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April 2022

CALIFORNIA LAND USE™ LAW & POLICY Reporter

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Subscription Rate: 1 year (11 issues) $845.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California corporation: President/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

FEATURE ARTICLE

SECOND DISTRICT COURT OF APPEAL REJECTS DISPARATE IMPACT CLAIM PREMISED ON 'GENTRIFICATION THEORY' IN LOS ANGELES FAIR HOUSING ACT SUIT

By Bridget McDonald

The Second District Court of Appeal in a *partially published* opinion in *Crenshaw Subway Coalition v. City of Los Angeles* upheld the dismissal of a complaint that alleged the City of Los Angeles (City) violated the federal Fair Housing Act (FHA) by approving a commercial revitalization project that could potentially gentrify the surrounding neighborhood. The Court of Appeal held that the U.S. Supreme Court's decision in *Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), dictated that a disparate impact claim based on plaintiff's gentrification theory was not legally cognizable under the FHA or state Federal Housing & Unemployment Act. In the *unpublished* portion of the opinion, the court upheld dismissal of the complaint's CEQA claims as time barred. [*Crenshaw Subway Coalition v. City of Los Angeles*, ___Cal. App.5th___, Case No. B309288 (2nd Dist. Mar. 3, 2022).]

Factual and Procedural Background

The Baldwin Hills Crenshaw Plaza is a commercial development located on a 43-acre parcel near the Leimert Park neighborhood within the Crenshaw Corridor of south Los Angeles. These geographic areas "have served as the political, cultural, and commercial heart of Black Los Angeles since the 1960s, and are one of the last majority-Black communities in Los Angeles," with nearly 90 percent of present-day residents identifying as Black and/or Latinx.

The Plaza features an enclosed mall, a movie theater, several commercial establishments, a small number of offices, and surface and garage parking. In 2008, three private entities (collectively, the developer) applied to the City to redevelop the parcel by leaving most of the mall and theatre intact, while demolishing other portions of the mall and office space to construct a 3-million square-foot mixed-use facility. At the end of the Project's 20-year construction lifespan, the Project would feature over 300,000 square feet of retail and restaurant space, nearly 150,000 square feet of office space, a new 400-room hotel, and 961 residential units that would include a mixture of for-sale condominiums and apartments for rent, with ten percent of each set aside for affordable housing.

Project Approval and Administrative Proceedings

In December 2016, the Los Angeles city planning department (Department) held a noticed hearing to consider the Project's vesting tentative tract map and final Environmental Impact Report (EIR). In January 2017, the Department issued a letter of determination approving the map and certifying the FEIR, but issued the notice of determination 61 days later on March 20, 2017.

Between July and August 2017, the Los Angeles planning commission (Planning Commission) held a hearing and ultimately recommended that the Los Angeles city council (City Council) adopt a proposal to change the zoning and height district designation for the Project parcel, finding that no further environmental impact analysis was required. Several groups appealed the Planning Commission's determination to the City's planning and land use management (PLUM) subcommittee. In June 2018, the PLUM committee held a hearing, wherein it recommended denial of the appeal and concluded no further environmental review was required. Several

weeks later, the City Council unanimously voted to adopt the PLUM Committee's recommendation, thereby denying the appeals and enacting the ordinances necessary to change the parcel's zoning and height district designation.

At the Trial Court

In an initial complaint filed in July 2018—and later, an amended complaint filed in September 2018—the Crenshaw Subway Coalition, a neighborhood-based nonprofit opposed to gentrification and displacement of longstanding Black and Latinx residents, filed suit against the City and the developer to enjoin the Project. The complaint alleged the Project violated the federal Fair Housing Act, the California Fair Employment & Housing Act (FEHA), and the California Environmental Quality Act (CEQA).

In February 2019, the trial court sustained the City's and developer's demurrer to the CEQA claim, finding that the complaint was untimely because it was filed more than 30 days after the City posted its notice of determination in March 2017 and, alternatively, more than 180 days after the Planning Department approved the Project's vesting tentative tract map and FEIR in January 2017.

As to the FHA and FEHA claims, the Coalition alleged the Project would: 1) lead to an influx of new and more affluent residents; 2) this influx would lead to increased rents and property values that would pressure existing lower-income residents; 3) the higher rents would push lower-income and already-rent-burdened residents from their homes in the neighborhoods surrounding the Project; and 4) this displacement will largely fall upon the predominantly Black and Latinx residents living in those neighborhoods. As a result, the Project would have the effect of making dwellings unavailable "because of race and color" in violation of the disparate impact prong of the FHA and FEHA. While the Coalition acknowledged that the Project sought to economically revitalize the area and eliminate the spread of blight, it argued these goals could be served by other policies that had a less discriminatory effect, such as requiring the developer to dedicate all 961 apartments to low-income residents or build other permanent affordable housing nearby.

In May 2019, the trial court overruled the City and developer's demurrer to the FHA and FEHA claims, finding that the complaint met its pleading burden by alleging that the 20-year-long Project constituted a City "policy" that could have a "disparate impact displacing Black and Latinx populations in the immediate environs."

In July 2020, the trial court granted the City's and developer's motion for judgment on the pleadings (MJOP) based on new case law established in *AIDS Healthcare Foundation v. City of Los Angeles*, Case No. B303308 (Jun. 15, 2020), which rejected a similar gentrification-based lawsuit under the FHA. The Coalition timely appealed.

The Court of Appeal's Decision

On appeal, the Coalition argued the trial court erred in granting the MJOP because the California Supreme Court had ordered de-publication of the *AIDS Healthcare* decision, and erred in sustaining the demurrer because its July 2018 lawsuit was timely filed under CEQA. As such, the Second District Court of Appeal articulated that, in accepting the complaint's allegations as true, it would consider whether the pleading stated a legally cognizable cause of action, and if it did, whether the pleading also alleged facts sufficient to support that cause of action.

The FHA and FEHA Claims and Procedural Arguments

The Coalition initially argued two procedural limitations precluded the court from considering the viability of the FHA and FHEA claims: 1) the California Supreme Court's order depublishing the *AIDS Healthcare* decision mandated automatic reversal of the trial court's ruling because the opinion formed the sole basis for the trial court's decision; and 2) the City and developer are judicially estopped from arguing in favor of affirmance beyond an *AIDS Healthcare*-based argument because neither party sought review of the trial court's earlier orders. The Second District Court of Appeal rejected both arguments.

As to the first contention, the appellate court explained that de-publication of the *AIDS Healthcare* opinion was not dispositive of the claims raised in the operative appeal. The California Rules of Court barred the court from inferring that de-publishing the opinion constituted the Supreme Court's explicit disapproval of its reasoning. The court also explained that it was not barred from considering the City's and developer's arguments in support of affirmance. That

the parties did not seek review of the earlier order on their demurrer does not bar them from making arguments that attack that determination in suggesting the ultimate order should be upheld. The parties are similarly not judicially estoppel from arguing in favor of the trial court's order, as judicial estoppel only precludes a litigant from taking *inconsistent* positions before a tribunal.

The Coalition Failed to Allege a Legally Cognizable FHA Claim

The Second District noted that the Coalition's "gentrification" theory implicated the broader issues of balancing the social benefits of economic development and revitalizing blighted neighborhoods with the social costs of urban renewal, socioeconomic inequality, and racial injustice. While important, the answers to these questions were best reserved for elected officials, not the court. Rather, the court's task is limited only to whether the Coalition's claims are legally cognizable under the FHA and FEHA.

Based on the U.S. Supreme Court's ruling in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) (*Inclusive Communities*), the Coalition had not alleged a legally cognizable claim under the FHA. The FHA was passed to provide for fair housing throughout the U.S. The FHA makes it unlawful to make unavailable, either through a practice or policy, a dwelling to any person because of race, color, religion, sex, familial status, or national origin. The act gives rise to two types of claims:

> 1) a 'disparate treatment claim,' where a plaintiff must establish that the defendant possessed a discriminatory intent when it undertook the challenged practice or policy; or 2) a 'disparate impact claim,' where the plaintiff must establish that the challenged practice has a 'disproportionately adverse effect on minorities or other protected groups and is otherwise unjustified by a legitimate rationale.'

While the latter may be more difficult to prove, such claims are crucial to achieving the Act's goals because they target artificial and unnecessary barriers to minority housing and integration that can occur through unconsciously hidden biases.

Nevertheless, the Supreme Court in *Inclusive Communities* held that the FHA is "not a panacea against all wrongs" and cannot be used to displace valid governmental policies. Thus, in considering the viability of a disparate impact claim at the pleading stage, courts must "rigorously examine" three cautionary "safeguards," which preclude claims that: 1) "cause race to be used and considered in a pervasive and explicit manner to justify governmental or private actions"; 2) "co-opt the act into an instrument to force housing authorities to reorder their priorities and thereby displace valid governmental policies"; or 3) "have the effect of perpetuating racial isolation and segregation."

Here, the Second District Court found the Coalition's gentrification theory was limited by each of these safeguards.

The first safeguard cautions against construing the FHA so as "to inject race into a city's decision[-]making process," for doing so "raises serious constitutional concerns and tends to perpetuate race-based considerations rather than move beyond them." Here, the gentrification theory "is premised on the allegation that the persons displaced by the gentrification are members of minority groups" based on socioeconomic status. However, the FHA only prohibits discriminatory policies based on race, color, religion, sex, familial status or national origin—not socioeconomic status. Thus:

> . . .if gentrification were a valid theory for relief under the FHA, city officials would be required to avoid gentrification-based displacement for a potential development located in a majority minority community, but not for one in a mostly white community.
>
> This, in turn:
>
> . . .would inexorably cause race to be used and considered in a pervasive and explicit manner in deciding whether the justify governmental or private actions, thereby injecting racial considerations into the decision.

The second limitation underscores that the FHA does not "decree a particular vision of urban development" and does not seek to bind housing authorities or developers into a "double bind of liability, subject

to suit," no matter where they authorize and build new low-income housing. Therefore, a claim will not lie if:

> . . .the specter of disparate impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals because, by recognizing such a claim, the FHA would have undermined its own purpose as well as the free-market system.

Here, the gentrification theory directly implicated this by identifying "alternative but less discriminatory policies," that would require the developer to dedicate every new residential unit to affordable housing or build additional affordable housing around the development.

Finally, under the third limitation, the overarching tenant of the FHA is to move the nation towards a more integrated society. Thus, while the FHA does not prohibit the consideration of race "in certain circumstances and in a proper fashion," it is not solely limited to the subset of segregation that is to the detriment of minorities. Here, the gentrification theory rests on the harms that Black and Latino residents will suffer from displacement. The court explained that this basis:

> . . .*exists* to protect this concentration of minority community members, and thus seeks to employ the FHA as a means of preserving the racial composition of these communities. However politically, culturally, historically, and commercially beneficial such segregation might be for those resulting communities, the FHA was designed as a tool for moving toward a more integrated society, not a less integrated one (original emphasis).

