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CALIFORNIA LAND USE™
LAW & POLICY Reporter

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LAND USE NEWS

NEW RESEARCH STUDY ATTEMPTS TO QUANTIFY THE COST OF CLIMATE CHANGE AND FLOOD RISK IN THE UNITED STATES—FOR THE INDIVIDUAL HOMEOWNER

A new study, undertaken by First Street Foundation has been released in which the foundation attempts to quantify just how financially detrimental the ongoing risk of flooding—due to climate change—is within the United States.

Background

First Street Foundation (First Street) is a not-for-profit research and technology group which focuses on "America's Flood Risk." First Street finds that the financial toll of flood damage from climate change is and would continue to be enormous, and further finds that while "institutional real estate investors and insurers have been able to privately purchase flood risk information, the same cannot be said for the majority of Americans." First Street goes on to detail the problem as follows:

> Flooding is the most expensive natural disaster in the United States, costing over $1 trillion in in inflation adjusted dollars since 1980. . . .the majority of Americans have relied on Federal Emergency Management Agency (FEMA) maps to understand their [flood] risk. However, FEMA maps were not created to define risk for individual properties. This leaves millions of households and property owners unaware of their true risk.

First Street's mission statement is to fill the need for:

> . . .accurate, property-level publicly available flood risk information. . . via a team of leading modelers, researchers and data scientists to develop the first comprehensive, publicly available flood risk model. . .[which is]. . .peer reviewed. . . .(https://firststreet.org/mission/)

The First Street Foundation's Study: 'Defining America's Flood Risk'

In the new research study, issued by First Street on February 22, 2021, it analyzes the "underestimated flood risk to properties throughout the United States." First Street emphasizes that while the insurance industry, for example, has access to risk assessment, the private real property owner generally does not. That theme is key to First Street: providing the tools for informed decision-making at the individual property owner level. It also suggests that at the city or county level, land use planning to assess risk from flood can benefit from its Study.

Methodology

First Street applies its "Flood Model" and marries that information to an "analysis of the depth-damage functions from the U.S. Army Corps of Engineers" in order to estimate "Average Annual Loss" for residential properties throughout the United States and "into the climate-adjusted future." The Flood Model of 2020 Methodology is available online at: https://firststreet.org/flood-lab/published-research/flood-model-methodology_overview/

The analysis referred to above, is to a scientific abstract done in the fall of 2020, entitled "Assessing Property Level Economic Impacts of Climate in the US, New Insights and Evident from a Comprehensive Flood Risk Assessment Tool" and is available online at: https://www.mdpi.com/2225-1154/8/10/116

Expanded Mapping of Economic Risk Associated with Flood Risk

First Street has found that a "great deal of flood risks exists outside of Federal Emergency Management Agency's designated Special Flood Hazard Areas (SFHAs)." This current First Street Study provides a:

> . . .vastly expanded mapping of economic risk

associated with flood risk, and demonstrates the extent to which information asymmetries on flood risk contribute to financial market asymmetries, specifically in the form of underestimations of financial and personal risk to property owners. (https://firststreet.org/flood-lab/published-research/highlights-from-the-cost-of-climate-americas-growing-flood-risk/)

What the Study Revealed

The Study found that for the long-term impact of climate change, there were nearly 4.3 million homes (defined as 1-4 units) across the U.S. with *substantial* flood risk that would result in financial loss. The Study also found that if these homes were to insure against flood risk, the estimated risk through FEMA's National Flood Insurance Program (NFIP), the rates would need to increase 4.5 times to cover the estimated risk in 2021, and 7.2 times to cover the growing risk by 2051.

First Street found that the average estimated loss for the 5.7 million properties that have *any* flood risk and an expected loss from that flooding represents $3,548 per home. Using climate modelling projection for 30 years hence, yields a 67 percent increase in the average estimated loss per household. (*Ibid*)

Conclusion and Implications

The First Street Study contains a lot of fascinating and useful information including interactive models. In the end, the Study hopes to provide accurate and comprehensive estimated, to the general public, of annual flood damage in order to improve risk management and "cost-effective hazard mitigation planning." Emphasis is on the Study's availability to individual property owners, renters and communities—think city planners—to make informed decisions about risk reduction. For more information, with a wealth of information and inner statistical and methodology links, *see:* https://firststreet.org/flood-lab/published-research/highlights-from-the-cost-of-climate-americas-growing-flood-risk/
(Robert Schuster)

LOCAL JURISDICTION LAND USE CONSIDERATIONS OF CANNABIS 'ACTIVITY BUFFERS' IN CALIFORNIA

California's Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) confers certain authority to local jurisdictions to license and regulate the cultivation, distribution, transport, storage, manufacturing, processing, and sale of both medical and adult-use cannabis and cannabis products. In adopting such a regulatory scheme, local jurisdictions face a whole litany of policy considerations. These include, among other things, whether to permit cannabis activity, what types of cannabis activity to allow, whether to restrict the number of licensees, and in which zones to allow the activity. Alongside these considerations, local jurisdictions must also consider the compatibility of the types of cannabis activity they intend to permit with other uses in the vicinity of where cannabis activity is to be allowable.

Cannabis Retail Sales, Sensitive Uses and Buffer Zone Considerations

School, Day Care, and Youth Center Buffers

When approving Proposition 64 legalizing adult-use cannabis in California, voters approved language acknowledging that certain uses involving children are highly sensitive to legalized cannabis activity. In acknowledgement of that sensitivity, Proposition 64 included in Business and Professions Code § 26054, language that created a default 600-foot buffer zone around all K-12 schools, day care centers, and youth centers (Sensitive Uses) in which no cannabis activity could be licensed. This buffer is measured from the property line of Sensitive Uses.

However, § 26054 also provides local jurisdictions with the authority to modify this buffer ("unless a licensing authority or local jurisdiction specifies a dif-

ferent radius"). *[Immediately following the approval of Prop. 64, some debate existed about whether the authority conferred on local jurisdictions only provided for more restrictive—or larger—buffers than the 600 feet provided for in Section 26054. Local jurisdictions have since interpreted this language to allow for both larger and smaller buffers.]

An example of such a modification is found in the City of Goleta's municipal code which provides for a 600-foot buffer from K-12 schools for cannabis retail storefronts but does not provide such a buffer around day care centers and youth centers, and does not provide for any buffer around other types of cannabis activity.

Buffers around Other Uses

Proposition 64 did not call out any other types of uses as so sensitive to warrant a default buffer zone. Nevertheless, local jurisdictions regularly impose buffers around other sensitive uses such as residential zones, parks, libraries, and community centers. For example, the City of Modesto's municipal code provides for a 200-foot buffer around the city's parks and libraries as well as a 100-foot buffer around residential uses.

Some local jurisdictions also provide for buffers between cannabis retail storefronts to minimize the appearance of a cannabis-centric business district. Turning again to the City of Goleta for an example, cannabis retail storefronts there may not be located within 600 feet of another cannabis retain storefront.

Policy Considerations for Local Jurisdictions

Once a local jurisdiction has made the threshold determination that it wishes to permit cannabis activity the complex process of developing a set of local regulations begins. In considering buffers, it is important for local jurisdictions to keep in mind what types of issues they are seeking to address in creating a buffer: public health and safety, child exposure to cannabis activity, density of cannabis activity, or some other concern.

Proximity to Sensitive Uses

Depending on the types of zones in which a local jurisdiction chooses to permit cannabis activity, different types of sensitive uses may or may not be an issue within their jurisdiction. For jurisdictions only seeking to permit manufacturing or cultivation activity in industrial zones, school buffers are less likely to be an issue than for those local jurisdictions focusing on retail activity. If local zoning places residential zones immediately adjacent to industrial zones, a residential buffer may be appropriate. If a local jurisdiction's business districts contain a lot of mixed-use parcels, then a buffer not just around residential zoning but one around parcels *containing a residential use* may be appropriate.

Additional Impact Mitigation

While cannabis retail storefronts are perhaps the most visually impactful type of cannabis activity, other types of cannabis activity may pose other types of risks than visual exposure. For example, some jurisdictions consider extraction facilities to pose a heightened risk. When considering this type of risk, local jurisdictions may wish to consider whether a buffer from sensitive uses is the most effective avenue for risk mitigation. Other types of mitigation such as special safety plans or security plans for specific types of uses may be better-suited to provide for public health and safety as well as peace of mind to nearby residents and businesses.

Availability of Commercial and Industrial Properties

When considering whether and how large a buffer to impose on cannabis activities, local jurisdictions may wish to consider the availability of commercial and industrial sites where cannabis activity could be located depending upon how large a buffer is imposed. This consideration may also be of particular importance to local jurisdictions that are relatively small, have small business and industrial districts, or that have sensitive uses spaced throughout in a way that would preclude all but a small portion of their jurisdiction to contain cannabis activity.

Conclusion and Implications

Perhaps the most important takeaway for local jurisdictions and anyone in the cannabis industry seeking to do business within a jurisdiction that permits cannabis activity is that California law provides flexibility. Local jurisdictions facing public health and safety concerns, or resident concerns should know that their ability to impose use buffers on cannabis

activity gives them the ability to address a multitude of concerns. Cannabis businesses seeking to do business in a local jurisdiction where concerns about their type of use should likewise keep this approach in mind when applying for local approvals and should proactively propose a solution-oriented approach to overcoming whatever concerns may have been expressed.
(Andreas L. Booher)

LAWSUITS FILED OR PENDING

U.S. EPA DISMISSES ITS APPEAL OF U.S. DISTRICT COURT'S MORE NARROW JURISDICTIONAL DELINEATION OF SALT PONDS ADJACENT TO SAN FRANCISCO BAY

On February 26, 2021, the U.S. Environmental Protection Agency (EPA) filed a motion to voluntarily dismiss the agency's earlier appeal of a decision by the U.S. District Court for the Northern District of California rejecting a jurisdictional delineation in which the agency determined that a salt production complex adjacent to the San Francisco Bay was not jurisdictional and therefore not subject to federal Clean Water Act (CWA) § 404. The District Court's October 2020 decision found that EPA failed to consider whether salt ponds associated with the Redwood City Salt Plant fell within the regulatory definition of waters of the United States (WOTUS), and instead erroneously applied case law to reach a determination that the salt ponds were "fast lands," which are categorically excluded from CWA jurisdiction. "Fast lands" are those areas formerly subject to inundation, which were converted to dry land prior to enactment of the CWA. [*San Francisco Baykeeper, et al. v. EPA, et al.*, Case No. 20-17359 (N.D. Cal).]

By voluntarily dismissing the appeal, EPA appears to have conceded to the court's holding that the true measure of the jurisdictional extent of a WOTUS is the natural extent of such waters, absent any artificial components that limit the reach of an adjacent jurisdictional water body. Moreover, given the court's reliance on the "significant nexus" analysis, established by the *Rapanos* Supreme Court decision, in reaching its conclusion, EPA's decision to dismiss the appeal appears to be consistent with President Biden's January 20, 2021 Executive Order titled, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis."

