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LAND USE NEWS

DROUGHT STRICKEN STATE WATER PROJECT'S LAKE OROVILLE PLUMMETS TO LOWEST LEVEL IN DECADES—OTHER STATE RESERVOIRS ARE ALSO LOW DUE TO DROUGHT

As the drought continues to ravage the western United States and California descends into one of the worst droughts on record, California's second-largest reservoir, Lake Oroville, has reached its lowest water level since September 1977. Oroville is, however, not the only reservoir that holding far less water this year than in average years.

Background

Lake Oroville was created by Oroville Dam, which the California Department of Water Resources (DWR) completed in 1967. Lake Oroville conserves water for distribution by the California State Water Project to homes, farms, and industries in the San Francisco Bay area, the San Joaquin Valley and throughout southern California. The Oroville facilities also provide flood control and hydroelectric power and recreational benefits.

Water from Lake Oroville contributes to the irrigation of more than 755,000 acres in the San Joaquin Valley and comprises a critical source of supply to water agencies that collectively serve more than 27 million people. At full capacity, the lake can supply enough water to 7 million average California households for one year.

Lowest Water Surface Levels Since 1977

When the lake is full, the water surface level is 900 feet above sea level. Two years ago, the lake reached 98 percent capacity at 896 feet. Now, the water level has plummeted and recently measured just 643.5 feet above sea level, which is 28 percent of its total capacity and 36 percent of its historical average for this time of year. According to California Department of Water Resources (DWR), Lake Oroville received only 20 percent of expected runoff from snowmelt this year, which DWR characterized as a record low. The reservoir dropped by an average of more than one foot per day in July as DWR made releases to meet water quality and wildlife sustainability requirements.

Imagery from the lake's levels, in particular the exposed barren lake floor in places, provides an illustrative snapshot of how dire the drought is in California.

Low Lake Levels Threaten Edward Hyatt Power Plant

The water from Lake Oroville is used to power the Edward Hyatt Powerplant (Hyatt Plant). The Hyatt Plant is designed to produce up to 750 megawatts of power but typically produces between 100 and 400 megawatts, depending on lake levels. According to the California Energy Commission, the typical average high daily demand across California is approximately 44,000 megawatts. The Hyatt Plant's production of 400 megawatts alone represents meeting nearly 1 percent of California's total peak daily energy demand.

The Hyatt Plant opened in the late 1960s and has never been forced offline by low lake levels. DWR reports that once the lake's surface level falls below 630 feet above sea level, the Hyatt Plant will be unable to generate power due to lack of sufficient water to turn the plant's hydropower turbines. With the lake level at its recent condition, California State Water Project officials anticipated at the time of this writing that the Hyatt Plant could go offline as soon as late August or early September.

The California Energy Commission has confirmed it is actively planning for the Hyatt Plant to go offline this fall. If the plant stops generating power, it will likely remain offline until November or December before sufficient precipitation hopefully arrives in the region to turn the underground turbines back on.

Most California Reservoirs are in Dire Straights

A lack of snowpack and rain due to drought have greatly impacted the storage of precious water in the state's largest reservoirs. The California Department of Water Resources has reported recently the fol-

lowing percentage information *for September* for the following reservoirs:

•*Trinity*: The Trinity Reservoir has historically been at 43 percent capacity and currently is at 30 percent of total capacity;

•*Shasta*: The Shasta Reservoir has historically been at 40 percent capacity and currently is at 24 percent of total capacity;

•*Oroville:* The Oroville Reservoir has historically been at 36 percent and currently is at 22 percent of total capacity;

•*Melones:* The Melones Reservoir has historically been at 63 percent and currently is at 35 percent of total capacity;

•*Folsom:* Folsom Reservoir has historically been at 41 percent and currently is at 24 percent of total capacity;

•*San Luis:* San Luis Reservoir has historically been at 27 percent and currently is at 13 percent of total capacity;

•*Don Pedro*: Don Pedro Reservoir has historically been at 74 percent and currently is at 50 percent of total capacity;

•*Millerton*: Millerton Reservoir has historically been at 139 percent and currently is at 57 percent of total capacity. (*See:* https://cdec.water.ca.gov/resapp/RescondMain)

All the other key state reservoirs, with the exception of Perris Reservoir [which is at 84 percent currently, are down substantially as well. (Ibid)

Conclusion and Implications

Lake Oroville serves as a stark emblem of the severity of this drought and its dramatic impact in such a relatively short period of time. Two years ago, the lake reached 98 percent capacity but has quickly plummeted to historically low levels not seen in nearly half a century. Lake Oroville also highlights the significant role water plays in energy generation and the implications that a far-reaching drought can have on hydro-energy generating facilities and power production in California. And the relentless drought has also left the state's reservoirs far down from water levels normally experienced in an annual measurement done each September.
(Chris Carrillo, Derek R. Hoffman; Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

CALIFORNIA FISH AND GAME COMMISSION FORMALIZES SCHEDULE TO EVALUATE STATE ESA PETITION TO LIST THE SOUTHERN CALIFORNIA STEELHEAD AS ENDANGERED

In August 2021, the California Fish and Game Commission (Commission) formalized its schedule to evaluate a petition to list the Southern California Steelhead as an endangered species under the California Endangered Species Act (CESA). The petition submitted by CalTrout asserts that the steelhead's continued existence is in jeopardy due to habitat loss compounded by the impacts of climate change. The California Department of Fish and Wildlife's (Department) initial evaluation of the petition is due to the Commission by mid-December. Thereafter, the Commission is expected to determine whether listing may be warranted, and hence whether steelhead will receive a formal candidate species designation, in February 2022.

Background

According to the California Fish and Game Commission, the Southern California steelhead (steelhead) is a highly migratory and adaptive species that occupies multiple habitat types over their complete life-history. The steelhead spends one to four years maturing in the Pacific Ocean, at which point they will typically return to their natal river system to spawn. Once they re-enter the river system, steelhead migrate several to hundreds of miles to reach suitable spawning habitat that typically consists of cool, clean water, and complex, connected habitat that provides sufficient nutrients and foraging opportunities. Freshwater spawning sites require sufficient water quantity and quality. The primary habitat conditions that influence the species are temperature, dissolved oxygen, water depth and velocity.

Steelhead below natural and man-made fish passage barriers in southern California were listed as endangered under the federal Endangered Species Act (ESA) in 1997. The range of federally protected steelhead now extends from the United States-Mexico border to the Santa Maria River. Despite being listed under the ESA, the steelhead population has continued to decline, according to CalTrout.

CalTrout submitted its petition to list the steelhead as endangered under the California Endangered Species Act to the California Fish and Game Commission (Commission) on June 7, 2021. CESA provides a state law equivalent to the federal ESA. Pursuant to state law, the Commission transmitted the petition to the Department of Fish and Wildlife (Department). The Department then had until September 21, 2021, to submit a written evaluation report with a recommendation to the Commission regarding whether to reject or accept and consider the petition. The Department requested a 30-day extension to submit its written evaluation, which the Commission granted. The Commission now expects to formally receive the Department's evaluation by December 15, 2021.

Evaluating Listing the Steelhead

The Department is currently evaluating whether to recommend that the Commission reject or, on the other hand, accept and consider the petition. Fish and Game Code § 2073.5 provides that, within 90 days of receiving a listing petition, the Department must evaluate the petition on its face and in relation to other relevant information the Department possesses or receives. The Department must then submit to the Commission its written evaluation recommending either that: 1) there is not sufficient information to indicate that the petitioned action may be warranted and thus the petition should be rejected, or 2) there is sufficient information to indicate that the petitioned action may be warranted, and the petition should be accepted and considered. If the petition is sufficient and is accepted by the Commission, the Department then prepares a written status report on the species. (Fish & G. Code, § 2074.6; *Mountain Lion Foundation v. Fish & Game Commission*, 16 Cal.4th 105, 115 (1997).) During the process, interested parties may also submit written comments and scientific reports. (Cal. Code Regs., tit. 14, § 670.1, subd. (h).)

Once the Department's final report and recommendation are received by the Commission, the Commission schedules a hearing for final consideration of the petition (Fish & G. Code, § 2075) and decides whether the petitioned action is warranted or not warranted (*id.*, § 2075.5).

The Commission is required to find a listing warranted if the continued existence of the species is in serious danger or threatened by any one or any combination of six factors, including: 1) present or threatened modification or destruction of its habitat; 2) overexploitation; 3) predation; 4) competition; 5) disease; or 6) other natural occurrences or human-related activities. (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(A).)

The stated goal of the CalTrout petition is to establish a state-level endangered species "redundancy" with federal coverage for steelhead under the federal ESA. Listing the species as endangered under CESA would also, according to CalTrout, preserve organizing principles that currently direct recovery actions for the species.

With respect to the first CESA listing factor—present or threatened modification or destruction of habitat—CalTrout's petition asserts that the steelhead population has declined largely due to degradation, simplification, fragmentation, and total loss of habitat. The petition cites water withdrawal, storage, conveyance, and diversions—for instance, large dam construction, mainstem channel straightening, and floodplain disconnection—as reducing or eliminating historically accessible habitat. The petition also cites modification of natural flow regimes by water infrastructure development resulting in increased water temperatures and depleted flow necessary for migration, spawning, rearing, and forging, all of which is asserted to be amplified by climate change.

