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CONTENTS

FEATURE ARTICLE

LAND USE NEWS

REGULATORY DEVELOPMENTS

RECENT FEDERAL DECISIONS

Continued on next page

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RECENT CALIFORNIA DECISIONS

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FEATURE ARTICLE

THE THIRD DISTRICT COURT OF APPEAL FINDS A PROGRAM EIR FOR THE CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE'S STATEWIDE PEST PREVENTION PROGRAM VIOLATED CEQA

By Bridget McDonald

In an *unpublished* decision, the Third District Court of Appeal in *North Coast Rivers Alliance v. Department of Food and Agriculture* partially upheld the trial court's determination that the program Environmental Impact Report (EIR) approved by the Department of Food and Agriculture (Department) for its Statewide Plant Pest Prevention and Management Program violated the California Environmental Quality Act (CEQA). The court held that the program EIR's tiering strategy, checklist, baseline, and mitigation measures for potential significant impacts to pollinators and cumulative impacts to impaired water bodies were inadequate. The appellate court further held that Public Resources Code § 21108 requires the Department to file a notice of determination when it approves or decides to carry out an activity under the program EIR, including when the Department concludes that no new environmental document is required under CEQA. [*North Coast Rivers Alliance v. Department of Food and Agriculture*, *Unpub.*, Case No. C086957, (3rd Dist. Oct. 15, 2021).]

Factual and Procedural Background

The California Department of Food and Agriculture is tasked with preventing the introduction and spread of injurious plant pests. The Department's pest prevention and management activities are covered by pest-specific CEQA documents. In 2014, the Department implemented a Statewide Plan Pest Prevention and Management Program for which it certified a program EIR that provided a consolidated set of management practices and mitigation measures. The EIR provides an overarching environmental analysis of reasonably foreseeable activities to be carried out under the program. The EIR concluded that the Program would have significant environmental effects, and therefore, adopted a statement of overriding considerations.

Two groups of petitioners—1) North Coast Rivers Alliance, Pesticide Free Zone, Inc., Health and Habitat, Inc., Californians for Alternatives to Toxics, and Gayle McLaughlin (collectively, the NCRA petitioners), and 2) Environmental Working Group, City of Berkeley, Center for Food Safety, Pesticide Action Network North America, Beyond Pesticides, California Environmental Health Initiative, Environmental Action Committee of West Marin, Safe Alternatives for Our Forest Environments, Center for Biological Diversity, Center for Environmental Health, Californians for Pesticide Reform, and Moms Advocating Sustainability (collectively, the EWG petitioners)—sought writs of mandates challenging the program EIR.

The trial court ultimately ruled in petitioners' favor on several issues and granted their request for peremptory writs of mandate. The trial court ordered the Department to set aside its certification of the program EIR and addenda thereto, and rescind its approval of the Program. The trial court further enjoined the Department from engaging in chemical activities control or eradicate pests under the Program, except those authorized in CEQA documents independent from the program EIR, until the Department certifies an EIR that corrects the identified CEQA violations.

The Department appealed the trial court's decision, and the EWG petitioners cross-appealed. On appeal, the Department asserted that the program EIR's tiering strategy and checklist complied with CEQA requirements for assessing whether an activity

carried out under the Program is adequately examined in the EIR; the Department need not file a notice of determination when it approves or decides to carry out an activity under the Program; the EIR properly incorporates ongoing activities into its baseline and the baseline need not include unreported pesticide use data; biological and water quality mitigation measures were satisfactory; the EIR's discussion of organic and no pesticide alternatives was adequate; the addenda to the EIR properly relied on the contested biological and water quality mitigation measures; and the trial court's injunction was unsupported by necessary findings. Both the Department and the EWG petitioners challenged the trial court's ruling regarding the program EIR's discussion of potentially significant impacts to certain species and impacts to water bodies. Separately, the EWG petitioners also argued that the program EIR improperly characterized certain program features as mitigation measures, and that the project description was inadequate.

The Court of Appeal's Decision

The Court of Appeal reviewed the Department's decision under the prejudicial abuse of discretion standard. Under this standard, the court presumes the program EIR is adequate and reviews the sufficiency of the document in light of what is reasonably foreseeable, looking not for perfection but for adequacy and full disclosure. As such, the NCRA and the EWG petitioners bear the burden of proving that the program EIR was legally inadequate or that insufficient evidence supports its conclusions, thereby prejudicing informed decisionmaking.

The Program EIR's Tiering Strategy

CEQA encourages the tiering of EIRs whenever feasible. Under this method, a program EIR provides overarching coverage of general matters and environmental effects, while subsequent EIRs or CEQA documents are prepared for specific activities undertaken later. When an agency carries out a site-specific activity pursuant to the program EIR, it should use a written checklist to document its evaluation of the site and determine whether the activity's environmental effects were adequately addressed in the program EIR or whether additional environmental documentation is required to assess potential significant effects not previously studied. If the agency determines that the activity is within the scope of the program and would have no new effects or corresponding mitigation, the agency may approve with project with no new environmental document. This determination need not be made in the public process.

Here, the program EIR adopts a tiering strategy and checklist via three parts: A, B, and C. Under Part A, the "yes" and "no" questions do not ask whether the program EIR discusses a proposed activity's potentially significant effects on the environment at the site where the activity will occur. Part B also does not require such a determination. Part C requires an assessment of whether the proposed activity will result in significant effects that were not considered in the program EIR, however, the decisionmaker is only directed to Part C if the responses to the questions in Part A are "no." Though the Department argued that staff must conduct site assessments pursuant to best management practices, the tables in Part B do not require a site assessment for most Program activities, and staff is not required to assess whether the proposed activity would have significant impacts at a particular site, apart from that analyzed in the Program EIR.

For these reasons, the Court of Appeal held that the program EIR's tiering strategy and checklist violate CEQA because they permit the Department to carry out a proposed activity without determining whether the proposed activity would have more significant or different potential environmental effects than those covered in the program EIR, and thus, whether additional CEQA documentation must be prepared.

The Notice of Determination—Public Resources Code § 21108

Public Resources Code § 21108 provides that a state agency must file a notice of approval or determination with the Office of Planning and Research when that agency approves or determines to carry out a project under CEQA. Under the statute's reading, the obligation to file a Notice of Dermination is not limited to a new or separate project, and does not preclude subsequent activities undertaken under a program EIR.

In light of this, the Court of Appeal held that, based on the language of § 21108, when the Department approves or decides to carry out an activity that falls within the scope of the Program and

concludes that no new environmental document would be required because the activity's significant environmental effects were adequately addressed in the program EIR, the Department must comply with § 21108, subdivision (a) by filing a Notice of Determination (NOD) or Notice of Availability (NOA). This is consistent with the Supreme Court's holding in *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors*, 48 Cal.4th 32, 54–56 (2010), which determined that a NOD must be filed when an agency determines to carry out an activity within the scope of a program EIR.

The Program EIR Baseline

The baseline for environmental analysis encompasses the existing conditions of the environment at the time the analysis was performed. As such, impacts of an existing project in the baseline is consistent with CEQA when a project is ongoing. While the agency enjoys the discretion to set the requisite baseline, its determination must be supported by substantial evidence.

The EWG petitioners and the trial court contend that the program EIR fails to specify the ongoing activities that are included in the baseline. The appellate court noted that the Department explained that the program EIR considers ongoing activities as part of its environmental baseline and ongoing activities have been previously subject to prior CEQA review and documentation. For these reasons, the court concluded that the program EIR adequately explains which ongoing activities are part of the environmental baseline.

Nevertheless, the appellate court agreed with the EWG petitioners that the baseline significantly understates existing pesticide use. Although it was proper for the Department to disclose that it could not determine the amount of unreported pesticide use in the program EIR and explain its reasoning, the Department still conceded that only one-third of pesticide active ingredients sold and reported in a given year is reported. Therefore, the missing two-thirds of reported ingredients is a significant portion of pesticide use that is not included in the baseline. In turn, the baseline cannot be regarded as an accurate description of the existing physical conditions or a reliable assessment of the environmental consequences of the Program.

The Mitigation Measures for Impacts to Biological Resources

The Court of Appeal overturned the trial court's finding that the mitigation measure for impacts to special-status species was inadequate because it improperly deferred formulation of a treatment plan to minimize or avoid substantial adverse affects. The Court of Appeal agreed with the Department that the proposed treatment plan was sufficient for mitigation because it includes site-specific measures that cannot be formulated until the time of specific project approval. The measure sets forth a series of steps that the Department must take to formulate the treatment plan, and thus commits the Department to mitigating impacts before treatment begins.

The Court of Appeal also agreed with the EWG petitioners that the program EIR fails to mitigate potential significant adverse impact son bees. The EIR disclosed that the use of pesticides for Program activities could harm bees, which are non-special-status pollinators, but failed to implement any mitigation measures for such potentially significant impacts. Though the Department explained that it would implement avoidance and minimization measures discussed in the program EIR, the appellate court concluded that the program EIR did not explain how management practices would minimize potentially adverse impacts to bees. Thus, the departments' statement in the program EIR that implementation of the enumerated measures would reduce or avoid potential impacts on bees, without supplemental facts or analysis, was inadequate.

The Mitigation Measures for Impacts to Water Quality

The appellate court upheld the trial court's determination that the mitigation measure for cumulative water quality impacts does nothing to reduce the significance of potential impacts to impaired waterbodies. The measure requires the Department to determine whether a treatment location contains an impaired body of water before conducting a treatment, and must implement the Program's management practices during the activity when an impaired waterbody is present. However, because the Program management practices are a feature of the Program, the EIR requires the Department to implement such practices during Program activities, regardless of the

presence of impaired waterbodies. Accordingly, the mitigation measure is not a "mitigation measure" because it merely requires compliance with a preexisting feature of the Program. To this end, the measure fails to mitigate potential cumulative significant impacts from discharges to impaired waterbodies, even though it recognizes that Program activities may contribute additional pesticides that result in additional impacts.

The Court of Appeal also found that the Department failed to provide any facts or substantial evidence to support its assertion that activities under the Program would not have any cumulative impacts on impaired surface waters. Though the EIR concluded that the Program's management practices would result in indetectable amounts of pesticides in impaired water bodies, the Department did not provide any facts or data to support this assertion. To this end, the EIR conceded that chemicals discharged under the Program could considerably contribute to impaired conditions, thereby resulting in a cumulative impact. Therefore, its conclusion that no cumulative impacts would occur was not only contradictory, but lacked evidentiary support in the record.

Cumulative Impacts

Finally, the Court of Appeal agreed with the trial court that the program EIR's cumulative impacts analysis was inadequate. While the EIR recognized that cumulative risk to ecological receptors and human health from Program activities would depend upon the type, location, and extent to which a pesticide is used, the EIR fails to describe these factors in any sort of detail. As an example, the court identified past, existing, and future pesticide use activities managed by the Department and other agencies in the geographic range of the Program, but did not specify the application methods involved, treatment areas, or quantities and concentrations of pesticides applied. As such, the EIR did not contain information from which the public and the Department could determine whether any potentially adverse environmental impacts would be cumulatively considerable when added to those other pesticide programs.

