Volume 31, Number 9
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CONTENTS

FEATURE ARTICLE

LAND USE NEWS

RECENT FEDERAL DECISIONS

Continued on next page

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LAW & POLICY Reporter

RECENT CALIFORNIA DECISIONS

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FEATURE ARTICLE

U.S. DISTRICT COURT GRANTS COMPREHENSIVE PRELIMINARY INJUNCTION ORDERING LOS ANGELES TO SHELTER THE HOMELESS POPULATION—NINTH CIRCUIT STAYS THE ORDER TEMPORARILY

By Bridget McDonald

In a sweeping 110-page opinion, U.S. District Court Judge David O. Carter for the Central District of California granted a preliminary injunction sought by plaintiffs in *LA Alliance for Human Rights, et. al. v. City of Los Angeles, et. al.* requiring the City and County of Los Angeles (City) to act on homelessness. The initial order directed the City to provide shelter or housing to every homeless person living on "skid row" within 180 days, and to place $1 billion in escrow to be used for homelessness efforts throughout the City. On May 13, 2021, the Ninth Circuit Court of Appeals stayed the order, pending resolution of the City's emergency stay motions and evidentiary hearing. [*LA Alliance for Human Rights, et. al. v. City of Los Angeles, et. al.*, ___F.Supp.3d___, Case No. 2:20-cv-02291 (C.D. Cal. Apr. 21, 2021).]

Factual and Procedural Background

The LA Alliance for Human Rights (LA Alliance) is a coalition comprised of Los Angeles residents, business owners, and stakeholders dedicated to finding solutions that address the homeless crisis and its related impact on health and safety issues throughout the region. On March 10, 2020, LA Alliance and numerous individual plaintiffs filed a federal lawsuit against the City in response to the surge in homelessness. As plaintiffs explain, homelessness in the City has increased by 75 percent since 2012, with the population nearly doubling in the last three years. To date, nearly 36,300 homeless individuals live in Los Angeles. This exponential growth has yielded an unfavorable strain on the City's infrastructure. The multiplication of homeless encampments has fostered unsanitary conditions, including vermin outbreaks, property crimes, and environmental impacts from the production and removal of human waste and detritus. Plaintiffs explain that these impacts have directly impacted their public health and properties due to loss of customers and tenants, and property damage.

Despite public outcry, plaintiffs contend the City has failed to allocate sufficient funds to proactively address this crisis. In 2019, taxpayers approved "Proposition HHH"—a City project that dedicates $1.2 billion to homelessness by constructing supportive units for homeless residents and affordable units for low-income residents. Despite this, plaintiffs argue the City has failed to swiftly and appropriately allocate the funds towards proven strategies with measurable results, thereby wasting taxpayer funds and allowing the problem to grow out of control.

For these reasons, plaintiffs allege 14 causes of actions related to the City's alleged failure to address homelessness. The complaint contends that the City's lack of action rose to claims under common, state, and federal law, including: negligence; violation of the California Civil Code, the California Welfare & Institutions Code, the California Environmental Quality Act (CEQA), the California Disabled Persons Act; violation of the federal Americans with Disabilities Act and section 1983 of Title 42 of the U.S. Code; and state and federal constitutional violations, including inverse condemnation, uncompensated taking, and violation of due process.

In the days and months following the filing of plaintiffs' complaint, the U.S. District Court for the Central District of California supervised the City's response to homeless populations amidst the worsening COVID-19 pandemic. Judge David O. Carter directed the City to provide sanitary stations and facilities to combat the spread of the coronavirus in homeless encampments. In the months thereafter,

the parties attempted but failed to reach a settlement agreement regarding how the City should house homeless residents. As such, plaintiffs filed a motion seeking a preliminary injunction directing the City to immediately house all homeless individuals and redirect Proposition HHH funding towards temporary housing solutions.

The District Court's Decision

On April 20, 2021, Judge Carter granted plaintiffs' request for a preliminary injunction. The 110-page opinion chronicles the multi-faceted history of the City's homeless crisis. Explaining that the court could not "idly bear witness to preventable deaths," and that the City and County had "shown themselves to be unable or unwilling to devise effective solutions to L.A.'s homelessness crisis," Judge Carter argued that judicial intervention is necessary because the "ever-worsening public health and safety emergency demands immediate, life-saving action."

History of Homelessness in Los Angeles

The opinion's Introduction recounts the history and evolution of homelessness in Los Angeles City and County. Though a multi-faceted issue, Judge Carter argues that homelessness is largely affected by, and contributes to, six key factors, including: race; disconnected public statements on homelessness; failure to exercise emergency powers for an emergency situation; government inaction; public health and safety; and gender.

Judge Carter began by explaining that the current homeless crisis is rooted in a "legacy of entrenched structural racism" that the City and County created through "redlining, containment, eminent domain, exclusionary zoning, and gentrification—designed to segregate and disenfranchise communities of color[.]" These practices span numerous chapters of history, including pre- and post-World War II, the Great Depression, the midcentury construction of the City's freeway network, and the creation of the "Skid Row containment zone." In turn, communities of color—particularly Black and Latino/a Angelenos—have disproportionately suffered historic rates of displacement, lack of property ownership, and in turn, homelessness.

Judge Carter argued that affordable housing has compounded the current housing insecurity crisis. For example, the City's shift from public housing to affordable housing has resulted in prioritizing higher-earning individuals over sustainable public housing initiatives, thereby excluding non-white residents who fall under "extremely low-income" brackets. To this end, Judge Carter contended that the Housing Element of the City's General Plan fails to remove constraints that would otherwise preserve existing affordable housing units and protect residents from displacement. By way of example, he observed that 75 percent of the City's residential property is zoned for single-family homes—a statistic that, absent major rezoning initiatives, will continue contributing to the City's lack of infrastructure to meet demand and house homeless individuals. Judge Carter argued that, in the wake of the looming update to the City's Housing Element, "never has there been so urgent of a need to utilize the Housing Element to restructure and reform the housing needs of [the City's] citizens."

As articulated by plaintiffs, Judge Carter contended that the "disconnect between politicians' public statements about the severity of the crisis and the actual efforts made to fund effective solutions" has grown congruently with the City's doubling homeless population. Nearly four years into Proposition HHH's ten-year plan to develop 10,000 housing units, Judge Carter queried why the City has only been able to construct seven projects containing 489 total units, most of which provide long-term affordable housing, rather than temporary or interim shelters that provide immediate relief.

Ultimately, Judge Carter argued that the homeless crisis has congruently created a simultaneous public health crisis throughout the City. As an example, he explains that encampments near freeways are considered "environmentally hazardous" for homeless residents due to chronic exposure to diesel sooth, vehicle exhaust, and other airborne carcinogens that cause lung and heart disease, asthma, and elevated cancer risks. Homeless populations also face other environmental risks, including heat stroke from exposure to warming temperatures, hypothermia from low temperatures or high winds, and heightened exposure to disease from a lack of sanitary and hygienic services.

Injunctive Relief—Likelihood of Success on the Merits

For the reasons set forth in the opinion's introduction, Judge Carter found that the court is compelled

to take immediate, life-saving action to address Los Angeles' homelessness crisis. While conceding that a preliminary injunction is an "extraordinary remedy" that requires courts to balance competing claims on a case-by-case basis with particular regard for the public consequences, Judge Carter qualified that a District Court may order injunctive relief on its own motion and is not restricted to ordering the relief requested by plaintiffs. Accordingly, a preliminary injunction is appropriate if the court finds that: 1) there is a likelihood of success on the merits; 2) absent preliminary relief, irreparable harm is likely; 3) the balance of equities tips in favor of preliminary relief; and 4) the injunction is in the public interest.

To satisfy the first prong, the court explained that plaintiffs must establish a likelihood of success on the merits by demonstrating that the law and facts clearly favor their position, not simply that they are likely to succeed. In this case, the court argued that several constitutional principles support a finding that the law and facts clearly favor plaintiffs' position. Judge Carter observed that "throughout history, the legislative, executive, and judicial branches of our government have taken it upon themselves to remedy racial discrimination." For example, the Supreme Court's opinions in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Brown v. Board of Education of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954) (*Brown I*), supplemented sub nom. *Brown v. Board of Education of Topeka, Kan.*, 349 U.S. 294 (1955) (*Brown II*), arose out of the judiciary's recognition of historic racial discrimination and the pressing need to remediate such impacts. Here, Judge Carter found that this case is similar to, and deeply intertwined with, the circumstances that gave rise to the *Swann*, *Brown I*, and *Brown II* decisions. Thus, Judge Carter found that the City's inaction, misappropriation of taxpayer funds, and ineffective housing policies have perpetuated systemic inequity and racial bias that disproportionately affects access to housing among communities of color. The court held that these disparities are long recognized as "severe constitutional violations" that are "so corrosive to human life and dignity as to justify the sweeping exercise of a federal district court's equitable powers."

Under this lens, the court specifically held that plaintiffs can likely succeed on each of their constitutional violation claims, including those alleging liability under the state-created danger and special-relationship exceptions to the Fourteenth Amendment, violation of the Equal Protection Clause through state inaction, and violation of the Fifth Amendment right to family integrity. Judge Carter argued that as state actors, the City and County have simultaneously violated and failed to protect the constitutional interests of homeless individuals, particularly within communities of color. The City and County have abdicated their duty to act, enacted containment policies that restrain personal liberty, and imposed discriminatory policies that have uprooted families from their communities. The court further found that the City and County are likely liable under plaintiffs' statutory claims, including violations of section 17000 of the state Welfare and Institutions Code and violations under the federal American with Disabilities Act, due to the localities' persistent inaction to treat and house homeless individuals.