Background

The Redwood City Salt Plant continuously operated as a commercial salt-producing facility since at least 1902, with facility operations largely unchanged since 1951, prior to the adoption of the federal Clean Water Act in 1972. The facility's salt ponds were created by reclaiming tidal marshes in San Francisco Bay through dredging, and construction of a system of levees, dikes, and gated inlets, permitted by the U.S. Army Corps of Engineers (Corps) in the 1940s. Since the 1940s, Cargill, Incorporated (Cargill), the current facility owner, and its predecessors made a handful of improvements to the facility, which included construction of a brine pipeline (1951), and new intake pipes to bring in seawater and improve brine flow at the facility (2000-2001). In the absence of these improvements, some of the facility's salt ponds would be inundated with the San Francisco Bay's jurisdictional waters.

In 2012, Cargill requested that EPA evaluate the jurisdictional status of the salt ponds. In response, EPA Region IX developed a draft jurisdictional determination in 2016, which indicated that only 95 acres of the Redwood City facility had been converted to "fast land" prior to enactment of the CWA. According to Region IX, the remaining 1,270 acres of the facility's salt ponds were jurisdictional under the CWA. Ultimately, in March 2019, EPA headquarters issued a significantly different final determination, which found that the entire Redwood City facility was *not* jurisdictional based on Ninth Circuit case law regarding the scope of CWA jurisdiction, spurring a challenge by environmental organizations.

The District Court's Decision

In evaluating the challenge, the court found that: 1) EPA was bound to apply its regulatory WOTUS definition, rather than Ninth Circuit case law; 2) headquarters improperly applied judicial precedent on the issue of "fast lands"; and 3) the headquarters delineation was inconsistent with a 1978 Ninth Circuit Court of Appeals case that evaluated the jurisdictional status of the Redwood City Salt Plant ponds, and concluded differently than the March 2019 EPA jurisdictional determination. *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978) (*Froehlke*). In

Froehlke, the Ninth Circuit determined: 1) that CWA jurisdiction still extended at least to those waters no longer subject to tidal inundation merely by reason of artificial dikes; and 2) the fast lands jurisdictional exemption applies only where the reclaimed area was filled prior to adoption of the CWA.

On December 3, 2020, EPA timely appealed the decision of the U.S. District Court for the Northern District of California.

The Biden Administration's Executive Order

On January 20, 2021, President Biden signed an Executive Order titled, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis" (the Order), which directed federal agencies to review regulatory actions taken by the prior Trump administration. In addition to directing agency heads to consider revision, rescission, or suspension of regulations adopted between January 20, 2017, and January 19, 2021, the Order repeals and revokes Executive Order 13778 of February 28, 2017 (Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule), suggesting that a revision of the Navigable Waters Protection Rule, which became effective on June 22, 2020 (2020 WOTUS Rule), may be underway.

Conclusion and Implications

EPA's dismal of the appeal of the District Court's decision in *San Francisco Baykeeper v.U.S. EPA* likely signals that the agency will publish a new WOTUS definition in the near future. The court suggested that although operations at the Redwood City Salt Plant had remained largely unchanged since 1951, any evaluation of the facility's jurisdictional status should be updated to account for the three major U.S. Supreme Court decisions regarding the appropriate scope of CWA jurisdiction: *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); and *Rapanos v. United States*, 547 U.S. 715 (2006). According to the District Court's October 2020 decision, the fact that the salt ponds "enjoyed a water nexus to the Bay" was dispositive, thus triggering revision of the headquarters' delineation, and suggesting that the *Rapanos* decision's significant nexus analysis largely influenced the court's decision. However, the 2020 WOTUS Rule entirely eliminated the significant nexus framework from the WOTUS definition. Consequently, the dismissal may signal a tacit agreement by the Biden administration that application of the significant nexus analysis remains appropriate, and may foreshadow future rulemakings pertinent to the scope of CWA jurisdiction.

(Meghan A. Quinn, Hina Gupta)

RECENT FEDERAL DECISIONS

DISTRICT COURT RULES ENVIRONMENTAL ANALYSIS OF GHGS INSUFFICIENT UNDER NEPA FOR MINE EXPANSION PROJECT

Utah Physicians for a Healthy Environment, et al. v. U.S. Bureau of Land Management, ___F.Supp.3d ___, Case No. 2:19-cv-00256-DBB (D. Utah Mar. 24, 2021).

The U.S. District Court for Utah has remanded an Environmental Impact Statement (EIS) for the expansion of the Coal Hollow Mine in southern Utah to the U.S. Bureau of Land Management (BLM) for revision, finding that BLM did not take a sufficiently "hard look" under the National Environmental Policy Act (NEPA) at the indirect effects and cumulative impacts of greenhouse gas (GHG) emissions associated with the expansion of the mine.

Factual and Procedural Background

In 2018, BLM approved a 2,114-acre lease for Alton Coal Development to expand the existing Coal Hollow Mine, doubling its size. Following a draft and supplemental draft EIS in 2011 and 2015, respectively, and almost 200,000 comments from interested parties, BLM published a Final EIS and issued the Record of Decision in connection with the approval of the lease. Plaintiffs Utah Physicians for a Healthy Environment, Sierra Club, Natural Resources Defense Council, National Parks Conservation Association, Grand Canyon Trust, and WildEarth Guardians challenged BLM's analysis of the environmental impacts of the lease under NEPA.

The District Court's Decision

Plaintiffs argued that BLM violated NEPA in three ways in its analysis of the proposed mine. First, plaintiffs claimed that BLM failed to analyze the impacts of GHGs generated directly and indirectly from the expansion of the mine. They asserted that while the mine's GHG emissions had been quantified, BLM had failed to calculate the social or economic costs of the mine's emissions, even though the agency had quantified various benefits associated with the mine. Second, plaintiffs alleged that BLM failed to adequately analyze the cumulative impacts of the mine's GHGs, having limited its review to climate impact sources in two counties in Utah, rather than all U.S. Department of the Interior coal mining projects under review. Third, plaintiffs argued that BLM failed to properly analyze the impact of mercury emissions resulting from combustion of coal from the mine.

The court looked to the NEPA regulations and considered each of the cases plaintiffs urged the court to follow, distinguishing them on most points, yet finding instances where the EIS fell short.

Analysis of GHGs, Climate Change, and Socioeconomic Impacts

The District Court first considered whether the EIS adequately addressed the impacts of the mine's GHG emissions. The court found fault with the EIS in delineating the mine's socioeconomic benefits, but not quantifying or discussing the social and economic costs associated with its GHG emissions.

The EIS forecast myriad economic benefits, quantifying the number of jobs created, the income from those jobs, the economic contribution of the coal produced from the mine expansion, federal royalties, tax revenue, and downstream economic benefits. The EIS also discussed various socioeconomic costs, such as declines in housing values, increases in traffic and noise, decreases in air quality, prospects of blasting damage, and environmental justice issues, among other effects, while neglecting to quantify any costs related to the mine's GHG emissions and its contribution to climate change.

Plaintiffs contended that the economic costs of GHGs were not quantified and that BLM should have used the Social Cost of Carbon to forecast these economic costs. BLM asserted that NEPA does not require the agency to monetize all of a proposed action's effects. Further, BLM argued that it was not required to utilize the Social Cost of Carbon to calculate costs associated with the mine's GHGs.

The court found that BLM adequately explained

its concerns with using the Social Cost of Carbon, and thus did not violate NEPA by failing to use this tool to calculate costs associated with the mine's GHGs. The court nevertheless concluded the treatment in the EIS of GHGs and their costs was problematic, finding it:

> . . to be spread out and disjointed in such a way that the public is unlikely to find the related pieces and put them together or have confidence that the agency considered the interrelated qualitative and quantitative information as a whole.

One section in the EIS on GHGs calculated the volume of projected GHGs from the proposed mine, including indirect emissions from combustion of the coal produced, and placed those emissions in the context of total global GHG emissions. A separate section on climate change qualitatively discussed the effects of GHGs on climate generally, and acknowledged that there are many socioeconomic costs and impacts from climate change, though without reference to the GHGs the mine would generate. Meanwhile, the socioeconomics section was silent as to the mine's GHG emissions or climate change, and the associated socioeconomic costs. Accordingly, the Court concluded that BLM had not presented the relevant quantitative and qualitative information and analysis in a way that the Court and the public could be confident that BLM had taken the requisite "hard look" at the mine's impacts from GHGs.

Cumulative Impacts of GHG Emissions

On the second question presented in *Utah Physicians*, the court found that BLM had failed to take a sufficiently hard look at the cumulative impact of GHG emissions from the expansion of the mine. Under the NEPA regulations, a cumulative impact is defined as:

> the impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.

To review the sufficiency of the analysis in the EIS, the court examined the administrative record as a whole to determine whether BLM made a reasonable, good faith, objective presentation of cumulative impacts sufficient to foster public participation and informed decision making. The court noted that a meaningful cumulative impact analysis must address: 1) the area in which the effects of the proposed project will be felt, 2) the impacts that are expected in that area from the proposed project, 3) other actions, past, present, and proposed, and reasonably foreseeable, that have had or are expected to have impacts in the same area, 4) the impacts or expected impacts from these other actions, and 5) the overall impact that can be expected if the individual impacts are allowed to accumulate.

BLM defined the cumulative impacts assessment area as approximately 2.85 million acres over two counties, along with the reasonably foreseeable coal haul transportation route. The EIS inventoried reasonably foreseeable actions and developments in the assessment area over the next 20 years, identified likely coal, oil, and gas development in the assessment area, and discussed cumulative impacts over a dozen different types of resources. While present and reasonably foreseeable future fossil fuel developments in the assessment area were identified in the cumulative impacts analysis, no quantitative or qualitative discussion was provided regarding GHG emissions from these developments, though data regarding other emissions was provided. While the EIS discussed GHGs and climate change generally, and projected GHG emissions were calculated, the cumulative impacts section provided no data or substantive discussion about GHGs from the expansion of the mine, or other present or reasonably foreseeable future actions. The cumulative impacts analysis also did not cross reference these other sections of the EIS that addressed GHGs and climate change.

The District Court concluded that the EIS failed to meaningfully describe and discuss relevant information on other present and reasonably foreseeable future GHG sources. Plaintiffs contended that that BLM should have analyzed the cumulative impacts of all DOI coal mining projects under review, in line with recent decisions in *WildEarth Guardians v. Zinke*, 368 F.Supp.3d 41, 77 (D. D.C. 2019), and *Indigenous Environmental Network v. U.S. Department of State*, 347 F.Supp.3d 561 (D. Mt. 2018). The District Court, however, expressly declined to impose a requirement

that all federal or Department of the Interior mining approvals be included in the cumulative impacts analysis.

Analysis of Mercury Emissions

On the third issue before the court in *Utah Physicians*, the court held that BLM had taken a sufficiently hard look at the impacts associated with mercury emissions from the combustion of coal produced at the mine. In the EIS, BLM quantified the mercury emissions, recognized the impacts to fish, wildlife, and human health from these mercury emissions, and explained why a more detailed mercury analysis was not performed. Plaintiffs argued that BLM failed to adequately analyze the effects of mercury from combustion of the mine's coal, including the effects of mercury deposition on fish near the Intermountain Power Plant (IPP). The existing mine provided about 6 to 18 percent of the coal combusted at IPP on an annual basis, but BLM stated that it was not known with any certainty where the coal mined from the new tract would be shipped and combusted. The court noted that there was no precedent requiring a more detailed analysis by BLM of impacts to the environment from mercury, given the uncertainty as to the location, method and timing of combustion by end-users of the mine's coal. The court concluded that the analysis in the EIS did not violate the requirements of NEPA to take a "hard look" at the impact of mercury emissions.