Conclusion and Implications

The Third District Court of Appeal's opinion may be *unpublished* for now, but provides a succinct analysis of numerous claims that tackle a sweeping program EIR. The opinion sheds light on the requisite standards that agencies must consider in preparing a program EIR. As evidenced by the decision, agencies should tread cautiously in the amount of detail and information they include in a program EIR, for failure to include enough pertinent information may render the EIR inadequate under the California Environmental Quality Act. As such, agencies should take extra care to ensure that all available pieces of information are adequately considered and analyzed, and mitigation measures are sufficiently specific so as to not defer mitigation. The court's opinion is available at: https://www.courts.ca.gov/opinions/nonpub/C086957.PDF.

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LAND USE NEWS

STATE OF DROUGHT EMERGENCY EXTENDED TO ALL 58 COUNTIES IN CALIFORNIA AS LACK OF PRECIPITATION PERSISTS AND CONSERVATION EFFORTS FALL FLAT OF GOALS

With the current drought still appearing to have no end in sight, California Governor Gavin Newsom, on October 19, 2021, issued a proclamation extending the drought emergency statewide and further urging Californians to step up their water conservation efforts.

Voluntary Conservation Efforts

Back in July, Governor Newsom issued an executive order imploring Californians to voluntarily reduce their water use by 15 percent as compared to 2020 in order to protect the State's water reserves and complement ongoing local conservation mandates. Despite Governor Newsom's pleas, Californians reduced their water use at home by a meager 1.8 percent statewide in July compared to last year's water use. Since then, these numbers have certainly increased, with August's report indicating an average conservation of about 5 percent statewide.

Leading this conservation effort has been the north Coast region, reducing water use by 18.3 percent compared to last year's figures, with the San Francisco Bay Area and Sacramento River regions following at 9.9 percent and 8.1 percent reductions in water use, respectively. On the other side of the coin, the South Coast region—which houses over half of the State's population—was only able to achieve a 3.1 percent reduction in water use from last year.

Statewide Proclamation of Emergency

As a part of Governor Newsom's Statewide proclamation of a drought emergency, he acknowledged that:

> . . .sustained and extreme high temperatures have increased water loss from reservoirs and streams, increased demands by communities and agriculture, and further depleted California's water supplies.

With that said, the Governor reiterated that:

> . . .the most impactful action Californians can take to extend available supplies is to re-double their efforts to voluntarily reduce their water use by 15 percent from their 2020 levels.

Primarily, the Governor's proclamation adds the eight counties not previously included in the drought state of emergency: Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Francisco and Ventura. With the lackluster conservation figures reported for the South Coast region in August, it immediately stands out that the counties of Los Angeles, Orange, San Diego, and Ventura all lie within this region, along with portions of San Bernardino and Riverside counties.

In addition to the inclusion of the remaining counties as being in a state of drought emergency, the proclamation also requires local water suppliers to implement water shortage contingency plans that are responsive to local conditions and prepare for the possibility of a third dry year. Noting that long-term weather forecasts for the winter rainy season, dire storage conditions of California's largest reservoirs, low moisture content in native vegetation, and parched soils magnify the likelihood that drought impacts will continue in 2022, the Governor's proclamation emphasizes that we are not out of the woods yet even with the winter months arriving.

Another notable inclusion in the Governor's proclamation is the grant of authority to the State Water Resources Control Board to adopt emergency regulations as needed to supplement voluntary conservation by prohibiting certain wasteful water practices. Among such "wasteful water practices," the proclamation includes the use of *potable* for: water for sidewalk and building washing; the individual private washing of vehicles; irrigation of ornamental land-

scapes including turf during and within 48 hours after at least a quarter inch of rainfall; and for decorative fountains or the topping-off of decorative lakes and ponds.

Conclusion and Implications

With the rest of the state being brought under the umbrella of the drought emergency, the Governor continues to stress that this is a statewide problem necessitating statewide response. Furthermore, this statewide proclamation has since been complemented by the Metropolitan Water District, which declared a regional drought emergency shortly after, calling on local water suppliers to implement all conservation measures possible to reduce usage. This regional proclamation is a huge follow up to the Governor's statewide proclamation as MWD manages water deliveries to 26 agencies in six counties, including the aforementioned Los Angeles, Orange, San Diego, Riverside, San Bernardino, and Ventura counties. For more information on the proclamation, *see:* https://www.gov.ca.gov/2021/10/19/governor-newsom-expands-drought-emergency-statewide-urges-californians-to-redouble-water-conservation-efforts/; *and see:* https://www.gov.ca.gov/wp-content/uploads/2021/10/10.19.21-Drought-SOE-1.pdf. (Wesley A. Miliband, Kristopher T. Strouse)

FORT BRAGG LAUNCHES NEW DESALINATION SYSTEM AS DROUGHT RESPONSE WITH HELP FROM THE STATE WATER RESOURCES CONTROL BOARD

The current drought has taken its toll on many communities throughout California, but for the residents of Fort Bragg, a new desalination-reverse osmosis system could help ease the impacts the drought has had on the north coast city.

Background

The City of Fort Bragg's (City) primary water source comes from the Noyo River, the largest of the City's three surface water sources that serves the nearly 3,000 customer connections in the area. Suffering a similar fate as the Sacramento-San Joaquin River Delta, however, the Noyo River has suffered from increased saltwater intrusion as a result of lowered flows at the river's mouth as a result of the drought. This summer, in fact, flows in the Noyo reached such a low level that Fort Bragg's water system was considering pulling from its emergency reservoir to maintain a sufficient supply for the area's residents. Despite the grim situation the City was facing, it instead sought to utilize desalination to extract more drinking water supplies from the river, requesting emergency funding from the State Water Resources Control Board (SWRCB or State Water Board) to do so.

The Project and Funding

Working together with the SWRCB, the City's initial application for funding was approved in May 2021, and thanks to expedited approvals through the State Water Board's Emergency Drinking Water Program, the City and the SWRCB were able to have the desalination unit delivered by September 24 with testing the following week.

While the speed in which the SWRCB and the City were able to get the desalination up and running is obviously an impressive enough feat, the State Water Board also funded 100 percent of Fort Bragg's grant request, totaling $691,796. Using the funding and assistance from the State Water Board, the City was able to get the desalination-reverse osmosis system up and running with the additional support of a new shallow groundwater well treatment system that can produce an 57,000 gallons of water per day, providing the City with a much needed boost to its current supplies.

Fort Bragg's new desalination unit is designed to release desalinated water into a raw water pond that flows into the City's existing full-sized treatment plant. Mounted on a concrete skid, the unit can produce 200 gallons a minute of desalinated water. Although the unit has a maximum running time of

12 hours per day, the unit is capable of processing up to 144,000 gallons in a 24-hour period when factoring in the run time restrictions.

Perhaps as a gage of the desalination plant's success, in late October 2021, and *after* the recent state wide drought proclamation by Governor Newsom, the city council passed a resolution rescinding the Stage 2 Water Warning and lifting all mandatory water conservation restrictions within the Fort Bragg water service area. (*See:* https://www.mendocinobeacon.com/2021/11/01/fort-bragg-city-council-lifts-all-water-conservation-restrictions/)

Commenting on the project, Joe Karkoski, deputy director of the State Water Resources Control Board's Division of Financial Assistance stated:

> Fort Bragg came to us with a creative solution, and our team worked with them to address any obstacles to making it happen quickly. . . .Expedited approvals through our Emergency Drinking Water Program allow us to help people in communities like Fort Bragg who are struggling with drought impacts.

Conclusion and Implications

The impact this new desalination system will have on the City of Fort Bragg is undeniable and helps the City work towards a more reliable water system, but the City's project may have big implications throughout the state. The State Water Resources Control Board has worked to fund countless drought assistance projects for other cities, water systems, and households throughout the state to repair or replace wells, provide hauled or bottled water, install point-of-use treatment systems, conduct well testing and provide technical assistance. When push comes to shove, the State Water Resources Control Board and the City of Fort Bragg seem to have proven that these drought assistance programs can also be conducted in an expedited timeframe. Within the span of just four months, for example, the City of Fort Bragg was able to have its initial application approved and a desalination unit delivered and ready to use only a few weeks later.

The timeline in which Fort Bragg was able to receive the much-needed aid provided by the State Water Resources Control Board may be the exception and not the rule, but it at least shows that the State Water Board is capable of working together with local water systems to quickly resolve problems brought on by the drought. For more information, *see:* https://www.waterboards.ca.gov/press_room/press_releases/2021/pr10122021-fort-bragg-desalination.pdf. (Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

CALIFORNIA PROPOSES SETBACK REQUIREMENT FOR NEW OIL AND GAS WELLS—HOW DOES IT MEASURE UP?

On October 21, 2021, the California Department of Conservation's Geologic Energy Management Division (CalGEM) released a draft regulation that would prohibit new oil and gas wells and facilities within 3,200-feet from homes, schools, hospitals, and other sensitive locations (https://www.conservation.ca.gov/calgem/Documents/public-health/PHRM%20Draft%20Rule.pdf) If approved, California's setback requirement would become the nation's largest statewide buffer zone between oil wells and communities. Colorado currently has the nation's largest setback requirement from oil wells as 2,000 feet; but it has several exceptions. Therefore, as proposed, California's setback requirement is significantly larger than Colorado's and lacks exceptions. As California continues the rulemaking process, it is valuable to see how the rule compares to the nation's current most stringent buffer zone.

Background

A 2017 study approximates that 17.6 million people in the United States live within one mile of an oil or gas well. (Eliza Czolowski et al, *Toward Consistent Methodology to Quantify Populations in Proximity to Oil and Gas Development: A National Spatial Analysis and Review*, Environmental Health Perspectives (Aug. 23, 2017), https://doi.org/10.1289/EHP1535.) In October 2021, CalGEM's scientific advisory panel, organized to inform its setback requirement rulemaking released responses to CalGEM's questions (hereinafter Panel Responses to CalGEM) for developing setback regulations, and found that living near oil and gas wells may increase certain health risks, including increased risk of respiratory disease, cancer, and reproductive harm (https://www.conservation.ca.gov/calgem/Documents/public-health/Public%20Health%20Panel%20Responses_FINAL%20ADA.pdf)(See Panel Responses t o CalGEM, at p. 1-11.) However, the scientific advisory panel also concluded that adequate setback requirements (also referred to as buffer zones) that establish minimum distances between oil and gas wells and locations that support human activities or natural ecosystems, can operate to protect the health and safety of communities most directly affected by oil and gas operations, and minimize these adverse health impacts. (*See*: Panel Responses to CalGEM, at p. 12-13.) While there is no consensus on the appropriate distance for protective setbacks from oil and gas operations; the panel's research showed that studies consistently demonstrate evidence of harm at distance less than one kilometer (approximately 3,200 feet) from oil and gas wells.

