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CALIFORNIA LAND USE™
LAW & POLICY Reporter

RECENT CALIFORNIA DECISIONS

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LAND USE NEWS

MARIN MUNICIPAL WATER DISTRICT ADOPTS BAN ON POTABLE WATER USE FOR LANDSCAPING IN NEW DEVELOPMENTS

Continuing its efforts towards reducing the burden of new developments on the already limited water supplies within Marin County, the Marin Municipal Water District (District) has adopted a new restriction on the use of potable water for all new developments. Specifically, the use of potable water for the installation of any new landscaping for all new water service connections is now prohibited until after the termination of the current water shortage emergency.

The Marin Municipal Water District's Ban

The District's thrifty outlook on future water uses seems to stem from the disparity between the District's service area population of roughly 191,000 and its declining water storage levels fast approaching 30,000 acre-feet as of late August. Highlighting the concern over the low water storage levels, the District stated in its adoption of Ordinance No. 453 that:

> . . .as a result of this drought, the District reservoirs are projected to be as low as 25,000 acre-feet on December 1, 2021 in the absence of above average rainfall and runoff, which is less than one year of water supply based on recent demand.

For reference, the District's 2020 annual demand was 28,199 acre-feet.

Looking at the water savings this prohibition is slated to bring, the District estimates that new development would require an additional 42 acre-feet in new drinking water demand. With the implementation of these new restrictions, the District is estimated to reduce this demand by 14 acre-feet. Expanding this estimate to look at new developments over the next two years, the District further estimates that for the 62 acre-feet in new drinking water demand from new developments the new prohibition would provide a savings of 15 acre-feet. While as a static number this may seem like penny-pinching at best, the new prohibition is reducing the new drinking water demand from such new developments by roughly 30 percent, which is certainly an appreciable figure.

The new Ordinance is not a standout measure, either. The landscape restrictions imposed by Ordinance No. 453 are very similar to those approved by the District's neighbor to the north, the North Marin Water District, for its 60,000-plus Novato customers. There, Novato developments are allowed to move forward so long as the developments do not use any drinking water supplies to irrigate their landscaping.

In addition to the adoption of this emergency measure, the board of directors for the District further considered making these prohibitions permanent at its August 3, 2021 public meeting. There, the District discussed the possibility of extending the prohibitions beyond the water shortage emergency. While no official action on the matter was taken, the move would certainly be in keeping with the District's efforts to minimize the water use in new developments.

Conclusion and Implications

The Municipal Water District is working with an increasingly limited water supply, receiving the bulk of its water from its seven reservoirsJ: Alpine, Bon Tempe, Kent, Lagunitas, Nicasio, Phoenix, and Soulajule, which combine for a storage capacity of 79,566 acre-feet. As of August 22, these reservoirs held a combined 30,658 acre-feet in storage, or a mere 38.53 percent of the reservoirs' storage capacity. The District normally receives about 25 percent of its water from the Russian River Watershed via the North Marin Aqueduct, but the river up north is facing a severe water shortage of its own, so severe in fact that the State Water Resources Control Board has gone so far as to issue curtailment orders for water rights holders within the watershed.

With its water resources dwindling, the District should likely be looking at every feasible conservation measure, even if the measures individually bring about only minimal reductions in water use. Although the savings estimated from the new prohi-

bitions, discussed above, only represent about 0.1 percent of the District's annual water demand, a better figure to compare this with is that the use of recycled water accounts for just 2 percent the District's total water supply. Expanding the utilization of recycled water has been a priority of the District for some time now, and while a "death by a thousand cuts" approach to staving off such extreme water shortages is not the most palatable of methods, every tool available should be seriously considered by the District moving. (Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

STATE WATER RESOURCES CONTROL BOARD IMPLEMENTS EMERGENCY WATER REPORTING AND CURTAILMENT REGULATIONS IN LIGHT OF HISTORIC DROUGHT

At its August 3, 2021 Public Meeting, the State Water Resources Control Board (State Water Board) considered whether to adopt emergency regulations that would instate certain reporting requirements and allow for the curtailment of water rights in the Sacramento-San Joaquin Delta Watershed (Delta Watershed). As the public meeting came to an end, the State Water Board ultimately decided to adopt these Emergency Reporting and Curtailment Regulations, passing them on to the Office of Administrative Law who approved the Regulations as of August 19, 2021. With these new Regulations coming into effect, thousands of water users either have been or are expected to be issued curtailment orders to cease water diversions under their curtailed water rights.

Emergency Regulations as Adopted: Curtailment of Diversions due to Drought Emergency

The Emergency Regulations, as adopted, add to Title 23 of the California Code of Regulations, Division 3, Chapter 2, Article 24 §§ 876.1 and 878.2. The Emergency Regulations will also amend 23 CCR § 877.1, 878, 878.1, 879, 879.1, and 879.2.

Beginning with the newly added 23 CCR 876.1, this section applies to water diversions within the Delta watershed and authorizes the Deputy Director to issue curtailment orders, subject to: (a) the several exceptions provided in §§ 878, 878.1, and 878.2, and (b) to the considerations provided in § 876.1(d). This section also provides a process to request a correction to a water right's priority date or to propose that curtailment may not be appropriate for a specific diverter or stream system. Initial Orders issued pursuant to this section will require reporting under § 879 and will either require curtailment or will instruct right holders regarding procedures for potential future curtailments. Furthermore, § 876.1(g) authorizes temporary suspensions of curtailment orders in the event that water availability increases. Finally, § 876.1(h) provides that by October 1, 2021 the Deputy Director must consider the suspension, extending of suspensions, or reimposition of curtailments, and must continue to do so every "by no more than every 30 days thereafter."

As noted above, several exceptions to these curtailment orders are laid out in §§ 878, 878.1, and 878.2. First among these exceptions, diversions solely for non-consumptive use may not be required to curtail in response to a curtailment order if their diversion and use of water does not decrease downstream flows and if they submit to the Deputy Director a certification describing the non-consumptive use and evidencing how the use does not decrease downstream flows. Second, under § 878.1, diversions that are necessary for minimum human health and safety standards may not be required to curtail, so long as several conditions are met that vary based upon whether the diversions are less than or greater than 55 gallons per person per day. Lastly, § 878.2 provides an exception for water users under alternative water sharing agreements that achieve the purposes of the curtailment process and that are submitted to and approved by the Deputy Director.

In addition to the requirements imposed by curtailment orders issued pursuant to the Emergency Regulations, reporting requirements are also established, with water rights holders of rights in excess of 1,000 acre-feet annually potentially subject to more stringent and continuous reporting requirements.

Initial Orders in the Delta Watershed

On August 20, 2021, the day after the Emergency Regulations were approved, the State Water Board sent out Initial Orders to diverters in the Delta Watershed. These Initial Orders came with strict reporting requirements for such diverters, demanding a Compliance Certification be submitted by diverters no later than September 3, 2021—a turnaround of only two weeks. Furthermore, larger diverters (*i.e.* diverters in excess of 5,000 AFA) are subject to

enhanced reporting requirements, including monthly reporting for water diversions and use and monthly reporting of projected demand data.

In addition to the reporting requirements detailed in the Initial Orders, the orders also point out that any diverter seeking to utilize an exception as either non-consumptive use or necessary for human health and safety standards must submit a request by September 10, 2021, regardless of whether such water right has been curtailed as of this time.

Conclusion and Implications

The Initial Orders sent out by the State Water Resources Control Board will have major impacts on water users within the Delta Watershed. Thousands of users are expected to curtail diversions for the latter portion of August as well as for the duration of September, with many of these diverters facing the potential for further curtailments into October and beyond. The reporting requirements will certainly have water users' hands full in effort to maintain compliance. In any event, it seems just as likely that the State Water Board will face legal challenges to these new Emergency Regulations as water users scramble to respond to curtailment orders.

For more information on the Emergency Regulations and curtailments, readers can access the State Water Board's Sacramento-San Joaquin Delta Watershed Drought & Curtailment Information webpage at: Sacramento-San Joaquin Delta Watershed Drought Information | California State Water Resources Control Board.
(Wesley A. Miliband, Kristopher T. Strouse)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT FINDS REGULATION GRANTING LABOR ORGANIZATIONS A 'RIGHT TO TAKE ACCESS' TO AN AGRICULTURAL EMPLOYER'S PROPERTY CONSTITUTES A *PER SE* PHYSICAL TAKING

Cedar Point Nursery v. Hassid, ___U.S.___, 141 S.Ct. 2063 (June 23, 2021).

