Volume 31, Number 2
November 2021

CALIFORNIA LAND USE™

LAW & POLICY Reporter

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FEATURE ARTICLE

IN A LANDMARK DECISION, THE COURT OF APPEAL HOLDS THAT A CITY'S DECISION TO DENY AN APPLICATION FOR A TEN-UNIT MULTIFAMILY BUILDING VIOLATED THE STATE'S HOUSING ACCOUNTABILITY ACT

By Laura Harris

The First District Court of Appeal has held that the City of San Mateo (City) violated the state's Housing Accountability Act (HAA) in denying a proposal for multi-family housing based on concerns that the project's height and scale conflicted with the City's design standards. The court held that because the design standards were subjective, rather than objective, they could not serve as a basis to deny the application. The court also upheld the HAA against challenges that it infringed upon the City's rights under the California Constitution. [*California Renters Legal Advocacy and Education Fund v. City of San Mateo,* 68 Cal.App.5th 820 (1st Dist. 2021).]

Facts and Procedural Background

The Housing Accountability Act, colloquially known as the "Anti-NIMBY" (Not-In-My-Back-Yard) law, was originally passed in 1982 with the goal of:

> . . .meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects. (Gov. Code, § 65589.5, subd. (a)(2)(K).)

It provides that local governments may only deny an application to build housing if the proposed housing project does not comply with "objective" General Plan, zoning, and design review standards. (Gov. Code, § 65589.5, subd. (j)(i).) Dissatisfied with the dearth of housing in the state, in 2017 the California Legislature added teeth to this requirement by clarifying that a housing development is deemed to comply with such objective standards if "substantial evidence…would allow a reasonable person to conclude" that it does. (Gov. Code, § 65589.5, subd. (f)(4).) The Legislature also reiterated that the policy of the state and the HAA should be interpreted in a manner to afford the fullest possible weight to the interest, provision, and approval of housing.

In 2015, a developer applied to the City to build a ten-unit, multifamily residential building on a site surrounded by single-family residences. The site is designated for high-density multifamily residential in the City's General Plan and zoning code. San Mateo planning staff reviewed the application and, after securing a few minor alterations to the proposal, concluded that the Project was consistent with the city's General Plan for multifamily dwellings and with the city's design guidelines. Staff recommended that the planning commission (PC) approve the Project.

The application came before the PC in August 2017. At the hearing, several City residents objected to the Project, opining that it was out of scale with the surrounding single-family residential neighborhood. The PC continued the hearing. Before the continued hearing, planning staff again recommended approval of the Project because it was consistent with the City's General Plan, zoning, and design guidelines.

At the continued hearing, the PC voted to deny the application, citing concerns that the building was out of scale with the single-family homes in the neighborhood. The PC directed staff to prepare findings that the Project is inconsistent with the City's

The opinions expressed in attributed articles in *California Land Use Law & Policy Reporter* belong solely to the contributors, do not necessarily represent the opinions of Argent Communications Group or the editors of *California Land Use Law & Policy Reporter,* and are not intended as legal advice.

design guidelines because it is not in scale or harmony with the character of the neighborhood, and that the building is too tall and bulky for the site. More specifically, the PC explained that there is a two-story differential between the Project and adjacent single-family dwellings, which is inconsistent with the design guidelines' requirement that there be a "transition or step in height" between the buildings.

At its next meeting, the PC adopting the proposed findings in full and voted to deny the Project. Petitioners, California Renters Legal Advocacy and Education Fund (CARLA) and a group of housing advocates, appealed. The city council upheld the PC's decision. Petitioners then brought an action seeking a writ of administrative *mandamus* on the ground that the Project's denial violated the HAA.

The trial court denied the petition, holding that the City's design guidelines were objective for the purposes of the HAA and that the City properly denied the application because the Project was inconsistent with the guidelines. The court also denied the petition on the ground that the HAA conflicted with the California Constitution. In particular, the court held that, to the extent the HAA conflicted with otherwise enforceable provisions of the City's municipal code regarding housing development, the HAA is unenforceable because it intrudes into the City's municipal affairs under the "home rule" doctrine of the California Constitution (Cal. Const. Art. IX, § 5(a)) and because it violates the prohibition on delegating municipal affairs to private parties (Cal. Const. Art. XI, § 11(a)). Petitioners moved for a new trial, which the trial court denied. Petitioners appealed.

The Court of Appeal's Decision

Application of the HAA to the City's Design Standards

The First District Court of Appeal first considered whether the City properly denied the proposed multifamily housing Project under the HAA. The appellate court explained that the "pivotal question" in its application of the HAA is whether the City's design guidelines qualify as "applicable, objective General Plan, zoning, and subdivision standards and criteria, including design review standards" that, if not satisfied, would allow the City to disapprove the Project under Government Code § 65589.5, subdivision (j)(1). The court concluded that the portions of the City's design guidelines addressing height were not objective for the purposes of the HAA.

The appellate court explained that the question of whether the design standards are "objective" within the meaning of the HAA is a question of law to which the court owes the City no deference. At the time the City denied the application, the HAA did not define the term "objective," so the court looked to the ordinary meaning of that term. The dictionary defines "objective" as "'expressing or dealing with facts or conditions as perceived without distortion by personal feelings, prejudices or interpretations.'" Along this same line, the 2020 amendments to the HAA define "objective" as:

> . . .involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official. (Gov. Code, § 65589.5, subd. (h)(8).)

The court noted that under either definition, a standard is not "objective" if it requires the use of personal judgment.

Under this lens, the First District Court held that the language in the City's design guidelines requires subjective judgment, and is therefore not objective. For example, the design guidelines provide that if building height varies by more than one story, the City may require a "transition *or* a step in height." The fact that the guidelines allow a choice in how to address the height differential shows that the standard is not entirely objective. Moreover, the terms "transition" and "step in height" are open to interpretation. For instance, some might view the placement of large trees in between buildings, or the addition of trellises, as providing a "transition" or a "step in height." Indeed, under the City planning staff's original interpretation of the design guidelines, the question was treated as one of design choice that could be resolved in a variety of ways depending on which form the designer viewed as most "compatible" with adjacent buildings. Furthermore, even assuming the design guidelines require a setback in height, they do not state how large the setback must be, in turn leaving that determination open to subjective deter-

mination. Based on these and similar considerations, the court held that the City's design standards are subjective, rather than objective, so those standards cannot be a basis to deny a housing project under the HAA.

The court further explained that its determination that the City's design guidelines are not objective is supported by subdivision (f)(4) of the HAA, which the Legislature added in 2017 to reinforce the objectivity requirement. That subdivision provides that a standard is "objective" if there is substantial evidence that would allow a reasonable person to conclude a project is consistent with the standard. Here, a reasonable person could interpret the design guidelines as allowing a "transition" comprised of trees rather than a setback in building height, or could find a sufficient setback where the building includes trellises. In fact, this is what the City's planning staff initially reasonably concluded when it originally concluded that the Project was consistent with the design guidelines and recommended that the PC approve the Project.

California Constitutional Challenges

The First District next considered whether the HAA violates the California Constitution—in particular, whether subdivision (f)(4) of the HAA violates the "home rule" doctrine for charter cities, and the prohibition on delegation of municipal functions. The court concluded that it does not.

Home Rule

The California Constitution's "home rule" provides that charter cities may govern themselves without legislative intrusion into municipal affairs. (*See* Cal. Const., Art. XI, § 5.) The courts apply a four-part test to determine whether the Legislature may exert control over a charter city's action, despite its right to home rule: 1) whether the ordinance at issue regulates a "municipal affair"; 2) whether the case presents an actual conflict between local and state law; 3) whether the state law addresses a matter of statewide concern; and 4) whether the state law is "reasonably related" to resolving the concern at issue and is "narrowly tailored" to avoid unnecessary interference with local governance. Under this test, if the court determines that the subject of the state statute is of statewide concern and that the statute is reasonably related to its resolution and not unduly broad, then the conflicting charter measure is deemed not to be a "municipal affair" and the Legislature may pass legislation addressing it.

Applying these factors to the HAA and the City's design review ordinance, the Court of Appeal held that the first two prongs were met because planning and zoning laws are a traditional municipal affair and, to the extent the City's ordinances allow the City to reject applications for housing developments based on subjective standards, the ordinances are in direct conflict with the HAA. As to the third prong, the parties agreed that the provision of housing is a matter of statewide concern. The City argued, however, that subdivision (f)(4) of the HAA does not itself address a matter of statewide concern because local governments' denial of housing projects is not the sole cause of the housing crisis. Other factors, such as high construction costs, a shortage of construction labor, and delays caused by the need to comply with CEQA, also contribute to the shortage. The court rejected this argument, explaining that the Legislature, the California Supreme Court, and the courts of appeal have all acknowledged a statewide interest in providing enough housing to meet all of California's needs. The fact that local governments' denials of housing permits are not the *only* cause of the crisis is immaterial. The question is whether the problem the Legislature is trying to solve is a statewide problem, not whether the solution is the only possible solution.

As to the fourth and final prong—*i.e.*, whether the statute is reasonably related to resolving the identified statewide concern and narrowly tailored to avoid unnecessary interference with local government—the appellate court found that the Legislature's limitation on local governments' ability to deny new development based on subjective criteria is reasonably related to providing additional housing. Furthermore, the statute is narrowly tailored in that it leaves local governments free to establish and enforce policies and development standards, as long as those standards are *objective* and do not otherwise interfere with the jurisdiction's ability to meet its share of regional housing needs. Additionally, the HAA does not bar local governments from imposing conditions on projects to meet subjective standards; the HAA only prohibits local governments from reducing a project's density or denying the project altogether based on subjective standards. The HAA also allows local governments to

deny a proposed housing project if the project would have an unavoidable adverse impact on health and safety. (See Gov. Code, § 65589.5, subd. (j)(1)(A) and (B).) Accordingly, the statute is not only reasonably related to a statewide concern, but also narrowly tailored to avoid undue interference with local control over zoning and design decisions. Therefore, § (f)(4) of the HAA does not violate California Constitution's "home rule."

