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CALIFORNIA LAND USE™
LAW & POLICY Reporter

RECENT CALIFORNIA DECISIONS

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LAND USE NEWS

GOVERNOR NEWSOM'S DROUGHT EXECUTIVE ORDER AIMS TO INCREASE REGIONAL WATER CONSERVATION EFFORTS

California Governor Gavin Newsom's recently issued Executive Order N-7-22 (Executive Order) which targets efforts to increase water conservation and bolster regional responses to the state's ongoing drought conditions.

Background

The Executive Order is the latest in a series of executive orders designed to reduce the impact of drought conditions in the state. Citing record-setting dry months in January and February, and third straight year of drought conditions, the Executive Order sets out a variety of new measures aimed at increasing conservation and drought resiliency throughout the state.

Water Shortage Contingency Plans

Governor Newsom directed the State Water Resources Control Board (State Board) to consider adopting emergency regulations related to urban water suppliers by May 25, 2022. For urban water suppliers that have submitted a water shortage contingency plan, these regulations would require suppliers to implement Level 2 response actions, which generally include actions responsive to water supply conditions being reduced by 20 percent. For suppliers that have not submitted a water shortage contingency plan, the State Board would establish Level 2 contingency plans based upon water shortage contingency plans submitted by other similar suppliers. The Executive Order also indicates that more stringent requirements should be expected if drought conditions persist throughout and beyond this year.

Non-Functional Turf

The Executive Order further directs the State Board to consider adopting regulations defining and banning irrigation of "non-functional turf." The Executive Order clarifies that these regulations would be aimed at decorative grass and would not apply to school fields, sports fields, and parks. The Governor's Office estimates that these regulations will result in annual water savings of several hundred thousand acre-feet.

Limitations on Certain New and Replacement Groundwater Wells

The Executive Order also seeks to limit the construction of new groundwater wells and the expansion of existing wells. Prior to issuing a permit for a new well or for alteration of an existing well, the responsible agency must determine that: 1) the proposal is not likely to interfere with existing wells nearby; and, 2) the proposal is not likely to adversely impact or damage nearby infrastructure. Additionally, the Executive Order imposes additional requirements for new or altered wells in a basin classified as medium- or high-priority under the Sustainable Groundwater Management Act (SGMA). Permits for new or altered wells in these areas will need to be accompanied by a written verification from the local Groundwater Sustainability Agency certifying that the proposed well would not be inconsistent with any applicable Groundwater Sustainability Plan (GSP) and would not decrease the likelihood of reaching a sustainability goal for the area covered by a GSP.

These limitations do not apply to permits issued to individual domestic users with wells that provide less than two acre-feet of groundwater per year, or to wells that will exclusively provide groundwater to public water supply systems as defined in § 116275 of the Health and Safety Code.

Other Directives

The Executive Order also directs the California Department of Water Resources to take a number of steps to combat the impact of sustained drought. These include: 1) consulting with commercial, industrial, and intuitional sectors to develop strategies for improving water conservation, including direct technical assistance, financial assistance, and other approaches; 2) working with state agencies to address

drinking water shortages in households or small communities where groundwater wells have failed due to drought conditions; and, 3) preparing for implementation of a pilot project to obtain and transfer water from other sources and transfer it to high need areas. The Governor also directs the State Board to increase investigations in to illegal diversions and wasteful or unreasonable use of water and bring applicable enforcement actions.

The Executive Order rolls back regulations that limit the transportation of water outside its basin of origin and encourages agencies to prioritize petitions and approvals for projects that improve conditions for anadromous fish or incorporate capturing high precipitation events for local storage or recharge.

The Governor directed all state agencies to submit proposals to mitigate the effects of severe drought by April 15, 2022. Agency responses to that directive were in process at the time of this writing.

Conclusion and Implications

The Executive Order, though broad, is less aggressive in implementing conservation measures than prior orders during the 2012-2016 drought period. It focuses primarily on urban water suppliers and regulations to be implemented at regional and local levels. Though it does not include mandatory individual water use restrictions on California residents, the Governor signaled to Californians that unless conditions dramatically improve, such restrictions can be expected in the future. The Executive Order is available online at: https://www.gov.ca.gov/wp-content/uploads/2022/03/March-2022-Drought-EO.pdf. (Scott Cooper, Derek Hoffman)

REGULATORY DEVELOPMENTS

FERC REVISES POLICY STATEMENT ON NATURAL GAS FACILITIES CERTIFICATION TO BOLSTER CONSIDERATION OF GHG IMPACTS AND ENVIRONMENTAL JUSTICE IN WEIGHING PUBLIC CONVENIENCE AND NECESSITY

On February 18, 2022, the Federal Energy Regulatory Commission (FERC) issued a Draft Updated Policy Statement on the certification of new interstate natural gas facilities (Updated Policy) and a Draft Policy Statement Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews (GHG Policy). The Updated Policy clarifies FERC's framework in weighing a Project's economic benefits against its impacts on the environment and environmental justice communities when making a determination of public convenience and necessity. The GHG Policy directs FERC's assessment of the impacts of natural gas infrastructure projects on climate change in its reviews under the National Environmental Policy Act (NEPA) and the Natural Gas Act (NGA). This certification followed two Notices of Inquiry seeking comments from members of the public and stakeholders on revisions to the Policy. FERC recently declared this Updated Policy a draft and is seeking additional public comment.

Background

FERC issues certificates of public convenience and necessity for the construction and operation of facilities transporting natural gas in interstate commerce pursuant to § 7 of the Natural Gas Act (NGA). (15 U.S.C. §717 *et seq.*) Section 7(e) of the NGA requires FERC to make a finding that the construction and operation of a proposed project "is or will be required by the present or future public convenience and necessity" before issuing a certificate to a qualified applicant.

In 1999, FERC issued a Policy Statement regarding issuance of public convenience and necessity stating its goals, which include to: 1) "appropriately consider the enhancement of competitive transportation alternatives, the possibility of over building, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain"; 2) "provide appropriate incentives for the optimal level of construction and efficient customer choices"; and 3) "provide an incentive for applicants to structure their projects to avoid, or minimize, the potential adverse impacts that could result from construction of the project." (1999 Policy Statement, 88 FERC at 61,737.)

Updated Policy Statement

In its Updated Policy, FERC maintains the same goals of the 1999 Policy Statement but it acknowledges the significant developments that have occurred since issuance of the 1999 Policy Statement that warrant revisions in the Updated Policy. (Certificate Policy Statement, Pub. L. 18-1-000, ¶ 2 (2022).) These developments include an increase in the available supply of gas from shale reserves due to development of domestic shale formations and new extraction technologies. This increased domestic supply has resulted in reduced prices and price volatility, and more proposals for natural gas transportation and export projects. The increase in domestic supply, however, has coincided with a concern from affected landowners and communities, Tribes, environmental organizations regarding the environmental impacts of project construction and operation, including impacts on climate change and environmental justice communities.

Federal Mandate to Focus on Environmental Justice and Equity

The Updated Policy also addresses the mandate for federal agencies to focus on environmental justice and equity arising from Executive Orders requiring agencies to identify and address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities of their actions.

Relevant Factors to Consider and Evidence

The 1999 Policy Statement set forth the policy to consider all relevant factors reflecting the need for the project, including, but not limited to precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. (Certificate Policy Statement, Pub. L. 18-1-000, ¶ 53.) However, in implementing the Updated Policy, FERC has relied almost exclusively on precedent agreements to establish project need. During the comment period, commentors argued that FERC should analyze additional factors, such as future markets, opportunity costs, federal and state public policies, and effects on competition. FERC agreed, finding that FERC should weigh other evidence in order to comply with the NGA and the APA. For instance, the Updated Policy includes applications to detail how the gas will ultimately be used and why the project is necessary to serve that use.

The Updated Policy also provides guidance on what type of evidence will be acceptable. Following the U.S. Court of Appeals for the District of Columbia's recent holding in *Environmental Defense Fund v. FERC* that "evidence of 'market need' is too easy to manipulate when there is a corporate affiliation between the proponent of a new pipeline and a single shipper who have entered into a precedent agreement," under the Updated Policy, affiliate precedent agreements will be insufficient to demonstrate need.

Consideration of Adverse Effects

The Updated Policy Statement declares that FERC will consider adverse effects in its determination to consider whether to issue a certificate of public convenience and necessity. These interests include: 1) the interests of the applicant's existing customers; 2) the interests of existing pipelines and their captive customers; 3) environmental interests; and 4) the interests of landowners and surrounding communities, including environmental justice communities. The Policy grants the commission authority to deny an application based on adverse impacts to any of these interests. FERC's necessary finding that the project will serve the public interest is based on a consideration of all the benefits of a proposal balanced against the adverse impacts, including economic and environmental impacts. Where the 1999 Policy directed FERC to consider the economic impacts of a project before consideration of the environmental impacts, the Updated Policy directs concurrent consideration of environmental and economic impacts.

Dissenting Commissioners

Commissioners Danly and Christie dissented to the Updated Policy arguing that the new requirements would put an undue burden on approvals for natural gas pipelines resulting in significant increases in costs for pipeline operators and customers. (*Id.* at Dissent.)

Greenhouse Gas Policy

FERC also simultaneously adopted a GHG Policy. The GHG Policy requires FERC to quantify a project's reasonably foreseeable GHG emissions including emissions from construction, operation, and the downstream combustion of natural gas when FERC is conducting environmental review under NEPA. (Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, PL21-3-000 (2022) ¶28.) In 2016, FERC began to estimate GHG emissions on a more inclusive scale, including downstream combustion and upstream production. FERC then halted this practice in 2018 and several federal court decisions ensued. The GHG Policy implements decisions from federal courts holding FERC should gather information on downstream uses to determine whether downstream GHG emissions are a reasonably foreseeable effect of the project. (*Id.* at ¶¶11-14, citing *Sierra Club v. FERC* (2017) 867 F.3d 1357; *Birckhead v. FERC*, 925 F.3d 510, 518 (D.C. Cir. 2019).)