A California regulation grants labor organizations a "right to take access" to an agricultural employer's property in order to solicit support for unionization. Agricultural employers must allow union organizers onto their property for up to three hours per day, 120 days per year. Two growers sued, claiming that the regulation effected an unconstitutional *per se* physical taking under the Fifth and Fourteenth amendments of the U.S. Constitution by appropriating without compensation an easement for union organizers to enter their property. The U.S. District Court and the Court of Appeals for the Ninth Circuit rejected the claim. The U.S. Supreme Court granted *certiorari* and reversed, finding the regulation constituted a *per se* taking.

Factual and Procedural Background

The California Agricultural Labor Relations Act of 1975 gives agricultural employees a right to self-organization and makes it an unfair labor practice for employers to interfere with that right. The state Agricultural Labor Relations Board (Board) promulgated a regulation providing that the self-organization rights of employees include:

> . . .the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support.

Under that regulation, a labor organization may "take access" to an agricultural employer's property for up to four 30-day periods in one calendar year.

In order to take access, a labor organization must file a written notice with the Board and serve a copy of that notice on the employer. Two organizers per work crew (plus one additional organizer for every 15 workers over 30 workers in a crew) may enter the employer's property for up to one hour before work, one hour during a lunch break, and one hour after work. Organizers may not engage in disruptive conduct but are otherwise free to meet and talk with employees as they wish. Interference with organizers' right of access may constitute an unfair labor practice, which can result in sanctions against the employer.

After visits from the United Farm Workers, two agricultural growers (Cedar Point Nursery and Fowler Packing Company), believing that the union would likely attempt to enter their property again in the future, filed suit in the U.S. District Court. The growers argued that the access regulation effected an unconstitutional *per se* physical taking under the Fifth and Fourteenth amendments by appropriating without compensation an easement for union organizers to enter their property. They requested declaratory and injunctive relief prohibiting the Board from enforcing the regulation against them.

The District Court denied the growers' motion for a preliminary injunction and granted the Board's motion to dismiss. The court rejected the argument that the access regulation constituted a *per se* physical taking, reasoning that it did not allow the public to access their property in a permanent and continuous manner for whatever reason. In the court's view, the regulation was instead subject to evaluation under the multifactor balancing test of *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), which the growers had made no attempt to satisfy. The growers then appealed to the Court of Appeals for the Ninth Circuit.

At the Ninth Circuit

The Ninth Circuit affirmed. The court identified three categories of regulatory takings actions: 1) regulations that impose permanent physical invasions; 2) regulations that deprive an owner of all economi-

cally beneficial use of his or her property; and 3) the remainder of regulatory actions. While regulations in the first two categories constitute *per se* takings, those in the third must be evaluated under *Penn Central*. The Ninth Circuit agreed with the District Court that the access regulation did not fall into the first category because it did not:

> . . . allow random members of the public to unpredictably traverse [the growers'] property 24 hours a day, 365 days a year.

And given that the growers did not contend that the regulation deprived them of all economically beneficial use of their property, *per se* treatment therefore was not appropriate.

The Ninth Circuit denied rehearing *en banc* and the U.S. Supreme Court then granted certiorari.

The U.S. Supreme Court's Decision

The Supreme Court began by contrasting *per se* physical takings with government-imposed restrictions analyzed under the *Penn Central* standard. When the government physically acquires private property for public use, the Takings Clause of the Fifth Amendment imposes a clear and categorical obligation to provide the owner with just compensation. This type of taking constitutes the "clearest sort of taking" and is assessed using a *per se* rule: the government must pay for what it takes.

By contrast, when the government instead imposes regulations that restrict an owner's ability to use his or her own property, a different standard applies. To determine whether such a regulation goes "too far," the Supreme Court generally has applied a flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. Whenever a regulation, however, results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* does not apply.

Applying this framework, the Supreme Court concluded that the access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. Rather than restraining the growers' use of their own property, for instance, the regulation appropriates for enjoyment of third parties the owners' right to exclude, which the Court characterized as "one of the most treasured" rights of property ownership.

The Court also distinguished the reasoning of the Ninth Circuit, noting among other things that the duration of an appropriation bears only on the amount of compensation—it does not negate the physical taking itself. The fact that the regulation grants access only to union organizers and only for a limited time also does not transform the regulation from a physical taking into a use restriction analyzed under *Penn Central*. The Court also disagreed with the dissent's position that the "regulation does not *appropriate* anything" and instead merely "*regulates* . . . the owners' right to exclude," such that it must be assessed under the *Penn Central* factors.

Justice Kavanaugh concurred in the majority opinion, and Justice Breyer, Justice Sotomayor, and Justice Kagan joined in dissent.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the U.S. Supreme Court's takings jurisprudence, particularly with respect to the concept of a *per se* physical taking. The decision is available online at: https://www.supremecourt.gov/opinions/20pdf/20-107_ihdj.pdf.
(James Purvis)

U.S. SUPREME COURT FINDS 'FINALITY REQUIREMENT' FOR REGULATORY TAKINGS CLAIM DOES NOT REQUIRE EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES

Pakdel v. City and County of San Francisco, ___U.S.___, 141 S.Ct. 2226 (June 28, 2021).

The U.S. Supreme Court has issued a unanimous *per curium* opinion in *Pakdel v. City and County of San Francisco* holding that the partial owners of a multi-unit residential building did not have to comply with state administrative procedures before bringing an unconstitutional takings claim in federal court. The Su-

preme Court reversed the Ninth Circuit's dismissal of the owners' claims and rejected the Court of Appeals' interpretation of the "finality requirement," finding that the owners adequately established the city's decision was "final," and thus obviating the need to exhaust administrative procedures before bringing a regulatory takings claim under 42 U.S.C. § 1983.

Factual and Procedural Background

Petitioners, a married couple, partially own a multi-unit residential building in San Francisco (City). The couple purchased their interest in the property as a tenancy-in-common. Under that agreement, all building owners had a right to possess and use the entire property. In practice, however, the owners often contracted amongst themselves to divide the premises into individual residences. Similarly, owners agreed to convert tenancy-in-common interests into modern condominium-style arrangements, which allow individual ownership of certain parts of the building. When petitioners purchased their interest in the property, they signed a contract with the other building owners to take all available steps to pursue such a conversion.

Until 2013, the San Francisco department of public works employed a lottery system that accepted only 200 applications per year to pursue conversion of tenancy-in-common interests. In response to the predictable backlog that ensued, the City adopted a new program that allowed property owners to seek conversion, subject to a filing fee and several conditions. One such condition required that nonoccupant owners who rented out their units to offer their tenants a lifetime lease.

Although a renter lived in their unit, petitioners and their co-owners sought conversion, but agreed to offer a lifetime lease to the tenant. The City approved the conversion. Several months later, Petitioners requested that the City either excuse them from executing the lifetime lease or compensate them for the lease. The City refused both requests and informed petitioners that failure to execute the lifetime lease condition would violate the conversion program and could result in an enforcement action.

At the District Court

Petitioners sued the City in U.S. District Court, alleging the lifetime-lease requirement was an unconstitutional regulatory taking under 42 U.S.C. § 1983. The U.S. District Court for the Northern District of California rejected petitioners' claim without reaching the merits. Instead, the District Court relied on the (since-disavowed) rule in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194 (1985), which deemed certain regulatory takings actions unripe for federal resolution until the plaintiff seeks compensation through state-provided procedures. Under this ruling, the District Court dismissed petitioners' claims because they had failed to bring a state inverse condemnation proceeding before initiating the federal action. Petitioners appealed the dismissal to the Ninth Circuit Court of Appeals.

At the Ninth Circuit

During the pendency of the appeal, the U.S. Supreme Court decided *Knick v. Township of Scott, Pennsylvania,* 139 S.Ct. 2162 (2019). In *Knick*, the Court repudiated the *Williamson County* rule that a plaintiff must seek compensation in state court. Instead, the Court held that:

> . . .the availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim.

The Court reasoned that any other approach would conflict with "the general rule that plaintiffs may bring constitutional claims under § 1983 without first bringing any sort of state lawsuit."

Despite the Supreme Court's holding in *Knick*, a divided Ninth Circuit panel affirmed the dismissal of petitioners' claims. The Court of Appeals reasoned that *Knick* left untouched the alternative holding in *Williamson County*, which held that plaintiffs may only challenge "final" government decisions before bringing a regulatory takings claim. Accordingly, the Ninth Circuit found that petitioners' takings claim remained unripe because petitioners failed to obtain a final decision from the City regarding the application of the Lifetime Lease Requirement to their unit. The panel conceded that the City had twice denied petitioners' request for an exemption from the lifetime lease requirement, but noted that petitioners had belatedly requested an exemption at the end of the administrative process, instead of timely seeking one

through the City's prescribed administrative procedures. As such, the appellate court reasoned that an agency's conclusive decision is not *per se* "final" if the plaintiff did not afford the agency with an opportunity to exercise its "flexibility or discretion" in reaching its decision.

