future Drought Actions

Participants in the Warder Report identified previous drought actions and provided comments regarding actions that could improve drought management. Those comments were organized into four primary categories, including: Communication, Law and Policy, Data and Collaboration. A summary of the Warder Report comment and recommendations for each of those categories as summarized below.

Communication Recommendations

The SWRCB should communicate with water users earlier and more frequently in periods leading up to and during drought.

Communication quality should be improved by means of visual tools, graphics, and narratives regarding water availability estimates and reasoning for curtailment. Communications should also take into consideration the type of diverter receiving the communication.

In addition to improving communication quality and relationships, Participants recommended that the Board should communicate watershed conditions earlier and more thoroughly so that diverters could have time to anticipate and make adjustments.

Law and Policy Recommendations

Regulatory policies should be developed prior to the implementation of regulations, and SWRCB regulatory processes should involve stakeholders. Participants desired clear dry year procedures, which should be known well *before* times of drought.

More legal certainty and predictability regarding riparian and pre-1914 appropriative rights, including a uniform SWRCB validation process for pre-1914 and riparian claims. As for federal reserved rights, the Board should acknowledge and validate these rights as well.

With respect to the priority system, local area needs should be evaluated together with downstream needs, and participants suggested that the Board should spread shortages across junior upstream diverters.

The review and approval of water transfers and permitting processes should have greater efficiency and simplification, as well as shorter time frames. However, the Board should not permit new water diversions without at least accounting for existing water rights.

Surface water and groundwater management should be integrated, treating them as a single resource. A statewide centralized water accounting system for water rights, SGMA, environmental flows, *etc*. should be developed, with databases and procedures that are unified across agencies.

Curtailment notices and emergency regulations should not be used as they create conflicts with the due process protections water right holders are entitled to and do not include stakeholder input. However, if used, participants suggested modifications including the following: the notices should be refined based on area; junior diverters should not be curtailed for water from a point of diversion that a senior could never access; and triggers for response actions should be included.

Data Recommendations

Diverters should annually report water use for each water right each year.

The board's system for collecting, managing, and sharing water right and reporting data should be simpler and clearer.

In collaboration with stakeholders, the SWRCB should develop statewide methods of estimating watershed initial supply and determining water demand.

Water availability for users and the environment should be determined.

Collaboration Recommendations

The Board should partner with other tribal, state and federal agencies, NGOs, academia, and the regulated community to more effectively manage water rights system and bridge data, resource, and experience gaps.

State agencies should develop coordinated procedures and regulations for drought periods so that they can be more effective during the next drought.

Conclusion and Implications

California's recent dramatic drought remains fresh in the memories of many water users who endured those conditions. The recommendations in the Warder Report reflect significant time and effort dedicated to improving future responses to drought. The Warder Report provides the State Water Resources Control Board with needed perspective and input from stakeholders who were at the receiving end of curtailment notices and emergency regulations during the last drought. With another multi-year drought possibly on the horizon (if not already occurring), the Warder Report provides the Board with increased awareness of potential improvements needed to more efficiently and effectively manage droughts. At the same time, some of the recommendations are more aggressive and controversial than others and may draw opposition from water rights holders who perceive such recommendations to be similarly overreaching as the actions taken during the last drought.
(Gabriel J. Pitassi, Derek R. Hoffman)

LAWSUITS FILED OR PENDING

U.S. DISTRICT COURT PUSHES FEDERAL GOVERNMENT FOR SCHEDULE ON COMPLETING ENDANGERED SPECIES ACT REVIEW ON THE YUBA RIVER

The Yuba River is home to three fish species that are listed as either threatened or endangered under the federal Endangered Species Act (ESA). In 2016, Friends of the River brought an action in the U.S. District Court for the Eastern District of California against the National Marine Fisheries Service (NMFS) and the U.S. Army Corps of Engineers (Corps) to challenge the federal defendants' efforts to address impacts to those species in the operation of two federally owned dams on the Yuba River. On February 1, 2021, District Court Judge John A. Mendez ordered the federal defendants to commit to a timeline for taking action to address the impacts on the three species. The federal defendants subsequently announced a schedule extending through November 2021. [*Friends of the River v. National Marine Fisheries Service, et al.*, Case No. 2:16-CV-00818. (E.D. Cal.).]

Background

The Yuba River, a major tributary of the Sacramento River, is a habitat for spring-run chinook salmon, steelhead, and green sturgeon. The spring-run chinook salmon and the steelhead are listed as threatened under the ESA, and the green sturgeon is listed as endangered. The Corps operates two dams on the Yuba River, Daguerre Point and Englebright dams. The dams were built in 1910 and 1941, respectively. Both dams were constructed for the purpose of capturing mining debris, which contain significant amounts of mercury. Unlike other federal dam projects, the two dams were not designed to generate hydroelectric power. But two privately owned hydroelectric facilities are located downstream of Englebright Dam. Each hydroelectric facility has an easement to operate on the Corps' land, and each facility operates pursuant to a Federal Energy Regulatory Commission (FERC) license. Several entities divert water at or near Daguerre Point Dam.

Section 7 of the ESA requires an agency taking certain actions to first consult with a "consulting agency"—here, NMFS—before taking any action that will jeopardize the existence of a threatened or endangered species. In 2009, such a consultation process began for Englebright and Daguerre Point dams. In 2012, NMFS issued a Biological Opinion regarding the Corps' operation of Daguerre Point dam, finding that the Corps' proposed operations would jeopardize the survival and recovery of the three listed fish species. NMFS' analysis was based in part on a finding that "agency action" by the Corps included the activities of the hydroelectric facilities near Daguerre Point dam.

In 2014, NMFS issued a new Biological Opinion finding of no jeopardy to the survival and recovery of the three listed species. At the same time, NMFS also issued a Letter of Concurrence agreeing with the Corps' assessment that the contemplated operations of Englebright Dam were not likely to have an adverse effect on the three listed species. The 2014 Biological Opinion and associated LOC reversed course from the 2012 Biological Opinion by finding that neither the independently operated hydroelectrical projects associated with Daguerre Point dam nor the diversion works associated with Englebright dams constituted "agency actions" subject to review under Section 7 of the ESA.

The 2016 Federal Lawsuit

In 2016, Friends of the River filed an action in the U.S. District Court for the Eastern District of California against NMFS and the Corps on the grounds that the 2014 Biological Opinion and Letter of Concurrence were issued in violation of the Administrative Procedure Act (APA) and the ESA. Among other grounds, Friends of the River asserted that NMFS acted arbitrarily and capriciously by finding that the hydroelectrical facilities and diversion works were not "agency actions" that required analysis in the 2014 Biological Opinion and LOC. In February 2018, Judge Mendez denied Friends of the River's motion

for summary judgment and granted summary judgment in favor of the federal defendants. The Ninth Circuit Court of Appeals reversed Judge Mendez' order, finding that NMFS' decision to adopt the 2014 Biological Opinion was arbitrary and capricious. The Ninth Circuit remanded to the District Court and ordered NMFS provide a more detailed explanation of why it reversed its position from the 2021 Biological Opinion that the hydroelectrical facilities and diversion works were not "agency actions."

District Court Orders Additional Information from Federal Defendants

On remand, in November 2020, Judge Mendez clarified that NMFS could either provide a reasoned explanation for its changed position or undertake an entirely new agency action. Judge Mendez refused the request by Friends of the River to impose a deadline for NMFS to take action. Pursuant to the District Court's order on remand, the parties submitted a joint status report on January 29, 2021. The federal defendants stated in the joint status report that they had hired a third-party contractor to review and analyze the available data to assist the federal defendants in making a decision whether to provide a reasoned explanation for the changed position or to reinitiate consultation. The federal defendants did not provide a date or a timeline for when such a decision would occur.