Though the Coalition's theory seeks to prevent the displacement of these groups, it is "still designed to prevent a more fully integrated community," which is thus "inimical to the core purpose of the [FHA]" and not legally cognizable under *Inclusive Communities*.

Prima Facie FHA Claim

Notwithstanding the analysis above, the Second District Court also considered the Coalition's contention that it properly alleged a prima face disparate impact claim, which was sufficient to withstand the opposing MJOP. Establishing a "prima facie" claim involves a three-step burden-shifting process: 1) the plaintiff must initially show, via statistical evidence, that the defendant implemented a facially neutral policy that has a significantly adverse or disproportionate effect on a protected class; 2) if the plaintiff succeeds, the defendant must prove that the challenged policy is necessary to achieve a legitimate governmental or business interest; 3) if satisfactory, the plaintiff must then establish that a less discriminatory, yet equally effective, practice exists.

Even if the Coalition satisfied its "*prima facie* burden," the court concluded the claim was still not shielded from dismissal under *Inclusive Communities*. The *prima facie* burden-shifting rubric is merely an evidentiary standard to suss out valid and invalid claims, but the burden of establishing a legally cognizable claim always remains with the plaintiff. As established above, *Inclusive Communities* dictates that the Coalition cannot carry that burden because the gentrification theory is not legally cognizable. Therefore, denying the MJOP and allowing the case to move forward would be futile because discovery of additional facts cannot change the fundamental legal inconsistency between the Coalition's theory and the FHA.

The FEHA Claim

As California's statewide counterpart to the federal FHA, FEHA prohibits the denial of a dwelling based on discrimination due to race, color, or other protected characteristics. Courts must construe FEHA liberally, and while it cannot provide fewer rights than those articulated in the FHA, it may be construed to afford greater remedies than those provided by its federal counterpart. Through this lens, the Coalition argued that dismissal of its FHA claim was not dispositive of its FEHA claim because FEHA can be construed more broadly than the federal Act. The court rejected this, noting that while FEHA *can* be construed more broadly, it does not mean it must *always* be construed as such. Here, *Inclusive Communities* is:

> . . .*the* critical case delimiting the scope of disparate impact claims under the FHA, and thus is pertinent to the construction of FEHA (original emphasis).

Because the Coalition's gentrification theory was not legally cognizable under the FHA, it is—by extension—likewise not legally cognizable under FEHA.

The CEQA Claim

In an *unpublished* portion of the opinion, the Second District upheld dismissal of the Coalition's CEQA claim as time-barred. The Coalition argued that it timely filed its CEQA action because the Planning Department's approval of the vesting tentative tract map and EIR did not constitute the operative "decision to carry out or approve" the Project that kickstarted the statutory clock.

A CEQA action must either be filed within 30 days of when the agency publicly posts (for at least 30 days) a notice of determination within five days of the approval, or, within 180 days of the agency's decision to carry out or approve the project. Under CEQA, an "approval" occurs "upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract" or other form of entitlement. Here, the Department's approval of the vesting tentative tract map constituted an "approval" because it was a discretionary entitlement issued by the City for use of the Project. Because the City posted the notice of determination 61 days after the Planning Department's decision, the 180-day window thus applied.

Nevertheless, the Coalition argued that the Department's decision was not an "approval" because the City Council had yet to approve other requisite Project entitlements, including the height and zoning district changes. The court rejected this, finding that the contingency of other related approvals to implement the Project did not preclude a finding that the Department's approval of the tract map constituted the operative CEQA "approval." Per the CEQA Guidelines, a project is an:

> . . .activity which is being approved. . .[even if it]. . .may be subject to several discretionary approvals…the term 'project' does not mean each separate governmental approval.

The court also rejected the Coalition's argument that the City should be equitably estopped from invoking a statute of limitations defense because its December 2016 notice misled the public by portraying the Department as a hearing officer for the Planning Commission and City Council, rather than as the final decision maker. Unpersuaded, the court noted that equitable estoppel can only be invoked against public agencies in:

> . . . unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy.

Here, the notice was, at best, unclear and ambiguous about which entity would make a final decision. Because "certainty is essential to all estoppels," any perceived statement of doubtful or questionable inference was not enough to invoke the doctrine.

Conclusion and Implications

The Second District Court of Appeals *partially published* opinion in *Crenshaw Subway Coalition v. City of Los Angeles* follows a line of recent environmental cases that have begged a larger, yet reoccurring question: in an era when many social, economic, and environmental issues remain unsolved, how can affected parties rely on the judicial system to remedy past, present, and future harms? As with other analogous high-profile suits, the Second District reminds us of the law's limitations and where the line must be drawn between the electorate and judiciary. Here, plaintiffs relied on the ostensible ramifications of gentrification to allege violations of the Fair Housing Act. Nevertheless, the court found that the very harms that the Fair Housing Act sought to protect against were implicated by the Coalition's well-intentioned theory. In light of the growing trend highlighted by these cases, it remains to be seen how all three branches of government respond to address these ever-growing issues. The Second District Court of Appeal's opinion is available at: https://www.courts.ca.gov/opinions/documents/B309288.PDF.

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REGULATORY DEVELOPMENTS

FEDERAL ENERGY REGULATORY COMMISSION ISSUES DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE DECOMMISSIONING OF FOUR KLAMATH RIVER DAMS

On February 25, 2022, the Federal Energy Regulatory Commission (FERC) issued a Draft Environmental Impact Statement (DEIS) evaluating the effects of the surrender, decommissioning, and removal of four dams along the Klamath River in Klamath County in south-central Oregon and Siskiyou County in north-central California. The DEIS analyzes the effects of decommissioning the dams on consumptive water issues, flooding, aquatic biota, revegetation, dewatering, and recreation, among other matters. The DEIS recommends that the parties surrender their license and decommission the dams pursuant to the staff alternative, which includes mitigation measures and state- and federally- mandated conditions.

Background

The Lower Klamath Hydroelectric Project (Project) involves four hydroelectric facilities (dams) located on the Klamath River in Oregon and Northern California. They include J.C. Boyle (Oregon), Copco No. 1 (California), Copco No. 2 (California), and Iron Gate (California). (DEIS at 1-1; *In the Matter of WQC for Klamath River Renewal Corporation Lower Klamath Project License Surrender*, California State Water Resources Control Board WQC 202000408-025 at p. 5.) The Project spans over 390 acres of federal lands and an additional 5.75 acres for transmission line right-of-way. (DEIS at 1-1.) The dams "currently generate approximately 686,000 megawatt-hours (MWh) annually." (*Id.* at ES-xxxi.)

In 2004, PacifiCorp, the owner of the Project, applied to relicense the Project. (DEIS at 1-2.) In response thereto, FERC issued an environmental impact statement, which recommended a new license with considerable mandatory conditions and operation changes. (*Id.* at 12-3.) PacifiCorp concluded that such conditions were cost-prohibitive, and PacifiCorp, FERC, Tribes, and other interested parties began negotiations to decommission the Project. (*Ibid.*)

In 2010, 47 parties reached an initial settlement regarding the Project's license surrender. (DEIS at 1-3.) Six years later, in 2016, PacifiCorp, California, Oregon, the Department of the Interior, the National Marine Fisheries Service (NMFS), the Yurok Tribe, the Karuk Tribe, local governments, irrigators, and conservation and fishing groups, among other parties, reached an amended settlement, the Klamath Hydroelectric Settlement Agreement. (*Ibid*; Klamath River Renewal Corporation, "FERC Releases Draft Environmental Impact Statement for Klamath Dam Removal Project" (Feb. 25, 2022) [River Renewal Corporation Press Release], https://klamathrenewal.org/ferc-releases-draft-environmental-impact-statement-for-klamath-dam-removal-project/)

The Klamath Hydroelectric Settlement Agreement formed the Klamath River Renewal Corporation (River Renewal Corporation), a nonprofit organization, formed to take ownership of the dams. (River Renewal Corporation Press Release.) To this end, FERC approved an application for transfer of the Project from PacifiCorp to River Renewal Corporation, the State of Oregon, and the State of California. (DEIS at ES-xxx.) And in November 2020, River Renewal Corporation and PacifiCorp submitted an amended application to surrender the Project license and begin deconstruction and decommissioning of the Project. (*Ibid.*) As a result, FERC produced the DEIS in accordance with its obligations under the National Environmental Policy Act of 1969 (NEPA).

Summary of the DEIS

Pursuant to NEPA's requirements, the DEIS analyzes three alternatives: 1) River Renewal Corporation and PacifiCorp's proposed action as set forth in the surrender application; 2) the proposed action with Commission staff modifications; and 3) no action. (DEIS at 2-1.) The DEIS compares the alternatives' effects starting from a baseline of preserving the status quo, i.e., based on existing conditions at the time that the DEIS is developed. The DEIS analyzes the extensive tradeoffs affecting FERC's decision.

The action alternatives both involve the decommissioning and destruction of the dams and connected facilities. (DEIS at 2-1.) The action alternatives' objectives are to "[a]dvance the long-term restoration of the natural fish populations in the Klamath River Basin," improve the long-term water quality conditions, address the conditions causing high disease rates among Klamath River salmonids, and "[r]estore anadromous fish passage to viable habitat." (DEIS at 1-6.) The proposed action includes 16 environmental measure plans, each with various subparts. The more detailed plans pertain to reservoir drawdown and diversion, water quality monitoring and management, and aquatic resources. Under the water quality monitoring and management plan, the parties will have to work with the California State Water Resources Control Board (State Board) and the Oregon Department of Environmental Quality (Oregon DEQ) to address agencies' Water Quality Certifications' (WCQ) requirements and conditions. (*Id.* at 2-3-4.) The most extensive plan is the aquatic resources management plan, which corresponds with the action alternatives' objectives and provides plans for the following aquatic matters: spawning habitat, listed sucker salvage, fish presence monitoring, tributary mainstream connectivity, juvenile salmonid and Pacific Lamprey rescue and relocation, and the hatcheries management and operations. (DEIS at 2-15-16.)

Decommissioning and deconstructing the dams will result in permanent beneficial effects to, among other resources, water right transfers, water quality, and Tribal trust resources, in particular, aquatic and terrestrial resources. (DEIS at ES-lxiii-lxiv.) Most significantly, River Renewal Corporation's proposed alternative will improve aquatic resource habitat for the federally protected coho salmon, chinook salmon, steelhead, and Pacific lamprey, although the deconstruction also will result in short-term, significant, and unavoidable adverse effects. (DEIS at ES-lix-lx.) In addition, although the deconstruction of the hydropower facilities will result in a loss of renewable hydropower, PacifiCorp will offset the negative effects through a:

> . . .power mix at a rate that more than covers the loss from the baseline condition to comply with the California Renewable Portfolio Standard. (DEIS at ES-lxvii.)