In a dissenting opinion, Judge Bea explained that the "finality" requirement for regulatory takings claims only considers whether the initial decisionmaker "arrived at a definitive position on the issue." Accordingly, requiring plaintiffs to additionally "follow the decisionmaker's administrative procedures [would] risk establishing an exhaustion requirement for § 1983 takings claims"—"something the law does not allow." After the Ninth Circuit denied rehearing the matter *en banc*, Judge Collins separately dissented along similar lines, arguing that:

> . . .the panel's unprecedented decision sharply departed from settled law and directly contravened *Knick* [by] imposing an impermissible exhaustion requirement.

The Supreme Court's Decision

The Supreme Court granted *certiorari* and considered whether the Ninth Circuit properly required Petitioners to not only show that the City had firmly rejected their request for a property-law exemption, but also show that they complied with the City's administrative procedures for seeking relief.

In a unanimous *per curium* opinion, the Supreme Court agreed with the rationale of Judge Bea and Judge Collins' dissenting opinions, and held that the panel's view of "finality" was incorrect. The Court explained that the finality requirement is "relatively modest" because a plaintiff need only show that there is "no question" as to how the challenged regulation will apply to the particular parcel at issue. Under the facts at bar, the Court held that there was no question about the City's position as to how the Lifetime Lease Requirement applied to petitioners' property unit: petitioners must execute the lifetime lease or face an enforcement action. This definitive position unquestionably inflicted an actual and concrete injury on petitioners by requiring them to "choose between surrendering possession of their property or facing the wrath of the government."

The Supreme Court further explained that, contrary to the Ninth Circuit's holding, nothing more than "*de facto*" finality is necessary to satisfy the prerequisite before bringing a regulatory takings claim. The "finality" rule protects the government from being prematurely sued over a hypothetical harm, and provides the court with an understanding of "how far the regulation goes."

However, once the government commits to a particular position, these potential ambiguities evaporate, thereby rendering the dispute ripe for adjudication. Under this lens, the Supreme Court held that the Ninth Circuit's additional requirement—that a plaintiff must also comply with the administrative processes in obtaining the government's final decision—runs afoul of the ordinary operation of civil-rights suits. Here, petitioners brought their takings claim under 42 U.S.C. § 1983, which "guarantees a federal forum of claims of unconstitutional treatment at the hands of state officials." As the Court previously reiterated in *Knick*, this guarantee includes the "settled rule" that "exhaustion of state remedies is *not* a prerequisite to an action under § 1983."

Yet, by demanding that petitioners seek an exemption through prescribed state procedures, the Supreme Court found that the Ninth Circuit plainly and improperly imposed an additional exhaustion hurdle upon petitioners. The Court reasoned that, while the exhaustion doctrine may apply in instances where a plaintiff's failure to pursue administrative remedies leaves other avenues for governmental decisionmaking open, it is not a prerequisite in instances where the government has reached a conclusive position. Thus, for the limited purpose of establishing that a takings claim is ripe, "ordinary finality" is sufficient.

Finally, the Supreme Court noted that Congress always has the option of imposing strict administrative exhaustion requirements on certain claims brought under 42 U.S.C. § 1983. Here, however, Congress has not done so for takings plaintiffs. Therefore, the Court held that the Ninth Circuit "had no basis to relegate petitioners' claim to the status of a poor relation among the provisions of the Bill of Rights."

Conclusion and Implications

The Supreme Court's opinion in *Pakdel* marks one of three recently-decided takings cases and adds another nuance to the Court's evolving takings jurisprudence. The relatively short, *per curium* opinion clarifies the prerequisites a plaintiff must satisfy before bringing a regulatory takings claim under 42 U.S.C. §

1983. As iterated in the U.S. Supreme Court's *Knick* opinion: if a plaintiff can clearly establish that the government has reached a final, conclusive position on how the challenged regulation applies to their land, the plaintiff need not pursue and exhaust all administrative procedures before filing suit in federal court. However, if the government's final position is unclear or other avenues for administrative decision-making remain open, the plaintiff's takings claim may be unripe for federal judicial review. The Supreme Court's opinion is available at: https://www.supremecourt.gov/opinions/20pdf/20-1212_3204.pdf. (Bridget McDonald)

U.S. SUPREME COURT UPHOLDS EMINENT DOMAIN AUTHORITY OF FERC 'CERTIFICATE' PIPELINE COMPANY DESPITE STATE SOVEREIGN IMMUNITY CHALLENGE

Penneast Pipeline Co., LLC v. New Jersey, ___U.S.___, 141 S.Ct. 2244 (June 29, 2021).

In a narrow five-to-four decision, the U.S. Supreme Court in *Penneast Pipeline Co., LLC v. New Jersey* has held that the Natural Gas Act authorizes private natural gas companies to use eminent domain authority granted by the federal government to seize state public land for interstate pipeline construction. In upholding this authority, the Supreme Court rejected the State of New Jersey's exercise of sovereign immunity, instead holding that the state could not prevent construction of the PennEast natural gas pipeline on state-held conservation easements.

The Natural Gas Act

Congress passed the Natural Gas Act (NGA) in 1938 to regulate the transportation and sale of natural gas in interstate commerce. The NGA vested the Federal Energy Regulatory Commission (FERC) (formerly the Federal Power Commission) with authority to administer the NGA, which included approving the construction and extension of interstate gas pipelines. To build an interstate pipeline, the Act requires natural gas companies to obtain a certificate from FERC that reflects that construction "is or will be required by the present or future public convenience and necessity." Before FERC issues a such a certificate, it must set and notice the matter for a public hearing thereon.

The original iteration of the NGA did not provide certificate holders with a mechanism to secure the requisite property rights for building gas pipelines. As such, natural gas companies relied upon state eminent domain procedures, which were frequently unavailable. In turn, certificate holders were left with "an illusory right to build." To remedy this conflict, Congress amended the NGA in 1947. The amendment, as codified under 15 U.S.C. § 717f(h), authorized certificate holders to exercise federal—rather than state—eminent domain power. The statute effectuated certificates of public convenience and necessity by providing that certificate holders who cannot contractually acquire the necessary rights-of-way to construct, operate, and maintain a pipeline for the transportation of natural gas, may acquire the right by exercising federal eminent domain power through a federal or state court order.

Factual and Procedural Background

Petitioner PennEast Pipeline Co. is a joint venture owned by several energy companies. In 2015, PennEast applied for a certificate of public convenience and necessity from FERC to construct a 116-mile natural gas pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey. FERC published notice of the application and received thousands of comments thereon. FERC subsequently issued a draft Environmental Impact Statement (EIS) for the proposed pipeline, which yielded thousands of additional comments. In response to comments, PennEast modified several of the pipeline's proposed routes. In January 2018, FERC granted PennEast a certificate of public convenience and necessity. After FERC denied rehearing of its decision, several parties, including the state of New Jersey, petitioned review in the District Court for the D.C. Circuit.

Weeks after FERC issued the certificate, PennEast filed various complaints in the New Jersey District

Court. PennEast sought to exercise federal eminent domain power under the NGA to obtain rights-of-way along the approved pipeline route and to establish just compensation for affected property owners. PennEast also sought a preliminary and permanent injunction, which would allow it to take immediate possession of each property in advance of any award of just compensation. Of the property PennEast sought to condemn, the State of New Jersey held a possessory interest in two parcels and claimed a non-possessory interest in forty other parcels as conservation easements.

The State of New Jersey moved to dismiss PennEast's complaints on sovereign immunity grounds. The New Jersey District Court denied the state's motion, holding that it was not immune from PennEast's exercise of federal eminent domain power. The court in turn granted PennEast's requests for a condemnation order and preliminary injunctive relief. The state appealed the decision to the Third Circuit Court of Appeals.

At the Third Circuit Court of Appeals

The Third Circuit vacated the District Court's order. The appellate court conceded that the federal government can condemn stated-owned property, but reasoned that this power is the product of two separate powers: 1) federal eminent domain power and 2) the federal government's ability to sue nonconsenting states. The Court of Appeals thus reasoned that while the federal government can delegate its eminent domain power to private parties, it was doubtful whether the federal government could also extend its exemption from state sovereign immunity. The Third Circuit did not reach the merits of this query, however, and instead found that nothing in the NGA indicated Congress' intent to delegate this exemption such that PennEast was not authorized to condemn New Jersey's property.

