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LAND USE NEWS

PROPOSED FEDERAL SPENDING PLAN TARGETS WESTERN WATER INFRASTRUCTURE

In January 2022, the United States Bureau of Reclamation (Bureau) submitted its initial spending plan for Western water-related infrastructure, programs, and activities following passage of the Bipartisan Infrastructure Law signed by President Biden on November 15, 2021. The Plan and the Bureau 2022 budget request allocate funding for various categories of projects, including dam and water conveyance facility improvements, water recycling and desalination activities, and habitat conservation in California and the lower Colorado River Basin.

Background

The Bureau was established in 1902 and manages and develops water resources in the western United States. The Bureau is the largest wholesale water supplier and manager in the United States, managing 491 dams and 338 reservoirs. The Bureau delivers water to one in every five western farmers on more than 10 million acres of irrigated land. It also provides water to more than 31 million people for municipal, residential, and industrial uses. The Bureau also generates an average of 40 billion kilowatt-hours of energy per year.

Under the Bipartisan Infrastructure Law of 2021 (Infrastructure Law), the Department of the Interior (of which the Bureau is a subpart) will receive $30.6 billion over five years. The Infrastructure Law provides a total of $8.3 billion under Title IX (Western Water Infrastructure) to the Bureau for Western programs and activities. An initial $1.66 billion is allocated to the Bureau in fiscal-year (FY) 2022, and the Bureau has submitted an initial spending plan (Plan) for that funding, with allocations by project and location identified and updated monthly as funding selections are made for various funding categories. The total appropriation of $8.3 billion, provided in increments over five years, will be different annually, with higher percentages of allocations made in the first year's Plan based on shorter term capability of a given program, efficiency (including potential cost savings), and whether a program is ready for administration.

Key Priorities Identified

The Bureau has adopted four key priorities with respect to its Plan: 1) increase water reliability and resilience; 2) support racial and economic equity; 3) modernize infrastructure; and 4) enhance water conservation, ecosystem, and climate resilience. Under the Plan, the Bureau will consider a potential project's ability to effectively address water shortage issues in the West, to promote water conservation and improved water management, and to take actions to mitigate environmental impacts of projects. Accordingly, the Bureau will generally give priority to projects that complete or advance infrastructure development, make significant progress toward species recovery and protection, maximize and stabilize the water supply benefits to a given basin, and enhancing regional and local economic development as well as advance tribal settlements.

A Closer Look at the Plan

The Bureau's Plan would provide funding for a wide variety of Western water projects, programs, and activities. For instance, the Plan would provide $250 million for implementation of the lower Colorado River Basin Drought Contingency Plan and may be used for projects to establish or conserve recurring Colorado River water that contributes to supplies in Lake Mead and other Colorado River water reservoirs in the Lower Colorado River Basin, or to improve the long-term efficiency of operations in the Lower Colorado River Basin. The Bureau intends to allocate $50 million of Infrastructure Law funding to combatting the impacts of climate change, per a Memorandum of Agreement to invest up to $200 million in projects over the next two years to reduce the risk of Lake Mead falling to critically low elevations in the coming months and years (known as the 500 Plus Plan). To supplement these investments, the Department of

Interior signed various water conservation agreements with the Colorado River Indian Tribes and the Gila River Indian Community designed to help stabilize the elevation of Lake Mead.

The Bureau's FY 2022 proposed budget also includes $56.5 million for the Central Valley Project Restoration Fund, and $33 million for California Bay-Delta restoration activities focused on improving the Bay-Delta ecosystem and on improved water management and supplies. The Bureau's budget is intended to support the goals of environmental restoration and improved water supply reliability by providing $1.7 million for a renewed Federal-State partnership, $2.3 million for water supply and use, and $29.0 million for habitat restoration.

The Bureau's Plan also provides for significant investment in water and groundwater storage and conveyance projects to increase water supply via construction of water storage or conveyance infrastructure or by providing technical assistance to non-federal entities ($1.05 billion); aging infrastructure to support, among other things, developing and resolving significant reserved and transferred works failures that prevented delivery of water for irrigation ($3.1 billion); rural water projects, including developing municipal and industrial water supply projects ($1 billion); water recycling and reuse projects ($550 million) and "large scale" water recycling and reuse projects ($450 million) to promote greater water reliability and contribute to the resiliency of water supply issues; water desalination ($250 million); safety of dams to ensure Bureau dams do not present unacceptable risk to people, property, and the environment ($500 million); WaterSMART grants to provide adequate and safe water supplies that are fundamental to the health, economy, and security of the country ($300 million); watershed management projects ($100 million); aquatic ecosystem restoration and protection ($250 million); multi-benefit watershed health improvement ($100 million); and endangered species recovery and conservation programs in the Colorado River Basin ($50 million).

Conclusion and Implications

The Infrastructure Law is touted as a once-in-a-generation investment in the Nation's critical infrastructure, including Western water infrastructure. While it remains to be seen to what extent the investment in Western water infrastructure will enhance water supply reliability for the region, the Bureau of Reclamation's Plan represents an important and informative step toward addressing persistent and complex water supply and allocation issues. The Initial Spending Plan is available online at: https://www.usbr.gov/bil/docs/spendplan-2022/Reclamation-BIL_Spend_Plan_2022.pdf.
(Miles Krieger, Steven Anderson)

CALIFORNIA MAY PROHIBIT SEABED MINING OF PRECIOUS METALS IN THE STATE'S COASTAL WATERS

Computers have come a long way over the last 50 years, and nowadays if you were to stop any American on the street odds are they would have a computer on them in one form or another. Likewise, pretty much every car you pass on your morning commute is running thanks in part to a computer. But like all finite resources, the issues in maintaining a steady supply of precious metals to craft these brilliant machines has become more and more of an issue as the years go by and manufacturers continue to search for ways to keep the metals coming. One relatively new concept in harvesting precious metals is seabed mining, but a new California bill is seeking to prevent such operations from coming to California's coastline.

Assembly Bill 1832: The California Seabed Mining Prevention Act

In early February 2022, California Assemblywoman Luz Rivas (D – San Fernando Valley) introduced Assembly Bill (AB) 1832) (Bill), dubbed the California Seabed Mining Prevention Act, a bill which would proactively prohibit mining from taking place in roughly 2,500 square miles of California waters that aren't currently protected. California's neighbors to the north, Oregon and Washington, already have laws in place that prohibit such seabed mining.

Specifically, the Bill takes issue with seabed mineral mining as inconsistent with the public trust

by posing an "unacceptably high risk of damage and disruption to the marine environment of the state." The Bill also draws attention to importance of our state's marine waters, describing the rich and diverse ecosystems present along the coast and how these ecosystems are critical to the state's commercial fishing, recreational fishing, and tourism industries.

Another concern of the proposed legislation is the largely speculative impact these operations might have on marine environments. For example, the machinery required for such operations could have seriously destructive impacts on many of the surrounding communities of marine life. Furthermore, these operations could kick up large sediment clouds capable of traveling long distances and smother or otherwise negatively impact the feeding and reproduction of marine life. These sediment plumes and the noise generated by such operations could also negatively impact whales, dolphins, and other marine mammals throughout the region. On top of all the potential environmental concerns, these mining operations could also negatively impact the scenic value of the state's beaches, tide pools, and rocky reaches that Californians and tourists alike enjoy on a daily basis.

The Legislatures of both Oregon and Washington have passed legislation that prohibits seabed mining in their state waters, with Oregon's law dating back to 1991 and Washington joining just last year, so the proposed Bill in California is far from unprecedented. In fact, protections against seabed mining have gained popularity on a global scale with the European Parliament adopting a resolution in support of a moratorium on seabed mining in June of 2021.

Seabed Mining in California Waters

The technology and industry of seabed mining is still in its early stages, but these operations have already begun in several regions around the world, including waters off the coast of Namibia, Papua New Guinea, Japan and South Korea. While California waters have yet to host these seabed mining operations, the California Legislature can still utilize this opportunity to preemptively weigh in on the impacts of seabed mining before any negative impacts are realized.

As the Bill advocates, a prohibition on seabed mining would prevent potentially disastrous impacts on marine environments and it would likely do so without much impact on precious metal supplies. In the words of the Bill itself:

> California state waters do not represent a marketable source for battery metals, the emerging justification for extraction interest at the seafloor globally.

Even so, seabed mining operations in California could still provide meaningful supplies for other uses and would likely pop up along the coast in one of two areas: the North Coast for its caches of gold, titanium, and other precious and semiprecious metals and the South Coast for phosphorites.

The leasing authority for California's tidelands and submerged lands is generally held by the State Lands Commission, unless the California Legislature has granted such lands to local governments to manage on behalf of the state. At the state level, California is currently required to accept applications for hard mineral exploration and extraction leases along its coast, and to consider those applications on a case-by-case basis, so at this point seabed mining is at least a possibility in the state even if the industry has yet to come to California waters. The proposed Bill would nip that industry in the bud before it has the chance to take off.

Conclusion and Implications

While the aim of the bill is designed to protect the state's marine environment, it will undoubtedly face heavy opposition as it progresses as it poses a hard barrier to entry in the state for an industry permeated by future supply problems. Exacerbating the issue is the skyrocketing demand for computer electronics and electric vehicles over the last two decades and manufacturers will be hard pressed to keep pace. In order to do so, large deposits of metals and minerals will need to be sourced and a block on such a source is guaranteed to cause controversy, regardless of how well-intentioned the Bill may be. For the history and full current text of the bill, *see:* https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB1832.

(Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

U.S. ARMY CORPS OF ENGINEERS AND NOAA ENTER INTO JOINT MEMORANDUM REGARDING ESA CONSULTATIONS FOR EXISTING STRUCTURES

On January 5, 2022, the U.S. Army Corps of Engineers' (Corps) Civil Works Program and the National Oceanic and Atmospheric Administration (NOAA) signed an inter-departmental Memorandum of Understanding (MOU) aimed at streamlining the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (ESA) Section 7 Consultation for projects involving existing structures, such as bulkheads and piers. In particular, the MOU seeks to resolve certain legal and policy issues regarding "how the agencies evaluate the effects of projects involving existing structures on listed species and designated critical habitat," while accounting for recent revisions to the ESA's implementing regulations. (Mem. Between the Dept. of the Army (Civ. Works) and the NOAA, Jan. 5, 2022 (Corps/NOAA MOU.).)

Background

ESA Section 7 requires that federal agencies ensure any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of endangered or threatened species (collectively: special status species) or result in the destruction or adverse modification of designated critical habitat of such species. (16 U.S.C. § 1536(a).) As part of this consultation process, federal agencies must identify the "environmental baseline" against which the action is evaluated. (50 C.F.R. § 402.02.) Federal agencies must then evaluate the "effects of the action" against that baseline to determine whether the proposed action may jeopardize the continued existence of a special status species or its designated habitat. (50 C.F.R. § 402.14(c)(1)(i), (c)(1)(iv), (c)(4).) Traditionally, confusion existed over what constituted an effect of the action and what could be included in the environmental baseline—in particular, for permits issued for proposed actions involving existing structures, which may include bulkheads, piers, bridge or other in-water infrastructure.

In 2018, the NOAA National Marine Fisheries Service (NMFS) West Coast Region issued guidance to assist NMFS biologists in discerning whether the future impacts of a structure were "effects of the action." Subsequently, on August 27, 2019, NMFS adopted a final rule updating Section 7 inter-departmental consultation regulations to clarify definitions and analyses pertinent to the consultation requirement. (*See,* 84 Fed.Reg. 44976 (Aug. 27, 2019).) The updated regulations simplify the definition of "effects of the action" by adopting a two-part test: an "effect of the action" is a consequence that would not occur "but for" the proposed action and that consequence is "reasonably certain to occur." (50 C.F.R. § 402.02.) A conclusion that a consequence is "reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available." (50 C.F.R. § 402.17.)

The updated consultation regulations also establish a standalone definition of "environmental baseline," as "[t]he consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify." (84 Fed.Reg 45016; 50 C.F.R. §402.2.) To this end, the preamble to the rule asserts that the extent of an agency's discretion should be used to determine whether consequences of an action are part of the environmental baseline, but the effects of the action are not limited to those over which a federal agency exerts legal authority or control. (84 Fed.Reg. 44978-79, 44990.)

The MOU

Under the Corps' Civil Works Program, the Corps plans, constructs, operates, and maintains a wide range of in-water facilities at the direction of Congress. The Corps is charged with authorizing such projects under appropriate permitting, which may include establishing a particular use for a structure without providing a date by which the project must be decommissioned. (*See* 33 C.F.R. § 325.6(a) - (b).)

Such long-term infrastructure may require consistent maintenance and operation throughout its useable life. For instance, Corps' constructed civil works projects may implicate adjustments to fish passage facilities. (Corps/NOAA MOU at p. 4.) Generally, the Corps lacks discretion to cease the maintenance and operation of civil works projects that are congressionally authorized. Thus, the Corps interprets the new environmental baseline definition, set forth above, to include the future and ongoing effects of these existing structures' existences. (Corps/NOAA MOU at p. 5.)

Where maintenance of an existing structure implicates a new discharge, new structure, or work that affects navigable waters, the project proponent must obtain appropriate authorizations and permits from the Corps. (*See e.g.*, 33 C.F.R. §§ 322.3(a), 323.3(a).) The short-term effects that result from the Corps' discretionary approvals and permitting, such as construction impacts or the manner and timing of maintenance or operations, are included in the effects of the action. (Corps/NOAA MOU at p. 5.) Similarly, the Corps may not issue a Clean Water Action Section 404 permit for the discharge of dredged or fill material, if such authorization would jeopardize the continued existence of a threatened or endangered species and it must consider the effects of its decision on listed species and critical habitat. (*Ibid*; 33 C.F.R. §§ 320.4, 325.2(b)(5); 40 C.F.R. § 230.10(b)(3).)

In the MOU, NMFS agrees to defer to the Corps' interpretation of its discretion, as set forth above, on a project-by-project basis. (Corps/NOAA MOU at p. 5.) And the Corps commits to interpreting the scope of its discretion on a case-specific basis, by analyzing:

> . . .what consequences would not occur but for the action [*i.e.*, permit issuance] and are reasonably certain to occur." (*Id.* at p. 5, 6.)

In this analysis, the Corps will review, *inter alia*, the:

> . . .current condition of the [existing] structure, how long it would likely exist irrespective of the action, and how much of it is being replaced, repaired, or strengthened. (*Id.* at p. 6.)

The Corps will include these consequences, which stem from maintenance on or updates to an existing structure, as an effect of the action. (*Ibid.*)

Like the analyses of civil works projects, which involve minimal Corps' discretion, certain federal agencies also lack discretion to modify or cease maintenance or operation of an existing agency structure or facility. The Corps intends to consider this lack of discretion to define the "effects of the action" during the consultation process. Similarly, NMFS will defer to that federal agency's interpretation of its discretion following a project-specific analysis.

Conclusion and Implications

In sum, the MOU provides a clearer scope of consultation for Corps-issued permits authorizing maintenance or modification of existing structures, while establishing principles of interpretation for the revised ESA consultation regulations where Corps permitting is implicated. Establishing these principles is intended to facilitate timely project implementation through streamlined consultation. According to NOAA and the Corps, the MOU is also intended to allow for the expedited development of certain programmatic biological opinions and permitting for new projects that implicate the need for Corps authorization where existing structures are involved.

(Meghan Quinn, Tiffanie A. Ellis, Darrin Gambelin)

LAWSUITS FILED OR PENDING

U.S. SUPREME COURT GRANTS *CERTIORARI* IN *SACKETT,* PAVING THE WAY TO A DEFINITIVE TEST FOR DETERMINING WETLAND WATERS OF THE UNITED STATES UNDER THE CLEAN

On January 24, 2022, the U.S. Supreme Court granted the petition for review of the *Sackett v. United States Environmental Protection Agency* decision to decide whether the U.S. Court of Appeals for the Ninth Circuit set forth the proper test for determining when wetlands are navigable "waters of the United States" (WOTUS) under the federal Clean Water Act (CWA), 33 U.S.C. § 1362, subd. 7.

The grant of *certiorari* marks the latest action in a decades long debate over the standard that governs these crucial determinations. The U.S. Supreme Court last addressed the question in its famously fragmented opinion in *Rapanos v. United States,* (547 U.S. 715 (2006)), where a divided Court could not agree on a majority approach for determining wetland WOTUS. The lack of consensus in *Rapanos* resulted in a split of Circuit Courts of Appeals authority on whether Justice Scalia's plurality view of navigable waters or Justice Kennedy's "significant nexus" test is the proper application.

In *Sackett* the Ninth Circuit Court of Appeals considered whether a residential lot purchased by Chantell and Michael Sackett (Sacketts) contained wetlands subject to protection under the CWA. (*Sackett v. U.S. Environmental Protection Agency,* 8 F.4th 1075 (9th Cir. 2021).) The Ninth Circuit examined the myriad of regulatory WOTUS definitions and the opinions in *Rapanos,* and ultimately determined that the WOTUS definition in place at the time of the agency action controls the analysis, and that, pursuant to the court's own holding in *Northern California River Watch v. City of Healdsburg,* (496 F.3d 993 (9th Cir. 2007)), Justice Kennedy's significant nexus test was the controlling case law in the Circuit at that time. The Sacketts saw this decision as another inconsistency in defining and applying a WOTUS rule, and filed a petition for writ of *certiorari* requesting that the U.S.Supreme Court revisit *Rapanos* and determine the controlling test for wetland jurisdiction under the CWA. The U.S. Supreme Court granted the petition with petitioner and respondent briefs on the merits due on April 11, 2022 and June 10, 2022, respectively.

Regulatory and Judicial Background of WOTUS

Congress enacted the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. (33 U.S.C. § 1251, subd. (a).) The CWA extends to all navigable waters, defined as "waters of the United States, including the territorial seas," and prohibits those without a permit from discharging pollutants into those waters. (*Id.* §§ 1311 (a), 1362 (7).) Because the term "waters of the United States" is not defined within the four corners of the CWA, federal agencies have, by regulation and policy guidance, attempted to define the boundaries of what constitutes a WOTUS, including what constitutes a wetland WOTUS. Courts across the nation have then been conscripted, and sometimes struggled, to further identify the definitional limits of "waters of the United States," in specific controversies, which guides the scope of the federal government's regulatory jurisdiction under the CWA.