The Modified Action

FERC recommends that River Renewal Corporation and PacifiCorp implement the modified action. The modified action includes all of the proposed action's mitigation measures and plans, as well as the conditions set forth in California Water Board's and the Oregon DEQ's WQCs, and NMFS' and U.S. Fish and Wildlife Service's (FWS) [Biological Opinions'] (BiOps) requirements. (*Id.* at ES-xxxv.) The staff modifications prohibit any surface disturbance until the relevant parties complete all "consultations, final management plans, delineations, pre-drawdown mitigation measures, agreements, and wetland delineations." (DEIS at ES-xxxv.) The modifications also require that River Renewal Corporation: 1) adopt specified measures to minimize effects of deconstruction activities on air quality and purchase carbon offsets; 2) create measures in the California Slope Stability Monitoring Plan for the repair and replacement of structural damage to private properties abutting Copco No. 1 Reservoir, 3) develop measures for its translocation of freshwater mussels; 4) create an eagle conservation plan; 5) add criteria in its Terrestrial Wildlife Management Plans for "potential removal of structures containing bats between April 16 and August 31"; 6) prepare a supplemented Historic Properties Management Plan "to incorporate the pre- and post-drawdown requirements for cultural resources inspections, surveys, evaluations, mitigation, and management"; and 7) modify its Fire Management Plan, in coordination with the California Department of Forestry and Fire Protection, Oregon Department of Forestry, and the Fire Safe Council of Siskiyou County, to address issues raised by stakeholders. (DEIS at ES-xxxv-xxxvii.)

The No Action Alternative

The no action alternative, were FERC to adopt it and if PacifiCorp or River Renewal Corporation intended to continue hydropower generation, would require proceeding with relicensing the Project. (DEIS at ES-xxxviii, 2-1.) Until relicensing proceedings finished, operations would continue with no changes. (*Id.* at ES-xxxviii.) Thus, the existing conditions would persist. However, the existing conditions and continued operation of the facilities would result in long-term, significant, adverse effects to, inter alia: 1) sediment transport; 2) special status plan species;

and 3) threatened and endangered species. (*Id.* at ES-x1ii-iii.) For example:

> . . .the no-action alternative would not address the water quality and disease issues which, when combined with the ongoing trend of increased temperatures, poses a substantial risk to the survival of one of the few remaining [chinook] salmon populations in California that still sustain important commercial, recreational, and Tribal fisheries. (DEIS at ES-xxxviii.)

The recommended course of action and the dams' deconstruction inevitably will lead to substantial changes in the ecosystem of the Klamath River. (*See*, DEIS at 2-22.) These changes will attempt to restore the ecosystem to the benefit of natural vegetation and fish populations, as well as water quality and terrestrial wildlife preferring upland habitats. However, the changes also will have significant adverse effects on flood management and habitat for wildlife that prefer reservoir habitats, and it will result in short-term less than significant adverse effects while deconstruction takes place and the vast changes resulting therefrom occur. As dam decommissioning and destruction becomes more commonplace, appealing to a variety of stakeholders and citizens, the Klamath River Project DEIS provides a resource for considerations and relevant tradeoffs in large scale decommissioning projects.

Conclusion and Implications

Comment period is set to end on April 18, 2022. Thereafter, FERC will consider the comments received and issue a final environmental impact statement. The final Environmental Impact Statement is expected in September 2022.
(Tiffanie Ellis, Meredith Nikkel)

RECENT FEDERAL DECISIONS

FOURTH CIRCUIT VACATES U.S. FISH AND WILDLIFE SERVICE'S 2020 BIOLOGICAL OPINION FOR NATURAL GAS PIPELINE

Appalachian Voices, et. al. v. U.S. Department of the Interior, ___F.4th___, Case No. 20-2159 (4th Cir. Feb. 3, 2022).

On February 3, 2022, the United States Court of Appeals for the Fourth Circuit held that the analysis conducted by the United States Fish and Wildlife Service (FWS) in its 2020 Biological Opinion and Incidental Take Statement for the Mountain Valley Pipeline project (Project) was arbitrary and capricious. More specifically, the court concluded that the FWS failed to adequately consider the Project's impacts on two species of endangered fish, the Roanoke logperch (logperch) and the candy darter (darter) within the action area, and relied on post hoc rationalizations. The court vacated the FWS 2020 Biological Opinion and Incidental Take Statement and remanded for further proceedings. The FWS must now reassess the impacts to the two species in the Project's action area.

The Endangered Species Act

The Endangered Species Act of 1973 (ESA) requires federal agencies, in consultation with the FWS, to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species. During the consultation, the FWS must prepare a Biological Opinion on whether that action, in light of the relevant environmental context, is likely to jeopardize the continued existence of the species. The ESA requires the FWS to formulate its Biological Opinion in three primary steps: First, the FWS must review all relevant information provided by the action agency or otherwise available; second, the FWS must evaluate, in part, the environmental baseline of the listed species and the cumulative effects of non-federal action; and third, the FWS must incorporate its environmental-baseline and cumulative-effects findings into its jeopardy determinations for the listed species. If the FWS determines that the agency action is not likely to jeopardize a listed species but is reasonably certain to lead to an "incidental take" of that species, it must provide the agency with an Incidental Take Statement.

The ESA does not specify a standard of review, but the Administrative Procedure Act requires a reviewing court to:

> . . .hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Review under this standard is highly deferential but requires a reviewing court to analyze whether the agency's decision is based on a consideration of the relevant factors and whether there has been a clear error of judgment. In determining whether such an error was made, the reviewing court may look only to the agency's contemporaneous justifications for its actions and may not accept post hoc rationalizations for agency action.

The FERC and FWS Actions

The Federal Energy Regulatory Commission (FERC) authorized the construction of the Project on October 13, 2017. The Project is a 42-inch diameter, 304-mile natural gas pipeline stretching from West Virginia to Virginia. Because the Project could impact listed species, FERC consulted with the FWS for preparation of a Biological Opinion. The FWS then submitted its 2017 Biological Opinion and Incidental Take Permit, which concluded that the Project was not likely to jeopardize the listed species the FWS examined.

The Fourth Court's 2018 Decision and the 2020 Biological Opinion

On July 27, 2018, the Fourth Circuit found the U.S. Forest Service violated the National Environ-

mental Policy Act (NEPA) when it adopted FERC's Environmental Impact Statement (EIS) for the Project. In relevant part, the Fourth Circuit held that the U.S. Forest Service arbitrarily adopted FERC's flawed sedimentation analysis when assessing impacts to the Jefferson National Forest. A few months later, a U.S. Geological Survey scientist sent comments to the FWS, stating that its analysis of the Project's impacts on the logperch in its 2017 Biological Opinion was based on the same arbitrary assumptions. The scientist also identified several analytical flaws that significantly underestimated the potential impacts of the Project on the logperch.

Around the same time, the FWS published a final rule listing the darter as endangered. The court subsequently issued an order staying the 2017 Biological Opinion.

FERC reinitiated consultation for the Project with the FWS. On September 4, 2020, the FWS issued a new Biological Opinion (2020 BiOp) and Incidental Take Statement. The FWS determined that the Project was likely to adversely affect five listed species: a shrub called the Virginia spiraea, the logperch, the darter, the Indiana bat, and the northern long-eared bat. However, the agency ultimately found that the Project was unlikely to jeopardize these five species.

The Fourth Circuit's Decision

Alleged Failure to Adequately Analyze Environmental Baseline for Endangered Species

A collection of environmental nonprofit organizations petitioned the Fourth Circuit to review the 2020 BiOp and alleged, among other things, that the FWS failed to adequately analyze the environmental context for two species of endangered fish: the logperch and the darter. Specifically, the petitioners alleged that the FWS failed to adequately evaluate the environmental baseline and the cumulative effects of non-Federal activities within the action area for the two species and failed to incorporate these findings into its jeopardy determinations. Petitioners also alleged that the FWS failed to adequately consider climate change in its analysis.

The Fourth Circuit agreed with the petitioners that the FWS failed to adequately conduct its jeopardy analysis of the two species and instead relied on post hoc rationalizations. The court stated that while the 2020 BiOp described the range-wide conditions and population-level threats for the logperch and the darter, it failed to sufficiently evaluate the environmental baseline for the two species within the Project's action area itself. Additionally, the court found that the 2020 BiOp failed to analyze several stressors in the administrative record. The FWS challenged the court's analysis stating, in relevant part, that since it incorporated the results of two population and risk-projection models—one for the logperch and one for the darter—into the 2020 BiOp, it necessarily accounted for *all* potential past and ongoing stressors in the action area. The court disagreed with the FWS and explained that the FWS did not mention its reliance on these statistical models to evaluate the environmental baseline in the administrative record and its subsequent litigation reasoning was an impermissible post hoc rationalization. Additionally, the court stated that even if the FWS relied on these models, such reliance was unpersuasive because the models did not specifically focus on the action areas and the FWS did not explain why it believed these models reflect conditions within the action area.

Alleged Failure to Analyze for Cumulative Impacts to Species

Separately, the petitioners challenged the 2020 BiOp's analysis of the cumulative effects impacting the logperch and the darter. The court agreed, noting that the FWS failed to analyze non-Federal activities previously flagged in FERC's 2017 Environmental Impact Statement and included in the administrative record, including oil and gas extraction, mining, logging, water withdrawals, agricultural activities, road improvement, urbanization, and anthropogenic discharges. The court noted that none of these future impacts were expressly addressed in the 2020 BiOp or in the documents that the FWS relied on. In response, the FWS put forth the same argument above, stating that these future impacts were implicitly evaluated when the agency incorporated the logperch and darter models' projections. The court similarly rejected this argument as a post hoc rationalization.

Alleged Failure to Analyze Impacts of Climate Change

Lastly, the petitioners challenged the 2020 BiOp's analysis of the effects of climate change as part of the

environmental-baseline analysis. The court found that the FWS never explained in the 2020 BiOp that it was relying on these models to account for the effects of climate change and its claim that it implicitly accounted for it was an impermissible post hoc rationalization.

The court found it unnecessary to analyze the FWS' no-jeopardy conclusion in step three of the 2020 BiOp analysis because it concluded that the FWS arbitrarily evaluated the Project's environmental context at step two.

Conclusion and Implications

The court vacated the FWS 2020 Biological Opinion and Incidental Take Statement and remanded for further proceedings. On remand, the court directed the FWS to reassess the impacts to the two species and to ensure that it analyzes the Project against the aggregate effects of everything that has led to the species' current status and, for non-federal activities, those things reasonably certain to affect the species in the future. Factors relied on for this analysis should be included in the administrative record and the agency must not rely on post hoc justifications. The Fourth Circuit's opinion is available online at: https://www.ca4.uscourts.gov/Opinions/202159.P.pdf.
(Nirvesh Sikand, Darrin Gambelin)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT UPHOLDS EIR FOR KERN WATER BANK AUTHORITY'S WATER BANK RECHARGE PROJECT

Buena Vista Water Storage District v. Kern Water Bank,
___Cal.App.5th___, Case No. B309764 (2nd Dist. Feb. 23, 2022).