Congress is Briefed

On March 3, 2022, FERC commissioners appeared before the Senate Committee on Energy and Natural Resources on Thursday to discuss the Updated Policy. At the hearing, Senator Joe Manchin, Chairman of the Senate Energy and Natural Resources Committee and Senator John Barrasso expressed their opposition to the Updated Policy based on concerns that the Updated Policy will have on the nation's energy independence, jobs, and energy reliability and cost. Chairman Richard Glick and Commissioners Janes Danly, Allison Clements, Mark C. Christie, and William L. Philips gave testimony regarding the Updated

Policy. Commissioners Danly and Christie expressed their opposition for the Updated Policy while Commissioners Glick, Clements, and Philips expressed their support.

Public Comment

On March 24, 2022, FERC designated the Updated Policy and the GHG Policy draft policy statements and is seeking further public comment. (178 FERC ¶ 61,197.) The Update Policy and GHG Policy will not apply to pending project applications or applications filed before the Commission issues any final guidance in these dockets. The deadline to submit comments is April 25.

Conclusion and Implications

While the Updated Policy and GHG Policy seek to create greater balance in the consideration of greenhouse gas emissions impacts and environmental justice when FERC weighs public convenience and necessity, they have the potential to make certification of new interstate natural gas facilities more inconsistent and potentially more unlikely. This shift in policy represents the on-going tug-of-war between the competing priorities of reducing greenhouse gas emissions and maintaining energy security.
(Natalie Kirkish, Darrin Gambelin)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES $29.8 MILLION IN FUNDING FOR FRIANT-KERN CANAL REPAIR PROJECT

On March 24, 2022, the California Department of Water Resources (DWR) released $29.8 million in funding for repairs to the Friant-Kern Canal. The Friant-Kern Canal, owned by the U.S. Bureau of Reclamation (Bureau), but operated by the Friant Water Authority, has faced significant water delivery capacity issues caused by subsidence in certain portions of the canal. This DWR funding seeks to jump start the repair project and marks just one of many water-infrastructure projects that seek to address water capacity issues currently facing the State of California.

Background

The federal Central Valley Project is a power and water management project in California under the supervision of the Bureau. The Central Valley Project was created in 1933 in order to provide irrigation and municipal water to much of California's Central Valley region, by regulating and storing water in reservoirs in the northern half of the state and transporting it to the San Joaquin Valley by means of a series of canals, aqueducts, and pump plants. In more recent years, the movement of water throughout California has faced significant challenges caused by the increasing need for water and the high prevalence of drought periods. These current conditions have also had dramatic impacts on water infrastructure within the state, requiring collaboration between state, federal, and local governments to address severe issues with California's water infrastructure. One such collaboration effort seeks to restore the capacity of the Friant-Kern Canal.

Completed in 1951, the 152-mile Friant-Kern Canal was designed to augment water delivery capacity in Fresno, Tulare, and Kern counties. The canal, part of the Central Valley Project's Friant Division, is owned by the federal government; however, the Friant Water Authority operates and maintains it under contract with the Bureau. The Friant-Kern Canal begins at Friant Dam and conveys water from Millerton Lake, a reservoir on the San Joaquin River, south to the Kern River in Bakersfield. The Friant-Kern Canal currently delivers water to about one million acres of farmland and provides drinking water to thousands of San Joaquin Valley residents.

The Friant-Kern Canal was built in both concrete-lined and unlined earth sections and was designed as a gravity-fed facility to not rely on pumps to move water. At the time of its completion, the Friant-Kern Canal was constructed to have a capacity of 5,000 cubic feet per second (cfs) that gradually decreases to 2,000 cfs at its endpoint. However, the canal has lost more than sixty (60 percent) of its original conveyance capacity in its middle section. Subsidence in the

area, caused by pumping excess groundwater faster than it can be recharged, has caused parts of the canal to sink. Given that the canal was designed as a gravity-fed facility, this subsidence has significantly reduced the canal's delivery capacity, resulting in up to 300,000 acre-feet of reduced water deliveries in certain water years.

The Correction Project

To address the canal's capacity loss, the Bureau and the Friant Water Authority are implementing the Friant-Kern Canal Middle Reach Capacity Correction Project (Correction Project). The Correction Project is currently estimated to cost around $500 million, with Phase 1 estimated to carry a cost of around $292 million. The Correction Project is currently funded by a mixture of federal, state, and local funds. On March 24, 2022, the DWR released $29.8 million in funding to the Friant Water Authority to assist with initial funding for the Correction Project. This DWR funding allowed construction on Phase 1 to begin in January 2022. The Friant-Kern Canal is just one of four projects that will receive funds as part of a $100 million initiative in the California Budget Act of 2021 to improve water conveyance systems in the San Joaquin Valley. DWR is also working on similar projects on the Delta-Mendota Canal, San Luis Canal, and California Aqueduct.

Overall, the Correction Project seeks to restore capacity in the 33-mile section of the middle reach where subsidence has had the most impact on the canal's delivery capacity. Construction on Phase 1 of the Correction Project started in January 2022. Phase 1 includes the construction of ten miles of new concrete-lined canal to replace one of the worst pinch points in the subsiding canal sections. Phase 1 is anticipated to be completed and fully operational by January 2024. When the multi-phased project is complete, the canal's conveyance capacity will be restored from the current 1,600 cfs to its original capacity of 4,000 cfs, which should provide much needed relief to ongoing capacity issues in the San Joaquin Valley.

Conclusion and Implications

The Department of Water Resources funding for the Correction Project marks the initial step of funding for what is an overall significant investment in California's water infrastructure through strategic partnerships with other governmental agencies. It remains to be seen how the remainder of the Friant-Kern Canal will be funded, but with the beginning of construction on Phase 1 of the Correction Project, it appears that this project remains a priority on the federal, state, and local level. So long as Phase 1 is completed on schedule, the Correction Project may be able to provide some significant relief to California's current water infrastructure woes. With additional funding being provided for other water projects, it appears that California has committed to a significant level of investment in water infrastructure. For more information, *see: DWR Releases Funds for Repairs of the Friant-Kern* Canal, California Department of Water Resources (Mar. 24, 2022), https://water.ca.gov/News/News-Releases/2022/March-22/Repairs-Friant-Kern-Canal.
(Geremy Holm, Steve Anderson)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS NEPA DOCUMENT FAILED TO SUFFICIENTLY ANALYZE GHG EMISSIONS AND CLIMATE IMPACTS FROM PROPOSED MINING EXPANSION PROJECT

350 Montana v. Haaland, ___F.4th___, Case No. 20-35411 (9th Cir. Apr. 4, 2022).

The United States Department of the Interior (DOI) approved a proposed mining expansion in the State of Montana, finding in a 2018 Environmental Assessment (EA) under the National Environmental Policy Act (NEPA) that the project would not have a significant impact on the environment relative to cumulative statewide, national, and global greenhouse gas (GHG) emissions. Plaintiffs challenged, claiming DOI failed to take a "hard look" at the effects of the expansion's GHG emissions and failed to provide a convincing statement of reasons for the finding that the expansion would not have a significant effect on the environment. The Ninth Circuit Court of Appeals found that DOI's analysis failed to satisfy NEPA and remanded for further proceedings.

Factual and Procedural Background

Signal Peak Energy, LLC sought to expand its mining operations in south-central Montana. The expansion was expected to result in the emission of 190 million tons of GHGs. In 2018, DOI published an EA in which it explained that the amount of GHGs emitted over the 11.5 years that the mine is expected to operate would amount to 0.44 percent of the total GHGs emitted globally each year. The 2018 EA also calculated the project's GHG emissions as a percentage of U.S. annual emissions and Montana's annual emissions, but these domestic calculations only included the emissions generated by extracting and transporting the coal. Emissions from combustion of the coal (which account for 97 percent of the projected GHG emissions) were not included in the domestic calculations. Based on the various comparisons, DOI found that the project's GHG emissions would not have a significant impact on the environment.

The proposed mine expansion itself, even prior to the 2018 approval, had been subject to various litigation. Following DOI's 2018 actions, plaintiffs filed another legal action. Ultimately, the U.S. District Court granted summary judgment in favor of DOI on all but one claim: that DOI failed to consider the risk of coal train derailments along the corridor between the mine site and the port at Vancouver, British Columbia. The District Court vacated the 2018 EA, but not DOI's approval of the mine expansion, and remanded the matter for consideration of train derailment.

DOI subsequently published another EA that incorporated the 2018 EA and considered train derailment risks for the first time. Plaintiffs then filed this appeal.

The Ninth Circuit's Decision

Mootness

The Ninth Circuit first addressed Signal Peak's claim that the case was moot because plaintiffs challenged the 2018 EA, but the 2018 EA had been superseded by the EA that DOI prepared in 2020 after the U.S. District Court remanded the case for consideration of train derailments. The Ninth Circuit disagreed, finding that the 2018 EA retained relevance because the relevant portions (*i.e.*, the analysis of GHG emissions and the impact of those emissions on global warming, climate change, and the environment) were expressly incorporated into the 2020 EA and reissued. Accordingly, the Ninth Circuit retained the ability to order relief in the case.

Greenhouse Gas Emissions

The Ninth Circuit next addressed plaintiffs' claim that the EA violated NEPA by failing to provide a sufficient statement of reasons why the project's impacts were insignificant. The Ninth Circuit found that the 2018 EA had failed to articulate any science-

based criteria of significance in support of its Finding of No Significant Impact (FONSI), but instead relied on the arbitrary and conclusory determination that the mine expansion project's emissions would be relatively "minor." Comparing the emissions from the single project source against total global emissions, the Ninth Circuit found, "predestined" that the emissions would appear relatively minor, even though for each year of its operation the coal from the project would be expected to generate more GHG emissions than the single largest point source of GHG emissions in the United States. The Ninth Circuit also found that the EA's domestic comparisons failed to satisfy NEPA because DOI did not account for the emissions generated by coal combustion, obscuring and understating the magnitude of the project's emissions relative to other domestic sources of GHGs.