In absence of a federal setback requirement, some municipalities and states have imposed their own setbacks. Most major oil producing states have a setback requirement, including Texas, Colorado, and New Mexico. While California state law declares that any well drilled within 100 feet of a property line or public road a *de facto* nuisance; California is currently the only oil producing state without a statewide setback requirement. As such, in 2019, Governor Gavin Newsom directed CalGEM to strengthen health and safety protections for communities near oil and gas facilities. CalGEM spent two years developing the proposed setback regulations and accompanying proposed regulations, which include more protective pollution control measures for existing oil and gas wells and facilities. As California continues the rulemaking process, provided below is a comparison of how California's draft regulations compare with Colorado's rules for buffer areas for new oil and gas well regulations.

Colorado's Setback Requirement

In April 2019, Colorado approved Senate Bill (SB) 19-181, which overhauled the state's oil and gas well regulations. (Colo. Rev. Stat. Ann., § 34-60-102(1) (West).) In November 2020, as per the SB 19-181 requirements, Colorado's Oil & Gas Conservation Commission (COGCC) approved new rules for oil and gas well, including adoption of a 2,000-foot buffer zone between new wells and homes, school, and other occupied building. (*See*: COGCC Rule 604; https://cogcc.state.co.us/documents/reg/Rules/LAT-

EST/Complete%20Rules%20(100%20-%201200%20Series).pdf) This 2,000-foot buffer was significantly larger than any other statewide buffer zone in the country.

Although Colorado's setback requirement is regarded as the most stringent in the nation, there are a series of practicable exceptions to the requirement. The exceptions allow operators to drill as close as 500 feet from homes, but they do not apply to schools. (*See:* COGCC Rule 604.) Operators can seek informed consent from tenants or property owners to drill within the buffer zone. (*Id.* at Rule 604(b)(1).) Operators can also drill within the buffer zone if the well is located within an approved Comprehensive Area Plan that organizes multiple drill sites. (*Id.* at (b)(2).) Additionally, the drill pad may be located in the buffer zone so long as the wells, tanks, and compressors are 2,000-feet from homes. (*Id.* at (b)(3).) Lastly, COGCC can allow an exception to the setback requirement if the conditions of approval will provide substantially equivalent protections. (*Id.* at (b)(4).)

In addition to the setback requirement for new wells, COGCC also approved more protective regulations for existing wells that include tougher protections for air quality and wildfire and more stringent requirements for well construction.

California's Proposed Setback Requirement

CalGEM released detailed draft rules for protection of communities from health and safety impacts of oil and gas production operations, including a proposal of requiring a 3,200-foot setback for new oil and gas wells from homes, schools, hospitals, nursing homes, and other sensitive locations before approving any Notice of Intention to drill a new well with a new surface location. (Proposed Cal. Code Regs., tit. 14 (hereinafter Proposed Rules), § 1765.)

It is worth noting that the proposed 3,200 feet buffer zone is notably larger than what other states have instituted, including nearly a quarter of a mile larger than Colorado's 2,000 feet buffer zone. But the California's proposed setbacks are based on CalGEM's scientific advisory panel's recommendations after a review of epidemiological studies relevant to oil and gas production. Additionally, unlike Colorado's setback requirement, California's Proposed Rules lacks flexibility and exceptions. The only exception to the 3,200-foot setback requirement is when it is necessary to drill a well to actively alleviate a threat to public safety (for instance, to relieve underground pressure). (Proposed Rules, § 1765.)

The Proposed Rules also require approval and implementation of a Leak Detection and Response Plan by an operator of an existing wellhead or other production facility located within the setback mitigation area; and within two years of the rules' effective date, the operators shall stop production and injection operations within the setback mitigation area where a Leak Detection and Response Plan is not fully implemented. (Proposed Rules, § 1766.) The Proposed Rules also propose adding vapor venting prevention systems (and the requirements for such systems) for all permanent and temporary equipment used for oil and gas production that are located within the setback mitigation area. (Proposed Rules, § 1766.1.) The Proposed Rules further impose sound, lighting and dust control measures, and provide for gas and water quality sampling requirements for oil and gas production facilities and equipment located within the setback mitigation area. (Proposed Rules, §§ 1766.3–1766.7.)

In addition to the above requirements, the Proposed Rules also require that prior to commencing any work that requires a Notice of Intention under Public Resources Code § 3203, the operators shall notify the "property owners and tenants within a 1500-foot radius of the wellhead or within 500 feet of the surface representation of the horizontal path of the subsurface parts of the well in writing," and "offer to sample and test water wells or surface water on their property before and after drilling;" with the requirements for any water sampling and testing set forth in the Proposed Rules. (Proposed Rules, § 1766.2.) Prior to commencing drilling, the operator shall provide CalGEM with documentation of the effort to identify and notify property owners and tenants. (Proposed Rules, § 1766.2(c).)

Conclusion and Implications

California's Proposed Rules are still in the early stages of the rulemaking process. There are ample opportunities for interested parties to get involved in the rulemaking process and help shape California's overhaul of oil and gas regulations. CalGEM is taking public comment on the Proposed Rules through December 21, 2021, and details for submitting comments can be found in the Notice of Proposed rule-

making: (https://www.conservation.ca.gov/calgem/Documents/public-health/PHRM%20Notice%20of%20Public%20Comment%20Period%20and%20Workshop.pdf)

After the public comment period ends, CalGEM will conduct an in depth economic analysis and submit the Proposed Rules to the Office of Administrative Law for another process of receiving public comment and refinement.

As noted above, California's proposed setback requirement is significantly larger than Colorado's and lacks exceptions and flexibility. However, CalGEM is in the early rulemaking process and the rule may still change and flexibility may still be added to the setback requirement as interested parties continue to work with CalGEM in the rulemaking process. However, some see that the Proposed Rules send a strong message that California intends to pass strict oil and gas regulations.
(Breana Inoshita, Hina Gupta)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT UPHOLDS DISTRICT COURT'S REFUSAL TO GRANT INJUNCTION FOR TAKINGS CLAIMS ARISING FROM STATE REGULATION OF AUTOMOBILE BUSINESS SOFTWARE

CDK Global LLC v. Brnovich, ___F.4th___, Case No. 20-16469 (9th Cir. Oct. 25, 2021).

In a decision filed on October 25, 2021, the U.S. Court of Appeals for the Ninth Circuit upheld a U.S. District Court decision to deny a preliminary injunction challenging an Arizona law requiring makers of auto dealer software to allow dealers and third parties access to share the information input by auto dealers into the software. Plaintiffs in the case alleged that the Arizona law violated the Takings Clause of the United States Constitution by effectuating both a *per se* and regulatory taking under a long line of takings cases developed in the land use context. The decision highlights courts' reluctance to extend Takings Clause protections to claims of government intrusion or regulation in relation to personal and not real property.

Factual and Procedural Background

To manage their operations, car dealers use software known as a "Dealer Management System" (DMS). A DMS is essentially a database that contains information about a dealer's customers, vehicles, accounting, parts, and services. Some of this data is sensitive and includes client social security numbers and credit history.

Plaintiffs in the case were technology companies that license their DMS software to dealers. Plaintiffs previously allowed dealers to share access to the DMS with third-party data integration companies that would extract a dealer's data from the DMS and reformat it for use in the dealer's other software applications. However, in 2017 plaintiffs began to prohibit this practice of accessing and sharing data from DMSs "as necessary to protect its intellectual property rights and ensure robust system performance and security."

In 2019, the Arizona Legislature enacted a statute to ensure that dealers maintain control over the data they input to DMS servers. The 2019 law included two relevant provisions. The first prohibited DMS providers:

> . . .from taking any action by contract...or otherwise… to limit a dealer's ability to protect, store, copy, share or use data the dealer has stored in its DMS.

The second required DMS providers to adopt and make available a standardized framework for exchange, integration, and sharing of data with authorized integrators.

Plaintiffs sued the State of Arizona for declaratory and injunctive relief asserting a wide range of claims including violations of the federal Copyright Act, the Computer Fraud and Abuse Act, the Contracts Clause, and the Takings Clause. Plaintiffs then moved for a preliminary injunction. The District Court dismissed most of plaintiffs' claims but allowed the Copyright Act, Contracts Clause, and Takings Clause claims to proceed. After a hearing, the District Court denied the preliminary injunction and plaintiffs appealed.

Because of its relevance to the land use context, this article will focus on the Ninth Circuit's discussion of Takings Clause issues.

The Ninth Circuit Court's Decision

In its relevant part the Ninth Circuit rejected plaintiff's claims that the Arizona DMS law violated the Takings Clause of the U.S. Constitution. The Supreme Court identifies two types of claims under the Takings Clause. The first type of Takings Clause claim, a *per se* taking involves the government's physical appropriation of property. The second type of taking occurs when the government has restricted a property owner's ability to use his or her property. In this second scenario, a court must evaluate the action under the three-factor test announced in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), to determine whether the action constitutes a regulatory taking.

The *Per Se* Takings Claims

Plaintiffs argued that the Arizona DMS law resulted in a *per se* physical taking because the law "required DMS providers to allow authorized integrators to enter, use, and occupy their DMSs." Here the court ruled that the Arizona law did not effect a *per se* taking for two key reasons.

First, although the Arizona law required third parties to be allowed access to DMS provider systems, the lack of any actual physical invasion was dispositive. Regulations commonly require regulated entities to disclose information, but such requirements are not physical takings.

Second, the government effectuates a physical taking when it requires a property owner to submit to the physical occupation of his or her property. Here, although the Arizona law permitted authorized integrators to write data to a DMS on a dealer's behalf, plaintiffs voluntarily licensed its DMS to dealers, and nothing in the Arizona law compelled the dealer to do so. Once a property owner voluntarily opens their property to occupation by others, they cannot assert a *per se* right to compensation based on their inability to exclude particular individuals.

Based on the above, the court determined that plaintiffs were unlikely to succeed on their claim that a *per se* taking had occurred.

The Regulatory Takings Claims

The court moved on to reject plaintiff's regulatory takings claims. Determining whether a regulatory taking has occurred:

> . . .entails an ad hoc factual inquiry into (1) the economic impact of the regulation on the property owner, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental actions.

First, the Ninth Circuit found no clear error in the District Court's finding that the economic impact of the Arizona law was minimal. The cost of requiring plaintiffs to provide dealers and integrators access to DMS was small and the law allowed the dealers to recoup the direct costs they incurred in providing dealer data access as required under the law.

Second the court found that the Arizona law did not impermissibly interfere with distinct investment-backed expectations. In the case of personal property like the DMS software and data, by reason of the state's traditionally high degree of control over commercial dealings, a property owner "ought to be aware of the possibility that new regulation might…render his property economically worthless."

Third, the court found that the character of the Arizona law was more:

> . . .akin to an interference from [a] public program adjusting the benefits and burdens of economic life to promote the common good than a physical invasion by the government.

Here the court had no basis to question the judgment of the legislature that the law promoted the common good through advancement of consumer privacy and competition.

For the above reasons, the court concluded that plaintiffs were unlikely to succeed in their regulatory takings claim.