The petition also attributes steelhead population decline on overfishing (which CalTrout suggests is not a principal cause of decline), predation by and competition with expanding populations of non-native aquatic invasive species such as largemouth bass and bullfrogs, disease impacts that are currently unseen and/or unknown but which may be exacerbated by climate change, and other occurrences like increased air and water temperature due to climate change and existing water infrastructure.

Future Management Activities Sought

In addition to asserting the six factors required under CESA have been met, the petition suggests specific future management activities to be undertaken should the steelhead be listed as endangered so as to:

> . . .ensure that all state agencies have the clear mandate to prioritize [steelhead] protection and conservation in strategic planning, funding appropriations, and resource management plans.

Listing the steelhead as endangered would, according to CalTrout, provide the Department with direct authority to oversee projects proposed within the current limits of the steelhead's geographic range over its life-cycle, which includes historical watersheds currently blocked by water infrastructure as well as critical habitat designated by the federal government ranging from Santa Maria to Tijuana. Moreover, listing the steelhead would also allow the Department to establish species-specific mitigation measures that must be met for take coverage to be authorized.

Angling and Stocking Restrictions

The petition also identified specific suggested angling and stocking restrictions, and supports current coverage under the federal Endangered Species Act for steelhead downstream of physical barriers like dams while upstream rainbow trout would remain unlisted under both CESA and the federal ESA.

Conclusion and Implications

While the stated purpose of the petition is to provide redundancy with federal protections, listing the steelhead as endangered under CESA could well have impacts on development and water projects in coastal areas across southern California, from Santa Maria to southern San Diego County. However, it remains to be seen whether the Department will recommend that the Commission consider the petition or reject it. For more information, *see:* Upcoming Evaluation of Southern California Steelhead CESA Petition

Fish and Game Commission Action Item, available at: https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=193326&inline.
(Miles Krieger, Steve Anderson)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS NEPA LAWSUIT CHALLENGING WINTER DRILLING EXPLORATION WAS MOOT WHERE WORK ALREADY HAD BEEN COMPLETED AND ISSUES WERE NOT CAPABLE OF REPETITION

Native Village of Nuiqsut v. Bureau of Land Management, 9 F.4th 1201 (9th Cir. 2021).

The Native Village of Nuiqsut and environmental advocacy organizations sued the U.S. Bureau of Land Management (BLM), claiming violations of the National Environmental Policy Act (NEPA), the Administrative Procedure Act (APA), and the Alaska National Interest Lands Conservation Act (ANILCA) in connection with BLM's approval of a winter drilling exploration program on leaseholds in the National Petroleum Reserve in Alaska. The U.S. District Court found that the case was not moot and then entered summary judgment in favor of the government. The Ninth Circuit vacated, finding that the case was rendered moot by completion of the drilling exploration program and that exceptions to mootness did not apply.

Factual and Procedural Background

In 2018, the BLM approved a winter drilling exploration program for ConocoPhillips Alaska, Inc. in the National Petroleum Reserve in Alaska (Petroleum Reserve), west of the Native Village of Nuiqsut. The Petroleum Reserve covers approximately 23.6 million acres of public land and contains significant oil and gas resources. In connection with its 2018 approval, the BLM issued an Environmental Assessment (EA). That EA relied, in part, on a 2012 Integrated Action Plan/Environmental Impact Statement (IAP/EIS) and other supplemental review, which provided a comprehensive analysis of environmental impacts in much of the Petroleum Reserve. In its chosen course of action, the IAP/EIS made approximately 11.8 million acres available for oil and gas leasing. Along with the final EA, the BLM also issued a Finding of No Significant Impact (FONSI) for the winter exploration program, as well as an ANILCA evaluation.

After receiving approval, ConocoPhillips carried out the program, which included building ice pads, an ice airstrip, ice roads, and six new wells. ConocoPhillips completed the exploration on April 28, 2019.

On March 1, 2019, before the completion of the program, the Native Village of Nuiqsut and other plaintiffs (collectively: plaintiffs) brought suit, claiming that the BLM violated the APA, NEPA, and ANILCA when it approved the winter drilling exploration program. Plaintiffs' claims centered on the EA's explanations of impacts on caribou and subsistence and the BLM's consideration of alternatives to the proposal. ConocoPhillips intervened in the suit. The BLM and ConocoPhillips and plaintiffs then filed cross-motions for summary judgment.

At the U.S. District Court

The U.S. District Court decided that, although the dispute was no longer live, it fit into the "capable of repetition, yet evading review" mootness exception. It found that the time period for the exploration program (only about five months) was the type of short-term action that evades judicial review. It also found that plaintiffs should not need to ask for a preliminary injunction to avoid mootness. The District Court also noted that ConocoPhillips had proposed exploration for the upcoming winter and that the BLM had again completed an EA, and the BLM likely would authorize future winter exploration in the same area using an EA that relies on the IAP/EIS. After finding that the case was not moot, the District Court decided the case on the merits and granted the BLM and ConocoPhillips's motion for summary judgment. Plaintiffs appealed the ruling on the merits, and the BLM and ConcoPhillips renewed their argument of mootness.

The Ninth Circuit's Decision

The Ninth Circuit focused its decision on the question of mootness, first noting that the plaintiffs at least implicitly acknowledged that the case techni-

cally was moot because the courts could not give any relief to plaintiffs—ConocoPhillips had completed the operations, all equipment had been demobilized, authorized ice roads and pads had melted, and the exploration and appraisal wells had been capped. Nonetheless, plaintiffs argued that one of the exceptions to the doctrine of mootness applied such that the court should reach the merits of the lawsuit.

One exception is where the issues are "capable of repetition, yet evading review." This exception has two requirements: 1) the duration of the challenged action is too short to allow full litigation before it ceases or expires; and 2) there is a reasonable expectation that the plaintiffs will be subjected to the challenged action again. With respect to the first requirement, the Ninth Circuit agreed with the plaintiffs that the duration of the challenged action was too short to allow for full litigation prior to completion of the approved work.

Regarding the second requirement, the Ninth Circuit noted that in most NEPA cases the inquiry focuses on whether the agency will be relying on the same environmental report in the future or will utilize a new report or a new method in approving future actions. If the former, then the case is not moot. Although the Ninth Circuit found that the BLM might rely on some of the underlying environmental documents, it found that there were several aspects that made the case unique. First, the legal landscape had changed, as the regulations implementing NEPA had been amended, supplanting the regulations in force at the time the plaintiffs brought their lawsuit. These changes meant that the BLM would employ a different method for approving exploration projects in the future. Second, the BLM issued a new IAP/EIS for the Petroleum Reserve in 2020, which it stated would be used as support for any future EAs. Although technically that new IAP/EIS was still under review by the Department of the Interior, the 2020 IAP/EIS was binding during this time period, and the Ninth Circuit found that plaintiffs had not shown a reasonable expectation that they would be subjected to EA tiering to the 2012 IAP/EIS again.

The Ninth Circuit also considered other factors, including the fact that the BLM could not tier to or incorporate by reference certain other supplemental EIS documents for future EAs, similar to the 2018 EA, as well as ConocoPhillips's declaration that it would not pursue exploratory drilling in the near future. With the case being moot, the Ninth Circuit found that both it and the District Court were without jurisdiction to decide the case and thus could not reach the merits. It then vacated the District Court decision and remanded with instructions to dismiss the case.

Conclusion and Implications

The case is significant because it contains a substantive discussion of mootness in the context of NEPA, particularly regarding the later use of earlier environmental documents. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/24/20-35224.pdf. (James Purvis)

NINTH CIRCUIT UPHOLDS ARMY CORPS PLAN TO DREDGE NAVIGATIONAL CHANNELS IN SAN FRANCISCO BAY UNDER THE COASTAL ZONE MANAGEMENT ACT

San Francisco Bay Conservation & Development Commission v. U.S. Army Corps of Engineers, 8 F.4th 839 (9th Cir. 2021).

The Ninth Circuit Court of Appeals in *San Francisco Bay Conservation and Development Commission v. U.S. Army Corps of Engineers* affirmed summary judgment in favor of the U.S. Army Corps of Engineers (Corps) in an action challenging the Corps' 2017 plan to dredge 11 navigational channels in the San Francisco Bay. The San Francisco Bay Conservation and Development Commission (Commission), which approved the plan subject to conditions, claimed the Corps violated the Coastal Zone Management Act (CZMA) by failing to adhere to dredging disposal conditions. The Ninth Circuit rejected the Commis-

sion's claim on grounds that the conditions were not enforceable under the governing CZMA management program.

Facts and Procedural Background

The Coastal Zone Management Act (CZMA) was enacted in 1972 to protect the nation's coastal zone resources. The act facilities cooperative federalism by encouraging states to develop management plans for their coastal zones, for submission and approval by the National Ocean and Atmospheric Administration (NOAA).

Before a federal activity may be conducted in a state's coastal zone, the federal agency must obtain the state's approval in the form of a "consistency determination" (CD). The CD must explain how the federal activity is consistent with the enforceable policies of the state-approved management program. The implementing state agency may concur, conditionally concur, or object to the CD. If the state conditionally concurs, it must set forth conditions for compliance and explain why those conditions are necessary to ensure consistency with the program's enforceable policies. The federal agency may reject the state's conditions, but doing so renders the concurrence an objection. The federal agency is prohibited from proceeding with a project over a state's objection, unless the federal agency concludes that the action is fully consistent with the management program's enforceable policies, or, that full consistency is prohibited by existing law. The federal agency generally cannot evade an enforceable program policy solely based on cost.