Conclusion and Implications

Based on BLM's failure to take a sufficiently hard look at the indirect effects and cumulative impacts of GHGs associated with the expansion of the Coal Hollow Mine, the U.S. District Court remanded the EIS to the Bureau of Land Management for revision, without vacating BLM's approval of the FEIS and Record of Decision. The court noted that an order of *vacatur* would disrupt the activities that have commenced since the lease approval, such that the vacatur would "lead to impermissibly disruptive consequences in the interim." While plaintiffs succeeded on the merits of two out of three claims, based on this decision, Alton Coal Development appears likely to proceed without any shift in the mine expansion as proposed.

The case provides some utility to NEPA practitioners, with its evaluation of the analysis in the BLM EIS of GHGs, climate change, and socioeconomic impacts, as well as the indirect effects of combustion of the mine's coal. The opinion put boundaries on the analysis of GHGs, climate change, and associated socioeconomic effects, finding that an agency is not required to use the Social Cost of Carbon to evaluate GHGs and deferring to the agency in the tools it uses to monetize impacts from GHGs and climate change. The court nevertheless underscored that where an agency rejects the use of certain tools or methodologies, it must provide a reasoned explanation and clearly present its quantitative or qualitative information and analysis on a particular impact. The court also made clear that an agency is not required to look to its, or other agency, actions nationwide in evaluating cumulative impacts associated with GHGs and climate change. With respect to indirect, downstream effects associated with fossil fuel production, such as mercury deposition, the opinion supports the approach that indirect effects should be addressed in an EIS where information on downstream activities is available and reasonably certain, but does not require analysis of scenarios that are uncertain.
(Allison Smith)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT REJECTS INVERSE CONDEMNATION CLAIM BY POWER PLANT AGAINST MUNICIPAL UTILITY DISTRICT FOR FAILURE TO DEMONSTRATE CAUSATION

Amedee Geothermal Venture I v. Lassen Municipal Utility District, *Unpub.*,
Case No. CO86978 (3rd Dist. Mar. 26, 2021).

In an *unpublished* March 26 decision, the Third District Court of Appeal rejected an inverse condemnation claim filed against the Lassen Municipal Utility District (LMUD) by the operator of a geothermal power plant in Lassen County. The power plant failed to restart after LMUD replaced a 34.5 kilovolt power line at the plant with a 12.47 kilovolt line. Both the trial court and the Third District Court of Appeal determined that the power plant failed to demonstrate that LMUD's actions actually caused the plant failure. Several other factors, such as a lack of freon and inadequate maintenance, were equally or more likely to have caused the plant's failure.

Factual and Procedural Background

Amedee Geothermal Adventure (Amedee) operated a geothermal power plant in Lassen County, which utilized the energy from local hot springs to generate electricity for sale to the Pacific Gas and Electric Company (PG&E). For decades, the plant became less and less profitable and was characterized by operational problems including inadequate maintenance practices, and an inability to secure sufficient freon after manufacture of freon was banned in the 1990s.

In 2009, the Lassen Municipal Utility District developed a capital improvement plan involving the replacement of a 34.5 kilovolt with a 12.47 kilovolt line at the Amedee plant. After LMUD installed the 12.47 kilovolt line, workers at the Amedee plant were unable to restart it. After multiple attempts to restart, the plant's generator breaker failed and came apart. In 2014, after the plant was brought up and running again, the owners of the Amedee plant shut it down.

At the Trial Court

Amedee brought a lawsuit against LMUD alleging breach of contract, negligence, and inverse condemnation. On the breach of contract and negligence causes of action, the jury returned a defense verdict finding that LMUD was not liable for breach of contract, and that Amedee failed to "prove that it was harmed by a dangerous condition of LMUD's property.) " A bench trial then followed on Amedee's inverse condemnation claims. During the bench trial, the trial court made its own factual findings. The trial court noted that the Amedee plant ultimately failed due to one of three "chronic problems" that it had. First, it lacked adequate freon, the plant's operating fluid. Second, the plant suffered from aquification to the surface of the hot water around well casings, and the plant lacked the financial means to fix this problem. Third, the plant was plagued by inadequate maintenance and a failure to replace aging parts and components at the plant.

As to the causation required to establish an inverse condemnation claim, the trial court concluded that nothing in the evidence presented during trial established a causal connection between the line change and the failure of the plant. This included testimony by Amedee's two experts, who were unable to conclude that the line change performed by LMUD caused the plant to fail.

The Court of Appeal's Decision

On appeal, the Third District Court of Appeal upheld the trial court's rulings as to Amegee's breach of contract and negligence claims.

Inverse Condemnation Claim

Regarding inverse condemnation, Amedee raised two arguments claiming that the trial court's ruling "on the inverse condemnation claim must be reversed because the court improperly relied on the jury's verdict on Amedee's [negligence] claim." Amedee argued that the jury's verdict was not relevant to the inverse

condemnation claim and the trial court's reliance on the jury's verdict was also not proper because the jury included LMUD ratepayers. The Third District Court of Appeal rejected these claims, finding that the trial court made its own factual findings when upholding the trial court's rejection of Amedee's inverse condemnation claims.

The court upheld the trial court's decision regarding inverse condemnation by pointing to specific language in the lower court's decision indicating that the court:

> . . .intend[ed] to render its independent opinion on the matter giving due regard go the jury's findings as best they can be determined.

The trial court noted that the strongest evidence that LMUD's line change caused the breakdown of the Amedee plant was the fact that the plant's damage was more or less contemporaneous with LMUD's line voltage change. However, there were several other equally plausible reasons, that could have caused the plant to break down. These included: 1) the extended period of time that the plant was shut down; 2) fairly extensive plant maintenance had been performed at the same time as the line change; 3) Amedee started both of its large electrical brine pump engines at the same time, which was unusual; and 4) there had been ongoing problems related to a lack of freon and lack of maintenance at the plant.

Ultimately, the court reviewed the record and determined that Amedee never contended that there was any inherent inadequacy of a 12.47 kilovolt line at the plant, and they never showed evidence of how the line changed cause harm at the plant. Another large challenge was that after repairs were made to the Amedee plant after the line change, it had many of its most productive years while operating with LMUD's new 12.47 kilovolt line until closing in 2014.

Because Amedee failed to establish that LMUD's change of the power line to the plant caused its failure, the Third District Court of Appeal upheld the trial court's decision rejecting Amedee's inverse condemnation claims. The court determined that the trial court proceedings clearly indicated that the lower court performed its own independent analysis of the facts to determine that Amedee failed to show that LMUD's action caused a breakdown of the plant.

Conclusion and Implications

The *Amedee* decision highlights the key requirement of proving causation when bringing inverse condemnation actions against government agencies. In this case, Amedee was simply unable to show that LMUD's change of electrical lines was responsible for the power plant's failure. The court's *unpublished* opinioon can be found here: https://www.courts.ca.gov/opinions/nonpub/C086978M.PDF
(Travis Brooks)

THIRD DISTRICT COURT UPHOLDS DECISION TO NOT RECIRCULATE EIR THAT STUDIED IMPACTS OF A DENSER PLANNING DISTRICT BEFORE DISTRICT WAS CHANGED

Citizens for Positive Growth and Preservation v. City of Sacramento
___Cal.App.5th___, Case No. C090205 (3rd Dist. Feb. 26, 2021).

The Third District Court of Appeal in *Citizens for Positive Growth and Preservation v. City of Sacramento* held that the City of Sacramento (City) appropriately considered the higher density impacts of including three blocks of a residential special planning district into a project that involved a city center Specific Plan. The Court of Appeal also held that no recirculation of the draft Environmental Impact Report (EIR) was required under the California Environmental Quality Act (CEQA) resulting from the removal and reapproval of those three blocks as part of the project following the draft EIR.

Factual and Procedural Background

The project is the Sacramento Central City Specific Plan (Plan). Part of the Plan involved removal of a three-block area from the Alhambra Corridor Special

Planning District (Alhambra SPD) and placing those three blocks in the Plan area by way of City ordinance. The three blocks had previously been removed from the Alhambra SPD by way of City ordinances in 2016, a year before the Plan was proposed.

But after the draft EIR was circulated in 2017, a challenge by Citizens to the prior three block area ordinances for failure to prepare an accompanying EIR was upheld, causing rescission of the 2016 ordinances. The Plan project was thus modified to include a new ordinance removing the three-block area from the Alhambra SPD. The draft EIR for the Plan had already included analysis of the impacts of placing the three-block area within the Plan area.

The Alhambra SPD was created in 1992 to assist in the preservation of the neighborhood scale and character while providing additional housing opportunities in the area. The Alhambra SPD had special regulations and standards, including a requirement that development within 300 feet of a residential zone not exceed 35 feet in height. This "residential preservation transition buffer zone" was to protect residential neighborhoods from visual intrusion by new development that is out of scale with adjacent residential neighborhoods.

When the City adopted the 2016 ordinance, the boundary of the SPD was shifted three blocks to align with Interstate Business 80 and the three blocks were rezoned to the City's base zoning designations, without the buffer zone protections. The City adopted the 2016 ordinances without CEQA review. A CEQA lawsuit was filed in 2016 by Citizens

In September 2017, while the first lawsuit was pending, the City circulated the draft EIR for the Plan to the public. The Plan was a land use planning document establishing guidelines and policies for the 4.25-square-mile "core" central city area. The Plan established the Central City SPD covering the three-block area that had been removed by the 2016 ordinances.

A chief goal of the Plan was to facilitate and encourage more compact infill development within the Central City SPD, including by allowing expanded heights and densities in areas near transit services. The 2017 draft EIR discussed how the proposed project would increase maximum allowable height in the various zones contained within the Central City SPD.

The 2017 draft EIR assumed that the three-block area had already been removed pursuant to the 2016 ordinances. The 2017 draft EIR thus analyzed how the project would increase the maximum allowable heights within the various base zones of the three-block area, without regard to the Alhambra SPD height restrictions. Thus, the draft EIR analyzed the impacts of the Plan at full build-out with the existing physical conditions in the area affected by the Plan.

In January 2018, after the close of the public comment period on the draft EIR, the court in the first lawsuit challenging the 2016 ordinances issued its decision requiring the 2016 ordinances to be rescinded.

In February 2018, the City released the final EIR for the plan, discussing the first lawsuit and the effect that invalidation of the 2016 ordinances would have on the project. The City explained that the court's decision created an overlap between the boundaries of the Alhambra SPD and the Central City Plan and a potential inconsistency in zoning designation for parcels in the three-block area.

To remedy the inconsistency, the City proposed in the final EIR a new ordinance to again remove the three-block area from the Alhambra SPD. The City acknowledged that removing the three-block area from the Alhambra SPD could result in taller developments, but those taller developments would not change the draft EIR analysis, which had already studied the taller developments in the three-block area as part of the Plan. Thus, the new ordinance would merely bring the description of the project into conformance with the assumed conditions in the draft EIR and would not have any new significant environmental impacts or cause a substantial increase in the severity of any previously identified impacts that were not already analyzed in the draft EIR.