Conclusion and Implications

The *CDK Global v. Brnovich* decision highlights the difficulties faced by plaintiffs that attempt to allege Takings Clause claims in actions not involving government intrusion onto or regulation of real property. Although the U.S. Supreme Court and federal Circuit Courts of Appeals have continued to develop and in many cases strengthen private property rights under the Takings Clause, these principles do not typically extend to government actions related to personal property like software. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/10/25/20-16469.pdf.
(Travis Brooks)

D.C. CIRCUIT FINDS AGENCY'S EXPRESSED INTENTION TO READOPT REGULATIONS FOLLOWING WITHDRAWAL IS NOT SUFFICIENT TO AVOID MOOTING OF LAWSUIT

State of Alaska v. U.S. Department of Agriculture, ___F.4th___, Case No. 17-5260 (D.C. Cir. Nov. 16, 2021).

An appeal challenging the perennially-controversial Roadless Rule's application to National Forests in Alaska was set for oral argument before the D.C. Circuit when it was rendered moot, in part, by adoption of an exemption for Alaska's Tongass National Forest. That exemption was a result of a notice-and-comment rulemaking process by the Trump administration. The incoming Biden administration made clear its intention to initiate a new process to reimpose the Rule on the Tongass. Nonetheless, the D.C. Circuit Court of Appeals affirmed the dismissal of the state's challenge as moot.

Background

In 2001, the Forest Service, within the Department of Agriculture, adopted the "Roadless Rule," which prohibits road construction, road reconstruction, and timber harvesting in inventoried roadless areas on National Forest System lands. 66 Fed.Reg. 3244 (Jan. 12, 2001). The State of Alaska challenged the Roadless Rule on the basis of its impact on use of the Tongass and the Chugach National Forests, which together comprise vast areas of the state. The state's focus has been on the Rule's impact on the timber harvesting industry and "the communities dependent on" the Tongass' "resources."

Alaska dismissed its first suit challenging the Roadless Rule when the Department of Agriculture agreed to exempt the Tongass. That 2003 exemption, however, was struck down by a U.S. District Court in 201—the current lawsuit promptly followed. This 2011 lawsuit was dismissed on statute of limitations grounds, reinstated by the District of Columbia Circuit, and then summary judgment was granted to the Department of Agriculture. Before oral argument on the state's subsequent appeal, in 2018 the agency agreed to initiate a new rulemaking process to, once again, exempt the Tongass from the Roadless Rule, and in 2021 "issued a final rule exempting the Tongass from the Roadless Rule." 36 C.F.R. § 294.50 (2021). However:

> . . .after the 2020 Presidential election, the Agriculture Department announced its intention to propose a new rulemaking that would 'repeal or replace the 2020 Tongass Exemption' from the Roadless Rule.

The D.C. Circuit's Decision

The 2021 exemption rendered moot that portion of the state's 2011 lawsuit challenging application of the Rule to the Tongass:

> Finding a case 'plainly moot' when the agency order has been 'superseded by a subsequent ... order' is so routine that our court usually 'would handle such a matter in an unpublished order.' Citing *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 46 (D.C. Cir. 1992).

The D.C. Circuit issued an opinion to address the state's arguments that 1) the "voluntary cessation" doctrine should be applied against a federal agency, and 2) "the prospect of a new regulation reimposing the Roadless Rule on the Tongass saves the case from mootness."

The Voluntary Cessation Doctrine

The voluntary cessation doctrine:

> . . .prevent[s] a private defendant from manipulating the judicial process by voluntarily ceasing the complained of activity, and then seeking a dismissal of the case, thus securing freedom to 'return to his old ways.' *Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990).

Clarke articulated "serious doubts" as to the appropriateness of applying this doctrine to federal agencies:

> [I]t would seem inappropriate for the courts either to impute such manipulative conduct to

> a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose. 915 F.2d at 705.

The Circuit Court "reiterated" its concerns in *National Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 352 (D.C. Cir. 1997), and endorsed those concerns once again by declining to assign these underhanded motives to the Department of Agriculture.

Analysis under the *National Wildlife Federation* Decision

The state's second argument relied on a Department of Agriculture's 2021 letter to the District Court, in which is stated its intention to initiate a new rulemaking process to eliminate the Tongass exemption from the Roadless Rule. The letter also stated:

> Upon publication, the proposed rule will be subject to notice and comment proceedings. As part of such proceedings—and before promulgating any new final rule to re-impose the 2001 Roadless Rule or similar management prescriptions to the Tongass National Forest—USDA will consider environmental impact reviews under the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), and timber market analysis under the Tongass Timber Reform Act, 16 U.S.C. § 539d, that were not available when USDA first promulgated the 2001 Roadless Road (without a Tongass Exemption). Unless and until USDA issues a new final rule for inventoried roadless areas within the Tongass National Forest, the 2020 Tongass Exemption will remain in effect and the Roadless Rule 'shall not apply to the Tongass National Forest.' *See* 36 C.F.R. § 294.50 (2021).

The Circuit Court found these circumstances to be "directly on point" with those presented in *National Wildlife Federation v. Hodel*, 839 F.2d 694, 742 (D.C. Cir. 1988), in which the defendant federal agency suspended a challenged rule when that rule was remanded for agency reconsideration by the District Court, at the same time announcing the intention "to propose new regulations." *Ibid*. The challengers in *that* case argued that their suit should not be mooted as the intent to impose new regulations presented an issue "capable of repetition, yet evading review." Quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). This, however, was:

> . . .not a clever manipulation of regulatory and appellate procedure designed to escape review; it was merely a prudent response to the district court's remand order. *National Wildlife Federation v. Hodel*, 839 F.2d at 742.

Were new regulations adopted, they would then be challengeable.

A more fundamental problem with continuing to litigate in the absence of currently-applicable regulations is the federal court's lack of authority to issue advisory opinions. The court:

> . . .cannot presume that any such future rulemaking will repeal the Tongass exemption in toto [and d]oing so would be inconsistent with the purpose of notice-and-comment rulemaking under the Administrative Procedure Act.

Furthermore, the court stated:

> [T]o determine whether the Roadless Rule will be reapplied to the Tongass would require us to speculate about future actions by policymakers. The Rule itself has been controversial from its inception. *See Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 979-81 (9th Cir. 2015) (*en banc*) (M. Smith, J., dissenting). New notice-and-comment rulemaking, and new environmental assessments, take time. Intervening events, such as elections or changes in policy priorities, bearing on these processes are unpredictable. The content of any future regulation is currently unknowable.

Thus, the dismissal as moot of the challenge to the Roadless Rule, as applied to the Tongass, was affirmed.

Conclusion and Implications

The dramatic shifts in policy aims and priorities of the executive branch over the past six years continue to percolate through the federal courts, as years-long litigations take dramatic twists and turns. Litigants,

having invested many years and substantial resources in a case, and with the potential for a changing of the guard (comparatively) just around the corner, are understandably loathe to see their claims mooted. Nonetheless, longstanding and deeply engrained principals of judicial restraint and economy virtually pre-ordained the outcome here. The court's opinion is available online at: https://www.leagle.com/decision/infco20211116147.
(Deborah Quick)

RECENT CALIFORNIA DECISIONS

SIXTH DISTRICT COURT FINDS OIL AND GAS ORDINANCES PREEMPTED UNDER STATE LAW

Chevron U.S.A., Inc. v. County of Monterey, ___Cal.App.5th___, Case No. H045791 (6th Dist. Oct. 12, 2021).

Mineral rights holders brought an action for declaratory and injunctive relief challenging the validity of County of Monterey (County) ordinances banning "land uses" in support of new oil and gas wells and "land uses" in support of wastewater injection. The Superior Court entered judgment striking down the ordinances, and Protect Monterey County, which had intervened in the action, appealed. The Court of Appeal for the Sixth Judicial District affirmed, finding that state law governing oil and gas operational methods and practices preempted the challenged County ordinances.

Factual and Procedural Background

In November 2016, the voters of Monterey County passed Measure Z, which added ordinances banning: 1) "land uses in support of" oil and gas wastewater injection or oil and gas wastewater impoundment throughout the County's unincorporated areas; and 2) "land uses in support of" new oil and gas wells in unincorporated areas of the County. The initiative was sponsored by Protect Monterey County.

Beginning in December 2016, various mineral rights holders filed multiple mandate petitions and complaints for declaratory and injunctive relief and for inverse condemnation against the County, challenging Measure Z. The plaintiffs alleged that Measure Z was preempted by state and federal law and would result in an unconstitutional taking of their property. The court stayed the effective date of Measure Z following a stipulation. Protect Monterey County intervened.

The Superior Court ultimately found the ordinances preempted, rejecting a claim that they were simply a "land use" prohibition, which it characterized as a pretextual attempt to do indirectly what the ordinances could not do directly. Regarding provisions addressing wastewater injection and impoundment, for example, the Superior Court focused on the lack of any distinction between wastewater injection and impoundment, on the one hand, and surface equipment and activities in support of wastewater injection and impoundment (which Measure Z was purportedly directed at), on the other. The key issue, the Superior Court concluded, was whether Measure Z would regulate the conduct of oil and gas operations or their permitted location. Because it would effectively regulate the manner of oil and gas production, for which the Superior Court found that state law already occupied the field, the court found it preempted.

The Superior Court also found the provision conflicted with Public Resources Code § 3106, which provides that it is the State of California's oil and gas supervisor who has the authority to decide whether to permit an oil and gas drilling operation to drill a new well or to utilize wastewater injection in its operations, and also conflicted with the state's authority under the federal Safe Drinking Water Act (SDWA) because the state, not local authorities, was authorized to make findings that Measure Z purported to make as to whether wastewater injection would endanger drinking water sources.

With respect to the provision regarding new oil and gas wells, the Superior Court found that the ban on new wells also conflicted with the SDWA because it necessarily banned wastewater injection. The court also found that the new well ban was preempted because it would prevent plaintiffs from drilling new wells for wastewater disposal purposes as permitted under Public Resources Code § 3106.

The Superior Court entered judgment and issued a writ of mandate directing the County to invalidate these ordinance sections. Protect Monterey County then appealed.

The Court of Appeal's Decision

State Law Preemption

The Court of Appeal first addressed the issue of state law preemption, noting that otherwise valid

local legislation may be preempted by state law if such legislation "conflicts" with state law. Protect Monterey County argued that Measure Z was not preempted by state law because oil and gas statutes and regulations expressly acknowledge and affirm local authority, thus precluding a finding that state law has completely occupied the field, and that state law only addresses specific, technical aspects of oil and gas production, leaving local governments free to exercise their traditional authority over land use, health, and safety to protect communities from harm.

The Court of Appeal disagreed, finding that the Superior Court correctly concluded the two components of Measure Z were preempted by Public Resources Code § 3106. That section of state law, the court explained, identifies the state's policy as encouraging the wise development of oil and gas resources and expressly provides that the state will supervise the drilling of oil wells so as to permit the use of all practices that will increase the recovery of oil and gas. In doing so, § 3106 lodges the authority to permit all methods and practices firmly in the state's hands. Section 3106, it further noted, makes no mention of any reservation to local entities of any power to limit the state's authority to permit well operators to engage in certain methods and practices. The Court of Appeal also found that the legislative history of § 3106 was consistent with this understanding of the statute's text.

