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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

CALIFORNIA SUPREME COURT HOLDS THAT ISSUE EXHAUSTION IS NOT A PREREQUISITE TO SEEKING JUDICIAL REVIEW OF BUSINESS IMPROVEMENT DISTRICT ASSESSMENTS UNDER PROPOSITION 218

By Bridget McDonald

The California Supreme Court in *Hill RHF Housing Partners, L.P. v. City of Los Angeles* reversed the Second District Court of Appeal's denial of writ challenges to a business improvement district (BID) assessment scheme on grounds that the petitioner-property-owners failed to exhaust their objections in underlying public hearings. The Supreme Court unanimously held that, under Proposition 218, the opportunity to protest the validity of a proposed BID assessment is not a remedy that must be exhausted as a prerequisite to filing suit because it does not involve the type of "clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties." [*Hill RHF Housing Partners, L.P. v. City of Los Angeles,* 12 Cal.5th 458 (Dec. 20, 2021).]

Proposition 218

Proposition 218—the "Right to Vote on Taxes Act"—was approved by voters in 1996 as part of a series of voter initiatives that sought to restrict the ability of state and local governments to impose taxes and fees. Adopted in 1978, Proposition 13 was the first of those measures and prohibited counties, cities, and special districts from imposing special taxes without a two-third vote of the electorate. Prop 218 was subsequently passed to address increased circumvention of Prop 13, wherein municipalities would raise service rates without voter approval by labelling them "fees, charges or assessments," rather than "special taxes." Prop 218 supplemented Prop 13 by adding Articles XIII C and XIII D to the California Constitution, which placed similar restrictions on assessments and property-related taxes.

Section 4 of Article XIII D (Section 4) sets forth substantive and procedural ramifications to limit local governments' ability to impose assessments on properties. For example, the section requires agencies to provide written notice to affected property owners regarding the amount, duration, and basis of the proposed charges, along with the date, time, and location of a public hearing on the assessment. At that hearing, the agency must consider all protests against the proposed assessment and tabulate ballots for or against it. The agency shall not impose the assessment if, at the close of the hearing, ballots submitted in opposition exceed those submitted in favor. The section's judicial review scheme places the burden on agencies to demonstrate that the underlying property receives a special benefit over and above the benefits conferred on the public at large, and that the amount of any contested assessment is proportional to, and no greater than, the benefits conferred on the property.

The Property and Business Improvement District Law

The Property and Business Improvement District (PBID) Law (Sts. & Hy. Code, § 36600 *et seq.*) provides a framework for establishing and operating business improvement districts (BID) in the state. A BID is a local business district that funds business-related improvements and activities by levying assessments on businesses or other real property that benefit from those improvements. The Law sets forth the process for creating a BID, which begins with a written petition signed by property owners in the proposed district that details the proposed BID boundaries, proposed service expenses, method and basis for levying assessments, and the calculated assessment amount.

Upon receipt of this petition, the respective city council may adopt a resolution expressing an intent

to form the proposed BID. The resolution must provide notice of a public hearing and contain information that is sufficient to enable an affected property owner to discern of the nature and extent of the proposed improvements, maintenance, activities, and charges levied. At the conclusion of the hearing, the city council may resolve to adopt, revise, or change the proposed assessment, so long as the revisions only reduce the proposed assessment. The council must also render a determination on any protests and shall not establish the BID or levy assessments if a majority protest was received.

Factual and Procedural Background

The San Pedro and Downtown Center BIDs

Petitioners Mesa RHF Partners, L.P. (Mesa), Hill RHF Housing Partners, L.P. (Hill), and Olive RHF Housing Partners, L.P. (Olive) provide housing and services to low-income seniors. Mesa owns the Harbor Tower in San Pedro (City), which is within the boundaries of the San Pedro Historic Waterfront Property and Business Improvement District (San Pedro BID). Hill owns the Angelus Plaza and Olive owns the Angelus Plaza North in Downtown Los Angeles, both of which fall within the Downtown Center Business Improvement District (Downtown Center BID). Shortly after both BIDs were created in 2012, petitioners brought legal challenges against them. Petitioners and the City ultimately settled the dispute, wherein the City agreed to reimburse petitioners for their BID assessment payments.

In 2017, both BIDs were proposed for ten-year term renewals. Pursuant to the PBID Law, Prop 218, and the Prop 218 Omnibus Implementation Act, the City Council adopted two ordinances that expressed an intent to establish the BIDs and provided requisite details on the assessments, notices of the public hearings, and voting ballots. The City Council held hearings on the Downtown Center and San Pedro BIDs three weeks apart. On the day of the San Pedro BID, a City representative advised petitioners' counsel that the previously-negotiated settlement agreements would no longer be in effect due to differences between the former and renewed BIDs. An authorized representative for petitioners voted against both BIDs at each hearing, however, neither the representative nor any other commenter raised specific challenges or legal arguments. At the conclusion of both hearings, there was no majority protest against either BID, thus prompting the City Council to adopt the ordinances to reestablish each BID.

At the Trial Court

Petitioners initiated two actions against the City, alleging each BID violated Prop 218. Petitioners contended that the BIDs were premised on an incorrect and inadequately supported understanding of the "special" vs. "general" benefits of each activity, and that the assessments imposed on petitioners would exceed the reasonable cost of the proportional specifical benefits conferred on their parcels. Each complaint alleged petitioners exhausted their administrative remedies. The City disagreed. The Los Angeles Superior Court ultimately determined that petitioners had sufficiently exhausted their objections to the assessments through their act of casting ballots against the BIDs, but nevertheless, denied the petitions on merits.

At the Second District Court of Appeal

Division One for the Second District Court of Appeal upheld the trial court's denial but declined to reach the merits of petitioners' claims on grounds that petitioners failed to adequately exhaust their administrative remedies. The court observed that the PBID Law's:

> . . .detailed administrative procedural requirements provide affirmative indications of the [California] Legislature's desire that agencies be allowed to consider in the first instance issues raised during the BID approval process.
>
> As such, exhaustion under the BID Law requires:
>
> . . .nothing more of a property owner than submitting a ballot opposing the assessment *and* presenting to the agency at the designated public hearing the specific reasons for its objection to the establishment of a BID in a manner the agency can consider and either incorporate into its decision or decline to act on.

Because petitioners only submitted ballots opposing the BIDs, but failed to present their specific

objections during the public hearings, they failed to adequately exhaust their administrative remedies.

The California Supreme Court's Decision

The California Supreme Court granted petitioners' petition for review to consider whether a party must present their specific objections to BID assessments at the appropriate Prop 218 public hearing for those arguments to later be heard on the merits in court. The Court held that the:

> . . .opportunity to comment on a proposed BID does not involve the sort of 'clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties that has allowed [the Court] to infer an exhaustion requirement in other contexts.

Proposition 218 and PBID Law

The Court first concluded that the legislative intent of Prop 218 indicated that its provisions shall be liberally construed to effectuate its purpose of limiting local government revenue and enhancing taxpayer consent. Thus, instead of employing a deferential standard of review, courts should exercise their independent review in determining whether an assessment violates Prop 218. Similarly, the PBID Law elaborates upon Prop 218's specifications, including the requirement that affected property owners be individually noticed of the assessment's information and accompanying ballot.

Exhaustion of Remedies

The exhaustion doctrine generally requires a party to raise their specific contentions during administrative proceedings before resorting to the courts. While some statutes expressly require exhaustion, courts may also infer an exhaustion requirement in statutory and regulatory schemes that do not contain an explicit command. In deciding whether to draw such an inference, courts give due consideration to the extra judicial procedures involved and to whether an exhaustion requirement would comport with, and advance the general purposes of, the statutory scheme.

Nevertheless, there are limits to the doctrine. Courts will not impose an exhaustion requirement when the administrative remedy "did not incorporate 'clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties.'" In other words:

> . . .unless there is clear legislative direction to the contrary, a process proffered as an administrative remedy does not have to be exhausted when its dispute resolution procedures are so meager that it cannot be fairly regarded as a remedy at all. When the relevant extra judicial procedures are so clearly wanting, the exhaustion rule does not come into play because it has been determined there is no genuine remedy to exhaust.

There are also exceptions to exhaustion, such as when the claimed remedy might involve a clearly defined process for aggrieved parties to submit at least *some* of their complaints.

'Issue Exhaustion' Does Not Apply

The Supreme Court held that the doctrine of "issue exhaustion" did not apply to petitioners' judicial claims against the BID assessments. The Court observed that, unlike other statutes, the relevant portions of Prop 218 do not explicitly limit judicial actions to issues that were previously presented to an agency. Thus, inferring an exhaustion requirement would not comport with the proposition's statutory scheme.

The Court disagreed with the Second District Court of Appeal's determination that Prop 218 provided petitioners with an opportunity to participate in a public comment session, which necessarily conveyed an implied intent that objections must be presented to the City before being raised in court. The Supreme Court reasoned that the "machinery" associated with Prop 218's public comment process is not as suggestive of a scheme designed for "the submission, evaluation, and resolution of complaints." The Court elaborated that "a public comment session concerning a proposed legislative act, without more, is not obviously geared toward the 'resolution' of objections," such as those raised by petitioners.

While the Court agreed with the City's interpretation of § 4 as requiring agencies to consider protest votes and oral/written objections, the provision did not resolve whether the process had to be exhausted through presentation of specific objections at public hearings. The Court found it significant that § 4 only

requires the City to "*consider*" specific objections—it does not impose a legal obligation on agencies to "*respond*" to such comments. It therefore followed that lawmakers did not intend for this public comment process to carry "a preclusive edge" that must "be fully exploited in order to preserve objections for a later lawsuit."