In April 2018, the City certified the final EIR and adopted a new ordinance removing the three-block area from the Alhambra SPD. Citizens filed the present lawsuit claiming that the City violated CEQA by not studying the impacts of removing the three-block area from the Alhambra SPD and by adding significant new information to the final EIR after the close of public comment on the draft EIR without revising and recirculating the EIR to the public. The superior court denied Citizen's claims.

The Court of Appeal's Decision

The Court of Appeal, applying the substantial evidence standard of review, held that EIR appropriately analyzed the potential physical impacts of develop-

ment that would occur from the new maximum allowable heights for each zoning designation within the Plan area, including those for the three-block area. The Court of Appeal, applying the substantial evidence standard of review, also held that the new information in the final EIR regarding the rescission of the 2016 ordinances and the passage of a new ordinance was not significant new information in the context of the EIR because the draft EIR already took into consideration the environmental impacts of removing the three-block area from the Alhambra SPD and including that area within the Plan.

Analysis of Impacts of Changes on Alhambra SPD

Citizens argued that the EIR failed to analyze the impact of the changes on the Alhambra SPD allowing increased building heights in the three-block area in relation to what was allowed under the Alhambra SPD. The Court of Appeal rejected that argument, finding that the project was not the Alhambra SPD, but instead the comprehensive Central City Specific Plan, which included the changes in the rule of the Alhambra SPD. The EIR appropriately analyzed the potential physical impacts of the project, including the new maximum allowable heights for each zoning designation within the Plan area. To study only the impacts on the Alhambra SPD as suggested by Citizens would have too narrowly circumscribed CEQA review.

Additionally, Citizens was wrong in claiming that the focus of the analysis should have been on the SPD development standards. The baseline for CEQA analysis is not the pre-existing development standards, but instead the pre-existing development. The final EIR expressly discussed the differences in height restrictions and other limitations under the Alhambra SPD and the Central City Specific Plan and explained how the rescission of the 2016 ordinances and the new ordinance relating to the three-block area did not alter the draft EIR's conclusions.

No Recirculation Required

Citizens claimed that the City violated CEQA by failing to recirculate the EIR despite making significant changes to the project after the close of the public comment period. However, recirculation is required only when the new information is significant. New information added to an EIR is significant when the EIR has been changes in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect. (14 Cal. Code Regs., § 15088.5, subd. (a).)

But recirculation is not required if the new information merely clarifies, amplified, or makes insignificant modifications to an otherwise adequate EIR. The Court of Appeal concluded that because the information added to the final EIR about rescission of the 2016 ordinances and the new ordinance had no effect on the existing physical conditions or the maximum heights allowed under the project, the City correctly concluded that the new information did not alter the EIR's analysis of the project's environmental impacts.

Conclusion and Implications

This opinion by the Third District Court of Appeal demonstrates how not all new information contained in a final EIR that may be "significant" from a legal perspective (rescinded and new ordinance) may not be significant from a CEQA perspective requiring recirculation of the EIR because the new information does not change the analysis of potential significant environmental impacts evaluated in the previously circulated draft Environmental Impact Report. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/C090205.PDF
(Boyd Hill)

SECOND DISTRICT COURT UPHOLDS JUDGMENT AND FEE AWARD IN INVERSE CONDEMNATION ACTION

Felkay v. City of Santa Barbara, 62 Cal.App.5th 30 (1st Dist. 2021).

An owner of an oceanfront lot filed a petition for writ of mandate and complaint for inverse condemnation after the City of Santa Barbara (City) denied a coastal development permit to construct a residence on the property. The Superior Court denied the *mandamus* relief but entered judgment on a jury award for the landowner and awarded attorney and expert fees. The City appealed and the Court of Appeal subsequently affirmed.

Factual and Procedural Background

Felkay purchased an ocean-front residential lot in Santa Barbara. The property was a "flag lot," consisting of a narrow driveway from the street to the remainder of the property, which then sloped downward toward the ocean, ending in a sheer cliff above the beach. Felkay submitted a proposal to build a single-family residence. After various modifications, City staff concluded that: 1) the proposal was inconsistent with Santa Barbara Local Coastal Plan Policy 8.2, which generally prohibits development on a bluff face; and 2) that the area above the bluff face was not developable.

City staff recommended that the City planning commission approve the application notwithstanding the inconsistency with Policy 8.2 to avoid an unconstitutional taking. The planning commission, however, rejected the permit because it violated Policy 8.2. Felkay then appealed to the city council, which likewise denied the permit. The city council found that Felkay failed to show that the proposed development: 1) was not on a bluff face, 2) was compatible with the prevailing character of the neighborhood, 3) would be geologically stable, and 4) was based on a reasonable investment-backed expectation. It also found that a takings determination was not ripe because Felkay had not investigated other potential uses of the land.

At the Superior Court

Felkay filed a petition for writ of mandate and complaint for inverse condemnation. The City demurred to the causes of action for inverse condemnation on the grounds that the claims were not ripe and that Felkay had not exhausted his administrative remedies. The Superior Court sustained the demurrer to the cause of action for inverse condemnation by physical taking but otherwise overruled the demurrer. After a hearing, the Superior Court denied the petition for writ of mandate. The case then proceeded to the liability phase of the inverse condemnation claims. Following trial, the Superior Court found that Felkay's claims were ripe; that he was not required to pursue futile applications; denial of the permit rendered the property unbuildable and deprived Felkay of all economic benefit of the property; and the denial constituted a "taking." Following a damages trial, a jury found the City was liable to Felkay for the fair market value of $2.4 million. After judgment, the Superior Court awarded attorney and expert fees of $1,007,397.

The Court of Appeal's Decision

Ripeness

The City first contended that the inverse condemnation claim was not ripe because, after it denied the permit, Felkay did not submit a revised application for another proposal. Typically, a property owner must submit more than one proposal to the permitting authority seeking variances or reducing environmental impacts to the extent necessary to allow at least some economically beneficial or productive use of a property. Here, however, the Court of Appeal disagreed with the City, finding that the City had rejected any variance or waiver and "made plain" that no development would be permitted below the bluff face determination, and there was evidence that the area above the bluff face was not buildable. Because any further application would essentially be "futile," Felkay was not required to submit a revised application, and the claim was deemed ripe.

Exhaustion of Administrative Remedies

The Court of Appeal next addressed the City's claim that Felkay had not exhausted his administra-

tive remedies. The Court again disagreed with the City, finding that Felkay had appealed the Planning Commission's denial to the city council, and the City had not been denied the opportunity to amend the agency decision and/or grant a variance to avoid liability.

Exhaustion of Judicial Remedies

The City also argued that Felkay failed to litigate his writ petition to conclusion because he did not make a Public Resources Code § 30010 claim (which authorizes a local government to approve a project that violates coastal restrictions in order to avoid an unconstitutional taking) in those proceedings. The Court of Appeal found that the City was estopped from making this argument on account of a stipulation between the parties that limited the issues to be heard in the mandate proceeding (and which reserved the inverse condemnation claims for trial).

Conclusion and Implications

The case is significant because it contains a substantive discussion of takings and inverse condemnation claims within the Coastal Zone, particularly with respect to ripeness. The decision is available online at: https://www.courts.ca.gov/opinions/documents/B304964.PDF
(James Purvis)

SIXTH DISTRICT COURT FINDS EIR FOR RESIDENTIAL SUBDIVISION VIOLATED CEQA BY FAILING TO PROVIDE SUBSTANTIAL EVIDENCE OF NO SIGNIFICANT IMPACTS TO WILDLIFE CORRIDORS

Landwatch Monterey County v. County of Monterey, Unpub., Case No. H046932 (6th Dist. Mar. 29, 2021).

In an *unpublished* decision issued March 29, 2021, the Sixth District Court of Appeal in *Landwatch Monterey County v. County of Monterey* partially upheld the trial court's finding that the final Environmental Impact Report (EIR) for a residential subdivision project did not comply with the California Environmental Quality Act (CEQA) in its treatment of potential impacts to wildlife corridors. The appellate court rejected petitioner's cross-appeal regarding the EIR's discussion of groundwater impacts, and thus reversed the trial court's judgment requiring the County of Monterey to recirculate the EIR on topics related to groundwater resources.

Factual Background

In 2001, Real Party in Interest, Harper Canyon Realty, LLC, submitted a development application to the County of Monterey (County) for a combined development permit for the proposed Harper Canyon Subdivision Project. The Project contemplates a residential subdivision that would develop 344 acres into 17 residential lots for single-family homes. The undeveloped project site is located along Highway 68 and bordered by an existing housing division, the Toro County Park, and the Fort Ord Public Lands.

Before deeming the development application complete in 2002, the County health department required preparation of a project-specific report for the Project site's hydrogeology and the Project's potential impacts to groundwater. The consultant-prepared study (Todd Report) concluded the Project would have a negligible effect on ground water quality and quantity, and that adequate water supply existed.

In 2005, the County's planning commission directed planning department staff at the County of Monterey Resource Management Agency to prepare an Environmental Impact Report for the Project. Three years later, while drafting the EIR, County staff and its consultant discussed a 2007 regional groundwater study prepared by Geosyntec Consultants for the Monterey County Water Resources Agency (Geosyntec or El Toro Study). The study evaluated groundwater resource capacity of the County's El Toro Planning Area and hydrogeologic connectivity between existing subareas. The study concluded that the Planning Area's Primary Aquifer System was in overdraft, but that current and increased levels of pumping could be sustained for decades due to existing groundwater storage and production potential.

Though the Geosyntec study did not address the

Project specifically, the Project's site and groundwater wells partially fell within the El Toro Planning Area. As such, County staff directed the Project's consultant to seek input from the Monterey County Water Resources Agency (Agency) about potential impacts on the El Toro Primary Aquifer System from the Project's water demand. The Agency took the position that a sustainable long term water supply existed for the Project because it would be served by a separate water source—the Salinas Valley Water Project, which was scheduled to become operational by 2010.

In October 2008, the County released the Project's draft EIR (DEIR) for public comment and review. Initial comments concerned the DEIR's groundwater resources and hydrogeology section, which largely relied on the Todd Report to conclude that the Project would have less than significant long-term impacts on regional groundwater resources. Though the DEIR concluded that the Salinas Valley Water Project would sustain the Project, commenters observed that the DEIR failed to consider whether the Project would exacerbate the Geosyntec study's overdraft findings.

In 2010, the County prepared and recirculated a revised section of the DEIR (Revised DEIR) limited to transportation issues. That same year, Geosyntec prepared a supplement to its 2007 groundwater study for the Monterey County Water Resources Agency. The 2010 Geosyntec study did not reference the Project. Similarly, the Revised DEIR did not reference the 2010 Geosyntec study or revise the groundwater resources chapter.

In December 2013, the County released the Project's Final EIR (FEIR). The FEIR included the 2008 DEIR, the 2010 Revised DEIR, comments received and responses thereto, as well as resulting text changes, clarifications, or amplifications necessary to address comments raised over the course of the County's review of the Project. The FEIR also included a "master response" to comments relating to water resources issues, which discussed the Geosyntec studies and their relevance to the Project's groundwater resources. The FEIR also revised the location of the Project's groundwater wells from the El Toro Groundwater Basin to the Corral de Tierra Subbasin of the Salinas Valley Groundwater Basin. Unlike the El Toro Basin, the Corral de Tierra Subbasin is not currently affected by overdraft. Finally, the FEIR included two new paragraphs that were not previously in the DEIR, which addressed the environmental issue of the Project's impacts to wildlife corridors.