The Court of Appeal also rejected several related arguments by Protect Monterey County, including, that provisions in plaintiffs' leases require them to comply with local laws. The leases themselves, the court noted, are not state laws and cannot conflict with state laws. The court also rejected the general claim that local regulation of oil and gas drilling is within the police power of local entities and that Measure Z's provisions control only "where and whether" oil drilling occurs. The Court of Appeal found that the provisions did not regulate "where and whether" oil drilling would occur but rather "what and how" drilling operations could proceed. Ultimately, it concluded, the fact that Measure Z repeatedly uses the words "use of land" and "land use" does not avoid the fact that Measure Z would ban specific oil and gas drilling operational methods and practices that § 3106 places under the authority of the State.

Federal Preemption and Takings Claims

Because it upheld the Superior Court's decision on the grounds of state law preemption, the Court of Appeal did not consider whether Measure Z also was preempted by federal law or constituted a facial taking of plaintiffs' property. It also did not address a challenge to certain evidentiary rulings, as those rulings played no role in the resolution of the state law preemption issue, which was an entirely legal issue. The Court of Appeal then affirmed the Superior Court's judgment.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding principles of preemption as it relates to oil and gas operations in California, particularly in the context of Public Resources Code section 3106. The decision is available online at: https://www.courts.ca.gov/opinions/documents/H045791.PDF.
(James Purvis)

THIRD DISTRICT COURT FINDS PUBLIC RESOURCES CODE 21168.9 DOES NOT AUTHORIZE TRIAL COURT TO SPLIT ENVIRONMENTAL REVIEW ACROSS EIR AND MND UNDER CEQA

Farmland Protection Alliance v. County of Yolo, ___Cal.App.5th___, Case No. C087688 (3rd Dist. Nov. 3, 2021).

The Third District Court of Appeal in a partially published decision in *Farmland Protection Alliance v. County of Yolo* has held that the trial court erred in directing the County of Yolo to prepare a limited Environmental Impact Report (EIR) to correct portions of a certified Mitigated Negative Declaration (MND) after concluding that substantial evidence supported a fair argument test that a proposed bed and breakfast and agricultural tourism project could have potentially significant impacts on three protected species.

The appellate court held that Public Resources Code § 21168.9 did not authorize the trial court to split the project's environmental review across a limited EIR and MND. Rather, CEQA requires that an agency prepare a full EIR when it is found that substantial evidence supports a fair argument that any aspect of a project may have a significant environmental effect.

Factual Background

Real Parties in Interest Field & Pond, Dahvie James, and Philip Watt, submitted an application to the County of Yolo (County) and its board of supervisors seeking a conditional use permit to operate a bed and breakfast and commercial event facility (Project), which would be supported by onsite crop production to provide visitors with an educational experience about agricultural operations. The Project site was located on an agriculturally-zoned property that housed three dwellings, three barns, a water tower, several grain silos, and a two-acre fishing pond. The site, historically referred to as the William Cannedy Farm, had been used for special events wherein it was permitted to operate one event per month, not to exceed eight events per year.

The Project sought to convert the existing structures into a large bed and breakfast and event center that would accommodate lodging for up to nine guest rooms, indoor/outdoor events for up to 300 attendees per event, and up to 35 events during the first year of operation. If successful, the permit sought to increase ethe number of yearly events between March through November. The agricultural component of the project proposed enhancing the value of the land by converting portions of the property into crop-producing endeavors that would be managed by a resident farmer who would provide educational outreach to visitors.

Procedural Background

In March 2016, the County issued a mitigated negative declaration for the Project, and recirculated a revised draft the following month. The revised MND identified potentially significant impacts to agricultural resources and four biological resources: the valley elderberry longhorn beetle, the tricolored blackbird, the Swainson's hawk, and the western pond turtle. The MND therefore provided that, as a condition of approval, Real Parties would be required to implement mitigation measures to mitigate potential impacts to those resources.

In August 2016, the County planning commission (Commission) denied the application and declined to adopted the revised MND. Real Parties appealed the Commission's to the County board of supervisors (Board). In September 2016, the Board approved the conditional use permit (CUP) and adopted the MND. In October 2016, the Board rescinded its decision after learning it did not adopt the final version of the MND. The Board subsequently approved the use permit with conditions, adopted the corrected revised MND and errata thereto, and a mitigation, monitoring, and reporting plan.

At the Trial Court

Petitioners Farmland Protection Alliance and Yolo County Farm Bureau filed a petition for writ of mandate and complaint for declaratory and injunctive relief against the County asserting that the Project violated the California Environmental Quality Act (CEQA), was inconsistent with the Yolo County General Plan, violated the Williamson Act, and violated provisions of the Yolo County Code. The trial court partially granted the petition on grounds that substantial evidence supported a fair argument that the project may have a significant impact on the valley elderberry longhorn beetle, the tricolored blackbird, and the golden eagle (three species). The trial court disagreed that the Project was inconsistent with the General Plan or violated the Williamson Act or Yolo County Code.

As such, the trial court ordered the County to undertake further study to prepare a subsequent environment impact report to address only the potential impacts of the project on the three species. The court's judgment also ordered the County to file a return to the peremptory writ of mandate setting forth all actions taken to comply with the writ and indicating whether the County certified a subsequent EIR for the Project. Finally, the court ordered that the Project approval and related mitigation measures would remain in effect while the County conducted further environmental review, and Real Parties could continue operating the Project under the County's permitting scheme.

Petitioners appealed the trial court's decision, arguing that the trial court violated CEQA by ordering the County to prepare a limited EIR instead of a full EIR, despite having found substantial evidence supported a fair argument that the Project may have

significant effects on the three species. Plaintiffs also asserted that the trial court erred in allowing the Project to continue to operate during the pendency of the County's subsequent environmental review. Though Real Parties and the County asserted that the trial court properly ordered preparation of a limited EIR, Real Parties cross-appealed on grounds that the trial court erred in finding substantial evidence supported a fair argument that the Project may have significant effects on the three species.

During the pendency of the appeal, and although Real Parties appeal requested an order vacating the judgment requiring preparation of the limited EIR, the County filed a return to the peremptory writ that explained that the County had undertaken further study, prepared a limited EIR that analyzed the potential impacts to the three species, and adopted a resolution certifying the EIR, which found no significant impacts.

The Court of Appeal's Decision

In the published portion of the Court of Appeal's opinion, the Third District held that the trial court erred in directing the County to prepare a limited EIR that corrected only those portions of the MND related to the project's potentially significant impacts on the three species.

The appellate court agreed with petitioners, who contended that a limited EIR was infeasible because:

> . . .once evidence is presented that a project might have a substantial impact on the environment—in any area—the lead agency *must* proceed to prepare an environmental impact report *for the proposed project*. (Citing *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372.)

Under this standard, the appellate court rejected the County's and Real Parties' contention that the trial court has discretionary authority under Public Resources Code § 21168.9 to craft a proper remedy after finding certain portions of an agency's action do not comply with CEQA. The court explained that the remedies under § 21168.9 do not trump the mandatory provisions of CEQA, as that section is intended to facilitate with compliance with the act. The court reasoned:

> The Act requires an agency to prepare a full environmental impact report when substantial evidence supports a fair argument that *any* aspect of the project may have a significant effect on the environment. Section 21168.9 was enacted to provide a trial court with flexibility in fashioning remedies to ensure compliance with the Act; it does not authorize a trial court to circumvent the mandatory provisions thereof. Indeed, to find otherwise would strike a death knell to the heart of the Act, which is the preparation of an environmental impact report *for the project*, as provided in the third tier of the environmental review process.

Substantial Evidence of Any Significant Impact Supporting Aspect of a Project Triggers the Need for an EIR

Pursuant to this rationale, the court explained that CEQA's "three-tiered" environmental review process precluded an agency, or trial court, from dividing up a project's impact analysis across the second and third tiers—*i.e.*, preparation of an initial study and MND, or preparation of an EIR, respectively—such that some of the impacts are analyzed in an MND and others are analyzed in an EIR. Rather, if there is any substantial evidence in the record that supports a fair argument that *any* aspect of the project may have a significant environmental effect, thereby triggering the need to prepare an EIR, a "full" EIR must be prepared in accordance with Public Resources Code § 21061. "In other words," as the court concluded:

> . . .the second and third tiers of environmental review under [CEQA] are mutually exclusive—the Act requires that an agency prepare *either* a negative declaration/mitigated negative declaration *or* prepare an environmental impact report *for the project*.

In light of this, the appellate court held that the trial court erred in issuing a limited writ that directed the County to prepare an EIR that only analyzed those portions of the MND that related to potentially significant impacts on the three species. While it is true that § 21168.9 permits trial courts with discretion to craft a specific remedy tailored to ensuring compliance with CEQA, the appellate court observed that the trial court failed to identify which subdivi-

sion of § 21168.9 it issued relief under. Nevertheless, the court concluded that neither § 21168.9 subdivision (a)(3) or subdivision (b) supported the trial court's order because both provisions provided for limited remedies, even though preparation of a full EIR was necessary to bring the County's actions into full compliance with the act. Because the trial court found that the fair argument test had been met as to the three species, the only available remedy was to set aside the County's decision to adopt the revised MND as an abuse of discretion in failing to proceed in a manner required by law.

Conclusion and Implications

The Third District's opinion provides important guidance for CEQA practitioners across all spectrums. The key takeaway from the decision is that, under Public Resources Code § 21168.9, a full EIR must be prepared when substantial evidence establishes a fair argument of a significant environmental effect. Though trial courts may tailor narrow remedies as appropriate, § 21168.9 does not authorize preparation of an EIR that is only limited to analyzing the potential impact(s) for which a fair argument has compelled preparation. In other words, an agency may not divide environmental analysis across two types of environmental documents—*i.e.*, a Mitigated Negative Declaration and an Environmental Impact Report—for doing so circumvents the intent of the act. While the Third District Court of Appeal did not define what constitutes a legally sound "full EIR," practitioners are advised to be conscientious about potential impacts observed during the initial study process, and to prepare an EIR if and when there is any indication that substantial evidence supports a fair argument of a potentially significant environmental effect. A copy of the court's opinion is available at: https://www.courts.ca.gov/opinions/documents/C087688.PDF. (Bridget McDonald)

FOURTH DISTRICT COURT MOSTLY UPHOLDS DENIAL OF CEQA CLAIMS REGARDING CITY'S UTILITY LINE UNDERGROUNDING PROJECTS

McCann v. City of San Diego, ___Cal.App.5th___, Case No. D077568, (4th Dist. Oct. 8, 2021).

In a decision filed on October 8, 2021, the Fourth District Court of Appeal largely upheld, but reversed one portion of the trial court's judgment in a California Environmental Quality Act (CEQA) action that challenged two projects approved by the City of San Diego. Both projects involved the undergrounding of overhead utility wires in different neighborhoods of the city. The decision provided guidance on a number of CEQA issues including: the requirement of exhaustion of administrative remedies, the prohibition against improper piecemealing, the amount of detail required in a CEQA project description, the sufficiency of lay comments to require preparation of an Environmental Impact Report (EIR) in relation to potential aesthetic impacts, and the appropriate method to determine whether a project may cause significant impacts related to greenhouse gas emissions when analyzing a project's consistency with a local Climate Action Plan.