The Supreme Court's Decision

The U.S. Supreme Court granted *certiorari* to determine whether the NGA grants FERC certificate holders the authority to condemn land in which a state claims an interest. Justice Roberts delivered the majority opinion of the Court. Justice Barrett filed a dissenting opinion joined by Justices Kagan and Gorsuch. Justice Gorsuch filed a separate dissenting opinion joined by Justice Thomas.

In a narrow five-to-four decision, the Supreme Court held that the federal government can constitutionally confer on pipeline companies eminent domain authority to condemn necessary rights-of-way in which a state possesses an interest. The Court further held that, although nonconsenting states are generally immune from suit, they surrendered their sovereign immunity from the exercise of federal eminent domain power when they ratified the Constitution. Thus, because the NGA delegates federal eminent domain power to private entities, those parties can properly initiate condemnation proceedings against state-owned property.

Federal Eminent Domain Power

At the outset, the Majority chronicled the legal history and evolution of federal and state eminent domain power. As evinced by prior precedent: "the fact that land is owned by a state is no barrier to its condemnation by the United States." Since its inception, the federal government has wielded its eminent domain power in areas subject to federal jurisdiction and property within a state. In exercising such power, the government may condemn property through physical possession without authority of court order, or it can initiate condemnation proceedings under various acts of Congress.

For as long as the United States has exercised its eminent domain authority, it has also delegated that power—with approval—to private parties. Private condemnation of land has commonly been exercised for public works projects, and thus, may be exercised within state boundaries or against state property. Early precedent has established that such power may be wielded with or without a concurrent act of the state in which the lands lie. To this end, early cases reflected the understanding that state property was not immune from the exercise of delegated federal eminent domain power. To entertain a contrary position would give rise to the "dilemma of requiring the consent of the state" in virtually every infrastructure that the federal government authorizes.

Based on these principles, the Supreme Court held that the NGA properly delegates certificate holders with the power to condemn any necessary rights-of-way, including land in which a state holds an interest. The delegation conferred under § 717f(h) of the NGA is categorical—it:

> . . .solve[s] the problem of States impeding interstate pipeline development by withholding access to their own eminent domain procedures.

At the time the section was enacted, and in the years that followed, it was understood that States' property interests could be subject to condemnation proceedings. Therefore, the Court held that FERC's issuance of a certificate of public convenience and necessity to build a pipeline carries, coupled with the condemnation authority conferred therein, is consistent with the nation's history and the Supreme Court's precedents.

State Soverzign Immunity Under the Eleventh Amendment

As a defense to PennEast's complaints, the State of New Jersey argued (and the principal Dissent agreed) that sovereign immunity bars condemnation actions against a nonconsenting state. Alternatively, the state (but not the Dissent) contended that § 717f(h) does not speak with sufficient clarity to authorize such actions. The Majority rejected each of these arguments.

First, the Court recognized that the states' immunity from lawsuits is a fundamental aspect of the sovereignty they enjoyed before the Constitution was ratified. States thus may only be sued in limited circumstances, such as where a state unequivocally expresses consent to suit, where Congress clearly abrogates the state's immunity under the Fourteenth Amendment, or by virtue of states' "implicit agreement" to the structure and intent of the original Constitution (*i.e.*, "the plan of the Convention").

Based on these principles, the State of New Jersey and the Dissent asserted that private parties cannot condemn state-owned property under the NGA because § 717f(h) does not contain an applicable exception to sovereign immunity, and instead only represents Congress' attempt to regulate interstate commerce. The Majority rejected this argument and reiterated that states' consented in the plan of the Convention to the exercise of federal eminent domain power, including condemnation proceedings brought by private delegees. The Majority conceded that, while the State of New Jersey and the Dissent did not disagree with these fundamental principles, their arguments rested on the flawed reasoning that Congress, through the NGA, authorized private parties to bring condemnation suits against nonconsenting states. The Court explained that the error in this rationale is that:

> . . .it attempts to divorce the eminent domain power from the power to bring condemnation actions—and then argue that the latter, so carved out, cannot be delegated to private parties with respect to state-owned lands.

Yet, eminent domain power is "inextricably intertwined" with condemnation authority. Therefore, a grant of judicial power, by way of initiating condemnation proceedings, does not imply an improper abrogation of sovereign immunity. Absent the power to condemn state property interests, the Majority reasoned that the only constitutionally permissible way to exercise federal eminent domain power "would be to take property up front and require states to sue for compensation later." The Majority concluded that this act of "favoring private or Government-sponsored invasions of state-owned lands over judicial proceedings" would not serve state sovereign immunity.

Finally, the Majority rejected the other dissenting theory that, even if states consented in the plan of the Convention to the types of condemnation proceedings that PennEast initiated, the Eleventh Amendment nonetheless divests federal courts of subject-matter jurisdiction over suits filed against a State by a diverse plaintiff. The Court explained that precedent has interpreted the Eleventh Amendment to confer a "personal privilege which a state may waive at pleasure." As such, the Eleventh Amendment does not bar an action against a state respondent, where, as here, the state consents to suit in federal court.

The Majority Opinion concluded that by summarizing the relationship between federal eminent domain power and state sovereign immunity:

> . . .the federal eminent domain power is 'complete in itself,' and the States consented to the exercise of that power—in its entirety—in the plan of the Convention. The States thus have no immunity left to waive or abrogate when it comes to condemnation suits by the Federal Government and its delegatees.

Applying this holding to the case at bar, the Supreme Court reiterated that the NGA fits well within

the tradition of the nation's history and the federal government's longstanding exercise and delegation of eminent domain authority. Here, the PennEast pipeline was made possible not only by these principles, but by their codification through the enactment of § 717f(h). The Majority repeated that § 717f(h) authorized FERC certificate holders to condemn all necessary rights-of-way, whether owned by private parties or states. These condemnation actions due not offend state sovereignty because states consented to such proceedings in the plan of the Convention and at the founding to the exercise of federal eminent domain power. Therefore, the Supreme Court reversed and remanded the Third Circuit for further proceedings consistent with this holding.

Conclusion and Implications

The Supreme Court's ruling marks one of three takings opinions issued by the Court, thus far, in 2021. In *PennEast*, the Majority narrowly reaffirmed the scope of the Natural Gas Act and its delegation of federal eminent domain authority to private pipeline developers. The opinion provided additional insight and clarification into the limits of the Eleventh Amendment and the extent to which states enjoy sovereign immunity from condemnation suits. As the Court repeatedly reiterated: states consented to federal eminent domain authority, therefore, sovereign immunity does not protect them from condemnation proceedings initiated thereunder. While the opinion provides important practical implications as to how the NGA may affect future interstate pipeline development on state-owned land, it also sheds provides detailed insight into the history and effect of federal eminent domain power and sovereign immunity under the Eleventh Amendment. The Supreme Court's opinion is available at: https://www.supremecourt.gov/opinions/20pdf/19-1039_8n5a.pdf.
(Bridget McDonald)

NINTH CIRCUIT FINDS THAT THE FAA VIOLATED NEPA BY FAILING TO ANALYZE ENVIRONMENTAL IMPACTS OF DECISION TO AUTHORIZE NEW AIRPORT APPROACH ROUTES

City of Los Angeles v. Dickson, *Unpub.*, Case No. 18-71581, (9th Cir. July 8, 2021).

In an *unpublished* decision, the Ninth Circuit found that the Federal Aviation Administration (FAA) violated the National Environmental Policy Act (NEPA) when it issued a decision altering three arrival routes into Los Angeles International Airport *without first* conducting any final NEPA review. Under federal aviation law, the Ninth Circuit had original jurisdiction to consider petitions by the City of Los Angeles and Culver City challenging the final order by the FAA. The court also found that the FAA's attempt at a post-hoc application of the categorical exclusion to NEPA was unlawful on substantive grounds because the "substantial controversy" surrounding the arrival routes decision gave rise to an "extraordinary circumstance" preventing reliance on that exclusion.

Factual and Procedural Background

In 2018, the FAA published and implemented three amended flight arrival routes into Los Angeles International Airport that lowered altitudes and consolidated flight tracks over certain residential areas in the City of Los Angeles and Culver City. After implementation of the project, the City of Los Angeles filed a public records request seeking all records related to the FAA's environmental review, under the National Environmental Policy Act, of the decision to implement the project. While FAA staff were able to locate draft documents reflecting commencement of an environmental analysis of the project, it was clear that the FAA never prepared a final environmental determination in relation to the FAA's implementation of the project. In an attempt to comply with NEPA after the FAA's decision, FAA staff thereafter prepared a "Memorandum to File: Confirmation of Categorical Exclusion Determination." The FAA prepared this "confirmation" more than three months after the FAAs decision on the new arrival routes.