The Ninth Circuit disagreed, however, that DOI was required to use a "Social Cost of Carbon" metric (a method of quantifying GHG impacts that estimates the harm, in dollars, caused by each incremental ton of carbon dioxide emitted into the atmosphere in a given year) to quantify the environmental harms that would result from the project's GHG emissions. The Ninth Circuit also held that it was less clear whether DOI had any other metric available to assess the impact of the project. Because additional fact-finding therefore was necessary to decide whether an Environmental Impact Statement (EIS) was required, and because the record concerning the consequences of vacatur was not developed, the Ninth Circuit remanded to the District Court.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the sufficiency of analysis for greenhouse gasses and climate change in NEPA documents. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/04/04/20-35411.pdf.
(James Purvis)

NINTH CIRCUIT AFFIRMS SUMMARY JUDGMENT IN FAVOR OF U.S. FISH AND WILDLIFE SERVICE, FINDING THE 'BARRED OWL REMOVAL EXPERIMENT' DID NOT VIOLATE NEPA

Friends of Animals v. United States Fish and Wildlife Service, 28 F.4th 19 (9th Cir. 2022).

On March 4, 2022 the Ninth Circuit affirmed summary judgment in favor of the U.S. Fish and Wildlife Service (FWS or the Service) in an action that challenged the Service's "barred owl removal experiment" under the federal Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA). The court's panel held that the experiment, which would remove barred owls from the threatened northern spotted owl's habitat, would produce a "net conservation benefit," and that the Service was not required to issue a supplemental Environmental Impact Statement (EIS) because an earlier analysis adequately contemplated the experiment.

Factual and Procedural Background

The northern spotted owl is one of three subspecies that commonly resides in mature and old-growth forests in the Pacific Northwest and northern California. Due to its dwindling population, the owl is considered "threatened" under the ESA. Conversely, the unrelated barred owl is an abundant species native to eastern North America. Over the past century, the barred owl population has grown and expanded westward, in turn encroaching upon the spotted owl's habitat.

The FWS' 2011 Northern Spotted Owl Recovery Plan found that barred owls negatively impacted northern spotted owl survival and reproduction. Barred owls competed for food and nesting/roosting sites; at times, attacking their spotted owl brethren. As part of the agency's broader efforts to preserve spotted owl populations, the Recovery Plan charged FWS with designing and implementing large-scale control experiments to assess the effects of barred owl removal and spotted owl site occupancy, reproduction, and survival.

In 2013, FWS issued a Record of Decision (ROD) and EIS authorizing a "barred owl removal experiment." The experiment would lethally remove barred owls from certain areas to measure their environmental and demographic effect on spotted owls, including the effects on rates of occupancy, survival, reproduction, and population. The experiment designated four "study areas" across the spotted owl's range, including a 500,000-acre stretch along the Oregon Coast. Within that area, FWS designated "treatment areas," from which approximately 3,600 barred owls would be removed over four years. The EIS concluded that the experiment would have a negligible effect on the barred owl population, and only minor and short-term negative effects on spotted owls; with the overall experiment yielding a net positive benefit by providing FWS the data necessary to craft long-term recovery strategies for the spotted owl.

Enhancement of Survival Permits and Safe Harbor Agreements

The ESA generally prohibits the "take" of any threatened or endangered species. As an exception, ESA allows FWS to issue "Enhancement Survival Permits" (ESP), which authorize "take" for "scientific purposes or to enhance the propagation or survival of the affected species." FWS may issue these permits and implement their terms via "Safe Harbor Agreements" (SHA), which the agency concurrently enters into with non-federal landowners whose lands the agency seeks to use for conservation efforts. In doing so, FWS must find that the SHAs provide a "net conservation benefit" to the affected species by contributing to its recovery.

FWS issued ESPs and entered into SHAs with four non-federal landowners within the Oregon Coast study area. Each permittee allowed FWS to access their property to remove barred owls and agreed to support onsite surveys. In exchange, the permittees could continue harvesting timber in areas where no spotted owls resided. The permits thus authorized incidental take only in "non-baseline" sites—*i.e.*, where no resident spotted owl had been observed within the last three to five years.

Biological Opinions and Environmental Impact Statements

FWS issued a series of Biological Opinions (BiOps) pursuant to ESA, which concluded the ESPs would not jeopardize the spotted owl or its critical habitat. Instead, the permits would confer an overall benefit based on the information gained from the experiment.

FWS also prepared an Environmental Assessment for each permit, pursuant to NEPA. The EAs made a Finding of No Significant Impact (FONSI) because the permits only authorized incidental take on non-baseline sites, which are unlikely to be recolonized by spotted owls unless barred owls are removed.

At the U.S. District Court

In June 2017, Friends of Animals (Friends) sued FWS challenging the ESPs and SHAs. Friends alleged FWS violated ESA by: 1) issuing a permit that failed to achieve a "net conservation benefit"; 2) failing to use the best biological and habitat information to form baseline conditions; and 3) failing to analyze the SHA's effect on critical habitat. Friends also alleged FWS violated NEPA because it: 1) failed to prepare a Supplemental EIS; and 2) failed to discuss the experiment and permits in a single EIS, as required for "connected actions."

The U.S. District Court in Oregon rejected each of these contentions and granted summary judgment in favor of FWS. Friends timely appealed.

The Ninth Circuit's Decision

A three-judge panel for the Ninth Circuit Court of Appeals affirmed the District Court and rejected Friends' renewed ESA and NEPA claims.

'Informational Benefits' Constitute 'Net Conservation Benefits' under the ESA

As to Friends' first contention, the court agreed with FWS that the "informational benefit" gleaned from the removal experiment constituted a "net conservation benefit" under ESA. ESA's regulations authorize FWS to enter into SHAs with non-federal landowners whose lands the agency wants to use for conservation efforts where the proposed actions are reasonably expected to provide a net conservation benefit to the affected species. Contrary to Friends' characterization, ESA's definition of "conservation" includes research activities aimed at collecting information, such as the efficacy of removing barred owls as a conservation strategy. Thus, by extension, "net conservation benefit" includes the informational

and research benefits contemplated by the removal experiment. These benefits, in turn, indirectly aid the recovery of the northern spotted owl, as contemplated by the ESA.

FWS Reasonably Described Baseline Conditions Using Resident Owl Survey Data

The court rejected Friends' contention that FWS improperly defined the baseline sites that would not be subject to the permits' incidental take authorizations. For each SHA, FWS designated a site as "baseline" if a single spotted owl had been observed there between 2013 to 2015. By doing this, Friends claimed FWS determined the sites were "effectively abandoned," even though the agency's policy states that 3 to 5 years of survey data cannot establish site "abandonment." The Court of Appeals quickly debunked this, explaining that nowhere in the Safe Harbor Policy does it mention "abandonment" in its discussion of baseline conditions. Moreover, for each SHA, FWS determined that the baseline sites were "*unoccupied*," not "*abandoned*"—two wholly separate terms with differing requirements.

The court also rejected Friends' assertion that FWS needed to consider non-resident "floater" spotted owls in its baseline considerations. Here, FWS found floaters would likely not contribute to specie recovery because there was no evidence that they could successfully breed. Therefore, because the Safe Harbor Policy instructs FWS to be flexible, it was reasonable for FWS to set baseline sites based on the "resident" owls that are of primary concern.

FWS Adequately Analyzed the Small Critical Habitat Affected by the Oregon Permit

Friends objected to the BiOps for each permit, claiming they failed to analyze their overlap with critical habitat on state lands. The court rejected this, noting that Friends failed to point to anything in the administrative record to show that FWS failed to analyze affected critical habitat. Rather, because the amount of critical habitat that would be destroyed was unknown, FWS took a conservative approach, which still concluded that less than 0.04 percent of spotted owl habitat would be destroyed.

Friends also argued the BiOps were arbitrary and capricious because they only analyzed one subset of designated critical habitat—nesting/roosting—and ignored impacts to others, such as foraging, transient, or colonization habitats. Contrary to Friends' claim, the court determined that the BiOps did analyze the permits' effects on those sub-habitats, and concluded they would not be appreciably reduced due to their scattered nature. Even absent this analysis, it would not have been arbitrary and capricious for FWS to only focus on nesting/roosting habitats because they are the most indicative in determining whether owls can support themselves.

A Supplemental EIS under NEPA Was Not Required

NEPA does not specifically identify when an agency must prepare and issue a supplemental EIS. Guidance from the Council on Environmental Quality explains that a supplemental EIS is required if the agency makes substantial changes to the proposed action that raise environmental concerns, or there are significant new circumstances that bear on the proposed action or its environmental impacts. A supplemental EIS is not required if the new alternative is a minor variation or qualitatively within the spectrum of one of those discussed in the original EIS.

Contrary to Friends' contention, FWS did not make "substantial changes" to the removal experiment by issuing ESPs and SHAs that authorized the incidental take of spotted owls. Rather, the permits were merely a "minor variation" of the broader experiment because, even in their absence, the experiment could still proceed without access to non-federal lands. The permits and SHAs were also "within the spectrum of alternatives" discussed in the 2013 EIS. Therefore, it would have been "incongruous" with NEPA to require FWS to proceed with the experiment until such specifics were fleshed out in a supplemental EIS.

Finally, FWS took the requisite "hard look" in determining that the permits were not environmentally significant. FWS prepared an EA for each permit and concluded an incidental take of spotted owls would occur only if the experiment increased the species' population in non-baseline areas. Because barred owls would resume displacing spotted owls after the experiment ended, spotted owl population gains would be temporary, therefore, the experiment's environmental effects would be the same with or without the permits.