Factual and Procedural Background

In 1970, the city began trying to underground its overhead utility lines. By 2016, due in part to financial constraints, the city had only undergrounded 406 miles of overhead lines with approximately 1,000 miles yet to complete. In 2017, the city adopted a utilities undergrounding program master plan with a goal of undergrounding 15 miles of overhead lines each year. The master plan and related provisions of the city's municipal code establish a process where the city designates priority undergrounding projects each year by dividing portions of the city with existing overhead utility lines into discrete blocks for undergrounding. The city then provides a rough estimate of the cost to complete the undergrounding in each block. Each year the city council approves a

project allocation and selects the blocks to be undergrounded based on available funding. After a yearly allocation and block selection is approved, city staff begins its initial planning work including environmental review for each discrete set of underground projects or blocks under CEQA.

The city council then creates an underground utility district including the selected blocks to be completed with each year's funding. All residents and property owners in the proposed district are mailed a notice of public hearing and a map of the proposed area for the undergrounding project. Residents and property owners are then given the opportunity to comment prior to the council's approval and creation of the district. Thereafter, the city began a detailed design process that takes one to two years to complete. During community meetings residents and property owners are given an opportunity to discuss the projects, including the placement of utility boxes and streetlights. Community members were notified of upcoming construction and are invited to attend a community forum as the designs for each undergrounding project are finalized.

During the construction phase, workers dig trenches or drill tunnels within the public right-of-way to accommodate underground wires and cables. At the same time, new transformers, cable boxes, and pedestals are installed above ground as needed. These transformers are required for every eight to fourteen homes. The transformers are roughly three feet in each dimension, painted green, and placed on a short concrete pad measuring four feet by four feet.

The petitioner challenged two undergrounding projects. The first of these projects was determined to be exempt (Exempt Project) from review under CEQA, and the other was approved with an initial study and Mitigated Negative Declaration (MND Project). The petitioner argued that both projects, and particularly the transformer boxes proposed as part of each, would potentially cause significant environmental impacts requiring an EIR to be prepared. After briefing and argument, the trial court found that the petitioner failed to exhaust her administrative remedies prior to seeking judicial review of the Exempt Project. The court also found that petitioner failed to demonstrate that substantial evidence supported a fair argument that the MND Project may have a significant impact on the environment.

The Court of Appeal's Decision

On appeal the petitioner raised the same issues as raised at the trial court level. The Fourth District upheld the trial court's decision on all but one of the issues raised by the petitioner.

Exhaustion Doctrine

Citing state Supreme Court precedent, the court set out the doctrine of exhaustion of administrative remedies:

> . . .[w]here an administrative remedy is provided by statute, relief must be sought from the administrative body, and this remedy exhausted before the courts will act. The rule is a jurisdictional prerequisite in the sense that it is not a matter of judicial discretion, but a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis and binding on all courts.

As the court noted, the above doctrine applies in the CEQA context in the same manner it applies in other writ cases. In other words, CEQA does not preempt any local administrative appeal process, and expressly contemplates that a local lead agency can establish its own procedures to appeal decisions related to CEQA review. Where an appeal process is available and a party fails to exhaust its administrative remedies, it may not bring a judicial action challenging the environmental determination.

The Court of Appeal held that petitioner's claims regarding the Exempt Project were precluded by the doctrine of exhaustion of administrative remedies. Here, the city's municipal code included an administrative appeal procedure where a person seeking to challenge an environmental determination, including a CEQA exemption determination by staff, must file an application to appeal to the city council within ten business days. The filing of this appeal would allow for a public hearing and determination related to the exemption. Here petitioner failed to avail herself of this administrative appeal remedy and did not appeal city staff's exemption determination within ten days. As a result, the court found that petitioner failed to exhaust her administrative remedies and her claims related to the Exempt Project were barred.

City Properly Piecemealed Its Review of the MND Project

Turning to the petitioner's challenge of the city's certification of an MND for the MND Project, the court cited the long line of cases establishing the rule that a local agency may not improperly split a project into separate segments to avoid consideration of the cumulative impacts of a project. Instead:

> CEQA mandates that environmental considerations do not become submerged by chopping a large project into many little ones - each with a minimal potential impact on the environment - which cumulatively may have disastrous consequences.

To avoid this "piecemealing" CEQA defines a project broadly as:

> . . .the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.

Improper piecemealing did not occur here. Each undergrounding project undertaken as part of the city's master plan was "independently functional and did not rely on any other undergrounding projects to operate." The MND Project was independently functional, did not rely on future projects to move forward, and the city's separate analysis of the MND project under CEQA was not an improper piecemeal review.

City's Project Description for the MND Project was Adequate

The Court of Appeal also rejected petitioner's argument that the city improperly deferred its decision regarding the precise location of transformer boxes in the project description and other approval materials. Petitioner contended that this precluded the city from considering the environmental impacts of the MND Project in their entirety. The court noted that CEQA requires agencies to focus on aspects of a project that may have an impact on the physical environment. Petitioner claimed that the location of the MND Project's transformers was controversial and therefore should be studied under CEQA. CEQA is concerned with physical environmental impacts, not controversy or neighborhood sentiment alone. Here, the MND revealed that the relevant portions of the project would be constructed in the public right-of-way that are unoccupied by trees, and in some instances may require removal of trees. Accepting these limited constraints on the location of the transformers, the city could reasonably consider the environmental impacts of the MND Project even though the precise location of the transformers was not yet known.

Substantial Evidence Did Not Support a Fair Argument that the MND Project Would Have a Significant Aesthetic Impact

The Court of Appeal also rejected petitioner's argument that substantial evidence supported a fair argument that the MND Project would have significant aesthetic impacts requiring an EIR to be prepared. As the appellant, the petitioner bore the burden of identifying substantial evidence in the record to support a fair argument that the project may have a significant impact on the environment. Petitioner failed to identify such evidence.

Here, petitioner relied on a comment by a single speaker, along with her own comments and those of her attorney regarding the aesthetic impacts of the transformers proposed as part of the MND Project. Even if the court were to assume that the limited comments in the administrative record did constitute substantial evidence, petitioner failed to establish that those comments supported a fair argument of a significant aesthetic impact caused by the transformers that were part of the project. The court distinguished the instant matter from several prior cases where lay opinion gave rise to a fair argument of significant aesthetic impacts; these cases all involved larger buildings and structures. Although aesthetic impacts "must not be ignored under CEQA" the court saw:

> . . .no reason to believe that CEQA requires an EIR to evaluate the aesthetic impact of small, three-foot cubes placed next to the street in a developed neighborhood.

City's Determination that the MND Project's Greenhouse Gas Impacts Were Not Significant Was Not Supported by Substantial Evidence

The court next reversed the trial court and found that the city's determination that the MND Project would not result in significant greenhouse gas impacts was not supported by substantial evidence.

In 2015, the city adopted a greenhouse gas reduction plan to provide for streamlined review rather than calculating the emissions from each individual project, known as the Climate Action Plan (CAP). For CEQA purposes, the city used a checklist to determine whether projects would potentially result in significant greenhouse gas impacts under the CAP. In step 1, the city would determine whether projects were consistent with applicable land use and zoning designations. For projects inconsistent with land use or zoning regulations, the city determined that the project would likely result in a significant impact thus requiring further review in an EIR. If a project was found to be consistent with such regulations, the city moved on to step 2, which required an analysis of the project's consistency with the CAP. Crucially however, the city's checklist only required an analysis of project consistency with the CAP for projects that did not require a certificate of occupancy. Here, because the project did not involve any occupied buildings, the city was never required to analyze whether the project was consistent with the CAP.

The court found that the city's approach to analyzing the MND Project was fundamentally flawed. Under CEQA, the city could not simply conclude that projects not requiring certificates of occupancy were consistent with the CAP. In other words, the

> . . .the City's MND determination is incomplete because it failed to analyze whether the [MND Project was] consistent with the [CAP] and additional analysis is necessary before the City can properly certify the MND.

The court noted its decision did not necessarily mean that the city needed to prepare an EIR to analyze greenhouse gas impacts, however the city did need to perform an analysis to determine whether the MND Project is consistent with the CAP. If found consistent with the CAP with all mitigation measures included, the city could still avoid the need to prepare an EIR for the MND Project. However, if the analysis determines that the project is inconsistent with the CAP and the MND Project cannot be revised and greenhouse gas impacts cannot be mitigated, the city would need to prepare an EIR.

Conclusion and Implications

The *McCann* decision provides helpful clarity and guidance related to a number of CEQA issues. For CEQA petitioners, the case highlights the importance of paying attention to, and complying with, local administrative appeal procedures and deadlines to preserve rights to challenge a local agency's decision in court. The decision also provides clarity regarding CEQA piecemealing, CEQA project descriptions, and greenhouse gas impact analyses. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/D077568.PDF
(Travis Brooks)

FIRST DISTRICT COURT FINDS DEVELOPERS WERE NOT 'INDISPENSABLE' PARTIES TO CEQA LAWSUIT—REJECTS MOTION TO DISMISS

Save Berkeley's Neighborhoods v. Regents of the University of California, ___Cal.App.5th___, Case No. A160560(1st Dist. Oct. 21, 2021).

Save Berkeley's Neighborhoods (Save Berkeley) filed a petition for writ of mandate against the Regents of the University of California (Regents) and various developers. It asserted claims under the California Environmental Quality Act (CEQA) seeking to vacate the certification of a supplemental Environmental Impact Report (SEIR) for a project that would demolish a parking structure on campus and construct

a new parking structure with residential living on top and a new academic building. The Superior Court sustained the developers' demurrers to the petition without leave to amend but declined to dismiss the entire matter after finding that the developers were not indispensable parties. The developers appealed and Save Berkeley cross-appealed. The Court of Appeal affirmed, finding that failure to comply with CEQA's provisions as to who must be named as a real party in interest in a CEQA case *may* be grounds for—but does not *mandate*—dismissal of the action.

Factual and Procedural Background

The Regents approved a project to demolish a parking structure and construct apartment housing above a new parking structure and a new academic building. In connection with that approval, the Regents certified a SEIR. On May 17, 2019, the Regents filed a Notice Of Determination (NOD) under CEQA identifying American Campus Communities and Collegiate Housing Foundation (CHF) as the parties undertaking the project. American Campus Communities is the developer, and CHF is the ground lessee and borrower for the project's housing component.

On June 13, 2019, Save Berkeley filed a petition for writ of mandate seeking to vacate the Regents' approval on CEQA grounds. The petition named the Regents, Janet Napolitano (as president of the University of California), and Carol T. Christ (as chancellor of the University of California, Berkeley) as respondents. On September 18, 2019, Save Berkeley filed a first amended petition for writ of mandate, which was substantively identical to the initial petition but added American Campus Communities and CHF as real parties in interest. The amended petition acknowledged that American Campus Communities and CHF were listed as the parties undertaking the project in the NOD. Save Berkeley also later filed a first amendment to the first amended petition to add American Campus Communities Services, Inc. and "American Campus Communities Operating Partnership LP" (collectively: ACC) as real parties in interest.