On February 1, 2021, Judge Mendez ordered the federal defendants to clarify within the next ten days whether and when it would either provide a more reasoned explanation for the disputed findings in the 2014 Biological Opinion or reinitiate consultation.

In a press release, Friends of the River touted the order as:

> . . .critical of [NMFS'] continued delay in making a decision that could seal the fate of the Yuba River's threatened fish species.

Friends of the River also indicated optimism that, with the new Biden administration, NMFS and the Corps will take on a more active role in managing the Yuba River.

On February 11, 2021, the federal defendants filed a supplemental status report reiterating their statement from the earlier status report that they had not yet made a decision on reinitiation and that they had hired a third-party contractor to assist in their review of the issue. The federal defendants further specified that they expected to make a decision by October 2021 for Englebright dam and November 2021 for Daguerre Point Dam.

Conclusion and Implications

After over a decade since initiating the consultation process for Englebright and Daguerre Point dams, the U.S. District Court is pressing the federal defendants to complete the process or undertake a new agency action. Friends of the River has expressed optimism with the change in federal administration. However, the federal defendants are not expected to take further action until the fall of this year.
(Brian Hamilton, Meredith Nikkel)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT REFUSES TO GRANT *CERTIORARI* FOR APPEAL OF RECENT NINTH CIRCUIT DECISION, LEAVING CURRENT TAKINGS JURISPRUDENCE INTACT

Bridge Aina Le'a, LLC v. Hawaii Land Use Commission, 592 U.S.___, 141 S.Ct. 731 (Feb 22, 2021).

On February 22, 2021, eight of the nine U.S. Supreme Court Justices denied a writ of *certiorari* sought by plaintiffs in the recent Ninth Circuit Court of Appeals' decision in *Bridge Aina Le'a, LLC v. Hawaii Land Use Commission*. Justice Thomas offered the Court's sole dissent. Plaintiffs initially prevailed on their federal takings claims in the U.S. District Court for the District of Hawaii after a state land use commission temporarily reverted plaintiffs' 1,060-acre parcel from an urban residential to an agricultural zoning designation. After the Ninth Circuit Court of Appeals reweighed and reevaluated the case, it overturned the U.S. District Court's decision, finding that "no reasonable jury" could have found a taking. In his dissent, Justice Thomas argued that "nobody... has any idea how to apply [the] standardless standard" established in the Court's 1978 *Penn Central v. New York City* decision; the Court should either determine that there is no such thing as a regulatory taking, or it should set a clear standard as to when one occurs.

Background

The case involved a 1,060 acre parcel on the island of Hawaii that was initially part of a larger 3,000 acre parcel zoned agricultural, but since 1989 had a residential zoning designation (Property). In January of 1989, the Hawaii Land Use Commission (Commission) approved a petition to change the zoning classification of the parcel to an urban zoning designation subject to a condition that the owner of the property designate most homes on the parcel affordable. In 1991, a new owner petitioned the Commission to develop a less dense community with fewer affordable units than proposed earlier.

The Property remained undeveloped through 2005 when plaintiffs Bridge Aina Le'a Pu purchased it (Bridge). Bridge petitioned the Commission to allow a housing development on the property that included a lower percentage of affordable units than previously proposed. The Commission added a condition with this third approval that required Bridge to complete its affordable units by November 17, 2010, with an additional condition that 16 of the affordable units be completed by March 31, 2010.

By July of 2010, Bridge had made little progress completing the 16 units it was required to complete by March 31. After issuing an order to show cause, the Commission issued a final reversion order that reverted the parcel back to an agricultural zoning designation in April of 2011.

Bridge appealed the Commission's order and prevailed in state Circuit Court and at the state Supreme Court, which overturned the Commission's reversion to an agricultural use designation on state law procedural grounds. Bridge brought a number of federal claims in its state court action, which the state successfully removed to federal court. Specifically, Bridge alleged that the Commission's reversion of the parcel from an urban to an agricultural zoning designation effected a regulatory taking under the prior U.S. Supreme Court cases *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), and *Penn Central Transportation Company v. City of New York,* 438 U.S. 104 (1978). After a jury trial, the U.S. District Court for the District of Hawaii entered a Judgment as a Matter of Law that Bridge was entitled to nominal damage of $1 for a taking under both the *Lucas* and the *Penn Central* decisions.

At the Ninth Circuit Court of Appeals

In the Ninth Circuit Court of Appeals, the court rejected Bridge's takings claims under both the *Lucas* and *Penn Central* decisions. A taking under *Lucas* involves a *per se* taking where "a regulation denies all economically beneficial or productive use of land." Here, the Ninth Circuit found that even though the reclassification of the parcel to agricultural zoning could reduce the value of the parcel by 83 percent,

the parcel was still worth $6.36 million—not, the court's eye, a total deprivation in value. The Ninth Circuit also noted that the agricultural zoning designation allowed for a range of appropriate uses, and the parcel's value under that use designation was not *de minimis*.

The Ninth Circuit also rejected Bridge's claims under the multi-factor *Penn Central* regulatory takings test. Here, the Commission's reversion of the zoning designation of the parcel for one year only diminished the value of the parcel by approximately 16.8 percent, thus the reversion order did not have a sufficient economic impact to Bridge. Next, the Commission's reversion of the zoning designation did not interfere with Bridge's reasonable investment-backed expectations as Bridge was well aware of the Commission's conditions that the project be constructed by certain deadlines, or the parcel would be reverted to agricultural zoning. Finally, the Ninth Circuit found that the Commission's zoning decision was not "arbitrary and unreasonable."

The Supreme Court Rejects *Certiorari*—Justice Thomas Disagrees

Bridge appealed the Ninth Circuit's Decision to the U.S. Supreme Court. On February 22, 2021 eight of the Justices voted to deny Bridge's petition for a writ of *certiorari* without comment.

Justice Thomas, however, offered a fairly concise comment in the form of a dissent. Justice Thomas noted at the outset that:

> . . .it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges and Immunities Clause of the Fourteenth Amendment.

Thomas went on to note that our current regulatory takings jurisprudence leaves much to be desired. In one "exceedingly rare" circumstance, takings occur categorically whenever a regulation requires a physical intrusion or leaves land "without economically beneficial or productive options for its use" under *Lucas*. For all other regulatory takings claims, the Supreme Court has "generally eschewed any set formula for determining how far is too far, requiring courts instead to engage in essentially *ad hoc*, factual inquiries" under the *Penn Central* test. This test includes three factors, "[b]ut courts must also weigh all… the relevant circumstances." The *Penn Central* test is thus a "standardless standard," that "nobody...has any idea how to apply."

Thomas believes that the instant case illustrated his point. After an eight-day jury trial, the District Court found a taking. On appeal, the Ninth Circuit "reweighed and reevaluated the same facts and under the same legal tests to conclude that no reasonable jury could have found a taking." These vastly different outcomes based on the same law "indicate that [the Court has] still not provided courts with a workable standard."

Thomas concluded by noting that: ". . .[i]f there is no such thing as a regulatory taking, we should say so. And if there is, we should make clear when one occurs."

Conclusion and Implications

The *Bridge Aina Le'a* case is the latest in a long line of regulatory takings cases that many argue is the result of a takings jurisprudence that is simply not workable, or as Thomas put it "neither individually coherent nor collectively compatible." Perhaps due to the case's unique factual circumstances, eight of nine justices decided not to provide a clearer standard of what constitutes a regulatory taking in this instance. Time will tell whether the Supreme Court will find occasion, with the right case, to clarify its takings jurisprudence. A copy of the Suprme Court's denial of *certiorari* can be found here: https://www.supremecourt.gov/opinions/20pdf/20-54_4315.pdf
(Travis Brooks)

U.S. SUPREME COURT FINDS FOIA'S DELIBERATIVE PROCESS EXEMPTION PROTECTED DRAFT BIOLOGICAL OPINIONS FROM PUBLIC DISCLOSURE

U.S. Fish & Wildlife Service v. Sierra Club, 592 U.S.___, 141 S.Ct. 777 (Mar. 4, 2021).

