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LAND USE NEWS

BIDEN ADMINISTRATION FISCAL YEAR 2022 PROPOSED BUDGET PRIORITIZES U.S. BUREAU OF RECLAMATION WATER PROJECTS

The Biden administration (Administration) recently submitted a proposed budget for Fiscal Year 2022 to Congress (Proposed Budget), which includes a $1.5 billion investment for the United States Department of the Interior, Bureau of Reclamation (Bureau) to combat widespread drought in the West. The Proposed Budget supports the Administration's goals of ensuring reliable and environmentally responsible delivery of water and power for farms, families, communities and industry, while providing tools to confront widening imbalances between water supply and demand throughout the West.

Background

The National Oceanic and Atmospheric Administration (NOAA) recently reported 47 percent of the contiguous United States is experiencing drought conditions due to lack of precipitation and higher than average temperatures. NOAA reports that in 2020, drought conditions broadened and intensified throughout the western United States, particularly in California, the Four Corners region and western Texas.

Earlier this year, the Administration announced the formation of an Interagency Working Group (Working Group) to address worsening drought conditions in the West and to support farmers, tribes, and communities impacted by water shortages. The Working Group is tasked to coordinate resources across the federal government, working in partnership with state, local, and tribal governments to address the needs of communities suffering from drought-related impacts.

The Proposed FY 2022 Budget

The Proposed Budget includes four key components to manage water resources in the West, including: water reliability and resilience, racial and economic equity, conservation and climate resilience, and infrastructure modernization.

Specifically, the Proposed Budget would provide the following funding to the Bureau.

Increase Water Reliability and Resilience

The Proposed Budget includes $1.4 billion for the Bureau's Water and Related Resources Operating Account, which funds planning, construction, water conservation, management of Bureau lands, and efforts to address fish and wildlife habitat needs. The Proposed Budget also supports the operation, maintenance and rehabilitation activities-including dam safety-at Bureau facilities. It includes $33 million to implement the California Bay-Delta Program and to address California's current water supply and ecological challenges, while $56.5 million is allocated for the Central Valley Project Restoration Fund to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity River basins.

Support Racial and Economic Equity

The Proposed Budget seeks to address what it describes as racial and economic equity in relation to water by supporting underserved communities and tribal areas. It proposes allocating $92.9 million to advance the construction and continue the operations and maintenance of authorized rural water projects. Additionally, the Proposed Budget includes a total of $157.6 million for Indian Water Rights Settlements. Finally, it allocates $20 million for the Native American Affairs Program, which provides technical support and assistance to tribal governments to develop and manage their water resources.

Enhance Water Conservation and Climate Resilience

The Proposed Budget requests Congress fund: $45.2 million for the Lower Colorado River Operations Program, including $15 million to build on the work of the Bureau, Colorado River partners and stakeholders to implement drought contingency plans; $3.3 million for the Upper Colorado River Operations Program to support Drought Response Operations; $184.7 million to find long-term, com-

prehensive water supply solutions for farmers, families and communities in California's Central Valley Project; and, $54.1 million for the WaterSMART Program to support the Bureau's collaboration with non-federal partners to address emerging water demands and water shortage issues in the West. A total of $27.5 million would continue the Bureau's research and development investments in science, technology, and desalination research in support of prize competitions, technology transfers, and pilot testing projects.

Modernize Infrastructure

The Bureau's dams and reservoirs, water conveyance systems, and power generating facilities continue to represent a primary focus area of organizational operations. The Proposed Budget allocates $207.1 million for the Dam Safety Program, including $182.5 million for modification actions, while $125.3 million is requested for extraordinary maintenance activities across the Bureau as a strategy to improve asset management and address aging infrastructure to ensure continued reliable delivery of water and power.

Next Steps

With the release of the President's Proposed Budget, Congress will now begin drafting spending bills. The House Appropriations Subcommittees were, as of this writing, expected to begin the process of voting on Fiscal Year 2022 spending bills in late June, with full committee votes to be held through mid-July and voting in the Senate in August. Congress has until September 30, 2021—when Fiscal Year 2021 funding levels lapse—to pass new spending bills to avert partial government shutdown on October 1, 2021.

Conclusion and Implications

With the Proposed Budget and the establishment of the Working Group, the Biden administration aims to take a proactive and heavily-funded federal approach in combatting worsening drought conditions in the western United States. The ball is now in Congress' court to present an approved budget for Presidential signature. Whether the Biden Administration's unprecedented $6 trillion Proposed Budget will be approved remains to be seen and will likely face legitimate concern and opposition. When it comes to prioritizing funding for new water projects and maintaining aging infrastructure, the most significant long-term risk may be under—not over—spending. (Chris Carrillo, Derek R. Hoffman)

CALIFORNIA TO STOP ISSUING FRACKING PERMITS BY 2024 AND PHASE OUT OIL EXTRACTION BY 2045

California Governor Gavin Newsom has directed the responsible state agencies to stop issuing new hydraulic fracturing (fracking) permits by January 2024 and phase out all oil extraction in the state by 2045. The announcement comes just months after Newsom unveiled an ambitious executive order that would put the state on the path to carbon neutrality by mid-century.

Fracking Permit Ban

On April 23, Newsom directed the California Department of Conservation's Geologic Energy Management Division (CalGEM) to stop issuing new permits for hydraulic fracturing by January 2024. As a result, CalGEM is expected to issue new regulations to wind down permits in the coming months.

"As we move to swiftly decarbonize our transportation sector and create a healthier future for our children, I've made it clear I don't see a role for fracking in that future and, similarly, believe that California needs to move beyond oil," Newsom said in an April 23 press release.

The fracking permit ban is being celebrated as a major victory for environmental groups in the state. While fracking accounts for just two percent of California's oil production according to the California Department of Conservation, banning the practice has been a flashpoint among environmental groups who raised concerns over chemical spills, groundwater contamination and water waste near fracking sites.

In recent years, legislative and administrative efforts to restrict fracking have resulted in a decline in fracking activity, but this is the first time that the

state has issued a permanent ban on the practice. According to the Governor's office, fracking in the state is at its lowest level since stringent regulations were put in place by the legislature back in 2014. The Newsom administration had also imposed a temporary moratorium on fracking permits in 2019, but lifted the moratorium in 2020 following independent scientific review.

Despite mounting pressure from environmental groups to stop fracking operations, Newsom had initially balked at an outright ban and instead sought an incremental approach meant to address economic effects on the geographic regions most dependent on the petroleum industry. Newsom had also previously claimed that he lacked the executive authority to ban fracking and called on the legislature last year to instead pass a ban of its own.

An anti-fracking bill introduced by State Senators Scott Wiener (D-San Francisco) and Monique Limon (D-Santa Barbara) earlier this year was, however, met with fierce opposition from the oil industry and a number of petroleum industry trade unions. As proposed, the legislation would not only ban fracking but also impose stringent restrictions on oil extraction in the state, including a ban on wells within 2,500 feet of homes, schools and other populated areas beginning as early as January 2022. Similar bills had previously failed in the legislature in 2014 and again in 2020. With the April 23 announcement, Newsom is apparently reversing his stance in deciding to use his regulatory authority to phase out fracking activity in the state.

Oil Extraction Ban

Newsom has also ordered the California Air Resources Board (CARB) to begin planning for a complete phase out of oil extraction in the state by no later than 2045. The phase-out will now officially be included in the state's Climate Change Scoping Plan, which was set up to promote cross-sector and cross-agency collaboration focusing on benefits in disadvantaged communities, opportunities for job creation and economic growth on the path to carbon neutrality. The governor's latest announcement comes on the heels of his September 2020 executive order, which called, among other things, for the phase-out of new fossil fuel-powered passenger vehicles by 2035.