Irreparable Harm

As to the second prong, the court likewise found that plaintiffs will likely suffer irreparable harm in the absence of preliminary relief because the deprivation of constitutional rights "unquestionably constitutes irreparable injury." During a time where nearly five or more homeless individuals die per day, Judge Carter held that "no harm could be more grave or irreparable than the loss of life."

Balancing of Equities and the Public Interest

The court applied this rationale to further find that plaintiffs satisfy the third prong supporting injunctive relief, which requires that the balance of equities tip in plaintiffs' favor. As to the fourth and final prong, which requires that plaintiffs demonstrate that the public interest favors granting an injunction, Judge Carter not only held that plaintiffs have satisfied their burden, but also finds that "the current state of the homelessness crisis in Los Angeles begs intervention." The court rejected the City's argument that granting the injunction would not be in the public's interest because it would "usurp the discretionary policy making decisions of the City's elected officials and impose mandatory duties." Judge Carter explained that the court seeks to ensure accountability and promote action where there has historically been inaction by issuing practical flexibility in its remedy. For these reasons, the court expressed its lack of confidence in

the City's newly announced spending budget, finding that there is:

> . . .no reason to believe that the City's new budget will be in any way adequate to meet the crisis of homelessness or overcome decades of intentional racism and deliberate indifference.

A Two-Prong Order for Injunctive Relief

Judge Carter explained that, because plaintiffs have satisfied their burden supporting issuance of a preliminary injunction, the court found it necessary and:

> "in the proper exercise of its equitable powers to craft an immediate response to this unconscionable humanitarian crisis."

The court explained that, under Article III of the Constitution, the court enjoys broad equitable powers that it may employ "as a means of enforcement to compel defendants to take certain steps to ensure compliance with constitutional mandates" and to redress statutory violations. To this end, the court reiterated that its authority is guided by the U.S. Supreme Court's decision in *Brown v. Plata,* 563 U.S. 493 (2011), which:

> . . .upheld district courts' authority to use their equitable powers when necessary to address constitutional violations even where those powers shape local government's authority and impacts their budget.

With this framework in mind, the court issued a two-pronged order centered on "accountability" and "action." As to the "Accountability" prong, the court ordered that the City place $1 billion of its "justice budget" in escrow immediately, with funding streams account for and reported to the court within seven days. Within 90 days, the court ordered the City to conduct an audit of all funds received from local, state, and federal entities intended to aid the Los Angeles homeless crisis, as well as prepare a report on all developers that are currently receiving Proposition HHH funds, and propose revised measures to limit misuse or waste of such funds.

As to the "action" prong, the court ordered the City Controller to oversee creation of a report within 30 days that identifies potential land available to house and shelter homeless individuals in each district. The court further ordered the cessation of all sales, transfers by lease or covenant, of the properties identified in the report. The court further mandated that the City and County offer—and if accepted, provide—shelter or housing immediately to all unaccompanied women and children living on skid row within 90 days, to all families within 120 days, and to the general population living on skid row in 180 days. Within 90 days, the County is also required to provide individuals in need of special placement with appropriate emergency, interim, or permanent housing for mental health treatment services. Finally, the City and County must prepare a "hyper-local" and community-based plan that ensures skid row is uplifted and enhanced without involuntarily displacing its current residents to other areas of Los Angeles.

Conclusion and Implications

At the time of this writing, a three-judge panel for the Ninth Circuit Court of Appeals issued an order on May 13, 2021, staying Judge Carter's April 20, 2021 Order. In its ruling, the Ninth Circuit panel placed an administrative hold on the judge's decree until June 15 in order to determine the impact of an evidentiary hearing scheduled later this month in the case. The appellate court also asked for additional briefs from all parties, with the goal of a Ninth Circuit hearing in July.

In the interim, some litigants may find that Judge Carter's Opinion and Order deviate from acceptable forms of injunctive relief, while improperly infringing upon the sanctity of the separation of powers. Other litigants may find that the opinion represents the first proactive step to address a worsening humanitarian and constitutional crisis that has been compounded by decades of political inaction. Thus, while it remains to be seen how the case will ultimately transpire at both the District Court and Court of Appeals' levels, the opinion shines light on an increasingly multi-faceted problem that the judiciary has previously left undisturbed, despite its nationwide impact on localities. For more information of the court's order, *see:* https://imla.org/wp-content/uploads/2021/04/LA-Alliance-for-Human-Rights-v.-City-of-Los-Angeles-Order-Granting-Injunction-4-20-2021.pdf.

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LAND USE NEWS

GOVERNOR NEWSOM ISSUES DROUGHT PROCLAMATIONS

On April 21, 2021, Governor Gavin Newsom issued a State of Emergency Proclamation for Mendocino and Sonoma counties due to extremely dry conditions in the Russian River Watershed. Less than a month later, on May 10, 2021, Governor Newsom issued an expanded drought emergency proclamation to include the 39 additional counties that encompass the Klamath River, Sacramento-San Joaquin Delta and Tulare Lake watersheds. While Governor Newsom stopped short of declaring a statewide drought emergency, he directed state agencies to take immediate action to bolster drought resilience and prepare for impacts on communities, businesses, and ecosystems should dry conditions continue into the coming years.

Background

Much of the West is experiencing severe to exceptional drought and California is in a second consecutive year of dry conditions. Governor Newsom issued the emergency proclamation for Mendocino and Sonoma counties while standing in the bottom of Lake Mendocino, describing his location as what "should be 40 feet underwater" but for the historic drought. (Governor Newsom's Drought Update, April 21, 2021.) Recent warm temperatures and extremely dry soils have depleted expected runoff water from the Sierra-Cascade snowpack resulting in a historic and unanticipated estimated reduction of 500,000 acre-feet of water supply—or the equivalent of supplying water for up to one million households for one year—from reservoirs and stream systems. Upon issuing the expanded drought emergency proclamation, Governor Newsom said:

> . . .[w]ith the reality of climate change abundantly clear in California, we're taking urgent action to address acute water supply shortfalls in northern and central California while also building our water resilience to safeguard communities in the decades ahead. (Governor Newsom Expands Drought Emergency to Klamath River, Sacramento-San Joaquin Delta and Tulare Lake Watershed Counties (May 10, 2021) Office of Governor Gavin Newsom.)

The drought emergency declarations follow a series of actions that California has taken since the 2012-2016 drought to strengthen drought resilience. The actions include investment in water management systems, establishment of the Safe and Affordable Fund for Equity and Resilience Program, and development of the Newsom Administration's Water Resilience Portfolio. Statewide urban water use is 16 percent less than it was at the beginning of the last drought and yet, according to the declarations, extreme drought conditions this year "present urgent challenges" including the risk of water shortages in communities, greatly increased wildfire activity, diminished water for agricultural production, degraded habitat for many fish and wildlife species, threats of saltwater contamination of large fresh water supplies conveyed through the Sacramento-San Joaquin Delta, and additional water scarcity if drought conditions continue into next year. Governor Newsom's proclamations declare that:

> . . .to protect public health and safety, it is critical the State take certain immediate actions without undue delay to prepare for and mitigate the effects of, the drought conditions statewide.

The Drought Emergency Proclamations

The drought emergency proclamations each contain a series of orders directing state agencies to take immediate action to bolster drought resilience across California. The proclamations encourage state agencies to take action as swiftly as possible by providing flexibility in complying with certain regulatory requirements, such as the California Environmental Quality Act and certain provisions of the California Water Code.

Among other things, the proclamations direct the State Water Resources Control Board to consider modifying requirements for reservoir releases and

diversion limitations to conserve water upstream later in the year to maintain water supply, improve water quality and protect cold water pools for salmon and steelhead. They direct state water officials to expedite review and processing of voluntary transfers in order to foster water availability where it is needed most.

The proclamations direct state agencies to work with local water districts and utilities to make all Californians aware of the drought, and encourage actions to reduce water usage by promoting the Department of Water Resources' Save Our Water campaign. They also direct state agencies to engage in consultation, collaboration, and communication with California Native American tribes to further existing partnerships and coordination, and assist tribes in necessary preparation and response to drought conditions.

The proclamations direct the State Water Resources Control Board, Department of Water Resources, the Department of Fish and Wildlife, and the Department of Agriculture to consult with the Department of Finance in order to accelerate funding for water supply enhancement, water conservation, and species conservation projects, as well as to identify unspent funds that can be repurposed to assist in drought projects and recommend additional financial support for certain groundwater substitution pumping. The proclamations further direct action to maintain critical instream flows, proactively prevent community drinking water shortages, support our agricultural economy and food security, and generally increase resilience of California's water supplies and water systems.

Conclusion and Implications

Governor Newsom officially issued the Proclamation of a State of Emergency for Mendocino and Sonoma counties on April 21, 2021. The full text can be found at: https://www.gov.ca.gov/wp-content/uploads/2021/04/4.21.21-Emergency-Proclamation-1.pdf. The expanded Proclamation of a State of Emergency including an additional 39 counties was issued on May 10, 2021. Its full text can be found at: https://www.gov.ca.gov/wp-content/uploads/2021/05/5.10.2021-Drought-Proclamation.pdf. On May 17, 2021, the Department of Water Resources and U.S. Bureau of Reclamation filed a temporary urgency change petition to modify certain water quality requirements and will continue to develop an operations plan in a final Drought Plan for 2021.