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), (collectively: Agencies) have modified the WOTUS definition on several occasions, by rule and policy guidance. Upon initial enactment of the CWA, the Corps adopted the traditional judicial term for navigable waters—that the waters must be "navigable in fact." (39 Fed. Reg. 12115, 12119 (Apr. 3, 1974).) In 2008, after the U.S. Supreme Court decision in *Rapanos*, the Agencies released guidance for the CWA asserting jurisdiction over "wetlands adjacent to traditional navigable waters." (U.S. Environmental Protection Agency and U.S. Army Corps of Engineers, Memorandum on Clean Water Act Jurisdiction Following U.S. Supreme Court's Decision in *Rapanos v. U.S.* (2008).) In 2015, under the Obama administration, the Agencies issued the Clean Water

Rule that amended WOTUS to include eight categories of jurisdictional waters, including non-adjacent wetlands and other non-navigable water bodies. (80 Fed. Reg. 37054 (June 29, 2015).) In 2019, under the Trump administration, the Agencies repealed the 2015 rule and restored the pre-2015 WOTUS definitions. (84 Fed. Reg. 56626 (Dec. 23, 2019).) Then, in 2020, the Agencies under the Trump administration issued the Navigable Waters Protection Rule (85 Fed. Reg. 22250 (Apr. 21, 2020)), which narrowed the conditions upon which non-adjacent wetlands would be considered WOTUS, but was vacated in 2021 by a federal district court in Arizona (*Pascua Yaqui Tribe v. United States Environmental Protection Agency*, Case No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. 2021)), thereby prompting the Agencies' re-implementation of the pre-2015 WOTUS definitions. On December 7, 2021, the Agencies, under the Biden administration, published a proposed rule to revise the definition of WOTUS to include water as WOTUS when it "significantly affects" a downstream traditionally navigable water, interstate water, or territorial sea. (86 Fed. Reg. 69372.)

U.S. Supreme Court Decisions on WOTUS

Contemporaneous to the Agencies' iterations of the wetland WOTUS definition, the U.S. Supreme Court provided jurisprudence guiding the interpretation of WOTUS. In a 1985 decision, the Court held that wetlands actually abutting traditional navigable waterways were considered WOTUS. (*United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).) In 2001, the Court held that WOTUS does not include "nonnavigable, isolated, intrastate waters" in its decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 (2001). Most recently, and most relevant to the issue before the Court now, in 2006, the Court issued its fragmented opinion in *Rapanos v. United States* holding that the CWA does not regulate all wetlands but failing to provide a majority approach to determining WOTUS jurisdiction. Justice Scalia, writing for the plurality, argued that wetlands that have a contiguous surface water connection to regulated waters "so that there is no clear demarcation between the two" are adjacent and may then be regulated as WOTUS. (574 U.S. at 742.) The concurring opinion, authored by Justice Kennedy, advanced a broader "significant nexus" test that would allow regulation of wetlands as WOTUS if wetlands:

> . . .alone or in combination with similarly situated lands. . . significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense. (*Id.* at 780.)

Background in the *Sackett* Case

In 2004, near Idaho's Priest Lake, Michael and Chantell Sackett purchased a "soggy residential lot" which they planned to develop. In 2007, shortly after the Sacketts began placing sand and gravel to fill the lot, the EPA issued an administrative compliance order stating that the property contained wetlands subject to protection under the CWA. In 2008, the Sacketts brought suit against the EPA asserting that the agency's jurisdiction under the CWA did not encompass their property. Various aspects of the case had been slowly making their way through the federal courts and in 2021, the Ninth Circuit Court of Appeals considered whether the Sackett's Idaho property contained wetlands subject to CWA jurisdiction. The Sacketts argued that Scalia's reasoning from *Rapanos* is controlling, and that because their property does not have a continuous surface connection to a navigable water, it falls outside the scope of the EPA's authority under the CWA. The Ninth Circuit disagreed and ultimately upheld Kennedy's "significant nexus" test as the controlling authority in the Ninth Circuit, noting that the decision was not written on a blank slate but backed by a previous conclusion in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), holding Justice Kennedy's concurrence as the controlling law from *Rapanos*.

On September 22, 2021, the Sacketts submitted their petition for writ of *certiorari* to the U.S. Supreme Court requesting that the Court revisit its decision in *Rapanos* and decide if the plurality test for WOTUS authored by Justice Scalia is controlling under the CWA.

Conclusion and Implications

For over two decades, the term "waters of the United States" has whipsawed between broad and narrow definitions, changing as frequently as execu-

tive administrations, through both informal guidance documents and formal notice-and-comment rulemaking. Moreover, the absence of majority guidance out of *Rapanos* has left lower courts divided over whether federal CWA jurisdiction exists over features like those on the Sackett's property and the best test for determining jurisdiction. The constant fluctuation has led the Sacketts to ask the Court to "chart a better course for the Clean Water Act by articulating a clear, easily administered, and constitutionally sound rule for wetlands jurisdiction." The U.S. Supreme Court's election to hear the case demonstrates there may be finality on the horizon for a significant area of environmental law that has long evaded clear definition.

(Nicole E. Granquist, Meghan Quinn, Jaycee L. Dean, Meredith Nikkel)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT AFFIRMS DISMISSAL OF ACTION CHALLENGING CITY OF OAKLAND'S RESIDENTIAL TENANT RELOCATION ORDINANCE

Ballinger v. City of Oakland, 24 F.4th 1287 (9th Cir. 2022).

The Ballinger family leased their home in the City of Oakland (City) while fulfilling military assignments on the East Coast. While gone, the City adopted a tenant relocation ordinance requiring landlords re-taking occupancy of their homes to pay tenants a relocation fee. The Ballingers later moved back into their home, paid the fee, and then challenged the ordinance on constitutional grounds. The U.S. District Court dismissed the lawsuit, dismissing all their claims. The Ballingers appealed, and the Ninth Circuit Court of Appeal in turn affirmed.

Factual and Procedural Background

In September 2016, the Ballingers leased their Oakland home for one year while fulfilling military assignments on the east coast. After one year, the lease converted to a month-to-month tenancy. Under the City's Municipal Code, even after a lease has ended and converted to a month-to-month tenancy, the tenancy only may end if the landlord has good cause. Ending the tenancy, or "evicting," for good cause includes when a landlord chooses to move back into a home at the end of the month.

In January 2018, the City adopted a Uniform Residential Tenant Relocation Ordinance (Ordinance), which requires landlords re-taking occupancy of their homes upon the expiration of a lease to pay tenants a relocation payment based on rental size, average moving costs, the duration of the occupancy, and whether the tenants earn a low income, are elderly or disabled, or have minor children. Half the payment is due upon the tenant's receipt of the notice to vacate and the other half upon actual vacation. The payment need not be spent on relocation costs. Failing in bad faith to make the payments allows a tenant to bring an action against the landlord.

When the Ballingers were reassigned back to the Bay Area, they decided to move back into their Oakland home. They gave their tenants 60 days' notice to vacate the property, paying half the relocation payment up front and the remainder after the tenants vacated. They then sued the City, bringing facial and as-applied constitutional challenges, claiming the fee is an unconstitutional physical taking of their money for a private purpose and without just compensation. They also claimed the fee constitutes an unconstitutional exaction of their home and an unconstitutional seizure of their money under the Fourth and Fourteenth amendments.

The U.S. District Court dismissed the lawsuit, rejecting all the claims. The Ballingers appealed.

The Ninth Circuit's Decision

Physical Takings Claim

The Ninth Circuit first addressed the claim that the Ordinance constituted a physical (*i.e.*, *per se*) taking. Rejecting that argument, the Ninth Circuit reasoned that the Ordinance essentially imposes a transaction cost to terminate a lease. It found "little difference" between lawful regulations, like rent control, and the Ordinance's regulation of the landlord-tenant relationship in the case. Thus, it concluded, the relocation fee is not an unconstitutional physical taking—it merely regulates the Ballingers' use of their land by regulating the relationship between landlord and tenant. To that end, the Ninth Circuit found that the Ballingers "voluntarily" chose to lease their property and to "evict," which actions required them to pay the relocation fee, and which they would not be compelled to pay if they continued to rent their property. A different case, the court explained, would be presented if the statute compelled a landowner over objection to rent his or her property or to refrain in perpetuity from terminating a tenancy.

The Obligation to Pay Money as a Taking

The Ninth Circuit next addressed whether the obligation to pay money itself was a taking. But the court also rejected this claim, finding the Ordinance merely imposed an obligation on a party to pay money on the happening of a contingency, which in this case happened to be related to a real property interest, but did not otherwise seize a sum of money from a specific fund, which is the standard that has been required under the case law. Thus, the court concluded, the Ballingers' physical taking claim was not an appropriate vehicle to challenge the power of a legislature to impose a mere monetary obligation without regard to an identifiable property interest.

The Exaction Claim

For these same reasons, the Ninth Circuit also disagreed that the City placed an unconstitutional condition (*i.e.*, an exaction) on the preferred use of their home. The predicate for any such claim, the court explained, is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing. Because the relocation fee was not a taking, therefore, it could not have been an unconstitutional exaction. Nor did the Ordinance seek to condition the grant of some government benefit on any such taking, and for this additional reason did not implicate the unconstitutional conditions doctrine.

The Seizure Claim

Finally, the Ninth Circuit also rejected the Ballingers' seizure claim. To plead a seizure claim, a plaintiff must allege a deprivation of rights, privileges, or immunities secured by the Constitution and laws. And to establish a deprivation of Fourth Amendment rights, a plaintiff must allege that the seizure was caused by state action. Here, the Ballingers claimed their tenants were "willful participants" in joint activity with the state or its agents and that the Ordinance authorized a meaningful interference with their possessory interest in their property. The Ninth Circuit disagreed, finding that the Ballingers had not established a cognizable theory of state action. The City did not directly participate in the monetary exchange between the Ballingers and their tenants. Nor did it exercise some coercive power over the tenants such that the tenants' action must in law be deemed to be that of the state. At most, the City only was involved in adopting an ordinance providing the terms of eviction and payment. But enacting the Ordinance, the Ninth Circuit concluded, was not enough to transform the tenants' actions into a state act.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding takings law, particularly in the context of monetary fees and landlord-tenant ordinances. The opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/02/01/19-16550.pdf.
(James Purvis)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT UPHOLDS APPROVAL OF HOUSING PROJECT BENEFITTING FROM DENSITY BONUS LAW

Bankers Hill v. City of San Diego, ___Cal.App.5th___, Case No. 37-2019-00020275 (4th Dist. Jan. 7, 2022).