A Single EIS Was Not Required under NEPA

Lastly, the Ninth Circuit held that the permits and experiment were not "connected actions" that required a single EIS. Friends argued that each permit and SHA depended on the experiment's informational benefit to satisfy the "net conservation benefit" requirement, therefore, FWS erred in analyzing the experiment separately.

Under NEPA, actions are considered "connected" if they "cannot or will not proceed unless other actions are taken previously or simultaneously," or if they are interdependent parts of a larger action on which they depend. If one project could be completed without the other, they have independent utility. Under this framework, the permits are not "connected" to the broader removal experiment because the experiment could proceed without the permits. Though the permits granted access to non-federal lands, such access was not "necessary" to complete the experiment; and any failure to access those lands would only delay, rather than inhibit, the overall experiment. Finally, the permits possess "independent utility" from each other because the issuance of one did not depend on the issuance of another. For these reasons, FWS did not have to assess their environmental impacts in a single EIS.

Conclusion and Implications

The Ninth Circuit Court of Appeals' opinion offers a straightforward analysis of basic Endangered Species Act and National Environmental Policy Act principles. As demonstrated by the barred owl removal experiment, an experiment designed to gain information about species survival can properly satisfy the "net conservation benefit" prescribed by ESA's "Safe Harbor Policy." In crafting these experiments, the agency may appropriately use survey data to distinguish between pre-existing "resident" species vs. temporary "floaters" to establish baseline conditions. And while the agency may issue permits and Safe Harbor Agreements to access non-federal lands to carry out these experiments, those permits are not necessarily "connected," such that they would require a single or supplemental EIS under NEPA. The Ninth Circuit's opinion is available at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/03/04/21-35062.pdf.

(Bridget McDonald)

NINTH CIRCUIT HOLDS CITY'S ZONING CODE PROHIBITING RELIGIOUS ASSEMBLIES ON GROUND FLOOR/STREET LEVEL VIOLATED EQUAL TERMS PROVISION OF THE RLUIPA

New Harvest Christian Fellowship v. City of Salinas, 29 F.4th 596 (9th Cir. 2022).

The Ninth Circuit Court of Appeals has reversed and remanded in part, the U.S. District Court's entry of summary judgment regarding New Harvest Christian Fellowship's claims that the City of Salinas' (City) violated the "substantial burden" and "equal terms" provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), holding that the City's Zoning Code (Code), partially prohibiting religious assembly did not impose a substantial burden on religious exercise, but that the Code provision at issue did facially violate the equal terms provision of RLUIPA.

Factual and Procedural Background

In March 2018, New Harvest purchased a two-story building in the City, with the intention of using the first floor for worship services and the second floor for classrooms, offices, storage space, and a kitchen. However, the building is located within the City's "Downtown Core Area," and thus subject to certain zoning restrictions.

The building is located in a "mixed use" zone, which requires religious assemblies to obtain a conditional use permit to operate. (Salinas Zoning Code § 37-40.290.) Additionally, the Code prohibits "clubs, lodges, places of religious assembly, and similar assembly uses" from operating on the "ground floor of

buildings facing Main Street within the Downtown Core Area," referred to as the "Assembly Uses Provision." (*Id.* § 37-40.310(a)(2).)

New Harvest was aware of the Code's provisions at the time it purchased the building, and applied for both a Code amendment and conditional use permit to operate as intended (Application). The City denied both of New Harvest's applications due to the Assembly Uses Provision. Instead, the City suggested, New Harvest maintain an active use at the front of the ground floor facing Main Street and build the sanctuary toward the back. However, New Harvest did not submit a modified application. Rather, New Harvest filed suit alleging the City's Code violated RLUIPA's substantial burden and equal terms provisions.

The RLUIPA

The relevant provisions in this case under RLUIPA are: 1) the substantial burden provision, and 2) the equal terms provision.

The substantial burden provision provides "[n] o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a…religious assembly or institution," unless the government can demonstrate a compelling interest under a strict scrutiny standard. (42 U.S.C. § 2000cc(a)(1).)

The equal terms provision provides that:

> "[n]o governmental shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." (42 U.S.C. § 2000cc(b)(1).)

The Ninth Circuit's Decision

The Ninth Circuit Court of Appeals affirmed the District Court's decision in part, upholding its ruling to grant summary judgment on the grounds that the City did not violate the substantial burden provision of RLUIPA, because New Harvest did not meet its burden of showing that the Assembly Uses Provision imposes a "significantly great" restriction on its religious exercise.

However, the Court of Appeals reversed and remanded the District Court's decision to grant summary judgment on New Harvest's equal terms provision claim, finding that the Assembly Uses Provision of the City Code facially violated the equal terms provision of RLUIPA.

Substantial Burden Argument

Looking first to New Harvest's claim that the Code violated the substantial burden provision of RLUIPA, the court explained that New Harvest had the burden of proof to show that the City's denial of its Application was a substantial burden on its exercise of religion, where a substantial burden "must place more than inconvenience on religious exercise," and a "challenged land use regulation must impose a 'significantly great restriction or onus upon [religious] exercise.'" (*New Harvest*, 602; [citing, *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011).] The Court of Appeals analyzed the totality of the circumstances, including: 1) New Harvest did not show that the Assembly Uses Provision precluded it from conducting worship services in the building because New Harvest could have modified its Application; 2) New Harvest did not show that it was precluded from using other sites within the City; and 3) New Harvest did not look for alternatives even though it knew of the zoning restrictions at the time it purchased the building. Due to these reasons, the court held that New Harvest did not meet its burden of showing that the Assembly Uses Provision imposes a "significantly great" restriction, rather than an inconvenience, on its religious exercise.

Next, the Court of Appeals analyzed New Harvest's equal terms claim by looking at the text of the Assembly Uses Provision. New Harvest alleged that the Assembly Uses Provision facially violates the equal terms provision because it permits certain nonreligious assemblies to operate on the ground floor of the Main Street Restricted Area (the same area the building is located) while forbidding religious assemblies from doing the same. The court looked to the elements of an equal terms claim, focusing on the fourth element—the imposition or implementation must be "on less than equal terms with a nonreligious assembly or institution." (42 U.S.C. **§** 2000cc(b)(1).)

The court compared New Harvest's intended use on the first floor of the Main Street Restricted Area, a prohibited religious assembly under the Code, to that of theatres, a permitted nonreligious assembly. The court explained that theatres and religious assemblies

are similarly situated as they are only open for certain parts of the day, attract sporadic foot traffic around their opening hours, and while there are some regular members, they are also open to non-members. The Court of Appeals held that because the City allowed theaters to operate on the first floor of the Main Street Restricted Area but not religious assemblies, the Assembly Uses Provision of the Code is a facial violation of RLUIPA because it does not treat New Harvest as well as nonreligious assemblies that are similarly situated.

Conclusion and Implications

This opinion by the Ninth Circuit balances both the City's deference with respect to its Code and New Harvest's interests. On the one hand, it criticizes New Harvest's decision to purchase a building in an area that it knew was restricted for its intended use and choosing not to pursue any modifications recommended by the City, highlighting that New Harvest's choices were a contributing factor to their inconvenience. On the other hand, the court was critical of the City's Code with respect to its violation of the equal terms provision under RLUIPA, noting that the City "should have done and can do much better." (*New Harvest*, 609.) Although the court does not provide a pointed solution for cities to craft their codes in such a way as to avoid facial violations of RLUIPA, it does suggest that cities should employ an "accepted criterion" with respect to prohibiting certain uses. As is always the case, it seems the main takeaway is for cities to ensure their codes are narrowly tailored with specific criteria to avoid facial challenges to their codes. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/03/22/20-16159.pdf.

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT REVERSES DECISION ADOPTING LIMITED INTERPRETATION OF JUDGMENT AND WRIT AND RELATED DENIAL OF ATTORNEY'S FEE MOTION

Community Venture Partners v. Marin County Open Space District, *Unpub.*, Case Nos A161851 & A162374 (1st Dist. Mar. 28, 2022).

In an *unpublished* decision filed on March 28, 2022, the First District Court of Appeal overturned a trial court judge's discharge of a writ previously issued by another judge, finding that the judge discharging the writ had misinterpreted the first judge's judgment and writ. The original judgment and writ partially overturned the Marin County Open Space District's approval of a mountain bike program for a trail project and the parties disputed whether the writ required Marin County to set aside the project or simply perform more analysis of competing projects pursuant to county regulations. The First District also overturned the trial court's denial of petitioners' attorney's fee motion, finding that the denial of that motion was based on an erroneous interpretation of the original judgment and writ. The case presented a fairly peculiar procedural scenario involving the competing interpretations of a judgment and writ.

Factual and Procedural Background

In 2007, Marin County (County) adopted the Marin Countywide Plan that focused on conserving biological resources, protecting against environmental hazards, and sustainably managing open spaces, trials, and roads. Pursuant to the Countywide Plan, in 2014, the County Open Space District finalized and adopted the Road and Trial Management Plan (RTMP) to establish and maintain a sustainable system of roads and trails, reduce the environmental impacts of such roads and trails, and improve the visitor experience and safety of road and trail users.

The RTMP set out a specific process to evaluate competing project proposals. This process involved six steps designed to select projects consistent with the district policies and prioritize projects that do not increase biophysical impacts. Unfunded projects then compete for funding and such funding is approved for selected projects during the district's budget process.

In March of 2015, the district held a workshop to consider proposals for the Alto Bowl Open Space Preserve. One of these proposals included improvements to the Bob Middagh Trail that among other things would open the trail to bikes. The district scored the Middagh proposal, but did not score some competing project proposals that advocated not allowing bikes on the Middagh Trail. In May of 2015, the district released a document titled "Road and Trial Project Approval" approving the Middagh Trail proposal. The approval document included a RTMP consistency assessment and Notice of Determination that the project did not require additional environmental review, thus relying on the Environmental Impact Report (EIR) prepared for the RTMP.