Dredging in the San Francisco Bay

The U.S. Army Corps of Engineers oversees the dredging of navigable waterways in the San Francisco Bay. Dredging removes sediment that accumulates in the Bay's channel beds via one of two methods: hydraulic dredging, which uses suction to remove material from the channel floor; or mechanical (clamshell) dredging, which scoops sedimentary material from the channel to remove it. The dredged sedimentary material is then deposited in one of three alternative sites: 1) in-Bay disposal sites, which are the least expensive but environmentally disfavored; 2) beneficial reuse sites, which are environmentally favored but more costly; and 3) ocean disposal sites.

The San Francisco Bay area is managed by the San Francisco Bay Plan. The Bay Plan was adopted in 1965 and created the San Francisco Bay Conservation and Development Commission to oversee its implementation and management. Because the Bay Plan was adopted prior to the enactment of the CZMA, NOAA formally approved the Bay Plan and wholly incorporated it into the CZMA's federal scheme in 1977. Therefore, any amendments to the Plan must be approved by NOAA in order to render it legally enforceable against the federal government.

The Bay Plan is one of many federal-state cooperative efforts that has shaped how dredged material in the San Francisco Bay area is disposed of. Another effort, the Long-Term Management Strategy (LTMS), was released in 1999 through a collaboration between several regional, state, and federal agencies. The LTMS was created to guide agency decisions about the placement of dredged material in the Bay Area over the next 50 years. The LTMS endorsed a "long-term approach" of low in-Bay disposal (approximately 20 percent), medium ocean disposal (approximately 40 percent), and medium upland/wetland reuse (approximately 40 percent) (the 20/40 Goal). In 2001, the LTMS was used to inform several NOAA-approved amendments to the Bay Plan, including three policies that envisioned reducing the disposal of dredged material back into the Bay and increasing reuse of such material for environmentally friendly purposes.

The Army Corps' 2017 San Francisco Bay Dredging Plan

In March 2015, the Corps submitted proposal to the Commission and the Regional Water Quality Control Board (RWQCB) to dredge 11 of the Bay's navigational channels. The Corps submitted a CD to the Commission that proposed dumping up to 48 percent of the Corps' dredged material back into the Bay. The Corps concurrently applied to the Regional Water Board for a related Water Quality Certification (WQC).

In June 2015, the Commission responded to the Corps with a Letter of Agreement (LOA) that conditionally concurred with the CD. The LOA set forth two conditions of approval: 1) the "20/40 Disposal Condition," which reduced the volume of material deposited in the Bay to meet the 20/40 goal of the LTMS; and 2) the "Hydraulic Dredge Condi-

tion," which limited the Corps to using one hydraulic dredge in certain channels. Citing the Corps' regulations, the LOA directed the Corps to obtain funding to accomplish these conditions. A Corps representative signed the LOA on June 23, 2015.

In November 2015, the Corps rescinded its acceptance of the LOA and conditions, citing funding limitations and the costs associated with complying with the Disposal and Dredge Conditions. The Corps sent a similar letter to the RWQCB, which disavowed a WQC condition that limited hydraulic dredging to a maximum of one federal in-Bay channel per year.

After consulting with the Commission and RWQCB, the Corps proposed four potential courses of action (COA): (1) status quo dredging and placement; (2) dredging in accordance with the WQC, but not the LOA; (3) dredging in accordance with the LOA, but not the WQC; and (4) defer all maintenance dredging of the Bay. In January 2017, the Corps adopted the second course of action (COA #2), which amounted to a final action that rejected the 20/40 Disposal Condition and committed the Corps to hydraulically dredging only one of the federal channels.

At the U.S. District Court

In September 2016, the Commission filed suit seeking a declaration that the Corps was required to conduct dredging pursuant to the LOA. The San Francisco Baykeeper intervened in June 2017 after the Corps adopted COA #2. The parties filed cross-motions for summary judgment. The plaintiffs argued that the Corps' actions violated the CZMA because lack of funding and cost could not excuse the Corps from its obligation to comply with the LOA's conditions. The plaintiffs contended that the LOA's conditions were enforceable because they were necessary to ensure the Corps' operations were consistent with the enforceable policies under the Bay Plan. The Corps opposed by claiming the conditions were not based on enforceable policies under the CZMA.

The U.S. District Court for the Northern District of California granted summary judgment in favor of the Corps, holding that the Bay Plan's dredging policies related to the 20/40 Disposal Condition were generalized policy statements and not legally enforceable under the CZMA. The court further found that COA #2 met the hydraulic dredge condition imposed by the WQC and LOA.

Plaintiffs timely appealed, arguing, among other claims, that the Corps' adoption of COA #2 violated the CZMA because the Commission's conditions are linked to federally enforceable policies.

The Ninth Circuit's Decision

A panel for the Ninth Circuit Court of Appeals affirmed the District Court's grant of summary judgment in favor of the Corps. Writing for the panel, Judge Schroeder rejected the plaintiffs' claim that the Corps was required to comply with the 20/40 Condition because the condition was not supported by an enforceable policy under the CZMA.

The Ninth Circuit reasoned that the plaintiffs had correctly explained how the CZMA prohibits federal agencies, such as the Corps, from refusing to comply with a conditional concurrence solely on the basis of cost. However, the 20/40 Disposal Condition was not based on an "enforceable policy" of the Bay Plan. Instead, the 20/40 Disposal Condition required the Corps to meet specific numerical targets that achieved the LTMS's goals—*i.e.*, no more than 20 percent of the Corps' dredged material could be disposed of in the Bay, and no less than 40 percent of the dredged material must be committed to beneficial reuse. However, the court explained that these metrics were not drawn from any actual or related provision of a NOAA-approved coastal management program.

The panel further explained that the 20/40 Disposal Condition was based on the LTMS, which never received NOAA approval, As such, its numerical targets were unenforceable as conditions under the Bay Plan or any other CZMA management program. The court rejected plaintiffs' counterargument that the Disposal Condition was based on the 2001 NOAA-approved amendments to the Bay Plan, observing that the policies spoke in general terms and did not contain any ratios or percentage-based targets. While it is true that the CZMA does not require policies to contain specific criteria to be enforceable, they must provide some meaningful guidance as to what is and is not permissible. For these reasons, the appellate court held that the Bay Plan's dredging policies did not contemplate specific ratios or allocations among different sites for the disposal of dredged materials, much less impose such requirements on an individual basis.

Because plaintiffs had not shown any textual or practical connection between the 20/40 Disposal Condition and the approved Bay Plan Policies in support thereof, the Ninth Circuit concluded that the condition was neither necessary to ensure consistency with, or based on enforceable policies, as permitted under the CZMA. Accordingly, the court held the 20/40 Disposal Condition was unenforceable and the Corps was not required to comply with it.

Conclusion and Implications

The Ninth Circuit's opinion provides a straightforward interpretation and analysis of the Coastal Zone Management Act. The opinion highlights the delicate balance of cooperative federalism between state and federal agencies, particularly with respect to activities in coastal zones. As the court's opinion explains, the CZMA defers to state agencies to ensure federal activities are consistent with the state coastal zone management programs. However, conditions of approval must be premised on specific and enforceable policies. Where, as here, policies merely contained overarching goals for the aggregate allocation of dredged material, state agencies should exercise caution in relying on them to impose specific obligations on individual federal actors such as the Corps. The Ninth Circuit's opinion is available at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/08/06/20-15576.pdf.
(Bridget McDonald)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT CLARIFIES TENSION BETWEEN TWO VARYING EMINENT DOMAIN RULES REGARDING THE VALUATION OF CONDEMNED PROPERTY

City of Escondido v. Pacific Harmony Grove Development, LLC, 68 Cal.App.5th 213 (4th Dist. 2021).

In a decision filed August 26, 2021, the Fourth District Court of Appeal upheld the City of Escondido's condemnation and related valuation of a strip of land located on a large industrial parcel. The land was long part of the city's circulation element of its General Plan and by ordinance the city required development applicants to dedicate public improvements to build out the General Plan's circulation element when developing property. In upholding the trial court's decision, the court rejected the property owner's arguments that the land should be valued at its "highest and best use" and that it was instead appropriate to value the strip of land in its undeveloped or agricultural state. This was the appropriate valuation because the city had long envisioned the strip of land as being improved with a roadway subject to dedication, and no prospective purchaser would be able to build a project there.)

Factual and Procedural Background

The city sought to acquire by condemnation a 72-foot-wide strip of land across a mostly undeveloped 17.2 acre industrial parcel to join two disconnected portions of a major roadway that runs through the city's industrial areas on each side of the property. The roadway and extension across the owner's property had long been in the circulation element of the city's General Plan and city code provisions required any applicant that constructs a new building to also dedicate property and construct improvements on areas dedicated to roadways and other improvements under the General Plan. The city argued that the strip of land had only nominal value ($50,000) because the city would require any development of the property to) include a dedication of the land for roadway purposes. The city's argument was based on the *Porterville* doctrine (*City of Porterville v. Young*, 195 Cal.App.3d 1260 (1987).)) Under *Porterville*, property to be condemned by the government is valued at in its undeveloped or agricultural state.

The property owners argued that the property should have been valued as though it could be fully developed at its highest and best use under the "Project Effect Rule.)) " Under the Project Effect Rule, a court will disregard for valuation purposes a condemner's belated imposition of a dedication requirement as a means to drive down the price of property. Under the Project Effect Rule, the owners claimed that the property was really worth approximately $960,176. The owners also claimed that the roadway was not needed, the owners also argued they were entitled to pre-condemnation damages caused by "the [c]ity's unreasonable delay in pursuing condemnation proceedings and other unreasonable conduct." The city responded that it did not engage in unreasonable delay or conduct because it commenced condemnation proceedings shortly after it annexed the property from county jurisdiction in 2015.