In a January 7, 2022, decision, the Fourth District Court of Appeal upheld the City of San Diego's (City) approval of a mixed-use housing project that utilized incentives and waivers under the state's Density Bonus Law to relax the city's height, setback, and other development standards. The decision confirmed that proponents of qualifying Density Bonus Law projects have broad discretion to include amenities and design elements that conflict with local development standards. For those projects that include sufficient percentages of affordable units, a city may only deny a requested incentive or waiver when certain narrow findings can be made.

Factual and Procedural Background

A developer proposed a mixed-use project with 204 dwelling units, office space for the adjacent St. Paul's Cathedral, and a courtyard that would be shared by project residents and the cathedral. The project included 18 units deed-restricted for very low-income households as defined by Health and Safety Code § 50105, which allowed it to take advantage of the Density Bonus Law. Under the Density Bonus Law, the developer received a density bonus to exceed the maximum density for the project site of 147 units. The developer also relied on the Density Bonus Law to request development incentives and waivers to exceed the applicable height limit, avoid a setback on one street, eliminate two on-site loading spaces for trucks, and reduce the number of private storage areas otherwise required for residents.

The project required discretionary approval of a development permit. At the planning commission hearing on the project, members of the public spoke in favor and against the project. Opponents complained that the project's use of an Environmental Impact Report (EIR) addendum was improper, that its proposed height would have a number of negative impacts on its surroundings, and that the project's lack of setbacks to an adjacent street was improper. Despite these complaints, the planning commission unanimously approved the project. Opponents then appealed the approval to the city council complaining again about the height of the building and lack of setbacks. The city council unanimously denied the appeal and approved the project.

Petitioners filed a writ of mandate alleging that the project: 1) violated the city's General Plan and relevant community plan, 2) violated the municipal code, 3) violated the state Density Bonus Law, and 4) that the city council's findings were not supported by substantial evidence.

The trial court denied the petition, finding that the project was consistent with the city's planning documents and that the project's use of incentives was appropriate to reduce setbacks along an adjacent street. The trial court also noted that the petitioners' failure to apprise the court of the Density Bonus Law in its briefing papers was fatal to their petition.

The Court of Appeal's Decision

On appeal, the association again argued that the project was inconsistent with the city's planning documents and that its findings in support of approval were inadequate and not supported by substantial evidence. Petitioners also argued that the project's design was not consistent with the density bonus and relative incentives because it included a large courtyard in its design. In other words, petitioners argued that the project could have been designed at the same density but at a lower height and with appropriate setbacks if the courtyard was not included.

The court noted that many of the project's alleged inconsistencies with the city's planning standards were irrelevant because once the developer "established its eligibility for the density bons and the requested setback reduction as an incentive, [the developer] was entitled to a waiver of any develop-

ment standard that would preclude construction of the project" unless the city found that one of a few narrow exceptions to the density bonus law applied.

The court rejected petitioners' argument that the project needed to remove the courtyard or incorporate redesigns to allow for the density of units proposed while still complying with the city's standard height and setback standards. The court rejected this argument relying on a prior appellate court decision *Wollmer v. City of Berkeley*, 193 Cal.App.4th 1329 (2011), wherein the court held that when a developer proposes a project that qualifies for a density bonus, the law provides a developer with:

> . . .broad discretion to design projects with additional amenities even if doing so would conflict with local development standards.

Therefore, petitioners could not demand that the developer remove the courtyard or redesign its building to satisfy the petitioners' subjective concerns. In *dicta*, the court also noted that under the Housing Accountability act:

> . . .an agency may deny approval of a housing development project on the basis that it is inconsistent with development standards *only* if those standards are objective.

The court cited the recent decision in *California Renters Legal Advocacy and Education Fund v. City of San Mateo*, 68 Cal.App.5th 820 (2021) in noting that many of the development standards cited by petitioners appeared "entirely subjective" and therefore unenforceable. However, because the court was able to reject the petition after finding that the city's approval of the project was supported by substantial evidence as well as the incentives and waivers available to the developer under the Density Bonus Law, it did not opine on the subjectivity of the City's development standards.

Conclusion and Implications

The *Bankers Hill* decision follows a line of recent cases that affirm the strong pro-housing provisions included in the Density Bonus Law and Housing Accountability Act. The decision makes clear that developers of qualifying Density Bonus Law projects have wide discretion in the designs and amenities they include in such projects. The court's opinion may be found here: https://www.courts.ca.gov/opinions/documents/D077963.PDF.
(Travis Brooks)

FIRST DISTRICT COURT FINDS HOUSING DEVELOPMENT CONTEMPLATED BY THE CITY'S SPECIFIC PLAN WAS EXEMPT FROM FURTHER CEQA REVIEW

Citizens Committee to Complete the Refuge v. City of Newark, 74 Cal.App.5th 560 (1st Dist. 2022).

The First District Court of Appeal in *Citizens Committee to Complete the Refuge v. City of Newark* has upheld the denial of an interest group's petition that alleged the City of Newark violated CEQA by relying on a Specific Plan Environmental Impact Report (EIR) to approve a housing development without conducting subsequent environmental review. The court held that the project was exempt from further review under the California Environmental Quality Act (CEQA) pursuant to Government Code § 65457 because it was consistent with the Specific Plan and substantial evidence supported the City of Newark's (City) conclusion that no project changes, changed circumstances, or new information required further analysis.

Factual and Procedural Background

The City's 1990 General Plan allowed for preparation of a Specific Plan for low-density housing, a business park, a golf course, and other recreational facilities in Areas 3 and 4 of the City. Because the Areas are located next to the San Francisco Bay, the

General Plan acknowledged that development in Area 4 would have impacts on wetlands that contained the endangered salt marsh harvest mouse.

In 2010, the City approved and certified an EIR for a Specific Plan for Areas 3 and 4. The Specific Plan authorized development of 1,260 residential units, a golf course, and related recreational activities. In Area 4, the Specific Plan allowed development of up to 316 acres across three subareas: Subarea B (residential uses), Subarea C (residential and/or recreational uses, such as the golf course), and Subarea D (only recreational uses). Citizens Committee to Complete the Refuge (CCCR) filed a CEQA action challenging the Specific Plan EIR. The trial court granted the petition and identified several deficiencies in the EIR, including the document's failure to articulate which aspects were intended to be used on a program-level versus project-level basis.

In response, the City prepared a recirculated EIR (REIR) for the Specific Plan. The REIR explained that it provided a program-level analysis of environmental impacts related to the development of housing and a golf course in Area 4. Because the exact location and final design of these developments was not yet known, the REIR analyzed environmental impacts based on the maximum development permitted. The REIR explained that once the City received a development proposal for Area 4, the City would proceed under CEQA Guidelines § 15168 by using a checklist or initial study to determine whether environmental review for the specific approvals would consist of an exemption, addendum, tiered negative declaration, or full subsequent or supplemental EIR.

The REIR found that the Specific Plan could significantly impact the harvest mouse by destroying its habitat through the filling wetlands and increased predation from cats, rats, and racoons from the placement of houses next to its habitat. The REIR also discussed impacts from climate change and sea level rise, noting that the San Francisco Bay's sea levels could rise by as much as 5.5 feet by 2100. To protect Area 4's housing units from flooding under this scenario, the REIR stated that fill would be used to raise the units to approximately 10–14.5 feet above sea level to avoid flooding. However, because sea level rise beyond 2100 could not be predicted with certainty, the REIR explained that it would be too speculative to analyze the efficacy of future potential adaptive strategies beyond that time frame, such as additional fill, levees, or sea walls.

The City certified the final REIR and readopted the Specific Plan in 2015. Later that year, the City executed a development agreement with real parties. In 2016, the City approved a subdivision map for the development of 386 housing units in Area 3. In 2019, real parties submitted a proposed subdivision map for Area 4, which would include 469 residential lots across 96.5 acres in Subareas B and C, but no other development. The map also omitted the golf course and proposed to deed much of Subarea D to the City. The City subsequently prepared a checklist and concluded that the REIR's analysis of the Specific Plan adequately encompassed the potential impacts of the proposed subdivision map, such that no further environmental review was required.

CCCR and the Center for Biological Diversity filed a petition for writ of mandate and complaint for injunctive relief challenging the checklist. The Alameda County Superior Court denied the petition, finding that substantial evidence supported the City's conclusion that no further environmental review beyond the REIR was necessary. petitioners appealed.

The Court of Appeal's Decision

The Legal Framework and Issues on Appeal

Government Code § 65457 provides a CEQA exemption for residential housing developments that implement and are consistent with a Specific Plan for which an EIR was previously certified. However, if any of the events under Public Resources Code § 21166 occurred after the Specific Plan was adopted—*i.e.*, substantial project changes, changed circumstances requiring major revisions to the EIR, or new information not previously known—the exemption does not apply unless and until a supplemental EIR is prepared and certified.

Under this framework, the Court of Appeal confined its review to two issues raised by petitioners: 1) whether project changes, changed circumstances, or new information triggered the § 21166 exception to the § 65457 exemption; and 2) whether the City failed to adequately study certain sea level rise mitigation measures that it may adopted in the second half of the century.

The First District concluded that the project was exempt from CEQA under § 65457 because substantial evidence supported the City's determination that no project changes, changed circumstances, or

new information required additional environmental analysis.