"This would be the first jurisdiction in the world to end oil extraction," California Secretary of Environmental Protection Jared Blumenthal told *The Los Angeles Times* following the governor's announcement:

> It's a big deal. I think it really helps frame all the other activities that we're doing something really important and it's a clear signal that we need to build a just transition for that industry.

The latest announcement drew criticism from the oil industry and a number of trade unions, including pipe fitters and electrical workers, who argue that the measure will cost thousands of union jobs and hollow out economies in the state's major oil-producing regions, including the economically depressed Central Valley. Meanwhile, environmental groups in large part lauded the announcement as the next step in the state's efforts to cut greenhouse gas emissions and target climate change, with some groups calling for an accelerated timeline on the fracking and oil extraction ban.

Conclusion and Implications

Newsom's directives may constitute a major inflection point in Sacramento's willingness to tackle the oil and gas industry as well as union interests that had previously opposed an outright ban on fracking. Nevertheless, both the fracking ban and the oil extraction phase-out are expected to spawn litigation and continue to be a major point of contention in the state for years to come. A link to Governor's Announcement is available online at: https://www.gov.ca.gov/2021/04/23/governor-newsom-takes-action-to-phase-out-oil-extraction-in-california/.
(Travis Kayla)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS U.S. FISH AND WILDLIFE SERVICE FAILED TO EXPLAIN WHY IT REVERSED PREVIOUS LISTING DECISION REGARDING PACIFIC WALRUS

Center for Biological Diversity v. Haaland, ___F.3d___, Case No. 19-35981 (9th Cir. June 3, 2021).

The Center for Biological Diversity brought an action challenging a decision by the U.S. Fish and Wildlife Service (FWS or Service) to reverse its previous decision that the Pacific walrus qualified for listing as an endangered or threatened species under the federal Endangered Species Act (ESA). The U.S. District Court had granted summary judgment for the Service, but the Ninth Circuit Court of Appeals reversed, finding that the FWS did not sufficiently explain its change in position.

Factual and Procedural Background

In 2008, the Center for Biological Diversity petitioned the FWS to list the Pacific walrus as threatened or endangered under the ESA, citing the claimed effects of climate change on walrus habitat. In February 2011, after completing a special status assessment, the FWS issued a decision finding that listing of the Pacific walrus was warranted, finding that: the loss of sea-ice habitat threatened the walrus; subsistence hunting threatened the walrus; and existing regulatory mechanisms to reduce or limit greenhouse gas emissions to stem sea-ice loss or ensure that harvests decrease at a level commensurate to predicted population declines were inadequate. Although the Pacific walrus qualified for listing, however, the need to prioritize more urgent listing actions led the Service to conclude that listing was at the time precluded.

The FWS reviewed the Pacific walrus's status annually through 2016, each time finding that listing was warranted but precluded. In May 2017, the Service completed a final species status assessment. Among other things, that assessment concluded that while certain changes, such as sea-ice loss and associated stressors, continued to impact the walrus, other stressors identified in 2011 had declined in magnitude. The review team believed that Pacific walruses were adapted to living in a dynamic environment and had demonstrated the ability to adjust their distribution and habitat use patterns in response to shifting patterns of ice. The assessment also concluded, however, that the walrus' ability to adapt to increasing stress in the future was uncertain.

In October 2017, after reviewing the assessment, the FWS issued a three-page final decision that the Pacific walrus no longer qualified as threatened. Like the 2011 decision, this decision identified the primary threat as the loss of sea-ice habitat. Unlike the earlier decision, however, the 2017 decision did not discuss each statutory factor and cited few supporting studies. Mainly, it incorporated the May 2017 assessment by reference, finding that, although there will likely be a future reduction in sea ice, the Service was unable to reliably predict the magnitude of the effect and the behavioral response of the walrus to this change. Thus, it did not have reliable information showing that the magnitude of the change could be sufficient to put the species in danger of extinction now or in the foreseeable future. The decision also found that the scope of any effects associated with an increased need for the walrus to use coastal haulouts similarly was uncertain. The 2017 decision referred to the 2011 decision only in its procedural history.

The Center for Biological Diversity filed its lawsuit in 2018, alleging that the 2017 decision violated the Administrative Procedure Act (APA) and the ESA. In particular, the Center for Biological Diversity claimed that the Service violated the APA by failing to sufficiently explain its change in position from the earlier 2011 decision. The U.S. District Court granted summary judgment to the FWS, and the Center for Biological Diversity in turn appealed.

The Ninth Circuit's Decision

The Ninth Circuit reversed the grant of summary judgment, finding that the "essential flaw" in the 2017 decision was its failure to offer more than a

cursory explanation of why the findings underlying the 2011 decision no longer applied. Where a new policy rests upon factual findings contradicting those underlying a prior policy, the Ninth Circuit explained, a sufficiently detailed justification is required. The 2011 decision had contained findings, with citations to scientific studies and data, detailing multiple stressors facing the Pacific walrus and explained why those findings justified listing. The 2017 decision, by contrast, was "spartan," simply containing a general summary of the threats facing the Pacific walrus and the agency's new uncertainty on the imminence and seriousness of those threats. The Ninth Circuit found that more was needed.

The Ninth Circuit also found that the 2017 decision's incorporation of the final species status assessment did not remedy the deficiencies. The assessment did not purport, for example, to be a decision document, and while it provided information it did not explain the reasons for the change in position. The assessment itself also reflected substantial uncertainty and, while it did provide at least some new information, it did not identify the agency's rationale for concluding that the specific stressors identified as problematic in the 2011 decision no longer posed a threat to the species within the foreseeable future.

Ultimately, the Ninth Circuit noted, the FWS may be able to issue a decision sufficiently explaining the reasons for the change in position regarding the Pacific walrus. But the 2017 decision was not sufficient to do so, and the Ninth Circuit found that it could not itself come up with the reasons from the large and complex record. It therefore reversed the grant of summary judgment with directions to the U.S. District Court to remand to the Service to provide a sufficient explanation of the new position.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the standards of judicial review that apply when an administrative agency alters a previous policy and a general discussion of the listing process under the ESA. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/06/03/19-35981.pdf.
(James Purvis)

NINTH CIRCUIT FINDS RULE REQUIRING 30-DAY NOTICE OF INTENT TO STATES FOR LISTING PETITIONS UNDER THE ENDANGERED SPECIES ACT WAS INVALID

Friends of Animals v. Haaland, 997 F.3d 1010 (9th Cir. 2021).

Friends of Animals brought an action challenging the U.S. Fish and Wildlife Service's (FWS or the Service) summary denial of its petition to list the Pryor Mountain wild horse population as a threatened or endangered distinct population segment under the federal Endangered Species Act (ESA). The U.S. District Court granted summary judgment for the FWS. The Ninth Circuit reversed, finding the rule requiring that private parties seeking to list species provide affected states 30-day notice of their intent to file a petition was invalid, and thus the FWS' summary denial of the organization's petition was arbitrary and capricious.

Factual and Procedural Background

There are two ways to list species as threatened or endangered under the federal ESA: 1) the Secretary of the United States Department of the Interior and delegated agencies, the FWS and the National Marine Fisheries Service (collectively: the Services), may identify species for protection; 2) or interested persons may petition the Secretary of the Department of the Interior and the FWS to list a species as threatened or endangered. In September 2016, the Services promulgated a rule requiring any petitioner to "provide notice to the State agency responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species that is the subject of the petition occurs" at least 30 days prior to submitting a petition.

The Services stated that the new rule would give affected states the opportunity to submit data and information in the 30-day period before a petition is filed, which the Services could then rely on during

their 90-day review of the petition. Although the Services acknowledged that the use of state-supplied information in its 90-day review was a change from prior practice, it found that the change would expand the ability of the states and any interested parties to take the initiative of submitting input and information to the Services to consider, thereby making the petition process both more efficient and thorough.