In a decision filed on February 23, and ordered published on March 22, 2022, the Second District Court of Appeal reversed a trial court decision setting aside the Kern Water Bank Authority's (KWBA) Environmental Impact Report (EIR) and approval of a project to divert remaining water from the Kern River in unusually wet years towards its Kern Water Bank (KWB). The decision, which upheld the KWBA's EIR and reinstated its approval of the project, includes a discussion of the adequacy of the EIR's project description, discussion of baseline conditions, and environmental impact analysis.

Factual and Procedural Background

The Kern River begins in the southern Sierra Nevada and flows southwest to the San Joaquin Valley. The upper segment of the river flows into the Lake Isabella Reservoir and Dam, which is used as a storage and regulation reservoir by the U.S. Army Corps of Engineers (Corps) and Kern River rights holders. The Kern River Watermaster manages water stored in the Isabella Reservoir and directs releases from it for water control purposes or to satisfy needs of Kern River water rights holders.

The Kern River is typically dry when it runs through Bakersfield but in some wet years flows through Bakersfield before reaching a physical structure named the "Intertie" through which flood waters are diverted to the California Aqueduct. Under California's appropriative water rights model, water rights to the Kern River are allocated into three groups, first point rights, second point rights, and third point rights. First and second point water rights holders receive water rights allocations on a daily basis, and any water not stored or diverted by first or second point rights holders belongs to lower rights holders. Typically, lower rights holders only receive water allocations in wet years. The City of Bakersfield and Kern Delta Water District have first point rights, petitioner Buena Vista Water Storage District has second point rights, and the Kern County water agency holds lower river rights.

In 2010, the State Water Resources Control Board ordered the Kern River's previous "fully appropriated stream" designation be removed based on evidence that some unappropriated water, that exceeded water rights holders' claims, was available in certain wet years, allowing for new appropriation applications to be processed.

The Kern Water Bank Authority Conservation and Storage Project was designed to divert up to 500,000 acre-feet-per-year from the Kern River for recharge, storage, and later recovery through existing diversion works to recharge the KWB. The KWBA acted as the lead agency, and prepared an EIR to evaluate environmental impacts of the Project. The EIR addressed appropriation of high flow Kern River water that is only available in wet years and after the rights of senior Kern River water right holders have been met. The EIR evaluated various environmental impacts, including impacts on hydrology and groundwater resources, and used the environmental settings from 1995 to February 2012 as baseline conditions. The EIR further discussed the hydrological impacts that would occur if the project was implemented.

The EIR noted that the project would only divert available Kern River water that cannot be used or stored by existing water rights holders and would not divert surplus flows in normal or dry years. Thus, the EIR concluded that the project would not have a significant impact on available water supply.

The EIR also discussed the project's impacts on groundwater and found that such impacts would be less than significant because the project would only increase water available for recharge and storage and not change recovery operations in dry years and would not result in significant impacts on groundwater recharge or local groundwater elevations.

Petitioner Buena Vista Water Storage District filed an action for writ of mandate seeking to set aside approval of the project and the related EIR. The trial court granted the writ, finding the EIR inadequate. Specifically the trial court found that: 1) the definitions of project water and existing water rights were inadequate because they were "inaccurate, unstable, and indefinite," 2) the baseline analysis was inadequate because "it fail[ed] to include a full and complete analysis, including quantification of competing existing rights to Kern River water," and 3) the analysis of environmental impacts with respect to potentially significant impacts on senior rights holders and on groundwater during long-term recovery operations.

The Court of Appeal's Decision

On appeal KWBA contended: 1) the project descriptions of project water and existing rights complied with the California Environmental Quality Act (CEQA), 2) a complete quantification of existing Kern River water rights was not required, and 3) the EIR properly evaluated the environmental impacts of long-term recovery operations on existing rights and groundwater levels. The appellate court agreed.

The Project Description

The court began by noting that the KWBA's project description was adequate. Here, the project description adequately and consistently described the project water as "high flow Kern River Water" which would only be available under relatively wet hydrologic conditions and after senior water rights holders rights had been met. Even though the EIR described in different words the conditions under which project water had historically flowed, these different descriptions still adequately described project water.

The Baseline / Environmental Setting

The court also concluded that the EIR provided an adequate description of the environmental conditions in the vicinity of the project by relying on historical measurements of water to determine how the existing physical conditions without the project could most realistically be measured. The court disagreed with the trial court that an exhaustive quantification of existing water rights was necessary. Here, historical use could determine the quantitative limits on the amount of water that a pre-1914 water appropriator could divert, and the KWBA had the discretion to rely on historical measurements to determine how existing physical conditions without the project can most realistically be measured.

Environmental Impacts Analysis

The court found that the EIR adequately discussed potential impacts on existing water rights and groundwater levels.

Regarding the first impact listed above, the project only sought to use unappropriated water, which excluded water being used pursuant to existing water rights, meaning that no significant impacts would occur to existing water rights. The EIR's conclusion that no mitigation was required because the project was not expected to have a significant impact on the existing water supply was supported by substantial evidence.

The court also overturned the trial court by finding that the EIR adequately assessed the impacts of long-term recovery operations on groundwater levels. The EIR determined that even maximum recovery volumes during a three to six year drought would not change substantially because no new recovery facilities would be built. The EIR further noted that even extended recovery periods would not exceed banked water quantities or result in changes to ground water levels. Substantial evidence supported the EIR's conclusion that there would not be significant impacts on groundwater levels because the project would not increase long-term recovery beyond historical operations.

Conclusion and Implications

In rejecting the petitioner's arguments under the CEQA and the lower trial court decision, the Second District Court of Appeal reiterated the principle that an Environmental Impact Report need not include a fully exhaustive environmental analysis nor perfection. With regard to the project it is enough that a local agency make a good faith effort in an EIR disclose that which it reasonably can based on information that is reasonably available. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B309764.PDF.
(Travis Brooks)

SECOND DISTRICT COURT AFFIRMS THAT COASTAL ACT CHALLENGE TO SHORT TERM RENTAL ORDINANCE IS BARRED BY ZONING ORDINANCE STATUTE OF LIMITATIONS

Coastal Act Protectors v. City of Los Angeles, ___Cal.App.5th___, Case No. B308306 (2nd Dist. Feb. 24, 2022).

The Second District Court of Appeal in *Coastal Act Protectors v. City of Los Angeles* affirmed the trial court's decision holding that challenge by Coastal Act Proctors (CAP) to the City of Los Angeles (City) short term rentals ordinance is barred by the Government Code § 65009 subdivision (c)(1)(B) 90-day statute of limitation applicable to zoning ordinance challenges

Factual and Procedural Background

Due to an increase in short term rental activity in the City brought about by internet sites such as Airbnb and VRBO, in June 2015, the city council (City Council) adopted a motion directing the department of city planning (Planning Department) to prepare and present an ordinance governing short term rentals in Los Angeles. The City Council wanted an ordinance that would allow residents to share their homes with guests, but that would prohibit wholesale conversions of residential buildings to vacation rentals, which would significantly reduce rental stock and contribute to increased rents and decreased affordable housing.

After ten public hearings over three years, the City Council adopted a Home Sharing Ordinance (Ordinance) on December 11, 2018 and on December 17, 2018, the Mayor approved the Ordinance. Before the Ordinance went into effect on July 1, 2019, the Planning Department entered into a contract with Host Compliance to develop an online registration system for short term rental activity and monitors internet advertising of short-term rentals within the City. By July 1, 2019, the City began accepting application from residents who wanted to participate in home sharing, and the City Council and Mayor approved supplemental funding for Host Compliance.

In November 2019, the City began enforcing the Ordinance, sending out warning letters to those suspected of advertising short term rentals without including the required associated registration number in the advertisement.

At the Superior Court

On February 13, 2020, over a year after the City adopted the Ordinance, CAP filed a petition for writ of mandate.

The petition alleged the Ordinance constitutes "development" as defined by the California Coastal Act, and therefore, the City had a clear legal duty imposed by statute to submit an application for a Coastal Development Permit (CDP) to the California Coastal Commission (CCC) in order to obtain approval of the Ordinance:

> Because the City did not obtain a CDP before adopting the Ordinance, CAP sought a writ of mandate to invalidate the Ordinance as it applies to the Venice Coastal Zone.

The trial court concluded the 90-day statute of limitations in Government Code § 65009 subdivision (c)(1)(B) applied, and the petition was untimely. It reasoned that the City's purported duty to obtain a CDP was a procedural task to perform in enacting a lawful Ordinance; therefore, CAP's petition challenging the City's failure to obtain a CDP constituted an action to "attack, review, set aside void, or annual" the decision of the City to adopt the Ordinance, bringing it within the ambit of Government Code § 65009 subdivision (c)(1)(B).

The trial court also concluded the Ordinance is not a "development" under the Coastal Act for which the City needed a CDP because the Ordinance affects only the permissible use of property for short-term rentals. The trial court reasoned that the site-specific owner of the property actually changes the us—the ordinance itself is not a change in the intensity of use under the Coastal Act and does not require a CDP.

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 determination that the CAP petition

was barred by the zoning ordinance statute of limitations, without needing to reach the issue of whether the Ordinance constituted "development" under the Coastal Act.

Statute of Limitations for a Zoning Ordinance Challenge is 90 Days

Government Code § 65009 is intended to provide certainty for property owners and local governments regarding local zoning and planning decisions and thus to alleviate the chilling effect on the confidence with which property owners and local government can proceed with projects created by potential legal challenges to local planning and zoning decisions.

To this end, § 65009 establishes a short statute of limitations of 90 days applicable to actions challenging several types of local planning and zoning decisions including, as relevant here, the adoption of a zoning ordinance. It is undisputed that CAP filed this action more than 90 days after the City's adoption of the Ordinance.

Statute of Limitations for Post-Ordinance Statutory Challenge is 3 Years

Zoning ordinance challenges are distinguished from post-zoning ordinance action statutory challenges. For example, in *Travis v. County of Santa Cruz,* 33 Cal.4th 757 (2004) (*Travis*), Government Code § 65009, subdivision (c)(1)(B) was held to not apply to a preemption claim based upon a statute enacted after the challenged ordinance was adopted. Instead, the three-year statute of limitation under Code of Civil Procedure § 338, subdivision (a) for violation of a statute was held to apply.

Similarly, in *Urban Habitat Program v. City of Pleasanton,* 164 Cal.App.4th 1561 (2008) (*Urban Habitat*), the three-year statute of limitations of Code of Civil Procedure § 338, subdivision (a) was held to apply to claims that the city failed to meet housing obligations that arose after the city adopted its zoning ordinances.

The Challenge for Failure to Adopt a CDP is to the Ordinance

The Coastal Act, including its CDP requirements, predates the Ordinance. Thus, assuming the City had a mandatory duty to obtain a CDP for application of the Ordinance to residences in the Venice coastal zone, that duty existed at the time the City enacted the Ordinance. CAP's petition, therefore, is an action to "attack, review, set aside, void, or annul" the City's decision to adopt the Ordinance subject to a 90-day statute of limitation. This case is more akin to *1305 Ingraham, LLC v. City of Los Angeles,* 32 Cal.App.5th 1253 (2019), applying the 90-day statute of limitation against a challenge that the City had failed to hold a hearing on an administrative appeal of an affordable housing permit, rather than a three-year statute of limitation.