Policy Rationales—Not Requiring Exhaustion Comports with Prop 218

While exhaustion traditionally supports the development of a record suitable for judicial review, Prop 218 and the PBID Law require preparation of documents that may, by themselves, provide a sufficiently substantial record. Because neither law legally requires agencies to actually respond to public objections, the effectiveness of comments as a vehicle for resolving disputes short of judicial involvement is likely reduced. Other provisions also militate against imposing an exhaustion requirement, such as PBID Law's 30-day deadline for filing suit or courts' application of the independent standard of review under Prop 218.

For these reasons, the Supreme Court resolved that:

> . . .a rule requiring the presentation of specific objections regarding a BID to an agency at the appropriate public hearing certainly would have no value whatsoever as applied to disputes such as those at bar.

While exhaustion could amend or explain the contested assessment, the doctrine:

> . . .does not apply in every situation in which an abstract possibility exists that an objection lodged through some channel will alter or otherwise affect an agency action.

Moreover, the inapplicability of issue exhaustion is in sync with the Court's previously articulated understanding of Prop 218:

> With the initiative having the goal of facilitating challenges to assessments, this would be odd terrain in which to expand the exhaustion doctrine by regarding a public comment process such as the one before [the Court] as an adequate remedy that must be exhausted prior to suit, especially when there are no especially compelling policy justifications for doing so.

Amici Curiae Arguments Do Not Justify Exhaustion Requirement

Arguments raised by the League of California Cities, the Association of California Water Agencies (ACWA), the California State Association of Counties, and the California Special Districts Association in *amici curiae* briefs were similarly unpersuasive. The Court rejected their assertion that not imposing an exhaustion requirement "would give short shrift to the provisions" of Prop 218 because objectors "could just ignore the hearing and proceed directly to the court if the BID is approved." The Court explained that there are:

> . . .good reasons why property owners might raise their complaints at the appropriate hearings, and why agencies are bound to consider these objections when made, even if the articulation of issues at these forums is not an absolute prerequisite for their subsequent presentation in court.

The Court also rejected the notion that a party's ability to sue upon unexhausted objections to an assessment would require litigants to rely on facts outside the administrative record to develop their claims, thereby thwart traditional principles of judicial review in mandate proceedings. The Court explained that, under the circumstances here, "there is no necessary congruence between *issue* exhaustion and a rule limiting judicial review to *evidence* in the administrative record." Because Prop 218 places the burden on agencies to demonstrate that an assessment conforms to the law, and courts exercise their independent judgment in determining whether this demonstration has been made, the "interest in extending due deference to agency determinations… does not carry the same weight" as claims raised under the traditional substantial evidence standard.

Conclusion and Implications

The California Supreme Court's holding advances a significant procedural interpretation of Prop 218. In sum: a petitioner need not articulate their specific

objections to a BID assessment scheme at the corresponding public hearing to subsequently present those arguments in court. While petitioner-side practitioners no longer need to worry about the specificity of their public hearing comments, their clients should still adhere to Prop 218's other procedural requirements, such as casting their ballots in opposition to the proposed scheme, before bringing a legal challenge. While practitioners representing public agencies may find the Court's decision unfavorable, the opinion does concede that Prop 218 does not legally obligate agencies to specifically respond to assessment objections. Therefore, agencies should focus their efforts on producing detailed copies of all documents required by the statute to ensure the administrative record is sufficiently adequate. A copy of the Supreme Court's opinion is available at: https://www.courts.ca.gov/opinions/documents/S263734.PDF.

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LAND USE NEWS

U.S. BUREAU OF RECLAMATION AND SITES PROJECT AUTHORITY ISSUE REVISED ENVIRONMENTAL DOCUMENTS FOR THE SITES RESERVOIR PROJECT

On November 12, 2021, the Sites Project Authority (Authority) and the U.S. Bureau of Reclamation (Bureau) issued a Revised Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement (RDEIR/SDEIS) analyzing the environmental impacts of the Sites Reservoir Project under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA). The RDEIR/SDEIS identifies a range of significant impacts and adverse environmental effects to water quality, vegetation resources, special status species, geologic resources, prime farmland, air quality, and other resources.

Background

The Sites Reservoir Project (Project) calls for the construction of an off-stream reservoir that would capture and store excess water from the Sacramento River for use in dry periods. (RDEIR/SDEIS at ES-1.) The Project was first proposed as a potential project in 2000, and has since been awarded over $800 million in Proposition 1 and WIIN Act funds. (*Id.* at ES-1—ES-2.)

The Bureau is the lead agency for the Project under NEPA and the Authority is the lead agency under CEQA. The Bureau and the Authority issued a Public Draft EIR/EIS for the Project in 2017 that evaluated four project alternatives, all of which included a reservoir sized between 1.3 and 1.5 million acre-feet (MAF) that would use existing Sacramento River diversion facilities and a Delevan Pipeline on the Sacramento River to allow for release of flows into the river. (*Id.* at ES-2.) In October 2019, however, the Authority initiated a new value planning process to consider additional project alternatives that could make the Project more affordable while also addressing comments on the 2017 Draft EIR/EIS. (*Id.*)

The Authority and the Bureau prepared the RDEIR/SDEIS to evaluate the new project alternatives developed in conjunction with the Authority's value planning process. (*Id.* at ES-3.) The Project's objectives include, but are not limited to, improving water supply reliability and resiliency, increasing the operational flexibility of the federal Central Valley Project (CVP), and enhancing the Delta Ecosystem. (*Id.* at ES-6.)

Summary of the RDEIR/SDEIS

The RDEIR/SDEIS identifies four project alternatives: a no project alternative and three action alternatives identified as Alternatives 1, 2, and 3. Alternatives 1 and 3 both call for a reservoir size of 1.5 MAF and share many other similarities, while Alternative 2 calls for a slightly smaller reservoir of 1.3 MAF. (*Id.* at 2-5.) All three action alternatives would involve the use and improvement of existing Sacramento River diversion facilities, the construction of two main dams to impound water from Funks Creek and Stone Corral Creek, construction of the Dunnigan Pipeline to convey water from the reservoir to the Colusa Basin Drain and the Sacramento River, and the construction of new recreational facilities and roads. (*Id.* at 2-8—2-28.)

The three action alternatives also share several common operational features. The Project could divert Sacramento River water between September 1 and June 15 and hold that water in storage until requested for release, with releases typically occurring between May and November. (*Id.* at 2-29.) Released water could be used along the Tehama-Colusa Canal and the Glenn-Colusa Irrigation District Main Canal, or transported through the new Dunnigan Pipeline for conveyance through the Sacramento River or Yolo Bypass to locations both in the Delta and south of the Delta. (*Id.*) The Project could also facilitate exchanges of water with the Central Valley Project and State Water Project. (*Id.* at 1-36—2-37.) Additionally, releases of stored water would be used for hydropower generation. (*Id.* at 2-40.) The Authority's preferred alternative—and the proposed project

under CEQA—is Alternative 1. (*Id.* at 2-56.) In addition to a 1.5 MAF reservoir capacity, Alternative 1 differs from the other two action alternatives because it proposes a bridge across the reservoir and would limit Reclamation's financial involvements to a 7 percent investment. (*Id.* at 2-57.)

Although CEQA and NEPA use different terminology to refer to the environmental analysis the Authority and the Bureau of Reclamation have undertaken in the RDEIR/SDEIS, they both essentially require the identification of both the environmental impacts of each project alternative and potential mitigation measures. (*Id.* at 3-5—3-7.) CEQA, however, requires that the RDEIR/SDEIS either implement feasible mitigation measures that would reduce significant environmental impacts to a less-than-significant level or make a finding that no feasible mitigation exists such that a specific impact is determined to be significant and unavoidable. *Id.* at 3-8.

In general, the RDEIR/SDEIS has identified similar environmental impacts under CEQA and environmental effects under NEPA for all three alternatives. (*See id.* ES-16—ES-43.) The RDEIR/SDEIS has also identified feasible mitigation measures for several significant impacts to vegetation resources, wildlife resources, aquatic biological resources, geology and soils, and greenhouse gas emissions that would reduce those impacts to less-than-significant. (*Id.*) Still, there remain a variety of impacts that the RDEIR/SDEIS has determined are significant and unavoidable under CEQA, either because there are no feasible mitigation measures or because the mitigation measures proposed would not reduce the impacts to a less than significant level. These impacts include water quality impacts, impacts to golden eagles, and impacts to land uses, among others. (*See id.*)

Conclusion and Implications

Although comments on the RDEIR/SDEIS were originally due on January 11, 2022, the public comment period was since extended to January 28, 2022. The next step for the Bureau of Reclamation and the Sites Project Authority will be to consider any comments received and issue a Final EIR/EIS. Although the Bureau and the Authority must consider the Final EIR/EIS in deciding whether to approve the Project, the California Water Commission will also consider it in determining whether the Project remains eligible for Proposition 1 funding and in approving its final funding award.
(Sam Bivins, Meredith Nikkel)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA TO RECEIVE EXTENSIVE BENEFITS FROM FEDERAL INFRASTRUCTURE INVESTMENT AND JOBS ACT

With the United States as a whole still looking for ways to springboard out of the COVID era, Congress was able to assemble and pass a once-in-a-generation bipartisan infrastructure bill. Aptly named the Infrastructure Investment and Jobs Act [HR 3684], the bill was signed into law on November 15. The $1.2 trillion bill puts into motion historic federal investments for the nation's physical and cybersecurity infrastructure and aspires to create 2 million jobs per year over the course of a decade in doing so.