Changes to the Project

Petitioners alleged the project contemplated three specific changes that would yield new significant impacts on the harvest mouse: 1) the project now proposed residential development in all upland portions of Subareas B and C; 2) the project eliminated the golf course; and 3) the elevated areas that will be developed next to wetland habitat and now called for riprap armoring.

As to the first project change, petitioners alleged that filling and elevating all upland portions of Subareas B and C for residential development, instead of the areas' wetlands, would deprive the harvest mouse of "escape habitat" (*i.e.*, refugia) because harvest mice temporarily flee to the uplands' higher ground when wetland habitat is inundated with periodic flooding. The court rejected this claim, observing that the Specific Plan proposed development in upland areas that were used for agriculture. The REIR thus concluded that losing these upland habitats would be less than significant because their current agricultural use did not provide high quality transitional habitat for the mouse. The project also contemplated a smaller development footprint, which meant the subdivision would eliminate less upland habitat than what the REIR originally analyzed.

As to the second project change, petitioners asserted that omitting the golf course further eliminated potential escape habitat because developing the course would not change upland elevation. The appellate court likewise rejected this claim, explaining that the REIR's finding of no significant impact from upland development did not depend on the golf course to provide escape habitat. Rather, the REIR discounted the quality of area because it was regularly disced and ripped for agriculture. Moreover, by eliminating the golf course, the map also abandoned development in Subarea D, therefore, the area could provide continued refugia for the mouse.

Finally, petitioners claimed that additional review was required to analyze potential *indirect* impacts to harvest mouse habitation associated with developing adjacent to (rather than on) wetland habitat. Specifically, the project's adjacent development now contemplated armoring the western sides of the raised and filled areas with riprap. petitioners contended the use of riprap would significantly impact the harvest mouse because it would provide additional rat habitat, and thus increase the severity of rat predation on the mouse. While the REIR identified different techniques the City could use to avoid settlement of fill, the court agreed that the REIR failed to mention "riprap," therefore, the project's use of it in connection with erosion was new.

As such, the court whether the project's use of riprap constituted a "*substantial*" change from the techniques previously analyzed in the REIR—*i.e.*, whether it created a new impact or increased the severity of previously identified impacts, or, whether petitioners' claim presented new information of substantial importance regarding new/different mitigation measures that would substantially reduce one or more environmental effects. (Pub. Resources Code § 21166, subd. (a); CEQA Guidelines § 15162, subd. (a)(1), (3)(D).) Here, the use of riprap did not meet this standard. Though petitioners argued that, without riprap, rats would den further from mouse habitat thereby reducing rat predation relative to the Specific Plan, petitioners failed to cite any evidence that would substantiate the need for additional environmental review. Moreover, even if the City was required to revise the project or its predator management plan to accommodate for, or require elimination of, increased rat predation, such an adjustment would not constitute a "major" revision to the REIR.

In rejecting petitioners' riprap arguments, the First District Court of Appeal acknowledged that it was allowing the City's development to proceed despite potentially increased impacts to the harvest mouse. Nevertheless, the appellate court explained that Government Code § 65457 compels this result because it set a higher threshold for review pursuant to its evident legislative intent: to increase the supply of housing. Therefore, projects, such as the City's, are permitted to proceed when they are consistent with a Specific Plan that has already undergone environmental review, regardless of the project's possible environmental impacts.

Changed Circumstances and New Information

Petitioners also asserted that subsequent environmental review was required because changed circumstances and new information related to the amount and rate of sea level rise emerged after the City certified the REIR. petitioners argued that the City was re-

quired to examine whether the project risked exacerbating the effects of sea level rise on the environment because of how the project interacts with wetlands. Specifically, developing all the uplands in Subareas B and C will prevent wetlands from migrating inland as sea levels rise and wetlands gradually become submerged. The project would induce "coastal squeeze" by preventing wetlands from becoming established on higher ground, in turn forcing the harvest mouse to retreat to residential areas where it will face increased predation from dogs, cats, peoples, and cars.

The court disagreed that this constituted "new" information that required subsequent analysis. While increased rates of sea level rise might expedite the effects of thwarted wetland mitigation, the overall impact remains the same: wetlands will be lost because the Specific Plan did not provide for any mitigation of thwarted wetland migration. Thus, under CEQA, it is immaterial that sea level rise may occur faster or make mitigation more difficult. Moreover, the REIR's adaptive management strategies were responses to, not mitigation measures for, sea level, and were thus not governed by the rules concerning deferred mitigation. Finally, the City's potential response to environmental conditions that will take place 50-80 years from now cannot be considered part of the current project, for doing so would be too speculative.

Conclusion and Implications

The First District Court of Appeal's opinion offers a straightforward analysis of the CEQA exemption for a residential project that implements and is consistent with a Specific Plan that had previously undergone environmental review. While the court's opinion analyzes well-established principles under Public Resources Code § 21166, it also follows a recent, but growing trend in appellate decisions regarding housing statutes: Government Code § 65457 reflects the Legislature's clear interest in increasing the supplying of housing, and that interest is important enough to justify forging the benefits of environmental review. And while that interest is arguably tempered by the looming, but expedited, rate of sea level rise, CEQA does not require agencies to mitigate for speculative or unknown impacts that are anticipated to occur in the latter half of this century. The court's opinion is available at: https://www.courts.ca.gov/opinions/documents/A162045.PDF.
(Bridget McDonald)

FOURTH DISTRICT COURT UPHOLDS CITY'S FINDING OF CONSISTENCY WITH PLANNING DOCUMENTS AND DECISION TO PREPARE AN ADDENDUM UNDER CEQA

Davisson Enterprises, Inc. v. City of San Diego, *Unpub.*, Case No. D078151 (4th Dist. Jan. 14, 2022).

Petitioner Davisson Enterprises, Inc. filed a petition for writ of mandate and complaint for declaratory and injunctive relief against the City of San Diego (City), challenging the City's decision to approve the Otay Mesa Central Village Lumina Project No. 555609 (Project). In particular, it claimed that the City's approval violated the California Environmental Quality Act (CEQA) and state Planning and Zoning Laws as being inconsistent with the City's Central Village Specific Plan (Specific Plan) and Climate Action Plan (CAP). The Superior Court rejected these contentions and petitioner appealed. In an *unpublished* opinion, the Court of Appeal affirmed.

Factual and Procedural Background

The proposed Project would provide for up to 1,868 residential units, 62,525 square feet of commercial space, 6.3 acres of school and/or recreational use space, 6.6 acres of parks, and 16.2 acres of public streets. The Project also proposed the installation of a sewer system with the capacity to serve not only the Project site but also future surrounding development. The proposed sewer system contained sewer lines of sufficient length and with sufficient capacity to accommodate the sewer infrastructure needs of the entire Specific Plan area for purposes of foreseeable development. This included a sewer main line at a depth of 20 feet.

During the administrative process, petitioner raised concerns about the proposed sewer design and the possibility that sewer pump stations would have to be installed on neighboring sites in the future as a result of the Project's proposal to install its sewer system at a depth of 20 feet. The City responded to these concerns. The Otay Mesa Community Planning Group then voted in March 2019 to recommend approval of the Project. In June 2019, the planning commission also voted to recommend approval. The city council then considered the Project in July 2019. At the council meeting, representatives from the petitioner group spoke out against the Project's sewer system proposal, claiming that the Specific Plan required the developer to install the sewer system at a depth of 31 feet to allow for a gravity-based system for the entire area as built out.

The city council approved the Project with the proposed 20-foot deep sewer system. In approving the Project, the City prepared an addendum to a 2014 Environmental Impact Report (EIR) that had been prepared for an Otay Mesa Community Plan Update. Among other things, the addendum addressed the Project's wastewater infrastructure plans and determined the Project would create no substantial change from the 2014 EIR's previous analysis.

In August 2019, petitioner filed a petition for writ of mandate and a complaint for declaratory and injunctive relief. Petitioner alleged that the Project represented a substantial change from the requirements of the Specific Plan such that the City was required to prepare a supplemental EIR, rather than rely on an addendum. Petitioner also alleged that the Project was inconsistent with land use plans that had been approved by the City because it would result in a sewer system that did not rely solely on gravity for its function, and instead would require the installation of sewer pump stations for future developments. The Superior Court rejected these claims and entered judgment in favor of the City. Petitioner then appealed.

The Court of Appeal's Decision

The Court of Appeal first addressed petitioner's principal contention, which was that the Specific Plan requires that a gravity-based sewer main line service the entire development area. The Court of Appeal rejected this characterization, noting that while a gravity-based system is clearly a conceptual *goal* of the Specific Plan, the Specific Plan could not reasonably be read as *mandating* a gravity-based system. In arriving at this conclusion, the Court of Appeal set forth at length the relevant language of the Specific Plan and detailed the manner in which it contradicted petitioner's claim.

Petitioner also claimed the Project's 20-foot deep sewer system was inconsistent with planning documents because it would necessitate the use of pump stations. But the court again disagreed, noting that it was not possible based on the administrative record to determine whether any pump stations would be necessary. Thus, because the Specific Plan did not require a gravity-based system, and even if it did the record did not establish that a 20-foot deep sewer main would necessitate pump stations in the future, the Court of Appeal found that the City's determination that the Project was consistent with the Specific Plan was not an abuse of discretion.

The Court of Appeal next addressed petitioner's claim that the Project was inconsistent with the City's Climate Action Plan (CAP), which outlines the actions the City will take to achieve its proportional share of state greenhouse gas emission reductions. The court again disagreed, noting that petitioner's argument that the Project was inconsistent with the CAP was premised on the underlying contention that the sewer system was not consistent with the applicable land use plans. Thus, on the same basis as noted above, the court rejected petitioner's claims regarding the CAP.