The Sierra Club brought a Freedom of Information Act (FOIA) action against the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), challenging their denial of a request for certain draft Biological Opinions generated during a rule-making process by the U.S. Environmental Protection Agency (EPA). After the Ninth Circuit Court of Appeals found that the documents should be produced, on March 4, 2021, the U.S. Supreme Court reversed, finding that the deliberative process privilege protected the documents from disclosure.

Factual and Procedural Background

In 2011, the EPA proposed a rule regarding the design and operation of "cooling water intake structures," which withdraw large volumes of water to cool industrial equipment. Because aquatic wildlife can become trapped in these structures and die, the EPA was required to "consult" with the FWS and NMFS (together: Services) under the Endangered Species Act (ESA) before proceeding. Generally, the goal of consultation is to assist the Services in preparing a Biological Opinion on whether an agency's proposal would jeopardize the continued existence of threatened or endangered species. Typically, these opinions are known as "jeopardy" or "no jeopardy" opinions. If the Services find that the action will cause "jeopardy," they must propose "reasonable and prudent alternatives" that would avoid harming the threatened species. If a "jeopardy" opinion is issued, the agency either must implement the alternatives, terminate the action, or seek an exemption from the Endangered Species Committee.

After consulting, the EPA made changes to the proposed rule, which was submitted to the Services in 2013. Staff members at the Services completed draft Biological Opinions, which found the proposed rule was likely to jeopardize certain species. Staff sent these drafts to the relevant decisionmakers within each agency, but decisionmakers at the Services neither approved the drafts nor sent them to the EPA. The Services instead shelved the drafts and agreed with the EPA to extend the period of consultation. After further discussions, the EPA sent the Services a revised proposed rule in March 2014 that significantly differed from the 2013 version. Satisfied that the revised rule was unlikely to harm any protected species, the Services issued a joint final "no jeopardy" Biological Opinion. The EPA issued its final rule that same day.

The Sierra Club submitted FOIA requests for records related to the Services' consultations with the EPA. The Services invoked the deliberative process privilege to prevent disclosure of the draft "jeopardy" Biological Opinions analyzing the EPA's 2013 proposed rule. The Sierra Club brought suit to obtain those records. The U.S. District Court agreed with the Sierra Club, and the Ninth Circuit affirmed in part. Even though the draft Biological Opinions were labeled as drafts, the Ninth Circuit reasoned, the draft "jeopardy" opinions constituted the Services' final opinion regarding the EPA's 2013 proposed rule and must be disclosed. The U.S. Supreme Court then granted *certiorari*.

The Supreme Court's Decision

Generally, FOIA mandates the disclosure of documents held by a federal agency unless the documents fall within certain exceptions. One of those exceptions, the deliberative process privilege, shields from disclosure documents reflecting advisory opinions and deliberations comprising the process by which governmental decisions and policies are formulated. The privilege aims to improve agency decisionmaking by encouraging candor and blunting the chilling effect that accompanies the prospect of disclosure.

The privilege distinguishes between predecisional, deliberative documents, which are exempt from disclosure, on the one hand, and documents reflecting a final agency decision and the reasons supporting it, which are not, on the other hand. As the Supreme Court observed, however, a document does not represent an agency's final decision solely because nothing follows it; sometimes a proposal dies on the vine or

languishes. What matters is if the document communicates a policy on which the agency has settled and the agency treats the document as its final view, giving the document "real operative effect."

Draft Biological Opinions Reflected a Preliminary View of the Proposed Rule

Applying those general principles, the Supreme Court found that the draft Biological Opinions were protected from disclosure under the deliberative process privilege because they reflected a preliminary view—as opposed to a final decision—regarding the EPA's proposed 2013 rule. In addition to being labeled as "drafts," the Supreme Court explained, the administrative context confirmed that the draft opinions were subject to change and had no direct legal consequences. Because the decisionmakers neither approved the drafts nor sent them to the EPA, they were best described not as draft Biological Opinions but as drafts of draft Biological Opinions. While the drafts may have had the practical effect of provoking EPA to revise its 2013 proposed rule, the Supreme Court reasoned, the privilege still applied because the Services did not treat the draft Biological Opinions as final. The Supreme Court thus reversed the Ninth Circuit decision and remanded the case for further proceedings consistent with its holding.

Conclusion and Implications

The case is significant because it contains a substantive discussion of the deliberative process privilege, particularly in the context of the U.S. Endangered Species Act—and by a Supreme Court shaped in part by the Trump administration appointees. The decision is available online at: https://www.supremecourt.gov/opinions/20pdf/19-547_new_i42k.pdf (James Purvis)

NINTH CIRCUIT REJECTS NEPA/ESA CHALLENGES TO ROADBUILDING AND TIMBER HARVESTING PLAN IN EASTERN IDAHO

Friends of Clearwater v. Higgins, *Unpub.*, Case No. 20-35623 (9th Cir. Feb 22, 2021).

In an *unpublished* memorandum decision issued February 22, 2021, a three-judge panel of the Ninth Circuit Court of Appeals rejected plaintiffs' multiple claims under the National Environmental Policy Act (NEPA) and the federal Endangered Species Act (ESA). Plaintiffs challenged the U.S. Forest Service's approval of a road building and timber harvesting plan on 12,000 acres in eastern Idaho. In the U.S. District Court for Idaho, plaintiffs sought a preliminary injunction to prevent the plan from moving forward. Both the District court, and the Ninth Circuit Court of Appeals found that plaintiffs failed to establish a likelihood of success on the merits for their NEPA claims, and failed to demonstrate irreparable harm on their ESA claim. The Ninth Circuit therefore refused to grant an injunction.

Factual and Procedural Background

In October of 2019, the U.S. Forest Service issued a Decision Notice and Finding of No Significant Impact (FONSI) for a road construction and timber harvesting plan in Shoshone County, Idaho. The project sought to allow timber harvesting and road building to improve forest health, provide for sustainable harvesting of timber, and reduce wildfire fuels to lessen wildfire severity. The project was located on 12,000 acres and would include approximately 1,700 acres of timber harvest and prescribed burning. The would construct or reconstruct approximately 10.5 miles of roads.

In 2018, the Forest Service issued a scoping notice seeking public comment and in 2019 issued a draft and final Environmental Assessment. The Final Environmental Assessment found that no federally endangered or threatened wildlife species were likely to be affected by the project. To determine whether any federally listed threatened or endangered species were present in the project area, the Forest Service relied on U.S. Fish and Wildlife Service (FWS) Information and Planning and Consultation (IPaC) maps for Idaho.

The wildlife report associated with the Environmental Assessment determined the project would

have not have an effect on grizzly bears based largely on the lack of grizzly bear occurrence in the project area or its nearby ranger district. In response to plaintiffs' notice of intent to sue, the Forest Service asked the FWS for information regarding bears found near the project area. While a few individual GPS collared grizzlies had been tracked 10 to 15 miles from the project site, none were known to have travelled through the project area.

The Environmental Assessment also analyzed the project's impact on "elk security habitat" which is habitat that has timbered areas greater than 250 acres, more than one-half mile from a motorized route. The forest plan called for management activities to maintain existing levels of elk security where possible. The Environmental Assessment determined that the project would reduce elk security habitat by 210 acres. However, the Forest Service determined that the seasonal closure of an ATV trail in the habitat would increase elk security habitat by 314 acres, resulting in a net gain of 94 acres.