Procedural Background

In early 2014, the County planning commission (Commission) considered the Project and FEIR, and ultimately denied approval of the Project on grounds that the Harper Canyon had not provided sufficient evidence of long-term water supply. The Commission cited to evidence that the Corral de Tierra Subbasin did not receive hydrological benefits from the Salinas Valley Water Project, as the FEIR purported.

Harper Canyon appealed the Commission's denial to the Monterey County board of supervisors (Board). Prior to a hearing in December 2014, counsel for Landwatch Monterey submitted letters from experts regarding the FEIR's inadequacy and flawed analyses. In April 2015, the Board adopted a resolution certifying the FEIR and approving the Project. The Board's findings concluded that the FEIR did not require circulation because the FEIR merely clarified and amplified the DEIR's analysis and did not contain significant new information. The Board conditioned the approval with various requirements, including one condition related to a "Wildlife Corridor Plan."

In May 2015, petitioners filed petitions for writ of mandate alleging the County violated CEQA by approving the Project. In 2018, after consolidating the two actions, the Monterey County Superior Court granted and denied the petitions in part. The court held that the FEIR should be decertified as to the groundwater and wildlife corridor analyses only. In denying all other claims, the court upheld the County's certification and the remaining portions of the FEIR.

In 2019, the trial court filed a peremptory writ of mandate directing the County to set aside the portions of its Resolution as to the groundwater and wildlife corridor analyses, and to comply with CEQA by remedying the deficient EIR before approving the revisions to the combined development permit. The parties appealed.

The Court of Appeal's Decision

The First District Court of Appeal considered the legality under CEQA of the County's certification of the FEIR with respect to the Project's effects on groundwater resources and on a corridor to facilitate wildlife movement. The court's review considered

whether the County prejudicially abused its discretion in certifying an EIR that failed to include relevant information, thereby precluding informed decisionmaking and public participation.

Groundwater Resources

The County and applicant's appeal argued the trial court erred in concluding that the County was required to recirculate the FEIR before certifying it. In their cross-appeal, petitioners argued the FEIR is informationally inadequate because the environmental setting for groundwater resources is internally contradictory and omits critical information about the basin's overdraft conditions and potential cumulative impacts.

The First District Court of Appeal disagreed with petitioners' claim that the environmental setting described in the FEIR admitted both a surplus and an overdraft of groundwater in the Corral de Tierra Subbasin. Rather, the FEIR acknowledged that some areas within the subbasin would not meet estimated water demand upon buildout, therefore, development should be extremely rationed in the area. Conversely, the FEIR did not claim the Project would benefit from a surplus of water—rather, it explained that future property owners' contributions to the Salinas Valley Water Project coupled with county agencies' opinions, supported the conclusion that the Project has a long-term sustainable groundwater supply that would yield a less-than-significant impact on groundwater resources. Thus, the appellate court held that the County did not ignore or omit critical information about the Project's setting to render the FEIR informationally insufficient.

The Court of Appeal further rejected petitioners' challenge to the FEIR's cumulative impact analysis. Petitioners argued that the impact of the Project, in combination with others, exceeds the threshold significance, and that the Project's effect is a considerable contribution to significant effects on groundwater resources. The appellate court found that substantial evidence supported the County's decision that the Project's incremental effect would not be cumulatively considerable. In referencing the Geosyntec study, the FEIR observed that the primary aquifer is in overdraft, but the Project is located in an area with a large, saturated thickness of that aquifer. Moreover, any significant impacts caused by groundwater pumping will be mitigated by water provided by the Salinas Valley Water Project. Thus, petitioners failed to meet their burden in showing that the FEIR's cumulative impacts analysis fails under CEQA.

Finally, the appellate court reviewed the record for substantial evidence to determine whether the County appropriately concluded that revisions made to the FEIR from the DEIR's groundwater discussion did not mandate recirculation of the FEIR. The court explained that recirculation is required where it is revealed that the DEIR omits critical information such that it is so fundamentally inadequate and conclusory that it precludes meaningful public review and comment. Here, substantial evidence supports the County's decision to not recirculate the FEIR. The County made substantive changes to the FEIR in response to public comments on the current basin's overdraft conditions. The new information in the FEIR merely bolstered the discussion of the Geosyntec study and more adequately described the Salinas Valley Basin and Corral de Tierra Subbasin—it did not constitute "significant new information" that mandated recirculation. For these reasons, the appellate court reversed the trial court's ruling, finding that it erred in concluding that the DEIR's inadequacies required recirculation of the groundwater resources analyses.

Wildlife Corridors

The County and Applicant challenged the trial court's ruling that the FEIR's analysis of potential impacts to wildlife corridors was deficient. The trial court concluded the FEIR failed to adequately explain why the Project would not significantly impact wildlife corridors. On appeal, the County argued that the trial court erred because substantial evidence did support the FEIR's finding of no significant impacts.

The FEIR described "wildlife corridors" as:

> . . .established migration routes commonly used by resident and migratory species for passage from one geographic location to another [that] serve to link otherwise fragmented acres of undisturbed areas.

The report's biological resources section observed that maintaining the continuity of these established corridors is important to sustaining species diversity and wildlife populations. Therefore, it established that an impact was considered significant if the Project substantially interfered:

> . . .with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors.

During review of the Project, the County received numerous public comments regarding the DEIR's seemingly incomplete discussion of the project's site active mountain lion habitat and corridor. In October 2010, the County had received a study related to wildlife connectivity in the region surrounding the Project site, which further reiterated that the development was located in prime habitat for wildlife, including mountain lions. The 2013 FEIR amended the DEIR by adding two paragraphs that referenced a wildlife technical report related to the nearby Ferrini Ranch Subdivision. However, the FEIR did not append or incorporate by reference that project's technical memorandum, or discuss the 2010 connectivity study. After the Commission denied the Project, the County prepared a report for the Board recommending that approval of the Project be conditioned on the applicant's submission of a Wildlife Corridor Plan.

The First District ultimately concluded that the FEIR failed to provide basic information about the wildlife corridor that is indisputably located around the Project. Because the FEIR did not definitively state whether the corridor overlaps a portion of the Project site, the County could not establish an appropriate baseline to conclude whether an impact is significant. For example, while the FEIR noted that the wildlife corridor in the surrounding El Toro Creek area is not on the Project site, the FEIR does not explain how the corridor relates to the passage or whether the corridor basses by or through the Project site. Rather, the County determined without any study or supporting documentation that the layout of the Project will be sufficient to maintain the corridor and prevent interference with animal movement. This absence of information renders the FEIR informationally deficient under CEQA.

The FEIR's discussion of potential impacts to wildlife corridors also relied on the technical memorandum for the separate Ferrini Ranch Project, which confirmed the importance of the El Toro Creek wildlife corridor. However, the FEIR failed to address whether the corridor passes through *this* Project, thereby omitting basic information necessary for a reader of the EIR to understand the topic of the wildlife corridor and the Project's potential impacts to it. To this end, the appellate court concluded that comments from staff did not constitute substantial evidence that the Project would not have significant effects because the comments were conclusory and vague. Staff did not explain how the Project's low-density configuration of homes was evidence that the impact on any corridor was significant.

Deference

Although the Court of Appeal recognized that it must be deferential to the County's determination, it qualified that the overriding purpose of CEQA is to ensure that agencies regulate activities that may adversely affect or damage the quality of the environment. Here, the County failed to provide substantial evidence to support its conclusion that the Project would not have significant impacts on wildlife. This error was prejudicial because it deprived decisionmakers and the public of substantial relevant information about the Project's likely impacts. For these reasons, the First District directed the County to not take any further action on the Project without preparing, circulation, and considering a legally adequate EIR regarding the wildlife corridor issues.

Conclusion and Implications

The First District Court of Appeal's detailed opinion marks the conclusion of a 20-year process to review and approve a large subdivision project in Monterey County. The opinion provides insight into the requisite analyses for a legally sufficient EIR. Notably, the First District disagreed with the trial court's finding that the project's EIR failed to adequately consider groundwater impacts. Given the sensitive nature of groundwater resources in the area, the appellate court's opinion sheds light on considerations that local agencies and developers must consider. The opinion also emphasizes the importance of a robust biological resources analysis. As evidenced by the holding, an agency prejudicially abuses its discretion if it fails to adequately describe the interaction between, and potential effects of, a project on a wildlife corridor. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/H046932.PDF
(Bridget McDonald)

SECOND DISTRICT COURT FINDS THAT LOCAL AGENCY FORMATION COMMISSIONS CANNOT COMPEL PAYMENT OF ATTORNEY FEES PURSUANT TO INDEMNITY AGREEMENTS

San Luis Obispo Local Agency Formation Commission v. City of Pismo Beach,
61 Cal.App.5th 595 (2nd Dist. 2021).

In a March 3, 2021 decision, the Second District Court of Appeal upheld a trial court decision that held that the Cortese-Knox-Hertzberg Act (Act) does not authorize a Local Agency Formation Commission (LAFCO) to require applicants to enter into an indemnification agreement requiring payment of attorney's fees incurred after LAFCO's administrative processing of an annexation application. The Act does not authorize collection of attorney fees incurred after the administrative process leading to LAFCO's acceptance or denial of an annexation application.

Factual and Procedural Background

The Central Coast Development Company (Central Coast) owned approximately 154-acres of property within the sphere of influence of the City of Pismo Beach (City). Central Coast intended to construct 252 single family homes and 60 senior units and annex into the City. The City approved Central Coast's application for a development permit for the property. The City and Central Coast then applied to the San Luis Obispo LAFCO to annex the project site into the City. LAFCO denied the application and the City and Central Coast brought a lawsuit challenging LAFCO's decision to deny annexation. The trial court upheld LAFCO's rejection of the City and developer's annexation request.

LAFCO's annexation application signed by the City and Central Coast included indemnity language stating that:

> . . .[a]s part of this application, Applicant agrees to defend and indemnify, hold harmless and release [LAFCO], its officers, employees, attorneys, or agents from any claim, action or proceeding brought against any of them, the purpose of which is to attack, set aside, void, or annul, in whole or in part, LAFCO's action on the proposal or on the environmental documents submitted to or prepared by LAFCO in connection with the proposal. This indemnification obligation shall include, but not be limited to, damages, costs, expenses, attorneys' fees, and expert witness fees that may be asserted by any person or entity, including the applicant arising out of or in connection with the application.

After prevailing on the City and Central Coast's lawsuit on the merits, LAFCO presented a bill to the City and Central Coast for approximately $400,000 for attorney's fees and costs incurred defending the City and Central Coast's lawsuit. The City and Central Coast refused, and LAFCO brought an action to recover its attorney's fees and costs.

The trial court granted the City and Central Coast's motion for judgment on the pleadings and denied LAFCO's request for leave to amend its lawsuit.

The Court of Appeal's Decision

The Second District Court of Appeal struck down each of LAFCO's arguments that it was entitled to collect attorney's fees.