ACC and CHF demurred, claiming Save Berkeley failed to name them as parties within the applicable statute of limitations, CEQA required their joinder as real parties in interest, and they were necessary and indispensable parties to the litigation. Because these defects could not be cured, they requested the court sustain the demurrer without leave to amend and dismiss the entire action. Following a hearing, the court sustained the demurrers without leave to amend. Applying the factors under Code of Civil Procedure § 389(b), however, the superior court found that the Regents, ACC, and CHF were closely aligned because they were undertaking the project for the university's own use and benefit. It noted that Save Berkeley would have no way to challenge the SEIR if the case was dismissed, whereas ACC and CHF were parties in a related case against the same SEIR and thus unlikely to be subject to a harmful settlement. The superior court concluded that ACC and CHF were not indispensable parties, dismissed them, but declined to dismiss the entire matter given their unity of interest with the Regents. ACC and CHF appealed and Save Berkeley cross-appealed.

The Court of Appeal's Decision

Appealability

The Court of Appeal first addressed Save Berkeley's contention that the appeal must be dismissed because the order sustaining the demurrer was not an appealable order. The court disagreed, noting that in multiparty actions, a judgment disposing of all the issues as to one party is appealable even if issues remain as to other parties. This exception typically applies even if some of the legal issues related to the dismissed parties are identical to those remaining in the action among other parties. Thus, the appeal did not violate the final judgment rule.

Necessary and Indispensable Parties

The Court of Appeal next turned to the merits of the appeal, which regarded whether ACC and CHF were "indispensable" parties under the statutory scheme (there was no dispute they were "necessary"). If found to be "indispensable," the entire action must be dismissed. If not, the court could allow the action to proceed. The principal question on appeal was whether CEQA's statutory provisions for who must be joined in a CEQA lawsuit (*i.e.*, which parties must be named as real parties in interest) were intended to provide "finality and certainty" such that the factors provided in Code of Civil Procedure § 389 for assessing whether a case should still proceed in light

of the failure to properly name a particular party are rendered inapplicable.

The Court of Appeal disagreed with ACC and CHF's position, finding that nothing in CEQA states that an action against a lead agency *must* be dismissed for failure to properly name and serve the real parties in interest. Rather, the court concluded, CEQA only recognizes that failure to name and serve the real parties in interest *may* be grounds for dismissal depending on the factors set forth in Code of Civil Procedures § 389. It also considered legislative history, concluding that amendments to CEQA had been made to clarify who must be named as a real party in interest but did not alter the analysis of whether a real party is indispensable to an action. In limiting its focus to clarifying the real parties, the court found, the California Legislature recognized that failure to name a real party can be grounds for—but need not necessarily lead to—dismissal.

Under § 389, therefore, those entities deemed real parties in interest under CEQA are considered necessary parties but not necessarily indispensable parties. If a necessary party cannot be joined, a court will determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person thus being regarded as indispensable. Applying the factors for such consideration provided under § 389, the Court of Appeal affirmed the superior court's finding that ACC and CHF were not indispensable parties. Among other things, the court concluded that the record reflects a strong unity of interest between the Regents and ACC and CHF and, while the parties' motivations may differ, they had similar interests in having the project proceed in a timely manner. The Court of Appeal also distinguished cases relied on by ACC and CHF, noting that those courts concluded developers were indispensable where the parties challenged projects pursued by the developers that would have no meaningful involvement by the government agency apart from the initial approvals. Here, by contrast, the Regents were not so removed from the project, having pursued the project and having a vested interest in its success. The project was for the benefit of UC Berkeley, the Regents would be involved in the management and operation of two-thirds of the new buildings, and it would obtain ownership of the project upon repayment of the project debt.

Save Berkeley's Cross-Appeal

Finally, the Court of Appeal addressed Save Berkeley's argument that the superior court erroneously found the petition subject to CEQA's 30-day statute of limitations (for purposes of assessing the timeliness of naming ACC and CHF in the lawsuit). Save Berkeley claimed the NOD failed to describe the project's consideration of a student enrollment increase and thus did not trigger the 30-day limitations period under Public Resources Code § 21167(c). The Court of Appeal disagreed, finding that the project was not for the purpose of promoting future growth in the student body, but rather to respond to a lack of resources for the current university community. While the SEIR considered past growth, it did so only to create a revised "campus headcount baseline" from which to assess the project's impacts. Accordingly, the court found, the description of the project in the NOD was not defective, and the 30-day limitations period calculated from the posting of the NOD applied.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the applicability of Code of Civil Procedure § 389 to CEQA actions, specifically as it relates to a consideration of whether a party should be deemed indispensable to an action and, in light of such analysis, whether a lawsuit should be dismissed or allowed to continue. The decision is available online at: https://www.courts.ca.gov/opinions/documents/A160560.PDF.
(James Purvis)

FOURTH DISTRICT COURT AFFIRMS EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIRED WHEN A CITY'S INTERPRETATION OF ITS OWN ORDINANCE IS PLAINLY WRONG

Tze v. City of Palo Alto, ___Cal.App.5th___, Case No. G060401 (4th Dist. Oct. 20, 2021).

The Fourth District Court of Appeal affirmed the trial court's decision granting plaintiff's administrative writ petition challenging the City of Palo Alto's currently pending administrative citations for failure to maintain a grocery store under the city's ordinance limiting a property's use to grocery store use, but denying plaintiff's traditional writ petition seeking to unwind prior administrative citations for failure to maintain a grocery store due to plaintiff's failure to exhaust administrative remedies for those earlier citations.

Factual and Procedural Background

Plaintiff Edgewood SC LLC (Edgewood) sought approval from the City of Palo Alto (City) to redevelop Edgewood Plaza (Plaza), a 1950s shopping center in the City. The Plaza was initially zoned as a Planned Community (PC), to be used primarily for retail. The original construction consisted of a building for a market (the grocery building) and two smaller one-story retail buildings. The Plaza became a commercial failure and a blight.

Edgewood purchased the Plaza and submitted a redevelopment proposal and application to the City in 2010. The proposal retained all the buildings in the plaza. But it suggested moving one of the retail buildings, which were deemed historically significant, to clear space for construction of ten single-family homes and a public park.

Edgewood argued for retaining the PC zoning for the Plaza rather than changing the zoning to a Commercial Neighborhood (CN) zone. Edgewood argued it was desirable for the Plaza to have a grocery store use so that the Plaza "is a successful grocery anchored neighborhood center and not just another retail district." Edgewood argued that "[u]nder a CN zone a grocery user cannot be compelled whether for initial occupancy or long-term occupancy. Only a PC zone can compel a grocery store."

In April 2012, the City approved Edgewood's proposal for developing the Plaza as a PC zone, which the City memorialized in a zoning ordinance. The zoning ordinance contained a section entitled "Special limitations on land uses," which provides "[t]he [grocery] building shall be primarily used for grocery uses only." The zoning ordinance specified that no building permits would be approved for construction of the homes prior to submittal to the City staff of a lease agreement from a grocery operator to occupy the grocery building.

Edgewood secured The Fresh Market as a tenant for the grocery building on a ten-year lease with multiple five-year extension options. The City approved the lease in February 2013, and The Fresh Market began operating in June of that year.

In November 2013, the zoning ordinance was amended and included a new sentence stating:

> . . .[t]he commercial property owner shall ensure the continued use of the [grocery] building as a grocery store for the life of the Project.

The City did not discuss the new sentence with plaintiff, nor was there any advance public notice indicating any material modifications to the requirements for the grocery building. After the zoning ordinance amendment, Plaintiff finished construction on the project and sold the homes.

In 2015, Fresh Market ceased operating in California, but continued to pay rent. By 2017, after contacting over 70 grocery stores, Crystal Springs, a new grocery store, took over the lease and began operating a grocery store.

During the intervening period of non-operation, the City claimed Edgewood had a duty under the ordinance to ensure a grocery store was operating in the building. The City alleged that Edgewood was in violation of the ordinance and after a few months began assessing daily fines, starting at $500 per day and then increasing to $1,000 per day. Each daily fine citation provided that Edgewood could appeal the fines within 30 days of the fines. Edgewood continued paying the fines for a year, without appeal.

When the City increased the fines to $5,000 per

day a year later in 2016, Edgewood filed an appeal of 14 of the new violations in the amount of $248,250, but it was too late to appeal the first 56 violations in the amount of $382,250. The assigned hearing officer found in favor of the City and upheld the 14 citations challenged.

Edgewood then filed a petition for writs of administrative and traditional *mandamus*. The former sought to reverse the hearing officer's decision on the 14 citations, while the latter requested invalidation of all the citations issued by the City against Edgewood.

On the writ of administrative *mandamus*, the trial court agreed with Edgewood, finding the ordinance only prevented the building from being used for anything other than a grocery store. As to the writ of traditional *mandamus*, the court found in favor of the City. It ruled the remaining citations were not subject to challenge because Edgewood had not exhausted its administrative remedies. The City appealed the court's administrative *mandamus* ruling, while Edgewood cross-appealed the traditional mandamus ruling.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's decisions, applying *de novo* review to interpretation of the ordinance, which under its plain meaning only required continued "use" as a grocery store, not continued "operation." But the court determined that Edgewood failed to exhaust its administrative remedies with respect to most of the administrative citations and failed to qualify for any exception to the doctrine.

The 'Plain Meaning' of Ordinances

Ordinances are interpreted according to their plain meaning just as state statutes. Only when there is an ambiguity do courts look beyond the wording of the ordinance to its purpose, legislative history and public policy.

Here, the ordinance clearly provides that Edgewood must ensure only continued "use" of the grocery building as a grocery store for the life of the Project, not continued "operation." "Use" describes a designated purpose assigned to a plot of land in the context of land use and planning. Thus, under the technical definition of "use," the ordinance only restricted Edgewood from using the grocery building for any purpose than for a grocery store.

The ordinary definition of use is not altered by the adjective "continued" added to the word "use." It does not convert the word "use" to the word "operation."

Since the plain meaning controls, and there is no ambiguity, the Court of Appeal did not need to review extrinsic factors. Although the City cited to the situation in which Fresh Market ceased operation and continued paying rent as a cessation of "use," there was nothing in the record to show that the City's ordinance intended to prevent such a scenario. Ordinarily, the requirement to pay rent would be sufficient incentive to prevent such a scenario.

Moreover, the City in a prior ordinance for a different grocery property demonstrated that it understood the difference between "use" and "operation" and required a different grocery store to remain in continuous "operation."

Public policy reasons dictate that, unless a restriction is clearly intended to affect operation, that it would create an undue burden on a landlord to ensure continued operation of a business when the landlord lacks control over its operation.

When the plain meaning of an ordinance is obvious, the court is not required to give the local agency's interpretation any deference.

Exhaustion of Administrative Remedies

The exhaustion of available administrative is a prerequisite to resort to the courts. It is jurisdictional because the courts cannot interfere with the jurisdiction of another tribunal. Edgewood argued that certain exceptions to the exhaustion requirement applied, including inadequate remedy, nullity, lack of due process and lack of equity.

Regarding the inadequate remedy exception, Edgewood argued that the City's hearing officer lacked authority to interpret the ordinance. But the City's municipal code granted the hearing officer broad powers to make decisions, including regarding the existence of a violation. Edgewood argued that it was not entitled to an evidentiary hearing, but again, the municipal code provided for one.