Delegation of Municipal Functions

The Court of Appeal next considered whether subdivision (f)(4) of the HAA violates the California Constitution's prohibition on "delegat[ing] a private person or body power to … perform municipal functions." (Cal. Const. Art. XI, § 11, subd. (a).) The court held that, contrary to the City's arguments, the HAA does not prevent local agencies from adopting and enforcing objective land use and design standards that are consistent with their other obligations. While subdivision (f)(4) of the HAA lowers the burden to show a project is consistent with objective standards, the statute does not cede municipal authority to private persons. For example, local agencies maintain the discretion to determine whether the record contains substantial evidence that a reasonable person would find the project consistent with applicable objective standards, and the authority to impose conditions of approval on the project, provided that they do not reduce the project's density where applicable objectives are met.

The City argued that subdivision (f)(4) of the HAA would allow anyone, even the project proponent, to place evidence in the record that a project is consistent with objective standards and thereby force a local agency to approve the project. The court rejected this argument, however, because the "substantial evidence" standard provides a sufficient degree of scrutiny, such that not all self-serving evidence will support the conclusion that a project is consistent with applicable objective standards. Furthermore, subdivision (f)(4) requires that the evidence allow a *reasonable person* to consider whether the project is in conformity with the objective standards. Therefore, the statute does not require a local agency to approve a project based on the unsupported opinion of a single person, or upon evidence that a reasonable person would not find credible.

Accordingly, the court rejected the city's arguments that subdivision (f)(4) of the HAA impermissibly delegates municipal authority.

Due Process

Finally, the City argued that subdivision (f)(4) violates the rights of neighboring landowners by depriving them of an opportunity to be heard before a housing project is approved. More specifically, the City argued that subdivision (f)(4) renders local government review a useless exercise because if anyone submits evidence that the project is consistent with applicable objective standards, the project is deemed consistent and must be approved.

The court rejected the City's argument. Even assuming that due process protections apply to a municipality's determination that a project is consistent with objective standards under subdivision (f)(4), there is no due process violation. The substantial evidence standard requires evidence that is of "ponderable legal significance" and is reasonable, credible, and of solid value. Nothing in the HAA prevents neighbors from presenting evidence to the agency that the substantial evidence standard is not met. Furthermore, neighbors can also present evidence that the agency should impose conditions on the project to minimize adverse effects, or even deny the project if it would have an unavoidable and "specific, adverse impact upon the public health or safety." (Gov. Code, § 65589.5, subd. (j).) Therefore, although subdivision (f)(4) may affect which arguments carry the day, it does not deprive opposing neighbors with a meaningful opportunity to be heard.

Finally, the court returned to the history of the HAA. The Legislature has steadily strengthened the statute's requirements, making it progressively clear that the statute must be taken seriously. The reason the HAA is so strong today is because California's housing supply is in crisis. The court saw no inconsistencies with the provisions of the HAA and the California Constitution.

Conclusion and Implications

Since the Housing Accountability Act was first passed in the 1980s, California has faced statewide housing shortages that can lead to homelessness, physical health conditions, lengthy commute times, and equitable and environmental consequences. The

First District Court of Appeal's decision marks the first time an appellate court has interpreted the current iteration of the HAA, and serves as an important victory for housing advocates and the YIMBY (Yes-In-My-Backyard) movement. The opinion not only upholds the HAA as constitutional, but reiterates its directive that municipalities increase local housing supply. It also serves as a warning to California cities and counties to take the HAA's requirements seriously when determining whether to deny a housing project that is not a risk to public health and safety and only inconsistent with arguably subjective standards. Nevertheless, the opinion will likely have far-reaching implications throughout the State and efforts to address the housing crisis. The First District's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A159320.PDF.

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LAND USE NEWS

FEDERAL EMERGENCY MANAGEMENT AGENCY FLOOD RISK RATING 2.0 ROLLS OUT AS FIRST MAJOR UPDATE TO PRICING METHODOLOGY

Formally taking effect as of October 1, 2021, Risk Rating 2.0 is the first time the Federal Emergency Management Agency (FEMA) has updated its pricing methodology for flood risk since the 1970s. The pricing of rates under the National Flood Insurance Program (NFIP) has been based on relatively static measurements, emphasizing a property's elevation within a zone on FEMA's Flood Insurance Rate Map. With the implementation of Risk Rating 2.0, however, FEMA expects the new rates to more accurately reflect the risks associated with properties throughout the country.

Background

According to FEMA, Risk Rating 2.0 is designed in part to correct the problem of policyholders with properties of lower value paying rates that more accurately reflect the risk associated with homes of higher value. Whereas the traditional pricing methodology relied heavily on FEMA's Flood Insurance Rate Map, Risk Rating 2.0 models a property's risk through various considerations like the probability of inland flooding, historical storm surges, the cost to rebuild the property, historical losses, elevation, and any natural surroundings and barriers to the property.

FEMA breaks down its projections for rate changes across four categories: immediate cost reductions; increases that are $10 or less a month; increases between $10 and $20 a month; and increases of more than $20 a month. Under the new rates, FEMA estimates that Risk Rating 2.0 will result in immediate cost reductions for 23 percent of existing policies nationwide. While this means that nearly 1.2 million policies nationwide will see costs decrease, more than 3.8 million policyholders will see their rates increase.

Impacts in California

Most California policyholders will see small increases but, overall, the state should see an average policy discount of more than 10 percent. Looking closer at the state's numbers, the number of policies benefitting from a decrease in premiums will be 27 percent in California. This means that roughly 58,000 policies will have their premiums decrease under Risk Rating 2.0 once they are eligible for renewal. By contrast, 69 percent of policies will see relatively minor increases of less than $20 per month and only 4 percent of policies will see increases in premiums greater than $20 per month.

State Regional Impacts

As for the specific regions throughout the state, 4 of California's top 5 zip codes with the most NFIP policies are located in the Greater Sacramento region. In the Natomas area, just north of Downtown Sacramento, policyholders see moderate declines in their policy premiums. South of downtown in the Pocket area, however, policyholders can expect to see their premiums increase. Generally speaking, premium decreases are also expected for most of the Sacramento and San Joaquin valleys.

In the San Francisco Bay Area, premium increases are to be expected in some of the lower lying coastal areas. Conversely, properties in the foothills around the Bay will experience significant discounts. Specifically, areas like South San Francisco, Pacifica and Millbrae will see increases of about $5-7 per month, while properties in the higher up areas such as the Oakland Hills and San Ramon will benefit from decreases of more than $20 per month.

To the south, those in Malibu will see some of the largest discounts in the entire state with an average reduction in policy premiums of more than $40 per month. In the Santa Monica foothills and Hollywood Hills, policyholders can also expect relatively large decreases in their premiums. For those in the San Fernando Valley and Los Angeles Basin, however, policy premiums will be seeing modest increases.

A Phased Approach

In rolling out Risk Rating 2.0, FEMA will be taking a phased approach. In Phase 1, which began on October 1, 2021, all *new* policies will be subject to the new pricing methodology. Furthermore, existing policyholders eligible for renewal will be able to take advantage of immediate *decreases* in their premiums. For Phase 2, all policies renewing on or after April 1, 2022 will be subject to the Risk Rating 2.0 pricing methodology. In essence, current policyholders set to receive premium decreases under Risk Rating 2.0 will transition to the lower rate immediately at the first renewal of their policy. Any premium increases will transition gradually and within the existing statutory limits until the full-risk rate for the property is reached.

Conclusion and Implications

FEMA's Risk Rating 2.0 is intended as a complete overhaul to the policy pricing methodology for policyholders under the NFIP. As changes to the methodology will be affecting policies throughout the State, drastically in some cases, policyholders should familiarize themselves with how Risk Rating 2.0 will impact their own policies. With the rainy seasons—hopefully—fast approaching, those without coverage should likewise act fast in ensuring that their property is protected given that flood insurance from the NFIP normally carries a 30-day waiting period before it takes effect. For information, *see:* https://www.fema.gov/flood-insurance/risk-rating.
(Wesley A. Miliband, Kristopher T. Strouse)

CALIFORNIA PASSES THREE KEY HOUSING BILLS THIS LEGISLATIVE YEAR TO STREAMLINE CEQA REVIEW FOR CERTAIN HOUSING PROJECTS

In the current legislative year, Governor Gavin Newsom has signed over 30 bills to fight California's ongoing housing crisis by providing tools to expand the state's housing production, streamline housing permitting and increase density across the state. Some of the notable bills within this year's housing package include Senate Bills (SB) 7, 8, 9 and 10. Since taking office, the Governor has signed 16 California Environmental Quality Act (CEQA) reform bills aimed at streamlining state laws to maximize housing production. Out of the various housing bills approved this year, SB 7, 9 and 10, include CEQA streamlining for certain housing projects.

Senate Bill 7

SB 7, known as the Housing and Jobs Expansion and Extensions Act and signed by the Governor on May 20, 2021, was the first of the housing bills approved this year. It extends expedited CEQA judicial review for small-scale housing developments. Prompted by high unemployment in 2011, the Legislature enacted Assembly Bill 900, known as the Jobs and Economic Improvement Through Environmental Leadership Act, to provide streamlining benefits under CEQA for specific "leadership projects" (*i.e.* large, multi-benefit housing, clean energy, and manufacturing projects) and only "for a limited period of time to put people to work as soon as possible." AB 900 established fast-track administrative and judicial review procedures for leadership projects that met certain conditions, including the creation of high-wage, high-skilled jobs, no net additional emission of greenhouse gases (GHG), and the payment of certain costs by the project applicant. Eligible projects were entitled to immediate review in the Court of appeal—rather than Superior Court—and would be reviewed on an expedited timeframe.

Under this legislation, the Governor was required to certify that a project met these statutory criteria to qualify for fast-track status. As originally enacted, AB 900 contained no deadline for the Governor's certification of a leadership project. The statute provided a deadline for a lead agency to approve a project by June 1, 2014, and the legislation itself was set to expire on January 1, 2015, unless a later enacted statute extended or repealed that date. The statutory deadline was extended several times and in its final iteration, AB 900 required the Governor to certify a leadership project by January 1, 2020 and the

lead agency to approve the project by the sunset date, January 1, 2021.