Enforceable Contract Claim

First, the court struct down LAFCO's argument that the indemnity agreement above was an enforceable contract provision. The court noted that a contract requires consideration, which consists of either a benefit to the promisor or a detriment to the promisee. A promise to do something the promisor is already legally required to do is not consideration. Here, LAFCO had a statutory duty to accept all completed applications and to review and approve or disapprove an application.

Government Code Section 56383

LAFCO argued that it had the power under Government Code § 56383 to charge fees to cover its costs, arguing it was not only authorized to col-

lect fees for filing and processing of applications, but also anticipated attorney fees that may result from challenging LAFCO's decision. It argued that the indemnity provision included as part of the LAFCO application was given as consideration for not requiring anticipated attorney fees to be paid as part of the initial application fee. The court noted that Government Code § 56838, does not allow for the collection of costs and fees incurred during post administrative action, such defending lawsuits challenging a LAFCO decision.

Accordingly, the court found that LAFCO lacked authority under Government Code § 56383 to require the indemnity agreement.

Section 56383 subdivision (a)(1)-(4) provides that:

> The commission may establish a schedule of fees and a schedule of service charges pursuant to this division including but not limited to: (1) Filing and processing applications filed with the commission. (2) Proceedings undertaken by the commission and any reorganization committee. (3) Amending or updating a sphere of influence. (4) Reconsidering a resolution making determinations.

Subdivision (b) of § 56383 provides that the fees and charges permitted by that section "shall be imposed pursuant to [§] 66016." Government Code § 66016 requires a government agency, prior to approving an increase in an existing fee or service charge, to hold at least one open and public meeting at which "oral or written presentations can be made, as part of a regularly scheduled meeting."

The court noted that LAFCO did not conduct any such meeting to authorize levying attorney's fees. The court also noted that § 56383 contemplates that the fees charged under the section "will be limited to those necessary to the administrative process, not to post-decision court proceedings." Provisions of the statute require the executive officer of LAFCO to settle the costs charged under § 56383 at the end of the *administrative proceedings*. Section 56383 does not provide for the collection of costs incurred after administrative proceedings.

Implied Power Claim

The court also rejected Central Coast's arguments that it had "the power implied from its purpose to require the indemnity agreement" providing for payment of attorney's fees. Here arguments of implied authority were blunted by Code of Civil Procedure § 1021, which provides:

> Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.

Here, attorney's fees in post-administrative actions for LAFCO are not specifically provided for by statute, and there was no valid agreement for such fees.

Conclusion and Implications

The *San Luis Obispo LAFCO v. City of Pismo Beach* decision provides important clarification as to what fees local agencies can require applicants to pay. As to LAFCOs, the decision makes clear that the Government Code does not authorize LAFCOs to require applicants to indemnify or pay LAFCOs attorney costs or fees incurred *after* the end of administrative proceedings. The court's published opinion is available online at: https://www.courts.ca.gov/opinions/documents/B296968.PDF

(Travis Brooks)

FIRST DISTRICT COURT UPHOLDS EIR UNDER CEQA FOR EXPANSION OF AGGREGATE OPERATION FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Stop Syar Expansion v. County of Napa, ___Cal.App.5th___, Case No. A158723 (1st Dist. Apr. 3, 2021).

In a *partially* published decision, the First District Court of Appeal in *Stop Syar Expansion v. County of Napa*, rejected a challenge to Napa County's (County) certification of an Environmental Impact Report (EIR) for the expansion of Syar Industries, Inc.'s aggregate operation. The appellate court upheld the trial court's determination that petitioners failed to adequately exhaust their administrative remedies pursuant to the County code's appellate proceedings, and failed to establish that the Project was inconsistent with the County's General Plan.

Factual and Procedural Background

In May 2008, Syar Industries, Inc. (Syar) filed an application with the County to expand its aggregate mining operation (Project). In October 2015, after more than seven years of environmental reviews, the County planning commission (Commission) certified the final EIR under the California Environmetal Quality Act (CEQA), and approved a modified version of the Project, which permitted an expansion half the size of that originally sought. The Commission also conditioned the permit's approval on more than 100 pages of conditions and mitigation measures.

Petitioner, Stop Syar Expansion (SSE), appealed the Commission's certification of the EIR and project and permit approvals to the County board of supervisors (Board). Petitioner asserted that the EIR and approvals were deficient in numerous respects. After a year of additional environmental review and public hearings, the Board issued a 109-page decision that rejected petitioner's appeals, certified the EIR, and approved an even-further modified Project and permit.

Petitioner filed a petition for writ of mandate under CEQA challenging the Board's certification of the EIR. The petition challenged 16 purported deficiencies in the EIR. After briefing and a hearing on the merits, the Napa County Superior Court denied the writ petition on various grounds. The court denied the merits of some of petitioner's claims, while rejecting others on grounds that petitioner failed to exhaust their administrative remedies.

Petitioner timely appealed, claiming the EIR remained deficient in five areas. Petitioner contended the EIR failed to properly analyze air quality impacts as to daily particulate emissions, failed to establish an appropriate baseline for considering truck traffic emissions, and imposed insufficient mitigation for the loss of carbon sequestration capacity due to loss of oak woodlands. Petitioner also claimed the EIR relied on an inappropriate water usage baseline and failed to adequately consider the Project's impacts to water quality. Separate from its CEQA claims, petitioner also argued that the EIR failed to address the Project's asserted inconsistencies with the County's General Plan.

The Court of Appeal's Decision

The First District Court of Appeal considered whether the County prejudicially abused its discretion in certifying the EIR and approving the related Project approvals. The court's review of the EIR would look not to perfection, but for adequacy, completeness, and a good faith effort at full disclosure of the analytic route the County took from evidence to action. Thus, to determine whether the County abused its discretion, petitioner must establish that the EIR failed to include relevant information thereby precluding informed decisionmaking and informed public participation.

Exhaustion of Administrative Remedies

The First District Court of Appeal considered whether petitioner failed to adequately exhaust their administrative remedies as to their air quality and water usage claims. The essence of the doctrine is the public agency's opportunity to receive and respond to the "exact" factual issues and legal theories before they are subject to judicial review.

The exhaustion analysis entails a dual inquiry. First, pursuant to Public Resources Code section

21177, petitioner must demonstrate that it participated in the Commission hearings before the issuance of the notice of determination, and that the issues raised in the instant court action were raised during those proceedings.

Second, and per the court's holding in *Tahoe Vista Concerned Citizens v. County of Placer,* 81 Cal. App.4th 577 (2000) (*Tahoe Vista*), petitioner must establish that it exhausted any remedies provided by the County. Here, the Napa County Code provides for Commission actions to be appealed to the Board. The code requires that a challenger file a "notice of intent to appeal" within ten days and submit an "appeal packet" that identifies and explains the basis of the specific factual or legal determination that is being appealed. To avoid waiver, the appellant must expressly state why the Commission prejudicially abuse its discretion or failed to sufficiently consider facts before making its decision. Thus, petitioner must show that it timely filed a notice of intent to appeal and submitted an appeal packet that specifically identified the claims raised in its petition for writ of mandate.

Based on these principles, the Court of Appeal rejected petitioner's argument that, pursuant to *Citizens for Open Government v. City of Lodi,* 144 Cal.App.4th 865 (2006) (*Citizens*) and *California Clean Energy Committee v. City of San Jose,* 220 Cal.App.4th 1325 (2013) (*Clean Energy*), it was not required to exhaust its administrative remedies under the County's appeal ordinance.

In *Citizens*, the relevant city code did not require that an appellant specifically identify the issues it took with the planning commission's decision. Rather, the code provided that any person could appear and present their views and comments, but qualified that a subsequent court challenge may be limited to only those issues raised by the appellant or other objector.

Similarly, in *Clean Energy*, the court concluded the city had improperly divided CEQA duties between the planning commission and city council. However, the challenged action by the city council (as the final decisionmaker) was valid, therefore, there was no valid appeal to be taken under the city code's appellate provisions.

In contrast here, the County's appeal procedure is akin to that in *Tahoe Vista*—it provided petitioner with an opportunity to appeal the Commission's decision, but required petitioner to specify the particular grounds for appeal. While the Board will exercise its independent judgment in determining the propriety of the decision appealed, the appeal is bounded by the grounds set forth in the appellate packet. In the unpublished portion of the opinion, the Court of Appeal upheld the trial court's determination that petitioner failed to exhaust their administrative remedies. The Court of Appeal held that the grounds stated in petitioner's appeal did not come close to apprising the Board of the issues petitioner now pursued in the instant court action. Though the appeal packet made bland and generic assertions of inadequate air and water quality analyses, petitioner never referred to the specific deficiencies they now challenge.

General Plan Consistency

The Court of Appeal also considered petitioner's argument that the EIR failed to address the Project's asserted inconsistencies with the County's General Plan. During the trial court proceedings, the County contended that because an EIR must only address *in*consistencies with a General Plan, the Project's EIR was not deficient because it concluded the Project was *consistent* with the General Plan. The County also argued that petitioner improperly attempted to assert this claim under CEQA, rather than pleading a separate cause of action by way of ordinary mandamus under Code of Civil Procedure § 1085. The trial court agreed and found that because petitioner's General Plan consistency argument is not a CEQA issue, it must be reviewed by ordinary *mandamus*.

Although the trial court directed petitioner's attention to this procedural error, petitioner did not seek leave to amend to add a cause of action for ordinary mandamus. Petitioner maintained this position on appeal, arguing that it was not required to challenge the County's General Plan consistency determination by way of ordinary mandamus. Rather, petitioner contended that the General Plan "consistency" and "inconsistency" determination under CEQA differs from that conducted under General Planning and land use law. Petitioner argued that the Project's inconsistency with the County's General Plan violates CEQA because it failed to "adequately inform the public and decisionmakers about inconsistencies with any policies, as required by CEQA."

The First District rejected petitioner's interpretation, explaining:

> . . .[t]ry as SSE [Petitioner] might to explain that it is not challenging the County's substantive consistency determination, that appears to be exactly what SSE is doing, as it repeatedly maintains the EIR 'failed to disclose inconsistencies' with the General Plan.

Contrary to petitioner's assertion, CEQA Guidelines § 15125, subdivision (d)—which requires that an EIR discuss any inconsistencies between a proposed project and applicable General Plan—does not suggest that the term "inconsistency" under CEQA has an altogether different meaning than under basic planning and land use law.

Notwithstanding petitioner's flawed interpretation, the Court of Appeal held that the General Plan "inconsistency" claim lacked merit. The Board not only addressed petitioner's various claims that the Project was inconsistent with the General Plan, but also prepared a separate, detailed General Plan consistency analysis for the Project permit. Absent evidence to the contrary, the appellate court explained that the determination of whether the Project is consistent with General Plan policies is left to the County; it is emphatically *not* the role of the courts to micromanage such decisions.