The CEQA Claim

Finally, the Court of Appeal addressed petitioner's contention that the City violated CEQA by relying on an addendum to the 2014 EIR, rather than adopting a supplemental EIR. Petitioner also claimed that the addendum itself was inadequate because, among other things, it contained no discussion of the foreseeable impacts associated with the change in sewer infrastructure. At the outset, the court noted that petitioner did not contend that the City's decision to proceed under CEQA's subsequent review provisions was unsupported by substantial evidence. Thus, it proceeded under the presumption that the 2014 EIR remained relevant to the Project.

Claim of a Lack of Substantial Evidence

The Court of Appeal then turned to the question of whether substantial evidence supported the City's determination that neither a subsequent nor a supplemental EIR was required. In arguing that the Project required a supplemental EIR, petitioner relied in part on an assertion that the 2014 EIR assumed all future sewer infrastructure installation would comprise gravity-based lines. However, the Court of Appeal found that petitioner failed to cite to any portion of the 2014 EIR that states it had assumed installation of only a gravity-based system. Petitioner also claimed that the Project's 20-foot sewer depth involved substantial changes to the EIR because it requires that future developments build pump stations to handle sewer flow. Again, the Court of Appeal found that the record did not support this argument. The court also noted that, to the extent any future projects would in fact require a pump station, those projects would have to undergo their own respective environmental review at the appropriate time. Lastly, the Court of Appeal also rejected petitioner's claim that the addendum adopted by the City was inadequate, on the grounds that petitioner essentially repeated already rejected claims.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the standard of review where an agency determines a project to be consistent with planning documents, as well as a discussion regarding CEQA's subsequent review provisions. The opinion is *unpublished* and is available online at: https://www.courts.ca.gov/opinions/nonpub/D078151.PDF.

(James Purvis)

FOURTH DISTRICT COURT AFFIRMS ORDINANCE ALLOWING SHORT TERM RENTALS IN SINGLE FAMILY RESIDENTIAL ZONE DOES NOT VIOLATE ZONING CODE

Protect Our Neighborhoods v. City of Palm Springs, 73 Cal.App.5th 667 (4th Dist. 2022).

In a January 7, 2022, decision, the Fourth District Court of Appeal approved an ordinance adopted by the City of Palm Springs that re-affirmed and clarified existing provisions allowing for short-term rentals in single-family residential neighborhoods. The decision includes a helpful discussion of the wide discretion that courts will allow a local agency when interpreting that agency's own ordinances and legislation. To the extent a subsequently adopted ordinance potentially conflicts with an earlier adopted ordinance, a court will favor an interpretation that harmonizes the two ordinances, instead of finding that the later ordinance impliedly repealed the earlier ordinance.

Factual and Procedural Background

As a vacation destination, the City of Palm Springs City has had ordinances since 2008 that expressly allow the short-term rental of a single-family dwelling, subject to conditions designed to protect the interests of neighboring residents (as well as the City's own interest in collecting transient occupancy taxes, a/k/a hotel taxes). In 2017, the City reenacted the previous short term (aka vacation) rental ordinance (Ordinance), with amendments. The Ordinance made a finding that it was consistent with the City's zoning code (zoning code or Code).

Under the Code, the uses allowed without a permit in a single-family residential (R-1) zone include: 1) use as a permanent single-family dwelling and 2) uses customarily incident to the permitted uses when located on the same lot therewith.

"Dwelling" is defined as a building or portion thereof designed exclusively for residential occupancy, but not including hotels, boarding or lodging houses. All uses not expressly permitted are prohibited. In an R-1 zone, commercial uses shall not be permitted by planning commission determination.

The Ordinance, as originally enacted in 2008, and as reenacted in 2017, applies to rentals for 28 days or less and requires the owner of a vacation rental property to register the property with the City annually

and to obtain a vacation rental registration certificate. The owner has to procure liability insurance and limit occupancy based on the number of bedrooms.

The owner must use "reasonably prudent business practices" to ensure that renters and their guests did not create unreasonable noise, disturbances, engage in disorderly conduct, or violate the law. The owner, the owner's agent, or the owner's designated "local contact person" has to be available at all times to respond to complaints, and the owner must pay transient occupancy taxes.

In 2017, Ordinance was reenacted and amended with certain changes. The amendments barred the ownership of more than one vacation rental, limited vacation rentals to 36 per year, revised the enforcement provisions, and added new provisions for Estate Homes with five or more bedrooms and for Homesharing.

The amendments also made a couple of findings that mentioned zoning. First, they added a finding that one of the purposes of the Vacation Rentals chapter is to ensure that vacation rentals are ancillary and secondary uses of residential property consistent with the provisions of the Ordinance.

Second, it added a finding that the primary use of single-family and multifamily dwelling units in the City is the provision of permanent housing for full time and part time residents of the City who live and/or work in the City, that vacation rentals are not a use specifically recognized in the Ordinance, are similar in character and use as hotels and other commercial short term uses, and are permitted in single-family or multifamily zones as an ancillary and secondary use of residential property in the City.

During a city council meeting, the city attorney explained that the recognition of vacation rentals as an ancillary and secondary use of residential property within the city resolves any kind of ambiguity that may exist on that particular issue. The City's director of planning has determined that, under the Code, the short-term rental of residential property is a permitted use in a residential zone.

Protect Our Neighborhoods (Protect), a membership organization opposed to short-term rentals, filed a writ action challenging the Ordinance as amended. Protect claimed that the Ordinance violated the City's Code on the following grounds: 1) Short-term rentals violate the Code because they are commercial, not residential; 2) Short-term rentals violate the Code because they change the character of, and adversely affect the uses permitted in, a single-family residential zone; 3) The Ordinance is inconsistent, contradictory, and based on erroneous findings; 4) If the Code permits short-term rentals at all, it does so only on condition that the owner obtain a land use permit or a conditional use permit; and 5) If the Code permits short-term rentals at all, it does not allow owners to rent out properties that they do not live in.

The trial found in favor of the City and against Protect on all issues. Particularly, it found: 1) The City's adoption of the Ordinance reflects its longstanding and consistent interpretation of its Code that short-term rentals are not a prohibited commercial use of residential property; and 2) The Ordinance reaffirms the City's longstanding determination that short-term rentals are ancillary and secondary uses of the properties.

The Court of Appeal's Decision

The Court of Appeal under the independent judgment test applicable to questions of law affirmed the trial court's determinations, finding that the Ordinance did not conflict with and was consistent with the City's Code.

Commercial Use Not Prohibited in Residential Zone

The argument of Protect draws a false dichotomy between residential and commercial uses. The Code permits not only use as a dwelling, but also uses customarily incident to use as a dwelling. It does not prohibit any customarily incident use merely because it is commercial. Commercial activities are not strictly prohibited in single-family (R-1) zones unless they are specifically enumerated in the Code. The Code merely prevents the Planning Commission from authorizing new commercial uses.

In the Ordinance, the City confirmed that vacation rentals are an ancillary and secondary use of residential property. The Code does not appear to prohibit the long-term rental of a house in an R-1 zone, whether annually or month-to-month. The City's director of planning testified that it has been the City's practice to treat the occupancy of residential property by renters as a permitted use. It follows that the short-term rental of a house also is not unduly commercial.

There is a meaningful distinction between a short-term rental and a short-term motel stay. A vacation rental, by the City's definition, is a rental of a single-family dwelling. The City could reasonably conclude that the short-term rental of a single-family dwelling (particularly when it is subject to the restrictions in the Ordinance) has different impacts than the short-term rental of 20 or 50 or 100 rooms in a motel.

Change of Character of R-1 Zones

The argument that short-term rentals change the character of R-1 zones and adversely affect the uses permitted in R-1 zones was rejected because it was based on a separate inapplicable provision of the City's business regulation of home occupations. Even if short-term rentals do adversely affect owners of nearby single-family residences and their use of their own property, allowing them was a legislative judgment that was up to the City.

Consistency of Findings

Protect challenges the findings about ancillary use because an owner can acquire a piece of property and use it exclusively as a short-term rental, without ever living there. However, a property can be residential even if it is vacant. The Code defines dwelling in terms of whether the building is designed exclusively for residential occupancy, not whether anyone actually resides there. It then limits the uses of such a property to either: 1) use as a single-family residence, or 2) uses customarily incident thereto. As previously noted, short-term rental is such an incidental use.

The Need for a Permit

The Code lists three uses that can be permitted in an R-1 zone if and only if the planning commission issues a land use permit. These are a large day care, a model home, and a temporary on-site sales trailer in conjunction with the sale of subdivision lots. Similarly, the Code lists a number of uses that can be permitted in an R-1 zone if and only if the planning commission issues a conditional use permit. These include accessory apartments, churches, schools, and golf courses. Protect argues that vacation rentals have greater impacts than these uses. The Code, however, does not say that other uses that are like the listed uses require a permit, nor that other uses that have similar impacts require a permit. To the contrary, it specifically says that uses customarily incident to use as a single-family dwelling are allowed without a permit.

Conclusion and Implications

The *Protect Our Neighborhoods* decision highlights the significant deference that courts will allow a local agency when that agency is interpreting its own ordinances and other legislation. In instances where there is a potential conflict between a new ordinance and earlier adopted provisions that are not expressly repealed, a court will interpret harmonize both ordinances if possible before finding that the earlier ordinance was impliedly repealed.