Petitioners brought a § 1085 writ action challenging the district's approval of the project. The writ alleged that the district abused its discretion when approving the Middagh Project because it failed to follow the RTMP's evaluation process and failed to consider competing proposals. The trial court partially ruled in favor of petitioners on the writ petition, finding that the district failed to consider suggested physical changes without a change-in-use (i.e. without allowing bikes on the Middagh Trail) and failed to show why those proposals could not be scored and evaluated under the RTMP.

Petitioners prepared a judgment and peremptory writ of mandate. The parties were unable to agree on the language of a proposed judgment and writ. Ultimately the trial court entered a judgment and writ that incorporated petitioner's proposed language for the writ, however this language only referenced setting aside the Notice of Determination and was somewhat unclear as to whether the project needed to be set aside. The district appealed the judgment and the First District Court of Appeal rejected the appeal,

affirming the portion of the trial court's judgment granting petitioners *mandamus* relief under § 1085.

On remand, petitioners moved for attorney's fees under Code of Civil Procedure § 1021.5. This resulted in a debate between the parties whether petitioners were a "successful party," and whether the writ required the district to set aside its approval of the Middagh Project or merely required it to do more analysis of competing proposals. The trial court denied the fee motion, finding that petitioners were not a successful party under § 1021.5 because they did not obtain their primary objective of forcing the district to set aside its approval of the project. The trial court also found that even if petitioners were successful, by merely achieving additional procedural considerations by the district, they failed enforce an important public right.

The district then filed a motion to discharge the writ with a declaration indicating that a staff member had scored previously unscored competing proposals with the RTMP's evaluation tools—at no point did the district set aside the project. Petitioners argued that the return to writ was deficient because it did not set aside the project. The trial court rejected petitioners' claims, finding that the writ only required the district to score the competing proposals without setting aside the project.

The Court of Appeal's Decision

The Court of Appeal evaluated both the trial court's approval of the district's return to writ and its denial of attorney's fee award to petitioners. Ultimately, the court overturned the trial court's decision on both items.

Return To Writ

Petitioners contended that the trial court erred by discharging the writ without requiring the district to set aside the Middagh Project approval for bike uses. The district responded that the only relief sought and ordered on the § 1085 writ was a requirement that the district score previously unscored proposals and that the ruling's language requiring approval to be set aside was *only* related to the petitioners' California Environmental Quality Act (CEQA) claims that were tied to the Notice of Determination. The court closely analyzed the trial court's judgment and writ and concluded that the writ "inadvertently used the phrase Notice of Determination" when describing what it was setting aside, but the ruling actually intended that the district set aside its underlying approval of the Middagh Project as well as the Notice of Determination.

The court then analyzed whether the district met the requirements of the writ by scoring previously unscored competing project proposals and deciding to allow the project to move forward. Upon close analysis, the court determined that the district:

> ...did not demonstrate that its evaluation of the competing proposals complied with the RTMP, and the District remains subject to the command that the Middagh Project's change-in-use be set aside until it does so.

Attorney's Fee Motion

Regarding the trial court's denial of petitioner's attorney's fee motion, the court concluded that the trial court's determination that petitioners were not a successful party was based on an "erroneous interpretation of the ruling and writ"—*i.e.* that the writ did not require the district to set aside the underlying project approval while it considered competing projects. The court reversed and remanded the trial court's decision on the attorney's fee motion to determine whether petitioners were a successful party and had vindicated an important public right.

Conclusion and Implications

The *Community Venture* decision presented a fairly rare procedural situation where two parties disagree about language of a judgment and writ and where two superior court judges' interpretation of a judgment and writ also vary. Although the case presented an uncommon procedural situation, the case provides a helpful illustration of the procedures and standards involved in writ actions and attorney's fee motions. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/A161851.PDF.

(Travis Brooks)

FOURTH DISTRICT COURT FINDS PETITIONER RESIDENTS ENTITLED TO ATTORNEY'S FEES IN CONNECTION WITH HOUSING ELEMENT LAWSUIT

Garcia v. City of Desert Hot Springs, *Unpub.*, Case No. E075523 (4th Dist. Mar. 16, 2022).

Petitioner residents sued the City of Desert Hot Springs (City) and related public entities to force them to complete a long-overdue obligation to revise the Housing Element of the City's General Plan. After the parties entered into a stipulated judgment, petitioners moved to recover attorney's fees, which the trial court denied. Petitioners appealed and the Court of Appeal [in an unpublished opinion] reversed, finding that the trial court's focus on "causation" was irrelevant and remanding for the trial court to determine a reasonable amount of attorney's fees.

Factual and Procedural Background

Petitioners, all "low-income residents of the City of Desert Hot Springs and the surrounding area," sued the City of Desert Hot Springs, the city council, the Desert Hot Springs Successor Agency, and the city housing authority to force them to carry out a long-overdue obligation to revise the Housing Element of the General Plan. Eventually, the parties entered into a stipulated judgment that, among other things, set a timeline for the City to complete the revision. Under the judgment, if the City missed a deadline, it could not grant any building permits, zoning changes, or subdivision map approvals (except for emergency shelters and affordable housing) until it came into compliance. The judgment did not contain a monetary award for petitioners but allowed them to move for attorneys' fees and costs if, after first attempting to resolve fees and costs with the City, they were unable to reach an agreement.

Petitioners then moved to recover their attorney's fees under Code of Civil Procedure § 1021.5, which codifies California's "private attorney general" statute. The Superior Court denied the motion on the ground that it was "unnecessary" for petitioners to incur attorneys' fees because the City had taken steps to remedy its non-compliance before the lawsuit and continued to take such steps through the filing of the stipulated judgment. Petitioners, the Superior Court concluded, had failed to establish that the necessity and financial burden of private enforcement was such as to make an award appropriate, as required under § 1021.5. The trial court also denied the motion costs without explanation. Petitioners appealed.

The Court of Appeal's Decision

Code of Civil Procedure § 1021.5 provides that, upon motion, a court may award attorney's fees to a successful party against one or more opposing parties in an action that has resulted in the enforcement of an important right affecting the public interest if: 1) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; 2) the necessity and financial burden of private enforcement are such as to make the award appropriate; and 3) such fees should not in the interests of justice be paid out of the recovery, if any.

Necessity of Private Enforcement

The Court of Appeal first addressed petitioner's claim that the trial court's reasoning was erroneous because the "necessity of private enforcement" prong of the test does not require proof that a plaintiff *caused* the defendant's change of behavior; it requires only proof of an absence of public enforcement, which was absent in the case. The Court of Appeal agreed, finding that causation was irrelevant, and that the statutory requirement of "necessity of private enforcement" addresses the issue of the comparative availability of public enforcement, not the causal relationship between the claimant's action and the result. In that regard, the Court of Appeal found that there was no question that the petitioners showed their litigation was necessary in the sense that public enforcement was not available or not sufficiently available to achieve compliance.

Contribution to the Enforcement of an Important Right

The Court of Appeal further agreed with petitioners that the litigation contributed to the enforcement

of an important right and helped secure a significant benefit to a large class of people. Accordingly, the court found that the petitioners were entitled to an award of fees. They also were entitled to recover costs. The Court of Appeal therefore reversed the trial court's order denying fees and costs and remanded to the trial court to determine the reasonable amount of attorney's fees and the appropriate amount of costs to be awarded to the residents.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding Code of Civil Procedure § 1021.5, namely the "necessity of private enforcement" prong. The *unpublished* decision is available online at: https://www.courts.ca.gov/opinions/nonpub/E075523.PDF.
(James Purvis)

FIRST DISTRICT COURT REVERSES PROJECT APPROVAL AND EIR CERTIFICATION BASED ON INADEQUACY OF 'NO PROJECT' ALTERNATIVE DISCUSSION

Save the Hill Group v. City of Livermore, ___Cal.App.5th___, Case No. A161573 (1st Dist. Mar. 30, 2022).

The First District Court of Appeal in *Save the Hill Group v. City of Livermore* reversed the trial court's decision upholding approval by the City of Livermore (City) of a residential housing project entitled the Garaventa Hills Project (Project) and its reissued final Environmental Impact Report (RFEIR) on the basis that the RFEIR failed to adequately discuss the "no project" alternative under the California Environmental Quality Act (CEQA).

Factual and Procedural Background

The Project is 31.7 acres located in an area called Garavanta Hills (Site). The Site is the last remaining undeveloped area in that section of the City. The Site is moderately steeply sloping with two prominent knolls at the center and an intermittent stream channel, Altamont Creek , at the southern boundary. The Site consists of predominately non-native grassland habitat.

West of the Site is the 24-acre Garaventa Wetlands Preserve (Preserve), owned and managed by the Livermore Area Recreation and Park District (LARPD). The Site together with the Preserve, provides habitat for a variety of special-status species protected under the California Endangered Species Act and/or federal Endangered Species Act.

The Site and Preserve is hydrologically connected to the Springtown Alkalie Sink (Sink), a unique alkaline wetlands area owned and managed by the Wetlands Exchange in cooperation with the City, the California Department of Fish and Wildlife (CDFW), and the U.S. Fish and Wildlife Service (FWS). The Project environmental review recognized that any alterations to existing drainage patterns in the Site may affect the quantity, timing and quality of precipitation that enters the Sink and which is needed to maintain a functioning ecosystem.

A Project draft Environmental Impact Report (DEIR) was published in late 2012. The Project initially was to include 76 homes with a looped roadway system and a two-way vehicular and pedestrian connector bridge over Altamost Creek. After initial opposition, the Project was reduced to 47 homes, the bridge was eliminated, and a large rock outcropping was preserved. The City issued a final environmental impact report (FEIR) in June 2014.

Due to concerns about grading and aesthetics by the public and comments by the LARPD regarding compatibility with the Preserve, The City's planning commission recommended that the city council reject the Project under its second proposal, and the city council declined to certify the FEIR or approve the Project.