Plaintiffs sought a preliminary injunction to prevent timber harvest and road construction on the project and alleged that the Forest Service violated the Administrative Procedure Act by, among other things failing: 1) request a species list from the FWS and by failing to prepare a Biological Assessment including grizzly bears as required by the Endangered Species Act, and 2) by failing to take a "hard look" at the cumulative effects of the project on the elk population, and by failing to analyze the efficacy of the proposed ATV trail closure on the elk population.

The U.S. District Court in Idaho held that while plaintiffs had shown a likelihood of success on the merits of their ESA claim, "their generalized allegations of harm [did] not demonstrate likely irreparable injury." Because of this, the public interest and balance of equities tipped in the defendant's favor, and did not justify the issuance of an injunction.

The Ninth Circuit's Decision

In a brief memorandum decision, a three-judge panel of the Ninth Circuit Court of Appeals rejected each of plaintiffs' arguments on appeal.

On appeal, plaintiffs claimed that the District Court erred by requiring a showing of likely harm to the "species of grizzly bear" rather than harm to the interests of the members of plaintiffs' environmental group. The court noted that plaintiffs who seek to enjoin a violation of the ESA must show a "definitive threat of future harm to protected species." Harm to members of environmental groups can suffice for claims under the ESA, but only if such members can show harm to themselves as a result of harm to listed environmental species.

The Ninth Circuit found that plaintiffs failed to present sufficient evidence of irreparable harm to grizzly bears. Here, nothing in the record demonstrated that any grizzly bears had ever been located in the project area.

Plaintiffs also argued that the District Court erred by failing to adequately analyze the cumulative effects of the project on elk and the Environmental Assessment's chosen mitigation measures. Plaintiffs argued that the Forest Service was required to disclose in the Environmental Assessment historical declines in the elk population in the project area due to past logging and road building activities. The court found that a the Forest Service was not required to engage in such a "fine-grained" analysis of historical details of past actions. An aggregate method of analyzing cumulative impacts was sufficient. The Ninth Circuit agreed with the District Court that the Forest Service's proposal to increase cumulative elk security beyond baseline levels was reasonable and not an abuse of discretion. The court ruled that the District Court's conclusion that the seasonal closure of an ATV trail with signage, gates, and gate monitoring was reasonable.

Finally, plaintiffs argued that a misstatement in the Environmental Assessment that "the project area… does not include the St. Joe Wild and Scenic River Corridor" constituted a failure to fully inform the public, which deprived the public of an opportunity to offer meaningful comments on the Environmental Assessment under NEPA. The Ninth Circuit agreed with the District Court that the Environmental Assessment's single sentence incorrectly stating the scope of the project did not "so drastically undermine public participation as to render the [Forest Service's] action unlawful."

The Ninth Circuit concluded that plaintiffs had failed to establish a likelihood of success on the merits on their National Environmental Policy Act claim or the necessary irreparable harm to prevail on their claims under the Endangered Species Act and affirmed the District Court's decision.

Conclusion and Implications

The *Friends of Clearwater unpublished* decision highlights the difficulties that environmental groups face when challenging Environmental Assessments under the Endangered Species Act, when there is a possibility, but no clear history that endangered species inhabit or migrate through project areas. The case also demonstrates that relatively small mistakes in an Environmental Assessment will not result in a finding that an Environmental Assessment deprives the public of an opportunity to offer meaningful comments on an agency's analyses in violation of NEPA. A copy of the court's unpublished decision can be found here: http://cdn.ca9.uscourts.gov/datastore/memoranda/2021/02/22/20-35623.pdf
(Travis Brooks)

NINTH CIRCUIT REVERSES PARTIAL STAY OF CEQA CLAIMS IN ACTION CONCERNING THE STATE WATER BOARD'S AMENDMENTS TO THE WATER QUALITY CONTROL PLAN

United States v. California State Water Resources Control Board, 988 F.3d 1194 (9th Cir. 2021).

In *United States v. California State Water Resources Control Board*, the Ninth Circuit Court of Appeals reversed the U.S. District Court for the Eastern District's order partially staying state law claims under the California Environmental Quality Act (CEQA) in a parallel federal action brought by the United States against the California State Water Resources Control Board (SWRCB or Board). The Ninth Circuit held that under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the District Court erred in staying the state law claims, while allowing the federal intergovernmental immunity claim to proceed in federal court.

Factual and Procedural Background

The California State Water Resources Control Board manages the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay Delta) pursuant to a water quality control plan initially adopted in 1978. The Bay Delta includes the New Melones Dam, which is operated by the U.S. Bureau of Reclamation (Bureau). The Bureau must adhere to California state law while operating the dam.

In December 2018, the Board adopted an amended water quality control plan for the Bay Delta. The Amended Plan made numerous changes, including altered flow objectives and salinity levels, which would adversely affect operation of the New Melones Dam. On March 28, 2019, the United States filed two simultaneously lawsuits against the SWRCB—one in federal court and one in state court. The United States asserted the same three causes of action in both suits—namely, that the SWRCB violated CEQA in adopting the Amended Plan. After the Board moved to dismiss the federal suit, the United States filed an amended complaint in the federal action to assert a federal claim that the Board discriminated against the United States under the constitutional intergovernmental immunity doctrine.

The United States respectively informed the state and federal courts of the other concurrent suit. The United States acknowledged that its preferred forum was in federal court, but that it brought the state court action out of an abundance of caution in the event the federal action could not be adjudicated on the merits. The SWRCB asked the U.S. District Court to either abstain from hearing the case pursuant to *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941), or stay the federal court proceedings pursuant to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The District Court denied abstention under *Pullman*, but considered whether to issue a partial stay under the *Colorado River* decision.

The Supreme Court's *Colorado River* decision contemplated the propriety of issuing a partial stay of proceedings where some, but not all of a federal plaintiff's claims are pending in a parallel state action. In conducting its *Colorado River* analysis, the District Court examined the CEQA and intergovernmental immunity claims separately. The court ultimately decided that the *Colorado River* stay factors weighed against staying the federal intergovernmental immunity claim, but weighed in favor of staying the state

CEQA claims. As such, the District Court stayed the CEQA claims until further notice, but permitted the federal intergovernmental immunity claim to proceed. The United States appealed the *Colorado River* stay. The Board did not cross-appeal the denial of abstention under *Pullman*.

The Ninth Circuit's Decision

On appeal, the Ninth Circuit reversed the District Court's issuance of a partial stay of the CEQA state law claims. The Court of Appeal held that the Supreme Court's decision in *Colorado River* only permits a partial stay under exceptional circumstances, none of which were present here.

Analysis under the *Colorado River* Decision

The Ninth Circuit conducted its analysis under a *de novo* standard review. The appellate court first considered the stay doctrine promulgated by *Colorado River.* There, the Supreme Court held that there are rare cases where, in the interest of "wise judicial administration giving regard to conservation of judicial resources and comprehensive disposition of litigation," a district court may dismiss or a stay a federal suit due to the presence of a concurrent state proceeding. The instances where such a stay is appropriate are limited—the court must consider eight factors, including whether the state court proceedings will resolve all issues before the federal court. A partial stay under *Colorado River* is not appropriate where the state court proceedings will not resolve the entire case before the federal court, thereby failing to provide relief for all of the parties' claims.