SB 7, which was proposed by Senate President pro Tempore Toni G. Atkins (D-San Diego), extends the provisions of AB 900 through the year 2025and provides CEQA streamlining benefits to projects that were previously certified under AB 900 but that did not receive project approvals by the prior deadline of January 1, 2021. SB 7 also expands eligible housing projects by including infill housing projects with lower investment amounts than previously allowed.

SB 7 adds the following components to AB 900: 1) eligibility for infill housing development projects with investments between $15 million and $100 million (the previous threshold was $100 million and above); 2) a requirement of quantification and mitigation of the impacts of a project from the emissions of greenhouse gases with geographic restrictions for non-housing development projects; 3) a revision of labor-related requirements for projects undertaken by both public agencies and private entities, adding "skilled and trained" workforce to the existing prevailing wage requirements; and 4) authorization for the Governor to certify a project before the lead agency certifies the final Environmental Impact Report (EIR) for the project and/or an alternative described in an EIR. SB 7 requires an applicant for certification of a project to: 1) demonstrate that they are preparing the administrative record concurrently with the administrative process; and 2) agree to pay the costs of both the trial court and court of appeal in hearing and deciding a case challenging a lead agency's action on a certified project.

No AB 900 project has been overturned in court since the law was enacted, and implementation of the law and its benefits resulted in the creation of over 10,000 new housing units. SB 7 extends the provisions of AB 900 and marked the first bill of the Senate's 2021 "housing package" that targets California's ongoing housing crisis, while including an emphasis on minimization of greenhouse gases and boosting employment opportunities. SB 7 accomplishes this by tackling zoning and CEQA reforms, both of which often slow down the speed of housing projects.

Other Senate Bills

In addition to approving SB 7 earlier this year, on September 16, 2021, Governor Newsom signed additional housing bills, which included SB 9 and 10, which provide some CEQA streamlining for certain housing projects as well. SB 9, known as the California Housing Opportunity and More Efficiency (HOME) Act, provides for the ministerial approval of housing development projects that contain up to two dwelling units (duplexes) on a single-family zoned parcel, and also allows for ministerial approval of qualifying lot splits that subdivide single-family parcels into two lots, if various criteria are met. Taken together, these provisions of SB 9 allow for development of up to four housing units where only one would have been permitted, without further CEQA review. It includes provisions to prevent the displacement of existing renters and protect historic districts, fire-prone areas and environmental quality. SB 9 is being viewed by some as an effective end of single-family residential zoning within California.

SB 10, which was proposed by Senator Scott Wiener (D-San Francisco), creates a voluntary process for local governments to streamline zoning processes for new multi-unit housing near transit or in urban infill areas. SB 10 allows local jurisdictions to pass an ordinance through January 1, 2029, to zone any parcel for up to ten residential units if located in transit-rich and urban infill areas. Adoption of such an ordinance or a resolution to amend a general plan consistent with the ordinance would be exempt from CEQA, thereby providing increased ability for cities to approve upzoning without being hindered by CEQA processes and litigation related to zoning. SB 10 also allows a local jurisdiction to override voter-approved zoning for these qualifying parcels by a two-thirds vote, a provision which has already been challenged by AIDS Healthcare Foundation in a lawsuit. Further, the effects of SB 10 in streamlining CEQA for housing projects may be limited as SB 10 does not provide CEQA exemptions or ministerial approval process for the housing projects built on these upzoned parcels itself, and also prohibits by-right approvals and CEQA exemptions for projects with more than 10 dwelling units developed on one or more parcels rezoned through SB 10.

Conclusion and Implications

Housing in California remains in crisis mode with prices continuing to rise rapidly and "affordable" entry-level housing scarce. Senator Wiener has

taken on these challenges with many efforts to tackle affordable housing. CEQA is often an expensive process which inherently challenges the practicality of affordability With those bills signed into law by Governor Newsom, the state is creeping towards addressing housing woes.
(Madeline Weisman and Hina Gupta)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT VACATES JUDGEMENT REQUIRING CLEAN WATER ACT CITIZEN SUIT TO PROVE ONGOING DISCHARGE IN CASE ALLEGING MONITORING VIOLATIONS

Inland Empire Waterkeeper and Orange County Coastkeeper v. Corona Clay Co., 13 F.4th 917 (9th Cir. 2021).

The Ninth Circuit Court of Appeals, on September 20, 2021, vacated a U.S. District court's grant of partial summary judgment and jury instructions. The court found that an ongoing discharge violation is not a prerequisite to a citizen suit asserting ongoing monitoring and reporting violations.

Factual and Procedural Background

The Corona Clay Company (Corona) processes clay products at an industrial facility overlooking Temescal Creek in Corona, California. Inland Empire Waterkeeper and Orange County Coastkeeper (Coastkeeper) are two affiliated nonprofit organizations with the mission of protecting water quality and aquatic resources in Orange and Riverside counties.

Storm water discharges from Corona's industrial processing activities are regulated under a statewide general National Pollutant Discharge Elimination System (NPDES) permit (General Permit). The General Permit includes requirements to sample storm water discharges, and if the discharge exceeds specified pollutant levels, specific response actions are required.

In 2018, Coastkeeper filed a citizen suit under the federal Clean Water Act (CWA) alleging that Corona illegally discharged pollutants into the navigable waters of the United States, failed to monitor that discharge as required by the General Permit, and violated the conditions of the permit by failing to report violations. The District Court granted partial summary judgment for Coastkeeper after finding, with no dispute, that Corona had violated various requirements imposed by the General Permit and that the discharge was flowing into Temescal Creek.

On the remaining issues, the District Court instructed the jury that Coastkeeper must prove either a prohibited discharge after the complaint was filed, or a reasonable likelihood that discharge would recur. In issuing the jury instructions, the court determined Coastkeeper was required to show not only a monitoring violation, but also ongoing discharge violations to bring a CWA citizen suit.

The District Court's jury instructions asked the jury to determine two questions: First, whether Corona had discharged pollutants into "waters of the United States" and whether the discharge occurred after the complaint was filed. Second, whether the storm water discharge adversely affected the beneficial uses of Temescal Creek. The jury was also instructed to only answer the second question if it answered the first question in the affirmative. After the jury answered "No" to the first question, the court entered a final judgment in favor of Corona. Both parties appealed.

The Ninth Circuit's Decision

Standing

The Ninth Circuit first considered and rejected Corona's arguments that Coastkeeper lacked standing to bring the action. To have standing, an organizational plaintiff must have a concrete and particularized injury fairly traceable to the challenged conduct that likely can be redressed by a favorable judicial decision. The court determined Coastkeeper showed standing by sworn testimony from several members that they lived near the creek, used it for recreation, and that pollution from the discharged storm water impacted their present and anticipated enjoyment of the waterway. The court then determined that failure to provide information can give rise to an injury for purposes of standing. Coastkeeper's allegations that Corona failed to file reports required by the General Permit was an injury in fact that could support Coastkeeper's standing.

Jury Instructions

The Circuit Court next considered the District Court's conclusion and jury instructions that a CWA suit alleging monitoring and reporting violations can only lie if there are also current prohibited discharges. Under this analysis, the Ninth Circuit first considered a Supreme Court decision issued after the District Court's final judgment, which determined that a National Pollutant Discharge Elimination System permit is required when discharge flows directly into navigable waters or when there is a "functional equivalent of a direct discharge." Here, the Ninth Circuit noted that the District Court failed to ask the jury whether Corona's indirect discharge amounted to a "functional equivalent" of a discharge.

Demonstration of Ongoing Discharge Violations as Prerequisite to Citizen Suit

The Ninth Circuit then considered whether the District Court erred by requiring Coastkeeper to demonstrate ongoing discharge violations in order to bring a citizen suit alleging monitoring and reporting violations. Under current Supreme Court case law, entirely past violations which are not likely to recur cannot support a citizen suit seeking injunctive relief. In support of the District Court's decision, Corona asserted Congress left violations of monitoring and reporting requirements to regulatory agencies alone. The Ninth Circuit rejected the District Court's conclusion and Corona's assertion, reasoning that an ongoing discharge violation is not a prerequisite to a citizen suit asserting ongoing monitoring and reporting violations; the CWA allows a citizen suit based ongoing or imminent procedural violations. Because the District Court's partial summary judgement was predicated on Corona's admitted discharge and the jury instructions required Coastkeeper to prove elements not required by the CWA, the Ninth Circuit vacated the jury verdict and remanded for further proceedings in light of recent Supreme Court caselaw.

Conclusion and Implications

Because the District Court's partial summary judgement was predicated on Corona's admitted discharge and the jury instructions required Coastkeeper to prove elements not required by the CWA, the Ninth Circuit vacated the jury verdict and remanded for further proceedings in light of recent Supreme Court caselaw.

This case affirms that if a prohibited discharge into waters of the United States occurred, a Clean Water Act citizen suit can be premised on ongoing or reasonably expected monitoring or reporting violations. The court's decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/09/20/20-55420.pdf; or at: https://scholar.google.com/scholar_case?case=5623238957513399786&hl=en&as_sdt=6&as_vis=1&oi=scholarr.
(Carl Jones, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT UPHOLDS CEQA CATEGORICAL EXEMPTION FOR ONE UTILITY PROJECT BUT FINDS MITIGATED NEGATIVE DECLARATION FAILED TO EVALUATE GHG EMISSIONS FOR OTHER PROJECTS

McCann v. City of San Diego, ___Cal.App.5th___, Case No. D077568 (4th Dist. Oct. 18, 2021).

A property owner petitioned for a writ of mandate, alleging that the City of San Diego's (City) environmental review processes related to its decisions to approve two sets of projects regarding the undergrounding of utility wires violated the California Environmental Quality Act (CEQA). The Superior Court denied the petition in all respects and the property owner appealed. The Court of Appeal for the Fourth Judicial District found that the property owner failed to exhaust administrative remedies with respect to the set of projects that relied on a categorical exemption but that the Mitigated Negative Declaration (MND) prepared for the other set of projects failed to properly evaluate greenhouse gas (GHG) emissions.