In 2017, Friends of Animals filed a petition requesting that the FWS list the Pryor Mountain wild horse population as a threatened or endangered distinct population segment under the ESA. The FWS in turn notified Friends that the submission did not qualify as a petition because it did not include copies of required notification letters or electronic communications to state agencies in affected states. The FWS did not identify any other deficiencies with the petition.

Friends filed an action in federal court, requesting a declaration that the FWS violated the ESA and Administrative Procedure Act (APA) by impermissibly requiring that the 30-day notice be made to affected states and refusing to issue a finding on Friends' petition within 90 days. Friends also sought vacatur of the 30-day notice requirement and issuance of a finding on the Pryor Mountain wild horse petition within 60 days. Friends then moved for summary judgment. A magistrate judge found that the notice provision contravened the ESA and recommended granting summary judgment to Friends. The U.S. District Court, however, found that the pre-file notice requirement was a permissible construct of the ESA and therefore granted summary judgment to the FWS.

The Ninth Circuit Opinion

Because the pre-file notice requirements were enacted through formal "notice and comment" rulemaking procedures, the Ninth Circuit reviewed the rulemaking under the two-step *Chevron* framework. Under this framework, a court first determines whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, that will end the matter. If the statute is silent or ambiguous, however, the question for a court is whether the agency's answer is based on a permissible construction of the statute. With respect to the first step, the Ninth Circuit first found that Congress had not spoken to the precise issue. Although the ESA includes guidance on when to involve the states, it does not prohibit the Services from providing notice to states and does not directly address procedures prior to filing a petition.

Accordingly, the Ninth Circuit considered whether the Services' construction of the rule was reasonable. The FWS contended that Congress had explicitly left a gap for the agencies to fill with regard to petition procedure, that the pre-file rule was based on a permissible construction of the statute, and that the rule imposed only a small burden on petitioners. The Ninth Circuit noted, however, that courts have "repeatedly admonished" the Services for soliciting information from states and other third parties during the 90-day finding period, noting that the ESA requires that the 90-day finding determine whether the petition itself presents sufficient information to warrant a 12-month review, and that the Services' solicitation or consideration of outside information not otherwise readily available is contrary to the ESA.

The FWS tried to distinguish the pre-file notice rule, claiming the rule did not mandate that states submit any information or that the Services consider any information submitted by a state, and thus did not rise to the level of soliciting new information from states. The Ninth Circuit found this a distinction without practical effect, concluding that the rule provided an avenue for the Services to consider factors it was not intended to consider during the 90-day finding and thus ran afoul of the ESA's plain directive that the Services' initial assessment be based on the contents of the petition. It also found that the pre-file notice rule created a procedural hurdle for petitioners that did not comport with the ESA. That is, the Services' authority to establish rules governing petitions does not extend to restrictions that frustrate the ESA by arbitrarily impeding petitioner's ability to submit—or the Services' obligation to review—meritorious petitions.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding review of agency decisions under the two-step *Chevron* framework as well as a general discussion of the petition process under the Endangered Species Act. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/05/17/20-35318.pdf.
(James Purvis)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT AFFIRMS STRIKING OF INITIATIVE GENERAL PLAN AMENDMENTS THAT REQUIRE TRAFFIC MITIGATION DISPROPORTIONATELY BEYOND PROJECT IMPACTS

Alliance for Responsible Planning v. Taylor (County of El Dorado), ___Cal.App.5th___, Case No. C085712 (3rd Dist. Apr. 19, 2021).

The Third District Court of Appeal in *Alliance for Responsible Planning v. Taylor* affirmed the striking of portions of County of El Dorado (County) initiative Measure E that amended General Plan policies to require project mitigation for traffic impacts disproportionately beyond those caused by the project as a facially invalid exaction and taking under *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

Factual and Procedural Background

El Dorado County Measure E was adopted in June 2016 to end the practice of "paper roads." Previously, if a project would increase traffic beyond certain thresholds, the project could be approved conditioned upon developer contribution of its proportional share of traffic impact fees to cover the cost of future road improvements, so long as the necessary traffic-mitigating improvements were included in the County's ten- or 20-year (depending on the project type)

Capital Improvement Program

Measure E sought to require that cumulative traffic-mitigating road improvements to be completed as part of the project approval pursuant to revisions to the General Plan policies.

Policy TC-Xa 3 revisions required that before any discretionary project can be approved, all necessary road capacity improvements must be fully completed to prevent to fully offset and mitigate all direct and cumulative traffic impacts from new development from reaching Level of Service F during peak hours upon any highways, arterial roads and their intersections during weekday, peak-hour periods in unincorporated areas of the county.

Policy TC-Xf revisions required that approval of discretionary projects condition the project to construct all road improvements necessary to maintain or attain Level of Service standards detailed in the Transportation and Circulation Element based on existing traffic plus traffic generated from the development plus forecasted traffic growth at ten-years from project submittal.

Measure E also provided nine General Plan implementation statements, including statement eight, which required level of service determinations for Highway 50 on-off ramps and road segments to be determined by the California Department of Transportation (Caltrans) rather than the County.

The County interpreted the two Measure E policies to either require a moratorium on new development until every road improvement needed to prevent gridlock ($400 million in programed traffic mitigation) was completed, or to require a condition for every discretionary approval that would impact traffic to carry out major road infrastructure conditions for all cumulative impacts before design review could be approved, and with no required reimbursement.

Thus, small businesses seeking project approvals which could not afford the infrastructure requirements would need to wait until the County or another private party such as a major developer fully completed the road infrastructure for cumulative impacts. This, reasoned the County would violate *Dolan v. City of Tigard*, requiring that there be a nexus between a project's impact and the exactions imposed. The County reasoned that there would need to be a separate County-initiated General Plan amendment to allow for smaller projects to not have to build the costly infrastructure as a project condition in order for Measure E to not constitute a constitutional taking.

The County also reviewed implementation statement eight and concluded that it was inconsistent with County General Plan policy to focus on week-

day peak hour traffic volumes, whereas Caltrans often looks at the entire seven-day week and/or annual average daily traffic.

Soon after Measure E passed, Alliance sought a writ of mandate to have Measure E declared invalid for violating the *Dolan* unconstitutional conditions doctrine. Alliance maintained that conditions imposed by Measure E were exactions, exceeding fair share and lacking a reasonable relationship to the harm flowing from a development.

At the Trial Court

Alliance argued that the Measure E amendments to policies TC-Xa 3 and TC-Xf imposed unconstitutional conditions. A developer would either have to construct every programed traffic-mitigating improvement or merely those necessary to prevent traffic resulting from its own development along with other cumulative developments. Both cases exceeded fair share in that developers must construct road improvements to serve other developments — "[a] project cannot build half of a lane or a small percentage of an interchange or state highway."

As to implementation statement eight, Alliance argued it was inconsistent with General Plan policy TC-Xd in that it sought to delegate to Caltrans authority to determine Level of Service conditions, when that responsibility is assigned to the County Department of Transportation.

Taylor intervened in the case, arguing:

> Measure E does not change the fair share analysis, it simply provides that where a project will result in traffic exceeding [Level of Service] F, the necessary improvements must be built before the project. How that is accomplished is not specified in Measure E and could be accomplished in a variety of ways. An applicant could choose to build the improvements, or wait until other development can/will contribute, or until the County builds the improvement.

The trial court granted the petition in part, striking several amendments to the General Plan including the above-mentioned revisions to policies TC-Xa 3 and TC-Xf, as well as implementation statement eight. The trial court found that the amendments to Policies TC-Xa 3 and TC-Xf violated the takings clause by conditioning approval on the developer paying more than its fair share for the cost of traffic mitigation arising from the development.

The court explained, an:

> . . .owner/developer seeking approval of a single project is expressly solely responsible to pay for construction of all road improvements necessary to bring the traffic volume on the roads affected by the project to a specified [Level of Service] level. This would require property owners/developers to pay for not only the project's incremental impact to traffic congestion of the County road system, but also be responsible to pay for improvements that arise from the cumulative effect of other projects, and in some instances to pay for projected future increases in traffic. This clearly exceeds the developer's fair share in that it is not roughly proportional to the project's traffic impact it seeks to address.