Under this lens, the Ninth Circuit observed that the United States' state and federal court suits contained the same three CEQA causes of action. The claims related to how the SWRCB analyzed evidence in arriving at its conclusions in the Amended Plan, and how the Board described details of the Plan in light of its evidentiary analysis. However, the amended federal complaint also contains the additional intergovernmental immunity cause of action. The United States claims that the SWRCB's imposition of a more stringent salinity requirement on the Bureau's operation of the New Melones Dam improperly discriminates against the federal government. Thus, although the federal and state actions alleged the same three CEQA claims, the Ninth Circuit noted that a partial stay would note further *Colorado River* doctrine's purpose of "conserving judicial resources." Because a stay would cease all activity in the case, the District Court would be unable to adjudicate the federal intergovernmental immunity claim—a claim that fell under its jurisdiction, rather than the jurisdiction of the state court.

The Ninth Circuit also considered whether the United States had engaged in forum-shopping, which would justify issuance of a partial stay under *Colorado River*. "Clear-cut evidence" must exist to issue a partial stay based on forum-shopping—it must be clear that the party filing the federal claim did so to avoid state court adjudication. Though the United States could have filed its intergovernmental immunity claim in its initial federal complaint—and only added it after the Board filed a motion to dismiss—there was no "clear-cut evidence" that the United States engaged in the type of forum shopping necessary to justify a partial stay under *Colorado River.* The United States informed the state and federal courts of its concurrent suits, and indicated it preferred the federal forum to resolve the disputes. To this end, the Board failed to establish how the state proceeding would resolve the United States' intergovernmental immunity claim, as the United States had not raised the claim in its state court proceedings. For these reasons, the United States did not improperly "forum shop." Because federal courts have "a virtually unflagging obligation to exercise the jurisdiction given [to] them," a partial stay would have improperly precluded the District Court from resolving the United States' separate federal claim.

Abstention Claim under the *Pullman* Decision

Finally, the Ninth Circuit considered the SWRCB's claim that the abstention doctrine under *Pullman* provides an alternate ground for upholding the District Court's stay order. Pursuant to the abstention doctrine, federal courts may refrain from hearing cases where the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law. *Pullman* requires the federal court to abstain from deciding the federal question while it waits for the state court to decide the state law issues. Here, the Ninth Circuit explained that the District Court did not stay the federal constitutional claims—it only stayed the state CEQA claims—and it declined to abstain pursuant to *Pullman*. Contrary to the Board's

assertion, issuance of a stay under *Pullman* would require the court to stay the federal intergovernmental immunity claim while the state court decided the CEQA claims. This, in turn, would in appropriately "enlarge" the rights the Board obtained under the District Court's judgment. For these reasons, the Ninth Circuit held that it could not affirm the District Court's stay on the basis of *Pullman* abstention.

Conclusion and Implications

The Ninth Circuit's opinion provides helpful guidance for parties to actions involving overlapping state and federal claims. Importantly, the opinion clarifies the partial stay doctrine promulgated under the *Colorado River* decision. In concurrent federal and state actions, issuance of a partial stay is only permissible in very limited circumstances, namely where there is strong evidence of forum shopping. A party must establish forum shopping by proving that the state court can adjudicate all claims brought in the federal action. Where a party asserts a federal claim that cannot be decided by the state superior court, the federal court retains jurisdiction, such that a partial stay should not issue. Finally, a federal court cannot abstain from adjudicating an action under the *Pullman* decision if doing so will enlarge the rights of the party requesting abstention. The Ninth Circuit's opinion is available online at: http://cdn.ca9.uscourts.gov/datastore/opinions/2021/02/24/20-15145.pdf
(Bridget McDonald)

RECENT CALIFORNIA DECISIONS

SIXTH DISTRICT COURT AFFIRMS DISMISSAL OF CEQA CHALLENGE FOR FAILURE TO TIMELY NAME THE NEW PROPERTY OWNER AS AN INDISPENSABLE PARTY

Organizacion Comunidad de Alviso v. City of San Jose, ___Cal.App.5th___,
Case No. H046458 (6th Dist. Feb. 9, 2021).

The Sixth District Court of Appeal in *Organizacion Comunidad de Alviso v. City of San Jose* held that a California Environmental Quality Act (CEQA) lawsuit challenging the environmental review for a project failed to timely name the new property owner as an indispensable party within the CEQA 30 day statute of limitations after a properly filed Notice of Determination (NOD) by the City of San Jose (City) that identified the new owner. The Court of Appeal held that the City's failure to provide an actual copy of the NOD by email as requested by petitioner did not provide justification to avoid the statute of limitations under either the doctrines of relation back or of equitable estoppel. Petitioner had record notice of the new owner provided by the City's filing of the NOD with the Santa Clara County recorder as required by CEQA and additional actual notice during the City proceedings.

Factual and Procedural Background

The Project consists of the redevelopment of fallow farmland in the City by rezoning the 64.5-acre property to light industrial use, with one of two development options: 1) 1.2 million square feet of light industrial development; or 2) 436,880 square feet data center (49.5 megawatts) with a PG&E substation on 26.5 acres of the site, plus 728,000 square feet of light industrial development. The Project includes rezoning from Planned Development to Light Industrial zoning. Development Option 2 includes a special use permit and a development exception for reduced parking requirements.

In September 2017, petitioner emailed the City's environmental project manager and asked to be placed on the City mailing list for notices of the project. That same day the City gave notice to petitioner of the planning commission and city council hearings for the Project and its environmental review. Later that month, Microsoft purchased the property from Cilker and filed a universal planning application to take over as Project applicant.

The city council hearing took place in October 2017. Although the agenda labeled Cilker as the owner and did not mention Microsoft as the owner, Microsoft was identified as the owner during the hearing. Petitioner attended the hearing and commented on the Project. The city council certified the Project Environmental Impact Report (EIR), approved the Project under Option 2, including a *water supply assessment*, and imposed a mitigation and monitoring program.

Petitioner emailed the project manager two days after the hearing and requested a copy of the NOD. The project manager responded that the Project would be reconsidered at an additional city council hearing in December 2017. The city council reconsidered and again approved the Project at that hearing. The December 2017 agenda listed Microsoft as the owner, but the city council resolution approving the Project incorrectly named Cilker as the owner.

Petitioner again requested a copy of the NOD the day after the December hearing, and the City provided a copy of the NOD, but with Cilker incorrectly named as the owner. Five days later the City issued a corrected NOD naming Microsoft which was filed with and recorded by Santa Clara County clerk, but the City did not email a copy or the corrected NOD to petitioner.

Petitioner filed its CEQA petition for writ of mandate against the City alleging violations of CEQA and Planning and Zoning Law within the 30-day statute of limitations period following the NOD. The petition named the City as respondent and Cilker as the real party in interest. Cilker's attorney notified petitioner that Cilker did not own the property and that Microsoft had acquired the property, and also in-

formed petitioner of the corrected NOD. More than a month after receiving that letter and 70 days after the corrected NOD, petitioner filed a first amended petition naming Microsoft as the real party in interest.

Microsoft, Cilker and the City filed demurrers to the first-amended petition arguing that the CEQA action was time-barred by failure to name Microsoft as a party within the 30-day statute of limitations after the corrected NOD was filed. The trial court sustained the demurrers without leave to amend as to the CEQA cause of action, and petitioner dismissed its remaining Land Use and Planning Law cause of action. The trial court thereupon entered a judgment of dismissal of the lawsuit as to all parties.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court decision, holding that, despite the City's violation of CEQA by not providing an actual copy of the corrected NOD, petitioner had both constructive notice of the corrected and recorded NOD and actual notice that Microsoft was the owner. The Court of Appeal found that with constructive notice of the correct party, the relation back doctrine would not apply to relate the naming of Microsoft to the date of the initial petition. The Court of Appeal also found that Microsoft and the City could not be equitably estopped to raise the statute of limitations defense because of the same constructive notice of the corrected NOD.