Factual and Procedural Background

Over a period of decades, the City has made efforts to convert its overhead utility systems, suspended on wooden poles, to an underground system. In 2017, as part of its new Utilities Undergrounding Program Master Plan, the City set a goal of undergrounding 15 miles of overhead lines each year. Given the small scope of projects that could be completed in any one year due to limited funding, the Master Plan and accompanying Municipal Code § developed a process to manage the selection and prioritization of undergrounding projects in any given year. Following the process set forth, the city council each year approves a "project allocation" to select blocks to be completed based on the available funding. Once the allocation is approved, City staff begins its initial work, including CEQA review, for each block.

Subsequently, the City creates an "Underground Utility District" including the selected blocks for projects to be completed with that year's funding. All residents and property owners within the proposed district are mailed a notice of public hearing and a map of the proposed area for the undergrounding projects. Any member of the public may attend and comment. The City then holds a public hearing and, assuming no insurmountable issues arise, approves the creation of the Underground Utility District. A detailed design process follows, and then construction.

Plaintiff Margaret McCann filed a petition for writ of mandate, challenging the City's CEQA compliance related to its decision to approve two sets of undergrounding projects. One set was found to be exempt from CEQA and the other required preparation of a MND given that some of the sites had cultural significance for Native American Tribes. Plaintiff asserted that the significant impact on the environment that would be caused by the above-ground transformer boxes, and the projects as a whole, required the City to prepare an Environmental Impact Report (EIR) for both sets of undergrounding projects.

A few months later, McCann sought a temporary restraining order enjoining the City from engaging in any conduct (in particular, the cutting of trees) in furtherance of the undergrounding projects during the pendency of her action. The Superior Court issued the temporary restraining order and set a hearing on a request for a preliminary injunction on the same day of the merits hearing. In an opposition, the City noted that tree removal was unrelated to the undergrounding projects, and instead was part of a sidewalk repair project. Ultimately, the Superior Court denied both the writ petition and the request for a preliminary injunction. McCann appealed.

The Court of Appeal's Decision

Exempt Projects

The Court of Appeal first addressed the City's determination on the projects found to be exempt,

finding that McCann's claims regarding the exempt projects were barred because she had failed to exhaust her administrative remedies prior to challenging the City's determination in a judicial action. Specifically, the City's Municipal Code creates a procedure for interested parties to file an administrative appeal of an exemption determination before a project is submitted for approval. McCann did not avail herself of that procedure, and the Court of Appeal found that she could not now raise that issue for the first time in a legal action. The Court of Appeal also rejected McCann's argument that the notice posted in connection with the public's right to appeal the City's exemption determination violated constitutional due process principles, failed to comply with CEQA, and improperly bifurcated the CEQA process.

Mitigated Negative Declaration Projects

Regarding the MND adopted for the other set of undergrounding projects, McCann contended that the City violated CEQA by: segmenting the citywide undergrounding project into smaller projects; not defining the location of each transformer box before considering the environmental impacts of the plan; and failing to consider the significant impact on aesthetics caused by the projects. The Court of Appeal rejected these claims, finding that: each utility undergrounding project was independently functional and did not rely on any other undergrounding project to operate or necessarily compel completion of another project; McCann failed to establish that the precise location of the transformer boxes was critical to considering the environmental impacts of the project; and substantial evidence did not support a fair argument that the transformers at issue would have a significant environmental impact so as to trigger a need for an EIR.

However, the Court of Appeal agreed with McCann that the City's GHG emission findings were not supported by substantial evidence. Although CEQA provides agencies with a mechanism to conduct a streamlined review of a project's greenhouse gas emissions by analyzing a project's consistency with a broader greenhouse gas emission plan, such as the City's Climate Action Plan, the Court of Appeal found that the record showed the City never completed the required analytical process for the MND projects. Thus, the Court of Appeal found that remand was necessary to allow the City to conduct further review to determine if greenhouse gas emissions would be consistent with the City's Climate Action Plan.

Conclusion and Implications

Based on the above analysis, the Court of Appeal reversed the Superior Court judgment in part regarding the analysis of greenhouse gas emissions, but otherwise affirmed the Superior Court.

The case is significant because it contains a discussion of both categorical exemptions and MNDs under CEQA, including as well principles of exhaustion of administrative remedies. The decision is available online at: https://www.courts.ca.gov/opinions/documents/D077568.PDF.
(James Purvis)

FIFTH DISTRICT COURT AFFIRMS DENSITY BONUS LAW DOES NOT REQUIRE DEMONSTRATION THAT CONCESSIONS WILL RENDER DEVELOPMENT ECONOMICALLY FEASIBLE

Muskan Food & Fuel v. City of Fresno, ___Cal.App.5th___, Case No. F079342 (5th Dist. Sept. 27, 2021).

The Fifth District Court of Appeal in *Muskan Food & Fuel, Inc. v. City of Fresno* affirmed the trial court's decision denying a petition for writ of mandate challenging the City of Fresno's (City) planning commission (Commission) denial of petitioner's appeal of a Conditional Use Permit (CUP) issued by the director of the City's development and resource management department (Department), holding that the petitioner failed to exhaust its administrative remedies by failing to petition a City council member to file an appeal of the Commission decision.

Factual and Procedural Background

Muskan Food operates a convenience store and gas station across the street from the proposed development. Muskan Food has a Type 20 ABC license (off-sale beer and wine).

The proposed development is two commercial/retail buildings and includes gas pumps and a service station/specialty market in a portion of one of the buildings, with a Type 21 ABC license (off-sale general alcohol). The property is zoned community commercial/urban growth management.

The City's municipal code addresses alcohol sales and restricts locations for new establishments, including a restriction on locations within 500 feet of an existing alcohol establishment or in an area of high concentration of alcohol establishments as determined by the ABC. Those restrictions applied to the proposed development unless it qualified for an exception. The exception relevant to the development is when the proposed off-premises sale of alcoholic beverages is:

> . . .incidental and appurtenant to a larger retail use and provides for a more complete and convenient shopping experience.

This exception's implementation was guided by a City policy which stated: 1) specialty grocery stores enhance neighborhoods and provide specialty products not often found in general markets and 2) specialty grocery stores following the prescribed design guidelines may qualify for the exception and be allowed to sell alcohol with a conditional use permit as incidental and appurtenant to a larger retail use. The policy set forth eight design elements and defined "Specialty Food Grocer" by referring to the percentage of floor space dedicated to specialty foods (at least 70 percent), fresh food (at least 10 percent), and alcohol (not more than 5 percent).

In September 2017, the director of the Department issued a notice of intent to grant the conditional use permit application, stating that written appeals protesting the possible approval should be submitted prior to 5:00 p.m. on October 2, 2017.

The president of Muskan Food sent an e-mail to Phillip Siegrist, Planner II, of the Department, asserting that the area had a high concentration of off-sale alcohol licenses andthat adding another licensed business went against efforts to resolve the over-saturation issue. The e-mail listed eight Type 21 licensed businesses and two Type 20 licensed businesses within a one-mile radius of the Subject Property.

Siegrist prepared a staff memorandum reviewing various aspects of the proposal and recommending an approval of the application, subject to specified conditions. The memorandum found the project consisted of a combination specialty grocery store/automobile service station and general retail/office space consistent with the Community Commercial planned land use designation. The memorandum stated specialty grocery stores are permitted in the Community Commercial zone district by right, but a request by such a store to sell alcoholic beverages requires an approved conditional use permit in accordance with and subject to additional regulations for special uses regarding alcohol sales.

The memorandum found that the addition of a new off-sale alcohol license would create an overconcentration of off-sale alcohol licenses within the project's census tract. However, the memorandum also found that the City's policy allowed for an exception from the location restrictions to be made to allow alcohol sales as specialty grocery stores if the store includes eight key elements.

The memorandum recommended the approval of the application for a conditional use permit and specified the conditions of approval. On October 19, 2017, the Director of the Department signed the memorandum, approving the conditional use permit.

On the same day as the Director's approval, the Department notified Real Parties' architect of the application's approval, the conditions to be complied with before the building permits would be issued, and the other conditions imposed. Those conditions included the Specialty Food Grocer design elements and floor space allocation.

On October 19, 2017, notice of the Director's action in granting the conditional use permit application was mailed to persons who had submitted objections.

On November 3, 2017, a law firm representing Muskan Food submitted a letter to the director of the Department appealing the Director's decision to approve the CUP on the basis of the location restrictions, claiming no applicable exceptions.

On December 6, 2017, the City's planning commission held a public hearing on the appeal. The Commission received a staff report that recommend-

ed denying the appeal and upholding the Director's approval of the conditional use permit. The report stated:

> The applicant submitted enough information for staff to determine the project's compliance with the Specialty Food Grocer definition and meet all eight of the key design elements pursuant to Policy and Procedure No. C-005.

The Commission, by a vote of four to three, approved the conditional use permit, subject to the conditions of approval specified by the Department.

The next day, Muskan Food sent an email to the Mayor and to the Fresno chapter of the American Petroleum and Convenience Store Association (APCA) stating its concern with the City's approval of the conditional use permit using the Specialty Grocery Store exception and asking to raise the concern with the City. APCA raised that concern with the Mayor, attaching Muskan Food's email. Importantly, neither email asked the Mayor to file an appeal of the Commission action approving the conditional use permit.

On December 9, 2017, the mayor sent a reply e-mail to the APCA that stated:

> Thanks for the e[-]mail Andy. I'm not sure why the Planning Commission is approving ABC licenses. We need to have a meeting to discuss this. I will invite Serop Torossian the chair of the Planning Commission to be at the meeting.

On December 20, 2017, the law firm representing Muskan Food sent a letter to the Director of the Department stating that Muskan Food

> "disagrees with the [Commission] findings and decision and, therefore, hereby appeals such decision to the Fresno City Council."

On December 28, 2017, the director of the Department responded in a letter stating that Muskan Food failed to timely petition the City council or Mayor.