The trial court similarly rejected Taylor's assertion that conditioning necessary improvements could be constitutionally construed, "possibly" though County funding contributions or reimbursements–or denying the project until the improvements were completed by others. The court noted that Measure E places improvement construction solely on the developer's shoulders, while at the same time, it fails to mandate that improvement costs exceeding the developer's fair share be reimbursed.

Moreover, denying the project until someone else constructs the mandated improvements is still impermissible as it attempts to coerce the property owners to construct the improvements or be forced to wait an indefinite period of time for someone else to construct the improvements.

As to implementation statement eight, the trial court found it in conflict with the General Plan. Taylor appealed.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court determinations as to the unconstitutionality of the amended policies requiring disproportionate traffic mitigation and as to the inconsistency of implementation statement 8 to the General Plan. Whether TC-Xa 3 requires all programed improvements be completed, or merely improvements addressing cumulative traffic impacts, a project must construct improvements go-

ing beyond its fair share. The Court of Appeal held that Measure E on its face was ripe for determination because the challenged amendments are not susceptible to a constitutional interpretation.

Standard of Review and Applicable Law

An initiative measure must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears. (*Pala Band of Mission Indians v. Board of Supervisors*, 54 Cal.App.4th 565, 574 (1997).) For a facial challenge to succeed, the plaintiff must demonstrate that the challenged portion will result in legally impermissible outcomes in the generality or great majority of cases. (*Larson v. City and County of San Francisco*, 192 Cal.App.4th 1263, 1280 (2011).)

In evaluating whether a statute effects an unconstitutional exaction, under *Nollan–Dolan* and their progeny, the court must first determine whether the essential nexus exists between the legitimate state interest and the permit condition. (*Dolan*, *supra*, 512 U.S. at p. 386; *see also*, *Nollan*, supra, 483 U.S. at p. 837.) If so, the court must determine if the degree of exaction demanded by the condition bears the required relationship to the projected impact of the proposed development. (*Dolan*, at p. 388.) There must be "rough proportionality" between the property the government demands and the social costs of the applicant's proposal. (*Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 605–606 (2013).)

The Court of Appeal held that both interpretations of Policy TC-Xa 3 identified in the County memo ran afoul of *Nollan–Dolan*. If TC-Xa 3 required the completion of "[a]ll necessary road capacity improvements" to prevent peak-hour gridlock, it plainly casts a wider net than the harm resulting from an individual project. Thus, rough proportionality would be unsatisfied and mostly likely essential nexus is as well.

Similarly, if TC-Xa 3 demanded only mitigation addressing traffic from the discretionary project combined with "cumulative traffic impacts from new development," a developer would still be required to complete improvements addressing impacts beyond its own. Thus, this too would exceed rough proportionality, which requires the government make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

The Court of Appeal rejected Taylor's suggestion that a developer can simply wait until others complete the improvements. The principles that undergird *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so. (*Koontz*, *supra*, 570 U.S. at p. 606.)

Not a Land Use Control

The Court of Appeal rejected Taylor's claim that Measure E is a land use control rather than a taking. The difference between a lawful land use control and an unlawful taking in California is the requirement for the developer to give up a property interest for which the government would have been required to pay just compensation under the Takings clause outside the permit process. (*Building Industry Assn. v. City of San Jose*, 61 Cal.4th 435, 463 (2015).) Under Measure E a developer must give up a property interest as a condition of approval: the developer must complete or construct road improvements.

Conclusion and Implications

This opinion by the Third District Court of Appeal confirms that while a citizen initiative may seek a laudable goal such as prompt traffic mitigation, it cannot be at the expense of disproportionate private developer funding. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C085712.PDF.
(Boyd Hill)

FOURTH DISTRICT COURT ALLOWS MALICIOUS PROSECUTION ACTION TO MOVE FORWARD AGAINST UNSUCCESSFUL CEQA PLAINTIFF

Dunning v. Johnson et. al., ___Cal.App.5th___, Case No. D076570 (4th Dist. Apr. 23, 2021).

In a decision filed in April, but certified for publication on May 13, 2021 the Fourth District Court of Appeal affirmed a trial court decision allowing a developer's malicious prosecution action to move forward despite an anti-SLAPP (Strategic Lawsuit Against Public Participation) action brought by a ranch owner defendant that brought a previous unsuccessful action under the California Environmental Quality Act (CEQA) against the development. The developer plaintiff alleged malicious prosecution causes of action against the ranch owner defendant and its attorney. The court did not reach the merits of the malicious prosecution action, but ruled that the action could proceed against the ranch owner defendant, not the attorney defendants, despite the significant hurdle typically posed by the anti-SLAPP statute for this type of action.

Factual and Procedural Background

In an earlier CEQA action, Clews Horse Ranch filed a petition for writ of mandate challenging the City of San Diego's decision to approve development of a private school adjacent to the horse ranch. The petition challenged the city's approval of the project and adoption of a Mitigated Negative Declaration (MND). The trial court denied Clews Ranch's petition for writ of mandate and complaint, and the court of appeal affirmed that judgment in a published decision, *Clews Land and Livestock, LLC v. City of San Diego,* 19 Cal.App.5th 161 (2017). Thereafter, the defendants in the CEQA action filed a malicious prosecution lawsuit against Clews Horse Ranch and its attorneys.

The plaintiffs in the malicious prosecution action alleged that the ranch defendants and their attorneys lacked probable cause and acted with malice when they pursued their earlier CEQA litigation. The attorneys for defendants then filed a motion to strike (which Clews Ranch joined) under the state's anti-SLAPP statute, which is designed to protect defendants from meritless lawsuits that chill the defendants' rights to petition and free speech on issues of public concern. The anti-SLAPP statute authorizes a special, procedure to strike such claims early on in litigation. To prevail in an anti-SLAPP motion, a party must show that: 1) the challenged allegations or claims arise from a protected activity, and if so, 2) the party whom the anti-SLAP motion was filed against must show that their claims have at least "minimal merit" in order to proceed. The minimal merit standard is similar to a "summary judgment-like procedure" requiring a malicious prosecution plaintiff to present "competent admissible evidence" sufficient, if accepted as true, to prevail in the action.

In the hearing on the anti-SLAPP motion, the trial court concluded that the malicious prosecution action involved protected activity by Clews Ranch. However, as to the second factor above, the trial court denied the anti-SLAPP motion after determining that plaintiffs established a probability of prevailing on its malicious prosecution claim.

The Court of Appeal's Decision

The Fourth District Court of Appeal acknowledged, like the trial court, that the ranch defendants' underlying CEQA litigation was a protected activity. Therefore, the court's decision focused solely on the second factor—whether the plaintiffs established a "probability of prevailing on each element of its malicious prosecution cause of action." Only if the developer plaintiffs established this probability could they proceed with their malicious prosecution claims.

A malicious prosecution plaintiff must show that the prior action was:

> (1) commenced or maintained by or at the direction of the defendant and was pursued to a legal termination favorable to the [malicious prosecution] plaintiff, (2) was brought [or maintained] without probable cause; and (3) was initiated or [maintained] with malice.

Probable Cause Factor

Regarding the probable cause factor above, the court of appeal first acknowledged that to make a showing that defendants lacked probable cause suf-

ficient for malicious prosecution, only one of many claims brought by those defendants must lack probable cause. The court then determined that plaintiffs sufficiently established, with at least minimal merit, that Clew Ranch lacked probable cause for pursuing its CEQA claims related to supposed noise impacts. The evidence presented by Clew Ranch in support of these noise claims were meritless because they did not allege impacts on the environment of "persons in general" and only alleged impacts to Clew and the small group of persons using their ranch. Moreover, the evidence that Clew presented was insubstantial and speculative lay opinion. Accordingly, the court concluded that:

> . . .[plaintiffs] established a probability of prevailing on the issue of whether the defendants pursued at least one of their theories in the CEQA litigation without probable cause.