(Holly Tokar, Meredith Nikkel)

RECENT FEDERAL DECISIONS

D.C. CIRCUIT ADDRESSES PETITION CHALLENGING FERC DECISION ON HYDROPOWER LICENSE AND RELATED ENDANGERED SPECIES ACT CLAIMS

Shafer & Freeman Lakes Environmental Conservation Corporation v. Federal Energy Regulatory Commission, 992 F.3d 1071 (D.C. Cir. 2021).

The D.C. Circuit Court of Appeals has granted in part, denied in part, and dismissed in part a petition challenging the Federal Energy Regulatory Commission's (FERC) decision on an amended hydropower license for the Oakdale and Norway Dams in Indiana, and the related Biological Opinion from the U.S. Fish and Wildlife Service (FWS or the Service). The amended license increases flow below the Oakdale Dam during periods of drought, in order to protect threatened and endangered species of mussels. Petitioners challenged the scientific basis for mandating increased flows, which have the effect of lowering water levels in the lakes behind the dams. In line with petitioners, FERC would have required water levels in the lakes to be maintained, in line with the multiple-use considerations detailed in the Federal Power Act under which the dam license is issued. However, the FWS directed in its Biological Opinion on the amendment that flows below the dam meet certain minimum levels, as a reasonable and prudent measure to minimize incidental take.

The Court of Appeals found that the Service provided a reasoned and thorough justification for its conclusions in the Biological Opinion, supported by substantial evidence, but held that neither FERC nor the Service had adequately considered whether this reasonable and prudent measure was more than a "minor" change to FERC's proposed license amendment and therefore in violation of Service regulations. Accordingly, the Court of Appeals remanded the case to FERC for further proceedings on that issue, without vacating the amended license or Biological Opinion.

Factual and Procedural Background

Northern Indiana Public Service Company (NIPSCO) operates the Oakdale and Norway Dams, built in the 1920s on the Tippecanoe River. The Oakdale Dam creates Lake Freeman, and further upstream, the Norway Dam creates Lake Shaffer. With more than four thousand private lakefront properties, the lakes have a significant recreational and economic nexus with the surrounding communities. NIPSCO's 2007 FERC license required operation of the dams in an instantaneous run-of-river mode. The license did not allow the water level of the lakes to fluctuate more than three inches above or below a specified elevation.

During a drought in 2012, the Service found several species of threatened or endangered mussels were dying downstream from the Oakdale Dam, at least in part from low water flows. At the Service's direction, NIPSCO increased water flow out of Oakdale Dam to avoid liability under the federal Endangered Species Act (ESA). NIPSCO concurrently obtained variances from FERC to lower water levels in the lake below the elevation dictated in the license.

The FWS issued a Technical Assistance Letter, outlining procedures for NIPSCO to avoid ESA liability by mimicking natural run-of-river flow. While both the FERC license and the Technical Assistance Letter required "run-of-river" operations, the FWS defined this differently than FERC. Using a linear scaling methodology to determine that the natural water flow directly below Oakdale Dam would be 1.9 times the flow measured above Lake Shaffer, the Service advised NIPSCO to meet this flow requirement and cease electricity generation during low-flow events. NIPSCO sought an amendment of its FERC license to implement the Technical Assistance Letter.

Carroll and White Counties and the City of Montecello, which border Lake Freeman, and the nonprofit that owns much of the land beneath the lakes, Shafer & Freeman Lakes Environmental Conservation Corporation (together: Coalition) intervened in the FERC proceeding to oppose the license amendment, objecting to the Service's formula for calcu-

lating river flow. The Environmental Assessment prepared by FERC under the National Environmental Policy Act (NEPA) analyzed NIPSCO's proposed alternative to operate in accordance with the Service's guidance and FERC's preferred alternative to cease diversion of water for the generation of electricity during periods of low flow, but maintain Lake Freeman's target elevation. FERC cited its obligation under the Federal Power Act to balance wildlife conservation with other interests.

After a contentious formal Endangered Species Act (ESA) consultation, the Service published a Biological Opinion which concluded that FERC's alternative was not likely to jeopardize threatened or endangered mussel species. However, the Incidental Take Statement included a "reasonable and prudent measure" to minimize incidental take that required NIPSCO to maintain water flows below the Oakdale Dam measuring 1.9 times that of the average daily flow above the dams. The Coalition objected to this measure, which would draw down lake levels, and NIPSCO expressed concern about the clear conflicts between the Biological Opinion and FERC's alternative, which required a minimum lake elevation. While FERC disagreed with the Service, it treated the Service's reasonable and prudent measure as "nondiscretionary" and issued an amended license consistent with NIPSCO's application and the Service's Biological Opinion. The Coalition brought suit to challenge the amended FERC license and the Biological Opinion.

The D.C. Circuit's Opinion Challenges to the Biological Opinion

The Coalition raised numerous challenges to the scientific foundation of the Biological Opinion and argued that these errors required invalidation of both the Biological Opinion and the amended FERC license that incorporated the reasonable and prudent measure Biological Opinion. The court rejected each of these arguments.

The Court of Appeals considered whether the Service's issuance of the Biological Opinion, or FERC's licensing decision incorporating the Biological Opinion, were arbitrary and capricious or unsupported by substantial evidence. The court noted that under the ESA, the Service and FERC are required to use the best scientific and commercial data available when making decisions. But, the court reviews scientific judgments of an agency narrowly, holding agencies to certain "minimal standards of rationality," and vacating a decision only if the agency:

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

The Court of Appeal rejected the Coalition's argument that the Service's scientific conclusions did not deserve deference because the Service personnel who worked on the Biological Opinion lacked hydrological expertise. As the Service consulted hydrologists as part of its decision-making process, the court found that the Service' judgment merited the deference traditionally given to an agency when reviewing a scientific analysis within the agency's area of expertise.

The Coalition's arguments against the Biological Opinion centered on the Service's calculations of river flow using linear scaling methodology. Acknowledging the method's imperfections, the Service determined that this was the soundest available method for guaranteeing that water flow out of Oakdale Dam represented the natural flow of the river during low-flow periods. The court found that the Service provided a reasoned and thorough justification for its approach to managing the river's flow, explaining the scientific basis for its decision, identifying substantial evidence in the record buttressing its judgment, and responding to the Coalition's concerns. The court found the Service's analysis "comfortably passes" review under the standards of the Administrative Procedure Act.

Since the court found that the Service had acted reasonably in using the linear scaling methodology, it held that FERC had acted reasonably in relying on the Service's corresponding scientific judgments FERC's reliance on the determination that additional flows were needed to protect listed species of mussels, despite certain critiques of the methodology, was not arbitrary or capricious.

On other counts, the court held that it lacked jurisdiction because the Coalition had not raised the issues in its petition for rehearing before FERC. The

Coalition had sufficiently raised the validity of the Biological Opinion itself on rehearing, but did not raise several specific objections it brought before the court. Because of this failure to exhaust its administrative remedies under the Federal Power Act with regards to these objections, they could not be considered by the court.

The Service's 'Reasonable and Prudent Measure' and Minor Changes to the FERC License

ESA regulations provide that any reasonable and prudent measures the Service proposes to reduce incidental take cannot involve more than a minor change to the proposed agency action for which the Service prepared the incidental take statement. A reasonable or prudent measure that would alter the basic design, location, scope, duration, or timing of the agency action is prohibited. Service guidance provides that substantial design changes are inappropriate in the context of an incidental take statement issued under a no jeopardy biological opinion. With a finding of no jeopardy, the project, as proposed by the action agency, would be in compliance with the statutory prohibition against jeopardizing the continued existence of listed species.

Here, the Service required a level of flow through Oakdale Dam that could materially reduce the water level in Lake Freeman during drought. The Coalition contended that this reasonable and prudent measure was not a minor change, and therefore a violation of ESA regulations. The Court of Appeals found that the Service and FERC had acted in an arbitrary manner, having failed to adequately explain why the Biological Opinion's reasonable and prudent measure qualified as a minor change.

FERC's proposed alternative for the NIPSCO license amendment provided that during low-flow periods, NIPSCO would cease electricity generation, but would continue to operate the Oakdale Dam to maintain a constant water elevation in Lake Freeman. The Service concluded this alternative would not jeopardize threatened and endangered mussels, yet established a reasonable and prudent measure that required NIPSCO to draw down Lake Freeman during low-flow periods, in direct conflict with the terms of the license as proposed by FERC. The court found that the Service had failed to analyze whether it's reasonable and prudent measure complied with its own regulations on the scope of reasonable and prudent measures.

The Service argued that its proposal should be compared with NIPSCO's application, which incorporated the Service's requirement to provide downstream flows, rather than FERC's alternative. Against NIPSCO's application, the Service's reasonable and prudent measure did not represent a change. However, the court found that the alternative with which to compare the Service's proposal was FERC's proposed action, not NIPSCO's application. It was FERC's alternative that was analyzed in the Biological Opinion, and considered in formulating reasonable and prudent measures. Given the conflict between its alternative and the Incidental Take Statement, FERC adopted the NIPSCO alternative, reasoning that it considered implementation of the Service's reasonable and prudent measure as nondiscretionary. The court noted that FERC's treatment of the measure as nondiscretionary would be sensible in the normal course. But here, the Service's failure to address an important issue was apparent on the face of the Biological Opinion and infected FERC's license amendment as well.