The trial court decided against the owners on all counts and the owners appealed.

The Court of Appeal's Decision

The court began by noting that the measure of value in a condemnation case is the "fair market value of the property taken." The court then analyzed the two alternative methods for determining fair market value in an eminent domain proceeding, the *Porterville* doctrine and the Project Effect Rule.)

The *Porterville* Doctrine

The *Porterville* doctrine provides that:

> . . .when a city would lawfully have conditioned development of property upon the owner's dedication of a portion of the property to mitigate the impacts of the development, the fair market

> value of that portion in a subsequent condemnation action is its value in its undeveloped, agricultural state, rather than in its highest and best developed state.

The reasoning behind this rule is that, where an owner could not develop the portion of land subject to dedication, no willing buyer would purchase that portion of property for more than its undeveloped value, and the city should not pay more than that.

The *Porterville* doctrine requires two criteria to be met. First,) the dedication requirement must be constitutional under the *Nollan* and *Dolan* U.S. Supreme Court decisions. *Nollan* and *Dolan* require that a dedication must have an "essential nexus" to the valid public purpose that would be served by denying a project outright (*i.e.* if it excluded the dedication). The dedication must also be roughly proportional to the impact of the proposed development at issue. Second:

> . . .it must also be reasonably probable that the condemner would actually impose the dedication requirement as a condition of development.

The Project Effect Rule

The Project Effect Rule prohibits the fair market value of condemned property from being influenced by the project for which the property is being condemned. The rule applies when local agency undertakes a zoning action "explicitly or implicitly for the purpose of suppressing property values before an intended taking." In these instances, the effect of the zoning change at issue must be disregarded when valuing the condemned property.

The Court of Appeal recognized there is an inherent tension between the *Porterville* doctrine and the Project Effect Rule:

> . . .the former allows a city's dedication requirements to depress the value of condemned property, while the latter prohibits it.

The *Stamper* Decision

The California Supreme Court resolved this conflict in the 2016 *Stamper* decision (*City of Perris v. Stamper,* 1 Cal.5th 576 (2016)). Under *Stamper*, a court must look to the "date of probable inclusion" to determine whether the *Porterville* or Project Effect Rule applies. If the dedication requirement arose before the date of probable inclusion, the *Porterville* doctrine applies, if it arises after, the Project Effect Rule applies.

The date of probable inclusion arises when a public agency is engaging in a project for which it intended to acquire property by purchase or condemnation, if necessary. It must be "probable" that the property at issue would be included in that project.

The court determined that the dedication requirement was constitutional. As established through extensive testimony, the dedication requirement of the roadway parcel was proportional to the impacts that developing the property would cause. Moreover, the court concluded that it was probable that the city would actually condition development of the property on dedication of the roadway parcel. After all, since 2002, the city's operative General Plan and circulation element have shown a roadway running through the owner's property, and the city demonstrated a repeated practice of requiring developers to dedicate property to complete components of the circulation element when developing property.

The Project Influence Rule and the Issue of Pre-Condemnation Damages

The court also concluded that the project influence rule did not apply. Here, the dedication requirement at issue arose as part of the city's General Plan and circulation element, which were enacted several years before the "date of probable inclusion." The county did not expressly or impliedly designate the strip of land for roadway purposes to diminish its value, it did so as part of standard planning procedures.

The court also rejected the owner's pre-condemnation damages claim. To collect on this claim, the owner would need to demonstrate that a public agency acted improperly by either unreasonably delaying an eminent domain action following an announcement of intent to condemn, or by other unreasonable action resulting in a diminution in value. Here, a ten-year delay between committing to build the road and filing the condemnation of the owner's property was not improper or unreasonable, and was merely the "result of General Planning."

Conclusion and Implications

The *City of Escondido* decision outlines the complicated doctrines that come into play when determining the appropriate value of land to be condemned by public agencies. Government agencies and landowners alike should familiarize themselves with these doctrines and procedures early on when facing situations that may involve condemnation of private property. A copy of the court's decision can be found online at: https://www.courts.ca.gov/opinions/documents/D077549.PDF.
(Travis Brooks)

THIRD DISTRICT COURT AFFIRMS USE OF EIR ADDENDUM TO PROVIDE ALTERNATIVE HABITAT MITIGATION SITE IN CEQA ACTION IMPLICATING THREATENED SPECIES

Environmental Council of Sacramento v. City of Elk Grove,
___Cal.App.5th___, Case No. C089384 (3rd Dist. Aug. 30, 2021).

The Third District Court of Appeal in *Environmental Council of Sacramento v. City of Elk Grove* affirmed a trial court decision upholding the City of Elk Grove's (City) approval of an addendum for changing the Environmental Impact Report (EIR) mitigation designed to reduce potential impact to a threatened species based on substantial evidence in the record that the new mitigation is not a substantial change that will result in major changes in the EIR.

Factual and Procedural Background

In 2014, the City certified an EIR for a project titled the Southeast Policy Area Strategic Plan (the Southeast Plan). The project allows for the development of about 1,200 acres that consists largely of agricultural and undeveloped lands.

The EIR found that implementation of the Southeast Plan would have a potentially significant impact on the threatened Swainson's hawk due to significant loss of its foraging habitat.

To mitigate that loss, the EIR required any developer to acquire conservation easements or other instruments to preserve suitable foraging habitat for the Swainson's hawk on a one-to-one mitigation ratio for each acre developed at a location acceptable to the City and to the Department of Fish and Wildlife (DFW).

In 2017, a developer sought to develop over 900 acres of the 1,200 acres within the Southeast Plan area. Because about 895 of those acres consists of Swainson's hawk foraging habitat, the EIR required the developer to preserve 895 acres of suitable foraging habitat for the Swainson's hawk, as determined by DFW.

To avoid going through DFW, the developer instead asked the City to amend the EIR to add an alternative mitigation option that would allow the developer to acquire mitigation lands on the Van Vleck Ranch located about 20 miles from the project area.

City staff agreed and prepared an addendum allowing either DFW to choose the mitigation land or the developer to choose 895 acres on the Van Vleck Ranch as the mitigation land. Under the Van Vleck Ranch alternative, there would be certain "habitat enhancements," including, for example: 1) the conversion of 50 acres of irrigated pasture on the Van Vleck Ranch (considered moderate-value foraging habitat) to alfalfa (considered high-value foraging habitat) and 2) the planting of 20 cottonwood trees on the Van Vleck Ranch to enhance/create nesting habitat.

City staff reasoned that an addendum, rather than a supplemental or subsequent EIR, was appropriate because, among other things, the modification would not cause an increase in severity of environmental impacts.

The California Department of Fish and Wildlife evaluated the proposed addendum under nine criteria. DFW found consistency with six of its criteria because the proposed mitigation lands would support foraging habitat for the hawk, be connected to other protected habitat thereby contributing to larger

habitat preserve, be outside areas identified for urban growth, and be managed in perpetuity as foraging habitat.

But, DFW believed, the modification would be inconsistent with its remaining three criteria. First, DFW asserted that the Van Vleck Ranch mitigation lands, at 18 miles from the project site, would not be within a biologically supportable distance from the impact site. According to DFW, many biological consultants and mitigation bankers have expressed that this distance is or should be ten miles.

Second, DFW asserted that the Van Vleck Ranch mitigation lands would provide inferior foraging habitat compared to the impact site. The majority of the proposed Van Vleck Ranch mitigation site is annual grassland with oak woodland, whereas the impact site contains a mix of alfalfa and other semi-perennial hays, hayfields, irrigated cropland and irrigated pasture. DFW claimed that the proposed Van Vleck Ranch mitigation site would not support the larger population density near the project site.

Third, DFW asserted that the Van Vleck Ranch mitigation site would be in direct competition with and have an unfair advantage over, the neighboring Van Vleck Ranch mitigation bank, which was established to sell Swainson's hawk mitigation credits. Environmental Council had similar objections.

City staff responses acknowledged DFW's concerns but recommended approval of the modified mitigation measure.

Regarding the DFW ten-mile argument, the City found that the preservation of foraging habitat at the Van Vleck Ranch will benefit the regional Swainson's hawk population as a whole and preserve historic grassland foraging habitat, which DFW has identified as a key factor for protecting the species. The City also found there were no comparable mitigation lands lying within ten miles of the project site, and the scattered smaller sites that were available had uncertain long-term habitat value and were four times as costly.

Regarding the DFW complaint about the quality of the Van Vleck Ranch mitigation lands, the City acknowledged that the Van Vleck Ranch lands would not support the same breeding density as the project site in the short term. But the City found the Van Vleck Ranch lands contain equal or better foraging habitat as compared with the habitat impact site. The City also found that the Van Vleck Ranch lands provide stable nesting and foraging conditions and are adjacent to other protected lands that also provide foraging habitat for the Swainson's hawk, citing the conversion of the 50 acres to alfalfa to provide increased prey availability for the hawk.

Regarding the DFW assertion of competition with the nearby Van Vleck Ranch mitigation bank, The City found that the proposed mitigation lands were not a competing option with the Van Vleck Ranch mitigation bank. The project site sits outside the mitigation bank's service area, thus not even an option for the City.