The need for such improvement in California is clear and the Infrastructure Investment and Jobs Act could address many problems throughout the Golden State. Infrastructure in California has suffered from a systemic lack of investment. Moreover, the state was recently given a grade of C- on its infrastructure report card, according to the American Society of Civil Engineers:

> The state has made progress in recent years to close the infrastructure investment gap, but much work remains to prepare the infrastructure to support the state's economy and preserve Californians quality of life. . . . Much of California's infrastructure needs significant investments to reverse the decades of underinvestment and help the built systems withstand climate change. Ports, for example, are presently in satisfactory condition, but require approximately $10.7 billion over the next 10 years to protect themselves against the impacts of earthquakes and sea-level rise. Dams and levees are increasingly providing protection against extreme precipitation whiplash, but many of these structures are aging and past their design lives. (*See:* https://infrastructurereportcard.org/asce-gives-california-infrastructure-a-c/)

While many sections of the new legislation simply authorize Congress to appropriate funding for fiscal years 2022 through 2026 for both current and newly created programs, other sections of the bill provide supplemental appropriations over that time period for many of the programs in the bill, above and beyond funding normally provided to such programs in Congress's annual spending bills.

An Upgrade to California's Water Resilience

With historic drought conditions ravaging the state over the last decade, the Infrastructure Investment and Jobs Act prioritizes water resilience for California.

In terms of water storage improvements, California will receive more than $1.5 billion in funding. Of this, over $1 billion will be utilized to improve water storage in California, potentially benefitting storage enhancement projects such as the B.F. Sisk Dam, Sites Reservoir, Los Vaqueros Reservoir, and Del Puerto Canyon Reservoir expansions. As for the remainder, an additional $500 million has been appropriated for repairs to aging dams, such as the San Luis Reservoir.

In furtherance of increasing California's water supply sustainability and resilience is an additional $250 million in funding, which will be directed to the state to bolster water desalination, a critical innovation needed to increase our supply as California deals with cycles of drought.

Among the chief concerns addressed in the bill's appropriations, there is also heavy investment in drinking water infrastructure. In response to the nationwide crisis regarding the lack of safe drinking water, California can expect to receive $3.5 billion over the next five years to improve its water infrastructure across the state and to ensure that clean, safe drinking water is available in all Californian communities.

Federal Level Appropriations

At the federal level, several other major appropriations are laid out in the Infrastructure Improvement and Jobs Act. Notably, $1.15 billion has been appropriated for surface and groundwater storage, and water conveyance projects, with $100 million reserved

for small surface and groundwater storage projects. Another $1 billion has also been appropriated for Water Recycling including $450 million for a new large water recycling project grant program authorized via the act. On the Colorado River side of the state, the federal appropriations have also included $300 million for the implementation of the Colorado River Drought Contingency Plan, as well as an additional $50 million for Colorado River Endangered Species Recovery and Conservation Programs.

Conclusion and Implications

With the new year well under way, the provision of funds has already begun and will continue over the course of the next five years. With the proper utilization of these funds, Californians can look forward to seeing advances in the state's water resilience in addition to other critical management areas of the state as a whole such as air quality, transportation, and wildfire management. While achieving the goal of modernizing the state's infrastructure has been a slow and ongoing process, the Infrastructure Investment and Jobs Act will provide an opportunity to boost this effort and bring statewide infrastructure up to twenty-first century standards. The Infrastructure Investment and Jobs Act's full text and history is available online at: https://www.congress.gov/bill/117th-congress/house-bill/3684.
(Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

U.S. ARMY CORPS OF ENGINEERS REISSUES AND MODIFIES NEW CLEAN WATER ACT SECTION 404 NATIONWIDE PERMITS

On December 27, 2021, the United States Army Corps of Engineers (Corps) finalized 40 nationwide permits and issued a new nationwide permit for water reclamation and reuse facilities. The 40 newly finalized nationwide permits follow 12 that were reissued and four new nationwide permits that were finalized in January 2021. The nationwide permits will go into effect on February 25, 2022 and all of the current nationwide permits will expire March 14, 2026. [U.S. Army Corps of Engineers, Reissuance and Modification of Nationwide Permits, 86 Fed. Reg. 73,522 (December 27, 2021).]

Factual and Procedural Background

Nationwide permits are general permits under Section 404 of the federal Clean Water Act authorizing placement of dredge or fill material into waters of the United States for recurring types of projects that have only minimal individual and cumulative adverse environmental effects. They also authorize activities that require Corps permits under Section 10 of the Rivers and Harbors Act of 1899, which regulates the placement of any structure in or over a navigable "water of the United States." Section 404(e) of the Clean Water Act authorizes the Corps to issue nationwide or regional general permits for up to five years for activities that are similar in nature and have minimal individual and cumulative adverse environmental effects. The Corps has issued nationwide permits at regular intervals since 1977.

Nationwide Permits expedite permitting and reviews for the projects that they cover by allowing an applicant to avoid the requirement for an individual Section 404 or Section 10 permit and the associated reviews under the National Environmental Policy Act (NEPA). Nationwide permits are used to authorize approximately 70,000 projects in a typical year. The Corps stated that the newly finalized Nationwide Permits support effective implementation of the recently passed bipartisan Infrastructure Investment and Jobs Act by providing infrastructure permit decisions with minimal delay and paperwork.

More on the Army Corps' Recent Actions

The Corps released a proposed rule in September 2020 to reissue the nationwide permits issued in 2017. In January 2021, the Corps published a final rule which reissued 12 nationwide permits, finalized four new nationwide permits, and made some adjustments to the general conditions and definitions for the nationwide permit program.

Reissuance of the 2017 Nationwide Permits

During the process of reissuance, the Corps made a relatively small number of changes to the 2017 permits. One of the most significant changes, which drew criticism from environmental groups, removed a 300-linear-foot limit for losses of streambed from ten nationwide permits that were finalized in January 2021, during the closing days of the Trump administration:

- *Nationwide Permit 21*, Surface Coal Mining; *Nationwide Permit 29*, Residential Developments; *Nationwide Permit 39*, Commercial and Institutional Developments; *Nationwide Permit 40*, Agricultural Activities; *Nationwide Permit 42*, Recreational Facilities; *Nationwide Permit 43*, Stormwater Management Facilities; *Nationwide Permit 44*, Mining Activities; *Nationwide Permit 50*, Underground Coal Mining; *Nationwide Permit 51*, Land Based Renewable Energy Generation Facilities; and *Nationwide Permit 52*, Water-Based Renewable Energy Generation Pilot Projects.

The Corps also took steps to expand three additional 2017 permits:

- *Nationwide Permit 27,* Aquatic restoration, enhancement, and establishment activities: The Corps added "releasing sediment from reservoirs to restore or sustain downstream habitat" and "coral restoration or relocation" to the list of examples of activities authorized by the permit;

•*Nationwide Permit 41*, Reshaping existing drainage ditches: The Corps expanded the nationwide permit to include reshaping of existing irrigation districts;

•*Nationwide Permit 48*, Commercial shellfish mariculture activities: The new permit changes its name from "aquaculture" to "mariculture" to more precisely reflect that it permits activities in coastal waters. It also removes a prior prohibition against new commercial shellfish mariculture activities directly affecting more than 1/2-acre of submerged aquatic vegetation.

New Nationwide Permits Issued in January 2021

In January 2021, the Corps also promulgated four new nationwide permits, described below:

•*Nationwide Permit 55*, Seaweed mariculture: This new nationwide permit allows structures in marine and estuarine waters, including structures anchored to the seabed on the Outer Continental Shelf, for the purpose of seaweed mariculture activities and also allows projects to incorporate shellfish production in conjunction with seaweed production on the same structure or a structure part of the same project;

•*Nationwide Permit 56*, Finfish mariculture: This new nationwide permit allows structures in marine and estuarine waters, including structures anchored to the seabed on the Outer Continental Shelf, for the purpose of finfish mariculture activities. Similar to Nationwide Permit 55, this permit allows projects to incorporate shellfish production in conjunction with seaweed production on the same structure or a structure part of the same project;

•*Nationwide Permit 57*, Electric utility line and telecommunications activities: this new permit allows activities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication lines, and associated facilities in waters of the United States. These activities were previously covered by Nationwide Permit 12, which also permits oil and natural gas pipelines, but which was enjoined from use for a period in 2020 in litigation challenging the Keystone XL pipeline. By creating a separate nationwide permit for electric utility lines and telecommunications lines, the Corps will allow these projects to avoid oil and gas pipeline litigation impacts;

•*Nationwide Permit 58*, Utility lines for water and other non-hydrocarbon substances: this new permit allows activities required for the construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. The new permit also allows associated utility line facilities, such as substations, access roads, and foundations for above-ground utility lines, in waters of the United States. These activities were previously covered by Nationwide Permit 12. Creating a separate nationwide permit for water utility activities avoids potential impacts from challenges to oil and gas pipelines, and also removes conditions that were focused on other types of pipelines or utilities.

New Nationwide Permit Issued in December 2021

In December 2021, the Corps reissued the remaining 40 nationwide permits and finalized a fifth new nationwide permit:

•*Nationwide Permit 59*, Water reclamation and reuse facilities: this new nationwide permit will help expedite and provide clarity for smaller water recycling, reuse, and groundwater recharge projects. The Corps limited its scope to projects that impact less than one half of an acre of waters, which will preclude its use for medium or large scale water recycling or recharge projects.

In its discussion of the new Nationwide Permit, the Corps cited the climate resilience and conservation benefits of water reclamation and reuse projects:

> Water reclamation and reuse facilities can be an important tool for adapting to the effects of climate change, such as changes in precipitation patterns that may affect water availability in areas of the country. Water reclamation and reuse facilities help conserve water, which may

be beneficial as water availability changes or increases in water demand occur.

In response to comments filed by public water agencies and their representatives, the final rule's preamble includes language stating that the Corps will not consider the source of water when applying nationwide permits to water reclamation or reuse projects. It states:

> For water reclamation and reuse facilities, the Corps regulates discharges of dredged or fill material into waters of the United States for the construction, expansion, or maintenance of those facilities. In general, the Corps does not have the authority to regulate the operation of these facilities after they are constructed, expanded, or maintained through discharges of dredged or fill material into waters of the United States authorized by this nationwide permit. The Corps does not have the authority to regulate releases of water to recharge or replenish groundwater, to regulate the mixing of water from various sources, or to regulate the movement of water between watersheds.