Under the § 46110(a) of the Federal Transportation Code (Title 49), the Ninth Circuit has original

jurisdiction to hear petitions challenging any "final order" issued by the FAA. Accordingly, soon after the FAA issued its arrival routes decision, the City of Los Angeles filed a petition with the Ninth Circuit. Culver City intervened as a petitioner-intervenor. Petitioners alleged that the FAA violated NEPA, the National Historic Preservation Act (NHPA), and § 4(f) of the Department of Transportation Act by making the arrival routes decision without first conducting environmental review under NEPA.

The Ninth Circuit's Decision

The court began by noting that NEPA requires the FAA and other federal agencies to "evaluate and disclose the environmental impacts of their actions." The review processes outlined in NEPA are intended to "ensure that before an agency can act," the agency considers potential environmental review.

The National Environmental Policy Act Claim

The FAA pointed to two documents as evidence that it completed the necessary environmental review of the project under NEPA. First, the FAA pointed to an "Initial Environmental Review" document, and a memo confirming that the project qualified for a categorical exclusion exclusion from CEQA review. However, as the court noted "both documents postdated the publication of the Amended Arrival Routes by several months…[and] cannot constitute the FAA's NEPA review".

The court also struck down the FAA's application of NEPA's categorical exclusion on substantive grounds, finding that application of that exclusion was "arbitrary and capricious" and violative of NEPA. A categorical exclusion cannot be applied when there are "extraordinary circumstances" where a normally excluded action may have a significant environmental effect.

FAA procedures and regulations provide that where a proposed action is "likely to be highly controversial on environmental grounds… meaning that there is a substantial dispute over the degree, extent or nature of a proposed action's environmental impacts" such extraordinary circumstances exist and a categorical exclusion is not appropriate. The court found that the record clearly indicated there was a substantial dispute about the noise and other impacts of the amended arrival routes decision. Despite this, the FAA's "Initial Environmental Review Document" failed to address the controversy in clear violation of FAA regulations. The court held that the FAA's application of the categorical exclusion was arbitrary and capricious and violated of NEPA. The court granted petitioners' petition for review of their NEPA claims.

The National Historic Preservation Act Claim

The court went on to grant petitioners' petition for review under the National Historic Preservation Act. Here, the FAA failed to consult with the City of Los Angeles or Culver City. The NHPA requires an agency to consider the effects of actions on historic structures, and "in fulfilling this obligation, agencies must consult with certain stakeholders… including representatives of local governments." Here, the FAA's failure to consult with the cities violated the NHPA and denied the cities their right to participate in the process and object to the FAA's findings regarding historical impacts.

The Remedy of Remand

The court concluded that the FAA violated NEPA and NHPA when making the Amended Routes decision. The court noted that while the typical remedy in this circumstance is *vacatur*, the court also has discretion to remand the decision to the agency without *vacatur* "when equity demands." Here, although the FAA's failure to conduct the proper environmental review was a serious error, the FAA asserted that vacating the amended arrival routes would be "severely disruptive in terms of cost, safety, and potential environmental consequences…" As such, the court exercised its discretion to remand without *vacatur*, leaving in place the amended arrival routes while the FAA undertakes a proper NEPA analysis.

Conclusion and Implications

Though *unpublished*, the *Dickson* decision highlights the importance of conducting the appropriate, formal level of environmental review or determination that a project is exempt from review under NEPA before an agency action subject to NEPA is made. Where significant controversy exists regarding an action, regardless of whether such action would not typically require NEPA review, that

controversy will often give rise to an "extraordinary circumstance" rendering the exclusion inappropriate. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/memoranda/2021/07/08/19-71581.pdf. (Travis Brooks)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT FINDS COASTAL DEVELOPMENT PERMIT APPLICATIONS FOR MOBILE HOME REMODELS WERE 'DEEMED APPROVED' UNDER THE PERMIT STREAMLINING ACT

Linovitz Capo Shores LLC v. California Coastal Commission, 65 Cal.App.5th 1106 (4th Dist. 2021).

Owners of beachfront mobile homes petitioned for a writ of mandate declaring that the coastal development permits they sought from the California Coastal Commission were deemed approved by operation of law under the Permit Streamlining Act. The Superior Court denied the petition, and the homeowners appealed. The Court of Appeal for the Fourth Judicial District reversed, finding that the requisite "public notice required by law" had occurred, and the permits were deemed approved.

Factual and Procedural Background

The petitioners in the case were homeowners of beachfront mobile homes in Capistrano Shores Mobile Home Park, located in the City of San Clemente. Between 2011 and 2013, the homeowners each applied for, and received, a permit from the California Department of Housing and Community Development (HCD) to remodel their respective mobile homes. They planned to change interior walls, outfit the exteriors with new materials, replace the roofs, and add second stories. The homeowners also applied for coastal development permits from the California Coastal Commission. Their applications expressly indicated that they were not addressing any component of the remodels for which they obtained HCD permits, including the addition of second stories. Rather, their coastal development permit applications concerned desired renovations on the grounds surrounding the structures.

The homeowners completed their remodels at various times between 2011 and 2014. In 2014, the Coastal Commission issued notices to the homeowners that their then-complete remodels were unauthorized and illegal without also having obtained a coastal development permit for that work. The Coastal Commission gave the homeowners two options. First, they could revise their previously submitted applications to instead request authorization to remove the allegedly unpermitted remodels and resubmit the applications within 30 days. Second, they could apply for "after-the-fact" authorization to retain the unpermitted development. The notice, however, indicated that Coastal Commission staff would not support requests to retain the second stories.

The homeowners believed that the Coastal Commission did not have any authority over their structure renovations but chose to apply for after-the-fact permits, reserving their right to later challenge the Commission's jurisdiction. The Coastal Commission issued individual public hearing notices for each application. In accordance with the notices, the Coastal Commission held a public hearing concerning all the applications in July 2016. At that meeting, staff gave a presentation concerning the projects and recommended approval of the applications with certain conditions, one of which was to limit the height of the mobile home units to 16 feet to protect views to and along the ocean and coastal scenic areas. Approval of such a condition, however, would have required each applicant to demolish their home and start construction anew.

Following a presentation by the homeowners, the Commission considered the applications one-by-one. During this process, commissioners expressed various views regarding the applications. At one point, a commissioner suggested continuing the matters to a future date to allow more time for negotiations; however, the Coastal Commission's legal counsel stated that was not an option due to an impending deadline under the Permit Streamlining Act.

During this process, the homeowners' representative made a proposal regarding the remaining applications that would allow for discussion about alternatives to staff's recommendation. He indicated that the homeowners could withdraw the applications and resubmit them right away, and he simultaneously requested a commissioner make a motion to waive the

standard six month waiting period for resubmittal and waive all additional fees. The Commission voted to allow immediate resubmission of the applications, but it rejected the request to waive or reduce the required fees for resubmittal. Following these votes, the meeting was adjourned. Neither the homeowners nor the Commission took any further action regarding the pending applications.

A few months later, the homeowners filed a petition for writ of mandate, requesting declaratory relief that their applications were approved, without conditions, by operation of law under the Permit Streamlining Act. They moved for judgment, which the Coastal Commission opposed. The Superior Court ultimately agreed with the Commission, finding that the Commission had jurisdiction and that the notice prerequisite to deemed approval under the Permit Streamlining Act was not satisfied. In arriving at that later conclusion, the Superior Court relied on *Mahon v. County of San Mateo*, 139 Cal.App.4th 812 (2006). The homeowners appealed.

The Court of Appeal's Decision

The Coastal Commission and HCD Jurisdiction

The Court of Appeal first addressed the homeowners' claim that HCD had exclusive jurisdiction over mobile home construction and design, and therefore the Coastal Commission lacked jurisdiction to require a coastal development permit for their projects. The Court disagreed, finding that the two state agencies have concurrent jurisdiction with respect to mobile homes located in the coastal zone.

In arriving at this conclusion, it examined the statutory schemes from which each agency derives its respective powers—the California Mobilehome Parks Act and the California Coastal Act of 1976, respectively, and concluded that the language of each evidenced the Legislature's intent for these statutes to operate concurrently with other state laws and permitting requirements. The court also found that there was no inherent conflict between HCD having authority over the construction and reconstruction of mobile homes from a health, safety, and general welfare standpoint, and giving the Coastal Commission authority to protect the natural and scenic resources, as well as the ecological balance, in the coastal zone. The statutes, and the agencies given authority by them, have distinct purposes. Thus, the Court of Appeal found that HCD and the Coastal Commission have concurrent jurisdiction over mobile home construction and replacement in the coastal zone.