Muskan Food filed a petition for writ of mandate with the Superior Court of Fresno County. The petition requested a writ ordering City to set aside the Department's Director's approval of the conditional use permit (CUP)and the Commission's decision to uphold that approval.

The trial court denied the writ, finding that: 1) the planning commission identified the exception to the location restrictions being applied to the proposed project and 2) substantial evidence supported the planning commission's findings that the project met the requirements of the exception for specialty grocery stores. The trial court held that Muskan Food exhausted its administrative remedies

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's decision, but did not reach the merits of the petition, holding instead under independent review that Muskan Food failed to exhaust its administrative remedies by failing to timely petition the Mayor or City council member to file an appeal.

Exhaustion of Administrative Remedies

The doctrine of exhaustion of administrative remedies requires a party to exhaust all available administrative remedies and obtain a final administrative decision as a condition precedent for judicial review. The petitioner has the burden of proof.

Exhaustion of administrative remedies furthers important societal and governmental interests, including: 1) bolstering administrative autonomy; 2) permitting the agency to resolve factual issues, apply its expertise and exercise statutorily delegated remedies; 3) mitigating damages; and 4) promoting judicial economy.

The policy favoring administrative autonomy reflects the assessment that courts should not interfere with an agency determination until the agency has reached a final decision and avoids running afoul of the separation of powers doctrine. The policy of judicial efficiency is promoted by the exhaustion doctrine because it: 1) lightens the burden on courts in cases where an administrative remedy is available; 2) facilitates the development of a complete record that draws on administrative expertise; and 3) serves as a preliminary sifting process that will unearth and analyze the relevant evidence.

Thus, when an applicable ordinance, regulation or statute provides an adequate administrative remedy, a party must exhaust that remedy. California courts usually will not have subject matter jurisdiction over

a dispute until the administrative tribunal has made a final determination.

The Court of Appeal's Decision

Under the City's code, decisions of the Commission may be appealed to the City council by the Councilmember of the district in which the project is located or by the Mayor, either on their own initiative or upon receiving a petition from any person. Appeals must be initiated by filing a letter with the Director. The appeal must include a statement of reasons for the appeal. The Code states that failure to petition the Mayor or City council is failure to exhaust administrative remedies.

Muskan Food contended on appeal that the word "petition" in the City's code is vague. While the Court of Appeal agreed that the term "petition" in that context is not defined and is vague, the Court of Appeal held that it was not so vague as to excuse no attempt to seek appeal at all.

Muskan Food contended that its attempts to contact the Mayor and bring the issue in front of the City were enough to constitute a "petition" under the objective standard adopted by the Court of Appeal. Examining the different communications Muskan Food had with the mayor and councilmember prior to the expiration of the 15-day petition period, the Court of Appeal held that Muskan Food never indicated a desire to actually appeal the Commission's decision. Voicing displeasure with a decision is not tantamount to petitioning for appeal of that decision within the requirements of the Municipal Code. Muskan Foods attempt to directly appeal to the Department staff did not comply with the explicit statutory requirement to petition to the Mayor or City Council.

Conclusion and Implications

This opinion by the Fifth District Court of Appeal demonstrates how important it is to comply strictly with exhaustion requirements. Although the City code was ambiguous about what constituted a "petition" to the City council or Mayor to file an appeal, Muskan Food did not come right out and say it was petitioning the Mayor, and Muskan Food addressed its follow up appeal letter to the Department staff rather than as a petition to the City council or Mayor. The Court of Appeal could easily have just affirmed the trial court non-controversial decision on the merits, but it chose in this instance to emphasize that exhaustion efforts must be in particular compliance with requirements. In a different case where a determination on the merits might be a close call, a court of appeal could have determined to reach the issues on the merits and allow a little more flexibility in determining whether objectively there was an attempt to "petition" for an appeal. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/F079342.PDF.
(Boyd Hill)

FOURTH DISTRICT COURT UPHOLDS APPLICATION OF CEQA URBAN INFILL EXEMPTION TO GAS STATION PROJECT

Protect Tustin Ranch v. City of Tustin, ___Cal.App.5th___, Case No. G059709 (4th Dist. Sept. 28, 2021).

In a case filed on September 28, 2021 and certified for publication on October 26, 2021, the Fourth District Court of Appeal upheld the City of Tustin's application of the Category 32 urban infill exemption for the proposed development of a Costco gas station at an already existing Costco location. In doing so, the court rejected plaintiffs' claims that the project was on a site larger than five acres when accounting for all of the existing buildings on the site, here work would only occur in a less than three acre area. The court also rejected plaintiffs' claims that the unusual circumstances exception to the urban infill exemption applied.

Factual and Procedural Background

Real party in interest Costco Wholesale Corporation applied to build a gas station next to an existing Costco warehouse. The project site was within an already constructed shopping center located along a major commercial thoroughfare. The project included

two components, the construction of a 16 pump gas station with canopy, and the demolition of an existing tire center and adjacent surface parking. The project required a conditional use permit and design review approval. Although the gas station would only occupy approximately 2.38 acres, the original application listed the total lot size as 11.97 acres.

The planning commission approved the project with a Category 32 urban infill exemption to the California Environmental Quality Act (CEQA) after finding each of the requirements to apply the exemption were met. Specifically, the planning commission determined that the project was consistent with the city's General Plan and was within city limits on a project site of no more than five acres that was substantially surrounded by urban uses. The planning commission further determined that the project site had no value as a habitat for endangered, rare, or threatened species and could be served by all required utilities and public services. Finally, the planning commission further determined that the project would not have any significant effects relating to traffic, noise, air quality or water quality.

Members of the public appealed the planning commission's approval of the project to the city council. The city council upheld approval of the project, finding that the project site was the actual 2.38 acres where demolition and construction would occur, not the nearly 12 acre site of the entire existing building. The city council further determined that there were no unusual circumstances or other exceptions to the infill exemption that would render the urban infill exemption unavailable. The city council adopted a resolution finding the project categorically exempt from CEQA review and granted the requested approvals. The city then filed a notice of exemption.

Plaintiffs timely filed a petition for writ of mandate challenging the city's finding that the project was exempt from CEQA. Plaintiffs argued that one of the criteria required to apply the urban infill exemption, that the project site be no more than five acres in size, was not met because the original project application documents described the project site as occupying nearly 12 acres. Plaintiffs also argued that the city erroneously relied on the urban infill exemption when the project fell within the scope of the unusual circumstances exception to CEQA set forth in the CEQA guidelines.

The trial court heard the matter and denied plaintiff's writ petition.

The Court of Appeal's Decision

On appeal, plaintiffs argued the trial court's decision was erroneous for two reasons: 1) the project was too large to qualify for the urban infill exemption (*i.e.* on a site larger than five acres), and 2) the city improperly relied on the infill exemption because the project fell within the scope of the unusual circumstances exception to the infill exemption.

Infill Development CEQA Exemption

The court began by recognizing that to apply the urban infill exemption, five criteria must be met: 1) the project must be consistent with the applicable General Plan designation and all applicable General Plan policies, 2) the proposed development must occur within city limits on a project site of no more than five acres substantially surrounded by urban uses, 3) the project site must have no value as a habitat for endangered, rare, or threatened species, 4) approval of the project must not result in any significant effects relating to traffic, noise, air quality, or water quality, and 5) the site must be adequately served by all required utilities and public services.

Plaintiffs were only challenging the applicability of one of the above criteria, the size of the project site. The court noted that when a public agency makes a factual determination that a project falls within a categorical exemption, courts will apply the substantial evidence standard in reviewing the agency's finding and will not weigh conflicting evidence. Instead, the court will:

> . . .review the administrative record to see if it contains evidence of ponderable legal significance that is reasonable in nature, credible, and of solid value, to support the agency's decision.

Here, the court determined that the administrative record contained substantial evidence indicating the project site was less than five acres in size. Multiple documents in the record confirmed the size of the project site was actually 2.38 acres when including the entire area of project work including the new gas station and demolished tire center. This 2.38 acre footprint was supported by multiple technical docu-

ments, an environmental assessment form, and maps all indicating that the actual site where the project would occur. The court concluded that substantial evidence supported the city's factual determination concerning project site size.

The court then analyzed plaintiff's contention that it was improper for the city to apply the urban infill exemption because the unusual circumstances exception applied. As the court noted, CEQA Guideline 15300.2 subdivision (c) provides that it is improper to rely on an exemption shall not be applied for an activity where "there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."

Analysis under the *Berkeley Hillside* Decision

The court looked to the standards established by the state Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal.5th 1086 (2015) for guidance on the burdens and applicable standards of review for exceptions to exemptions. As the court noted in *Berkeley Hillside*, the party challenging an exemption has the burden of producing evidence supporting an exception. This may be done in two steps. First, the plaintiff can show evidence that the project is unusual because it has some feature that distinguishes it from others in the exempt class. In the second step, the plaintiff must establish a reasonable possibility of a significant effect due to that unusual circumstance.

Whether a project presents unusual circumstances for projects in an exempt class is a factual inquiry. Accordingly, when a court analyzes whether unusual circumstances exist, it will look to the approving agency as the factfinder and apply the substantial evidence standard.

If unusual circumstances exist, the court then looks to determine whether a reasonable possibility exists of a significant effect due to that unusual circumstance. At this second stage, the court applies the fair argument standard, meaning that it reviews the evidence to see if there is a fair argument of a reasonable possibility that the project will have a significant effect on the environment. If there is substantial evidence of a reasonable possibility that a project will have such an effect, the agency may not rely on the exemption even if there is evidence to the contrary.

As to the first step above, the court determined that substantial evidence supported the city's conclusion that the project was not unusual in relation to other infill development that would qualify for the exemption. As to size, the court determined that the proposed gas station was not "remarkably different" from other Costco gas station s in California. The court further found that conditions in the immediate vicinity of the project site did not give rise to unusual circumstances. Here, the project was within a major shopping center and along a major commercial thoroughfare. Substantial evidence in the record showed that the proposed gas station was in line with the characteristics of the surrounding setting.