This language clarifies that the Corps does not plan to withhold or condition this new nationwide permit in response to concerns about the water that will be used for the project – such as imported or recycled water.

Conclusion and Implications

The U.S. Army Corps of Engineers' new nationwide permit for water reclamation and reuse projects will expedite groundwater recharge projects that impact less than one-half an acre of waters or wetlands. The new permit and its discussion also demonstrate that the Biden administration views water recharge, reuse, and recycling as important tools for increasing water reliability and adapting to the impacts of climate change. The reissuance of existing nationwide permits provides continuity until March 2026 for a program that expedites permitting for infrastructure and other projects that have minor impacts on waters and wetlands regulated under the Clean Water Act. For more information on the general permits, *see:* https://www.federalregister.gov/documents/2021/12/27/2021-27441/reissuance-and-modification-of-nationwide-permits.
(Lowry Crook, Ana Schwab, Rebecca Andrews)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT REVERSES DENIAL OF COMPANY'S REQUEST TO INTERVENE BY RIGHT IN CHALLENGE TO BLM'S ISSUANCE OF OIL LEASES

Western Watersheds Project v. Haaland, ___F.4th___, Case. No. 20-35780 (9th Cir. Jan. 5, 2022).

A three judge panel of the Ninth Circuit Court of Appeals reversed and remanded a decision by the U.S. District Court for Wyoming to deny an energy company's motion to intervene by right under Federal Rule of Civil Procedure Rule 24 (a). The litigation at issue involved an effort to invalidate oil leases issued under the Trump administration that plaintiffs argued violated an Obama-era policy disfavoring the issuance of such leases in sage-grouse habitat. The Ninth Circuit rejected the District Court's conclusions that the energy company's motion to intervene was untimely and that the company's interests would be adequately represented by existing parties, namely a trade association representing approximately 300 similar energy companies in the action. The case provides a helpful analysis in the land sue context of the factors involved in determining whether to grant a motion to intervene as of right under Rule 24 (a).

Factual and Procedural Background

In 2010 the U.S. Fish and Wildlife Service (FWS) also concluded that the greater sage-grouse warranted protection under the federal Endangered Species Act (ESA). A related policy required the Bureau of Land Management (BLM) to prioritize oil and gas leasing outside of sage-grouse habitats. After the 2016 presidential election, the federal government's land-use policies shifted. Under the new administration, the BLM accelerated oil and gas leasing on ecologically significant habitats, including those identified as sage-grouse habitat. Pursuant to these changed policies, the BLM auctioned oil and gas leases in Wyoming in March of 2018. Appellant, a national energy company, was the high bidder on seven leases for which it paid over $8.4 million.

Appellees, two environmental organizations sued BLM in 2018 to challenge the oil and gas leases in identified sage-grouse habitats. All-told, appellees challenged over 2,200 leases covering more than 2.39 million acres across multiple states.

After appellees filed their complaint, a regional trade association representing more than 300 member companies, including appellant, moved to intervene as defendant. The District Court granted the trade association's motion to intervene along with a similar motion filed by the State of Wyoming.

In December of 2018, the District Court issued a case management order dividing the litigation into discrete phases based on specific lease sales. In "Phase One" the District Court agreed to consider appellees' challenge to a subset of lease sales, including the leases acquired by appellant in 2018, and found that BLM improperly restricted public involvement in Phase One lease sales. As a result, the District Court issued a vacatur vacating these sales, but stayed its vacatur pending appeal.

The Motion to Intervene

A little over two weeks after the District Court issued its stay, appellant moved to intervene for the purpose of appealing the Phase One decision, and participating in any subsequent phases in which its remaining leases were to be considered.

The District Court denied appellant's motion to intervene in the Phase One or other stages. The District Court concluded that appellant was not a required party under Rule 19 of the Federal Rules of Civil Procedure because its "interests were adequately represented by an existing party in the suit" namely the trade association. The court also concluded that appellant was not entitled to intervene as of right under Rule 24(a) because appellant was adequately represented by an existing party, and that its request for intervention was untimely for three reasons: 1) Phase One was nearly complete, 2) appellant's involvement would introduce new arguments and issues on appeal

thus prejudicing existing parties, and 3) appellant was supposedly aware of the lawsuit and appellees' effort to vacate the Phase One leases but waited years to move to intervene.

The Ninth Circuit's Decision

The Ninth Circuit began by noting that a non-party is entitled to "intervene as of right" under Rule 24(a) when it: 1) timely moves to intervene, 2) has a significant protectable interest related to the subject of the action, 3) may have that interest impaired by the disposition of the action, and 4) will not be adequately represented by existing parties to the action. An applicant seeking intervention bears the burden of showing these four elements are met, however a Circuit Court interprets such requirements "broadly in favor of intervention.)" The court's decision focused on the timeliness and adequate representation by existing parties factors.

Timeliness

Regarding timeliness, the court first analyzed the stage of proceedings at which point appellant sought to intervene. On this point the court recognized that although "delay can strongly weigh against intervention… the mere lapse of time, without more, is not necessarily a bar to intervention." The general rule is that a post judgment motion to intervene is timely if filed within the time allowed for filing an appeal. Appellant filed its motion for intervention within the time to file a notice of appeal from the Phase One decision, and for that reason the court found that appellant's delay in filing a motion to intervene did not weigh against intervention into Phase One. Regarding the timeliness of appellant's motion to intervene in the remaining phases of litigation, the court found that the length of appellant's delay did not preclude intervention.

The court also looked to the prejudice that intervention by appellant would cause to existing parties, which is "the most important consideration in deciding whether a motion for intervention is untimely." With respect to Phase One, the court rejected the District Court's conclusion that appellees would face prejudice because intervention may require "additional briefing on appeal, including possible additional arguments not presented to or ruled upon by the District Court." The court noted:

> . . .that is a poor reason to deny intervention, given the possibility that [appellant]'s additional arguments could prove persuasive. That [appellant] might raise new, legitimate arguments is a reason to grant intervention, not deny it.

Regarding the subsequent phases, the court similarly found that the parties in the litigation would not suffer sufficient prejudice to warrant denial of intervention.

The court also considered the "length of, and explanation for, any delay in seeking intervention." Here, the Court of Appeals rejected the District Court's conclusion that appellant was aware of the lawsuit and that its leases were at issue from the date that the litigation was filed. The court highlighted uncontested evidence in the record, that the District Court apparently overlooked, indicating that appellant had no idea that its leases were involved in the instant litigation. The court recognized that although appellant intervened two years after the litigation had begun, it's motion to intervene actually came just three months after appellant discovered that its leases were involved in the litigation.

The court concluded under the totality of the circumstances that the District Court abused its discretion in finding that appellant's motion for intervention was untimely.

Adequacy of Representation

Under Rule 24 (a), an intervening party must show that its "interests will not be adequately represented by existing parties." The burden in making this showing of inadequate representation "is minimal and satisfied if the appellant can demonstrate that representation of its interest may be inadequate." To evaluate adequacy of representation, courts look to three factors: 1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments, 2) whether the present party is capable and willing to make such arguments, and 3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

The court conceded that appellant and the existing trade association party both had the objective of upholding BLM's lease sales. This gave rise to a presumption that existing parties adequately represented

appellant. To rebut this presumption appellant needed to make a "compelling showing" of inadequate representation. The court concluded that appellant had made this showing. First, the trade association party did not seek to raise several colorable arguments that appellant sought to raise. The trade association was also only given ten pages for its Phase One merits brief, despite the fact that there were 932 leases at issue. As a result, the court concluded that the trade association could not adequately represent the more specific interests that the appellant wanted to raise in the action. Appellant, as a party with legally protected contract rights with the federal government, would offer a necessary element to the proceeding that other parties would neglect. Here, appellant had a substantial due process interest in the outcome of the litigation by virtue of its contract with the BLM. Although the trade association intervened with the express purpose of representing companies like the appellant, it was charged with representing 300 such companies engaged in all aspects of oil and gas production. It is possible that appellant's more narrow interests would differ from those of the trade association.

The Court of Appeals concluded that appellant had satisfied the requirements for intervention as of right under Rule 24(a), and reversed and remanded the District Court's decision.

Conclusion and Implications

The *Western Watersheds Project* case provides a helpful overview in the land use context of the factors involved in determining whether a party is entitled to intervene in a federal action as of right under Rule 24(a). A copy of the court's opinion can be found online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/01/05/20-35780.pdf.
(Travis Brooks)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT AFFIRMS APPLICATION OF LEGISLATIVE IN-LIEU FEE SCHEME TO PROVIDE COASTAL ACCESS

Jack Wall v. California Coastal Commission, ___Cal.App.5th___, Case No. B312912 (2nd Dist. Dec. 16, 2021).

The Second District Court of Appeal in *Jack Wall v. California Coastal Commission* affirmed the trial court's decision granting in part petitioner Jack Wall's (Wall) petition for a writ of *mandamus* against respondent California Coastal Commission (Commission) on the grounds that the Commission's denial of a Coastal Development Permit (CDP) was uncalled for given Wall's agreement to pay a statutorily required in-lieu fee for coastal access required under the Coastal Act and California Constitution.