Regarding the nullity exception, Edgewood argued that since the City lacked authority to issue any citations under the ordinance, the resulting citations were null as a matter of law. However, the nullity doctrine has only been applied to tax matters or to matters where the government agency lacked author-

ity to act. Here, the City had authority to act to issue citations, but did not meet the requirements to act, and thus the exhaustion doctrine applied in this case. (*Ramirez v. Tulare County Distr. Attorney's Office*, 9 Cal.App.5th 911, 933 (2017).)

Due Process Argument

Regarding the lack of due process, Edgewood argued that the ordinance's requirement of prepayment of the fine in order to file an administrative appeal violated due process. Edgewood failed to cite to any authority that such a prepayment requirement violates due process opportunity to be heard in a meaningful manner.

Regarding lack of equity, Edgewood argued that allowing the remaining citations would constitute unjust enrichment for the City. But Edgewood failed to establish any injustice because it could have timely challenged the fines but did not.

Conclusion and Implications

This opinion by the Fourth District Court of Appeal demonstrates how important it is to timely comply with exhaustion requirements even when seemingly ineffective at the administrative hearing level. Even if the City of Palo Alto hearing officer was not going to make a determination as to whether the City met the requirements under the City's authority to issue administrative fines, the plaintiff needed to go through that process to obtain jurisdiction with the court, where it could then obtain a court order regarding the City's compliance with the requirements of its ordinance. (https://www.courts.ca.gov/opinions/documents/F079342.PDF.
(Boyd Hill)

LEGISLATIVE WRAP UP

2021 YEAR-END LAND USE LEGISLATIVE WRAP UP

The 2021-2022 Legislative Session has now come to a close and a number of bills related to land use have been signed into law or vetoed by the Governor. The following list of bills reflects each bill that the California Land Use Reporter has been tracking over the course of this year. As indicated, some of the bills, for one reason or another, never even made it to the Governor's desk. Nonetheless, for purposes of providing our readers with a comprehensive breakdown we continue to present those bills here. In addition, some of these "stuck" bills have either been converted to two-year bills or will resurface in a "new and improved" form.

As for those bills that did reach the Governor's desk, several impact primary land use areas such as the California Environmental Quality Act (CEQA), California Coastal Act (Coastal Act) and Subdivision Map Act (Map Act), as well as issues such as air quality, greenhouse gas emissions and water, housing and redevelopment reform. As with the close of any Legislative session it will interesting to watch the impact, if any, of these laws on land use practitioners, and how they translate into new bills for the future.

Unless otherwise noted, each of the laws signed by the Governor will go into effect on January 1, 2022.

Coastal Resources

•AB 1408 (Petrie-Norris) This bill would, at the request of an applicant for a coastal development permit, authorize a city or county to waive or reduce the permit fee for specified projects, and authorize the applicant, if a city or county rejects a fee waiver or fee reduction request, to submit the coastal development permit application directly to the Coastal Commission.

AB 1408 was introduced in the Assembly on February 19, 2021, and, most recently, on March 11, 2021, was referred to the Committee on Natural 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 Secretary of State at Chapter 236, Statutes of 2021.

•SB 627 (Bates)—This bill would, except as provided, require the Coastal Commission or a local government with an approved local coastal program to approve the repair, maintenance, or construction of retaining walls, return walls, seawalls, revetments, or similar shoreline protective devices for beaches or adjacent existing residential properties in the coastal zone that are designed to mitigate or protect against coastal erosion.

SB 627 was introduced in the Senate on February 18, 2021, and, most recently, on April 8, 2021, had its first hearing scheduled for April 13, 2021, in the Committee on the Judiciary cancelled at the request of its author, Senator Bates.

Environmental Protection and Quality

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

AB 1260 was introduced in the Assembly on February 18, 2021, and, most recently, on August 26, 2021, was held under submission in the Committee on Appropriations.

•AB 1154 (Patterson)—This bill would, until January 1, 2029, exempt from CEQA egress route projects undertaken by a public agency that are specifically recommended by the State Board of Forestry and Fire Protection that improve the fire safety of an existing subdivision if certain conditions are met.

AB 1154 was introduced in the Assembly on Feb-

ruary 18, 2021, and most recently, on March 4, 2021, was referred to the Committee on Natural Resources.

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

SB 7 was introduced in the Senate on December 7, 2020, and, most recently, on May 20, 2021, was approved by the Governor and chaptered by Secretary of State at Chapter 19, Statutes of 2021.

Housing / Redevelopment

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

AB 345 was introduced in the Assembly on January 28, 2021, and, most recently, on 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 Secretary of State at Chapter 345, Statutes of 2021.

•AB 617 (Davies)—This bill would authorize a city or county, by agreement, to transfer all or a portion of its allocation of regional housing need to another city or county and allow the transferring city to pay the transferee city or county an amount determined by that agreement, as well as a surcharge to offset the impacts and associated costs of the additional housing on the transferee city.

AB 617 was introduced in the Assembly on February 12, 2021, and, most recently, on February 25, 2021, was referred to the Committees on Housing and Community Development and Local Government.

•AB 682 (Davies)—This bill would require a city or county with a population of more than 400,000 people to permit the building of cohousing buildings, as defined, in any zone where multifamily residential buildings are permitted, and require that cohousing buildings be permitted on the same basis as multifamily dwelling units.

AB 682 was introduced in the Assembly on February 12, 2021, and, most recently, on March 15, 2021, had its hearings in the Committees on Housing and Community Development and Local Government postponed by the committees.

•SB 6 (Caballero)—This bill, the Neighborhood Homes Act, would provide that housing development projects are an allowable use on a "neighborhood lot," which is defined as a parcel within an office or retail commercial zone that is not adjacent to an industrial use, and establish certain minimum densities such projects depending on their location in incorporated/unincorporated areas and metropolitan and non-metropolitan areas.

SB 6 was introduced in the Senate on December 7, 2020, and, most recently, on August 23, 2021, was read for a second time, amended and then re-referred to the Committee on Housing and Community Development.

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

SB 9 was introduced in the Senate on December

7, 2020, and, most recently, on September 16, 2021, was approved by the Governor and chaptered by the Secretary of State at Chapter 162, Statutes of 2021.

•SB 15 (Portantino)—This bill would require the Department of Housing and Community Development to administer a program to provide grants to local governments that rezone idle sites used for a big box retailer or a commercial shopping center to allow the development of workforce housing as a use by right.

SB 15 was introduced in the Senate on December 7, 2020, and, most recently, on June 2, 2021, was in the Assembly where it was read for the first time and then held at the desk.

•SB 621 (Eggman)—This bill would, among other things, authorize a development proponent to submit an application for a development for the complete conversion of a structure with a certificate of occupancy as a motel or hotel into multifamily housing units to be subject to a streamlined, ministerial approval process, provided that the development proponent reserves an unspecified percentage of the proposed housing units for lower income households, unless a local government has affordability requirements that exceed these requirements.

SB 621 was introduced in the Senate on February 19, 2021, and, most recently, on April 22, 2021, had its first hearing in the Committee on Governance and Finance cancelled at the request of its author, Senator Eggman.

•SB 765 (Stern)—This bill would: (i) provide that the rear and side yard setback requirements for accessory dwelling units may be set by the local agency; (ii) authorize an accessory dwelling unit applicant to submit a request to the local agency for an alternative rear and side yard setback requirement if the local agency's setback requirements make the building of the accessory dwelling unit infeasible; and, (iii) prohibit any rear and side yard setback requirements established pursuant to this bill from being greater than those in effect as of January 1, 2020.

SB 765 was introduced in the Senate on February 19, 2021, and, most recently, on April 15, 2021, had its first hearing in the Committees on Housing and Governance and Finance during which testimony was taken the bill scheduled for a further hearing.

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.

•AB 1295 (Muratsuchi)—This bill, beginning on or after January 1, 2022, would prohibit the legislative body of a city or county from entering into a residential development agreement for property located in a "very high fire risk area," which is defined to mean a very high fire hazard severity zone designated by a local agency or a fire hazard severity zone classified by the State Director of Forestry and Fire Protection.

AB 1295 was introduced in the Assembly on February 19, 2021, and, most recently, on March 4, 2021, was referred to the Committees on Housing and Community Development and Local Government.

•AB 1401 (Friedman)—This bill would prohibit a local government from imposing a minimum parking requirement, or enforcing a minimum parking requirement, on residential, commercial, or other development if the development is located on a parcel that is within one-half mile walking distance of public transit, as defined, or located within a low-vehicle miles traveled area, as defined.

AB 1401 was introduced in the Assembly on February 19, 2021, and, most recently, on August 26, 2021, was held under submission in the Committee on Appropriations.

•SB 478 (Wiener)—This bill would prohibit a local agency, as defined, from imposing specified standards, including a minimum lot size that exceeds an unspecified number of square feet on parcels zoned for at least two, but not more than four, units or a minimum lot size that exceeds an unspecified number of square feet on parcels zoned for at least five, but not more than ten, units.

SB 478 was introduced in the Senate on February 17, 2021, and, most recently, on September 28, 2021,

was approved by the Governor and chaptered by the Secretary of State at Chapter 363, Statutes of 2021.

Zoning and General Plans

•AB 1322 (Bonta)—This bill, commencing January 1, 2022, would prohibit enforcement of single-family zoning provisions in a charter city's charter if more than 90 percent of residentially zoned land in the city is for single-family housing or if the city is characterized by a high degree of zoning that results in excluding persons based on their rate of poverty, their race, or both.

AB 1322 was introduced in the Assembly on February 19, 2021, and, most recently, on September 2, 2021, was read for a second time, amended and then re-referred to the Committee on Environmental Quality.

•SB 10 (Wiener)—This bill would, notwithstanding any local restrictions on adopting zoning ordinances, authorize a local government to pass an ordinance to zone any parcel for up to ten units of residential density per parcel, at a height specified in the ordinance, if the parcel is located in a transit-rich area, a jobs-rich area, or an urban infill site, and would prohibit a residential or mixed-use residential project consisting of ten or more units that is located on a parcel rezoned pursuant to these provisions from being approved ministerially or by right.

SB 10 was introduced in the Senate on December 7, 2020, and, most recently, on September 16, 2021, was approved by the Governor and chaptered by the Secretary of State at Chapter 163, Statutes of 2021.

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

SB 12 was introduced in the Senate on December 7, 2020, and, most recently, on July 12, 2021, failed passage in the Committee on Housing and Community Development but was subsequently granted reconsideration.

•SB 499 (Leyva)—This bill would prohibit the land use element of a General Plan from designating land uses that have the potential to significantly degrade local air, water, or soil quality or to adversely impact health outcomes in disadvantaged communities to be located, or to materially expand, within or adjacent to a disadvantaged community or a racially and ethnically concentrated area of poverty.

SB 499 was introduced in the Senate on February 17, 2021, and, most recently, on March 25, 2021, had its April 8, 2021, hearing in the Committee on Governance and Finance canceled at the request of its author, Senator Leyva.
(Paige H. Gosney)

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