The court noted that plaintiffs' concerns really seemed to tie into what might be uncovered if the city were to engage in further environmental review and find potential soil contamination from the project. However the court noted that:

> . . .unsupported concerns, presumptions or conjectures are not enough to force the City to proceed further down the CEQA road. A categorically exempt project, by definition, is deemed by law to not have a potentially significant effect on the environment unless the project's administrative record sufficiently demonstrates the applicability of an exception to the claimed exemption.

Here, plaintiffs did not reach the question of whether there was a fair argument of a reasonable possibility of a significant environmental effect because there was no adequate showing of unusual circumstances.

The court upheld the trial court's judgment and rejected plaintiffs' claims.

Conclusion and Implications

Protect Tustin Ranch is a helpful decision because it explains the procedural and substantive requirements that a project opponent must meet to successfully claim that a project falls within the unusual circumstances exception to an exemption. The case also demonstrates that utility of the urban infill exemption for projects in urban settings on a site less than five acres in size. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/G059709.PDF.
(Travis Brooks)

FIRST DISTRICT COURT REJECT'S LANDOWNERS' CLAIMS TO EASEMENT RIGHTS ACROSS NEIGHBORING SUBDIVISION, EFFECTIVELY LEAVING PROPERTY LANDLOCKED

Rock v. Rollinghills Property Owners Association, *Unpub.*, Case No. A160163 (1st Dist. Sept. 20, 2021).

In an *unpublished* decision filed September 20, 2021, the First District Court of Appeal upheld a trial court decision rejecting plaintiffs' various arguments that they had easement rights to travel across an adjacent subdivision to access a public roadway in Mendocino County. Plaintiffs were aware when purchasing their property that the property was landlocked with no access to a public roadway. After failing to negotiate easement rights with neighboring property owners, plaintiffs were unsuccessful in suing for such easement rights thus leaving their property landlocked.

Factual and Procedural Background

In 2002, plaintiffs purchased approximately 150 acres of land in Mendocino County with the intention of building a retirement home there. Before closing on the purchase, plaintiffs were informed that the property was landlocked without roadway access. Plaintiffs purchased the property with the apparent hope that they could negotiate an access easement from neighboring landowners. The defendants in the case were members of the owners association for a subdivision south of plaintiffs' property.

Plaintiffs' property was zoned for timber production, which the prior owner accessed by way of a logging road across an adjacent parcel to the southwest. To the south of plaintiffs' property, defendants' subdivision was approximately 530 acres in size subdivided into 25 lots. The subdivision's northern boundary abuts the southern boundary of plaintiff's property, while portions of the subdivision's southern boundary abut land owned by William Hays, who developed the subdivision in the early 1970s. In the 1970s the predecessor owner of the Hays property granted an easement across his property for the exclusive use of landowners in the subdivision. This easement provided the subdivision's sole access to public roadways. The subdivision map for defendants' subdivision, prepared in the 1970s, showed a never constructed internal roadway that passed south to north through the subdivision and terminated at the subdivision's northern boundary with the plaintiff's property.

Before purchasing their property, plaintiffs received a preliminary title report that excluded from coverage "the lack of a legal right of access to and from a public street or highway" which plaintiffs acknowledged they understood at the time. In April of 2002, plaintiffs wrote the defendant owner's association expressing an interest in obtaining an access easement across the subdivision's roads so they could access their property. The defendants considered and denied plaintiff's request. For approximately four years thereafter, plaintiffs engaged in further unsuccessful negotiations with the defendants and adjacent landowners.

Despite their failure to gain easement rights for a roadway to their property, plaintiff's applied to the county in 2011 for a permit to construct a road from the subdivision to their property. When the owner's association protested, plaintiffs withdrew their application after the county informed them they likely did not have a deeded easement for access. In 2017 plaintiff's sued the owner's association for quiet title to express easement, easement by necessity/implication, easement by prescription, easement by estoppel, equitable easement, and declaratory and injunctive relief.

Following a four day bench trial, the trial court rejected all of plaintiffs' causes of action.

The Court of Appeal's Decision

The court methodically rejected each of plaintiffs' arguments that they were entitled to easement rights across defendants' property.

No Express Easement

First the court rejected plaintiffs' claim that the final subdivision map for defendants' subdivision created an express easement across the subdivision's private roads in favor of plaintiffs' property. .

Plaintiffs argued the fact that a roadway on the subdivision map passed through the subdivision

and terminated at the subdivision's northern border meant that the map:

> . . .expressed an intent to create an easement to the property to the north because it depicts [the roadway] as ending at the subdivision's northern boundary

However, the court distinguished the instant situation from a situation where lots are connected by a roadway *within* a subdivision map. There is a well-established precedent, expressed by the California Supreme Court in *Danielson v. Sykes*, 157 Cal. 686 (1910) that presumes lots within the same subdivision have easement rights on the roadways that connect them. As the state Supreme Court noted:

> . . .when one lays out a tract of land into lots and streets and sells the lots by reference to a map which exhibits the lots and streets as they lie with relation to each other, the purchasers of such lots have a private easement in the streets opposite their respective lots, for ingress and egress and for any other use proper to a private way.

However, the principle expressed in *Danielson* does not extend to lots *outside* of a subdivision map. The court also distinguished the instant case from a situation where a private property abuts an established public street or road. In these instances, a right-of-way is "simply presumed without further inquiry." Here plaintiffs' property was not adjacent to a public right of way, but a private easement.

No Implied Easement

Plaintiffs next argued that they had an implied easement across defendants' property. Specifically, plaintiffs claimed that the only reason why a roadway would pass through defendants' subdivision and terminate at the southern boundary of plaintiffs' property was to provide plaintiffs' property with access over the subdivision to a public road. The trial court considered the evidence on this claim and determined that the roadway was identified as a future access route for the benefit of inhabitants of the subdivision and not adjacent property owners. The court found that this conclusion was supported by substantial evidence and upheld the trial court's determination.

No Easement Required by the Subdivision Map Act Or by County Code

The court also rejected plaintiffs' claim that the Subdivision Map Act and the Mendocino County Code required access to be provided to plaintiffs' property. Specifically plaintiffs pointed to a provision in the Mendocino County Code providing that:

> . . .[w]here a division of land adjoins acreage, provision shall be made for adequate street access thereto.

The court rejected this argument. Accepting plaintiffs' interpretation of the county code as requiring private parties to grant easement rights "raise a serious question about the provision's constitutionality under the Takings Clause." Taking property to benefit a private person without establishing a public purpose violates the Takings Clause. Where a statute is susceptible to two interpretations, one which will render the statute constitutional and one which will render it unconstitutional in whole or in part:

> . . .the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.

Here, plaintiffs failed to demonstrate a public purpose for their claimed easement sufficient to justify taking defendants' property rights. The court would not interpret the Mendocino County Code in a manner that would result in an unconstitutional taking.

Defendants Were Not Estopped From Denying An Easement Existed

The court also rejected plaintiff's argument that defendants should be estopped from denying an easement across the subdivision. Plaintiffs argued that defendants should be so estopped because the original owner of the subdivision:

> . . .accepted the benefits of the subdivision, a requirement of which included street access from plaintiffs' parcel to the original owner's property.

The court rejected this argument on the basis that the county agreed that the original owner was not required to build the access road, and that its purpose was to provide the *subdivision* with roadway access to the northern portion of the subdivision, not to provide access to plaintiffs' property.

No Prescriptive Easement

The court also rejected plaintiffs' prescriptive easement claims after it was established through evidence that owner's association in the subdivision had posted notices under Civil Code § 1008 at the entrance to the subdivision that right to pass through the subdivision was by permission only. By complying with § 1008 the court found that plaintiffs' could not establish an open and notorious continuous and adverse use of the purported easement.

No Equitable Easement

Finally, the court rejected plaintiffs' claims to an equitable easement. Here plaintiffs' knew that they lacked access to their property when they purchased it which was well documented in the record. This meant that plaintiffs could not claim they purchased the property with a good faith belief that an access easement existed.

Conclusion and Implications

The *Rock* decision, although *unpublished,* is helpful in that it highlights the requirements for establishing various types of easements. The case also highlights the difficulties that a purchaser of land will have establishing easement rights when the purchaser was aware at the time of purchase that no such easement rights existed. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/A160163.PDF.
(Travis Brooks)

SECOND DISTRICT COURT AFFIRMS DENSITY BONUS LAW DOES NOT REQUIRE DEMONSTRATION THAT CONCESSIONS WILL RENDER DEVELOPMENT ECONOMICALLY FEASIBLE

Schreiber v. City of Los Angeles, ___Cal.App.5th___, Case No. B303642 (2nd Dist. Sept. 28, 2021).

The Second District Court of Appeal in *Schreiber v. City of Los Angeles* affirmed the trial court's decision holding that neither California's Density Bonus Law (Government Code, § 65915) nor the City of Los Angeles' (City) implementing ordinance require an applicant to provide financial documentation to prove that requested concessions will render the development "economically feasible."

Factual and Procedural Background

This case concerns an application for a mixed-use development with retail space and a residential lobby for the ground floor and residential units above. Schreiber resides in a single-family home nearby.

Existing zoning requirements would limit the building to three stories, a height of 45 feet in the front and 33 feet in the back, a total of 40 units, and a maximum floor area of 21,705 square feet (floor area ratio [FAR] of 1.5:1). Using concessions under the Density Bonus Law, the development application was for a 75-feet tall seven story building of 54 units including five very low-income units, five moderate income units, and 59,403 square feet of floor area (FAR 4.1:1).

An initial application for 53 units (but no moderate-income units) also included a Financial Feasibility Analysis prepared by RSG, Inc. (RSG analysis). The RSG analysis included estimated development costs, net operating income, and financial feasibility. It calculated the cost per unit as $1,106,847 without the requested incentives, and $487,857 with the incentives. The City's Density Bonus Law implementing ordinance required that "off menu" waivers or modifications of development standards include a pro forma showing that off menu items are needed to make the affordable units economically feasible.