Conclusion and Implications

This opinion by the Second District Court of Appeal helps provide clarity for ordinance challenges depending on whether they are based on subsequently enacted statutes, and the opinion reinforces the importance of immediately challenging an ordinance instead of waiting until the ordinance is implemented. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B308306.PDF.

(Boyd Hill)

THIRD DISTRICT COURT FINDS PLACER COUNTY'S EIR FOR A SPECIFIC PLAN AND REZONING PROJECT VIOLATED CEQA

League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer, 75 Cal.App.5th 63 (3rd Dist. 2022).

Conservation groups filed petitions for writ of mandate alleging that Placer County's approval of Specific Plan and rezoning to permit residential and commercial development in Martis Valley did not comply with the California Environmental Quality Act (CEQA) and the Timberland Productivity Act.

The cases were consolidated, and the Superior Court issued a petition for writ of mandate directing Placer County (County) to vacate its approvals only as they pertained to emergency evacuations for wildfires and other emergencies. The conservation groups appealed, and the County and landowner cross-appealed. The Court of Appeal for the Third Judicial District, on February 14, 2022 affirmed, upholding the County's analysis of emergency evacuation but finding several other CEQA violations.

Factual and Procedural Background

Real Party in Interest Sierra Pacific Industries (SPI) owns two large parcels of land in Martis Valley, an unincorporated area of Placer County between Truckee and Lake Tahoe. The west parcel is about 1,052 acres and the east parcel is about 6,376 acres. Both are undeveloped coniferous forest. Both parcels border, and in some small instances cross into, the Lake Tahoe Basin to the south. The west parcel is designated as Forest and zoned as Timberland Production Zone (TPZ), which restricts the land's permitted uses to growing and harvesting timber and other compatible uses. Most of the east parcel is designated Forest and zoned TPZ. About 670 acres of it is zoned for development of up to 1,360 dwelling units and 6.6 acres of commercial uses.

SPI has been engaged with conservation groups regarding conservation issues in Martis Valley for many years. In 2013, they signed an agreement to facilitate a transfer of the east parcel's development rights to portions of the west parcel and preserving the east parcel as permanent open space via purchase of a fee simple interest or conservation easement. Although cooperation among the parties ended, SPI and its partners applied to the County in 2013 for a Specific Plan they believed was consistent with the primary terms of the agreement. The Specific Plan would amend the Martis Valley Community Plan and zoning to: allow development of up to 760 residential units and 6.6 acres of commercial use on a 775-acre portion of the west parcel and withdraw those lands from the TPZ zone; and designate all of the east parcel as Forest and TPZ. Upon approval, SPI would sell the east parcel for conservation of place it in an easement.

It is these actions (not any approval of actual development) at issue in this case. The County released a Draft Environmental Impact Report (EIR) in 2015 and a Final EIR in 2016. After two hearings, the planning commission recommended the County deny the proposed Specific Plan. In October 2016, the County board of supervisors (Board) certified the EIR and approved the Specific Plan. The Board also found that the immediate rezoning of the west parcel out of the TPZ was consistent with the purposes of the Timberland Productivity Act and was in the public interest.

At the Superior Court

Conservation groups sued, alleging the County violated CEQA and the Timberland Productivity Act.

The Superior Court found in favor of the County on all claims except for the EIR's analysis of the project's impacts on adopted emergency response and evacuation plans. The court ordered that a writ of mandate issue directing the County to vacate its certification of the EIR and approval of the project as they pertained to emergency evacuations for wildfires and other emergencies. Conservation groups appealed, and the County and real parties cross-appealed.

The Court of Appeal's Decision

The parties' appeals raised numerous issues, resulting in a Court of Appeal opinion some 120 pages in length. Broadly, in one appeal, the Court of Appeal found: 1) the EIR's analysis of impacts on Lake Tahoe was insufficient; 2) a greenhouse gas (GHG) mitigation measure did not comply with CEQA; and 3) the EIR's evaluation of impacts on evacuation plans was sufficient. In the other appeal, the Court of Appeal found: 1) the same GHG mitigation measure was inadequate; 2) substantial evidence did not support the County's finding that no additional feasible mitigation measures existed to mitigate the project's transportation impacts; and 3) the EIR's energy analysis was insufficient.

An overview of the Court of Appeal's conclusions is as follows:

- The County did not abuse its discretion in the way it described the regional air quality setting. It used reliable data specific to the Tahoe Basin that was available. Substantial evidence supported the County's determination in making the description.

•The County abused its discretion by not adequately describing Lake Tahoe's existing water quality, which could be impacted by traffic generated by the project.

•The County did not abuse its discretion by analyzing air quality impacts by reference to a threshold of significance approved by the Placer County Air Pollution Control District. The County had discretion to reasonably formulate standards different than those used by the Tahoe Regional Planning Agency (TRPA). The County did not err in failing to adopt and use a VMT threshold used by TRPA as a threshold of significance.

•Substantial evidence supported the County's decision not to recirculate the Draft EIR after the Final EIR added information regarding climate change impacts. At no time did the Final EIR state that the project's greenhouse gas emissions would impact the environment more severely than what was disclosed in the Draft EIR.

•A mitigation measure regarding greenhouse gas emissions that was to be applied to future projects was invalid and improperly deferred. The measure required the project to meet certain adopted future targets that did not currently exist and may never exist. Thus, the measure deferred the determination of the impact's significance to an unknown time and did not sufficiently commit the County and applicants to mitigating the impact.

•The County made the necessary findings under the Timberland Productivity Act required to immediately rezone the west parcel from TPZ to a zoning that would permit the proposed development. Those findings were supported by substantial evidence.

•Substantial evidence supported the County's finding that the project would not have a significant impact on emergency response and evacuation plans. Among other things, the project would provide emergency vehicle access by way of the main entrance and also two emergency vehicle access routes to the west parcel. The project also would not cut off or otherwise modify any existing evacuation routes. The project also would develop a fire protection plan that would include a project emergency and evacuation plan.

•Substantial evidence supported the County's finding that cumulative conversion of forest land associated with the project would be less than significant. The Final EIR had found that estimating additional climate-related forest loss due to drought, wildfire, or bark beetle, as the conservation groups urged, would be speculative. The County reasonably relied on General Plan projections and conclusions to assess cumulative impacts.

•Substantial evidence did not support the County's conclusion that no additional feasible mitigation measures existed to mitigate the project's significant and unavoidable impact to traffic congestion on State Route 267, aside from payment of a traffic impact fee.

•The EIR's analysis of the project's energy consumption was insufficient under CEQA because it failed to address whether any renewable energy features could be incorporated into the project as part of determining whether the project's impacts on energy resources were significant.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding numerous important California Environmental Quality Act topics, including but not limited to CEQA thresholds of significance, mitigation measures, recirculation, emergency evacuation plan impacts, and energy. The Third District Court of Appeal's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C087102.PDF.
(James Purvis)

FIRST DISTRICT COURT FINDS CITY'S ANALYSIS OF AND COMMENT RESPONSES TO TRAFFIC IMPACTS IN FINAL EIR SUFFICIENT IN LIGHT OF AMENDMENTS TO CEQA GUIDELINES

Pleasanton Citizens for Responsible Growth v. City of Pleasanton, ___Cal.App.5th___, Case No. A161855 (1st Dist. Feb. 28, 2022).

The First District Court of Appeal in *Pleasanton Citizens for Responsible Growth v. City of Pleasanton* affirmed the trial court's decision rejecting Pleasanton Citizens for Responsible Growth's (PCRG) claims challenging the adequacy of the City of Pleasanton's (City) analysis and comment responses related to traffic and air quality impacts of the construction of a Costco Wholesale Corporation (Costco) retail store, gas station, and other commercial developments (cumulatively: Project) under the California Environmental Quality Act (CEQA), holding that PCRG's claims were moot in light of recent amendments to the CEQA Guidelines (Guidelines).

Factual and Procedural Background

In 2009, the City of Pleasanton approved an update to its General Plan, which included an economic and fiscal element that contained "an aggressive program to retain and expand business." The Project at issue here is part of this program.

In September 2015, the City released the Draft Supplemental Environmental Impact Report (Draft SEIR) for the Project, which incorporated a transportation impact analysis. The analysis used a Level of Service (LOS) measurement to describe traffic congestion and delay at intersections based on the amount of traffic each roadway can accommodate in light of factors such as speed, travel time, delay, and freedom to maneuver. The Draft SEIR found that although certain traffic impacts would be less than significant, it also found that the Project would degrade traffic conditions below a LOS D rating at certain specified intersections and freeway ramps, resulting in significant impacts requiring mitigation measures.

The Draft SEIR also analyzed the Project's cumulative impacts on air quality, using the methodology identified by the Bay Area Air Quality Management District (BAAQMD), the regional agency responsible for developing air quality plans in the San Francisco Bay Area. The Draft SEIR concluded that the Project would result in significant and unavoidable cumulative air pollutant air quality impacts.

In March 2016, the City released the Final Supplemental Environmental Impact Report (Final SEIR), and in 2017, approved the Project and certified the Final SEIR.

In December 2017, PCRG filed a lawsuit to rescind the City's approval of the Project and certification of the Final SEIR, arguing that the City violated CEQA because it did not provide an adequate analysis of the Project's air quality impacts in the Final SEIR. In September 2018, the City voted to rescind the Project's approvals and conduct additional air quality analyses, and PCRG dropped its lawsuit.

In July 2019, the City circulated the Partial Recirculated Draft Supplemental Environmental Impact Report (Draft RSEIR). The Draft RSEIR included the updated air quality analyses, and the City determined that the Project's air pollutant emissions were less than significant. The City received roughly 300 public comments in response. Specifically, some of the comments suggested that the Draft SEIR's analysis of traffic and air quality impacts did not account for future cumulative development in the region, due to other, nearby developments under consideration by an adjacent city.

In November 2019, the City prepared the Partial Recirculated Final Supplemental Environmental Impact Report (RFSEIR), containing the City's responses to the comments received in response to the Draft RSEIR. The City defended its traffic and air quality analyses, responding that "all of the Draft SEIR's analyses of these issues…were based on models that accounted for regional cumulative growth," and that the:

> . . .models have already effectively accounted for individual development projects such as those identified in the comment, as the models assume that future development will occur in a manner that is generally consistent with the general plan and zoning of each site.

The City's other responses reflect the same defense of its Draft SEIR, echoing that it already incorporated thorough analyses of traffic and air quality impacts.

In February 2020, PCRG sent a letter to the City criticizing the RFSEIR for not adequately considering other pending or approved projects. One of its arguments was that the City did not analyze the additional nearby projects and that the RFSEIR should be revised and re-circulated as a draft. On February 4, 2020, the City's planning commission approved the project and certified the RFSEIR.