Malice Factor

Regarding the malice factor above, plaintiffs alleged that the malice element was satisfied based on three theories: 1) the Clews Ranch pursued the CEQA litigation for an improper purpose - to impede the development of plaintiffs' property, 2) Clews Ranch's principal pled guilty to child pornography charges and used its CEQA litigation merely to "maintain the seclusion" allowing him to continue abuse of children, and 3) the attorney defendants that represented Clews Ranch pursued the CEQA litigation in the hope that the plaintiffs would abandon their project, thus reducing the likelihood that Clews Ranch would sue them for malpractice for failure to timely administratively appeal the city's approval of a MND.

Regarding Clews Ranch, the court found that at least minimal merit had been shown to meet this factor. The court was persuaded of this by circumstantial evidence presented that showed multiple instances where Clews Ranch had previously harassed prior owners of the developer plaintiff's property. Clews Ranch had also engaged in harassment of developer demonstrated that Clews "has consistently and aggressively opposed any use and development of the project site."

The court did not find that the malice factor was met with regard to Clews' attorneys however. The court noted that Clews' improper motivations could not be simply imputed to his attorneys. The mere showing of a lack of probable cause "does not constitute a prima facie showing of malice for attorney defendants." The court was further persuaded with regard to the attorneys for defendants that the attorneys had actually acted in good faith in settlement negotiations and had sought solutions that would have actually allowed for development of the property. Thus, unlike Clews, the attorney defendants did not act in bad faith or improper purposes to block or thwart the project through delay.

Conclusion and Implications

Malicious prosecution actions are not commonly brought due in part to the common response by defendants of bringing an anti-SLAPP motion and expense of bringing them. However, this case demonstrates that in an appropriate case, it may be a remedy for a maliciously prosecuted CEQA case. The court's opinion can be found online at: https://www.courts.ca.gov/opinions/documents/D076570.PDF.
(Travis Brooks)

SECOND DISTRICT COURT AFFIRMS SUMMARY JUDGMENT FOR CONDOMINIUM OWNER, FINDING NO DUTY OF CARE TO PROVIDE ONSITE GUEST PARKING

Issakhani v. Shadow Glen Homeowners Association, Inc., 63 Cal.App.5th 917 (2nd Dist. 2021).

In *Issakhani v. Shadow Glen Homeowners Association, Inc.* the Second District Court of Appeal affirmed the trial court's grant of summary judgment in favor of a condominium complex owner, in a negligence action filed by a pedestrian who was struck by a car while jaywalking across a highway towards the complex. The appellate court held that neither common law nor a parcel-specific rezoning ordinance created a duty of care that required the condominium complex owner to provide a specific number of onsite parking spaces for guests such as the plaintiff.

Factual Background

On the evening of June 10, 2014, plaintiff, Anaeis Issakhani, visited the Shadow Glen condominium complex in Sun Valley—a 68-unit housing development outside the City of Los Angeles. The complex has 170 onsite parking spaces, which are marked "Reserved" for residents, and "Visitor" for guests. After driving through the onsite parking lot for several minutes, plaintiff concluded there was no available visitor parking, and therefore parked her car on the other side of a five-lane highway. Rather than walking to the next marked crosswalk several hundred feet away, she jaywalked to the complex. While doing so, she was struck by a car and suffered skull and brain injuries.

The Shadow Glen complex was built at a site originally zoned for single and dual family housing. The Los Angeles city council granted the developer's rezoning application and enacted ordinance No. 151,411 to rezone the parcel. However, the ordinance specified special conditions to protect the interests and character of the surrounding neighborhood. One condition required that the complex designate one guest parking spot per every two units. Because the complex had 68 units, the ordinance thus required 34 guest parking spaces. Though the complex contained 170 total parking spaces—13 more than required by the municipal code and ordinance—only six were marked as visitor spaces.

On Jun 10, 2016, plaintiff sued the complex's owner, the Shadow Glen Homeowners Association, Inc. (Association), alleging claims for negligence and premises liability. Plaintiff argued the Association was liable for its failure to maintain an appropriate number of guest parking spaces. The trial court granted summary judgment for the Association, finding that it did not owe plaintiff a duty of care under common law or ordinance No. 151,144, and that plaintiff could not prove causation. Plaintiff timely appealed the judgment.

The Court of Appeal's Decision

On appeal, plaintiff argued the trial court erred in granting summary judgment for the Association. In reviewing the trial court's grant of summary judgment, the Second District Court of Appeal articulated that the Association bore the initial burden of establishing that the action lacked merit by showing that plaintiff cannot establish one or more of the requisite elements of her claim. If the Association satisfies this burden, the burden shifts to plaintiff to show that a triable issue of one or more material facts exists.

Here, plaintiff's claims for negligence and premises liability contemplated the same elements: 1) a legal duty of care; 2) a breach of that duty; and 3) proximate cause resulting in injury. If the Association does not owe plaintiff a duty of care, it is entitled to summary judgment. The Court of Appeal makes this determination independently and owes no deference to the trial court's ruling or reasoning.

The Association's Duty under Common Law

The court explained that a duty of care exists when one party owes a legal obligation to prevent harm to another, such that breach of that obligation can rise to liability. Under common law, a landowner possesses a duty to maintain its land in a reasonably safe condition to avoid exposing others to an unreasonable risk of injury. Here, the Association's duty thus rested on whether it was required to protect invitees against off site injuries caused by alleged deficiencies on the condominium complex property. The appellate court answered this in the negative, finding that the Association did not encompass a duty to provide onsite parking for invitees in order to protect them from traffic accidents occurring off site as they travel to the premises.

The Association did not possess a duty of care for two reasons. Foremost, California Supreme Court precedent had already foreclosed plaintiff's argument that a landowner must provide invitees with onsite parking. In *Vasilenko v. Grace Family Church*, 3 Cal.5th 1077 (2017), the Supreme Court held that landowners who maintain offsite parking do not have a duty to protect their invitees from the "obvious dangers" of crossing public streets. However, even if the *Vasilenko* decision did not foreclose the Association's duty, the factors articulated in *Rowland v. Christian*, 69 Cal.2d 108 (1968), further counseled against such a duty. The foreseeability and public policy factors identified by the Supreme Court in *Rowland* guide the scope of a defendant's duty of care. Here, the *Rowland* foreseeability factors weighed against imposing a duty on the Association to provide onsite parking. While it is foreseeable that an invitee might be injured by traffic while crossing the street,

the connection between the Association's conduct and plaintiff's injury in the case at bar was far too attenuated. Rather, Plaintiff's injury was more directly caused by her election to park across the street, her decision about where and when to cross the highway, and the driver's ability to see her and react.

Similarly, the *Rowland* public policy factors weighed against imposing a duty of care on the Association. First, requiring onsite guest parking would not effectively prevent future harm—it would simply result in residents, rather than invitees, parking off site. Second, landowners are not entirely blameworthy in failing to provide more parking where few options exist for doing so. Instead, drivers and invitees are best poised to prevent future traffic accidents. Third, requiring onsite parking for all invitees would impose "an unacceptably heavy burden" on landowners, who would be forced to constantly monitor the danger level of nearby streets and accommodate accordingly.

The Association's Statute-Based Duty

The Second District further considered whether the rezoning ordinance conferred a statutory duty of care upon the Association, as a matter of law. The appellate court emphasized that not all statutes and ordinances are capable of forming the basis for a duty of care that gives rise to an actionable negligence claim. While some may implement a broad and generally applicable rule of conduct based on public policy, others do not.