With this flaw, the court remanded the case to FERC for further proceedings consistent with the opinion, without vacating the license amendment or the Biological Opinion and Incidental Take Statement, given that vacatur would leave NIPSCO again with conflicting directives in the original FERC license and the Service's Technical Advice Letter.

Conclusion and Implications

This case highlights the potentially contradictory mandates among federal environmental and energy laws that agencies and facilities must navigate. The Federal Power Act's provisions for hydropower licensing has a multiple use doctrine at its core, as we see in other federal laws governing the use of federal lands and resources. The ESA, on the other hand, has a focus on the protection of species and habitat, with incidental take permits available where consistent with conservation of the species. In this case, FERC felt unable to reject the Service's reasonable and prudent measure in the Incidental Take Statement for Oakdale Dam. NIPSCO itself urged the agencies to not saddle it with contradictory directives, preferring flow and generation restrictions in the FERC license

to the prospect of ESA liability. With this opinion, the court has hinted that the agencies may not have struck the right balance between the dictates of the ESA and the Federal Power Act, and reminded the Service that where it has found an agency action will result in no jeopardy to a protected species, it must consider whether further would amount to a substantial change in the proposed action itself.
(Allison Smith)

DISTRICT COURT REFUSES TO APPLY EQUITABLE TOLLING TO SAVE FEDERAL TAKINGS CLAIMS AFTER REMAND FROM THE U.S. SUPREME COURT

Honchariw v. County of Stanislaus, ___F.Supp.3d___, Case No. 16-CV01183 (E.D. Cal. Mar. 31, 2021).

On remand from the U.S. Supreme Court after its seminal 2019 decision in *Knick vs. Township of Scott*, the U.S. District Court for the Eastern District of California granted defendant's motion for judgment on the pleadings and dismissed plaintiff's action. Even though the District Court accepted a later date, argued by plaintiff, as the date that his claims became ripe and triggered the relevant statute of limitations, the court refused to toll the statute of limitations while plaintiff pursued state court takings claims that the state court dismissed as untimely. One of the requirements to apply equitable tolling is that the party looking to benefit must provide the defendant with timely notice of their claims. A failure to timely file a previous action will often result in a failure to meet this timely notice requirement.

Factual and Procedural Background

In 1992, the plaintiff was named trustee to 33 acres of real property along the Stanislaus River. In 2006, plaintiff applied with the County of Stanislaus to subdivide his property into ten lots. The county planning commission denied his proposal and plaintiff appealed to the board of supervisors, which affirmed the commission's rejection without making any findings. Plaintiff filed a writ of administrative mandamus in Stanislaus County Superior Court challenging the board's decision. After the trial court upheld the board's decision, a state appellate court reversed, finding that the board's rejection of the subdivision application without any written findings was contrary to state law. Upon reconsideration and after the state court decision, the board changed tact and approved the subdivision map application on May 22, 2012.

On December 12, 2012, plaintiff filed a second action in state court seeking damages for: 1) temporary taking of his property by inverse condemnation under the state and federal constitutions, and 2) denial of his substantive due process rights under the Fifth and Fourteenth Amendments. The state court ultimately dismissed plaintiff's action as untimely under the state's Subdivision Map Act, a decision upheld by a state appellate court.

Nearly a year later, plaintiff brought an action in federal court again seeking damages for a temporary taking and for deprivation of his substantive due process rights.

In a November 14, 2016 order, the U.S. District Court for the Eastern District of California granted defendants' motion to dismiss after finding that plaintiff's takings claim was not ripe for federal adjudication pursuant to the U.S. Supreme Court's 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*. The Ninth Circuit affirmed the Eastern District's decision and plaintiff sought review from the U.S. Supreme Court. After the U.S. Supreme Court's 2019 decision in *Knick v. Township of Scott*, in which the *Williamson County* decision was partially overruled, the U.S. Supreme Court remanded the case back to the Ninth Circuit for reconsideration, which remanded the case back to the District Court for reconsideration. After a new round of briefing, defendants filed a motion for judgment on the pleadings.

The District Court's Decision

On remand from the U.S. Supreme Court, the District Court addressed each of plaintiff's arguments that their claims were not time barred, ultimately ruling against plaintiff on all counts.

Takings Claim

Regarding his takings claims, plaintiff argued that such claims were not subject to any statute of limitations applicable and that the relevant statute of limitations applicable to a 1983 claim did not apply. In its order dismissing plaintiff's action, the District Court recognized that the Ninth Circuit has held that takings claims *must* be brought under § 1983, and plaintiff's takings claims were therefore not cognizable separately under the U.S. Constitution. The court recognized that claims brought under:

> . . .section 1983 borrow from the forum state's statute of limitations for personal injury claims, and in California, that limitations period is two years.

The parties disputed when the statute of limitations began to run as well as whether plaintiff was entitled to equitable tolling of the statute of limitations that could save his claims. Defendants argued that the statute of limitations began to run when the board of supervisors initially denied plaintiff's appeal of his proposal to subdivide his property on March 24, 2009, meaning that the statute of limitations would have run by March 24, 2011. Plaintiff argued that his takings claim did not accrue until May 22, 2012 when the board approved his application for a subdivision after a state court ruled in plaintiff's favor. Plaintiff also argued that he was entitled to equitable tolling while his takings claim was being litigated in state court, or from December 12, 2012 until August 19, 2015 when the state Supreme Court denied plaintiff's petition for review.

The District Court concluded that plaintiff's takings claim accrued when the board approved its application for subdivision of his property, or May 22, 2012, the same date argued by plaintiff.

The District Court then rejected plaintiff's equitable tolling claims. Under federal law, the statute of limitations on a takings claim does not begin running until the claim is "ripe". After the *Knick* decision, a federal takings claim is ripe when "the government entity charged with implementing the regulations has reached a final decision regarding the application of the challenged regulations to the property at issue." This finality requirement is met when:

> (1) a decision has been made about how a plaintiff's own land may be used, and (2) the local land-use board has exercised its judgment regarding a particular use of a specific parcel of land, eliminating the possibility that it may soften the strictures of the general regulations it administers.

Here, the court concluded that plaintiff was not entitled to any tolling of the statute of limitations during the time plaintiff pursued his state court action because the state court action itself was dismissed as untimely. The court noted that under California law:

> . . .to determine whether equitable tolling may extend a statute of limitations courts must analyze whether a plaintiff has established the doctrines three elements [1] timely notice to the defendant, [2] lack of prejudice to the defendant, and [3] reasonable and good faith conduct by the plaintiff.

Under a line of case law, for plaintiff to comply with the timely notice requirement above and benefit from equitable tolling, he needed to file his state court action in a timely fashion and he did not do so. Without equitable tolling, plaintiff's claim was untimely and subject to dismissal.

Conclusion and Implications

Remand of the *Honchariw* action was closely watched after the *Knick* decision removed the second ripeness requirement established in the *Williamson County*. Despite the *Knick* decision's widening of the pathway to takings claims in federal court, this did not override plaintiff's failure to timely bring his claims in state and federal court.
(Travis Brooks)

DISTRICT COURT REJECT'S FOURTH AND FOURTEENTH AMENDMENT CLAIMS AFTER PLAINTIFF FAILS TO SECURE A BUILDING PERMIT AND REFUSES TO ALLOW COUNTY TO INSPECT PROPERTY

Schmid v. County of Sonoma, ___F.Supp.3d___, Case No. 19-cv-00883 (N.D. Cal. Mar. 24, 2021).

In a recent order, the U.S. District Court for the Northern District of California granted defendants' motion for summary judgment as to plaintiff's claims that the County of Sonoma violated his Fourth and Fourteenth Amendment rights when it refused to grant plaintiff's request for an agricultural exemption to the county's building permit requirement. Plaintiff began construction on his barn without first seeking an exemption to the county's building permit requirements, or applying for a building permit. The county provided plaintiff with the opportunity for a hearing on an appeal of the county's determination, and on multiple occasions, plaintiff refused to give the county an opportunity to inspect the barn to confirm whether or not the agricultural exemption could apply.

Factual and Procedural Background

Sonoma County initially cited plaintiff for performing construction work on his barn without a building permit or obtaining an exemption. After the county notified plaintiff that he had violated the county building code, plaintiff chose to apply for an agricultural exemption from the building permit requirement. Sonoma County dispatched an inspector to plaintiff's barn to confirm that the barn work qualified for an agricultural exemption, and the inspector found the barn was being used to store automobiles, and not for agricultural purposes. The inspector offered to conduct a later inspection to confirm agricultural use of the barn, however plaintiff refused, arguing that such inspection would violate the Fourth Amendment of the U.S. Constitution. Plaintiff later changed his mind and allowed the inspector to return, however when the inspector returned, plaintiff had completely blocked entry into the barn with bails of hay. Because the county was not allowed access to inspect the barn, it refused to apply the building permit exemption. Plaintiff appealed the decision to the county's board of building appeals, which held a two hour hearing. During the hearing, plaintiff was offered another opportunity to schedule an inspection and refused. The board of appeals unanimously affirmed denial of the exemption.

Plaintiff then brought a lawsuit in federal court arguing that the county's denial of his application for an agricultural exemption was unconstitutional.