At the Superior Court

On March 4, 2020, PCRG filed a petition for writ of mandate to urge the City to set aside the certification of the EIR and approval of the Project, arguing that: 1) the City did not include the other nearby projects within the RFSEIR's cumulative impact analyses on traffic and air quality, and 2) the City failed to respond to specific public comments with a "good-faith, reasoned analysis."

The City, joined by Costco, opposed the petition and argued that PCRG's arguments were subject to the substantial evidence standard, and that under that standard, PCRG failed to advance the evidence required to affirmatively prove the RFSEIR did not adequately analyze cumulative impacts by not including the other nearby projects in the analysis.

The trial court ruled in favor of the City and PCRG, holding that: 1) the substantial evidence standard is proper; 2) there was substantial evidence in the record showing that the RFSEIR adequately considered the other nearby projects in its cumulative impact analysis; and 3) there is substantial evidence in the record showing the City's responses to the specific comments included good faith reasoned analysis in compliance with the requirements of Guidelines § 15088.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's decision, finding that: 1) due to the amendment to Guidelines § 15064.3 subdivision (a), PCRG's argument regarding the City's adequacy of traffic analysis and sufficiency of responses to comments is moot; and 2) PCRG failed to set forth any evidence concerning the RFSEIR's analysis of cumulative air quality impacts under a substantial evidence standard, and that the City's responses to the comments were sufficient.

The Court of Appeal reviewed the agency's determinations for substantial evidence and analyzed the challenges related to the traffic impacts, the air quality impacts, and whether or not the City's responses to public comments regarding the adequacy of those impact analyses were in compliance with CEQA.

Traffic Analysis

With regards to the traffic analysis argument presented by PCRG, the City and Costco argued that the Court of Appeal did not need to consider the arguments in light of recent amendments to the Guidelines. The Court of Appeal cited to both *Citizens for Positive Growth & Preservation v. City of Sacramento*, 43 Cal.App.5th 609, 625 (2019) and Guidelines **§** 15064 to support its holding that PCRG's arguments were moot.

Guidelines **§** 15064.3 "describes specific considerations for evaluating a project's transportation impacts" and provides that, except for roadway capacity projects, "a project's effect on automobile delay shall not constitute a significant environmental impact." (Guidelines, **§** 15064.3, subd. (a).) The court explained that although this section of the Guidelines became effective after the City certified the RFSEIR and approved the project, it applied prospectively, and thus, PCRG's argument is moot.

Additionally, the court explained that due to the amended Guidelines section, PCRG's related argument that the City's response to public comments on the cumulative impacts is also moot. This is because, as the court explained, PCRG's claims rely on the premise that the Project's cumulative traffic impacts constitute significant impacts within the meaning of CEQA. However, the Project's traffic impacts as determined by the LOS study, cannot constitute a significant impact pursuant to the amendment.

Air Quality Analysis

In response to PCRG's challenge regarding the adequacy of the City's analysis of, and responses to public comments on the Project's cumulative impacts on air quality, the court also found in favor of the City and Costco. The court stated that PCRG did not raise a direct challenge to the air quality analysis, rather it "piggybacks" those claims onto those directed at the City's findings on traffic impacts. The court reasoned that PCRG only attacked the validity of the City's analysis with respect to traffic impacts, argu-

ing that the City should have rerun its traffic model for the Project and nearby developments, relies on a letter prepared by its traffic consultant, does not summarize the RFSEIR's analysis of air quality impacts, does not explain specifically what part of the RFSEIR's analysis is defective, and refers to the adjacent projects as "traffic-intensive."

Substantial Evidence

Additionally, the court explained that PCRG failed to set forth any evidence under a substantial evidence standard that an appellant is required to provide when challenging an EIR for insufficient evidence. Instead, PCRG argued that the City should have rerun its traffic model to account for the adjacent projects, questioned the data and methodology of the traffic model, and that the Draft SEIR needed to be revised and recirculated. Citing to the trial court's analysis, the Court of Appeal wrote that PCRG's claim:

> . . .isn't a challenge to the scope of the impact analysis. This is a challenge to whether or not their rationale for not running an independent study or to update their traffic modeling is reasonable or not reasonable…

PCRG did not set forth the required evidence to show whether or not the City's rationale was reasonable.

Responses to Public Comments

The court similarly rejected PCRG's argument that the responses to public comments were inadequate. The court presented the standard for responses to public comments: "responses to comments need not be exhaustive; they need only demonstrate a 'good faith, reasoned analysis'" and that:

> . . .the sufficiency of the agency's responses to comments on the draft EIR turns upon the detail required in the responses, and where a general comment is made, a general response is sufficient. (citing *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal. App.4th 357, 378; Guidelines, § 15088, subd. (c).)

Where PCRG argues that the City's responses did not meet these standards, the court disagreed, asserting that the City's response "clearly cites and provides specific information from the draft SEIR as to whether and how it analyzed the new projects in its air quality impact analysis," and held that this level of detail was sufficient. Additionaly, the court explained, that where there is a disagreement over the responses, it does not mean the response is inadequate.

Conclusion and Implications

This opinion by the First District Court of Appeal deferred heavily to the CEQA Guidelines in making its determination, and gives deference to the City's analysis and responses. While both the trial court and Court of Appeal relied on the substantial evidence standard to analyze PCRG's arguments, the Court of Appeal's holding essentially came down to the CEQA Guidelines and whether or not PCRG was able to meet the standard of evidence required to show if the City was justified in its actions. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A161416.PDF.
(Lauren Palley, Boyd Hill)

THIRD DISTRICT COURT UPHOLDS EIR FOR IRRIGATION DISTRICT'S 'UPPER MAIN DITCH' WATER TRANSMISSION PIPELINE PROJECT

Save the El Dorado Canal v. El Dorado Irrigation District,
___Cal.App.5th___, Case No. C092086 (3rd Dist. Feb. 16, 2022).

The Third District Court of Appeal in *Save the El Dorado Canal v. El Dorado Irrigation District* rejected a challenge under the California Environmental Quality Act (CEQA) to the El Dorado Irrigation District's

(District) approval of the Upper Main Ditch piping project and Blair Road Alternative, finding that substantial evidence supported the District's determination that the project and approved alternative would have less than significant impacts. The court rejected petitioner's claims that the Environmental Impact Report's (EIR) project description and analyses of hydrological, biological, and wildfire impacts were insufficient.

Factual and Procedural Background

The El Dorado Irrigation District operates a primarily surface-water system in El Dorado County to meet the region's potable water demands. The system contains more than 1,250 miles of pipe and 27 miles of earthen ditches that connect the system's facilities and treatment plants. The Upper Main Ditch (UMD) is the system's main conveyance feature and is comprised of a three-mile open and unlined ditch that connects the system's Forebay Reservoir to the Reservoir 1 Water Treatment Plant (WTP).

The Upper Main Ditch Conversion Project

In June 2015, the District issued an initial study and notice of preparation for a proposed project that would convert the UMD in to a buried 42-inch pipeline that spanned the length of the existing ditch. The upstream end of the new pipeline would connect to the Forebay Reservoir and the downstream end would connect to a new metering and inlet structure at the Reservoir 1 WTP. After placing the pipeline, the District would backfill the pipe and reshape the ditch to allow for the passage of stormwater flows up to the current ten-year storm event capacity. Ultimately, the project would improve water conservation by reducing the amount of water currently lost to seepage and evaporation (approximately 11-33 percent), as well as water quality by reducing infiltration of contaminants that subsequently overburdened the system's water treatment plants.

The Blair Road Alternative

In addition to the proposed project, the District considered three alternatives. The Blair Road Alternative would also convert the UMB into a buried 42-inch pipeline, but instead of running the pipe along the existing ditch, the pipe would be placed across approximately 400 feet of District-owned property from the Forebay Reservoir to Blair Road, continue along the road until it reached the UMD crossing, then travel across private property to the Reservoir 1 WTP. The upstream and downstream connections would remain the same and the alternative would construct the project in the same manner.

The CEQA Process and Litigation

Between June 2015 and June 2018, the District engaged in an extensive public engagement process to seek comments and feedback on the scope of the project and EIR. In June 2018, the District circulated a draft EIR. The DEIR's project description described the location of the UMD and the setting's history of storm flows and drainage. The DEIR also described the Blair Road Alternative's setting and noted that, should it be adopted, the District would no longer use the existing ditch—instead reverting the land back to private landowners.

After an extended public comment period, the District issued the final EIR in January 2019. In April 2019, the District's board of directors (Board) adopted a resolution approving the Blair Road Alternative, certified the FEIR, and adopted a mitigation monitoring and reporting program. While the Board found that the initial project would achieve the project's objectives, the original project would have greater potential impacts to residents along the ditch from the resulting construction and eminent domain proceedings. The Board thus concluded the Blair Road Alternative would be feasible under CEQA because it would involve less construction activity near residents, require the removal of fewer tress, and reduce the number of easements across private property.

In May 2019, petitioner, Save the El Dorado Canal, filed a petition for writ of mandate alleging the project violated CEQA. The trial court denied each of petitioner's ten contentions. Petitioner timely appealed.

The Court of Appeal's Decision

On appeal, petitioner re-alleged that the project violated CEQA because the EIR contained an inaccurate project description and failed to adequately analyze potential impacts to hydrology, biological resources, and wildfire hazards. Under an abuse of discretion standard, the Third District Court of Appeal rejected each claim, finding that substantial evidence

supported the District's determination and petitioner failed to demonstrate otherwise.

Adequacy of Project Description

Petitioner alleged the EIR failed to adequately describe the project by omitting the "crucial fact" that the ditch that would soon be abandoned was the "only drainage system" for the watershed. In advancing this argument, petitioner's briefing not only alleged deficiencies with the project's description, but also the EIR's environmental setting and impact analyses. The court of appeal noted that compounding these arguments under one heading was "problematic" and needed to be under a "separate heading" in order to properly raise these issues.

Notwithstanding this, the Third District considered whether the EIR provided an "accurate, stable, and finite" description of the project's location, boundaries, objectives, and technical, economic, and environmental characteristics. In so doing, the court rejected petitioner's assertion that the EIR "failed to disclose the true nature of the Upper Main Ditch." Rather, the EIR provided a detailed description of the UMD's size, history, and location, and explained how the UMD passively intercepts stormwater runoff that would otherwise naturally flow down slope. With respect to the Blair Road Alternative, the EIR explained that the ditch would continue to passively receive and convey stormwater flows during storm events, even after the District abandoned its maintenance easement over it. The court concluded this evidenced an adequate, complete, and good faith effort at full disclosure about the Main Ditch and its relationship to the watershed's drainage system, as well as the District's intent to abandon the ditch should it adopt the Blair Road Alternative.

Impacts to Hydrology

Petitioner claimed the EIR inappropriately concluded that the Blair Road Alternative would not significantly impact watershed drainage because abandonment would permit "the underlying property owners to do with [the ditch] as they please." Citing a comment letter submitted by the County of El Dorado, petitioner claimed the EIR failed to mitigate foreseeable impacts to watershed drainage that will result when the abandoned ditch becomes clogged with vegetation and debris.