Conclusion and Implications

The First District's partially-published opinion reiterates long standing precedent surround the exhaustion doctrine. As the appellate court explained, a project challenger must exhaust their administrative remedies pursuant to Public Resources Code § 21177 *and* the appellate procedures set forth in the local agency's corresponding code. Per the court's opinion, it behooves a petitioner to strictly adhere to the code's appellate proceedings to ensure all issues are specifically raised before seeking judicial. Similarly, where a party challenges an agency's General Plan consistency analysis, such claims must be advanced separately from CEQA claims. Because Public Resources Code § 21168.9 only provides mandate procedures for CEQA violations, a petitioner must plead a General Plan inconsistency claim through a separate cause of action under the ordinary mandamus proceedings articulated in Code of Civil Procedure § 1085. The court's *partially* published opinion is available online at: https://www.courts.ca.gov/opinions/documents/A158723.PDF
(Bridget McDonald)

FIRST DISTRICT COURT UPHOLDS SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION ORDER REGARDING VIOLATIONS IN SUISUN MARSH

Sweeney v. San Francisco Bay Conservation and Development Commission, 62 Cal.App.5th 1 (1st Dist. 2021).

A landowner filed a petition for peremptory writ of mandate contesting a San Francisco Bay Conservation and Development Commission (BCDC) order directing the owner to cease and desist from placing fill at Point Buckler and from engaging in any development activities without obtaining a marsh development permit. BCDC's order also assessed an administrative civil penalty of $772,000 for violations of certain statutes. The Superior Court granted the petition, and BCDC in turn appealed. The Court of Appeal reversed.

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 restoring the site's exterior levee that had been breached in multiple places. These efforts largely converted the property from tidal marsh to a mostly dry island. He also began operating the site as a private recreational area for kiteboarding.

In November 2014, BCDC staff was concerned about unauthorized work at the site and conducted a site visit. Following that visit, BCDC staff notified Sweeney of various violations, directed him to stop work, and notified him that a marsh development permit was required prior to developing the site. Staff

also noted that any work that could not be retroactively approved through the permit process would likely need to be removed and the site restored to tidal marsh. He was also advised that potential future enforcement could include cease and desist orders and a civil penalty.

In April 2016, following months of correspondence regarding site conditions and the necessity for a permit, BCDC issued an interim cease and desist order, directing Sweeney to cease and desist from all unauthorized, unpermitted activities at the site. That was followed by a violation report/complaint for the administrative imposition of civil penalties, and formal enforcement proceedings began against Sweeney. The violation report/complaint proposed a civil penalty of $952,00 for more than two dozen separate violations of state law. A few months later, BCDC adopted a recommended enforcement decision with an administrative penalty of $772,000.

In November 2016, BCDC issued a Cease and Desist and Civil Penalty Order (Order), which made nearly 50 findings regarding the site and Sweeney's activities. It ordered Sweeney to cease and desist from placing any fill within the site or making any substantial changes to any part of the site that was or had been subject to tidal action before Sweeney's unauthorized work. Sweeney was further ordered to refrain from engaging in any development activity at the site without permits for any past, ongoing, or future work. In addition, Sweeney was directed to submit plans to restore the site and mitigate the impacts to wetlands due to the unauthorized activities. He was also ordered to pay the $772,000 administrative civil penalty.

In December 2016, Sweeney filed a petitioned for a peremptory writ of mandate to invalidate the BCDC Order. The Superior Court granted the petition and BCDC appealed.

The Court of Appeal's Decision

Permit Requirements under the Suisun Marsh Preservation Act

Typically, any person wishing to perform or undertake any development in the Suisun Marsh must obtain a marsh development permit. Within the Suisun Marsh's primary management area, these permits must be obtained from BCDC. Here, BCDC found that Sweeney performed work that required a permit, which he failed to obtain. The Superior Court set aside the Order because it found that Sweeney was exempt from the permit requirement based on a "repair exception" and an exception for work consistent with a site's local protection program. BCDC contended that neither exception applied, and the Court of Appeal agreed.

The Court of Appeal first addressed the "repair exception," which generally provides that a permit is not required for:

> . . .[r]epair, replacement, reconstruction, or maintenance that does not result in an addition to, or enlargement or expansion of, the object of such repair, replacement, reconstruction, or maintenance.

Even assuming that some of work constituted a "repair" of the breached levee, the Court of Appeal found that the exception would not apply because Sweeney had performed work that went well beyond levee repair or was completely unrelated to the levee.

The Court of Appeal next addressed the exception for work consistent with a site's local protection program. Even assuming that a prior management plan remained effective, however, the Court of Appeal found that the prior plan did not contemplate much of the work performed by Sweeney, and that many of the changes had no reasonable connection to the management contemplated in the prior management plan, and thus were inconsistent with that plan.

Penalties under the McAteer Petris Act

The Court of Appeal next addressed penalties. The Superior Court found that the administrative civil penalty exceeded the limits imposed under the *McAteer Petris Act, which authorizes BCDC to impose civil penalties, was unsupported by the findings, and violated the Eighth Amendment prohibition on excessive fines. *[This law, enacted on September 17, 1965, established the San Francisco Bay Conservation and Development Commission as a temporary state agency charged with preparing a plan for the long-term use of the Bay. In August 1969, the McAteer-Petris Act was amended to make BCDC a permanent agency and to incorporate the policies of the *Bay Plan* into state law.] BCDC argued that these conclusions were incorrect, and the Court of Appeal agreed.

With respect to the imposition of civil penalties, the Court of Appeal found that the penalty imposed was supported by the findings, which summarized more than two dozen separate violations that had been enumerated to Sweeney over the course of the enforcement proceedings and the monetary amount of each violation that went into the proposed penalty. The record also demonstrated the basis on which the civil penalty amount was reduced from the initially proposed amount of $952,000 to $772,000. The Court of Appeal rejected Sweeney's claim that BCDC had to list in its enforcement order each of the separate violations it alleged, finding that the findings on the penalty determination sufficiently "bridged the gap" between the evidence and the order. It also rejected Sweeney's argument that BCDC failed to consider certain factors set forth in Government Code § 66641.9, finding that BCDC had considered them.

Eighth Amendment Claim

The Court of Appeal next addressed the Eighth Amendment of the U.S. Constituion, 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, among other things, the court's own consideration of Sweeney's culpability as low. The Court of Appeal disagreed. Regarding culpability, for example, the Court of Appeal found substantial evidence supported BCDC's conclusion that Sweeney's culpability was substantial. There was evidence, for example, that Sweeney had past experience with governmental agencies with jurisdiction over Suisun Marsh at another property, and Sweeney had continued to perform work at the site after BCDC staff directed Sweeney to stop work.

Regarding the relationship between the harm and the civil penalty, the Court of Appeal found there was ample evidence that Sweeney's activities adversely impacted beneficial uses at the site and likely had resulted in the illegal take of threatened or endangered species protected under the California and federal Endangered Species acts. The court also found evidence that the civil penalty was not disproportionately high, noting it was based on more than two dozen violations found by BCDC to have occurred over a prolonged period of time. Finally, the Court of Appeal found there was substantial evidence supporting the conclusion that Sweeney could pay the fine.

Vindictive Prosecution Claim

The Court of Appeal also disagreed with the Superior Court's conclusion that BCDC's civil penalties were imposed for vindictive reasons. In particular, the Superior Court had found that Sweeney had made a showing of vindictiveness because BCDC imposed record penalties after Sweeney filed a successful petition to stay a 2015 Cleanup and Abatement Order by the San Francisco Regional Water Quality Control Board. The Court of Appeal noted that the vindictive prosecution doctrine has not yet been held to apply to proceedings before administrative bodies. Even assuming it would apply, however, the court found that Sweeney had not made a showing that BCDC increased any penalties against him in response to his exercise of some procedural right against BCDC or any other regulatory agency.

Fair Trial Claim

Finally, the Court of Appeal addressed Sweeney's claim that he had not received a fair hearing. The Superior Court had found that the prosecutorial and adjudicatory functions of the agency were insufficiently separate and disapproved of how the prosecution team "prepared the summary memos on which [BCDC] relied" and thus "impermissibly commingled the prosecution function with the judicial-making function." The Court of Appeal disagreed, finding that BCDC adhered to its standard procedures, which are similar to other procedures that have been validated in other cases. The Court of Appeal also addressed the "totality of the circumstances" and likewise concluded that the hearing had been fair. Among other things, the court rejected Sweeney's argument that the hearing did not afford him sufficient time to make his case and that BCDC had failed to make legal rulings on the potential statutory exemptions.

Conclusion and Implications

The case is significant because it contains a substantive discussion of numerous issues pertaining to BCDC administrative orders, including imposition of administrative civil penalties. The decision is available online at: https://www.courts.ca.gov/opinions/documents/A153582.PDF
(James Purvis)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

FOURTH DISTRICT COURT AFFIRMS CITY'S USE OF UNCODIFIED PARKING STANDARDS FOR STUDENT RELIGIOUS CENTER BASED ON STUDY OF PARKING NEEDS FOR SIMILAR CENTERS

Taxpayers for Responsible Use v. City of San Diego,
___Cal.App.5th___, Case No. D075587 (4th Dist. Mar. 30, 2021).

The Fourth District Court of Appeal in *Taxpayers for Responsible Use v. City of San Diego* held that the City of San Diego (City) could fashion particular parking standards for a student religious center based upon particular uses of the religious center and parking patterns studied for similar centers by the same organization in other cities. The City Code had no parking standards for the particular student religious center use. The Court of Appeal also denied a California Environmental Quality Act (CEQA) challenge claiming that the Environmental Impact Report (EIR) for the center did not discuss new zoning standards adopted by the City following the City's Notice of Preparation of the EIR.

Factual and Procedural Background

The project is a religious center for students by Hillel of San Diego. The City approved a site development permit (SDP) and EIR for the project. The center is on land located adjacent to the University of California at San Diego campus. The center is located on a parcel across the street from the campus and is located within a single-family residential zone. At the time of the City's 2010 Notice of Preparation (NOP) for the EIR, the City's Zoning Code allowed buildings used primarily for religious purposes within single family zones. Five years later in 2015, the City eliminated that provision from its Zoning Code.

Following a prior successful court challenge to a Negative Declaration for the Project, Hillel modified the size of the center from 15,000 square feet to 6.479 square feet with three buildings: a central building, a small library/chapel and a professional leadership building. Based on Hillel's historical programming and future plans, the center's religious activities will consist of small weekday gatherings for study groups, classes, lectures, meetings, professional staff activities, and periodic events.

In general, 10-50 people are expected to visit the center at one time, with occupancy normally limited to 100 people, but there may be up to eight special events with 100-150 attendees and another four events with greater than 150 attendees. The center has a surface parking lot with 27 parking spaces. To meet the parking demands of the 12 special events per year, Hillel adopted a transportation and parking management plan (Transportation Plan) that encourages alternate modes of transportation (walking/biking) and provides for off-site parking and a shuttle service.

As the EIR explains, no specific parking minimum exists in the City Code for this type of student religious facility. Although the student center would be used for religious purposes, it does not fit the definition for a church or place of religious worship because it will not have pews or regular worship services. Consistent with City and industry standards, the City estimated parking demand based on information for existing comparable facilities.

Thus, the City estimated the parking demand based on information for existing comparable facilities, taking into account the types of events to be held at the facility, the amount of people estimated to attend, the staff needed to serve the facility, a survey of existing UCSD Hillel student members and a survey of institutional data gathered from similar Hillel student facilities in California. In addition to the estimate because of no applicable standards, the applicant also requested a deviation from potential application of the church or place of worship standards of the municipal code, using the same information and data as for the estimate.