Factual and Procedural Background

Wall owns property in Hollister Ranch, a 14,500-acre subdivision in Santa Barbara County along 8.5 miles of coastline, divided into 136 parcels. In the 1970s the Commission approved several Coastal Development Permits (CDPs) for new Hollister Ranch residences, conditioned on the dedication of easements for pedestrian trails and recreation areas. The landowners sued to invalidate the conditions of the CDPs. Before the lawsuits could proceed, the Legislature in 1979 added Public Resources Code § 30610.3 to the Coastal Act to provide for an in-lieu public access fee scheme. That scheme provides that each landowner within the Coastal Zone that lacks authority to provide access to the coastline must pay an in-lieu public access fee as a condition of CDP approval. The fee is then deposited into a Coastal Access Account for the purchase and lands and view easements and to pay for any development needed to carry out the public access program. Upon payment of the fee, the landowner may immediately commence construction if other conditions of the CDP have been met. The Commission determined that this section applied to Hollister Ranch.

Later in 1979, Santa Barbara County adopted a Local Coastal Program (LCP) that was approved by the Commission. The LCP includes provisions to implement the Coastal Act, including § 30610.3. In 1982, the Legislature added § 30610.8 to the Coastal Act, requiring Hollister Ranch to provide public access along the coastline in a timely manner and fixing the amount of the fee for Hollister Ranch given that the Ranch landowners would not provide state surveyor access for the purpose of determining the fee. Subsequently, the Commission approved the Gaviota Coast Plan (GCP) as part of the County's LCP, which also requires payment of the fee consistent with § 30610.8.

The Walls own a 102-acre parcel in Hollister Ranch located three-quarters of a mile from the Pacific Ocean. The Walls' property has previously been developed with a single-family home, guesthouse, barn, and storage structure. The Walls did not pay an in-lieu public access fee in connection with any of the prior improvements.

In 2018, the Walls applied for a CDP to construct a pool and spa on their property. The County's director of planning and development approved the CDP without imposing an in-lieu public access fee. Two members of Commission appealed that approval to the Coastal Commission, citing noncompliance with the Coastal Act, LCP and GCP.

The Commission determined that the appeal raised a substantial issue and held a hearing. The Walls offered to pay the in-lieu fee in exchange for the Commission's approval of their CDP request. The Commission unanimously rejected the Walls' CDP request, stating that even if the fee had been paid, that Hollister Ranch has not provided public access and public recreational opportunities.

The Walls challenged the Commission's denial in a petition for writ of administrative mandamus. The superior court granted the petition in part, finding that the Commission failed to order the Walls to pay a $5,000 in-lieu public access fee in exchange for the CDP. The court also found it unclear whether the Commission's decision conditioned CDP approval on providing actual access to the ocean—something the Walls, as owners of an inland parcel, cannot

provide—so clarification on that basis was required. The trial court remanded the case to the Commission with directions to issue the CDP upon payment of the $5,000 fee unless other factual or legal bases for denial were specified.

The Walls appealed, contending: 1) the Coastal Act does not allow the commission to condition approval of the CDP on access to their property; 2) the Act does not allow the Commission to condition approval of the CDP on payment of the $5,000 public access fee; and 3) even if the Coastal Act allows these conditions, imposing them would be unconstitutional.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's determinations, finding that Public Resources Code § 30610.8 requires payment of an in-lieu public access fee for each CDP applicable to Hollister Ranch as a matter of law.

The Coastal Act Access Requirement

The California Constitution guarantees public access to the navigable waters of the state, including those along the Pacific Coast. (Cal. Const., art. X, § 4.)

For nearly five decades, enforcing this guarantee at Hollister Ranch in Santa Barbara County has been difficult and the California Legislature has enacted provisions of the Coastal Act to ensure public access. A primary goal of the Coastal Act is to maximize public access to the coast. New developments are generally required to provide access between the nearest public roadway and the coastline. Where an individual landowner in a subdivision lacks authority to provide the required access, the Act requires the landowner to pay an in-lieu public access fee as a condition of CFP approval.

Local governments issue CDPs in the context of local coastal programs. Each LCP must be developed in consultation with the Commission to ensure that it complies with Coastal Act provisions. Once the Commission certifies an LCP, the local government assumes primary permitting authority, with certain decisions appealable to the Commission.

No Direct Access Required, But In-Lieu Fee Required

Contrary to the Walls' first argument, the statements of members of the Commission bemoaning the lack of provision of meaningful access to the coast by Hollister Ranch does not mean that they based their decision on a requirement that the Walls provide direct coastal access.

Contrary to Walls' second argument, under the plain meaning of the statute, the language of § 30610.8 does not only apply to vacant lots as does § 30610.3, but instead it applies to all CDP permits. Section 30610.8 was a particularized application meant expressly for Hollister Ranch.

With regard to Walls' third argument, Wall failed to raise any constitutional argument in the trial court and thus waived that contention on appeal.

Conclusion and Implications

This opinion by the Second District Court of Appeal is the latest attempt by Hollister Ranch landowners to limit the Coastal Commission reach attempting to provide shoreline access along the ranch coastline. Given the Court of Appeal's citation of the California Constitutional provision requiring coastal access, it is not likely that the Court of Appeal in a different case will be inclined to consider a subsequent constitutional challenge to the Legislature's in-lieu fee scheme for providing access. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B312912.PDF.

(Boyd Hill)

FIRST DISTRICT COURT HOLDS STATE WATER BOARD'S PROCESS OF GRANTING DOMESTIC USE REGISTRATIONS IS 'MINISTERIAL' AND EXEMPT FROM CEQA REQUIREMENTS

Mission Peak Conservancy v. State Water Resources Control Board, 72 Cal.App.5th 873 (1st Dist. 2021).

Petitioner conservation group brought an action against the State Water Resources Control Board (SWRCB or Water Board), alleging that the SWRCB violated the California Environmental Quality Act (CEQA) when it granted a small domestic use registration to property owners without first conducting environmental review. The Superior Court sustained the Water Board's demurrer without leave to amend and petitioner appealed. The Court of Appeal affirmed, finding that the process of granting the domestic use registration was ministerial under CEQA.

Factual and Procedural Background

The Water Rights Permitting Reform Act of 1988 provides a streamlined process for acquiring a right to appropriate water (up to ten acre-feet per year) for domestic or other specified uses. Generally, an eligible person obtains the right by: 1) registering the use with the Water Board; 2) paying a fee; and 3) then putting the water to "reasonable and beneficial use"; *i.e.* registration form requires certain information (e.g., location of the proposed use, diversion, and storage; certification that the registrant has provided registration information to the Department of Fish and Wildlife and will comply with any imposed conditions) and is deemed complete when the Water Board receives a substantially compliant form and the fee.

A completed registration gives the registrant a priority of right as of the date of completed registration to take and use the amount of water shown on the registration form. Once registered, the right remains in effect unless forfeited or revoked under specified circumstances. The SWRCB is authorized to set general terms and conditions applicable to all registrations. However, given its overall lack of discretion over individual permits, the Water Board has designated the registration process generally to be exempt from CEQA as a ministerial action.

Petitioner challenged the SWRCB's granting of a domestic use registration to property owners on a property in Alameda County. It was apparently undisputed that the registration form, on its face, met the program requirements, although petitioner alleged that the form contained false information. Petitioner asserted a single cause of action for CEQA violations, contending that the registration process is discretionary, not ministerial, and therefore not exempt from CEQA. The Superior Court granted the Water Board's demurrer, and petitioner appealed.

The Court of Appeal's Decision

CEQA applies only to discretionary projects proposed to be carried out or approved by public agencies. A project is discretionary when an agency is required to exercise judgment or deliberation in deciding whether to approve an activity. By contrast, projects that do not require discretion (*i.e.*, ministerial projects) are exempt from CEQA. Ministerial projects involve little or no personal judgment by the public official as to the wisdom or manner of carrying out a project. The test for whether an action is discretionary or ministerial is whether the law governing the agency's decision to approve the project gives it authority to require changes that would lessen the project's environmental effects. If so, the project is discretionary; not ministerial.

Here, the Court of Appeal found petitioner had failed to point to any statute granting the SWRCB authority to place conditions on the registration to lessen environmental impacts. Rather, the registration is automatically deemed complete, and the registrant obtains the right to take and use the specified amount of water, when the Water Board receives a substantially compliant form along with the registration fee. The Water Board determines whether a registration is compliant essentially by applying a checklist of fixed criteria. The registration is effective as of the date of the form, and it remains effective unless the water right is forfeited, abandoned, or revoked.

The Court of Appeal also rejected petitioner's various arguments. First, it rejected petitioner's claim that another public agency—the Department of Fish and

Wildlife—had discretion to impose conditions that could lessen environmental impacts, finding that the Water Board had no authority to modify or otherwise shape those conditions. If the Department of Fish and Wildlife has set any conditions, the Water Board must accept them.

Second, petitioner had argued that the project did not satisfy the requirements for a domestic use registration because the registration misrepresented facts (*e.g.*, the size of the pond and other features). Thus, petitioner claimed, the SWRCB had discretion, at least in a colloquial sense, to deny the project. The Court found that this argument misunderstood the relevant test, which was whether the Water Board had the legal authority to impose environmentally beneficial changes as conditions on the project. Petitioner pointed to no such authority. Rather, it argued the Water Board misapplied the fixed criteria to the facts and made the wrong ministerial decision. But CEQA does not apply to or otherwise regulate ministerial decisions—full stop.

Third, the Court of Appeal rejected petitioner's contention that, even assuming the Water Board's decision was ministerial, the action nonetheless violated CEQA because the project did not meet the requirements for a small domestic use and thus the SWRCB's action was not supported by substantial evidence. Similar to petitioner's second argument, the Court of Appeal found that this was simply an argument that the Water Board made an erroneous ministerial decision—which, as the Court previously noted, is not a basis for a CEQA claim.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the distinctions between ministerial and discretionary actions under the California Environmental Quality Act. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A162564M.PDF. (James Purvis)

THIRD DISTRICT COURT FINDS SUBSTANTIAL EVIDENCE SUPPORTED CITY'S DETERMINATION THAT A PROJECT WAS CONSISTENT WITH APPLICABLE PLANNING DOCUMENTS

Old East Davis Neighborhood Association v. City of Davis,
___Cal.App.5th___, Case No. C090117(3rd Dist. Jan. 12, 2022).