Here, Ordinance No. 151,411 was enacted as the final step of an administrative procedure related to rezoning a single parcel. Although the City's mechanism for implementing the rezoning was by way of Ordinance No. 151,411, the Ordinance did not embody a "general public policy" that could be used as a fulcrum to create a duty of care. To this end, the Ordinance would not impose a duty to provide guest parking, even if it had set forth some general rule of conduct. Although plaintiff argued that the city's zoning activities were generally intended "to promote health, safety, and the general welfare," (under the municipal code), the Ordinance was not designed to protect invitees or prevent traffic accidents. Instead, the plain language of the Ordinance indicated that it was designed to preserve the character and aesthetic of the neighborhood surrounding the complex. That the Ordinance might have the incidental effect of protecting guests from road danger was not sufficient to create an actual duty to do so. Finally, because the Ordinance imposed fines as a penalty for noncompliance, any Ordinance-based duty was conferred upon the city, and not to invitees.

Lastly, the Court of Appeal rejected plaintiff's final argument that the Association engaged in misfeasance by reducing the number of guest parking spots from the number required by the Ordinance. The court noted that plaintiff conflated a "duty" of care with a "standard" of care. Here, the Ordinance's minimum number of spots was akin to a standard of care—without a duty of care, a standard of care, alone, could not establish liability. Second, any misfeasance was not actionable because liability for misfeasance is rooted in a general duty of ordinary care, which the court reiterated did not exist here. Finally, the court reasoned that imposing misfeasance liability would create perverse incentives for landowners—*i.e.*, if landowners could be held liable for misfeasance by reducing the number of guest parking spaces, they would in turn, become incentivized to engage in nonactionable nonfeasance, such as by simply not offering guest parking at all.

Conclusion and Implications

The Second District Court of Appeal's opinion articulates and refines a landowner's "duty of care" under common and statutory law. A landowner's common law duty of care does not encompass a duty to provide onsite parking for invitees to protect them from traffic accidents occurring offsite, even where the invitee is travelling to the landowner's premises because they were obligated to park offsite due to lack of available onsite parking. Similarly, landowners do not possess a statutory "duty of care" under local ordinances that only impose parcel-specific rezoning conditions, particularly absent evidence that the plaintiff is a member of a class that was intended to be protected. Where the court is tasked with creating a new duty of care for landowners, it will consider the intent behind local ordinances and zoning decisions, along with relevant foreseeability and public policy factors. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B301746.PDF.

(Louisa Rogers, Bridget McDonald)

SECOND DISTRICT COURT AFFIRMS INJUNCTION AGAINST CITY'S SHORT TERM VACATION RENTAL BAN BECAUSE CITY LACKED COASTAL DEVELOPMENT PERMIT

Kracke v. City of Santa Barbara, ___Cal.App.5th___, Case No. B300528 (2nd Dist. May 4, 2021).

The Second District Court of Appeal in *Kracke v. City of Santa Barbara* affirmed the injunction against enforcement of a City of Santa Barbara (City) regulation that effectively banned short term vacation rentals (STVRs) in the coastal zone because the City failed to obtain a required Coastal Development Permit (CDP) prior to enforcing the regulation.

Factual and Procedural Background

The City's Local Coastal Program (LCP) under the Coastal Act was certified in 1981 when STVRs were virtually nonexistent. The City maintained that STVRs were not legally permitted under either the LCP or its municipal code even though it allowed them to operate until 2015. The City only required the homeowner to register the STVR, to obtain a business license and to pay the 12 percent daily transient occupancy tax.

By 2015, there were 349 STVRs, including 114 STVRs in the coastal zone. In that fiscal year alone, the City collected $1.2 million in STVR occupancy taxes.

In June 2015, City staff issued a Council Agenda Report advising that:

> . . .[a]ll vacation rentals or home shares that are not zoned and permitted as hotels, motels, or bed and breakfasts are in violation of the Municipal Code.

The City found that the proliferation of STVRs was driving up housing costs, reducing housing stock and changing the character of residential zones.

Following a hearing, the city council unanimously directed its staff to proactively enforce the City's zoning regulations, "which prohibits hotel uses in most residential zoning districts." This action effected an STVR ban in residential areas and strict regulation of STVRs as "hotels" in commercial and R-4 zones.

By August 2018, the 114 coastal STVRs had dwindled to just 6. As one City councilmember observed, "[T]he door is closing on vacation rentals." Kracke, whose company manages STVRs, filed his petition for writ of mandate challenging the City's regulation for lack of Coastal Act compliance on November 30, 2016.

Six days later, the Coastal Commission's Chair, Steve Kinsey, sent a guidance letter to local governments, including the City, outlining "the appropriate regulatory approach to vacation rentals in your coastal zone areas moving forward." He explained:

> [P]lease note that vacation rental regulation in the coastal zone must occur within the context of your local coastal program (LCP) and/or be authorized pursuant to a coastal development permit [CDP]. The regulation of short-term/vacation rentals represents a change in the intensity and use and of access to the shoreline, and thus constitutes development to which the Coastal Act and LCPs must apply. We do not believe that regulation outside of that LCP/CDP context (*e.g.*, outright vacation rental bans through other local processes) is legally enforceable in the coastal zone, and we strongly encourage your community to pursue vacation rental regulation through your LCP.

In January 2017, Jacqueline Phelps, a California Coastal Commission Program Analyst, followed up with the city planner, Renee Brooke. Phelps explained that the Commission:

> . . .disagree[s] with the City's current approach to consider residences used as STVRs as 'hotel' uses (pursuant to the City's interpretation of the definition of 'hotel' included in the [Municipal Code] for the purpose of prohibiting or limiting STVRs in residential zones.

She directed Brooke to the 2016 guidance letter and again urged the City:

> . . .to process an LCP amendment to establish clear provisions and coastal development permit

> requirements that will allow for STVRs and regulate them in a manner consistent with the Coastal Act.

The Commission's Deputy Director, Steve Hudson, sent a similar letter a few months later.

After considering the evidence, the trial court found that the City's STVR enforcement policy constituted a "development" within the meaning of § 30106 of the Coastal Act. It issued a writ requiring the City to allow STVRs:

> . . .in the coastal zone on the same basis as the City had allowed them to operate prior to June 23, 2015, until such time as the City obtains a coastal development permit or otherwise complies with the provisions of the Coastal Act.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court determinations based on substantial evidence that the City's STVR regulation constituted "development" under the Coastal Act required the California Coastal Commission's approval of a CDP, LCP amendment or amendment waiver before the ban could be imposed.

Coastal Act Policies

The Coastal Act is designed to protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources. (Pub. Res. Code, § 30001.5, subd. (a).) It also seeks to maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners. (Pub. Res. Code, § 30001.5 subd. (c).) The Commission is charged with implementing the Coastal Act's provisions.

The Coastal Act tasks local coastal governmental entities, such as the City, with developing their own LCPs to enforce the Act's objectives. The LCP's content is determined by the entity but must be prepared in full consultation with the Commission. Once completed, the LCP is submitted to the Commission for certification. (Pub. Res. Code, §§ 30512-30513.) Although the Coastal Act does not displace a local government's ability to regulate land use in the coastal zone, it does preempt conflicting local regulations. (Pub. Res. Code, § 30005, subd. (a).)

CDP Required for Development

The Coastal Act requires that any person who seeks to undertake a 'development' in the coastal zone obtain a CDP. (Pub. Res. Code, § 30600, subd. (a).) "Development" is broadly defined to include, among other things, any change in the density or intensity of use of land. California courts have given the term 'development' an expansive interpretation consistent with the mandate that the Coastal Act is to be liberally construed to accomplish its purposes and objectives.

A ban on STVRs has already been determined by the Court of Appeal to constitute development under the Coastal Act because it affects density and intensity of use and impacts coastal access. (*Greenfield v. Mandalay Shores Community Assn.*, 21 Cal.App.5th 896, 899-900 (2018).)