The Permit Streamlining Act

The Court of Appeal next addressed the homeowners' claim that their applications were deemed approved by operation of law under the Permit Streamlining Act. The Coastal Commission did not dispute the lack of action on its end, but it maintained that the permits were not deemed approved because: 1) the homeowners withdrew their applications; and 2) the requisite public notice required for an application to be deemed approved was never given.

On the first issue, the Court of Appeal found that there was substantial evidence supporting the Superior Court's factual finding that the applications had not been withdrawn. The homeowners orally indicated their desire to withdraw the applications, but simultaneously asked the Coastal Commission to waive resubmittal fees and the resubmittal waiting period. After voting to waive the resubmittal waiting period, the Coastal Commission's counsel stated it was up to the applicants to decide whether to, in fact, withdraw in light of the Commission's vote. The Coastal Commission then declined to waive the resubmittal fees and the meeting recessed without further comment from appellants or their representative.

On the second issue, the parties agreed that some type of notice must be provided before an application may be deemed approved but disagreed about what must be included in such notice. Aside from the passage of the necessary amount of time (which was not disputed in the case), the only precondition to a permit being deemed approved by operation of law under Government Code § 65956 is provision of "the public notice required by law." The Court of Appeal found that the Coastal Commission's notices of a public hearing regarding the homeowners' permit applications satisfied this requirement because they were done in accordance with applicable statutes, and regulations promulgated thereunder, as well as in a manner consistent with constitutional procedural due process principles and decisional law.

In arriving at this conclusion, the Court of Appeal disagreed with the interpretation of the Permit Streamlining Act set forth in *Mahon v. County of San*

Mateo, 139 Cal.App.4th 812 (2006), instead finding that the plain language of § 65956 does not require an agency's public notice to include a statement that the permit at issue will be deemed approved if the agency does not act on it within a specified number of days. Accordingly, the Court of Appeal reversed the Superior Court decision, finding that the homeowners were entitled to judgment in their favor.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the "deemed approved" provision of the Government Code, particularly the type of notice that must be provided before an application may be deemed approved by operation of law. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/G058331.PDF.

(James Purvis)

FOURTH DISTRICT COURT AFFIRMS COASTAL COMMISSION'S COASTAL BLUFF SETBACK REQUIREMENT CONSIDERING FACTORS OF SAFETY AND LIFE OF THE PROJECT

Martin v. California Coastal Commission, ___Cal.App.5th___, Case No. D076956 (4th Dist. June 13, 2021).

The Fourth District Court of Appeal in *Gary Martin v. California Coastal Commission* reaffirmed its determination in *Lindstrom v. California Coastal Commission,* 40 Cal.App.5th 73 (2019) (*Lindstrom*), holding that the City of Encinitas' Local Coastal Program (LCP) and Municipal Code require a development setback from coastal bluffs that takes into account the required factor of safety for the entire life of the project.

Factual and Procedural Background

The Martins own a blufftop vacant lot in Encinitas. They applied to the City of Encinitas (City) for a Coastal Development Permit (CDP) to build a two-story, 3,110 square-foot house with an additional 969 square-foot basement and 644 square-foot garage.

The proposed design set the first story of the home back 40 feet from the 93-foot-high bluff edge and set back the second story cantilevered deck 32 feet. The Martins submitted geotechnical reports certifying the home satisfied the requirements of the LCP contained in the City's Municipal Code § 30.34.020.

The City's third-party geotechnical consultant reviewed those reports and agreed with the analysis. On April 21, 2016, the city planning commission adopted a resolution approving the CDP for their home.

On May 25, 2016, two planning commissioners appealed the City's approval to the Coastal Commission. At the Commission's August 8, 2018 hearing on the appeal, Commission staff presented a report recommending approval of the home but with additional conditions that the home be set back 79 feet from the bluff's edge and barring the design from including a basement. The Commission adopted the staff's recommendation with the conditions.

The Commission found that the City's approval was inadequate because it failed to account for the LCP's requirement that new development be set back far enough to provide for a safety factor of 1.5 at the end of the 75-year life of the project. The safety factor is a calculation that addresses bluff stability, *i.e.*, the risk of landslides or bluff failure, while the time period of 75 years addresses bluff erosion over time during the project's existence.

In determining the 79-foot setback, the Commission relied on the analyses of its staff geologist and its staff engineer, after considering the geotechnical reports provided by the Martins, which certified that the home would be safe from coastal bluff retreat over its 75-year design life without the need for shoreline protection.

The Commission's staff arrived at 79 feet by adding the setback required to achieve a 1.5 factor of safety (40 feet) and the anticipated erosion over 75 years (39 feet). The 40 feet 1.5 factor of safety was not in dispute. However, the Commission staff disagreed with the Martin's engineer's estimate of a long-term future rate of erosion of 0.27 feet per year, calculating the future erosion rate to be 0.52 feet per year (39 feet over 75 years). Commission staff determined this rate

using the SCAPE method, a scientifically supported methodology that incorporates site-specific information and sea level rise estimates.

Commission staff also noted this rate was generally consistent with the 0.49 feet per year erosion rate used by the Commission for the prior five new blufftop home approvals in Encinitas.

As for the proposed basement, the Commission staff found that the Encinitas bluffs are hazardous and unpredictable, and bluff retreat may eventually cause the basement to be exposed, even with a 79-foot setback. The Commission staff also found that removing or relocating the basement, if feasible, would significantly alter the bluff and could threaten its stability.

The Martins submitted a plan for removing the basement, along with their engineer's certification of the plan. The Commission, however, found the removal plan was insufficient because it failed to provide any detail related to geologic stability risks of removing a basement on an eroding blufftop site, did not detail how removal of the basement would impact stability of neighboring structures, and did not detail how the basement void could be filled upon removal. Thus, the Commission concluded the proposed basement was inconsistent with the LCP's requirement that all blufftop structures be removable.

The Martins filed a petition for writ of administrative mandate and complaint for declaratory and injunctive relief challenging special conditions 1(a) (the 79-foot setback), 1(c) (the basement prohibition).

In addition to seeking a writ of mandate reversing the Commission's conditional approval, the Martins also sought a declaration that the Commission's bluff-edge setback methodology is unlawful and an injunction to preclude the Commission's future use of the methodology.

The trial court's judgment found that special condition 1(a) was inconsistent with the LCP and that the Commission's imposition of the condition was an abuse of discretion. The trial court rejected the Martins' challenge to special condition 1(c). Both parties appealed.

The Court of Appeal's Decision

The Court of Appeal applied the substantial evidence standard of review and reversed the trial court's determination that the Commission's 79-foot setback condition was an abuse of discretion.

The *Lindstrom* Case

In *Lindstrom v. California Coastal Commission*, 40 Cal.App.5th 73 (2019), the Court of Appeal noted that, while the Commission's jurisdiction on appeal is limited to the standards set forth in the LCP, the Commission's jurisdiction on appeal includes imposing reasonable conditions on the CDP that embody state policy. In *Lindstrom*, the Court of Appeal explicitly resolved the same setback question as in this case in favor of the Commission's additive interpretation of the LCP setback requirement. In both *Lindstrom* and this case, the Court of Appeal held that Encinitas Municipal Code § 30.34.020D explicitly requires a structure to be reasonably safe from failure and erosion over its lifetime, which means that the geotechnical report must demonstrate a safety factor of 1.5 at the end of 75 years.

No Error in Commission Setback Interpretation

The Martins argued that the Commission additive interpretation of the LCP contravenes the City's prior interpretation of the LCP. The Court of Appeal held that Municipal Code § 30.34.020D expressly requires that the geotechnical report must demonstrate the factor of safety for the entire 75 years and requires analysis of future structural support. The plain meaning of those provisions dictates the Commission's additive approach. The fact that various lesser setbacks have been accepted by the Commission since the adoption of the LCP in 1995 does not lead to the conclusion that the Commission's interpretation of § 30.34.020D is incorrect.

No Error in Commission Requirement for Removable Structures

The Martins argued that the condition prohibiting a basement should not have been imposed beyond the setback. Policy 1.6 of the LCP lists specific actions that the City must undertake to prevent unnatural coastal bluff erosion, including setbacks and removable construction. Because the paragraph concerning removable construction follows the paragraph concerning setbacks, Martin contended that removable construction was not required beyond the setback. The Court of Appeal disagreed, reading the paragraph regarding removable structures as standing alone.

Substantial evidence supported the Commission's determination that the basement would not qualify as a movable structure. There was evidence that the bluff is highly susceptible to landslides and actively eroding. There was evidence that the basement would be placed into terrace materials consisting of consolidated sand.