The City of Davis (City) approved a mixed-use building located between the City's Downtown Core and Old East Davis, an older neighborhood. Petitioner sought a petition for writ of mandate, claiming that insufficient information supported the City's finding that the project was consistent with applicable planning documents, in particular a finding that the project would serve as a "transition" between the Downtown Core and Old East Davis. The Superior Court granted the petition, the City and developer appealed, and the petitioner cross-appealed. The Court of Appeal for the Third Judicial District reversed, finding substantial evidence supported the City's approval.

Factual and Procedural Background

The "Trackside" Project (Project) was a proposed four-story, 47,983 square-foot mixed-use building that would include 8,950 square-feet of ground floor retail space and 27 apartment units on three upper floors. The project is a half-acre of land, zoned mixed-use, that sits in a "transition area" between the Downtown Core and the Old East Davis residential neighborhood. To the immediate west, there are train tracks marking the eastern border of the Downtown Core. To the immediate east, there is 30-foot wide alley marking the western border of the Old East Davis neighborhood. Abutting the alley on the Old East Davis side are several single-family homes.

The city council approved the project, finding the project consistent with the applicable planning documents. When it approved the project, the City also adopted a Sustainable Communities Environmental Assessment/Initial Study (SCEA) prepared for the project. A SCEA study is a streamlined environmental review permitted for projects qualifying as transit priority projects.

The Old East Davis Neighborhood Association challenged the City's approval action in a petition for writ of mandate. The petition claimed the project failed to meet the requirements for a SCEA assessment and was inconsistent with various planning documents. The Superior Court granted the petition, finding the record did not support the City's decision, reasoning that it was "a fundamental policy of the General Plan" that the project site be a "transition property," and that such policy was not met. It also found that because the project was inconsistent with the General Plan the SCEA therefore was inadequate. However, it did conclude that the project was a Transit Priority Project, and thus appropriately qualified for SCEA review.

The Court of Appeal's Decision

The City's and Developer's Appeals

The Court of Appeal first addressed the City and developer's claims that the Superior Court exceeded its authority in failing to defer to the City's findings and instead applied its own views. The court began by summarizing the standard of review and applicable law in reviewing such claims. Generally, a city council's determination that a project is consistent with a General Plan is carries "a strong presumption of regularity." Such determination only will be reversed if a reasonable person could not have reached the same conclusion based on the evidence.

As was the case in the Superior Court proceedings, the central question on appeal was whether substantial evidence supported the City's finding that the project would serve as a "transition" between the Downtown Core, to the west, and Old East Davis and residential homes, to the east. The Court of Appeal noted that, while certain criteria may be particularly important, the planning documents did not provide formulistic method for determining whether a proposed structure constitutes a transition. Instead, the court observed that such determination must use subjective measures such as "architectural fit" and "appropriate scale and character."

The Court of Appeal found that the Superior Court applied a formulistic approach, reasoning that a mixed-use building outside the Downtown Core could not exceed the height and size of a mixed-use building inside that area and still be considered a transition. In so doing, the Superior Court discounted various factors relied on by the City (*e.g.*, a step-back design, a nearby alley separating homes, 40-foot homes in Old East Davis, among other things). It is not, the Court of Appeal explained, a court's role to reweigh these factors unless no reasonable person could reach the same conclusion based on the evidence. Here, the Court of Appeal found nothing in the planning documents that compelled the conclusion that the City's reliance on the cited factors was inherently unreasonable. Nor had petitioner otherwise pointed to anything in the applicable planning documents that the project unambiguously ran afoul of.

Petitioner's Cross-Appeal

On cross-appeal, petitioner argued that the Superior Court failed to rule on three issues that had been raised regarding the City's failure to comply with CEQA. The Court of Appeal found that, with respect to each of these issues, the claim was forfeited because petitioner did not object to the Superior Court's tentative decision, which expressly declined to reach those issues. Even had the challenges been preserved, the Court of Appeal found that they lacked merit.

Petitioner also claimed the project violated certain guideline language that "a building shall appear to be in scale with traditional single-family houses along the street front." The Court of Appeal again disagreed, finding that the guidelines were relevant but not mandatory, and that even if the language were mandatory it would not follow that no reasonable person could agree with the City's conclusion that the project appears in scale with the adjacent area.

Finally, petitioner contended that the project failed to meet the requirements for a SCEA assessment, arguing that the project failed to satisfy statutory criteria to not have a significant effect on historical resources. These requirements, however, pertain to the exemption of a project from environmental review altogether—not merely allowing the project to use the streamlined SCEA process. Thus, the Court of Appeal found, they had no bearing on the case.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the standard of review for agency determinations of consistency with planning documents. The decision is available online at: https://www.courts.ca.gov/opinions/nonpub/C090117.

SECOND DISTRICT COURT VOIDS SETTLEMENT AGREEMENT TRANSFERRING STATE-OWNED COASTAL PROPERTY INTERESTS WITHOUT A FINDING AND HEARING

Pappas v. State Coastal Conservancy, ___Cal.App.5th___, Case No. B304347 (2nd Dist. Dec. 23, 2021).

The Second District Court of Appeal in *Pappas v. State Coastal Conservancy* affirmed the trial court's decision concluding that respondents California Coastal Commission (Commission) and State Coastal Conservancy violated Public Resources Code § 30609.5 (Coastal Conservancy Act) by entering into settlement agreement which violates restrictions on selling or transferring state-owned property interests near the coast by not holding a hearing and making required findings in support of the transfer prior to making the transfer.

Factual and Procedural Background

Hollister Ranch (Ranch) consists of 14,500 acres of private land running east-west along the Gaviota Coast in Santa Barbara County. The Ranch was sold to developers in 1965 (currently MGIC Equities Corporation—MGIC).

The Young Men's Christian Association of Metropolitan Los Angeles (YMCA) obtained a 160-acre inland parcel within the Ranch in 1970. It envisioned a youth camp for the site. The acquisition included a recreation easement over a 3,880-foot stretch of the Ranch's coast known as Cuarta Canyon Beach and an exclusive easement over a one-acre plot above the beach for restroom and educational facilities. YMCA also received access easements over various roads and footpaths leading to the beach, which was located about a mile south of the inland parcel (collectively, the YMCA Easements).

MGIC subdivided the land surrounding YMCA's holdings (excluding the YMCA parcel) in 1971. It created 135 separate parcels of approximately 100 acres each and marketed them for residential development. Those buying land in the new subdivision agreed to join the Hollister Ranch Owners Association (HROA) and to observe building and occupancy restrictions designed to preserve the area's rural and agricultural heritage.

They also agreed to join the Hollister Ranch Cooperative (HRC) and to dedicate at least 98 percent of their land to grazing, orchards, or other agricultural uses. This enabled the Ranch to qualify as an agricultural preserve under California's Land Conservation Act4 and thereby lower the owners' property tax rates.

YMCA finished plans for the camp in the late 1970s. It applied for a Coastal Development Permit (CDP) allowing it to build a recreation center, dining commons, education facilities, and housing for 150 campers and staff. The Commission issued the CDP on the condition YMCA guarantee public access to Cuarta Canyon Beach. YMCA satisfied this condition by executing and recording an "Irrevocable Offer to Dedicate and Covenant Running with the Land" on April 28, 1982 (OTD).

The OTD offered the public what in essence constituted an easement over the easements YMCA obtained from MGIC in 1970. YMCA also agreed to let the public use a proposed four-mile trail running along the coastal bluffs from Cuarta Canyon Beach eastward to Gaviota State Park (the Blufftop Trail Easement). The OTD authorized the Commission to accept the OTD on the public's behalf any time between 1992 and 2013.

YMCA began building the camp shortly after recording the OTD. HROA immediately sued to enjoin construction. YMCA abandoned the project after HROA offered to reimburse its planning and construction costs. HROA then annexed the parcel into the subdivision, sold it to a private buyer, and directed the sale proceeds paid to YMCA.

An entity called Rancho Cuarta now owns YMCA's former property. All 136 parcels within the Ranch's boundaries now belong to the subdivision.

The Ranch's owners and guests enjoy exclusive overland access to its 8.5 miles of coast. HROA holds title to the parcels along the beach as a common recreation area. A guarded gate admits vehicles from one entry point at the subdivision's eastern boundary. Consequently, beach access is limited to members of the public who can walk over the sand from Gaviota State Park to the east or from Jalama Beach County Park to the west. HROA requires these visitors stay

below the mean high tide line to avoid trespassing on its beach parcels. The area's rugged geography leaves large stretches of its coast accessible only by small watercraft.

The Conservancy accepted the OTD on behalf of the Commission in 2013. Hollister immediately filed this action. The complaint alleged YMCA could not legally sever its appurtenant easement rights from the inland parcel by dedicating access to the public. Further, it alleged the proposed four-mile public trail described in the OTD appeared to have no basis in YMCA's deeds from MGIC. The complaint sought judgment quieting title to the State Defendants' easement claims and declaring the OTD void ab initio, among other remedies.

Before trial, the parties entered into two settlement agreements: one resolving the HROA's claims (the HROA Settlement) and one resolving the class action claims of individual owners (the Class Settlement). In each, the State Defendants agreed to quitclaim their interests in the OTD in exchange for limited, but guaranteed, public access to the Ranch's beaches. The boards of the Commission and Conservancy approved the settlements in closed session.

The Gaviota Trail Alliance (Alliance) objected to the Class Settlement and moved to intervene in the action. The trial court granted the motion to intervene. The Class Plaintiffs nevertheless moved for final approval of the Class Settlement, which fully incorporated the terms of the HROA Settlement. The Alliance again objected and moved to set aside both.