The Court of Appeal rejected the City's contention that because STVRs are not expressly included in the LCP, they are therefore excluded, giving the City the right to regulate them without regard to the Coastal Act. The City cannot act unilaterally, particularly when it not only allowed the operation of STVRs for years but also benefitted from the payment of transient occupancy taxes. When the City abruptly changed this policy, it necessarily changed the intensity of use of and access to land and water in the coastal zone. (Pub. Res. Code. §§ 30600, subd. (a), 30106.

Conclusion and Implications

This opinion by the Second District Court of Appeal reaffirms the prior decision in *Greenfield* that STVRs within the coastal zone are subject to regulation under the Coastal Act and that actions by private communities or local government pertaining to STVRs must be subject to Coastal Commission jurisdiction and in accordance with Coastal Act policies. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B300528.PDF.

(Boyd Hill)

FIRST DISTRICT COURT UPHOLDS MARIN COUNTY'S DENIAL OF PROPOSED HOME ON EXPOSED HILLSIDE

Sasan v. County of Marin, *Unpub.*, Case No. A160325 (1st Dist. June 10, 2021).

In an *unpublished* June 10, 2021 decision, the First District Court of Appeal upheld Marin County's denial of a large and modern single family home project on an exposed hillside. The decision highlights the high levels of deference granted by courts to local agencies when interpreting their own general plan and zoning provisions. The decision also highlights the fact that a high level of specificity is not required to be included in a local agency's findings supporting a challenged decision, so long as the findings are sufficient to "bridge the analytic gap" and allow aggrieved parties to determine the basis by which they can seek review.

Factual Procedural Background

In 2016, plaintiffs filed an application for discretionary design review to construct a 3,328 square foot residence in Marin County. The residence was sited on an open hillside and would extend 28 feet above the surrounding hillside. In 2017, the Marin County community development agency (agency) approved plaintiffs' design review and tree removal permit application. A group of unhappy neighbors appealed this approval to the county planning commission. The appeal claimed that the home's modern design, size, and location were incompatible with nearby homes and natural surroundings.

At the planning commission hearing, a county planner explained staff's recommendation for approval of the application and multiple representatives of plaintiffs also spoke in favor of the project. The planning commission also considered hundreds of pages of public letters primarily in opposition to the project. Many of these comments included lay opinions that the building was "much larger than most homes in the area and too large for the site" and also inappropriate for the hillside slope where it was located.

Ultimately the planning commission approved the project. The commission found that the home's contemporary design, although distinctive, was not uncommon and was compatible with the architectural styles in the vicinity and was appropriate to the site. The neighbors appealed this approval to the county board of supervisors.

At the hearing on the appeal, a county planner again appeared to explain the agency's support for approval of the project. Multiple neighbors again spoke against the project. Comments against the project focused on the specific characteristics of the building site, and why the proposed home was particularly ill suited for it.

The board voted to grant the appeal and deny the plaintiff's applications. Department staff then prepared and the board unanimously executed a final resolution stating its findings and decision. The final resolution included 12 findings in support of the boards' decision. Several findings addressed the project's non-compliance with the county's design review criteria, the county's countywide plan, and tree preservation ordinances.

The plaintiff then filed a writ petition in Marin County Superior Court. The Superior Court found that board's decision was supported by substantial evidence and upheld its denial of the project.

The Court of Appeal's Decision

On appeal the plaintiffs claimed that the county board's findings and final resolution were legally defective and unsupported by substantial evidence. The Court of Appeal disagreed.

Claim of Inadequate Findings by Marin County

Plaintiffs alleged that the board's findings denying the application were legally inadequate because: 1) they failed to demonstrate the board's analytical route between the evidence and its decision to grant the appeal, and 2) the findings were insufficiently linked to the supporting evidence.

The court rejected these arguments noting that it had:

> . . . no difficulty concluding the board's findings adequately reveal the analytic route the administrative agency traveled from evidence to action.

Analysis under the *Topanga Association* Decision

The court noted that the board's findings met the standard established in *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506 (1974). *Topanga* requires an agency making a challenged decision to set forth findings that bridge the analytical gap between the raw evidence and the ultimate decision or order. The court noted that under *Topanga:*

> . . .the deciding agency's findings must be sufficient to enable the parties to determine whether and upon what basis they should seek review and to allow a reviewing court to determine the basis for the agency's action. However, great specificity is not required. It is enough if the findings form an analytic bridge between the evidence and the agency's decision. In addition findings are to be liberally construed to support rather than defeat the decision under review.

The court determined that the board's findings satisfied the above standard. The board referenced to the administrative record to support its conclusion that the project violated county codes and policies. The board made several findings that, based on the facts and documents presented during prior to and during the hearing, the project was inconsistent with provisions of the countywide plan regarding mass scale and visual quality as well as with multiple sections of the county code. The board supported these findings with "a detailed description of the home's siting on an open, grassy hillside away from the existing road and structures…," which was "more than sufficient" to meet the above *Topanga* standard. The court also rejected plaintiffs' claims that the findings needed to cite to specific portions of the administrative record. To the contrary, this requirement would:

> . . .be at odds with the established rule that findings are generally permitted considerable latitude with regard to their precision, formality, and matters reasonably implied therein and do not need to be extensive or detailed.

Substantial Evidence Claim

The court also rejected plaintiffs' claims that the trial court's decision was not supported by substantial evidence. In reviewing an appeal of a decision on a petition for writ of mandate, the appellate court's role is identical to that of a trial court with respect to the administrative record and the trial court's conclusions and dispositions were not conclusive on the court of appeal.

The court noted that the project documents and neighbors' written and oral input on the project's impacts provided a sufficient basis to meet the deferential substantial evidence test.

Conclusion and Implications

The *Sasan* decision highlights the fact that local agencies do not need to provide great specificity in their findings in support of a decision, so long as those findings provide enough of an analytical bridge to the evidence, to determine the basis for the agency's decision. Also of note is the fact that the pro-housing provisions of the Housing Accountability Act, which limit local agency discretion to deny multi-home development projects are typically not available to single home development projects like that involved in this case. The court's *unpublished* decision can be found online at: https://www.courts.ca.gov/opinions/nonpub/A160325.PDF.
(Travis Brooks)

FIRST DISTRICT COURT UPHOLDS AWARD OF ENHANCED ATTORNEY'S FEES TO LAND TRUST THAT SUCCESSFULLY ENFORCED CONSERVATION EASEMENT

Sonoma Land Trust v. Thompson, 63 Cal.App.5th 978 (1st Dist. 2021).

The First District Court of Appeal in *Sonoma Land Trust v. Thompson* upheld the trial court's award of enhanced attorney's fees to plaintiff, Sonoma Last Trust, in a "contentious" action against private landowners for violating the terms of a conservation easement.

Factual and Procedural Background

Pursuant to Civil Code §§ 815 and 815.3, the California Legislature has declared conservation easements "to be among the most important environmental assets of California." Conservation easements are voluntary agreements between a landowner and a land trust or governmental agency, which permanently limit the property's natural, scenic, historic, agricultural, forested, or other open-space conditions. Landowners are encouraged to convey such easements to qualified nonprofit organizations in exchange for state and federal tax benefits. However, violation of such easements can result in a court awarded injunctive relief, reasonable attorney's fees, and monetary damages, including costs associated with restoring and compensating for the loss of scenic, aesthetic, and environmental value.

Defendants-appellants Peter and Toni Thompson, owned land near Glen Ellen, California. The property had been the subject of a conservation easement, granted by the previous owners in favor of plaintiff-respondent, Sonoma Land Trust (Trust). The Thompsons intentionally violated the conservation easement by uprooting and dragging out heritage oak trees to their newly constructed home on an adjoining property—a parcel that was owned by the Thompson's, corporation Henstooth, Ranch, LLC—which ultimately killed the mature trees in the process. The Thompsons further violated the easement by bulldozing a new road, dumping pond dredge spoils, which included invasive weed, and grading sections of the easement property. The Thompsons lied about their actions, hid the damage, and attempted to keep the Trust from inspecting the easement property, a right the Trust enjoys pursuant to the easement.