The District Court's Decision

After plaintiff filed his lawsuit, the county filed a motion for summary judgment. Ultimately the court granted the county's motion after finding that as a matter of law, plaintiff failed to state a cognizable claim under Title 42 § 1983 of the United States Code. Plaintiff's action under § 1983 was premised on the Fourth and Fourteenth amendments to the United States Constitution. Plaintiff's claim was principally based on the theory that the county violated plaintiff's Fourth Amendment rights when the it required inspection of the barn.

Section 1983 Claim

As the court noted, to prevail on a § 1983 claim based on the Fourth Amendment, "a plaintiff must show that the state actor's conduct was an unreasonable search or seizure." Here, nothing showed that the county entered without plaintiff's consent. The county inspector never entered the plaintiff's property without permission, and was repeatedly denied access to the barn. Plaintiff argued that the county building code only allowed county inspectors onto their property after an agricultural exemption had already been granted, however this conflicted with a plain reading of the building code. With regard to agricultural exemptions, the building code required an inspection after a structure is completed or improved to verify that the structure is being used for the use stated in an application for an agricultural exemption. The building code assumes that an exemption will be obtained *before* construction begins, with an inspection afterward to verify proper use. Here, plaintiff began construction first and then applied for an exemption. Nothing in the building code required

the county to issue an exemption for unauthorized work done before approval of an exemption in the first place.

Here, there was no evidence that the county coerced plaintiff into authorizing inspections with criminal or other penalties for declining to allow permit-related inspections. The main consequence of refusing an inspection was that the county denied an exemption. This was not a coercive penalty and was merely the consequence of plaintiff's own failure to follow the building code. Accordingly, the court concluded that there had been no Fourth Amendment violation.

Due Process Claim

The court also rejected plaintiff's claims that he was denied substantive due process under the Fourteenth Amendment. To bring successful Fourteenth Amendment claims, plaintiff would need to establish that the county's actions were arbitrary or irrational because they failed to advance any "legitimate governmental purpose." Plaintiff's argued that they met all the requirements of an agricultural exemption, and therefore the county's refusal to issue such an exemption was arbitrary and irrational. The record showed otherwise, contrary to the requirements of the building code, plaintiff failed to obtain a building permit or exemption *before* engaging in construction. When the county attempted to perform an inspection, plaintiff refused. The court concluded that the denial of the exemption was not arbitrary or irrational.

The court also rejected plaintiff's procedural due process claims. If a liberty or property interest is involved, a court must determine what process was due and whether the party was actually afforded such process. The basic requirements for adequate due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Here, the county's detailed building code provisions setting out a the procedure to obtain an exemption, coupled with the opportunity to be heard by inspectors and permit appeals board, were well within traditional notions of procedural due process. The court rejected plaintiff's procedural due process claims.

Conclusion and Implications

The U.S. District Court's order granting summary judgment in the *Schmidt* case highlights courts' long-standing recognition of the valid police power that local agencies have to enforce building codes and inspection requirements. So long as such codes are enforced fairly with the right to appeal such decisions and be heard, local agencies do not violate the Fourth or Fourteenth amendments to the U.S. Constitution. (Travis Brooks)

U.S. ARMY CORPS OF ENGINEERS' CLEAN WATER ACT SECTION 408 REQUIREMENTS UPHELD BY THE DISTRICT COURT

Russellville Legends, LLC v. U.S. Army Corps of Engineers, ___F.Supp.3d___, Case No. 4:19-CV-00524-BSM (E.D. Ark. Mar. 31, 2021).

The U.S. District Court for the Eastern District of Arkansas recently granted a motion for summary judgment by the U.S. Army Corps of Engineers (Corps) and denied a motion for summary judgment by the Russellville Legends, LLC (Russellville) in a federal Clean Water Act (CWA) Section 408 case. The District Court's ruling determined when a project proponent is required to obtain section 408 review and approval.

Factual and Procedural Background

Section 408 of the Clean Water Act requires anyone seeking to alter, use, or occupy a civil works project built by the United States for flood control to obtain permission from the Corps. This permission can come in the form of a "consent." Section 408 policies provide that a consent is a written agreement between the holder of an easement and the owner of the underlying property that allows the owner to use

their land in a particular manner that will not interfere with the easement holder's rights. The Corps has guidelines providing that if any Corps project would be negatively impacted by a requestor's project, the evaluation should be terminated.

Russellville bought land located near a university from Joe Phillips (Phillips) in order to build student housing. Since 1964, the Corps held an easement over the land below the 334-foot elevation line that prevented structures from being constructed on the easement due to flooding risks. While Phillips owned the land, the Corps had given two consents for work within the easement: one to a nearby city, to remove dirt from within the easement, and one to Phillips, to replace the dirt that was removed.

After Russellville acquired the property, the Corps gave Russellville conflicting messaging about whether the consent the Corps gave to Phillips was still in effect such that Russellville could replace the dirt that had yet to be replaced by Phillips. The Corps first told Russellville that the consent was still in effect, but that Russellville could not build structures within the easement. Months later, the Corps told Russellville that the consent was only applicable to Phillips, so Russellville could not use it to replace any dirt.

Russellville submitted a Section 408 request, working with the Corps to provide environmental modeling satisfactory to the Corps, to determine the impacts Russellville's desired construction activity could have on water elevation and velocity in the Corps' easement. The Corps denied Russellville's request, pursuant to Corps' guidelines, because it determined the construction would negatively impact Corps projects. The Corps also denied the request because of an Executive Order that requires federal agencies to avoid modification of "support of floodplain development" when there is any practicable alternative.

Russellville sought judicial review of the Corps' denial and filed a motion for summary judgment. The Corps filed a cross-motion for summary judgment.

The District Court's Decision

The District Court began its analysis by explaining the relevant legal standards. It explained that summary judgment is appropriate when there is no genuine dispute of material fact, and that in the context of summary judgment, an agency action is entitled to deference. It also explained that the relevant standard for reviewing agency action under the federal Administrative Procedure Act (APA) is whether the agency action was arbitrary, capricious, or an abuse of discretion. An agency action is not arbitrary and capricious if the agency examined relevant data, stated a satisfactory explanation for its action, and included a rational connection between the facts and the decision made.

Declaratory Judgment Act Claim

Russellville first argued the consent the Corps granted to Phillips was reviewable as a contract under the Declaratory Judgment Act (DJA), such that the court could declare the rights granted under the consent. The court decided the consent was not a contract because it lacked consideration—a necessary element for every contract. Therefore, the court held the DJA did not apply, and did not allow the court to undertake such an interpretive review of the consent.

Corps Consent to Predecessor in Interest Didn't Apply to Successor in Interest

Russellville then argued that the consent the Corps granted to Phillips was still in effect to allow Russellville to undertake its desired construction, without any need for a new § 408 consent. The court held that it did not matter whether the consent the Corps granted to Phillips was still in effect because Russellville's construction would impact Corps projects. As a result of this impact, the court held Russellville had to obtain Corps approval under Section 408 and Russellville could not use the old consent even if it were in effect.

Rational Basis/Analysis

The court then reviewed the Corps' decision under the APA standard for agency actions to determine whether the denial was valid. Ultimately, the court held that the Corps' actions had a rational basis and were not arbitrary and capricious because the Corps examined relevant data, stated a satisfactory explanation for its action, and included a rational connection between the facts and the decision made.

The court first determined that the Corps examined relevant data. The court pointed out that the Corps examined Russellville's memorandum accompanying its request for consent, which used hydraulic models to determine the impacts in the easement area and on the Corps' projects, and determined that Rus-

sellville's construction would increase flood heights and water channel velocities. Russellville tried to argue that the Corps should have included some of its own studies and models to support its decision, but the court concluded that the Corps has no obligation to conduct its own studies, therefore its examination of Russellville's memorandum was sufficient.

The court next determined that the Corps stated satisfactory explanations to support its denial. The Corps had explained that its denial was because: 1) the project would increase flood risks to people and property, 2) the project would impair the usefulness of other Corps projects, and 3) the project would obstruct the natural flow of floodwater into a sump area that was an integral part of a Corps project. Taken together, the court found these specific explanations to be satisfactory.

Lastly, the court determined there was a rational connection between the Corps' factual findings and its ultimate decision. The Corps has an obligation to avoid adverse impacts associated with floodplain modification, and here the Corps denied Russellville's request for floodplain modification because the Corps found it would present an adverse impact.

Therefore, because the Corps' actions had a rational basis, and were not arbitrary and capricious, the court denied Russellville's motion for summary judgment and granted the Corps' cross-motion for summary judgment.

Conclusion and Implications

Section 408 cases are not very common. This case shows that a project proponent must go through the Section 408 request process if the project would impair Corps projects, regardless of whether consent was granted to a prior property owner. It also demonstrates that a project proponent carries the full burden of presenting all studies and analysis, and the Corps has no obligation to conduct its own studies or analysis. The District Court's opinion is available online at: https://casetext.com/case/russellville-legends-llc-v-us-army-corps-of-engrs
(William Shepherd, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT UPHOLDS SUPPLEMENTAL EIR PREPARED BY STATE LANDS COMMISSION FOR LEASE AMENDMENT PERTAINING TO DESALINATION PLANT

California Coastkeeper Alliance v. State Lands Commission, ___Cal.App.5th___, Case No. C088922 (3rd Dist. Apr. 8, 2021).