Conclusion and Implications

This opinion by the Fourth District Court of Appeal reaffirms the prior decision in *Lindstrom* that coastal bluff setbacks under the Coastal Act as ultimately determined by Coastal Commission standards must take into account both current and future factor of safety, depending on the life of the project, as determined by the LCP or otherwise. There may be room to negotiate for a shorter project lifetime, but the Encinitas LCP had a fixed 75-year time period. The Court of Appeal's opinion is available online at: https://www.courts.ca.gov/opinions/documents/D076956.PDF.
(Boyd Hill)

THIRD DISTRICT COURT AFFIRMS DISMISSAL OF CHALLENGE TO NEGATIVE DECLARATION FOR NEW BRIDGE PROJECT UNDER CEQA

Newton Preservation Society v. County of El Dorado,
Cal.App.5th___, Case No. C092069 (3rd Dist. June 16, 2021).

The Third District Court of Appeal has affirmed the dismissal of a challenge to a Mitigated Negative Declaration for a new bridge project under the California Environmental Quality Act (CEQA) on the grounds that there was no substantial evidence of a fair argument of new environmental impact related to fire hazards raised by the objections to the project on fire safety grounds.

Factual and Procedural Background

The project is the replacement of the existing Newtown Road Bridge at South Fork Weber Creek by El Dorado County (County). Petitioners challenged the Mitigated Negative Declaration for the project, arguing that the project may have significant impacts on fire evacuation routes during construction and, thus, the County was required to prepare an Environmental Impact Report (EIR).

The hazards and hazardous materials section of the adopted final Mitigated Negative Declaration stated that the project would "[i]mpair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan" and "[e]xpose people or structures to a significant risk of loss, injury or death involving wildland fires, including where wildlands are adjacent to urbanized areas or where residences are intermixed with wildlands," but such impacts would be less than significant.

> As to the first impact, the County explained: It is anticipated that Newtown Road would be closed at the Project site with through traffic detoured to Fort Jim Road during construction. The Fort Jim Road route is 0.6 miles longer than the Newtown Road route, resulting in minimal delays to through traffic. The Old Fort Jim Road detour would be approximately 3 miles in length and would require approximately 6 minutes. Access will be provided and maintained to all residences adjacent to the Project area. The County will prepare a detour plan in conjunction with the engineering plans. Project construction activities would be coordinated with [the El Dorado County Sheriff's Office of Emergency Services (Emergency Services Office)] and [the El Dorado County Fire Protection District (County Fire)] as described in Section 3.5.3 of this document.

Section 3.5.3 provided for a temporary evacuation route located downstream from the Project area that will cross South Fork Weber Creek downstream from the proposed bridge, join the middle portion of the driveway at 4820 Newtown Road, and then tie back into Newtown Road just upstream from the project area in the event construction occurs during the fire season and other factors as determined by the County DOT and County Fire. Section 3.5.3 explained that,

regardless of whether or not the temporary evacuation route is constructed, any evacuation order or shelter in place order from the Emergency Services Office will be executed in whatever manner the Office deems appropriate for the emergency that necessitates the evacuation.

As to the second impact, the County explained:

> The completed Project will not expose people or structures to a new or increased significant risk of loss, injury, or death involving wildland fires. Project construction activities would be coordinated with local law enforcement and emergency services providers as applicable. Project impacts are less than significant and no mitigation is needed.

In a master response to comments on the Mitigated Negative Declaration, the County noted that it consulted with representatives from both the Emergency Services Office and County Fire, and that decisions regarding evacuation were made by the Emergency Services Office based on the factors present for each situation.

The County then went on to expressly list the numerous alternative evacuation routes that could be used under either Scenario 1 if the temporary access route is not constructed or under Scenario 2 if the temporary access route is constructed.

The County approved the project and petitioners filed a petition for writ of mandate challenging the County's adoption of the final Mitigated Negative Declaration. The trial court denied the writ, with an extensive list of findings.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court determinations, holding that the proper application of the fair argument test for evaluating a negative declaration is whether the record contains substantial evidence that the project may have a significant effect on the environment or may exacerbate existing environmental hazards, and concluding that petitioners failed to carry their burden of showing substantial evidence in that regard.

Petitioner's Objections Were Not Substantial Evidence

Petitioners presented objections to the Mitigated Negative Declaration in the form of statements regarding existing evacuation routes in the event of fire, that the particular evacuation route for a fire was not identified, that firefighting resources are limited, that evacuation routes might not remain open, and that consultation did not occur with the Emergency Services Office and County Fire.

Those objections did not constitute substantial evidence of a fair argument because there was no evidence that the evacuation routes under the scenarios would not work, because there was no expertise regarding evacuation routes among the commenters, and because there was substantial evidence that the Emergency Services Office and County Fire consulted and visited the project site and approved of the evacuation measures and of firefighter access to the community under the presented scenarios.

In summary, petitioners did not cite substantial evidence in the record that raised a fair argument that the project may have a significant non-mitigated impact on the environment due to failure to provide adequate evacuation routes for project area residents during a wildfire or other emergency during construction of the project.

Petitioners Improperly Framed the Fair Argument Test

Petitioners erroneously framed the fair argument test as whether substantial evidence supports a fair argument that the proposed project will have significant impacts on resident safety and emergency evacuation. The question should have been framed instead as to whether the project may have a significant effect on the environment.

The questions in the sample checklist in appendix G to the Act's guidelines—including, whether the project would expose people or structures to a significant risk of loss, injury, or death involving wildland fires—do not extend the EIR requirement to situations where the environment has an effect on a project, instead of the other way around.

CEQA further does not generally require an agency to analyze how existing hazards or conditions might impact a project's users or residents, unless the project might exacerbate existing environmental hazards.

Under this framework, the Court of Appeal concluded that the comments relied upon by petitioners did not constitute substantial evidence supporting a fair argument that the project may have a significant effect on the environment or may exacerbate existing environmental hazards. Those comments included irrelevant and non-expert statements about past experiences with wildfires in the area, non-expert speculation about future fire dangers and evacuation routes.

Looking to Other Decisions

The comments petitioners relied upon were not analogous to the public comments constituting substantial evidence in the *Arviv*, *Oro Fino*, and *Protect Niles* cases relied upon by petitioners. (*Arviv Enterprises, Inc. v. South Valley Area Planning Com.*, 101 Cal.App.4th 1333 (2002); *Oro Fino Gold Mining Corp. v. County of El Dorado,* 225 Cal.App.3d 872 (1990); *Protect Niles v. City of Fremont,* 25 Cal. App.5th 1129 (2018).)

In *Arviv*, the public comments related to personal observations of impacts that had actually occurred from similar projects in the past. (*Arviv Enterprises, Inc.*, at pp. 1347-1348.) In *Oro Fino*, numerous residents testified regarding the noise they had experienced during the operation of a similar mineral exploration drilling project and numerous residents provided evidence of their experiences with the increase in traffic and traffic mishaps. (*Oro Fino Gold Mining Corp.*, at pp. 882, 883.) In *Protect Niles*, residents commented as to the aesthetic incompatibility of the project and the traffic 24 safety hazards that would result from the project due to excessive queueing, a tendency of westbound drivers to exceed the posted speed limit, and limited visibility around a 90- degree curve. (*Protect Niles*, at pp. 1146, 1151.)

The common thread of those cases is that lay testimony may constitute substantial evidence when the personal observations and experiences directly relate to and inform on the impact of the project under consideration. In contrast to the public comments in those three cases, in this case the comments lacked factual foundation and failed to contradict the conclusions by agencies with expertise in wildfire evacuations with specific facts calling into question the underlying assumptions of their opinions as it pertained to the project's potential environmental impacts.

Conclusion and Implications

This opinion by the Third District Court of Appeal demonstrates the limits of using CEQA to prevent development in areas with wildfire and other hazards and with limited evacuation routes. While existing wildfire dangers and existing limits for evacuation routes may not make development ideal in a certain location, CEQA review does not focus on those broader policies, but instead on whether the project increases the potential existing hazards, and CEQA review regarding hazards generally requires expert analysis. These broader planning policies should be addressed by experts in general and specific plans, infrastructure plans, fire safety plans and evacuation plans, not under CEQA. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C092069.PDF.
(Boyd Hill)

FIRST DISTRICT COURT AFFIRMS DECISION THAT CEQA TOLLING AGREEMENT WITH MUNICIPAL PARK DISTRICT WAS INVALID FOR FAILURE TO JOIN A REAL PARTY IN INTEREST

Save Lafayette Trees v. East Bay Regional Park District, 66 Cal.App.5th 21 (1st Dist., 2021).