The data showed that the average parking ratio for California Hillel facilities was 1.9 parking spaces per 1,000 square feet of student center facilities. The San Diego facility would have a ratio of 3.7 parking spaces per 1,000 square feet of facilities. The survey of the students also showed that 80 percent of the students would walk to the center, and half of the remaining students would carpool. Thus, the students would only use 15 spaces and the staff would use 7

spaces maximum, for a total of 22 out of the 27 spaces provided.

For the major events, Hillel's Transportation Plan provided a certain number of off-site parking spaces, a shuttle service, staff at both off-site and on-site locations and ongoing performance review of the parking situation for three years, with an obligation to procure additional off-site parking for the special events if needed based upon the performance review.

At the Trial Court

The trial court denied a writ of mandate brought by the petitioner challenging the City standards for parking and the EIR determination that parking impacts would be less than significant. The trial court found that the City's determinations regarding parking were supported by substantial evidence and that the City was entitled to substantial deference in determining the applicable parking standards. The trial court found that the 12 major events did not amount to a need to construct a parking facility given the Transportation Plan. The trial court also denied petitioner's challenge to the EIR for not discussing the post-application changed zoning standard for the residential property on which the center was to be located.

The Court of Appeal's Decision

The Court of Appeal, applying the *de novo* standard of review, held that parking standards for churches did not apply given the lack of pews for worship services and also held, applying the substantial evidence standard of review, that the specific needs of the facility supported a deviation from those church parking standards. The Court of Appeal held that the EIR description of the physical environmental conditions in the vicinity of the project at the time of the notice of preparation of the EIR did not need to include the change in zoning which occurred after the notice of preparation. The Court of Appeal also denied a challenge to the trial court as being biased, which challenge is not discussed in this note.

The Parking Survey

Petitioner argued that the survey of parking needs was inaccurate, seven years old, and not done by a neutral party. The Court of Appeal held that under the substantial evidence standard, the survey evidence was adequate because petitioner submitted no evidence that the survey had inaccurate or missing information.

Petitioner also argued that the church standard for parking applied to the maximum number of attendees for the special events, requiring one space for every three persons attending at maximum capacity (220 people). The Court of Appeal held that the City was entitled to deference in its decision that the church designation did not apply to the center, and also held that the Transportation Plan represents a reasonable way to address parking needs for the occasional special event.

The CEQA Baseline Project Description

Petitioner argued that the project did not comply with CEQA because it failed to analyze an inconsistency between the project and current zoning requirements created by the 2015 amendment to the City's zoning code withdrawing the provision allowing for religious use within the residential zone. The Court of Appeal held as a matter of law that there was no legal basis for petitioner's argument because the only inconsistencies between the project and zoning that would need to be discussed would be inconsistencies present at the time of the notice of preparation. (14 Cal. Code Regs., § 15125.)

The Court of Appeal further noted that under CEQA, there is no presumption that an omission of required information is prejudicial. The 2015 Zoning Code amendment contained an express grandfather clause stating that complete applications submitted to the City prior to the amendment would not be inconsistent with the amendment. Thus, the amendment is neither a part of the baseline condition at the time of the notice of preparation nor inconsistent with the project. The EIR was not a deficient informational document because it omitted a hypothetical discussion that the project would have been inconsistent with the Zoning Code if the NOP had been published after 2015.

Conclusion and Implications

This opinion out of the Fourth District Court of Appeal demonstrates the importance of reviewing zoning code definitions of uses to determine whether the particular project fits within defined uses and, if the definitions do not fit, of preparing a defensible

study of the intensity of such use to determine the appropriate standards to apply for the use. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/D075587.PDF
(Boyd Hill)

SUPERIOR COURT FINDS L.A. DEPARTMENT OF WATER AND POWER MUST CONDUCT ENVIRONMENTAL REVIEW BEFORE REDUCING PASTURELAND ALLOCATIONS

Mono County v. Los Angeles Department of Water and Power,
Case No. RG18-923377 (Alameda Super Ct. Mar. 8, 2021).

On March 8, the Alameda County Superior Court granted a writ of mandate in favor of Mono County (County) requiring the Los Angeles Department of Water and Power (LADWP) to conduct appropriate environmental review under the California Environmental Quality Act (CEQA) for proposed changes to the use of water by ranchers on leased land owned by LADWP in the County.

Background

LADWP owns 6,4000 acres in Mono County, and owns the water rights associated with that land. The land itself is ranch land that is also habitat for the Bi-State Sage Grouse. Historically, LADWP provided approximately 3.9 acre-feet of water annually to each acre on the ranch for habitat management and wildlife, for the maintenance and restoration of native vegetation, and for agricultural irrigation. During the 2013-2018 period, however, LADWP only provided 1.9 acre-feet per acre, which was below the ten-year average of 2.9 acre-feet per acre. The amount of water provided to the acreage depended each year on variations in precipitation, runoff, and other factors.

In 2010, LADWP began leasing the land to several ranchers. The leases included provisions for water supply and irrigation water. For instance, the leases provided for up to five acre-feet per year for irrigation water, although the leased water was subject to the paramount rights of LADWP, and the availability of water under the terms of the lease was determined solely by LADWP.

In 2013, LADWP adopted a conservation strategy to protect sage grouse. The conservation strategy set LADWP water policy for the pastures used by sage grouse, and recognized that lessees of pasturelands received a water allotment of up to five acre-feet of water per acre for irrigation. Minimum flows were required to be maintained in creeks to maintain aquatic life, and no irrigation was allowed when creek flows were at or below such minimums. Importantly, with respect to irrigated agriculture, the conversation strategy indicated that LADWP did not expect surface water management practices to change from current practices regarding pasturelands. This included pasture acreage receiving up to five acre-feet of water per acre in some years, while in other years irrigation might be prohibited due to minimum flow requirements in creeks. Under the terms of the leases, lessees were required to maintain irrigated pastures in good to excellent condition, and a drop-in pasture rate (as scored by an official scoring system) below 80 percent would require changes to pasture management.

In 2018, LADWP issued new proposed five-year leases to existing lessees. The new lessees provided that "at no time shall water taken from the well(s) be used for irrigation or stockwater purposes," and that LADWP "shall not furnish irrigation water" to lessees or the leased lands, and lessees "shall not use water supplied to the leased premises as irrigation water." In correspondence between the County and the City of Los Angeles following LADWP's proposal of the new leases, the City indicated that water allocations for 2018 would likely be similar to those in 2016, *i.e.* 0.7 acre-feet per acre.

The Superior Court's Ruling

The central issue in this case is whether LADWP approved a "project" without first conducting an environmental review under CEQA. The County argued that LADWP was required to conduct envi-

ronmental review before it proposed the new leases in 2018, which included the change in water use and simultaneously implemented water allocations consistent with the provisions of the new leases, *i.e.* reduced water allocations. The Superior Court concluded that LADWP was required to conduct environmental review under CEQA but had not done so.

Proposing 2018 Leases and Announcement Was a Project

The Superior Court found that when LADWP proposed the 2018 leases, and announced the 2018 water allocations, it committed to a definite course of action that triggered environmental review. For instance, the Superior Court found that LADWP had revised the terms of the leases to change the water use on LADWP's land when it sent the proposed leases, and set a short timeframe of less than a month for the proposed lessees to negotiate the new leases. Additionally, the court observed that a May 2018 letter from the mayor of Los Angeles to the County indicated the amount of water allocated that year under the existing leases would be similar to a prior dry year's allocation of 0.7 acre-feet. The court reasoned that this figure reflected the first year of a plan to decrease water allocations that the proposed leases would implement on a multi-year basis.

While the court weighed the evidence that LADWP was only proposing the new leases—as opposed to approving them—and that the low water allocation represented only a single year's allocation, the court found on balance that the proposed leases and the actual water allocation for 2018 demonstrated that LADWP was committed to a definite course of action and therefore had approved an action to significantly reduce or eliminate water deliveries.

Reductions in Water Allocations Was a Project

The Superior Court also found that LADWP's proposed reductions in water allocations under the new leases constituted a "project" subject to CEQA. CEQA defines a project as:

> . . .an activity which may cause either direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (a) an activity directly undertaken by a public agency […]. (Pub. Res. Code § 21065.)

In finding that the proposed change in water use under the new leases was a project, the Superior Court relied on several pieces of relevant evidence: the amount of water previously released for irrigation purposes from 1992 to 2018, averaging 1.9 acre-feet per acre to 3.9 acre-feet per acre; LADWP's conservation strategy to protect sage grouse by keeping irrigated pastures in good condition; the provisions of the proposed leases largely eliminating irrigation water; and LADWP's 2018 allocation of 0.7 acre-feet per acre. According to the Superior Court, the water use changes in the proposed leases altered the historical irrigation water baseline that provided significant environmental benefits. The Superior Court found that the 5-year historical average of 1.92 acre-feet per acre, which existed at the time LADWP proposed the changes to the lease terms and reduced the water allocation for 2018, was appropriate.

Conclusion and Implications

It is not clear whether LADWP will appeal the Superior Court's ruling, and whether the court's ruling would be upheld on appeal. However, this decision may indicate that reliance interests arising from long-standing water use practices or environmental benefits accruing from such practices may be more difficult to modify than is otherwise provided for under the terms of a contract, because even proposing modifications could trigger environmental review requirements that did not previously apply.

Case documents can be accessed through the Alameda County Superior Court docket, available here: https://publicrecords.alameda.courts.ca.gov/PRS/Case/CaseDetails/UkcxODkyMzM3Nw%3d%3d
(Miles Krieger, Steve Anderson)

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

•**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 April 20, 2021, was placed on the Committee on Appropriations suspense file.

•**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 April 8, 2021, had its scheduled April 13 hearing in the Committee on the Judiciary canceled at the request of its author, Senator Bates.

Environmental Protection and Quality

•**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 the California Environmental Quality Act (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 April 8, 2021, was referred to the Committee on Natural Resources.

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 April 14, 2021, was placed on the Committee on Appropriations' suspense file.

•**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 April 12, 2021, was read for a second time, amended, and then re-referred to 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 April 16, 2021, was set for hearing on April 22, 2021, in the Committee on Governance and Finance.

•**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 April 5, 2021, was placed on the Committee on Appropriations' suspense file.

•**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 April 19, 2021, had its scheduled April 22, 2021, hearing in the Committee on Governance and Finance canceled at the request of its author, Senator Eggman.

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 April 15, 2021, had testimony taken in the Committees on Housing and Governance and Finance with a further hearing to be scheduled.

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 April 19, 2021, was re-referred to the Committee on 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 April 20, 2021, was re-referred to the Committee on Housing and Community Development.

•**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 April 15, 2021, was scheduled for hearing on April 29, 2021, in the Committee on Housing.

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

AB 1322 was introduced in the Assembly on February 19, 2021, and, most recently, on April 20, 2021, was re-referred to the Committee on Housing and Community Development.

•**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 April 13, 2021, was read for a second time, amended and then re-referred to the Committee on Governance and Finance with a hearing set for April 22, 2021.

•**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 April 6, 2021, was set for hearing on April 29, 2021, in the Committee on Housing.

(Paige H. Gosney)

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