This opinion rejects awkward attempts to manipulate what is an express finding that short-term rentals are incidental permitted uses. The express purpose of the Ordinance amendments was to clarify the City's intent, and the Protect challenges go against that clear intent. The court found that the City is the ultimate decision-maker on such issues of intent. The court's opinion [certified for partial publication] is available online at: https://www.courts.ca.gov/opinions/documents/E074233.PDF.
(Boyd Hill, Travis Brooks)

SECOND DISTRICT COURT FINDS COUNTY'S ENVIRONMENTAL STRATEGY PLAN WAS MERELY 'ASPIRATIONAL' AND NOT A 'PROJECT' UNDER CEQA

Save Our Rural Town v. County of Los Angeles, Unpub., Case No. B309992 (2nd Dist. Jan. 26, 2022).

In an *unpublished* decision, the Second District Court of Appeal in *Save Our Rural Town v. County of Los Angeles* upheld a trial court judgment that found the "OurCounty" environmental strategy plan adopted by the County of Los Angeles (County) was not a "project" under the California Environmental

Quality Act (CEQA), and thus, did not require formal environmental review prior to approval. The appellate court agreed that the strategy plan was merely "aspirational" and insufficiently concreate to amount to a "project" under CEQA.

Factual and Procedural Background

In 2016, the County board of supervisors (Board) established a "Chief Sustainability Office" (CSO). The office sought to:

> . . .create a vision for making [the County's] communities healthier, more equitable, economically stronger, more resilient, and more sustainable.

The CSO was tasked with developing, implementing, and updated a Countywide Sustainability Plan. Between 2017 through 2019, the CSO began formal efforts to develop the plan by conducting workshops, expos, and presentations with business, civic, and community stakeholders, and ultimately circulating a "discussion draft."

During this process, the CSO received more than 6,000 comment letters, including those from the Association of Rural Town Councils and Save Our Rural Town (SORT) regarding the plan's compliance with CEQA. SORT urged the Board to defer approval of the plan until a legally sufficient environmental document was prepared. Before transmitting the final draft to the Board, the CSO explained that the "OurCounty" plan was a "strategic guidance document" and thus "not a project under CEQA." The memo also explained that any action implemented under the plan would return to the Board for review and appropriate CEQA findings, as necessary.

The Board approved the OurCounty Plan in 2019. The "high level strategic plan" contained 12 broad and aspirational "goals" that described the County's shared vision for developing a sustainable county. These goals were supported by 37 "strategies," which were "long range approaches," supported by 159 "actions" that included specific policies, programs, and tools. The plan also identified short-, medium-, and long-term targets and implementation horizons for county officials to implement within their jurisdiction. Finally, the Plan acknowledged that it was merely strategic, and thus did not supersede previously adopted land use plans, such as the County's General Plan, various community, neighborhood, and area plans. To this end, the Plan was not intended to be a new policy document with the legal enforceability of an ordinance or general plan, or have land use and zoning regulatory authority.

In January 2020, SORT filed a petition for writ of mandate alleging the County violated CEQA by failing to prepare an Environmental Impact Report (EIR) for the Plan or consider the potentially significant environmental impacts to rural communities that were raised by the public in connection with the Plan's renewable energy goals, strategies, and actions. The trial court acknowledged that the environmental impacts SORT complained of were legitimate, but denied the petition by finding no causal connection between the Plan and the harms SORT alleged. Because the Plan did not mandate, require, or commit the County to any specific action, it was not a CEQA "project" that was capable of causing direct or indirect physical environmental change.

The Court of Appeal's Decision

On appeal, the threshold issue considered by the Second District Court of Appeal was whether the OurCounty Plan is a "project" as defined by—and thus subject to—CEQA. As a legal question, the court would review the issue de novo by considering undisputed evidence in the record.

Definition of a Project

CEQA defines a "project" as an activity directly undertaken by a public agency that may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. Whether an activity constitutes a project requires consideration of the "whole of the action" and its potential for directly or indirectly changing the environment. This consideration does not necessarily require a determination that these potential effects will *actually* occur—rather, a causal connection between the proposed activity or existence of a non-speculative/suggestive environmental change may suffice. This connection may be established where the activity constitutes an "essential step" leading to the ultimate environmental impact. However, this connection may be lacking in the absence of any concrete development proposals, or where unspecified plans are enabled but not compelled.

A Project or Merely an Aspirational and Generally Permissive Plan?

Citing the Supreme Court's decisions in *Muzzy Ranch Co. v. Solano County Airport Land Use Commission*, 41 Cal.4th 372 (2007), and *Union of Medical Marijuana Patients, Inc. v. City of San Diego*, 7 Cal.5th 1171 (2019), the Court of Appeal explained that the test for determining whether an activity constitutes a "project" under CEQA is a "categorical question" that turns on whether the activity is of the sort "that may cause a direct physical change or a reasonable foreseeable indirect physical change in the environment." Unlike the airport land use plan in *Muzzy Ranch*, the court of appeal explained that the County's OurCounty Plan was not mandatory, such that it "trumped the land use planning authority of affected jurisdictions." Rather, the Plan was merely "aspirational" and "generally permissive in nature with a relatively broad, amorphous scope and content," coupled with "an idealistic statement of policy which might or might not be carried out."

The appellate court also explained that the Plan's aspirational nature was further supported by the absence of concrete development proposals with conceivable environmental impacts. Though it is reasonably foreseeable that the Plan's goals, strategies, and actions may have *some* future environmental impact, the Plan at this stage is merely nascent and its eventual effects are highly speculative. Without knowing more about the ultimate form of these goals and actions, any environmental assessment at this time would be premature.

Funding Goals Insufficient to Establish a Causal Nexis to Impacts

The court further rejected SORT's claim that the Plan's commitment to developing a funding and employment plan for its goals rendered it "sufficiently concrete." The court explained that most of the funding goals predate the adoption of the Plan and the Board did not specify how these funding goals directly related to the implementation of the Plan's goals and actions. For these reasons, these funding sources were insufficient to establish a causal connection between the Plan and any reasonably foreseeable impacts.

Plan did Not Encourage or Incentivize Renewable Energy Activity

The court likewise rejected SORT's assertion that the Plan's general goal of increasing the use of renewable energy sources committed the County to building solar farms, let alone in specific locations. Here, beyond a general shift towards more sustainability, it is unclear what the County intends to occur. Nothing in the Plan encourages or incentivized any specific renewable energy activity, and thus lacks a causal connection to the types of environmental changes SORT complains of. Relatedly, the court was unpersuaded by SORT's assertion that solar power plans will be sited in rural areas, in turn causing wildfires and result in more emissions of biogenic volatile compounds affecting ozone formation. The court reiterated that "nothing but speculating connects the high-level strategies and aspirational actions in OurCounty and Sort's Assertions." The County's commitment to moving ahead with the aspirational plan does not somehow make it tangible enough to constitute a project under CEQA.

Conclusion and Implications

The Second District Court of Appeals' *unpublished* opinion offers a brief and synthesized recap of what constitutes a "project" under CEQA. Relying on well-established Supreme Court precedent, an activity only becomes a "project" under CEQA if a causal connection exists between the activity and foreseeable environmental impacts. "Aspirational plans" that do not commit the agency to carrying out actions fails to substantiate this requisite connection to trigger CEQA review. Although strategic plans may set forth goals that will lead to future "projects," it is not until those projects are proposed and develop can they be adequately challenged under CEQA. The court's *unpublished* opinion is available at: https://www.courts.ca.gov/opinions/nonpub/B309992.PDF. (Bridget McDonald)

LEGISLATIVE UPDATE

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

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

Surplus Land

•**AB 1748 (Seyarto)—**This bill would add to the definition of "exempt surplus land," surplus land that is zoned for a density of up to 30 residential units and is owned by a city or county that demonstrates adequate progress in meeting its share of regional housing need in its annual report, as specified, has constructed an adequate number of housing units to meet its share of regional housing need in the immediately preceding or current housing element cycle, as specified, or is designated as "pro housing" by the Department of Housing and Community Development. This bill was introduced on February 1, 2022 and is currently with the Local Government Committee.

•**AB 2625 (Ting)—**This bill would require land retained or transferred for public park and recreational purposes, in accordance with the General Plan for the city or county, to be developed within five years, rather than ten years, and used for at least 30 years, rather the 25 years, following the retention or transfer for those purposes. This bill was introduced on February 18, 2022 and may be heard in committee on March 21, 2022

General Plans

•**SB 1067 (Portantino)—**This bill would prohibit a city with a population greater than 200,000 from imposing any minimum automobile parking requirement on a housing development project that is located within 1/2 mile of public transit, as defined, and that either: 1) dedicates 75 percent of the total units to low- and very low income households, the elderly, or persons with disabilities or 2) the developer demonstrates to the local agency that the development would not have a negative impact on the local agency's ability to meet specified housing needs and would not have a negative impact on traffic circulation or existing residential or commercial parking within 1/2 mile of the project. By changing the duties of local planning officials, this bill would impose a state-mandated local program. This bill was introduced on February 15, 2022 and was scheduled to be heard by the Government and Finance Committee on February 23, 2022.

•**AB 2094 (Rivas)**—This bill would additionally require a city or county's annual report to the Department of Housing and Community Development which requires, among other things, the city or county's progress in meeting its share of regional housing needs and local efforts to remove governmental constraints to the maintenance, improvement and development of housing, to include the locality's progress in meeting the housing needs of extremely low income households, as specified. This bill was introduced on February 14, 2022 and may be heard in committee on March 17, 2022.

•**AB 2339 (Bloom)—**This bill would revise the requirements of the housing element in connection with zoning designations that allow residential use, including mixed use, where emergency shelters are allowed as a permitted use without a conditional use or other discretionary permit. The bill would prohibit a city or county from establishing overlay districts to comply with these provisions. This bill was introduced on February 16, 2022 and may be heard in committee on March 19, 2022.