The developer's consulting biologist, Jim Estep, who researched the Swainson's hawk in the Sacramento Valley and California for over 30 years, agreed with the City's findings.

Following a public hearing, the City council adopted a resolution approving the addendum to the EIR. According to the City's resolution, the proposed modification would provide other viable options for mitigating the loss of foraging habitat at a 1:1 ratio, would not change the effectiveness of the EIR's mitigation measures, and would not cause an increase in severity of environmental impacts. Thus, the City found it unnecessary to prepare a subsequent or supplemental EIR.

At The Superior Court

Environmental Council filed a petition for writ of mandate against the City, claiming that the Addendum approval allowing for the Van Vleck Ranch mitigation option is not supported by substantial evidence as to: 1) mitigation beyond ten miles from the project; and 2) the Van Vleck Ranch as adequate replacement foraging habitat.

The trial court denied the petition. The trial court found that the developer's expert testimony provides substantial evidence that the appropriate range for the hawks is 20 miles, not ten miles. The DFW ten-mile position is unsubstantiated opinion, not substantial evidence.

The trial court also found that substantial evidence in the form of the developer's expert opinion supports the finding of adequate replacement habitat at the Van Vleck Ranch. DFW's disagreement about the significance of impacts to the project is not a basis for overturning the City's decision under the substantial evidence standard.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court determination that the City's decision to approve the Addendum was supported by substantial evidence of no substantial change requiring a major change in the EIR. Environmental Council's arguments merely showed a disagreement among experts regarding the impact of the new mitigation option. The substantial evidence standard only requires one expert opinion in support of the agency's decision.

Determination of Whether to File an Addendum

When changes to a project occur after an EIR is approved, the approving agency must determine whether to prepare and subsequent or supplemental EIR, or simply an addendum. A supplemental or subsequent EIR is required only when: 1) substantial changes are proposed in the project which will require major revisions of the environmental impact report; 2) there are substantial changes to the project's circumstances that will require major revisions to the EIR; or 3) new information becomes available. (Public Resources Code, § 21166; California Environmental Quality Act (CEQA) Guidelines, § 15162(a).)

Agencies may propose project changes requiring revisions to an EIR's mitigation measures. An adopted mitigation measure for a project may prove to be impracticable or unworkable, or a new mitigation measure may be superior to the one initially adopted. When substantial evidence shows that an agency's proposed change falls short of requiring major revisions of the EIR, the agency need only prepare an addendum to the EIR. (CEQA Guidelines, § 15164(e).)

Substantial Evidence Supports the Addendum

Environmental Counsel argued on appeal that substantial evidence did not support location of mitigation for the hawk habitat more than ten miles beyond the project area and that substantial evidence did not support the same density of Swainson's hawk nests in the Van Vleck Ranch as in the project area.

With respect to the ten-mile argument, the Court of Appeal held that the mitigation measure need not be ideal and avoid all potential impacts. Instead, the mitigation measure need only mitigate impacts to a less than significant level. (Public Resources Code, § 21081.) There was a conflict among experts as to whether ten or 20 miles was the appropriate distance. The developer's expert provided opinion that the hawks had a 20-mile range. Under the substantial evidence test, the court is not required to wade in and determine any dispute among experts, as long as there is credible expert opinion in support of the agency determination. (*California Native Plant Society v. City of Rancho Cordova*, 172 Cal.App.4th 603, 626 (2009).)

Again, with respect to the argument about the density of nests in the Van Vleck Ranch, the Court of Appeal held that there was a dispute among experts. The developer's expert provided opinion that the value of foraging habitat at the Ranch is similar to the value of the impact area and compared to the impact site is definitely a good tradeoff. While the Ranch may have less cultivated land than the impact site, it has good irrigated natural grassland which over time according to the developer's expert will be more dependable than reliance on cultivated farmland that is subject to changing cultivation patterns.

Conclusion and Implications

This opinion by the Third District Court of Appeal demonstrates the importance of having effective respected expert opinion regarding lack of environmental impacts of substituting new mitigation measures for a project to support an addendum for the new mitigation measures following approval of an EIR. It was the developer's expert's recognized expertise and more particular analysis regarding the hawk range and comparison of the two properties that gave credibility to the decision to approve an addendum rather than prepare a more detailed subsequent or supplemental EIR. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/C089384.PDF.
(Boyd Hill)

FIFTH DISTRICT COURT FINDS EXHAUSTION REQUIREMENTS DO NOT APPLY WHERE AN AGENCY GIVES NO NOTICE OF INTENT TO APPLY CEQA EXEMPTION PRIOR TO PUBLIC HEARING

Los Angeles Department of Water and Power v. County of Inyo, 67 Cal.App.5th 1018 (5th Dist. 2021).

In a *partially published* decision filed August 17, 2021, the Fifth Court District of Appeal upheld the trial court's issuance of a writ of mandate requiring the County of Inyo to vacate resolutions of necessity to condemn three landfill properties historically owned by the City of Los Angeles Department of Water and Power (LADWP). First, the court held that the California Environmental Quality Act's (CEQA) issue exhaustion requirement did not apply to the LADWP's challenge of the county's use of a CEQA exemption because the county did not provide sufficient notice of its intent to rely on the exemption prior to the hearing on the project. Such notification was not provided until the end of the public comment period of the hearing. Second, the court determined that the county improperly relied on CEQA's categorical existing facilities exemption when approving the resolutions. This article will discuss the published portions of the court's decision.

Factual and Procedural Background

LADWP is the second largest owner of property in Inyo County (County) after the federal government, including three landfill sites that it has leased to Inyo County since the 1950s: the Bishop-Sunland Landfill, the Independence Landfill, and the Lone Pine Landfill.

In 1999 the county adopted Mitigated Negative Declarations (MNDs) for each landfill in connection with updated operating permits. In 2012, the county adopted a four-page addendum to each prior MND for amendments to the operating permits. The 2012 amendments related to increases in the daily disposal tonnage, changes to the disposal footprint, and a change to the estimated closure date of each landfill.

In 2015, the county prepared a set of applications to expand the three landfills. In 2016 and 2017, LADWP and the County were negotiating the terms of a lease renewal for the Bishop-Sunland Landfill with LADWP seeking rent increases and revisions to the lease's termination rights. The county rejected these changes claiming that the LADWP's demands called into into question the county's ability to ensure long-term waste management services and would result in future difficulties obtaining necessary state regulatory permits from .

The negotiations were not successful, and on August 15, 2017, the county board of supervisors held a public hearing to consider approval of a resolution of necessity to acquire the landfill sites from LADWP through eminent domain. Several items were left out of the agenda report for this hearing, which merely described the negotiations for the renewal of the lease for the Bishop-Sundland Landfill, but did not include the 1999 MNDs, the 2012 Addendum or other CEQA analysis of the potential impacts of the county's condemnation of the property. Before the August 15 hearing, LADWP submitted a letter opposing the resolution of necessity, noting that compliance with CEQA was mandatory before the county could condemn the properties. LADWP also argued that the county failed to adequately describe the full extent of the project—as a result, the potential environmental effects of the project could not be adequately evaluated. In its objections, LADWP noted that the county already had plans to increase tonnage, expand uses, and correct violations at the landfill properties and the impacts of such changes in operations must be analyzed before the county could condemn the properties. With knowledge of future changes that the county would be making to the landfills and related operations, the county could not piecemeal those projects and delay CEQA review. LADWP also appeared at the August 15 hearing and made verbal comments in opposition of the resolution.

Just before the close of the public comment period of the August 15 hearing, county counsel stated that the condemnation project was exempt from CEQA under the existing facilities and commonsense exemptions. County counsel described the project as the condemnation itself, not involving a new land use or land use intensification. This was apparently the first time that the county made public that it was relying on CEQA exemptions for the condemnation.

At the August 15 hearing, the board of supervisors unanimously adopted separate resolutions of necessity to authorize condemnation of the three landfill sites for continued landfill purposes. The resolutions did not mention CEQA, did not determine the scope of the project for CEQA purposes, did not set forth any CEQA compliance, did not address any CEQA exemptions, and did not address the unusual circumstance exceptions to CEQA exemptions. After the hearing, the county did not file a notice of exemption.

The County filed a writ petition in Kern County Superior Court, which granted LADWP's writ petition and entered a judgment directing issuance of a peremptory writ of mandate to vacate the County's resolutions of necessity for failure to comply with CEQA. The County timely appealed.

The Court of Appeal's Decision

LADWP Did Not Fail to Exhaust Available Administrative Remedies

The court began its opinion by rejecting the county's argument that LADWP failed to exhaust available administrative remedies in not specifically raising some of the CEQA theories included in the writ petition during the county's administrative proceedings.

Regarding issue exhaustion, Public Resources Code § 21177 (a) provides that:

> . . .an action or proceeding shall not be brought… unless the alleged grounds for noncompliance with [CEQA] were presented to the public agency orally or in writing by any person during the public comment period provided by [CEQA] or prior to the close of the public hearing on the project.

The court noted that this exhaustion requirement does not apply where there was:

> . . .no public hearing or other opportunity for members of the public to raise objections… or if the public agency failed to give the notice required by law.

Pursuant to the decision in *Tomlinson v. County of Alameda,* 54 Cal.4th 281 289 (2012) (*Tomlinson*), because exemption determinations do not provide for a public comment period, that prong of the issue exhaustion requirement involving written comments during the public comment period did not apply here. Per *Tomlinson* the issue exhaustion requirement would only apply to LADWP if there was an opportunity for public comment at the public hearing.