The NOD Provides Constructive Notice for Statutory Purposes

CEQA requires the filing of a NOD for recording by the county recorder within 5 days after approval of a project and certification of an EIR. (Pub. Res. Code, § 21152, subd. (a).) Among other things, the NOD must identify and briefly describe the project, identify the lead agency and any responsible agency, the date of project approval and the agency's environmental impact determination, give the address where the environmental impact report may be examined, and state whether mitigation measures were adopted.

CEQA requires the mailing of the NOD when requested by a member of the public. (Pub. Res. Code, § 21167, subd. (f).) Thus, the City violated the law by not providing a mailed notice of the corrected NOD. However, CEQA also expressly provides that the failure to provide the mailed notice does not affect the statute of limitations established by the NOD's constructive notice. (Id.)

A timely and correctly filed NOD establishes record notice that starts the running an extremely limited 30-day statute of limitations under CEQA to facilitate the clear legislative intent to ensure extremely prompt resolution of lawsuits claiming violation of CEQA. (*Stockton Citizens for Sensible Planning v. City of Stockton*, 48 Cal.4th 481, 500 (2010).) A materially defective NOD that omits one of more requirements reverts the statute of limitations to 180 days. Under CEQA, the petition must name the property owner as a real party in interest within the applicable statutory period. (*Sierra Club, Inc. v. California Coastal Commission*, 95 Cal.App.3d 495, 502 (1979).)

The corrected NOD fulfilled the statutory requirements, providing record notice to petitioner that Microsoft was the property owner to be sued within 30 days of the NOD. Thus, petitioner was barred by the 30-day statute of limitations for failing to timely name Microsoft as the real party in interest.

The Doctrine of Relation Back

Petitioner sought relief under the doctrine of relation back, which allows substitution of the correct party as of the date the original pleading is filed when the petitioner is initially ignorant of the true name of the essential party. (Code Civ. Proc., § 474.) The doctrine of relation back cannot be applied in this instance because the corrected NOD provided constructive notice of the name of the real party and also because petitioner had actual notice of the name of the real party at the time petitioner filed the original petition, thereby obviating the claim of ignorance required in order to apply the doctrine of relation back.

Equitable Estoppel

Petitioner claimed that the doctrine of equitable estoppel should bar the statute of limitations defense for failure to name the correct property owner because of the City's provision to petitioner of the incorrect NOD and failure to provide the correct NOD to petitioner. Assuming for the sake of argument that the City purposefully tried to deceive petitioner by providing the initial NOD with the incorrect name and by failing to provide the corrected NOD with

the correct name of the property owner, petitioner could not have reasonably relied upon the incorrect NOD, because petitioner is presumed by law to have notice of the recorded corrected NOD. As the Court of Appeal pointed out, in most counties the recorded NODs are posted online and can easily be reviewed to confirm correct and timely filing and recordation.

Conclusion and Implications

This opinion by the Sixth District Court of Appeal is important because it reinforces the legislative intent to maintain an expedited statute of limitations for CEQA challenges where record notice is provided, thus avoiding unnecessary expenditures of government resources to confirm individual notice in each instance. While the circumstances of this case may evoke sympathy for petitioner, petitioner easily could have avoided its result by simply checking with the county clerk's office to get a copy of the recorded NOD either through a messenger or online (if available) to confirm the required information before filing the lawsuit. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/H046458.PDF
(Boyd Hill)

FIRST DISTRICT COURT UPHOLDS CITY'S REMOVAL OF STATUE, FINDING INSUFFICIENT NOTICE DID NOT EXCUSE APPELLANT FROM EXHAUSTING ADMINISTRATIVE REMEDIES UNDER CEQA

Schmid v. City and County of San Francisco, 60 Cal.App.5th 470 (1st Dist. 2021).

The First District Court of Appeal, on February 1, 2021, in *Schmid v. City and County of San Francisco*, upheld the dismissal of a taxpayer action that challenged the City of San Francisco's decision to remove a controversial 124-year-old statue. The appellate court ruled that appellants failed to exhaust their claim under the California Environmental Quality Act (CEQA), despite deficiencies in the city's hearing notice regarding the application of a categorical exemption to the removal action.

Factual and Procedural Background

In 1876, the James Lick Trust bequeathed to the "Pioneer Monument" to the City of San Francisco (City). The statutory monument consists of five bronze sculptures that depict a series of vignettes to commemorate the pioneering era in which the State of California was founded. The monument was installed on Market Street in 1894 to commemorate the state's 44 anniversary of its admission to the Union.

The "Early Days" statue is one of the monument's five figures. Designed by German sculptor Frank Happersberger, the statue depicts a reclining Native American over whom bends a Catholic priest endeavoring to convey religious knowledge, alongside a padre whose purported zeal for the church attempts to lift the Native American towards faith. Public criticism has surrounded the statue since its installation. Early critics contested the memorialization of pioneers given their questionable reputation. A century later, controversy shifted to the statue's racist and offensive imagery towards Native Americans. In the early 1993, the City moved the monument to its current location in the City's Civic Center.

Twenty-five years later, charges of the statue's racial insensitivity resurfaced. In December 2017, the San Francisco arts commission applied to the City planning department for a Certificate of Appropriateness (COA) to remove the "Early Days" statue and place it in storage. Because the statue is located in a landmarked historic district, the San Francisco historic preservation commission (HPC) was first tasked with reviewing the removal request. At a February 2018 public hearing, the HPC motioned to issue the COA and agreed with the planning department's staff-level determination that removing the statute is categorically exempt from CEQA. There were no issues raised at the HPC hearing about a perceived need for environmental review. Nor were there any appeals of HPC's categorical exemption determination to the San Francisco board of supervisors. Two weeks later, the arts commission authorized the statue's removal and placement in storage.

Taxpayers and longtime City residents, Frear Stephen Schmid and Patricia Briggs, opposed the statue's removal. Though neither resident attended the HPC hearing, they appealed the HPC's adoption of the COA to the San Francisco board of appeals (Board).

The Board initially upheld the appeal and vacated the COA, but changed course after a September 2018 rehearing. In response to growing public controversy surrounding the statue's racist and painful interpretation of Native Americans, the Board unanimously voted in favor of reinstating the COA. The City acted immediately to implement the COA in accordance with the arts commission's resolution. The morning after the Board's decision, during pre-dawn hours, the City removed the statue from its granite base, leaving the other four sculptures intact, and placed it in storage.

Appellants—Schmid and Briggs—subsequently filed suit seeking to overturn the Board's order authorizing the removal of the "Early Days" statue. Appellants alleged four causes of actions, claiming violations under the U.S. Constitution's First Amendment, public nuisance doctrine, public trust doctrine, and CEQA. The trial court sustained the City's demurrer without leave to amend. Appellants timely appealed.

The Court of Appeal's Decision

On appeal, Appellants claimed the Board abused its discretion in authorizing the removal of the "Early Days" statue and the manner in which it was removed. As to their CEQA claim, Appellants asserted that the Board failed to adhere to CEQA's protection of historic resources by refusing to require or prepare an Environmental Impact Report (EIR). To this end, appellants argued that removing the statue was not categorically exempt from CEQA review due to "common sense" and the large-scale size of the sculpture.

Exhaustion of Administrative Remedies

Under a *de novo* standard of review, the Court of Appeal for the First District considered whether the trial court properly found that appellants failed to state a cognizable claim under CEQA by failing to appeal to the board of supervisors the HPC's categorical exemption determination, as required by CEQA's doctrine of exhaustion of administrative remedies. Pursuant to Public Resources Code § 21151, CEQA's exhaustion doctrine serves as a jurisdictional prerequisite to bringing a CEQA lawsuit. Public Resources Code § 21177 mandates that each allegation of CEQA noncompliance be presented to the public agency prior to the close of the public hearing at which the agency's decision is made. A litigant is also personally responsible for raising any claim of CEQA noncompliance before the agency makes its decision. However, CEQA's exhaustion prerequisite may be overlooked, and thus, permit judicial review, in instances when an agency provides inadequate or no notice of the hearing at which it will render a final decision.