The trial court decided the Alliance's challenges exceeded the scope of the operative pleadings. It granted the Alliance leave to file a cross-complaint to address the validity and effectiveness of both settlements. The Alliance filed a cross-complaint and petition for writ of mandate (the writ petition) two weeks later. The writ petition contained eight causes of action under the Coastal Act and the Bagley-Keene Open Meeting Act (Gov. Code, § 11120 *et seq.*).

Hollister demurred without success. The Alliance then moved for judgment in lieu of trial on six of the cross-complaint's eight causes of action. The trial court granted judgment in favor of the Alliance on the second cause of action, finding the Conservancy violated the Coastal Act by agreeing to quitclaim the OTD to Hollister without complying with the Act's hearing and fact-finding procedures. (§ 30609.5, subd. (c).) It declared the settlements invalid on this ground. The ruling mooted all other causes of action except the Alliance's Bagley-Keene Act claim, which the court found time-barred. Hollister appealed. The Alliance cross-appealed.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's judgment invalidating the settlement agreements, because there was no required hearing or findings in support of transfer of State coastal land interests as required by the Coastal Act.

The Coastal Act Land Transfer Prohibition/Exceptions

The Coastal Act prohibits the state from selling or transferring its interests in state land along the coast unless it retains a permanent property interest adequate to provide public access to or along the sea. (§ 30609.5, subd. (a).) The Legislature enacted this provision in 1999 to prevent the permanent loss of public coastal accessways by preventing the sale or transfer of state land located between the first public road and the sea.

The Conservancy can circumvent § 30609.5(a)'s restrictions by making one or more access-related findings at a noticed hearing. (§ 30609.5, subd. (c).) Section 30609.5, subdivision (c) permits a transfer only if the relevant agency finds: 1) The state has retained or will retain, as a condition of the transfer or sale, permanent property interests on the land providing public access to or along the sea; 2) Equivalent or greater public access to the same beach or shoreline area is provided for than would be feasible if the land were to remain in state ownership; 3) The land to be transferred or sold is an environmentally sensitive area with natural resources that would be adversely impacted by public use, and the state will retain permanent property interests in the land that may be necessary to protect, or otherwise provide for the permanent protection of, those resources prior to or as a condition of the transfer or sale; or 4) The land to be transferred or sold has neither existing nor potential public accessway to the sea.

The Exemption Applies to Even a Challenged Interest in Land

Hollister's opposition to the petition stressed that

a void instrument like the OTD could not constitute an "ownership interest" in "'state land" sufficient to trigger § 30609.5's hearing procedures. The State Defendants' having quitclaimed their interests in the OTD, it followed, they did not transfer cognizable property rights because no such rights existed.

Section 30609.5, subdivision (e)'s defining language "fee, title, easement, deed restriction, or other interest in land" signals no intent to limit subdivision (c) to property rights fitting neatly into traditional classifications. Section 30609.5, subdivision (a)'s transfer restrictions apply to "existing or potential public accessway[s]." This language indicates the statute applies when, as here, the precise nature of the property interest is not yet discerned.

Conclusion and Implications

As expressed by the Second District Court of Appeal, its ruling does not preclude Hollister and the State Defendants from attempting to align the settlement agreements' terms and conditions with § 30609.5's provisions, or, in the alternative, to jettison the agreements and litigate Hollister's quiet title action to determine whether the OTD was no longer valid. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B304347.PDF.

FOURTH DISTRICT COURT APPLIES GUIDELINES § 15088.5(G)—FINDS CITY DID NOT VIOLATE CEQA BY FAILING TO SUMMARIZE REVISIONS TO PREVIOUSLY CIRCULATED PROGRAMMATIC EIR IN RECIRCULATED DRAFT

Save Civita Because Sudberry Won't v. City of San Diego, 72 Cal.App.5th 957 (4th Dist. Dec. 16, 2021).

In the *partially published* opinion the Fourth District Court of Appeal held, *for the first time*, that the City of San Diego (City) did not violate California Environmental Quality Act (CEQA) Guidelines, § 15088.5(g), for failing to summarize revisions made to a project's previously circulated programmatic draft Environmental Impact Report (EIR) in a subsequent recirculated draft EIR (DEIR). The court also held that the city council acted in a quasi-legislative capacity in certifying the final EIR (FEIR) and approving the project, thereby foreclosing petitioner's procedural due process claim.

Facts and Procedural Background

In October 2008, the City of San Diego approved the Civita project (Project)—a large, mixed-use development in the Mission Valley Community Plan (MVCP) area that would contain residences, public recreational spaces, open lands, and retail and office space. The Civita EIR analyzed the environmental impacts of a potential connection to a nearby roadway located in the nearby Serra Mesa Community Plan (SMCP) area. As part of its approval, the city council adopted a resolution directing staff to analyze an amendment to the SMCP and General Plan to include the contemplated street connection.

In April 2016, the City issued a programmatic draft EIR (PDEIR), for the "Serra Mesa Community Plan [SMCP] Amendment Roadway Connection Project," to analyze the adoption of the SMCP and General Plan amendments to reflect the proposed street connection. The proposed roadway contemplated would contain four lanes, together with a median, bicycle lanes, and pedestrian pathways, that would run in a north/south direction between existing roadways in the partially-built Civita mixed-use development. The Project Description chapter of the PDEIR stated that the proposed Project consisted of a "community plan amendment to the SMCP" to include certain street connections. The PDEIR made clear, though, that the action was only to amend the SMCP—not fund or construct the roadway connection—and therefore only analyzed impacts at a programmatic level.

In response to public comments received during the PDEIR review period, the City decided to analyze the roadway construction and amendments at a project-level. Thus, in March 2017, the City

recirculated a project-level EIR (RE-DEIR), which explained that it would replace the PDEIR and any comments submitted thereon, and instead, analyze construction of the roadway and amendments to the SMCP at a project-level.

After releasing the RE-DEIR for public review, the City received public comments asserting the City failed to comply with CEQA Guidelines § 15088.5, subdivision (g). The comments requested that the City provide a list of material changes in Project design or study, along with an interlineated and strike-out version of the RE-DEIR. The City's responses explained that the PDEIR had been so substantially changed and redrafted to reflect the new project-level analysis that a list of material changes and a strike-out version would be impractical and near illegible.

The City released the FEIR in August 2017 and held several public hearings thereon. In October 2017, the city council ultimately approved the Project, certified the FEIR, and adopted resolutions to amend the SMCP and General Plan to identify the contemplated roadway connection.

At the Trial Court

Save Civita filed a petition for writ of mandate in November 2017, alleging the City violated CEQA and the Planning and Zoning Law by illegally approving and adopting the Project. Save Civita subsequently filed a brief in support of its petition and complain, alleging, among other CEQA violations, that the City violated CEQA Guidelines § 15088.5, subdivision (g) by failing to summarize revisions made to the previously recirculated PDEIR. The brief also alleged that the City violated the public's right to due process and a fair hearing because at least one city council member who publicly voiced his support for the Project decided he was going to approve the Project long before any evidence was presented to the city council. The trial court rejected Save Civita's claims and denied the petition. Save Civita appealed.

The Court of Appeal's Decision

In the first published portion of the opinion, the Fourth District held that the City did not violate CEQA Guidelines § 15088.5, subd. (g), in failing to summarize the changes from the PDEIR to the RE-DEIR. The court further concluded that, even assuming the City did violate subdivision (g), such error was not prejudicial because any failure to summarize did not deprive the public of a meaningful opportunity to discuss and critique the Project. The Court of Appeal also noted that, prior to this decision, no other opinion or case had interpreted and applied Guidelines § 15088.5, subd. (g).

In the second published portion of the opinion, the Court of Appeal held that the city council, in certifying the FEIR and approving the Project, acted in a quasi-legislative capacity, and was thus not subject to the procedural due process requirements that apply to quasi-adjudicatory hearings.

The City Did Not Violate CEQA Guidelines Section 15088.5, Subdivision (g)

CEQA Guidelines § 15088.5, subd. (a), requires lead agencies to recirculate an EIR when significant new information is added to the EIR after public release but before certification. "Information" under the section can include changes in the project or environmental setting, as well as additional data or other information. Subdivision (f) pertains to the manner by which a lead agency shall evaluate and respond to comments when an EIR is recirculated. Finally, subdivision (g) requires the lad agency to summarize the revisions made to a previously circulated DEIR. Because the City's compliance with subdivision (g)'s "summarization requirement" constituted a question of law, the Court employed a *de novo* standard of review.

Save Civita claimed the City violated § 15088.5, subd. (g), because the RE-DEIR, nor attachment thereto, summarized the revisions made from the PDEIR. Save Civita asserted that:

> . . .requiring members of the public to rifle through these two voluminous, technical documents to try and figure out the differences was an obstacle to informed discussion.

The City countered by explaining that it adequately summarized the changes to the PDEIR in the RE-DEIR to sufficiently apprise readers that the RE-DEIR was an entirely different level of analysis and revisions are throughout. The City also argued that, given the vigorous public comment period, Save Civita failed to establish it was prejudiced from an insufficiency in the RE-DEIR's summary of changes.

In interpreting whether the City complied with subdivision (g), the Fourth District explained that the RE-DEIR included several chapters that summarized the changes to the PDEIR. When considered in conjunction with subdivision (a)—which requires recirculation of an EIR where significant new information is added, including project changes—the RE-DEIR's "History of Project Changes" chapter apprised the public that, in the wake of the issuance of the PDEIR, the City had conducted further evaluation of the subsequent actions necessary to implement and construct the roadway. Subdivision (g) must also be interpreted in connection with subdivision (f), which requires that an agency inform the public that comments on a prior EIR will not receive a response when the EIR is so substantially revised that the entire document is recirculated. Here, the RE-DEIR alerted the public that due to the substantial changes made, comments on the PDEIR would not be considered.