In 2016, the California Legislature amended the Density Bonus Law, preventing local government agencies from requiring a third party pro forma or feasibility analysis for Density Bonus Law concessions. A January 2017 City memorandum thus stated:

> The ability of a local jurisdiction to require special studies is eliminated unless they meet the provisions of state law. Financial pro formas and third-party reviews will no longer be required.

In response, the developer advised the City he would not be moving forward with a *pro forma* for the project.

At the City planning commission (PC) hearing, a city planner stated that:

> . . .financial pro formas, or financial analyses can no longer be considered as part of the density-bonus application.

A commissioner thanked her for the "[h]elpful clarification."

Following the hearing, the PC approved the project including the requested density bonus. It also approved two "off menu" incentives (increased floor area and maximum height), and two waivers (transitional height and rear yard setback requirements).

The PC found:

> The record does not contain substantial evidence that would allow the City Planning Commission to make a finding that the requested Off-Menu waivers and modifications do not result in identifiable and actual cost reduction to provide for affordable housing costs per State Law.

It further found:

> Granting of the off-menu requests would result in a building design or construction efficiencies that provide for affordable housing costs. The off-menu requests allow the developer to expand the building envelope so that additional affordable units can be constructed . . . . These incentives support the applicant's decision to set aside five dwelling units for Very Low Income households for 55 years as well as provide an additional five units for Moderate Income households.

Appellants filed a petition for writ of administrative *mandamus*. They alleged the PC misinterpreted the density bonus law, and its findings were not supported by the evidence. The trial court denied the petition.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court determinations under the independent review standard applicable to questions of statutory interpretation, holding that the City's Density Bonus Law implementing ordinance requirement for a pro forma or other documentation to show that off menu incentives were needed to make affordable units economically feasible was preempted by state law.

Density Bonus Law Concessions and Waivers

The Density Bonus Law requires that cities and counties allow increased building density, and grant concessions and waivers of permit requirements, in exchange for an applicant's agreement to dedicate a specified number of dwelling units to low income (at least 10 percent of the units) or very low income (at least 5 percent of the units) households for a period of 55 years or longer. The amount of density increase is based on the percentage of low or very low-income units. The Density Bonus Law also requires that the city or county grant incentives or concessions and waivers or reductions of development standards. The City adopted an ordinance to implement the statute.

Concessions (aka incentives) may include a reduction in site development standards or a modification of zoning code requirements or architectural design requirements that results in identifiable and actual reductions of affordable housing costs. The Density Bonus Law presumes that the incentives will result in cost reductions for the affordable housing. The applicant is not required to establish that cost reductions will result. Instead, the local agency must bear the burden of proof for the denial of a requested concession. Accordingly, the developer was not required to show, and the City was not required to affirmatively find, that the incentives would actually result in cost reductions.

Waivers or reductions of development standards include site or construction conditions, including, but not limited to, a height limitation, or a setback requirement. A local agency may refuse the waiver or reduction only if the waiver or reduction would have a specific, adverse impact upon health, safety, or the physical environment, would have an adverse impact on an historic resource, or would be contrary to state or federal law. The Density Bonus Law imposes no financial criteria for granting a waiver.

Financial Information Requirement

Prior to 2008, the Density Bonus Law required the applicant to show that the waiver or modification is necessary to make the housing units economically feasible, but that requirement no longer exists under the Density Bonus Law. In 2016, the Density Bonus Law was further amended to limit the documentation that can be required by a local government. The Density Bonus Law now limits documentation that can be required to reasonable documentation to establish eligibility for a requested density bonus, incentives or waivers/reductions of development standards.

Thus, a city or county is not prohibited from requesting or considering information relevant to cost reductions. The Density Bonus Law neither mandates nor prohibits the City from requiring that the applicant provide "reasonable documentation" regarding cost reductions. But a showing that an incentive is needed to make the project "economically feasible" relates to the overall economic viability of the project and is not the same as showing the incentive will result in "cost reductions." A local agency may not require information that an incentive is necessary to make the project "economically feasible" because that information does not establish eligibility for the concession.

A local ordinance is preempted if it conflicts with the Density Bonus Law by increasing the requirements to obtain its benefits. The City's implementing ordinance conflicts with the state Density Bonus Law because it requires an applicant demonstrate that an incentive is needed to make the project "economically feasible." It is therefore preempted by state law.

Conclusion and Implications

This opinion by the Second District Court of Appeal demonstrates that the Court of Appeal will strictly apply the Density Bonus Law to prevent local agencies from micro-managing developers to make sure that low-and-moderate income housing projects are economically feasible. The state's interest under the Density Bonus Law is more narrowly limited to whether or not there is substantial evidence to overcome the presumption that incentives will contribute to cost reduction of low and moderate income housing projects. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B303642.PDF.
(Boyd Hill)

THIRD DISTRICT COURT FINDS EIR FOR PROJECT FAILED TO ADEQUATELY CONSIDER CERTAIN IMPACTS TO LAKE TAHOE'S UNIQUE ENVIRONMENTAL RESOURCES

Sierra Watch v. County of Placer, 69 Cal.App.5th 86 (3rd Dist. 2021).

In a *partially-published* opinion, the Third District Court of Appeal in *Sierra Watch v. County of Placer*, reversed a trial court judgment that upheld the County of Placer's approval of a resort development project in Olympic Valley, the site of the 1960 Winter Olympics. The appellate court found that the project's Environmental Impact Report (EIR) violated the California Environmental Quality Act (CEQA) because it contained an inadequate description of the environmental setting and failed to adequately consider the project's potential air quality, water quality, and noise impacts on Lake Tahoe and the surrounding basin.

Facts and Procedural Background

In 1983, Placer County (County) adopted the Squaw Valley General Plan and Land Use Ordinance to guide development and growth within the Olympic Valley (formerly Squaw Valley) area. The 4,700-

acre area lies a few miles northwest of Lake Tahoe in the Sierra Nevada mountains.

In 2011, Real Party in Interest Squaw Valley Real Estate LLC (Squaw) proposed the first project under the general plan and ordinance—the Village at Squaw Valley Specific Plan. The Specific Plan Project would include two components that would be built over a 25-year timeframe: 1) an 85-acre parcel that would include 850 lodging units, approximately 300,000 square feet of commercial space, and 3,000 parking spaces (Village); and 2) an 8.8-acre parcel that would house up to 300 Project employees (East Parcel).

The County begun environmental review of the Project in 2012 and released a draft EIR in 2015. Petitioner, Sierra Watch, submitted comments on the draft EIR, asserting that the document failed to sufficiently consider Lake Tahoe in its discussion of the Project's environmental setting, and failed to adequately analyze and mitigate the Project's potential impacts on fire evacuation plans, noise levels, climate change, and traffic. The County released the final EIR in 2016, which included responses to comments. Six days before the County board of supervisors (Board) approved the Project, the County provided additional responses to post-EIR comments it had received. After a public hearing, the Board ultimately approved the Project with a statement of overriding considerations, which acknowledged that the Project would have some significant and unavoidable impacts, but those impacts would be outweighed by the Project's benefits.

Sierra Watch filed a petition for writ of mandate, alleging the County violated CEQA for the same reasons outlined in its comments on the EIR. The trial court rejected all of Sierra Watch's claims. Sierra Watch timely appealed.

The Court of Appeal's Decision

The Third District Court considered whether the County prejudicially abused its discretion in approving the Project. In the published portion of the opinion, the court reviewed whether the EIR sufficiently described the Project's environmental setting, and adequately considered water quality, air quality, and noise impacts.

Description of the Environmental Setting

The appellate court first considered whether the EIR's discussion of the environmental setting meaningfully addressed the Lake Tahoe Basin. Under CEQA, an EIR's description of the environmental setting must describe "the physical environmental conditions in the vicinity of the project." However, where "knowledge of the regional setting is critical to the assessment of environmental impacts," the description should also place:

> . . .special emphasis on environmental resources that are rare or unique to that region and would be affected by the project. (CEQA Guidelines, § 15125, subds. (a), (c).)

While all parties agreed that Lake Tahoe is a unique and significant environmental resource that could be affected by the Project, they disputed whether the EIR sufficiently considered the Lake, particularly with respect to the Project's water and air quality settings.

Water Quality Setting

The Court of Appeal agreed with Sierra Watch's assertion that the EIR's hydrology and water quality analysis failed to adequately describe the Tahoe regional setting. The draft EIR explained that the specific plan area contemplated by the Project would be:

> . . .located within the low elevation portion of the approximately eight square mile Squaw Creek watershed, a tributary to the middle reach of the Truckee River (downstream of Lake Tahoe).

However, in response to comments, the County explained that the Tahoe Regional Planning Agency (TRPA), which coordinates and regulates development in the Lake Tahoe Basin, tracks vehicle miles travelled (VMT) in the basin and establishes a cumulative VMT threshold in the basin. The final EIR explained that, although the cumulative VMT in the basin is nearing the maximum threshold, the Project's anticipated contribution to VMT in the basin would not exceed TRPA's threshold. In turn, the County concluded that VMT generated by the Project would not affect the lake's water quality.

The Court of Appeal rejected the County's rationale. The court noted that the County acknowledged the connection between VMT and potential adverse impacts to the Lake's water quality, including tailpipe emissions and crushed abrasives. Nevertheless, the final EIR still never discussed the importance of the Lake, its current condition, or the relationship between VMT and the Lake's clarity and water quality. Thus, the County's failure to include a more detailed description undermined its ability to assess the impacts of the Project and deprived the public of its ability to evaluate the relevance of the VMT change to Lake Tahoe, thereby rendering the EIR inadequate.

Air Quality Setting

The court found that the EIR's description of the air quality setting and baseline was more substantial, and thus, adequate. The EIR explained the applicable air quality standards and presented data on the current concentrations and sources of criteria air pollutants in the area. Sierra Watch argued that the EIR failed to discuss certain regulatory regimes, the basin's environmental carrying capacity, and current air quality conditions. The court held that Sierra Watch forfeited these arguments because they were either appropriately addressed in responses to comments, raised for the first time in Sierra Watch's reply brief, or unsupported by reasoned argument or explanation.