Under this lens, the First District Court held that appellants failed to contest the categorical exemption or call for CEQA review of the statue's removal at the HPC hearing. They also failed to appeal the categorical exemption determination to the board of supervisors—an administrative remedy provided under the San Francisco Administrative Code. Therefore, they did not satisfy the exhaustion requirements of Public Resources Code §§ 21177 and 21151.

Adequacy of Notice

The court also rejected Appellants' two arguments that challenged the adequacy of the City's notice of the HPC hearing at which it adopted the categorical exemption. Appellants first argued that notice was rendered inadequate by the City's description of the removal as a "small scale contributing feature" of the Civic Center Landmark District. Appellants cited *McQueen v. Building Director* (1988) 202 Cal.App.3d 1136, wherein notice was found inadequate after a regional district failed to disclose that the site of a land acquisition project was contaminated with hazardous materials. The court rejected Appellants' assertion, holding that, in contrast to the *McQueen* opinion, the City's description of the "Early Days" statue as a "small scale contributing feature" was accurate and not misleading or incomplete.

The appellate court agreed, however, with appellants' argument that there was no notice in advance of the HPC hearing that a categorical exemption from plenary CEQA review might be on the agenda. The court explained that listing a project and approval on the agenda, but failing to indicate that a categorical exemption would be considered, is insufficient to satisfy Public Resources Code § 21177, and thus excuses appellants from satisfying the exhaustion requirements therein. Therefore, Appellants were not required to object to the categorical exemption at the HPC hearing.

Failure to Appeal the Categorical Exemption Determination

Yet, the court explained that this defective notice only relieved appellants of § 21177's exhaustion requirements—not those promulgated under § 21151. Section 21151 requires an appellant to exhaust all available administrative remedies prior to filing a CEQA lawsuit. The court held that this section and exhaustion requirement operates independently of § 21177. As such, appellants were still required to exhaust their administrative remedies by appealing the categorical exemption determination to the board of supervisors, pursuant to Public Resources Code § 21151, subdivision (c), CEQA Guidelines § 15061, subdivision (e), and San Francisco Administrative Code § 31.16, subdivision (a). Appellants had only presented their CEQA objections to the Board, which lacked jurisdiction over the CEQA appeal. The court reasoned that, while Schmid did not attend the HPC hearing, the CEQA exemption determination was appealable for 30 days after the hearing. Here, Schmid was aware of the determination within this period because he mistakenly filed an appeal with the Board during that time. Appellants had ample time to correct this oversight so as to fully exhaust their remedies under §§ 21177 and 21151. Accordingly, the court of appeal held that Appellants failed to completely exhaust their available CEQA administrative remedies and consequently forfeited their right to bring the action in court.

Futility to Exhaustion

The First District Court also considered whether Appellants should be excused from exhausting their administrative remedies because doing so would be futile. Citing a board of supervisors resolution that was not contained in the record, appellants argued that an appeal to the proper Board would have been futile because the board of supervisors had already adopted a definitive position supporting removal of the statue. The court rejected this argument, stating that even if the board of supervisors held this view as a matter of policy, it still could have opted for the more robust and publicly transparent procedure of requiring an EIR before moving forward with the removal. However, because the Board was never presented with arguments regarding the appropriateness of a categorical exemption, the court reasoned it could only speculate about what the Board would have done. As such, the court concluded that, having failed to appeal the HPC's approval of a CEQA categorical exemption to the board of supervisors in September 2018, or at any other time, appellants failed to exhaust their administrative remedies.

Conclusion and Implications

The First District Court of Appeal's opinion emphasizes a strict judicial adherence to the doctrine of administrative remedies, particularly as a prerequisite to bringing a CEQA action. Though a litigant may properly exhaust their remedies under Public Resources Code § 21177, failure to properly exhaust the remedies under § 21151 will bar judicial review. Separately, the Court of Appeal candidly opines on the nature and factual substance of the appellants claims. Though the crux of appellants' claims were largely a matter of cultural grievance, their participation in the administrative process that led to the removal of the "Early Days" statue contributed to a robust public debate among residents about longstanding issues surrounding the City and California's legacy. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A158861.PDF
(Veronika Morrison, Bridget McDonald)

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FIRST DISTRICT COURT UPHOLDS REGIONAL WATER BOARD ORDERS REGARDING VIOLATIONS AT WETLAND MARSH ISLAND IN THE SUISUN MARSH

Sweeney v. California Regional Water Quality Control Board, San Francisco Bay Region, 61 Cal.App.5th 1 (1st Dist. 2021).

A landowner filed petitions for peremptory writs of mandate contesting the Regional Water Quality Control Board, San Francisco Bay Region's (RWQCB or Regional Board) cleanup and abatement order and an administrative civil liability order regarding a levee that had been reconstructed on Point Buckler, a wetland marsh island. The Superior Court granted the petitions and the RWQCB appealed. The First District Court of Appeal reversed, finding the trial court improperly set aside the orders.

Factual and Procedural Background

Point Buckler is a 39-acre tract located in the Suisun Marsh. John Sweeney purchased the island and subsequently transferred ownership to Point Buckler Club, LLC (together: Sweeney). For months, Sweeney undertook various unpermitted development projects at the site, including but not limited to the restoration of an exterior levee surrounding the site that had been breached in multiple places. He began operating the site as a private recreational area for kiteboarding and also wanted to restore the site as a duck hunting club.

This case pertains to two administrative orders issued by the RWQCB against Sweeney. The first order was a cleanup and abatement order (CAO), which found that Sweeney's various development activities were unauthorized and had adverse environmental effects. These included, among other things, impacts on tidal marshlands, estuarine habitat, fish migration, the preservation of rare and endangered species, fish spawning, wildlife habitat, and commercial and sport fishing. The order directed Sweeney to implement actions to address the impacts of the work. The second order imposed administrative civil liabilities (ACL Order) and required Sweeney to pay about $2.8 million in penalties for violations of environmental laws.

At the Superior Court

Sweeney successfully challenged both orders in the Superior Court, which set aside the orders on multiple grounds. Regarding the CAO, the Superior Court found the Regional Board violated Water Code § 13627, the order failed to satisfy criteria for enforcement actions contained in the Porter-Cologne Water Quality Control Act, and the order conflicted with the Suisun Marsh Preservation Act. For the ACL Order, the Superior Court found, among other things, that the order violated the Eighth Amendment's prohibition against excessive fines, conflicted with the Suisun Marsh Preservation Act, and was the result of a vindictive prosecution. Throughout its analysis, it also found that the Regional Board's findings were not supported by the evidence. The RWQCB appealed.

The Court of Appeal's Decision

The Cleanup and Abatement Order

The Court of Appeal first addressed the Regional Board's arguments under Water Code § 13267, which generally authorizes a Regional Board to investigate the quality of the "waters of the state" within the region subject to its authority. This investigative power includes the right to ask anyone who has discharged waste to provide technical or monitoring program reports under penalty of perjury. The Superior Court set aside the CAO on the grounds that the CAO did not include a written explanation or otherwise explain why the burden of preparing technical reports would bear a reasonable relationship to the need. The Court of Appeal disagreed, finding that the CAO explained the need for the reports and identified the evidence supporting the demand. The court also found that the RWQCB was not required to conduct a formal cost-benefits analysis of the burdens in obtaining such reports, contrary to Sweeney's claim.