In 2017, the developer submitted a third version of the Project with 44 residences, and a pedestrian bridge across Altamont Creek that would also serve as a secondary emergency vehicle access road. In August 2018, the City published the RFEIR. According to the RFEIR, the Project would result in the permanent

removal of 31.78 acres of grasslands with an additional 1.18 acres being temporarily being disturbed for the pedestrian bridge. To address these and other environmental impacts, mitigation measures were proposed, including acquisition of an 85-acre compensatory mitigation site (Bluebell) located in the Sink. The RFEIR and Project were approved by the planning commission and city council despite numerous citizens, including representatives of Save the Hill speaking out against the Project.

Save the Hill filed a petition for writ of mandate which included allegations that the City failed to adequately investigate and evaluate the no-project alternative to the Project in the RFEIR. In January 2020, the Superior Court issued a tentative order finding the RFEIR's determination of infeasibility for the no-project alternative inadequate because it failed to disclose and evaluation the possibility of using existing mitigation funding to make the "no project" alternative feasible. After supplemental briefing, in April 2020 the Superior Court found that Save the Hill failed to exhaust its administrative remedies with respect to the no-project alternative and changed its tentative order and denied the writ petition.

The Court of Appeal's Decision

The Court of Appeal reversed the Superior Court decision, finding under the substantial evidence standard of review that Save the Hill administratively raised a meritorious challenge to the adequacy of the RFEIR's analysis of the no-project alternative.

The 'No Project' Alternative

Under CEQA, an EIR must include enough detail to enable the public to understand and consider meaningfully the environmental issues raised by the Project. An EIR must consider feasible alternatives to the Project which would lessen any significant adverse environmental impact. One alternative that must be considered is the "no project." CEQA requires the "no project" alternative to address existing conditions as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services.

The Exhaustion Requirement

The exhaustion requirement requires that grounds for a CEQA noncompliance challenge must be raised during the administrative proceedings. The challenge must be sufficiently specific so that the agency has the opportunity to evaluate and respond to it. Bland and general references to environmental matters or isolated and unelaborated comments do not satisfy the exhaustion requirement; rather the exact issue must have been presented to the agency. However, less specificity is required to preserve an issue for appeal in an administrative proceeding than in a court proceeding because parties are not generally represented by counsel before administrative bodies.

Save the Hill's objections during the administrative process met the standard of fairly appraising the City of the RFEIR's failure to adequately flesh out the feasibility of not going forward with the Project. For example, during the public comment period, one representative wrote to express the loss of habitat by bulldozing the hill and asked whether there was land owned by the developer elsewhere in the City more suitable for building. The City responded by directing the representative to the no project alternative evaluation. Also, during the city council meeting, representatives voiced support of the alternative of preserving the Site as open space in perpetuity by rezoning the Site. A councilmember asked whether the City could buy the Site. The mayor asked whether there were funds to purchase Site so that there would be no Project. These discussions showed that the city council was focused as prompted by Save the Hill on the feasibility of a "no project" alternative, which sufficed to fairly apprise the City of Save the Hill's position.

Inadequacy of 'No Project Alternative Analysis

The "no project" alternative in the RFEIR is determined by the City to be environmentally superior to the Project, but determines that it is not feasible to assume the Site would remain undeveloped in the long term because it is zoned residential. However, the City failed to include a discussion about the feasibility of using available funding sources to purchase the Site and set aside Garaventa Hills for conservation rather than development. The City concedes that there is conservation funding under two settlement agreements to which the City is a party. One of

the settlement agreements requires that priority be given to purchases in areas containing unique vegetation and/or endangered species habitat, and Garaventa Hills falls within that criteria. Another one of the settlement agreements designates the Site as part of the space available to be purchased with $11.2 million earmarked for land acquisitions. Although the Site is zoned residential, that does not mean it is not feasibly capable of being rezoned as open space. The "no project" alternative should have contained a discussion of using the settlement funds to purchase and rezone the Site.

Conclusion and Implications

This opinion by the First District Court of Appeal emphasizes the need to evaluate the feasibility of viable project alternatives in an Environmental Impact Report, especially when feasibility issues are raised in the comments, and to not hide behind current zoning with respect to feasibility analysis. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A161573.PDF.
(Boyd Hill)

SECOND DISTRICT COURT FINDS CITY'S SELECTION OF ADDITIONAL ALTERNATIVE AFTER CIRCULATED FINAL EIR DID NOT RENDER DESCRIPTION OF PROJECT 'UNSTABLE'

Southwest Regional Council of Carpenters v. City of Los Angeles,
___Cal.App.5th___, Case No. B301374 (2nd Dist. Mar. 30, 20222).

The Second District Court of Appeal has reversed the trial court's grant of a petition under the California Environmental Quality Act (CEQA) that challenged a mixed-use redevelopment project. The court concluded the Environmental Impact Report (EIR) contained a sufficiently accurate, stable, and finite project description of the alternative that the City of Los Angeles (City) ultimately selected. Although the alternative was introduced after the City circulated the Final EIR (FEIR), the adopted version was adequately contemplated by the EIR because it would be developed within the same footprint and configurations analyzed in the Draft Environmental Impact Report (DEIR).

Factual and Procedural Background

In April 2017, the City released the draft EIR for the "Icon at Panorama" Project—a mixed-used development on a vacant 9-acre site within a "Transit Priority Area" in the Los Angeles neighborhood of Panorama City (Project). The Project proposed to demolish the site's existing abandoned structures and build seven buildings consisting of 422 market-rate residential units (387,000 sq. ft.), 200,000 sq. ft. of commercial space that featured a grocery store and 1,200-seat theater, and a 1,690-vehicle multi-story parking structure. The Project sought to revitalize a blighted, underutilized site by constructing new housing and commercial uses to meet community and regional needs. The Project would result in significant and unavoidable impacts from increased air quality emissions and traffic.

The DEIR analyzed four alternatives: 1) the "No Project" alternative, which contemplated no development; 2) the "Reduced Project" alternative, which consisted of 283 residential units (257,300 sq. ft.), 134,000 sq. ft. of commercial space, and 1,132 parking spaces; 3) the "All Commercial" alternative, which contained no residential units, 583,000 sq. ft. of commercial area, and 2,500 parking spaces; and 4) the "By-Right Project" alternative, which would be developed without the requisite zoning changes and include 350 residential units (259,600 sq. ft.), 160,000 sq. ft. of commercial space, and 1,350 parking spaces. The DEIR analyzed each alternative with varying building configurations within the same footprint.

Southwest Regional Carpenters, submitted comment letters and expert reports, noting potential impacts from hazardous soil contamination, increased traffic, and cumulative effects from the forthcoming Panorama Mall. The Los Angeles Sanitation Depart-

ment (LASAN) commented that wastewater could be sufficiently handled by the local reclamation plant, but detailed gauging may be required to identify whether local sewer connection points could sufficiently convey anticipated wastewater levels.

In August 2017, the City released a revised DEIR that analyzed roadway improvements to mitigate traffic impacts. The RDEIR's description of the Project and alternatives remained unchanged. Petitioners submitted comments on the RDEIR, with the same experts opining that the City underestimated vehicle trips per day and air pollution.

In February 2018, the City issued the final EIR. The document contained the same project description, but added a new "Alternative 5," which consisted of 675 residential units (615,000 sq. ft.), 60,000 sq. ft. of commercial area (no theater or grocery store), and 1,200 parking spaces. The reduction in commercial development sought to lessen adverse traffic and air quality impacts, while the increase in residential units sought to address regional housing shortages. Petitioners and their experts commented that Alternative 5 would generate more traffic and exacerbate impacts on school and fire services. They also contended the FEIR failed to adequately respond to LASAN's comment.

In March 2018, the City's advisory agency approved a smaller-still version of Alternative 5—an iteration that had not been included in the DEIR, RDEIR, or FEIR. Designed to eliminate some of the original Project's unavoidable impacts, the "Revised Project" contemplated 52 fewer residences (a 99,430 sq. ft. reduction) and the same 60,000 sq. ft. of commercial space. Petitioners appealed the approval to the planning commission, asserting that recirculation was required because the project description had changed so significantly. In April 2018, the planning commission denied petitioners' appeal. In August 2018, the city council upheld the denial and certified the Revised Project of 623 residential units and 60,000 sq. ft. of commercial space.

At the Trial Court

In October 2018, Petitioners filed a petition for writ of mandate alleging the City violated CEQA because: 1) the EIR contained an inadequate project description because neither the DEIR, RDEIR, or FEIR described the project that was ultimately approved; 2) the City failed to recirculate the EIR based upon the substantially changed project; 3) the EIR failed to adequately disclose and mitigate impacts to air quality, greenhouse gases, traffic, hazardous materials, and public services; and 4) the EIR failed to adequately analyze a reasonable range of alternatives.

At the trial court, the City argued that the Project remained a mixed-use development throughout the CEQA process, therefore, the question was not whether the project description was accurate, stable, and finite, but whether the changes constituted "significant new information" requiring recirculation under CEQA Guidelines § 15088.5. The trial court agreed. Although petitioners had waived any recirculation argument, the court found that the Revised Project did not constitute "new information" requiring recirculation. Nevertheless, the court concluded that nothing in § 15088.5 foreclosed petitioners from raising an argument that the project description had changed so much that it was "unstable."

In citing several cases for support [including: *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185 (*Inyo*), *Washoe Meadows Community v. Dept. of Parks and Recreation*, 17 Cal.App.5th 277 (*Washoe Meadows*), *South of Market Community Action Network v. San Francisco*, 33 Cal.App.5th 321 (*SoMa*), *etc.*] the court held that the Project description was impermissibly unstable and presented a "moving target which impaired the public's ability to participate in the environmental review process" by never being subject to the formal comment period.