As a result, in November 2015, the Trust filed suit seeking an injunction and damages under Civil Code § 815.7. The Thompson denied all allegations, as well as any obligation to restore the property, and assumed a "take-no-prisoners" stance throughout the litigation. The "contentious" litigation spanned four and a half years, and culminated in a 19-day bench trial, where the trial court found the Thompsons jointly and severally liable. Though not a party to the easement, the trial court also found Henstooth Ranch, LLC, liable as the site where the oaks were moved.

The trial court awarded the Trust injunctive relief, $575,899 in damages, and $2,961,264.29 in attorney's fees—$2,032,695.10 under the lodestar, and $813,078.04 as an added fee enhancement—pursuant to Civil Code § 815.7, subd. (d), and Code of Civil Procedure § 1021.5. The trial court determined that the Trust's attorneys had demonstrated outstanding skill, particularly due to the "novelty and difficulty" of this case, as well as the exceptional results secured. With respect to contingent risk, the trial court noted that, although the Trust's insurer paid the first $500,000 in attorney's fees, the attorneys accepted a reduced billing rate and worked on a fully contingent basis after the insurance coverage reached its cap.

Defendants appealed both the trial court's judgement on the merits (*Sonoma Land Trust v. Thompson* (Dec. 16, 2020, A157721)) and its award of attorney's fees.

The Court of Appeal's Decision

The First District Court of Appeal reviewed the trial court's decision *de novo*, and reviewed its award of attorney's fees for abuse of discretion, "mindful of the fact that the trial judge is in the best position to assess the value of an attorney's performance." Attorney's fees are awarded based on a lodestar, which constitutes the number of hours "reasonably expended" multiplied by a reasonable hourly rate. Trial courts are empowered to adjust lodestar calculations in order to fix the fee at the fair market value. And, importantly, attorneys fee awards are generally based on the value of the services provided, not the actual cost to the party.

Lodestar Calculations

The Thompsons challenged the trial court's lodestar calculation on three grounds. First, they argued the lodestar should have been reduced by $500,000, the sum which the Trust's insurer initially paid in attorney's fees. The Court of Appeal disagreed that a lodestar reduction was necessary "simply because the Trust had the foresight to purchase insurance." Instead, the trial court correctly based attorney's fees on the fair market value of the attorneys' services, as opposed to the true cost to the Trust. Thus, the appellate court concluded it was not relevant if the Trust was able to defray costs through insurance.

The Thompsons also argued that the Trust benefited from double recovery, under breach of contract principles. But the appellate court noted that the contract in this case—the easement—allows for

recovery of attorney's fees. As such, the Trust was entitled to recover such fees, irrespective of whether it initially paid them. Further, attorney's fee recovery was based not only on the terms of the easement, but also under Civil Code § 815.7, subd. (d), and Code of Civil Procedure § 1021.5. Finally, the Trust was prevented from double recovery because its insurance policy required the Trust to "reimburse the insurer from any damage award."

Second, the Thompsons argued the number of hours calculated was excessive and the Trust's attorneys were inefficient. The Court of Appeal was unconvinced by the Thompsons' "vague" and general arguments and their "cherry-pick[ed]" examples of inefficiency. Notably, the Trust trimmed its attorney's fees request by over 10 percent to account for such inefficiency. Yet, the Thompsons failed to argue what the lodestar *should* have been. Finally, because the case took years of "difficult, contentious pre-trial litigation" and because the Trust had to counter the Thompsons' "aggressive tactics," the number of hours calculated into the lodestar was "reasonable," "appropriate," and "necessary."

Finally, the Thompsons argued the lodestar was "disproportionate to the public benefit," as required under Code of Civil Procedure § 1021.5. However, because the trial court also based award of attorney's fees on Civil Code § 815.7, and the terms of the easement—neither of which mandate a finding of public benefit—the Court of Appeal disregarded this contention.

Fee Enhancements

The Thompsons claimed the trial court abused its discretion by adding a fee enhancement to the attorney's fee award. The Court of Appeal disagreed, observing that a trial court may apply a fee enhancement based on a myriad of factors, including contingent risk and exceptional skill. In response to contingent risk, specifically, fee enhancement:

> . . .compensates the lawyer for having taken the case despite the risk of receiving no payment in the event of a loss or the risk of a delayed payment in the event of a victory.

Yet, the Thompsons argued fee enhancement of this magnitude was inappropriate since "the litigation was only partially contingent." The appellate court emphasized, however, that partial contingency does not eradicate risk, it merely mitigates it. And, to that end, the trial court accounted for the fact that the Trust's attorneys did initially receive some fees—albeit ones "well below the market rate"—before proceeding on contingency.

The Court of Appeal also rejected the Thompsons' argument that fee enhancement should have applied only to fees incurred beyond the insurance coverage: the Trust incurred all of its fees while the case was still being litigated on the merits.

Finally, the Thompsons complained that the trial court used the same factors, such as attorney skill and case difficulty, in determining the lodestar and the fee enhancement. While it is true that double counting is prohibited, the Court of Appeal noted that the same factor may be used to determine both elements when it is only partially reflected in the lodestar. In other words "the lodestar may not capture aspects of the quality of representation that can support an enhancement." Here, the Trust's attorneys demonstrated "outstanding" skill in securing a "comprehensive victory" against a "vigorous" and "contentious" defendant in a case that raised complex legal questions requiring specialized knowledge. The lodestar, as interpreted by the Court of Appeal, did not fully account for these important factors.

Conclusion and Implications

The First District Court of Appeal's opinion reiterates appellate courts' hesitancy in overturning an award of attorney's fees, particularly because trial courts are in "the best position to assess the value of an attorney's performance." Where parties engage in contentious litigation, trial courts may be further inclined to apply enhancements or multipliers to fee awards—insurance coverage will not necessarily mitigate such awards. This is particularly based on the underlying principle that attorneys fee awards are based on the value of the attorneys' services, not the actual cost to the party they represent. Accordingly, litigants are behooved to ensure expeditious resolution of their matters to avoid the risk of incurring additional fees. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A159139.PDF.

(Blake Hyde, Bridget McDonald)

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 28, 2021, was referred to the Committee on Natural Resources.

Environmental Protection and Quality

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

AB 1260 was introduced in the Assembly on February 18, 2021, and, most recently, on June 3, 2021, was referred to the Committee on Environmental Quality.

Housing / Redevelopment

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

AB 345 was introduced in the Assembly on January 28, 2021, and, most recently, on June 16, 2021, was read for a second time, amended, and then re-referred to the Committee on Housing.

•**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 June 21, 2021, was read for a second time, amended, and then re-referred to the Committee on Housing.

•**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 24, 2021, was in the Assembly where it was read for the first time and held at the desk.

•**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 June 10, 2021, was re-referred to the Committee on Housing and Community Development.

•**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 June 2, 2021, was in the Assembly where it was read for the first time and held at the desk.

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 June 17, 2021, was re-referred to the Committee on Governance and Finance.

•**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 June 21, 2021, was read for a second time, amended, and then re-referred to the Committee on Governance and Finance.

•**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 June 3, 2021, was re-referred to the Committees on Housing and Community Development and Local Government.

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 June 21, 2021, was read for a second time, amended, and then re-referred to the Committee on Governance and Finance.

•**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 June 14, 2021, was read for a second time, amended, and then re-referred to the Committee on Housing and Community Development.

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

SB 12 was introduced in the Senate on December 7, 2020, and, most recently, on June 10, 2021, was re-referred to the Committees on Housing and Community Development and Local Government. (Paige Gosney)

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