The Court of Appeal next considered enforcement under Water Code § 13304(a), which establishes a Regional Board's authority to issue a cleanup and abatement order to any person who has caused or permitted waste to be discharged. Upon order, the discharger must clean up the waste or abate the effects of the waste or take any other necessary remedial action. The Superior Court found the conditions

for issuing a CAO were not satisfied, finding, among other things, that Sweeney did not "discharge waste" as defined in the Water Code, and that waste had not been discharged into "waters of the state." The Superior Court also found that Sweeney's activities did not create a "condition of pollution" at the site under the law.

Regarding "waste," the Court of Appeal found that the Superior Court employed an overly restrictive interpretation of the term, and that no rational fact finder could have reached a decision that the fill materials did not result in harm to beneficial uses. The evidence of harm associated with the fill used to repair the levee made it "waste." The court also rejected the argument that the fill constituted a "valuable improvement to the property," noting that even though a fill material may have commercial value, that does not preclude it from being waste under the relevant statutory provisions. Regarding "discharge," the Court of Appeal found that the Superior Court erred factually. Numerous activities not addressed by the Superior Court qualified as discharges, including the placement of fill for the levees. Regarding "waters of the state," the Court of Appeal found that there was no real dispute that a significant portion of the discharges occurred in such waters. Finally, regarding a "condition of pollution," the Court of Appeal found that the Superior Court made certain factual errors and construed the "condition of pollution" element far too narrowly.

The Suisun Marsh Preservation Act

The Court of Appeal next addressed the Suisun Marsh Preservation Act. The Superior Court found that the RWQCB undermined the policy and intent of the Suisun Marsh Protection Plan to preserve and protect duck hunting clubs as a legitimate use for wetlands, and thus the CAO was invalid. The Court of Appeal disagreed, finding that the Preservation Act has no impact on the regulatory authority of the Regional Board over wetlands, and it should not have been relied upon by the Superior Court to invalidate the CAO. Even if Sweeney was correct that the RWQCB's enforcement was subject to the Preservation Act, however, the Court found there still would be no violation. Nor does the Preservation Act, the Court found, otherwise direct state agencies to carry out activities in a manner favorable to duck hunting clubs.

The Administrative Civil Liability Order

The Court of Appeal next addressed the ACL Order, which was premised on discharges in violation of the Regional Board's Basin Plan and the federal Clean Water Act. Among other things, the Superior Court found that the ACL Order violated the Eighth Amendment's prohibition against excessive fines, conflicted with the Suisun Marsh Preservation Act, and was the result of a vindictive prosecution. Throughout its analysis, the Superior Court also found that the Regional Board's findings were not supported by substantial evidence.

The Court of Appeal first addressed the RWQCB's findings, concluding that those findings were supported by substantial evidence. Many of the same errors made with respect to the Superior Court's consideration of the CAO (*e.g.*, whether fill was discharged into waters of the state) also were made with respect to the ACL Order.

The Court of Appeal then addressed the Eighth Amendment, which generally prohibits excessive fines, noting that the "touchstone" of constitutional inquiry under the excessive fines clause is proportionality. The Superior Court found the penalty was "grossly disproportional" based on the court's own consideration of Sweeney's culpability as low. The Court of Appeal disagreed, finding there was substantial evidence in the record to support the Regional Board's findings. Regarding culpability, for example, it found there was evidence that, among other things, Sweeney had past experience with governmental agencies with jurisdiction over Suisun Marsh at another property, and his levee work there had resulted in illegal discharges of fill and direction from the relevant agencies. Regarding the relationship between the harm and the penalty, the Court of Appeal found there was ample evidence that Sweeney's levee construction converted the site from tidal marshland and adversely impacted beneficial uses at the site. The court also found evidence that the $2.8 million penalty was not disproportionately high. Finally, the Court of Appeal found that there was substantial evidence supporting the conclusion that Sweeney could pay the fine.

The Court of Appeal also disagreed with the Superior Court's conclusion that the Board's penalties were imposed for vindictive reasons. In particular, the Superior Court found the penalties were imposed in retribution for Sweeney's lawsuit challenging an

earlier order. The Court of Appeal first noted that the vindictive prosecution doctrine has not yet been held to apply to proceedings before administrative bodies. Even assuming it would apply, the court found there was substantial evidence that rebutted any finding of vindictive prosecution. The RWQCB, for example, had contemplated imposing civil liability months before Sweeney filed a lawsuit, and the court found that the evidence was sufficient to dispel the appearance of vindictiveness.

Fair Trial Issue

Finally, the Court of Appeal reversed the trial court's finding that Sweeney had not received a fair trial. The Court of Appeal found it had no reason to conclude Sweeney received an unfair hearing. The Regional Board, for instance, separated functions (*e.g.*, advisory, prosecutorial, *etc.*), it was not required to respond in writing to every issue raised, there is no requirement that hearings last for any particular amount of time, the Board adhered to procedures governing adjudicatory hearings, and the Regional Board's expert did not evidence any particular bias against Sweeney.

Conclusion and Implications

The case is significant because it contains a substantive discussion of numerous issues pertaining to administrative orders, in particular cleanup and abatement orders and administrative civil liability orders issued by a Regional Water Quality Control Board. The decision is available online at: https://www.courts.ca.gov/opinions/documents/A153583M.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 March 11, 2021, was referred to the Committee on Natural Resources.

•**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 March 23, 2021, was read for a second time, amended and then re-referred to the Committee on Environmental Quality.

•**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 March 24, 2021, was scheduled for hearing on April 13, 2021, in the Committee on the Judiciary.

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 March 4, 2021, was referred to the Committee on Natural Resources.

•**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 March 4, 2021, was referred to the Committee on Natural Resources.

•**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 March 1, 2021, was in the Assembly where it was read for the first time and then held at the desk.

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 March 25, 2021, was re-referred to the Committee on Appropriations.

•**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 25, 2021, was referred to the Committees on Housing and Community Development and Local Government.

•**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 March 15, 2021, had its hearings in the Committees on Housing and Community Development and Local Government postponed by the committees.

•**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 March 26, 2021, was scheduled for hearing on April 29, 2021, in the Committee on Housing.

•**SB 9 (Atkins)**—This bill, among other things, would 1) 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 2) 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 March 3, 2021, had its March 18, 2021, hearing in the Committee on Environmental Quality canceled at the request of the author, Senator Atkins.

•**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 March 18, 2021, was set for hearing on April 5, 2021, in the Committee on Appropriations.

•**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 March 16, 2021, was set for hearing on April 15, 2021, in the Committee on Environmental Quality.

•**SB 765 (Stern)**—This bill would: 1) provide that the rear and side yard setback requirements for accessory dwelling units may be set by the local agency; 2) 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, 3) 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 March 3, 2021, was referred to the Committees on Housing and Governance and Finance.

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 March 25, 2021, was re-referred to the Committee on Housing and Community Development.

•**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 March 4, 2021, was referred to the Committees on Housing and Community Development and Local Government.

•**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 March 11, 2021, was re-referred to the Committees on Housing and Community Development and Local Government.

•**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 ten, units.

SB 478 was introduced in the Senate on February 17, 2021, and, most recently, on March 24, 2021, was scheduled for hearing on April 8, 2021, in the Committees on Housing and Governance and Finance.

Zoning and General Plans

•**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 percnt 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 March 23, 2021, was re-referred to the Committee on Local Government.

•**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 March 22, 2021, was read for a second time, amended and then re-referred to the Committee on Governance and Finance.

•**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 March 25, 2021, was re-referred to the Committee on Housing.

•**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 March 25, 2021, had its April 8, 2021, hearing in the Committee on Governance and Finance canceled at the request of its author, Senator Leyva.
(Paige Gosney)

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