The court rejected the City's reliance on *SoMa*, stating that the issue was not whether the Revised Project had the same footprint, location, and environmental impacts as the original Project, but whether the DEIR provided an accurate description of the Project and alternatives "regardless of environmental impacts." Here, the instability of the Project's description was two-fold: 1) the adopted variant of Alternative 5 was "materially different" because no other alternative contemplated 623 residential units; and 2) the City presented the variant for the first time in the FEIR, after the close of public comments. The differing project descriptions, coupled with the City's timing, prejudiced informed public participation and decisionmaking thereby warranting reversal.

The court found fault only with the City's response to LASAN's comments, holding that the City failed to fully analyze sewage impacts based on a potential lack of immediately available local sewer line capac-

ity and ordered the City to set aside certification of the FEIR and approval of the Project, and prepare a new or supplemental EIR for public comment.

The Court of Appeal's Decision

On appeal, the City argued that the trial court erred by adding a "materially different" test to CEQA's stable project description requirement because "significant new information" under Guidelines § 15088.5 is the only ground upon which the trial court can order recirculation of an EIR.

Revised Project Description Complied with CEQA

The Second District Court of Appeal reversed the trial court's holding, finding that the City's description of the Revised Project complied with CEQA. The court explained that *Inyo*, *Washoe Meadows*, *SoMa*, and *StoptheMillenniumHollywood.com v. City of Los Angeles*, 39 Cal.App.5th 1 (*Stop the Millennium*) yield one salient conclusion:

> . . .a stable project description permits informed public participation in the environmental review process. Without that, the purposes of CEQA are nullified and the statute is violated.

From its inception to its approval, the Project always remained a mixed-use commercial and residential project on a defined site. The only changes related to the composition and ratio of the residential and commercial footprint—the overall size of the Project remained consistent and the site remained the same—each permutation of the Project established that if residential units were added, commercial space was subtracted. While the approved number of residences exceeded the numbers analyzed in the DEIR, the figure was still less than the number analyzed in Alternative 5.

The Second District explained that the precedent cases cited were individually distinguishable. Unlike those decisions, here the alternatives presented for public input involved varying mixes of residential and commercial uses that yielded roughly the same environmental impacts within the same footprint. The DEIR's description of each permutation was sufficiently detailed by including site renderings, layouts, square footages, and building descriptions. Although the Revised Project was not publicly vetted, it was not so significantly different from these other alternatives to conclude that the project description was inadequate.

For these reasons, the court agreed that consideration of additional alternatives after a DEIR is circulated does not render a project description unstable.

Public Comment on the Revised Project Not Required

While the court recognized that the public had did not have an opportunity to comment on the Revised Project, it found that CEQA does not require recirculation of a RDEIR solely because the agency identified and approved a new alternative after the DEIR was circulated for public review. Unlike the facts here, Guidelines § 15088.5 requires recirculation only where the agency declines to adopt a considerably different project alternative that would lessen environmental impacts. The court thus "declined to engraft that requirement into CEQA," especially:

> where, as here, the State and region are in the midst of a housing shortage and the dispute centers on the number of residential units approved in an urban in-fill development.

Finally, the court noted that the City provided the public with over five months and multiple hearings to comment on the Revised Project. Despite providing the public with ample opportunity to comment, Petitioners failed to establish any prejudice flowing from the City's decision-making process.

Revised Alternative 5 Did Not Require Recirculation

The court found that petitioners waived their "significant new information" argument by failing to raise it as a ground for recirculation. Nevertheless, the court held that recirculation was not required because the Revised Project was not considerably different from the alternatives analyzed in the DEIR—agencies may "mix-and-match" project components from different alternatives, particularly when done in response to public comments. Final EIRs, by necessity, will contain new information, but this does not always trigger recirculation requirements, especially when the proposed alternative is substantially similar

to those evaluated in the DEIR.

City Adequately Responded to LASAN's Comments

Finally, the Second District reversed the trial court and held that the City adequately responded to LASAN's comment about local sewer line capacity. LASAN's comment agreed that the final reclamation plant had sufficient capacity to accommodate the Project's total flows. It also noted that the local sewer system might able to accommodate the Project, but detailed gauging during the final permitting process would reveal whether the developer needed to construct additional sewer lines. The City responded that LASAN's comment corroborated the DEIR's conclusions, such that no further analysis was required.

The Court of Appeal disagreed that the City's response was inadequate because the comment admitted the Project would create a need for additional sewage capacity, which the EIR failed to analyze and mitigate. The court found that LASAN noted only that the Project *might* require additional sewer line capacity, which would be determined in future studies. Although these comments were directed at the original 422-unit project, they would still apply to the approved 623-unit Revised Project

Conclusion and Implications

Nearly three years after issuing its opinion in *Save the Millennium*, the Second District's opinion in *Southwest Regional Council of Carpenters* brings welcomed clarity to CEQA's project description requirement. As we may recall, *Save the Millennium* was published soon after the First District published its opinion in *SoMa*. Both cases involved large, urban, mixed-use projects, with building envelopes that afforded flexibility about the types of uses that could ultimately be constructed. While *SoMa* upheld this approach and the EIR's related project description, *Stop the Millennium* did not. Now, the Second District has clarified that "flexibility" and "instability" are not synonymous—a project proposal can evolve and incorporate a degree of flexibility, so long as the EIR adequately analyzes the different configurations and mixes of uses. Also, CEQA Guidelines § 15088.5 remains the appropriate test for reviewing whether an agency must recirculate an environmental document. Finally, though briefly mentioned in *dicta*, the court reiterates an implicit attitude that given the state's ongoing housing shortage crisis, courts should not expand the substantive or procedural requirements of CEQA in a manner that hinders critically needed housing development. The Second District's opinion is available at: https://www.courts.ca.gov/opinions/documents/B301374.PDF.
(Bridget McDonald)

SECOND DISTRICT COURT UPHOLDS AWARD OF ATTORNEY'S FEES TO CEQA PETITIONER IN SETTING ASIDE MND AND REQUIRING FOCUSED EIR TO ANALYZE TRAFFIC IMPACTS

United Homeowners Association v. Peak Capital Investments, et al., Unpub.,
Case No. B308682 (2nd Dist. Mar. 24, 2022).

In an *unpublished* decision filed on March 24, 2022, the Second District Court of Appeal upheld a trial court's award of attorney's fees to a successful California Environmental Quality Act (CEQA) petitioner in a lawsuit that challenged Los Angeles County's (County) certification of a Mitigated Negative Declaration (MND) for a condominium project. The lawsuit resulted in the County being required to prepare a focused Environmental Impact Report (EIR) to analyze cumulative traffic impacts at a nearby intersection. The Court of Appeal upheld the trial court's fee award, noting that requiring the County to prepare a focused EIR to analyze traffic impacts at a heavily trafficked intersection enforced an important public right affecting the public interest that conferred a significant benefit Court of Appeal also affirmed the amount of the trial court's fee award, even though the trial court did not provide a

"reasoned" explanation for all of the reasons that it reduced petitioner's fee request.

Factual and Procedural Background

A project proposed construction of an 88-unit, five-story condominium complex on a 1.84-acre parcel in the View Park-Windsor Hills Neighborhood in unincorporated Los Angeles County. The project incorporated 139,281 square feet of living space and 206 subterranean parking spaces. In August 2017, the Los Angeles County's planning commission approved a conditional use permit and vesting tentative map for the project with a MND.

Petitioner homeowner's association filed a petition for writ of mandate alleging that the County violated CEQA in adopting the MND for six separate reasons, including an allegation that the MND's traffic study was deficient and failed to adequately assess cumulative traffic impacts. Petitioners dropped some of their CEQA claims, and the trial court rejected several others. However the court found in favor of petitioners on their traffic related claims finding that the traffic analysis relied on by the MND was insufficient. Specifically, the trial court found that:

> . . .[t]here is substantial evidence that had an analysis of [nearby planned project traffic] been included with the Project, the PM peak traffic level of service would drop to an F, the lowest level of service…

The court ruled that the County's actions and determinations regarding most environmental impacts were justified with regard to the MND, however the court ordered the County to prepare a focused EIR addressing potentially significant traffic impacts. The court then entered judgment granting writ of mandate, directing the County to set aside project entitlements and the MND with respect to project impacts from traffic and circulation, and required the county to prepare a focused EIR on project traffic impacts.

Petitioners then filed a motion for attorney's fees under the public attorney general statute, Code of Civil Procedure § 1021.5. The attorney's fee motion requested fees totaling $169,651.50 for approximately 230 hours, alleging that petitioner's "enforced an important public right" that benefited nearby residents. The County and developer appealed, arguing that petitioners lost on almost all of their CEQA claims and that their sole relief was that a limited, Focused EIR be prepared regarding traffic. The County and developer argued, petitioners were not successful parties and:

> . . .failed to achieve [their] primary objective of stopping the entire Project… [The lawsuit] did not even succeed in reducing the Project's size, scope or layout…

The trial court disagreed, awarding petitioners attorney's fees totaling $118,089. The court found that petitioners were successful and succeeded in enforcing important statutory protections by ensuring the County complied with its CEQA obligations. The court also noted that petitioner's fee request was "to some extent unreasonable and required reductions".

The Court of Appeal's Decision

The Second District Court of Appeal opened its opinion by recognizing that an appellate court reviews a trial court award for attorney's fees under an abuse of discretion standard of review. Here, the court found no error in the trial court's decision and affirmed its award of attorney's fees.

The court then walked through the factors required to award attorney's fees under § 1021.5. As the court noted:

> . . .[t]o obtain fees under section 1021.5 the moving party must establish all of the following: (1) he or she is a successful party, (2) the action has resulted in the enforcement of an important right affecting the public interest, (3) the action has conferred a significant benefit on the public or a large class of persons, and (4) an attorney fee award is appropriate in light of the necessity and financial burden of private enforcement.

After recognizing that petitioners were a successful party, the court moved on to factors (2) through (4) above.