The court disagreed, citing the FEIR's response to the County's comment letter, which explained that private action or inaction will ensure the abandoned ditch retains its current capacity to convey stormwater across their property thereby reducing any risk of significant flooding. Moreover, unlike the District, the County can regulate private fill activities via administrative and civil penalties to ensure such activities do not yield significant environmental effects. For these reasons, it would be too speculative to predict landowners' particular actions or inactions and the ensuing potential effects to the ditch's stormwater conveyance capacity. Petitioner failed to point to any substantial evidence in the record to suggest otherwise to explain how the EIR's drainage analysis is inadequate.

Impacts to Biological Resources

Petitioner also alleged the EIR inadequately analyzed the project's potential impacts to biological resources by failing to mitigate impacts to riparian habitats and sensitive natural communities, and by conflicting with local policies and ordinances that protect such resources. The court noted that the EIR found the Blair Road Alternative would result in less potential biological impacts because it would be located within an existing road corridor devoid of riparian habitat and require less trees to be removed. As with the initial project, any impacts to vegetation communities—including those resulting from tree removal—would be mitigated to less than significant levels through permit acquisition and compliance. In turn, the Alternative would be consistent with the General Plan's biological resources management plan, the County's tree mortality removal plan, and CALFIRE's tree removal procedures. And, contrary to petitioner's assertion, compliance with these plans via mitigation measures would not increase the spread of bark beetle populations, thereby resulting in significant impacts.

The court also rejected petitioner's assertion that the County ignored comments submitted by the California Department of Fish and Wildlife (CDFW). Petitioner claimed CDFW's comment directed the County to obtain a streambed alteration agreement and consult with the U.S. Army Corps of Engineers, should construction implicate Waters of the United States (WOTUS). The County's response noted that the project and Alternative were specifically

designed to avoid WOTUS, but nevertheless would be required to mitigate any such impacts. The EIR explained that the riparian habitat affected by the project is not a naturally occurring waterbody, thus, plant and wildlife species are not dependent on water in the ditch. The court concluded this response was more than adequate to address CDFW's comment.

Finally, the court was not swayed by petitioner's claim that the EIR failed to adequately analyze and mitigate impacts to tree mortality. The court pointed to the EIR's explanation that trees surrounding the project site are not native riparian species, and thus, are not dependent on water conveyed through the ditch. To the contrary, most of the adjacent tree species are stress-tolerant and can withstand climatic variation and changes in water seepage. Thus, the EIR provided facts, reasonable assumptions, and expert opinion to satisfy the District's substantial evidence burden.

Wildfire Hazards Analysis

The Third District rejected petitioner's final contention that the EIR failed to adequately consider the entirety of the project's fire risks, and instead only considering construction-related impacts. Petitioner asserted the project would have potentially significant impacts by removing a water source that could be used as a firefighting tool. The court disagreed by noting that the EIR specifically debunked petitioner's claim—water in the ditch is intended as a drinking water supply and does not supply water for firefighting. Contrary to petitioner's claim and related comment letter, water from the ditch had never been used to fight prior fires and the CALFIRE Strategic Fire Plan did not include the UMD as a potential firefighting resource. Absent substantial evidence to the contrary, petitioner had not carried its burden of demonstrating the EIR's analysis was unsupported.

Conclusion and Implications

The Third District Court of Appeal's opinion offers a straightforward analysis of well-established CEQA tenants that govern a legally sufficient EIR and project alternatives. The court reiterated that CEQA does not mandate perfection, but rather a good faith effort at full disclosure of the project's description and impact analysis. To this end, an EIR may make some assumptions about future scenarios, but need not consider indirect impacts that are too speculative to predict. Finally, the opinion underscores the procedural and evidentiary burdens a CEQA challenger must satisfy to avoid forfeiting their arguments: a brief must raise separate and distinct issues under separate headings, and must lay out substantial evidence favorable to the agency and explain why it is lacking. The court's opinion is available at: https://www.courts.ca.gov/opinions/documents/C092086.PDF. (Bridget McDonald)

FIRST DISTRICT COURT REVERSES DEMURRER OF ACTION CHALLENGING AFFORDABLE HOUSING FEE—FINDS SUBDIVISION MAP ACT'S STATUTE OF LIMITATIONS DID NOT BAR PETITION FILED YEARS AFTER APPROVAL

Schmier v. City of Berkeley, ___Cal.App.5th___, Case No. A161556 (1st Dist. Feb. 25, 2022).

In a decision filed on February 25, 2022 and ordered published on March 21, 2022, the First District Court of Appeal reversed a trial court judgment granting the City of Berkeley's demurrer on the ground that petitioner's writ petition was barred by the statute of limitations set forth in Government Code § 66499.37. The court concluded that: 1) the Subdivision Map Act's 90-day statute of limitations did not apply because petitioner was not challenging the validity or legality of a condition attached to the city's 1996 approval of a condominium conversion, petitioner was instead challenging the city's *interpretation* of a lien agreement required by one of the city's conditions of approval; and 2) that even if the 90-day statute of limitations did apply, it did not begin to run until the city interpreted the lien agreement in a manner that petitioner disagreed with.

Factual and Procedural Background

In 1996, petitioner converted two apartment units in Berkeley into condominiums. At the time, the city's municipal code required owners converting apartments into condominiums to pay an "Affordable Housing Fee." To enforce this fee requirement, a lien agreement was entered into, which provided that in the event that the city's ordinance requiring a lien agreement and Affordable Housing Fee be "rescinded by the City of Berkeley (City), this lien shall be void and have no effect." Subsequently, the city "rescinded" its prior Affordable Housing Fee, and amended its municipal code, thus altering the Affordable Housing Fee calculation. Another ten years later, the petitioner sought to sell his condominium units. The city responded with a request that petitioner pay an affordable housing fee of $147,203 pursuant to the city's prior municipal code provisions and the lien agreement originally entered into by the petitioner and the city.

The petitioner protested the fee on multiple grounds, including that the fee had been rescinded, rendering the liens included in the original condominium conversion agreement void by its own terms. The city demurred to the complaint on the ground that the action was barred by the 90 day statute of limitations under the Subdivision Map Act, and specifically Government Code § 66499.37. The City claimed the 90-day statute of limitations began running more than 20 years earlier when the petitioner signed the lien agreements required as a condition of approval of its condominium conversion.

The trial court sustained the demurrer without leave to amend, ruling that the petitioner:

> . . .entered into an agreement involving the city ordinance that existed at the time the agreement [was] memorialized into a recorded lien. Whether or not the ordinance was later rescinded or amended is immaterial. The City may still enforce the agreed upon recorded lien on the property.

The Court of Appeal's Decision

On appeal, petitioner argued that the Subdivision Map Act's statute of limitations was inapplicable, and even if it were applicable, it would not have begun running until the dispute arose between petitioner and the city over the meaning of the language in the city's lien agreement. The court agreed with the petitioner on both points.

Regarding the applicability of the 90-day limitations period, the petitioner was not challenging the city's condition as part of its original approval of the condominium conversion that petitioner execute a lien agreement. Instead, petitioner was contesting the meaning of the language in the lien agreement, and the consequences of the city's subsequent rescission of the lien requirement. Petitioner was therefore not challenging the "reasonableness or legality" of a condition included in the city's original approval of his condominium conversion. Petitioner's dispute with the city could not have possibly existed at the time of the conversion approval because the city would not amend its municipal code for several years afterwards. Because the petitioner was not raising a facial challenge to the conditions imposed by the city (requiring that a lien agreement be entered into), nor its underlying municipal code provisions, § 66499.37's 90-day statute of limitations did not apply.

The court noted that even *if* the Subdivision Map Act's 90-day statute of limitations did apply, the statute of limitations could not have begun to run until the city rejected petitioner's assertion that the lien agreement, by its own terms, was no longer operative when the city amended its related municipal code provisions. The court found the 2020 decision from the decision in *Honchariw v. County of Stanislaus* (2020) 51 Cal.App.5th 243 instructive. In *Honchariw*, the Fifth District Court of Appeal noted that the 90-day statute of limitations in § 66499.37:

> . . .covers lawsuits challenging a variety of decisions by a local agency and lawsuits to determine the reasonableness, legality, or validity of any condition attached to a decision about a subdivision.

In *Honchariw*, the plaintiff was not challenging the reasonableness of any of the conditions of approval at issue but was instead contending the local agency was misapplying and interpreting the conditions of approval. The court in *Honchariw* found that the 90-day statute of limitations did not begin to run until the local agency's challenged interpretation of the relevant conditions of approval occurred.

Finding *Honchariw* instructive, the court found

that even if the Subdivision Map Act's 90-day statute of limitations applied, it could not begin to accrue "until the city disagreed with [petitioner] as to the meaning of the language in the lien agreements." The 90-day statute of limitations could only begin to run, if at all, when the city interpreted the challenged condition of approval or lien agreement in a manner that petitioner claimed was erroneous.

Conclusion and Implications

The *Schmeir* decision provides helpful guidance as to the application of the Subdivision Map Act's 90-day statute of limitations. Where a petitioner is challenging a local agency's interpretation of a condition of approval or related requirement of approval, and not the imposition of the condition of approval or requirement itself, the 90-day statute of limitations may not apply, or may not begin to run until the dispute over the local agency's interpretation of that condition arises. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A161556.PDF.
(Travis Brooks)

SECOND DISTRICT COURT FINDS COUNTY'S MODIFICATION OF USE PERMIT DID NOT COMPLY WITH TIMING REQUIREMENTS SET OUT IN COUNTY CODE

Tran v. County of Los Angeles, 74 Cal.App.5th 154 (2nd Dist. 2022).

A liquor store owner petitioned for a writ of mandate, seeking to overturn a decision by the Los Angeles County (County) board of supervisors (Board) to approve a modified conditional use permit for alcohol sales. The Superior Court denied the petition and the owner appealed. The Court of Appeal reversed, finding that the Board's decision to modify the use permit did not meet certain timing requirements set forth in the County Code and that the regional planning commission's (Commission) decision must be reinstated.

Factual and Procedural Background

The owner of a market in unincorporated Los Angeles County applied to renew the store's conditional use permit for the sale of beer, wine, and spirits for off-site consumption. The County department of regional planning (Department) reviewed the application and recommended certain limitations on the store's alcohol sales. The Commission approved the conditional use permit with a modification that extended the hours of alcohol sales beyond the limitations recommended by the Department.

Two days later, in May 2017, a recommendation to initiate review of the use permit was added to the agenda of the next Board meeting. The matter ultimately was set for public hearing at the Board's August 1, 2017 meeting. At the close of that meeting, the Board imposed new limits on alcohol sales (more limited than the Department's original recommendation) and certain alcohol container sizes. The Board passed the motion, entered a resolution of intent to approve the permit with the modified conditions, and instructed County counsel to prepare the necessary findings and conditions for approval. About eight months later, on March 20, 2018, the Board adopted the findings and conditions of approval prepared by counsel and approved the use permit with the modified conditions.