Here, the county did not provide adequate notice in advance of the hearing that CEQA exemptions would be considered. The County's staff report did not mention CEQA or any exemption, and nothing in the administrative record showed the that public was notified before the hearing of the County's possible reliance on CEQA exemptions. As a result, the first public notification of the County's reliance on the exemptions came just before the close of the August hearing. As a matter of law, the court determined that such disclosure at the end of a hearing was not adequate notice that a CEQA exemption would be considered. Accordingly, the court held that LADWP did not fail to exhaust its administrative remedies under § 21117.

The County Could Not Rely on the Existing Facilities Exemption

The County relied on both the Class 1 categorical exemption for existing facilities (CEQA Guidelines, § 15301) and the commonsense exemption.

The existing facilities exemption can apply to:

> . . .the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use.

LADWP relied on a prior decision *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal.App.4th 1165, 1192 (1997) (*Azusa*), where the Second District Court of Appeal held that the categorical exemption for an existing facility "should not be construed to include a large, municipal waste landfill."

Like the court in *Azusa*, the court here applied the principles of statutory construction to the regulation to determine that the term "facilities" was ambiguous. Here, the "facilities" was ambiguous in the context of the statutory and regulatory scheme as a whole.

Because the term facilities was ambiguous, the court looked to the interpretation of the existing facilities exemption that would best effectuate the legislative and regulatory intent of CEQA, which is to "afford the fullest possible protection to the environment within the reasonable scope of the statutory language." With this core legislative intent in mind, the term "facilities" should not be broadly interpreted to include:

> . . .a class of businesses that would not normally satisfy the statutory requirement for a categorical exemption. . . .[o]ver 90 percent of California's solid waste is currently disposed of in landfills, some of which pose a threat to groundwater, air quality and public health.

The court also looked to the legislative history related to 1998 amendments to the CEQA guidelines. This history indicated that the Secretary of Natural Resources at the time was aware of the *Azusa* decision but did not revise the facilities exemption to include landfills.

Accordingly, the court concluded the County did not properly rely on the existing facilities exemption in this instance.

Conclusion and Implications

The Court of Appeal's decision provides important guidance to local agencies and project applicants when relying on categorical CEQA exemptions to approve a project. Unless the local agency adequately notifies the public of its intent to rely on the CEQA exemption in advance of the hearing (typically in a staff report or public notice of the hearing), CEQA's issue exhaustion requirement will not apply to prospective challenges of the exemption.

The decision also provides guidance on how to interpret the applicability of existing facilities and other categorical exemptions when the particular application of such exemptions can be ambiguous. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/F081389.PDF. (Travis Brooks)

FIRST DISTRICT COURT FINDS AB 734 DID NOT IMPOSE DEADLINE ON GOVERNOR TO CERTIFY BASEBALL STADIUM FOR STREAMLINED ENVIRONMENTAL REVIEW

Pacific Merchant Shipping Association v. Newsom, 67 Cal.App.5th 711 (1st Dist. 2021).

The First District Court of Appeal in *Pacific Merchant Shipping Association* ruled that AB 734, which provides for "fast-track" judicial review of California Environmental Quality Act (CEQA) claims against the proposed Oakland A's baseball stadium, did not impose a deadline by which the Governor needed to certify the project for streamlined environmental review. The court held that the statute did not incorporate the January 2020 certification deadline that was set forth in separate guidelines adopted by the Governor regarding the application and certification of environmental leadership development projects.

Facts and Procedural Background

AB 900—The Jobs and Economic Improvement Through Environmental Leadership Act

In 2011, the California Legislature enacted Assembly Bill 900, the "Jobs and Economic Improvement Through Environmental Leadership Act of 2011." The legislation established "fast-track" administrative and judicial review procedures for "environmental leadership development projects" that met certain conditions, including the creation of high-wage, high-skilled jobs, no net additional greenhouse gas emissions, and the payment of certain costs by the project applicant.

AB 900 also required the Governor to certify that the project met the statutory criteria to qualify for fast-track status. Once certified, the statute mandated that CEQA challenges to the project must be resolved within 270 days. The bill was amended from time to time to include various deadlines by which the Governor needed to certify leadership projects. The final iteration of AB 900 provided that the Governor had to certify a leadership project by January 1, 2020, and the lead agency had to approve the project by January 1, 2021, the bill's sunset date. AB 900 also provided that the Governor could adopt implementing guidelines, promulgated by the Office of Planning and Research (OPR).

AB 734—The Howard Terminal Project

Faced with the City of Oakland's (City) impending loss of two professional sports teams, the state Legislature sought to facilitate a new professional baseball stadium at the Howard Terminal site, adjacent to the Port of Oakland. The Howard Terminal Project would create high-wage, highly-skilled jobs, and present an unprecedented opportunity to invest in new and improved transit and transportation infrastructure, and implement sustainability measures designed to improve air quality and mitigate the project's greenhouse gas (GHG) emissions.

In 2018, the Legislature approved AB 734—special legislation applicable solely to the Howard Terminal Project. The Legislature determined the special statute was necessary due to the unique need for expediting development of a sports and mixed-use project. If the Governor certified that the project met numerous specific environmental standards, AB 734 provided that all litigation challenging the project's approval or Environmental Impact Report (EIR) must be resolved within 270 days.

Though the bill closely mirrored AB 900 in certain respects, it did not contain the express deadlines on Governor certification or project approval. It did, however, provide that the Governor's AB 900 Guidelines applied "to the extent those guidelines are applicable and do not conflict with the specific requirements" of AB 734.

On November 20, 2018, the City issued a notice of preparation of a draft EIR for the Howard Terminal Project. In March 2019, real party, the Oakland Athletics Investment Group (the A's), submitted an application to Governor Newsom for certification of the project under AB 734. As a precursor to the Governor's certification, the California Air Resources Board (CARB) needed to find that the project would meet the bill's greenhouse gas emission reduction targets. CARB ultimately issued its determination in favor of the project 16 months later on August 25, 2020.

At the Trial Court

On March 16, 2020, a coalition of businesses operating at the Port of Oakland and led by the Pacific Merchant Shipping Association (PMSA), filed suit seeking an injunction and declaration that the Governor's authority to certify the project under AB 734 had expired on January 1, 2020. In April 2020, OPR amended the Governor's AB 900 Guidelines to expressly state that the certification timelines did not apply to projects undertaken pursuant to AB 734. In turn, PMSA filed an amended petition on May 15, 2020, to challenge OPR's authority to "revive" the Governor's expired certification power under AB 734. The Governor and the A's filed motions for judgment on the pleadings in August 2020. The parties argued that the Legislature never intended to incorporate the deadlines set forth in the Governor's AB 900 Guidelines into AB 734, and that, regardless, those deadlines had been eliminated by the April 2020 Guidelines amendment.

The trial court issued a tentative decision on November 20, 2020, which concluded the Guidelines appeared to indicate that AB 900's certification deadline applied to the Project. After requesting supplemental briefing on the legislative intent behind amendments to the Governor's AB 900 Guidelines, the trial court reversed its tentative decision and granted the motions for judgment on the pleadings on January 28, 2021. The court held that AB 900's certification deadlines were inapplicable because they would conflict with the AB 734, which did not contemplate deadlines. Moreover, because AB 900 expired on January 1, 2020, the statute and its deadlines lacked force or effect.

On February 11, 2021, the Governor certified the Howard Terminal Project for streamlined environmental review under AB 734. PMSA timely appealed.

The Court of Appeal's Decision

The First District Court of Appeal considered whether the Legislature, intended to import AB

900's certification deadline into AB 734 and onto the Howard Terminal Project. Because this inquiry entailed a question of statutory interpretation, the Court of Appeal employed de novo review to ascertain the Legislature's intent in a manner that would effectuate the purpose of the law.

AB 734's Ambiguous Statutory Language

Both parties asserted the plain language of AB 734 supported their interpretation of the bill. PMSA contended that the Guidelines, including the January 1, 2020 certification deadline, were "capable of being applied" to the statute because they did not conflict with any of its specific requirements and the deadline functioned as a clear mandate. The Governor and the A's argued that the statute never contemplated a deadline, therefore, the Guidelines could not "implement" AB 734 by imposing a deadline from a different statute.

The Court of Appeal recognized that the statutory text was ambiguous. Though the statute referred to AB 900 Guidelines, the court questioned whether the Legislature would intentionally imbed the Guidelines' "vital deadline" for certifying the project within an "oblique reference to the guidelines promulgated under a different expiring statute."

Legislative History of AB 734

Because the Legislature's express intent could not be gleaned from the plain language of AB 734, the court reviewed the legislative history. The history revealed that an early draft of the bill was criticized for failing to require greenhouse gas neutrality and for limiting the trial court's authority to stay or enjoin construction of the project. The analysis suggested that the City explore approving the project under AB 900, rather than pursue special legislation.

The bill's author proposed amendments to AB 734 to align it with AB 900, including a commitment that the project would achieve net zero greenhouse gas emissions. The bill's author explained that separate legislation was necessary because the project could not meet several important aspects of the AB 900, including the 2021 approval deadline. After several subsequent amendments, the final version was "substantially equivalent to AB 900 on key requirements," while also "raising the bar" with respect to its commitments to greenhouse gas reduction and mitigation measures.