The California State Lands Commission prepared a supplemental Environmental Impact Report (EIR), as a California Environmental Quality Act (CEQA) responsible agency, to a 2010 subsequent EIR that had been prepared by the City of Huntington Beach for a desalination plant, certain components of which would be located offshore. Plaintiffs sued, claiming that the State Lands Commission had failed to assume lead agency status, which resulted in an unlawful piecemealing of the environmental review. The trial court rejected plaintiffs' claims, who then appealed. The Court of Appeal in turn affirmed.

Factual and Procedural Background

Since 1999, real party in interest Poseidon Resources (Surfside) LLC (Poseidon) has been seeking to establish a desalination plant at a site in Huntington Beach. The site itself consists of approximately 11.78 acres including tide and submerged lands in the Pacific Ocean offshore of Huntington Beach. In 2005, Huntington Beach, serving as the lead agency performing environmental review of the proposal under the California Environmental Quality Act, certified an Environmental Impact Report. In 2006, Huntington Beach granted the project's conditional use permit and coastal development permit, although the project did not move forward. A few years later, Poseidon submitted a modified application, which was evaluated in a subsequent EIR prepared by Huntington Beach in 2010 as a result of changed circumstances and new information. Huntington Beach certified the subsequent EIR in 2010.

Following additional changes in circumstances, including regulatory changes, Poseidon proposed modifications to certain offshore project components, which it addressed via a lease modification with defendant State Lands Commission. The State Lands Commission, as a CEQA responsible agency, determined that it needed to prepare a supplemental EIR to Huntington Beach's 2010 subsequent EIR to evaluate the potential impacts associated with the lease modification project. The scope of the supplemental EIR was limited to evaluating the changes to the 2010 lease and the incremental effects of those modifications and was intended to be read in conjunction with the 2010 subsequent EIR. In late 2017, the Lands Commission certified its supplemental EIR.

Plaintiffs filed a petition for a writ of mandate asserting that the State Lands Commission failed to comply with CEQA. Among other things, plaintiffs claimed the State Lands Commission violated CEQA by failing to assume the role of lead agency in undertaking additional CEQA review. They also claimed that, in light of substantial changes to the project, substantial changes to the surrounding circumstances, and new information of substantial importance, the State Lands Commission should have performed a full EIR as lead agency. According to plaintiffs, the manner in which the Commission proceeded led to unlawful segmentation of the environmental review process. The trial court denied the petition and plaintiffs appealed.

The Court of Appeal's Decision

The Court of Appeal first addressed the State Lands Commission's decision to proceed with a supplemental EIR, as opposed to a subsequent EIR, finding that substantial evidence supported the Commission's determination that only minor additions or changes would be required to the previous EIR. The Court of Appeal noted, however, that plaintiffs did not argue that it was an abuse of discretion to proceed by supplemental EIR. Rather, they claimed that the election to prepare a supplemental EIR did not re-

lieve the State Lands Commission of a responsibility to assume the role of lead agency. According to plaintiffs, when the original lead agency has completed its statutory obligations, but project changes or new information require additional review, the next public agency to take discretionary action on the project "shall" step into the role of lead agency. The State Lands Commission's failure to do so, plaintiffs contended, was a legal error that resulted in the unlawful segmentation of the updated CEQA analysis.

The Court of Appeal rejected this argument, first noting that the CEQA Guidelines only require a responsible agency (such as the State Lands Commission in this case) to assume lead agency status where, among other things, a subsequent EIR is required under CEQA Guidelines § 15162. Because substantial evidence supported the State Lands Commission's decision to instead prepare a supplemental (rather than a subsequent) EIR, the Commission therefore was not required under the CEQA Guidelines to assume lead agency status. Accordingly, the Court of Appeal concluded, there was no legal error in this respect.

Piecemealing Claim

The Court of Appeal also rejected plaintiffs' piecemealing claim ("piecemealing" refers to the process of attempting to avoid full environmental review by splitting a project into several smaller projects that appear more innocuous than the total planned project). The court first noted that the 2010 subsequent EIR prepared by Huntington Beach had never been challenged, and thus was presumed to be legally adequate. Thus, the State Lands Commission only was required to analyze those changes to the project since 2010, as it did.

Upholding the supplemental EIR, the Court of Appeal found that the State Lands Commission undertook the procedures expressly authorized by statute and the CEQA Guidelines that were appropriate under the circumstances. The impetus for the changes was regulatory changes that were not foreseeable in 2010. Under these circumstances, the State Lands Commission did not improperly piecemeal the analysis. As required, it supplemented the previous 2010 subsequent EIR analysis, adding only that information necessary to make the previous EIR adequate for the project as revised in light of the changing regulatory landscape. It was not, the Court of Appeal concluded, required to create a plenary, stand-alone, all-inclusive EIR for the project.

Conclusion and Implications

The case is significant because it contains a substantive discussion of CEQA's subsequent review provisions, in particular the distinctions between subsequent and supplemental review, as well as a discussion regarding "piecemealing" claims under CEQA. The decision is available online at: https://www.courts.ca.gov/opinions/documents/C088922.PDF.
(James Purvis)

SECOND DISTRICT COURT REVERSES TRIAL COURT DETERMINATION THAT DUE PROCESS REQUIRES NOTICE OF AMOUNT OF ADMINISTRATIVE PENALTY ACTUALLY IMPOSED

Lent v. California Coastal Commission, ___Cal.App.5th___, Case No. B292091 (2nd Dist. Apr. 5, 2021).

The Second District Court of Appeal in *Lent v. California Coastal Commission* upheld the California Coastal Commission's (Commission) imposition of a significant fine for blocking a coastal access easement against the property owner who had refused to remove the interfering structures. The Court of Appeal held that the property owner (Lent) was responsible for the interfering structures built by Lent's predecessor-in-interest and had a duty to remove the structures upon request by the Commission. The court held that there was sufficient due process notice of the potential significant fine, and the fine was not excessive in light of repeated refusals to remove the structures and of the fact that Lent failed to present evidence of an inability to pay the fine.

Factual and Procedural Background

Lent owns a home on beachfront property in Malibu which Lent purchased in 2002. The prior owner of the home built the home in 1978 pursuant to a Coastal Development Permit (CDP) issued by the California Coastal Commission. The CDP required dedication of a five-foot wide vertical easement between the home and the neighboring home to the California Coastal Conservancy (Conservancy) for public access to the coast. By 1983 the prior owner built on the easement area a deck providing private access to the beach, a staircase from the deck leading up to the house, and a gate blocking public access to the easement area. The prior owner did not seek a CDP for those structures, nor were they approved by the Commission.

In 1993 the Conservancy sent a letter to the prior owners notifying them of the Conservancy's easement but stating that the Conservancy would keep the easement closed until it could contract with management agency to open and management easement for public use. The Conservancy asked the owners to either remove the gate or to seek the Conservancy's permission to keep the gate in place pending opening of the easement for public use.

After Lent purchased the home, in 2007 the Commission sent Lent a letter stating that the structures were inconsistent with the easement and violated the Coastal Act, asking Lent to remove them. The letter contained a copy of the CDP conditions. The next month the Commission served Lent with a notice of intent to commence cease and desist order proceedings.

Because the topography of the easement area includes several steep elevation drops, the Conservancy determined to build an accessway with stairs to make it useable for the public. The Conservancy hired a contractor and architect and met with Lent and the Commission in 2010 to discuss development of the accessway. Despite several letters by the Commission requesting removal of the structures, Lent objected and refused to remove the structures.

In 2014 the Commission served Lent with a notice of intent to issue a cease-and-desist order. The notice advised Lent that the Commission could impose administrative penalties under Public Resources Code § 30821, a statute enacted that year authorizing the Commission to impose penalties on property owners who violate the public access provisions of the Coastal Act in amounts of up to $11,250 per day. Still, Lent refused to remove the structures.

Two weeks before the 2016 scheduled hearing on the cease-and-desist order, the Commission staff issued a report detailing the Lents' alleged violations of the Coastal Act. In the report the Commission staff recommended that the Commission impose a penalty of between $800,000 and $1,500,000 (and specifically recommended a penalty of $950,000) but stated that the Commission was justified under the circumstances in imposing a penalty of up to the full statutory amount of $8,370,000.

At the hearing, the Conservancy executive officer stated that the only impediment to opening the easement for public access was Lent's refusal to remove the structures and that it was feasible to build an accessway in the easement area. During deliberations, the commissioners found Lent's conduct particularly egregious, warranting a higher penalty than staff's recommendation. The Commission issued the cease-and-desist order and imposed a penalty of $4,185,000, approximately half of the maximum allowable amount.

Lent filed a petition for writ of mandate, asking the trial court to set aside the Commission's order and penalty. In addition to contending that substantial evidence did not support the Commission's determination that Lent violated the Coastal Act, Lent argued that § 30821 is unconstitutional on its face because it allows the Commission to impose substantial penalties at an informal hearing where the alleged violator does not have the procedural protections traditionally afforded defendants in criminal proceedings. Lent also argued that § 30821 is unconstitutional as applied to Lent and that the penalty violated the constitutional prohibition on excessive fines.