In a decision filed June 30, 2021, the First District Court of Appeal affirmed a trial court decision holding that a tolling agreement between petitioners and the East Bay Regional Park District (EBRPD) did not bind Pacific Gas and Electric Company (PG&E) and was invalid because PG&E was a necessary and indispensable party to litigation at issue. As a result, petitioners' action was barred by the California Environmental Quality Act's (CEQA) 180-day statute of limitations, which began to run on the date that EBRPD's governing board authorized the park district to enter into a Memorandum of Understanding

(MOU) related to a tree removal plan near pipelines in the City of Lafayette.

Factual and Procedural Background

On March 21, 2017, EBRPD board of directors (Board) authorized EBRPD's entry into a memorandum of understanding with PG&E to accept funding for environmental restoration and maintenance related to maintaining a gas pipeline through Briones Regional Park. PG&E's proposed removal of 245 trees (as part of its Community Pipeline Safety Initiative) needed to be removed for safety reasons.

On June 27, 2017 EBRPD filed a Notice of Exemption announcing that the Board reviewed the MOU and determined that it was not an activity subject to CEQA. The NOE reflected the Board's determination that any "activity related to the MOU" would be categorically exempt pursuant to Public Resources Code § 21080.23 (work on existing pipelines), CEQA Guideline 15301 (b) (Operation and Repair of Existing Facilities), Guideline 15302 (Replacement and Reconstruction), and Guideline 1304 (Minor Alterations to Land).

On July 31, 2017, petitioners Save Lafayette Trees entered into an agreement with EBRPD to "toll all applicable statutes of limitations for 60 days." PG&E did not consent to the tolling agreement.

On September 29, 2018, petitioners filed a petition/complaint challenging EBRPD's approval of the MOU. The petition named EBRPD as respondent and PG&E as real party in interest. On March 28, 2018, petitioners filed their operative pleading which alleged causes of action: 1) that EBRPD failed to undertake a CEQA analysis of the potential environmental impact of removing trees before approving the MOU; 2) that EBRPD's approval of the MOU violated the procedural and substantive requirements of the City of Lafayette's Tree Protection Ordinance and EBRPD Ordinance 38; and 3) for violation of state constitutional rights to due process by approving the MOU "without providing notice reasonably calculated to apprise [petitioners] and other directly affected persons that hundreds of trees" near their properties would be removed, thereby affecting their property interests. This article will focus on the petitioners' CEQA claims.

The trial court granted PG&E's *demurrer* to petitioners' CEQA cause of action after finding the cause of action was barred by the 35-day and 180-day limitations periods set out in Public Resources Code § 21167.

The Court of Appeal's Decision

The court began by recognizing that the appropriate standard of review for an order granting demurrer was de novo, assuming the truth of all facts properly pleaded in the complaint and then determining if those facts are sufficient, as a matter of law, to state a cause of action under any legal theory. To prevail on an appeal from an order sustaining a demurrer, the party appealing must "affirmatively demonstrate error." Regarding petitioners' CEQA claims, the court held that the trial court properly dismissed these on statute of limitations grounds. The court also upheld the trial court's rulings related to the city's tree protection ordinance, EBRPD ordinance 38, and petitioners' constitutional notice claims.

The Tolling Agreement Was Invalid And Not Binding On PG&E

Central to this holding was the court's finding that petitioners' tolling agreement was invalid because PG&E:

> . . .a necessary and indefensible party to that [CEQA] cause of action, had not consented to the tolling agreement.

The trial court's finding that PG&E was a necessary and indispensable party was not an abuse of discretion.

Per the court, PG&E was a necessary party to the tolling agreement, "supported by persuasive dictum" in the decision *Salmon Protection & Watershed Network v. County of Marin*, 205 Cal.App.4th 195 (2012) (*SPAWN*). In the *SPAWN* decision, the plaintiff challenged the adequacy of Marin County's Environmental Impact Report (EIR) certified in connection with the adoption of a general plan update for the San Geronimo Valley watershed. To facilitate settlement negotiations, plaintiff and the county entered into a series of tolling agreements that tolled the applicable 30-day statute of limitations under CEQA. Settlement negotiations were unsuccessful and petitioners filed a lawsuit during the tolling period, but after the 30-day statute of limitations.

Owners of property within the affected watershed filed a complaint in intervention, alleging that plaintiff's complaint was untimely because "the purported agreement tolling the statute of limitations was not permitted under CEQA. "

The court in *SPAWN* stated in *dicta* that where there is a party whose project has been approved by a public agency, that party is a real party in interest in a challenge under CEQA to the validity of the approval, and they must be named as such. Therefore, "an agreement to toll the limitation period… must have the concurrence of the recipient of the approval that is being challenged" for that tolling agreement to be effective. *SPAWN* was distinguishable because there, the property owner intervenors were not necessary parties to an effective tolling agreement, their private project was not the subject of the appeal.

As the court noted the:

> *SPAWN* dictum espouses well-settled law regarding agreements to extend or waive statute of limitations. Although parties certainly may contract to extend the [CEQA] limitations period… it is well established that such an agreement has no effect on other potential parties not in privity.

On the other hand, PG&E in the instant case "was clearly the real party interest" and needed to be included in a tolling agreement to be effective. Public Resources Code § 21167, which establishes the applicable limitations period, has a primary purpose:

> . . .to protect project proponents from extended delay, uncertainty and potential disruption of a project caused by a belated challenge to the validity of the project's authorization.

Allowing a tolling agreement to be effective without a real party in interest would defeat this primary purpose.

Petitioners' CEQA Claims Were Barred by the180-Day Statute of Limitations

Even if the tolling agreement was ineffective, petitioners claimed that the applicable statute of limitations was never triggered and therefore did not bar their CEQA claims. Specifically, petitioners alleged that neither the Board's online agenda, nor the "accompanying description of the Board Resolution" mentioned or implied that trees would be removed as part of the PG&E funding proposal. Here, CEQA's 180-day limitations period began to run from EBRPD's formal approval of the MOU, which was accurately reflected by the resolution and the project as outlined in the staff report submitted to Board. Judicially noticeable public records showed that EBRPD formally approved the MOU and authorized EBRPD on March 21,2017. As a result, the public was "given the necessary constructive notice that the 180 days started to run from March 21, 2017" this was the statutory triggering date of the project approval.

The 180-day statute of limitations began to run on March 21, 2017 when the Board made its final decision, and expired on September 18, 2017, which was 11 days before petitioners commenced their action.

Conclusion And Implications

The court's decision states a clear rule that a tolling agreement related to a challenge of a CEQA or land use decision regarding a project is invalid if it does not bind the real party in interest. The court already stated this premise in the *SPAWN* decision, in what the court called "persuasive dictum." The decision also highlights the clear rule related to CEQA statutes of limitations that CEQA's maximum 180-day statute of limitations is triggered by a lead agency's formal approval decision, which creates a public notice providing constructive notice to would-be petitioners. The First District's decision is available here: https://www.courts.ca.gov/opinions/documents/A156150.PDF.

(Travis Brooks)

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 California 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 August 26, 2021, was passed in the Assembly by a vote of 13-3.

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 August 26, 2021, was held under submission in the Committee on Appropriations.

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 August 17, 2021, was read for a second time and ordered to the consent calendar.

•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 August 19, 2021, was read for a second time and ordered to a third reading.

•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 August 23, 2021, was sent from the Committee on Housing and Community Development with the author's amendments, read for a second time and amended, and then re-referred to the Committee on Housing and Community Development.

•SB 9 (Atkins)—This bill, among other things, would 1) require a proposed housing development containing two residential units within a single-family residential zone to be considered ministerially, without discretionary review or hearing, if the proposed housing development meets certain requirements, and 2) require a city or county to ministerially approve a parcel map or tentative and final map for an urban lot split that meets certain requirements.

SB 9 was introduced in the Senate on December 7, 2020, and, most recently, on August 26, 2021, was

in the Senate with concurrence in the Assembly's amendments pending.

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 August 16, 2021, was read for a second time and ordered to a third reading.

•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 August 26, 2021, was held under submission 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 August 26, 2021, passed the Assembly as amended in the Committee on Appropriations by a vote of 11-4.

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 July 7, 2021, had its first hearing in the Committee on Environmental Quality canceled at the request of its author, Assembly Member Bonta.

•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 August 26, 2021, was in the Senate with concurrence in the Assembly's amendments pending.

•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 July 12, 2021, SB 12 failed passage in the Committee on Housing and Community Development but was subsequently granted reconsideration.

(Paige H. Gosney)

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