Taken together, the Court of Appeal held:

> . . .where a recirculated EIR states that it is replacing a prior EIR and the agency makes clear the overall nature of the changes (as the City did in this case), and states that prior comments will not receive responses, the agency may be said to have complied with the Guidelines requirement that it 'summarize the revisions made to the previously circulated draft EIR.' (§ 15088.5, subd. (g).)

The appellate court further reasoned that, even if it had concluded that the City failed to comply with subdivision (g), its failure to adhere to the "summarization requirement" was not prejudicial. The court was not persuaded by Save Civita's claims that readers were forced to "leaf through thousands of pages," which caused "readers to have the mistaken belief" that the two EIRs addressed the same project. With respect to the first consequence, the court explained that the need to review the entire RE-DEIR was driven by the wholesale and material nature of the changes made. As to the second consequence, no reasonable reader could have been misled to believe that the PDEIR and RE-DEIR contemplated the same project. The RE-DEIR expressly and repeatedly stated that it evaluated the amendment *and* roadway construction, whereas the PDEIR only evaluated the community plan amendment. Finally, the court rejected Save Civita's claim that the City's failure to provide a summary of revisions created an "obstacle to informed discussion.

Procedural Due Process Requirements Do Not Apply to Quasi-Legislative Actions

Save Civita claimed that the City's certification of the FEIR and its approval of amendments to the SMCP and General Plan were quasi-adjudicatory decisions. As such, they contended the City violated the public procedural due process and fair hearing rights because a city council member who voted to approve the Project was:

> . . .a cheerleader for the Project and decided he was going to approve the Project long before any evidence was presented to the Smart Growth & Land Use Committee or City Council.

Under a *de novo* standard of review, the appellate court considered whether the City acted in a quasi-adjudicatory or quasi-legislative capacity in certifying the FEIR, which would ultimately dictate whether procedural due process requirements were triggered. The court explained that longstanding precedent has established that procedural due process protections do not apply to quasi-legislative actions, but do apply when an agency has proceeded in a quasi-adjudicatory capacity. Under CEQA specifically, Public Resources Code § 21168 governs challenges to quasi-adjudicatory decisions, whereas § 21168.5 governs all other agency decisions. Pointing to the California Supreme Court's decision in *Western States Petroleum Assn. v. Superior Court*, 9 Cal.4th 559, 566–567 (1995), the appellate court explained that a local agency's certification of an EIR is a quasi-legislative act, unless the underlying action that the public agency analyzed in the EIR is quasi-adjudicative. To this end, the Supreme Court's holding in *Yost v. Thomas*, 36 Cal.3d 561 (1984), squarely held that adoption of a Specific Plan is a legislative act.

Under this lens, the City's approval of amendments to the SMCP and the City's General Plan was a quasi-legislative act because it involved the adoption of rules of general application based on broad public policy.

To determine whether the City's certification of the FEIR was quasi-legislative or quasi-adjudicative, the appellate court looked to the nature of the

underlying actions analyzed in the FEIR: 1) the approval to build the road; and 2) the amendment to planning documents to show the proposed roadway. The court noted that precedent established that an agency's decision to approve the building of the road is a quasi-legislative act, for doing so is a determination that requires consideration of the public welfare, rather than a determination on an individual's rights. Here, the City's approval of building the road was no different—the City assessed a broad spectrum of community costs and benefits that were not limited to the individual interests of nearby property owners. This act, coupled with the amendments to the planning documents, were thus quasi-legislative acts. In turn, the City's act of certifying the FEIR constituted a quasi-legislative act that consequently foreclosed Save Civita's procedural due process claim.

Conclusion and Implications

The Fourth District Court of Appeal's opinion marks the *first published decision* to interpret and apply the "summarization requirement" under CEQA Guidelines § 15088.5, subdivision (g). Importantly, the court held that an agency complies with subdivision (g) if: 1) a recirculated EIR states that it is replacing a prior EIR; 2) it makes clear the overall nature of the changes; and 3) states that prior comments will not receive responses. The court also reiterated that the underlying nature of a proposed project dictates whether the agency's certification of the related EIR is a quasi-legislative or quasi-adjudicative act. Where an underlying project only contemplates legislative acts, such as approving a roadway or amending a Specific Plan, the agency acts quasi-legislatively, and thus, does not trigger procedural due process requirements. The court's opinion is available at: https://www.courts.ca.gov/opinions/documents/D077591.PDF.
(Bridget McDonald)

SUPERIOR COURT FINDS EIR FOR RESORT INADEQUATELY ANALYZED PROJECT IMPACTS TO EXISTING COMMUNITY FIRE EVACUATION ROUTES

Center for Biological Diversity et al. v. County of Lake et al.,
Case No. CV 421152 (Lake Cnty Super Ct (Jan 4 2022.)

In an order issued on January 4, 2022, a Lake County Superior Court judge granted an environmental group's petition for writ of mandate on the basis that the Environmental Impact Report (EIR) prepared in association with a large-scale luxury residential and resort project failed to adequately analyze project impacts to existing fire evacuation routes in rural Lake County. The EIR found that project impacts in this regard would be insignificant. The Superior Court concluded this finding was not supported by substantial evidence and ordered the County to set aside: 1) its certification of the EIR, 2) its findings regarding project impacts on an adopted emergency evacuation plan, and 3) its approval of the project.

Factual and Procedural Background

A developer proposed a luxury wine country resort in rural Lake County (County). The project proposed 1,400 residential units, five hotels, and resort apartments. The project also proposed various amenities including a golf course, polo fields, equestrian center, and mixed commercial uses. It was estimated that the project would result in approximately 4,070 new residents in the area, which was a significant increase relative to the existing population. The project site was in an area that had been overrun by catastrophic wildfires in recent years, including one in 2015 that burned 120 square miles and destroyed more than 1,200 homes.

To mitigate the wildfire risk to the project itself, the developer incorporated extensive anti-wildfire mechanisms including exterior sprinkler systems, underground utilities, fire breaks, and an on-site fire station and helipad.

The project was controversial due to its scale in a rural area. After the County approved the project and

certified the project EIR, an environmental organization filed a lawsuit alleging that EIR violated the California Environmental Quality Act (CEQA) for a wide range of reasons. The California Attorney General also intervened alleging that the EIR inadequately analyzed the project's environmental impacts.

Although plaintiffs raised a wide range of allegations, the key issue flagged by the court in its order related to the EIR's analysis of the project impacts on existing community evacuation routes.

The Superior Court's Decision

In its ruling and order on petitioner's and the state's petitions for writ of mandate, the Superior Court rejected a majority of the petitioner and the state's claims regarding the inadequacy of the project EIR. With regard to the EIR's analysis of project impacts on community evacuation routes, the court found that the County's conclusion that such impacts would be insignificant was not supported by substantial evidence.

Distinguishing a Reverse CEQA Issue from the Impacts of Additional Residents on Existing Environmental Hazards

The court began by recognizing that CEQA does not require the County to analyze the project's impacts on evacuation of future residents of the project. This would be a "reverse CEQA" issue, and need not be addressed in an EIR. However, an EIR must analyze a:

> . . .project's potentially significant exacerbating effects on existing environmental hazards—effects that arise because the project brings people into the area affected [must be analyzed].

Here, the court recognized there was evidence that the project might exacerbate existing environmental hazards and therefore such impacts must be analyzed. As pointed out by petitioners, a significant number of wildfire related deaths in the state have occurred during attempts to evacuate and result from inadequate evacuation routes. The court recognized that the project would bring an estimated 4,070 new residents into two census tracts that had a total population of 10,163 in 2017.

New residents competing with existing residents for the same limited evacuation routes could cause delay in evacuation resulting in increased wildfire related deaths. The court recognized that the project might significantly exacerbate existing environmental hazards, specifically wildfires and their associated risks. As a result, this was an issue that must be addressed under CEQA.

The Need for 'Identifiable Facts' to Support EIR Conclusions

In the EIR, the County concluded that impacts to existing emergency evacuation plans would be less than significant. The court found this conclusion to be supported primarily by opinions of traffic engineers and fire and law enforcement personnel. However, the court did not believe these opinions were based on "any identifiable facts." The court recognized two key problems with the EIR's conclusions regarding impacts on evacuation routes.

First, the evidence relied on by the County primarily addressed the issue of whether the project's residents could safely leave in the event of a wildfire. This evidence did not focus on the issue CEQA requires to be addressed "whether evacuation of the residents in the nearby area would be affected by the evacuation of the Project's residents during a wildfire."

Second, the evidence relied on by the County "could not be considered substantial evidence." The court noted that "unsubstantiated" expert opinion does not constitute substantial evidence under CEQA Guideline 15384(a). Apparently, although the EIR relied on expert opinion, these expert opinions were not sufficiently "supported by facts" identified in the record. As a result, the evidence relied on by the County's finding regarding insignificant impacts to emergency evacuation plans was not supported by substantial evidence.

Conclusion and Implications

The court issued a judgment granting plaintiff's writ of mandate and ordering the County to set aside certification of the EIR, its findings related to impacts on an emergency evacuation plan, and approval of the project.

It is unclear whether the developer will appeal the Superior Court's decision and whether the court's CEQA ruling will ultimately prevent the project from moving forward. The trial court's order does provide a

helpful demonstration of the importance that an EIR analyze a project's impacts that may exacerbate existing environmental hazards, which are distinguishable from environmental impacts on the future residents of a project. The decision also highlights the importance that even expert opinions must be based on enough relevant facts and information to form a basis for substantial evidence.

A copy of the Lake County Superior Court's order can be found online at: https://www.biologicaldiversity.org/programs/urban/pdfs/Guenoc-Valley-ruling.pdf. (Travis Brooks)

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