At the Trial Court

The trial court granted the petition in part and denied it in part, ruling that substantial evidence supported the Commission's decision to issue the cease-and-desist order and to impose a penalty. The court ruled, however, that the Commission violated the Lent's due process rights by not giving Lent adequate notice of the amount of the penalty the Commission intended to impose. Therefore, the court set aside the penalty and directed the Commission to allow Lent to submit additional evidence. Both Lent and the Commission appealed.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court holdings that the cease-and-desist order to Lent as the successor owner was appropriate and that substantial evidence supported the Commission's decision to issue the cease-and-desist order. However, it reversed the trial court as to due process, concluding that the Commission did not violate Lent's due process rights by imposing a $4,185,000 penalty, even though staff recommended a smaller penalty, because the Commission had previously advised the Lents it could impose a penalty of up to $11,250 per day and the Commission staff specifically advised Lent that the Commission could impose a penalty of up to $8,370,000.

On the Lent's appeal of the penalty, the Court of Appeal concluded that Lent failed to show § 30821 is unconstitutional, either on its face or as applied to Lent. It also concluded that the penalty did not violate the constitutional prohibition on excessive fines.

Cease and Desist Authority

Lent argued that the Commission did not have authority to impose the cease-and-desist order against the successor owner of a person who violates the Coastal Act. Lent's argument is contrary to settled law. Under Public Resources Code **§** 30810 the Commission may issue a cease-and-desist order after a public hearing if the Commission:

> . . .determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing a permit or (2) is inconsistent with any permit previously issued by the commission . . . .

It is well settled that the burdens of coastal development permits run with the land once the benefits have been accepted. (*Ojavan Investors, Inc. v. California Coastal Commision,* 26 Cal.App.4th 516, 526 (1994).)

Substantial Evidence

In its cease-and-desist order, the Commission concluded that Lent, by retaining "solid material and structures" on the property, including "the separate placement of a gate, a staircase, decks, and supporting structures," undertook activity that required a CDP and that was inconsistent with a previously issued CDP. Substantial evidence supported the Commission's finding the structures in the easement were inconsistent with both the plans submitted by the original owner and with the CDP.

Although a plan showing the structures had been submitted to the county, the plan was not submitted to or approved by the Commission. Testimony by the architects that plans submitted to the Commission normally do not show features outside of the building envelope was not persuasive because the features of the deck and stairs were shown on the plans, but within the building envelope.

Due Process Notice

Lent had reasonable and sufficient due process notice. Due process does not require an administrative agency to notify an alleged violator of an exact penalty the agency intends to impose, so long as the agency provides adequate notice of the substance of the charge. The Commission staff informed Lent that its recommended penalty range of $800,000 to $1,500,000 was just that—a recommendation—and that the Commission could impose a penalty of up to $8,370,000.

Due Process Constitutionality of Section 30821

Lent failed to satisfy the first prong of Due Process facial challenge, because it did not demonstrate that in the generality or the great majority of cases the Commission's imposition of a fine would violate due process. The Commission has discretion to impose a daily penalty of up to $11,250 for a violation of the Coastal Act, but it does not have to do so, even where it determines a property owner has violated the Coastal Act. Moreover, under § 30821, subdivision (h), the Commission may not impose a penalty if the alleged violator can correct the violation within 30 days of receiving notification of the violation without undertaking additional development that requires a permit.

Under the second prong for a facial due process challenge, Lent failed to demonstrate that there were insufficient procedures under § 30821. Several provisions of the Coastal Act and the regulations adopted by the Commission are designed to ensure alleged

violators have a meaningful opportunity to be heard, including provisions for notice, circulation of a summary by Commission staff, notice of evidence relied upon by the staff, and the ability to pose questions to speakers.

Lent did not submit any evidence that Lent was denied due process protections during the administrative hearing in order to support an as applied due process claim.

Excessive Fine Claim

Both the Eighth Amendment to the U.S. Constitution and article I, § 17 of the California Constitution prohibit excessive fines. (*See*: *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal.4th 707, 727-728 (2005).) The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality, which courts assess by considering: 1) the defendant's culpability; 2) the relationship between the harm and the penalty; 3) the penalties imposed in similar statutes; and 4) the defendant's ability to pay.

The Court of Appeal held that, on the first factor, there was sufficient evidence of repeated refusals by Lent to comply with the law. On the second factor, the repeated refusals prevented construction and use of the easement, which was the only point of access in more than a mile in either direction. On the third factor, there are numerous statutes with similar fine amounts. On the fourth factor, Lent failed to present any evidence of an inability to pay.

Conclusion and Implications

This opinion by the Second District Court of Appeal demonstrates how the California Coastal Commission intends to use its sword of administrative fines to enforce compliance and how significant fines can be assessed constitutionally against individual violating homeowners. Left undetermined is whether a demonstration of inability to pay might significantly reduce such fines. The Court of Appeal's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B292091.PDF.
(Boyd Hill)

FOURTH DISTRICT COURT UPHOLDS DISMISSAL OF CEQA ACTION FOR FAILING TO TIMELY REQUEST A HEARING UNDER PUBLIC RESOURCES CODE

Public Watchdogs v. California State Lands Commission, *Unpub.*, Case No. D077166 (4th Dist. Apr. 2, 2021).

Non-profit advocacy organization Public Watchdogs filed a petition for writ of mandate under the California Environmental Quality Act (CEQA). After Public Watchdogs failed to timely request a final hearing on its petition under Public Resources Code § 21167.4(a), the trial court granted respondents' motion to dismiss the writ petition. The court also denied a motion to set aside the default under Code of Civil Procedure § 473(b), brought on the basis that Public Watchdogs did not timely request a hearing due to a calendaring mistake. Public Watchdogs appealed, and the Court of Appeal for the Fourth Judicial District affirmed in an *unpublished* decision.

Factual and Procedural Background

Public Watchdogs filed a petition for writ of mandate on April 22, 2019, challenging a decision by the California State Lands Commission to certify an Environmental Impact Report (EIR) and approve a project in connection with the decontaminating and dismantling of the San Onofre Nuclear Generation Station. On July 30, 2019, respondents moved to dismiss the petition under Public Resources Code § 21167.4(a), under which Public Watchdogs was required to file a request for a hearing on the petition by July 22, 2019, but had failed to do so. Public Watchdogs filed a request for a CEQA hearing date the next day.

Also on the next day, Public Watchdogs moved for relief from default under Code of Civil Procedure § 473(b) for its failure to timely file a request for a hearing on the petition. That motion was accompanied by a declaration from one of Public Watchdog's attorneys, stating the failure to timely file was the

result of a calendaring error and claiming that respondents were not prejudiced by a nine-day delay in seeking a hearing date, particularly in light of a recently granted extension to prepare the administrative record for the case.

In opposition, respondents claimed that Public Watchdogs knew the filing date of its own petition and had filed a number of documents with the court that specified the correct filing date on the caption page. On phone calls, counsel also had discussed and agreed to the service date, but not the filing date. Respondents also argued that, even if the failure to timely request a hearing was based on a mistake of law, those mistakes were not reasonable, and therefore Public Watchdogs was not entitled to relief under Code of Civil Procedure § 473(b).

At the Superior Court

Following argument, the trial court denied Public Watchdog's motion for relief from default and granted respondents' motion to dismiss the petition. Among other things, the trial court found that the error—which it characterized as an attorney error in instructing a paralegal to count from the wrong legal date—was not the kind of clerical issue for which § 473(b) was designed, at least not in the context of CEQA, which is designed to minimize delay and expeditiously resolve disputes. The trial court also found that, even if counsel was factually mistaken about the filing date in a way that could be characterized as "clerical," that would not establish that Public Watchdog's other counsel, who was also an attorney of record, made the same mistake. The court also found that the entire premise of the claim to have been mistaken rested on a factual premise that belied the adversarial process—that is, that Public Watchdog's counsel relied on the representations of opposing counsel in calculating the statutory deadlines that applied to his client. Following dismissal, Public Watchdogs appealed.

The Court of Appeal's Decision

On appeal, Public Watchdogs contended that the trial court abused its discretion by declining to set aside the default under Code of Civil Procedure § 473(b) because Public Watchdogs had quickly requested relief, the relief would not have prejudiced respondents, and there was a sufficient excuse for the failure to timely file the request for the hearing date based on a calendaring mistake. In an *unpublished* opinion, the Court of Appeal disagreed, finding that the trial court did not abuse its discretion, as the decision was not "arbitrary, capricious or entirely lacking in evidentiary support." The Court of Appeal also deferred to the trial court's assessment of Public Watchdogs' attorney's credibility, noting that the conclusion was supported, among other things, by the fact that some of the pleadings filed in the case stated the petition's correct filing date, and found the trial court reasonably could have doubted the claim of clerical error because Public Watchdogs initially calendared the correct filing date, and the attorney changed it to the incorrect one, even though one of respondents' attorneys declared that they never discussed the issue of the filing date at the meeting that supposedly prompted the re-calendaring. The Court of Appeal also found that the trial court's decision was guided by a policy requiring strict compliance with CEQA guidelines to accomplish the purpose of the statute, which includes expedient resolution of disputes regarding an agency's alleged failure to make an adequate environmental assessment.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding Public Resources Code section 21167.4(a) and the strict timing provisions thereunder, including a discussion of potential relief under Code of Civil Procedure § 473(b). The decision, which is unpublished, is available online at: https://www.courts.ca.gov/opinions/nonpub/D077166.PDF.