Based on a fair reading of the legislative history, the First District Court of Appeal concluded that AB 900's deadlines were not meant to be imported into AB 734. Though the early senate analysis criticized the bill for being substantively weaker than AB 900 with respect to environmental protection, enforcement of a one-year certification deadline before AB 900 expired was never mentioned. The court held that AB 734's legislative history offered "no indication that the legislature intended for the Howard Terminal Project to be bound by the statutory deadlines specific to [AB] 900, and appreciable evidence points to the opposite conclusion."

AB 734's Legislative Purpose Supports the Court's Construction of the Statute

The Court of Appeal explained that its construction of AB 734 comported with the general policy behind the statute. The purpose of the statute is to assist the City retain the A's by streamlining environmental review for a state-of-the-art baseball. "In light of the significant environmental, economic, and cultural benefits which prompted the adoption of [AB] 734," the court held that PMSA's reading of the statute would "undermine rather than promote the general purposes of the statute and the objectives to be achieved." The court reasoned that PMSA would:

> . . .essentially make the special legislation a nullity because the Governor failed to certify the project by January 1, 2020, a deadline never mentioned in the statutory text and one which the bill author suggests could never be met.

Extrinsic evidence also supports the court's findings. Because the project was required to obtain a determination from CARB that it would achieve new standards for achieving greenhouse gas neutrality—which ultimately took 16 months to render—there was no way the Governor could certify the Project prior to CARB's determination. The court explained that PMSA:

> . . .would have th[e] court conclude that the Legislature, after engaging in months of negotiation and amendments, enacted comprehensive single-project legislation that was doomed from its inception because CARB's step in the process

would alone exceed the one-year deadline for certification.

The court found this construction "inimical" to the underlying purposes of AB 734.

For these reasons, the Court of Appeal concluded that the "more reasonable" interpretation of AB 734 was that the deadlines mentioned in the AB 900 Guidelines did not apply to the Howard Terminal Project. Therefore, the Governor's authority to certify the project had not expired and his February 2011 certification withstood PMSA's challenge.

Conclusion and Implications

The First District Court of Appeal's opinion marks another development in the judiciary's statutory construction of statutes that "fast-track" single environmental leadership projects under CEQA. As evinced by the court's extensive analysis, the legislative history of these special-legislative bills is particularly important where the plain language of the statute does not resolve questions surrounding the Legislature's intent. While the legislation in this opinion only concerns the Howard Terminal Project, the court's three-pronged analysis provides useful guidance on statutory interpretation jurisprudence. The Court of Appeal's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A162001.PDF.

Editor's Note: Attorneys from the author's law firm represented Real Party in Interest Oakland Athletics Investment Group LLC in the litigation summarized in this article
(Bridget McDonald)

SECOND DISTRICT COURT UPHOLDS EIR ANALYZING IMPROVEMENT PROJECT BY THE WATERSHED CONSERVATION AUTHORITY IN THE ANGELES NATIONAL FOREST

Save Our Access-San Gabriel Mountains v. Watershed Conservation Authority, 68 Cal.App.5th 8 (2nd Dist. 2021).

Save Our Access-San Gabriel Mountains (Save Our Access) petitioned for a writ of mandate challenging an action by the Watershed Conservation Authority (Authority) to certify an Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA) and approve an improvement project in the Angeles National Forest. The Superior Court granted the petition in part and issued a writ of mandate, and then awarded Save Our Access $154,000 in attorney fees. Both parties appealed, and the Court of Appeal reversed, finding that the EIR's analysis of parking and alternatives was sufficient, and that the project did not conflict with a land management plan or presidential proclamation regarding the forest.

Factual and Procedural Background

The project at issue was known as the San Gabriel River Confluence with Cattle Canyon Improvements Project, which would occur within 198 acres along a 2.5-mile stretch of the East Fork of the San Gabriel River, in the Angeles National Forest. The overall intent of the project is to provide recreational improvements and ecological restoration to address resource management challenges with a focus on reducing impacts along the most heavily used sections of the river. Enhancements include, among other things, the development of new picnic areas, pedestrian trails, river access points and upgrades to existing facilities, improvements to paved and unpaved roadways, parking improvements, restrooms and refuse disposal improvements, restoration of riparian and upland vegetation communities, and implementation of a Forest Closure Order to prohibit overnight camping.

A Draft EIR for the proposed project was circulated in November 2017 for public comments. With respect to parking, which was the focus of Save Our Access's legal challenge, the Draft EIR described the existing limited number of designated parking spaces and the widespread practice of parking in undesignated areas. The Draft EIR proposed to formalize parking spaces by adding features such as pavement, stripes, and signage. Undesignated parking areas would be blocked with boulders and "no parking" signage would be installed, resulting in a reduction

in the available parking and a corresponding reduction in the number of visitors able to park within the project site. Displacement that would occur, the Draft EIR found, would lead to increased use at other areas with similar amenities within the region, and it was assumed that displaced visitors would be dispersed across the region as they find substitute activities. However, the Draft EIR concluded that—notwithstanding the reduction in overall parking—the project would not increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial deterioration of those facilities would occur or be accelerated.

Following completion of a Final EIR, including responses to all public comments, the Authority certified the EIR and approved the project in October 2018. Save Our Access then sued in November 2018, seeking a writ of mandate directing the Authority to set aside its approval. The Superior Court granted the petition in part, concluding the project would create or exacerbate a parking shortage and, without adequate analysis and evidence of how that shortage would materialize, it could not be said that the project's parking impacts are insignificant. In a later order, the court awarded Save Our Access $154,000 in attorney fees. Appeals then followed.

The Court of Appeal's Decision

Parking

The Court of Appeal first addressed parking, disagreeing with the Superior Court that the EIR's analysis of parking was deficient. In particular, the Court of Appeal found that Save Our Access had not identified any adverse physical impact on the environment resulting from the reduction in parking, much less a potentially substantial, adverse change in any of the physical conditions within the area affected by the project. Nor had Save Our Access put forth evidence of any secondary adverse environmental effects of reduced parking, such as secondary traffic or air quality impacts at the project site. The court also agreed with *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco,* 102 Cal. App.4th 656 (2002), which stated "[t]he social inconvenience of having to hunt for scarce parking spaces is not an environmental impact; the secondary effect of scare parking on traffic and air quality *is*." While the court also acknowledged that in some instances parking could have a significant adverse impact on the environment, citing *Taypayers for Accountable School Bond Spending v. San Diego Unified School District,* 214 Cal.App.4th 1013 (2013), it found that the circumstances of the particular case are determinative. Here, given that Save Our Access had not alleged anything other than essentially a social inconvenience, and that the improvement project overall was intended to prevent further adverse physical impacts on the environment associated with the public's use of the area, the Court of Appeal rejected Save Our Access's claims regarding parking.

Alternatives Analysis

The Court of Appeal next addressed Save Our Access's claims that the EIR's alternatives analysis was deficient. Generally, an EIR is required to evaluate a reasonable range of alternatives that would feasibly attain most of the basic project objectives but would avoid or substantially lessen any of the significant effects of the project. There is no rule governing the specific number of alternatives that must be analyzed, but the EIR must set forth a range of alternatives necessary to permit a reasoned choice and examine those that the lead agency finds could feasibly attain most of the basic objectives of the project.

Here, the project EIR analyzed only two alternatives: 1) the proposed project; and 2) a "no project" alternative, which is required under CEQA. The Court of Appeal found that, under the circumstances of the case, this was reasonable. As a threshold matter, the Court of Appeal first rejected Save Our Access's contention that, under CEQA, an EIR must necessarily address more than the proposed project and the "no project" alternative. The court then noted, among other things, that the Authority had taken extensive pre-Draft EIR initiatives to design a project that would meet its stewardship and recreational goals. Environmental impacts of the project were studied in the Draft EIR, which found no significant impacts that could not be avoided or reduced to a less than significant level. The EIR also described various alternatives that were considered but ultimately were eliminated from full analysis. The EIR then analyzed the project and the "no project" alternative in detail. Under these circumstances, the Court of Appeal agreed with the Authority that consideration of other project alternatives was unnecessary.

Conflicts With Land Management Plans

The Court of Appeal next addressed Save Our Access' claim that the project conflicted with the Angeles National Forest Land Management Plan and President Obama's designation of the area as a national monument in Proclamation 9194. In particular, Save Our Access asserted that the project's reduction in parking conflicted with Proclamation 9194's objective to facilitate the growing population's use of the area. The court disagreed, finding this argument elevated parking concerns above all other objectives of the proclamation. The Court of Appeal also disagreed with Save Our Access' claim that the project was inconsistent with the Angeles National Forest Land Management Plan because it would limit recreational use. The court noted that the project's purpose was to improve the existing multi-use areas for public enjoyment. It would not restrict access to the area; it would provide for new and improved facilities.

Finally, the Court of Appeal noted that its resolution of the parties' appeals on the merits compelled reversal of the Superior Court's award of attorney fees to Save Our Access.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the discussion of parking under CEQA as well as a discussion of alternatives. The decision is available online at: https://www.courts.ca.gov/opinions/documents/B303494.PDF. (James Purvis)

THIRD DISTRICT COURT ALLOWS BROWN ACT CHALLENGE BECAUSE A REVISED DEVELOPMENT AGREEMENT WAS NOT MADE AVAILABLE TO THE PUBLIC

Sierra Watch v. Placer County, ___Cal.App.5th___, Case No. C087892 (3rd Dist. Aug. 24, 2021).