Fees

•**AB 2428 (Ramos)—**This bill would require a local agency that requires a qualified applicant, as described, to deposit fees for improvements, as described, into an escrow account as a condition for receiving a Conditional Use Permit or equivalent development permit to expend the fees within five years of the deposit. This bill was introduced on February 17, 2022 and is scheduled to be heard in committee on March 20, 2022.

•**AB 2179 (Grayson)**—Current law prohibits a local agency that imposes fees or charges on a residential development for the construction of public improvements or facilities from requiring the payment of those fees or charges until the date of the final inspection or the date the certificate of occupancy is issued, whichever occurs first, except that the payment may be required sooner under specified circumstances. This bill would similarly prohibit a noncompliant local agency, as defined, that imposes any fees or charges on a qualified development, as defined, from requiring the payment of those fees or charges until 20 years from the date of the final inspection, or the date the certificate of occupancy is issued, whichever occurs first. This bill was introduced on February 15, 2022 and was referred to the Committees on Housing & Community Development and Local Government.

Accessory Dwelling Units

•**AB 916 (Salas)—**This bill would prohibit a city or county legislative body from adopting or enforcing an ordinance requiring a public hearing as a condition of adding space for additional bedrooms or reconfiguring existing space to increase the bedroom count within an existing house, condominium, apartment, or dwelling. The bill would include findings that ensuring adequate housing is a matter of statewide concern and is not a municipal affair, and that the provision applies to all cities, including charter cities. This bill was introduced on February 17, 2021 and was last amended on January 3, 2022. It was ordered to Senate for hearing on February 27, 2022.

•**SB 897 (Wieckowski)—**This bill would increase the maximum height limitation that may be imposed by a local agency on an accessory dwelling unit from 16 feet to 25 feet. This bill was introduced on This bill was introduced on February 1, 2022 and is set for hearing in the Senate Housing Committee on March 24, 2022.

Density Bonus Law

•**AB 2063 (Berman)**—This bill would prohibit affordable housing impact fees, including inclusionary zoning fees, in-lieu fees, and public benefit fees, from being imposed on a housing development's density bonus units. This bill was introduced on February 14, 2022 and was referred to the Committees on Housing & Community Development and Local Government on February 24, 2022.

•**AB 2334 (Wicks)—**This bill, with respect to the affordability requirements applicable to 100 percent lower income developments, would require the rent for the remaining units in the development be set at an amount consistent with the maximum rent levels for lower income households, as those rents and incomes are determined by CTCAC. In addition, the bill, with regard to the enforcement of equity sharing agreements for for-sale units, would also permit the local government to defer to the recapture provisions of the public funding source. The bill would also also make a technical change to the Density Bonus Law by deleting duplicative provisions relating to for-sale units subject to the above-described provisions. This bill was introduced on February 16, 2022 and may be heard in committee on March 19, 2022.

Affordable Housing

•**AB 2186 (Grayson)—**This bill would establish the Housing Cost Reduction Incentive Program, to be administered by the Department of Housing and Community Development, for the purpose of reimbursing cities, counties, and cities and counties for development impact fee waivers or reductions provided to qualified rental housing developments. Upon appropriation, the bill would require the Department to provide grants to applicants in an amount equal to 50 percent of the amount of development impact fee waived or reduced for a qualified rental housing development by issuing a Notice of Funding Availability for each calendar year in which funds are made available for the program, as provided. The bill would require an applicant that receives a grant under the program to use those funds solely for those purposes for which the development

impact fee that was waived or reduced would have been used. The bill would also require the department to adopt guidelines to implement the program and exempt those guidelines from the rulemaking provisions of the Administrative Procedure Act. This bill was introduced on February 15, 2022. As of February 24, 2022, it was referred to the Committees on Housing & Community Development and Local Government.

•**AB 1850 (Ward)—**This bill would prohibit a city, county, city and county, joint powers authority, or any other political subdivision of a state or local government from acquiring unrestricted housing, as defined, unless each unit in the development meets specified criteria, including that the initial rent for the first 12 months post conversion is at least 10 percent less than the average monthly rent charged for the unit over the 12-month period prior to conversion and at least 20 percent less than the small area fair market rent.

•**AB 2295 (Bloom)**—This bill, notwithstanding any inconsistent provision of a city's or county's General Plan, Specific Plan, zoning ordinance, or regulation, would require that a qualified housing development on land owned by a local educational agency be an authorized use if the housing development complies with certain conditions. Among these conditions, the bill would require the housing development to consist of at least ten units, be subject to a recorded deed restriction for at least 55 years requiring that at least 49 percent of the units have an affordable rent for lower income households, as those terms are defined, and 100 percent of the units be rented by teachers and employees of the local educational agency, except as specified. The bill would prohibit a city or county from imposing any development standards on a housing development project under these provisions. The bill would exempt a housing development project subject to these provisions from various requirements regarding the disposal of surplus land. This bill was introduced on February 16, 2022 and may be heard in committee on March 19, 2022.

Planning

•**AB 2234 (Rivas)—**This bill would require a public agency, under the Permit Streamlining Act, to create a list of information needed to approve or deny a post-entitlement phase permit, as defined, and to make that list available to all applicants for these permits no later than January 1, 2024. No later than January 1, 2024, the bill would require a public agency to require permits to be applied for, completed, and stored through a process on its internet website, and to accept applications and related documentation by electronic mail until that internet website is established. The bill would also require the internet website or electronic mail to list the current processing status of the applicant's permit by the public agency, and would require that status to note whether it is being reviewed by the agency or action is required from the applicant. This bill was introduced on February 15 and may be heard in committee on March 18, 2022.

•**AB 2668 (Grayson)—**This bill would prohibit a local government from determining that a development, including an application for a modification, is in conflict with the objective planning standards on the basis that application materials are not included, if the application contains sufficient information that would allow a reasonable person to conclude that the development is consistent with the objective planning standards. This bill was introduced on February 18, 2022 and may be heard in committee on March 21, 2022.

•**AB 2386 (Bloom)—**This bill would specify that regulation, by ordinance, of the design and improvement of any multifamily property held under a tenancy in common subject to an exclusive occupancy agreement, as defined, is vested in the legislative body of the local agency. This bill was introduced on February 17, 2022 and may be heard in committee March 20, 2022.

•**AB 2656 (Ting)—**This bill would require the planning agency to provide the annual report that includes, among other things, the city or county's progress in meeting its share of the regional housing needs to the Department of Housing and Community Development, the Office of Planning and Research, on or by March 31 of each year, rather than April 1. This bill was introduced on February 18, 2022 and may be heard in committee March 21.

•**AB 2097 (Friedman)**—This bill would prohibit a public agency from imposing a minimum automobile parking requirement, or enforcing a minimum automobile parking requirement, on residential, commercial, or other development if the development is located on a parcel that is within one-half mile of public transit, as defined. When a project provides parking voluntarily,

the bill would authorize a public agency to impose specified requirements on the voluntary parking. The bill would also prohibit these provisions from reducing, eliminating, or precluding the enforcement of any requirement imposed on a new multifamily or nonresidential development to provide electric vehicle supply equipment installed parking spaces or parking spaces that are accessible to persons with disabilities. This bill was introduced on February 14, 2022 and was referred to the Committees on Housing & Community Development and Local Government.

California Environmental Quality Act

•**AB 1001 (Garcia, Cristina)**—This bill would authorize mitigation measures, identified in an environmental impact report or mitigated negative declaration to mitigate the adverse effects of a project on air or water quality of a disadvantaged community, to include measures for avoiding, minimizing, or compensating for the adverse effects on that community. This bill was introduced on February 18, 2021 and last amended on January 24, 2022. The bill is currently with the Rules Committee.

•**AB 1952 (Gallagher)**—This bill would exempt from the requirements of CEQA a project financed pursuant to the Infill Infrastructure Grant Program of 2019, and would make all legal actions, proceedings, and decisions undertaken or made pursuant to the program exempt from CEQA. The bill would also make nonsubstantive changes to the program by renumbering a code section and updating erroneous cross-references.

•**AB 2445 (Gallagher)**—This bill would require a person seeking judicial review of the decision of a lead agency made pursuant to CEQA to carry out or approve an affordable housing project to post a bond of $500,000 to cover the costs and damages to the affordable housing project incurred by the respondent or real party in interest. The bill would also then authorize the court to waive or adjust this bond requirement upon a finding of good cause to believe that the requirement does not further the interest of justice. This bill was introduced on February 17, 2021 and may be heard in committee on March 20, 2022.

•**AB 2485 (Choi)**—This bill would exempt from the requirements of CEQA emergency shelters and supportive housing, as defined. This bill was introduced on February 17, 2022 and may be heard in committee on March 20, 2022.

•**AB 2719 (Fong)**—This bill would further exempt from the requirements of CEQA highway safety improvement projects, as defined, undertaken by the Department of Transportation or a local agency. This bill was introduced on February 18, 2022 and may be heard in committee on March 21, 2022.

•**SB 922 (Wiener)**—This bill would extend the exemption for bicycle transportation plans for an urbanized area for restriping of streets and highways, bicycle parking and storage, signal timing to improve street and highway intersection operations, and related signage for bicycles, pedestrians, and vehicles under certain conditions, indefinitely. The bill would also repeal the requirement that the bicycle transportation plan is for an urbanized area and would extend the exemption to an active transportation plan or pedestrian plan, or for a feasibility and planning study for active transportation, bicycle facilities, or pedestrian facilities. This bill was introduced on February 3, 2022 and was referred to the Committee on Environmental Quality on February 16, 2022.
(Melissa Crosthwaite)

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