Air Quality Impacts

Notwithstanding Sierra Watch's forfeiture of certain air quality setting arguments, the court agreed with its claim that the EIR failed to meaningfully assess the Project's traffic impacts on Lake Tahoe's air quality. The court observed that the EIR:

> . . .provided mixed messages on the Project's potential impacts to Lake Tahoe and the basin from increased traffic.

The court reasoned that the EIR concluded the Project would not exceed TRPA's cumulative VMT threshold, but would likely exceed TRPA's project-level threshold of significance for basin traffic. Though the EIR noted that TRPA has not consistently applied any particular threshold when evaluating project-level impacts, it ultimately concluded that TRPA's thresholds were inapplicable because the Project is not located in the basin. The court found this reasoning unpersuasive because the EIR left open the question of what air quality standards actually applied to the Project. Instead, the EIR:

> . . .needed to determine whether the Project's impacts on Lake Tahoe and the basin were potentially significant—not simply summarize, and then declare inapplicable, another agency's framework for evaluating these types of issues.

The court also agreed that the EIR underestimated the Project's expected cumulative VMT in the basin by failing to consider expected VMT figures from other anticipated projects. Though the County recognized this failure after the final EIR was prepared, its "belated discussion of these issues came too late." Because these post-EIR responses acknowledged and analyzed the potential impacts from the Project's generation of additional daily VMT in the basin, they:

> . . .did not merely elaborate on and confirm the EIR's conclusions; they instead supplied critical analysis and conclusions that were initially absent from the EIR.

As such, the public was denied an opportunity to:

> . . .test, assess, and evaluate the newly revealed information and make an informed judgment as to the validity of the conclusions to be drawn therefrom.

Construction Noise Impacts

Sierra Watch asserted that the EIR failed to adequately analyze and mitigate construction noise impacts. The appellate court rejected most of Sierra Watch's arguments, but agreed that the EIR's analysis and mitigation of construction noise impacts was inadequate.

The court rejected Sierra Watch's assertion that the EIR failed to adequately disclose the duration of construction noise at any specific location of the Project. Although the EIR did not estimate the duration of construction noise for the Village parcel, it explained that that portion of the Project would be constructed over 25 years based on market conditions, and thus, it would be too speculative to identify specific noise levels for every single receptor. Because

a lead agency need not speculate about unknown project impacts in specificity, the court found the EIR's explanation persuasive, and the absence of estimates of construction to determination was not fatal to the EIR.

The court agreed, however, with Sierra Watch's assertion that the EIR failed to analyze the Project's full geographic range of noises by ignoring activities occurring farther than 50 feet from sensitive receptors. The court reasoned that a:

> . . .lead agency cannot ignore a project's expected impacts merely because they occur…'outside an arbitrary radius.'

Here, the EIR only considered impacts to sensitive receptors within 50 feet of construction—yet:

> . . .ignore[d] potential impacts to a receptor sitting an inch more distant[,] even though the noise levels at these two distances would presumably be the same.

Though the County explained that this analysis was standard practice, the court contended that an agency:

> . . .cannot employ a methodological approach in a manner that entirely forecloses consideration of evidence showing impacts to the neighboring region [and] beyond a project's boundaries.

As to the EIR's mitigation for construction noise impacts, the court largely rejected Sierra Watch's assertions. Because the EIR failed to adequately consider noise impacts beyond a certain radius, it rejected Sierra Watch's related mitigation challenge thereto as premature. The court also found their assertion that the EIR arbitrarily applied some of its mitigation measures to benefit only certain sensitive receptors lacked merit. To this end, the court rejected Sierra Watch's challenge to mitigation that required construction equipment be properly maintained and equipped with noise-reducing intake and exhaust mufflers in accordance with manufacturer recommendations. Because this mitigation contained two concrete requirements—equipment maintained in accordance with manufacturer recommendations and fitted with specified noise-reducing technologies—this mitigation measure was not improperly vague.

The court agreed, however, with Sierra Watch's claim that mitigation requiring:

> . . .operations and techniques. . .be replaced with quieter procedures where feasible and consistent with building codes and other applicable laws and regulations. . .[was too vague].

The measure's inclusion of the term "where feasible" is too vague because:

> . . .in effect, [it] only tells construction contractors to be quieter than normal when they can. Although that may be good neighborly advice, it is not sufficient as a mitigation measure.

Rather, the court held that the measure "defers until later the determination of which construction procedures can feasibly be changed and how these procedures can be modified to be quieter," but "offers no instruction on how either of these determinations are to be made." For these reasons, the measure was inadequate.

The Third District Court of Appeal thus instructed the trial court to enter a new judgment granting Sierra Watch's petition and issue a writ directing the actions the County must take to comply with CEQA.

Conclusion and Implications

The Third District Court's opinion sheds light on the fine line that agencies tread during the environmental review process, while highlighting the various considerations that must be balanced before proceeding with project approval. Foremost, where an agency has identified a rare and unique regional resource within a project's vicinity, the environmental setting should evince thoughtful and reasoned consideration of the resource and the project's potential impacts thereto. As such, an agency should not rely on disseminating post-EIR information to salvage any potential shortcomings. Similarly, because a project's boundaries are not necessarily confined, agencies should consider the extent of potential impacts beyond an arbitrary radius. Finally, mitigation that relies on performance "where feasible" runs the risk of

improper deferral. The opinion provides particularly helpful insight for practitioners in the Lake Tahoe basin who interface with the area's overlapping regulatory requirements; a copy of the decision is available at: https://www.courts.ca.gov/opinions/documents/C088130.PDF.
(Bridget McDonald)*

Editor's Note: Attorneys from the author's law firm represented Real Party in Interest Squaw Valley Real

FOURTH DISTRICT COURT DISMISSES APPEAL BY PARTIES THAT WERE NOT AGGRIEVED BY SUPERIOR COURT ENTRY OF DECLARATORY RELIEF IN CANNABIS DISPENSARY CASE

Taft v. Vargas, *Unpub.*, Case No. E076173 (4th Dist. Sept. 17, 2021).

Several parties wanting to operate retail cannabis dispensaries in the City of Jurupa Valley (City) sued the City and various other parties, including several defendants who already received permission to operate. The Superior Court issued declaratory relief, finding unconstitutional a provision in the City's municipal code relating to the process for obtaining necessary exemptions for such businesses. It denied the plaintiffs any other relief. While neither the plaintiffs nor the City appealed, several of the individual defendants who already had obtained exemptions appealed, believing the provisions at issue not to be unconstitutional. In an *unpublished* decision, the Court of Appeal dismissed the appeal, noting that the Superior Court's declaration did not take away these defendants' exemptions (or otherwise affect their rights), and it had no jurisdiction to hear an appeal in the absence of any party that was aggrieved by the Superior Court judgment.

Factual and Procedural Background

The City of Jurupa Valley's municipal code generally banned "commercial cannabis activity." In November 2018, voters in the City approved "Measure L," which added to the municipal code a new chapter that created exemptions from the ban and thereby allowed some cannabis-related businesses. Among other things, Measure L allowed for a limited number of exemptions for retail cannabis dispensaries to be issued—one per 15,000 residents of the City. Based on the City's then-current population, there could be a maximum of seven such exemptions.

Applications under Measure L were to be divided into two categories: priority and non-priority. In many ways, the requirements for each type of permit were the same. The difference was that a priority application required an original or certified copy of the applicant's initial statement by unincorporated association filed with the California Secretary of State that contained certain language and which was file-stamped on or before a certain date. Any applicant that could not include such a document would be considered a non-priority application.

The City received and approved six priority applications for exemptions to operate a retail cannabis dispensary. For various reasons, plaintiffs were precluded from filing priority applications. They sued the City and its City Manager. An amended petition added defendants, including the six individuals who had filed priority applications, as well as the entities on behalf of which they filed the applications. Ultimately, the Superior Court found that certain portions of the exemption process were unconstitutional and issued a declaration that they violated equal protection principles under even rational basis review. The Superior Court found, however, that the declaration was the only appropriate remedy and denied all other requested relief.

Neither plaintiffs nor the City or City Manager appealed. However, five of the six individual defendants who had applied for and received exemptions for retail cannabis dispensaries under the priority application process appealed. The only briefing received in the Court of Appeal was the individual defendants' opening brief; no respondent's brief was filed.

The Court of Appeal's Decision

The Court of Appeal did not address the merits of the appeal. Instead, it concluded that the appellants lacked standing to attack a judgment that was effectively in their favor. In particular, the Court of Appeal noted that the Superior Court's grant of declaratory relief did not disturb the City's approval of any exemption pursuant to the priority application process, including those granted to the appellants. The declaratory relief had no effect on appellants' rights or interests in operating their businesses as allowed by their exemptions. Other relief sought by plaintiffs that conceivably could have injuriously affected appellants was denied by the Superior Court. Thus, the judgment was effectively in appellants' favor, to the extent it affected their interests at all. Given this context, the Court of Appeal concluded that appellants therefore lacked standing to assert any claim of error in the Superior Court decision. Since no party with standing had appealed, the Court of Appeal found it lacked jurisdiction to decide the appeal and dismissed.

Conclusion and Implications

The case, although *unpublished,* is significant because it contains a discussion regarding the jurisdiction of appellate courts and when a party has been aggrieved for purposes of pursuing an appeal. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/E076173.PDF.
(James Purvis)

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 23, 2021, was approved by the Governor and chaptered by the Secretary of State at Chapter 236, Statutes of 2021.

Housing / Redevelopment

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

AB 345 was introduced in the Assembly on January 28, 2021, and, most recently, on September 28, 2021, was approved by the Governor and chaptered by the Secretary of State at Chapter 343, Statutes of 2021.

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 28, 2021, was approved by the Governor and chaptered by the Secretary of State at Chapter 345, 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 28, 2021, was approved by the Governor and chaptered by the Secretary of State at Chapter 346, Statutes of 2021.

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 28, 2021, was approved by the Governor and chaptered by the Secretary of State at Chapter 363, Statutes of 2021. (Paige H. Gosney)

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