The Third District Court of Appeal in *Sierra Watch v. Placer County* reversed a trial court decision finding no violation of the Ralph M. Brown Act (Brown Act, Government Code § 54950 *et seq.*) because the county failed to make a memorandum about a revised development agreement available to the public at the same time it was made available to county supervisors before a county meeting to consider the development agreement and because the revised agreement consequently made the agenda for the meeting misleading as to what agreement was to be considered.

Factual and Procedural Background

This case involves a project named the Village at Squaw Valley Specific Plan, a development on about 94 acres in Olympic Valley (formerly known as Squaw Valley). When the county released its Environmental Impact Report (EIR) for the project in 2015, Sierra Watch and the California Attorney General were among those commenting. According to the Attorney General, the EIR insufficiently analyzed project impacts from increased vehicle use in the Lake Tahoe Basin. In a follow-up November 2016 email, the Attorney General's office offered to speak with county staff about its concerns but warned that, absent additional environmental review, the Attorney General would challenge the EIR.

After receiving this e-mail, on November 9, 2016, the county posted the agenda for the upcoming meeting of its board of supervisors (Board), during which the Board would consider whether to approve the EIR and a development agreement for the project. At the same time it posted the agenda, the county also made available for public inspection the documents discussed on the agenda, including the proposed development agreement.

The same day the county posted the agenda, two deputy attorneys general met with county counsel and developer's counsel about the project. At the meeting, the two deputy attorneys general asked the county to require the developer to pay an air quality mitigation fee to the Tahoe Regional Planning Agency (TRPA). On November 14, 2016, the developer agreed with the Attorney General to pay the fee in exchange for an Attorney General agree-

ment not to sue over the project. County counsel then updated the development agreement to accommodate the agreement between the developer and the Attorney General by adding a provision requiring the developer to pay $440,862 in fees to be used for TRPA environmental improvement projects intended to reduce traffic and improve air and water quality at Lake Tahoe.

County counsel afterward, at 5:36 p.m. on November 14, 2016, e-mailed the county clerk the updated development agreement and a memorandum explaining the change and providing other information about the project. On receiving the e-mail, the county clerk placed copies of the development agreement and the memorandum in an office where the public can inspect county records—namely, the county clerk's office, which is open to the public from 8:00 a.m. to 5:00 p.m. on weekdays. At 5:42 p.m., the county clerk e-mailed the two documents to all Board members.

A few minutes before the county clerk shared the new materials with the Board, a deputy attorney general e-mailed Sierra Watch's counsel about the development. Without going into detail, she informed Sierra Watch's counsel that Squaw had agreed "to mitigate . . . the Project['s] in-basin trips as if the project were located in the basin." She also offered to talk about the new mitigation requirements, but Sierra Watch's counsel did not see the e-mail until after the Board's meeting began the following day.

The Board held its meeting the next day, November 15, 2016, which meeting Sierra Watch attended. Before the meeting began, county staff placed at a public table at the meeting copies of the memorandum and revised development agreement. Following some discussion of the revised development agreement, including the new TRPA provision, the Board voted in favor of the ordinance approving the EIR and agreement. Two weeks later, Sierra Watch sent a letter to the county alleging it had violated certain Brown Act provisions intended to ensure that local agency actions are conducted openly.

Sierra Watch claimed the county violated § 54954.2 of the Brown Act, which requires local agencies to post an agenda at least 72 hours before each board meeting containing a brief general description of each item of business to be transacted or discussed at the meeting. (§ 54954.2, subd. (a)(1).) Sierra Watch asserted the county's agenda was insufficient because it did not announce that the Board was to consider a substantive amendment to the proposed Development Agreement—namely, the addition of the TRPA-fee provision.

Second, Sierra Watch claimed the county violated § 54957.5 of the Brown Act, which requires local agencies, when distributing any meeting material to their boards less than 72 hours before an open meeting, to make that writing available for public inspection at the time the writing is distributed to all, or a majority of all, of the board members. (§ 54957.5, subd. (b).) Sierra Watch asserted the county it failed to make the memorandum and revised development agreement available to the public at the same time it was distributed to the Board members.

The county disagreed with both Sierra Watch's allegations and declined to reconsider its approvals. Sierra Watch filed a petition for writ of mandate and complaint for injunctive and declaratory relief against the county and its Board. Sierra Watch asked the trial court to nullify the Board's approval of the development agreement, grant injunctive relief, and declare that the county violated the Brown Act.

At the Superior Court

The trial court rejected Sierra Watch's claims. With respect to § 54954.2, the trial court held that the TRPA provision did not constitute a distinct item of business which needed to be separately identified on the agenda and that the development agreement did not differ radically from the previous version of the development agreement to such an extent as to make the agenda misleading. With respect to § 54957.5, the trial court found the county made the memorandum and revised agreement available for public inspection at the same time the memorandum and revised agreement was distributed to the Board members, even though the clerk's office was closed at that time.

The Court of Appeal's Decision

The Court of Appeal reversed the trial court determinations, holding that the Board's consideration of the revised development agreement, rather than the one referenced on the county's agenda, rendered the agenda misleading, and also holding that the memorandum and revised agreement were not available for public inspection because the County clerk's office

was closed. Despite the Brown Act violations, the Court of Appeal declined to vacate the county's EIR and revised development agreement approvals.

The Agenda Was Inaccurate and Misleading

The county's agenda informed the public that the Board would consider a certain development agreement, which agreement was shared at the time of the agenda. But the Board never considered that particular development agreement, thus violating § 54954.2. The situation was similar to the case of *Santa Barbara School District v. Superior Court*, 13 Cal.3d 315 (1975), in which the Court of Appeal held that a school district board's failure to consider one of the desegregation plans presented with the agenda and to consider instead a different plan violated § 54954.2. (*Id.* at pp. 335-336.)

The Court of Appeal noted that had the Board considered first the development agreement that was presented with the agenda and then moved to amend it with the TRPA provision, that would not have violated § 54954.2. Because the Board completely ignored the development agreement included with its agenda, a technical Brown Act violation ensued.

Despite holding that the agenda failed to disclose the county's intended consideration of the revised development agreement, the Court of Appeal held that the Board's approval of the EIR and revised development agreement could not be nullified because there was no prejudice to Sierra Watch. (*See, Fowler v. City of Lafayette*, 46 Cal.App.5th 360, 372 (2020) [prejudice required to nullify action taken not one the agenda].)

The Court of Appeal held that Sierra Watch's alleged harm in having too little time to review the TRPA provision was unrelated to the county's violation of § 54954.2. That is because there was no obligation to reveal the specific terms of the revised development agreement had the agenda been corrected to mention the revised development agreement.

Copies of the Late Documents Were Not Made Available to the Public at the Time of Board Distribution

When new documents concerning a meeting agenda item are made available to Board members less than 72 hours prior to the scheduled meeting, the county must make the writing available for public inspection at a public office or location that the county shall designate for that purpose. (§ 54957.5(b)(1).) However, because the memorandum and revised development agreement were placed in the county clerk's office after hours, the Court of Appeal held that they were not available for public inspection "at the time" the writing was distributed to the Board. Online posting will not satisfy the statutory requirement.

Because the Brown Act sought to avoid citizens being blindsided by government, if offices for inspection are closed, late documents should not be distributed to the Board until the offices for inspection are open. While this may delay certain measures, the need for an informed public outweighs any need to get late materials in front of the Board sooner.

Regardless of the violation of § 54957.5, the Brown Act does not provide for nullification of the action taken in violation thereof. (§ 54960(a).)

Conclusion and Implications

This opinion by the Third District Court of Appeal demonstrates that the Court of Appeal will strictly construe the provisions of the Brown Act to require disclosure of agenda items and documents to be considered. Regardless of the strict application of the Brown Act to require disclosure, where the violation is merely technical, such as the simple modification of one provision of the development agreement to provide mitigation allowed by law, the Courts of Appeal will be reluctant to provide relief unless substantial prejudice can be shown from the nondisclosure of the matter to be acted upon on the agenda. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/C087892.PDF. (Boyd Hill)

LEGISLATIVE UPDATE

This Legislative Update is designed to apprise our readers of potentially important land use legislation. When a significant bill is introduced, we will provide a short description. Updates will follow, and if enacted, we will provide additional coverage.

We strive to be current, but deadlines require us to complete our legislative review several weeks before publication. Therefore, bills covered can be substantively amended or conclusively acted upon by the date of publication. All references below to the Legislature refer to the California Legislature, and to the Governor refer to Gavin Newsom.

Coastal Resources

•**SB 1 (Atkins)—**This bill would include, as part of the procedures the Coastal Commission is required to adopt, recommendations and guidelines for the identification, assessment, minimization, and mitigation of sea level rise within each local coastal program, and further require the Coastal Commission to take into account the effects of sea level rise in coastal resource planning and management policies and activities.

SB 1 was introduced in the Senate on December 7, 2020, and, most recently, on September 9, 2021, was enrolled and presented to the Governor.

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 September 10, 2021, was enrolled and presented to the Governor.

•**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 September 8, 2021, was enrolled and presented to the Governor.

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

SB 9 was introduced in the Senate on December 7, 2020, and, most recently, on September 16, 2021, was chaptered by Secretary of State at Chapter 162, Statutes of 2021.

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 September 15, 2021, was enrolled and presented to the Governor.

•**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 September 17, 2021, was enrolled and presented to the Governor.

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 September 2, 2021, was read for a second time, amended and then re-referred to the Committee on Environmental Quality.

•**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 September 16, 2021, was chaptered by Secretary of State at Chapter 163, Statutes of 2021.
(Paige H. Gosney)

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