The store owner then filed a petition for writ of mandate, seeking to overturn the decision by the Board to modify the use permit, and to reinstate the Commission. The owner claimed that the Board's decision was untimely under County Code provisions, which provide that review decisions "shall be rendered in 30 days of the close of the hearing" and that the decision in any event did not provide "specific reasons for modification" and was not supported by evidence. The Superior Court denied the petition and the owner appealed.

The Court of Appeal's Decision

On appeal, the parties agreed that the Board's review of the Commission determination is governed

by Los Angeles County Code § 22.240.060, which provides that "[d]ecisions on appeals or reviews shall be rendered within 30 days of the close of the hearing." It further provides that:

> . . .[i]f the Appeal Body fails to act upon an appeal within the time limits prescribed in Subsection E.4, above, the decision from which the appeal was taken shall be deemed affirmed.

The store owner claimed that the Board's decision was rendered more than 30 days after the close of the Board's review hearing and thus the decision was a nullity under the County Code, and the Commission's decision must be affirmed.

'Shall' and the 30-Day Time Limit

The Court of Appeal first addressed the issue of whether the use of the word "shall" in the applicable provisions rendered the 30-day time limit mandatory, as opposed to only directory. Analyzing the language of the County Code and the case law, the Court of Appeal found that, when the provisions of the County Code are read together the intent of the 30-day time limit is to have a mandatory effect. The court also disagreed with the County's reliance on various case law, noting that the cases were distinguishable because they involved ordinances with no specified consequence for failure to act. Here, the County Code specified as much.

The Board's Decision 'Rendered'

The Court of Appeal next addressed the question of when the Board's "decision" had been "rendered," which is the relevant event that must occur within 30 days after the hearing. The County contended that the Board rendered its decision on August 1, 2017, when it closed the hearing, passed a motion of "intent to approve" the use permit with modified conditions, and instructed counsel "to prepare the necessary findings and conditions for approval of the [use permit] with changes." The owner claimed the Board rendered its decision on March 20, 2018, when it adopted the findings of counsel and approved the use permit with modifications.

Because the County Code does not define "decision" or "render," the Court of Appeal analyzed the Board's action based on a "plain meaning" application of these terms and found that the August 2017 "intent to approve" resolution did not accord with the usual understanding of an adjudicatory decision adopting specific findings and formally approving a use permit. Although the court noted this is a fairly common practice among local jurisdictions, it found that such a resolution of intent has no conclusive authority on the merits—at that point, in August 2017, the use permit had not been finally approved or the findings and conditions adopted. The court also disagreed with the County's contention that any error had not been prejudicial to the store owner.

Conclusion and Implications

Based on the above reasoning, the Court of Appeal reversed the Superior Court's judgment and remanded with instructions to issue a writ of mandate vacating the Board's decision and deeming the Regional Planning Commission's decision affirmed.

The case is significant because it contains a substantive discussion regarding the distinction between "mandatory" as opposed to "directory" timing requirements, as well as a discussion regarding the finality of local agency decisions. The decision is available online at: https://www.courts.ca.gov/opinions/documents/B309226.PDF.

(James Purvis)

LEGISLATIVE UPDATE

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

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

Surplus Land

•**AB 1748 (Seyarto)**—This bill continues to 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 continues to be heard in Committee, without amendments.

•**AB 2625 (Ting)**—This bill previously required 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, which was introduced on February 18, 2022, has been amended to no longer address Government Code § 54232 (Surplus Land Act). It now amends the Subdivision Map Act and exempts the leasing of, or the granting of an easement to, a parcel of land, or any portion of the land, in conjunction with the financing, erection, and sale or lease of an electrical energy storage system on the land, if the project is subject to review under other local agency ordinances regulating design and improvement. This amended bill was re-referred to the Committee on Local Government.

General Plans

•**SB 1067 (Portantino)**—This bill was amended on March 21, 2022 and deleted references to the population of the city, added counties, lowered the affordability threshold from 75 percent to 25 percent and made other substantive changes to now prohibit a city, county or city and county 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 25 percent of the total units to very low, low- and moderate-income households, students, the elderly, or persons with disabilities or (2) the developer demonstrates that the development would not have a negative impact on the city's, county's, or city and county's ability to meet specified housing needs and would not have a negative impact on 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 amended bill is scheduled to be heard in Committee on March 31, 2022.

•**AB 2094 (Rivas)**—This bill continues to 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 has been heard in the Housing and Community Development Committee with passage and has been re-referred to the Committee on Local Government.

•**AB 2339 (Bloom)**—This bill continues to 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 referred to

the Committee on Housing and Community Development and Committee on Local Government on March 3, 2022.

Fees

•**AB 2428 (Ramos)—**This bill continues to 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 5 years of the deposit. This bill was referred to the Committee on Housing and Community Development and Committee on Local Government on March 3, 2022.

Accessory Dwelling Units

•**AB 916 (Salas)—**This bill continues 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. There are no pending Committee assignments for this bill.

•**SB 897 (Wieckowski)—**This Bill was amended to: 1) define "objective standard" as a standard that involves no personal subjective judgment by a public official and is uniformly verifiable, 2) require a local agency to review and issue a demolition permit for a detached garage that is to be replaced by an accessory dwelling unit at the same time as it reviews and issues the permit for the accessory dwelling unit, 3) prohibits an applicant from being required to provide written notice or post a placard for the demolition of a detached garage that is to be replaced by an accessory dwelling unit, 4) requires a local agency, when a permit application for an accessory dwelling unit is submitted with a permit application to create new multifamily dwelling units, to reduce the number of required parking spaces for the multifamily dwelling by 2 parking spaces for each accessory dwelling unit located on the lot, 5) deletes the owner-occupancy requirement with respect to Junior Accessory Dwellings and makes other changes. It continues to increase the maximum height limitation that may be imposed by a local agency on an accessory dwelling unit from 16 feet to 25 feet. The amended bill was passed by the Housing Committee and re-referred to the Committee on Government and Finance on March 24, 2022.

Density Bonus

•**AB 2063 (Berman)**—This bill would continue to 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 referred to Committees but hearings have been postponed.

•**AB 2334 (Wicks)—**This bill was amended and continues, with respect to the affordability requirements applicable to 100 percent lower income developments, to 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 continues, with regard to the enforcement of equity sharing agreements for for-sale units, to permit the local government to defer to the recapture provisions of the public funding source. The Bill would also still make a technical change to the Density Bonus Law by deleting duplicative provisions relating to for-sale units subject to the above-described provisions. Notably, the amendment added, with respect to the definition of "maximum allowable residential density" to provide that where the density allowed in the zoning ordinance is inconsistent with that allowed in the land use element of the general plan or specific plan, the greater prevails. prevails, and adds the local agency must set forth how density is determined. This bill was introduced on February 16, 2022 and has no pending hearing date.

Affordable Housing

•**AB 2186 (Grayson)—**This bill continues to 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 reductions (amended language deletes "waiver") provided to specified developments. It was further amended to add that a local agency is also eligible to receive an amount equal to the accrued interest on a deferred development impact fee, as provided and requires the department to administer these grants by issuing a Notice of Funding Availability before December 31 of the year that the program receives funding, as specified, and accepting grant applications after the subsequent year. Upon appropriation, the bill continues to require the Department to provide grants to applicants in an amount equal to 50 percent of the amount of development impact fee reduced. This bill was re-referred to the Committee on Housing and Community Development on March 24, 2022.

•**AB 1850 (Ward)—**This bill continues to 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. There was been no action on this bill and no hearings scheduled or referrals to committees.

•**AB 2295 (Bloom)**—This bill has not been amended. It continues to provide, 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 continue to 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 has been referred to the Housing and Community Development Committee and the Local Government Committee on March 3, 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. The bill was referred to the Housing and Community Development Committee and the Local Government Committee on February 24, 2022.

•**AB 2668 (Grayson)—**This bill continues to 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 referred to the Housing and Community Development Committee and Local Government Committee on March 10, 2022. It was re-referred, without amendment, to the Local Government Committee on March 24, 2022.

•**AB 2386 (Bloom)—**This bill continues to provide that the legislative body of a local agency may regulate by ordinance, the design and improvement of any multifamily property held under a tenancy in common subject to an exclusive occupancy agreement, as defined, but has been amended to: 1) add definitions of

"design" and "improvement." 2) to specify that a local agency may require instruments governing the operation and maintenance of common areas and 3) prohibiting a local agency for doing either of the following: (a) Prohibit the ability to hold land by tenancy in common subject to an exclusive occupancy agreement, (b) Limit the area within a property for which a right to exclusive occupancy may be granted and 4) specifies that this new law does not supersede any provision of Chapter 12.75 (commencing with Section 7060) of Division 7 of Title 1. This bill was re-referred, with amendments, to the Committee on Local Government on March 21, 2022.

•**AB 2656 (Ting)—**This bill was amended to address the Housing Accountability Act and the California Environmental Quality Act (CEQA) and no longer addresses annual reporting obligations regarding the planning agency's progress in meeting its share of regional housing needs. As amended, the bill now addresses the definition of "disapprove the housing development project" as also including any instance in which a local agency denies a project an exemption from CEQA for which it is eligible, as described, or requires further environmental study to adopt a negative declaration or addendum for the project or to certify an environmental impact report for the project when there is a legally sufficient basis in the record before the local agency to adopt a negative declaration or addendum or to certify an environmental impact report without further study. This bill was re-referred to the Housing and Community Development Committee on March 28, 2022.

•**AB 2097 (Friedman)**—This bill would continue to 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 continue to authorize a public agency to impose specified requirements on the voluntary parking. The bill would also continue to 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 referred to the Committees on Housing & Community Development and Local Government. No hearings or additional referrals to committees have been made.

California Environmental Quality Act

•**AB 1001 (Garcia, Cristina)—**This bill was amended to delete reference to "water quality" but would continue to authorize mitigation measures, identified in an environmental impact report or mitigated negative declaration to mitigate the adverse effects of a project on air of a disadvantaged community, to include measures for avoiding, minimizing, or compensating for the adverse effects on that community. This bill was re-referred, with amendment, to the Rules Committee on March 22, 2022.

•**AB 1952 (Gallagher)—**This bill would continue to 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 non-substantive changes to the program by renumbering a code section and updating erroneous cross-references. This bill was referred to the Housing and Community Development Committee and the Natural Resources Committee on February 18, 2022.

•**AB 2445 (Gallagher)—**This bill would continue to 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 continue to 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 referred to the Natural Resources Committee and Judiciary Committee on March 3, 2022.

•**AB 2485 (Choi)—**This bill would continue to exempt from the requirements of CEQA emergency shelters and supportive housing, as defined. This bill was referred to the Natural Resources Committee and Judiciary Committee on March 10, 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 referred to the Natural Resources Committee on March 10, 2022.

•**SB 922 (Wiener)**—This bill was amended to add or modify definitions but continues to 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 continue to 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 re-referred, with amendment, to the Committee on Environmental Quality on March 16, 2022.
(Melissa Crosthwaite)

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