(James Purvis)

ORANGE COUNTY SUPERIOR COURT APPROVES STIPULATED JUDGMENT IN THE *BORREGO VALLEY GROUNDWATER ADJUDICATION*

Borrego Water District v. All Persons Who Claim A Right To Extract Groundwater in the Borrego Valley Groundwater Subbasin No. 7.024-1, et al., Case No. 37-2020-00005776 (Orange County Super Ct. Apr. 8, 2021).

A group of groundwater pumpers, including the local public water provider, Borrego Water District (BWD), entered into a settlement agreement in January 2020 to adjudicate the groundwater rights of the critically-overdrafted Borrego Valley Groundwater Subbasin No. 7.024-01 (Subbasin). The settlement agreement included a proposed "physical solution" and Groundwater Management Plan (GMP) intended to assure the Subbasin reaches sustainability no later than 2040. The negotiations that resulted in the settlement agreement were prompted by BWD's and the County of San Diego's efforts to prepare a groundwater sustainability plan under the Sustainable Groundwater Management Act (SGMA).

Consistent with the terms of the settlement agreement, in January 2020 BWD filed a "friendly" adjudication lawsuit naming the other settling parties as well as other pumpers of groundwater in the Subbasin. As required by the comprehensive groundwater adjudication statute (Code of Civil Procedure, § 830 *et seq.*), notice of the action was served on the owners of approximately 5,000 parcels across the Borrego Valley. Very limited opposition was expressed to the terms of the proposed judgment. As a result, on April 8, 2021, Orange County Superior Court Judge Peter Wilson issued judgment in the action

Background

The Subbasin underlies a small valley located in the northeastern part of San Diego County. Groundwater is the sole source of water for the valley, providing water for the unincorporated community of Borrego Springs and surrounding areas, including hundreds of acres of citrus farms and golf courses.

In 2014, the State of California adopted the Sustainable Groundwater Management Act to provide for the sustainable management of groundwater basins. Under SGMA, the Borrego Subbasin was designated by the California Department of Water Resources (DWR) as high priority and critically overdrafted. BWD and the County of San Diego (County) jointly opted to become the Borrego Valley Groundwater Sustainability Agency for the Borrego Subbasin (GSA).

A final draft Groundwater Sustainability Plan (GSP) for the Borrego Subbasin was prepared and circulated for public review and comment in late 2019. That GSP determined that the sustainable yield for the Subbasin was 5,700 acre-feet, that the Subbasin had been overdrafted for decades, and that then-current pumping levels of approximately 20,000 acre-feet per year could not be sustained. The GSP also contained an allocation plan and a rampdown schedule to reach sustainability by 2040.

Under SGMA, GSA's in critical basins were required to adopt a final GSP and submit it to DWR no later than January 31, 2020, or submit an alternative plan to the DWR by the same deadline.

A number of interested parties submitted comments during the three-year process culminating in the issuance of the draft final GSP. Those comments ultimately led to extended negotiations regarding the potential to adjudicate the groundwater rights of the Subbasin.

In January 2020, BWD and a group of major pumpers in the Borrego Subbasin entered into a written settlement agreement, which included a proposed stipulated judgment (Stipulated Judgment). The proposed Stipulated Judgment intended to comprehensively determine and adjudicate all rights to extract and store groundwater in the Subbasin. The Stipulated Judgment also intended to establish a physical solution for the sustainable groundwater management of the Borrego Subbasin. That same month, BWD filed the adjudication action seeking the Superior Court's adoption of the Stipulated Judgment. Additionally, BWD also filed the Stipulated Judgment with the DWR in January 2020 for review as a GSP alternative under SGMA. After a significant noticing period, Orange County Superior Court Judge Peter Wilson approved the adoption of the Stipulated Judgment on April 8, 2021.

The Stipulation and Judgment

As part of its approval, the court will continue to oversee the administration and enforcement of the Stipulated Judgment. To assist the court in the administration, the judgment establishes a Borrego Watermaster to administer and enforce on a day-to-day basis the provisions of the Stipulated Judgment and any subsequent instructions or court orders. The Watermaster Board of Directors is comprised of five members: 1) a BWD representative; 2) a County representative; 3) a community representative; 4) an agricultural representative; and 5) a recreational (golf course) representative. The Watermaster Board is responsible for overseeing the implementation of the physical solution and the Stipulated Judgment.

Given the lack of viable methods to address overdraft in the Borrego Subbasin through artificial recharge under current conditions, the physical solution includes a reduction in cumulative authorized pumping over time. The physical solution takes into consideration the unique physical and climatic conditions of the Subbasin, the use of water within the Subbasin, the character and rate of return flows, the character and extent of established uses, and the current lack of availability of imported water. In order to reduce pumping, the Stipulated Judgment establishes the initial sustainable yield of the Subbasin as 5,700 acre-feet per year. This sustainable yield may be refined as determined by the Watermaster by January 1, 2025, and periodically updated thereafter through input from a Watermaster Technical Advisory Committee (TAC).

In addition, the Stipulated Judgment assigns a Baseline Pumping Allocation (BPA) to identified parcels (BPA Parcels) based upon pumping volumes between 2010 and 2014, as primarily calculated by the County as part of the development of the GSP. The BPA will be used to determine the maximum allowed pumping quantity allocated to the BPA Parcels in any given Water Year (known as the Annual Allocation). In order to monitor usage, the Watermaster has required the installation of meters and will require each pumper to use a meter with telemetry capable of being read remotely by Watermaster staff or to file a verifiable report showing the total pumping by such party for each reporting period rounded to the nearest tenth of an acre-foot, and such additional information and supporting documentation as Watermaster may require. De minimis producers pumping less than two acre-feet per year are largely exempt from the Judgment.

Pumpers will be allowed to pump up to their Annual Allocation and will pay pumping fees based on the amount of water pumped. In addition, pumpers will be allowed to carry over water if they underpump allocation in any given year, so long as they timely pay Watermaster assessments. However, a pumper's carryover account can never exceed two times its BPA and any carryover must be the first water used in the following Water Year. Additionally, BPA transfers within the Borrego Subbasin will be allowed, subject to certain restrictions outlined in the Stipulated Judgment. Permanent water rights transfers will require specific fallowing standards to be satisfied such as: destroying all agricultural tree crops; stabilizing fallowed land through mulching, planting cover crops and/or other dust abatement measures; abandoning all non-used irrigation wells or converting these to monitoring wells; permanently removing above-ground irrigation lines; and removing all hazardous materials.

Annual Allocations will be ramped down over time based upon the Sustainable Yield for the Borrego Subbasin. The rampdown rate is 5 percent per year for the first ten years, which is faster than that proposed under the GSP. The rampdown is anticipated to materially reduce pumping levels in the Subbasin year over year for the first ten years. Further rampdowns are scheduled to occur from 2030 to 2040 to reach sustainable yield pumping by 2040.

Pumpers will initially be permitted to pump up to 120 percent of their Annual Allocation in Years 1 to 3, to allow for a transitional period provided that they underpump or purchase/lease water in Years four to five to make up for any over pumping in the first three years. Any pumping in excess of Annual Allocation will be subject to an administrative penalty of at least $500 per acre-foot, as set by the Watermaster, if not made up by underpumping or purchase/lease of make-up water.

Conclusion and Implications

The *Borrego Adjudication* and judgment appear to represent a positive method for parties to work together to meet SGMA goals, while also determining

groundwater rights. Whether the Borrego case will be used as an example for other basins around California will be revealed in time. The proposed judgment and stipulation is available online at: https://www.borregowaterlawsuit.com/admin/services/connectedapps.cms.extensions/1.0.0.0/asset?id=32b597ab-a083-4d8a-b802-78134160c370&languageId=1033&inline=true. (Miles Krieger, Geremy Holm, 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 May 20, 2021, was read for a second time and ordered to a third reading in the Committee on Appropriations.

Environmental Protection and Quality

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

AB 1260 was introduced in the Assembly on February 18, 2021, and, most recently, on May 13, 2021, was read for a second time and ordered to a third reading in the Committee on Appropriations.

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

SB 7 was introduced in the Senate on December 7, 2020, and, most recently, on May 7, 2021, was approved by the Governor and chaptered by the Secretary of State at Chapter 19, Statutes of 2021.

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 May 20, 2021, passed the Committee on Appropriations.

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

AB 491 was introduced in the Assembly on February 8, 2021, and, most recently, on May 20, 2021, was in the Senate where it was read for the first time and sent to the Committee on Rules for assignment.

•**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 May 20, 2021, was read

for a second time and ordered to a third reading in the Committee on Appropriations.

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

SB 9 was introduced in the Senate on December 7, 2020, and, most recently, on May 20, 2021, was read for a second time and ordered to a third reading in the Committee on Appropriations.

•**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 May 20, 2021, was read for a second time and ordered to a third reading in the Committee on Appropriations.

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 May 20, 2021, was read for a second time and ordered to the consent calendar.

•**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 May 20, 2021, was read for a second time and ordered to a third reading in the Committee on Appropriations.

•**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 May 20, 2021, was read for a second time, amended and ordered to a third reading 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 May 19, 2021, was ordered to the Committees on Governance and Finance, the Judiciary and Housing.

•**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 May 20, 2021, was read for a second time and ordered to a third reading in the Committee on Appropriations.

•**SB 12 (McGuire)**—This bill would require the safety element of a General Plan, upon the next revi-

sion 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 May 20, 2021, was read for a second time and ordered to a third reading in the Committee on Appropriations.
(Paige Gosney)

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