Enforcement of an Important Right Affecting the Public Interest

Regarding the important right and public interest factor, the court cited to a long line of precedent recognizing that enforcement efforts alone do not

justify an attorney's fee award, and while the public does have a significant interest in seeing that legal strictures are enforced, the Legislature did not intend to authorize an award of attorney's fees in every case involving a statutory violation. Thus, where the benefit to the public is the proper enforcement of the law, the significant benefit and important right requirements of § 1021.5 "to some extent dovetail."

Conferring a Significant Benefit on the Public

Regarding the "public benefit" factor, the court rejected the developer's arguments that by requiring a traffic study, the litigation would not likely have any practical impacts on development of the project, and that the petitioner group was not a large or public class. Here, the litigation invalidated the MND and required an EIR regarding traffic, which was relevant to at least one heavily traveled intersection that already had a "D" level of service. The intersection was heavily traveled, and the people that traveled the intersection would receive the benefit of ensuring that the County complied with CEQA in approving the project.

The court rejected the developer's arguments relying on a factually similar case where a "minute blemish" in a MND resulted in the trial court requiring the local agency to revise the MND. Unlike that decision, the County's failure to analyze cumulative traffic impacts was not a "minute blemish"—the County was actually required to set aside its MND and prepare a Focused EIR. The court concluded that the users of the affected intersection was a sufficiently large class to warrant the award of attorney's fees.

Fee Amount

The developer took issue with the trial court's fee award, claiming that the trial court "failed to clearly explain how it arrived at the final amount awarded." The trial court reduced the fees requested by petitioners based on: 1) their limited success, 2) block billing, 3) duplicative billing, 4) an erroneous bill included in the fee motion, and 5) an excessive amount requested for petitioner's fee motion. Although the court reduced the fee requested based on the above factors, it did not explain how many hours were being subtracted for most of these factors.

The court noted that trial court's failure to provide a "reasoned explanation' for an attorney's fee award did not constitute a reversible error, in fact a trial court is not required to issue a statement of decision at all for a fee award. A court can only reverse a trial court's attorney's fee award if the record contains some indication that the trial court considered improper factors when granting an attorney fee motion. Here, the developer failed to demonstrate that the trial court relied on improper factors when determining the amount to award petitioners.

Conclusion and Implications

The *United Homeowners* decision provides a helpful discussion of the factors required to award a successful party to attorney's fees in the CEQA context. Although a lawsuit that requires a local agency to comply with the legal strictures of CEQA may not be sufficient in and of itself to enforce a public right affecting the public interest and confer a significant benefit, so long as the CEQA violation found does not amount to a "minute blemish" attorney's fees may be warranted. The court's unpublished opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/B308682.PDF.
(Travis Brooks)

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 was amended on April 6, 2022 and was re-referred to the Committee on Housing & Community Development. It continues to add to the definition of "exempt surplus land," to exempt surplus land that is zoned for a density of up to 30 residential units, if both of the following is satisfied: 1) Residential properties within a radius of 500 feet of the site are zoned to have an allowable density of fewer than 30 dwelling units per acre; and 2) The most recent annual progress report submitted pursuant to paragraph (2) of subdivision (a) of § 65400 by the city or county that owns the surplus land shows that the total number of low-income and very low income housing units built within the city or county demonstrates that the city or county meets or exceeds proportionate annual progress towards the number of those housing units needed to meet the city's or county's share of regional housing need for each of those household income levels pursuant to Article 10.6 (commencing with § 65580) of Chapter 3 of Division 1 of Title 7 for the sixth cycle of its housing element.

•**AB 2625 (Ting)**—This bill has been re-referred to the Committee on Local Government. It continues to 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.

General Plans

•**SB 1067 (Portantino)**—This bill was amended on April 4, 2022. It was re-referred to the Committee on Housing and is set for hearing April 27, 2022. This bill continues to 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. However, it now provides that a project may not be exempt from the minimum automobile parking requirement if, within 30 days of receipt of a demonstration provided by the developer of that project that is meets 2) above, a city, county, or city and county makes a finding, supported by a preponderance of the evidence, that the demonstration meets one or more of the following conditions: I) The developer did not employ a qualified entity with demonstrated expertise preparing planning documents. II) The methodology did not follow best professional practices and III) The methodology was not sufficiently rigorous to allow an assessment of whether the project would have a negative impact on any of the conditions identified in the law.

•**AB 2094 (Rivas)**—This bill has been re-referred to the Committee on Appropriations, without amendment. 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.

•**AB 2339 (Bloom)—**This bill was re-referred to the Committee on Local Government, without amendment. 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.

Fees

•**AB 2428 (Ramos)—**This bill has had no legislative action Since March 3, 2002. 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 five years of the deposit.

Accessory Dwelling Units

•**AB 916 (Salas)—**This bill has had no legislative action since January 27, 2022. This bill continues to 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.

•**SB 897 (Wieckowski)—**This bill was amended on April 18, 2022 and is set for hearing on April 25, 2022. This bill 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, but, as amended, only if the accessory dwelling unit is within one half walking distance of a major transit stop or a high-quality transit corridor, as those terms are defined, or if the accessory dwelling unit is attached to a primary dwelling, as specified. This bill would also continue to prohibit a local agency from denying a permit for an unpermitted accessory dwelling unit, but as amended, specified only as to those "that [were] constructed before January 1, 2018," because, among other things, the unit is in violation of building standards or state or local standards applicable to accessory dwelling units, unless the local agency makes a finding that correcting the violation is necessary to protect the health and safety of the public or occupants of the-structure". In addition, it now specifies that the prohibition denying a permit does not apply to a building that is deemed substandard under specified provisions of law.

Density Bonus

•**AB 2063 (Berman)**—This bill was amended on April 18, 2022 and is set for hearing on April 25, 2022. It would continue to prohibit affordable housing impact fees, including inclusionary zoning fees, in-lieu fees, but deletes "public benefit fees", from being imposed on a housing development's density bonus units.

•**AB 2334 (Wicks)—**This bill was amended on April 18, 2022 and re-referred to the Committee on Local Government. It continues to make amendments to the to the Density Bonus Law and amends, 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 and adds the local agency must set forth how density is determined. It now amends the term "low vehicle traffic area" to be "very low traffic area" and adds, as to "regional vehicle miles traveled per capita" for "region" to mean "the entirety of incorporated and unincorporated areas governed by a multicounty or single-county metropolitan planning organization, or the entirety of the incorporated and unincorporated areas of an individual county that is not part of a metropolitan planning organization."

Affordable Housing

•**AB 2186 (Grayson)—**This bill was amended on April 18, 2022 and re-referred to the Committee on Local Government. The 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, with the amended bill deleting "waiver." It was also amended to delete reference within the definition of "qualified housing entity" to affordability for a term of at least 55 years.

•**AB 1850 (Ward)—**This bill was amended on March 29, 2022. It 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 certain requirements are met. It which now changes the term to "unrestricted multifamily housing" rather than "unrestricted housing" and deletes the reference to "rent for the unit prior to conversion [being] affordable to very low, low, or moderate income households" as criteria for exempting an entity from the prohibition.

•**AB 2295 (Bloom)**—This bill was amended on April 21, 2022. This bill continues to provide that a housing development project be deemed an allowable use on any real property owned by a local educational agency, as defined, if the housing development satisfies certain conditions, including other local objective zoning standards, objective subdivision standards, and objective design review standards, as described. The bill would deem a housing development that meets these requirements consistent, compliant, and in conformity with local development standards, zoning codes or maps, and the general plan. The bill, among other things, would authorize the land used for the development of the housing development to be jointly used or jointly occupied by the local educational agency and any other party, subject to specified requirements.

Planning

•**AB 2234 (Rivas)—**This bill was amended on April 21, 2022. It requires a public agency, under the Permit Streamlining Act, to post (previously, 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 and, as amended further, to include "an example of an ideal application and an example of an ideal complete set of [post-entitlement] phase permits for the most common housing development projects in the jurisdiction." It was also amended to apply only to large jurisdictions as defined in § 53559.1 of the Health and Safety Code.

•**AB 2668 (Grayson)—**This bill was amended on March 29, 2022. It 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, as amended, "substantial" (previously, "sufficient") information that would allow a reasonable person to conclude that the development is consistent with the objective planning standards.

•**AB 2386 (Bloom)—**This bill was amended on April 21, 2022. It 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 that delineate the meaning of "design" and "improvement" (not a reference to state law).

•**AB 2656 (Ting)—**This bill was amended on April 18, 2022 and re-referred to the Commission on Natural Resources. It continued to address the Housing Accountability Act and CEQA. It is amended to add legislative findings, as follows: (a) The definition of "disapproval" under the Housing Accountability Act (HAA) already extends to a negative vote on "any required land use approvals or entitlements necessary for the issuance of a building permit, (b) A city may not issue a building permit for a project until the city has approved the project's California Environmental Quality Act (CEQA) (Division 13 (commencing with § 21000) of the Public Resources Code) clearance. The denial of a CEQA clearance would seem to be encompassed within the HAA's definition of "disapproval", (c) The Department of Housing and Community Development expressly relied on the HAA's expansive definition of "disapproval" in its letter to San Francisco cautioning that the board of supervisors' vote on the environmental impact report for the project located at 469 Stevenson Street may constitute an "effective denial" in violation of the HAA, (d) The purpose of this bill is to clarify existing law and remove any doubt as to whether a local agency's failure to approve a legally sufficient CEQA review of an HAA protected project constitutes a violation of the HAA.

•**AB 2097 (Friedman)**—This bill was re-referred to the Committee on Housing & Community Development, without amendment. It 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.

California Environmental Quality Act

•**AB 1001 (Garcia, Cristina)**—This bill was amended on March 22, 2002 and re-referred to the Committee on Rules. It now requires mitigation measures, identified in an environmental impact report or mitigated negative declaration to mitigate the adverse effects of a project on air-quality of a disadvantaged community, to include measures for avoiding, minimizing, or-otherwise mitigating for the adverse effects on that community. The bill would require-mitigation measures to include measures conducted at the project site that avoid or minimize to less than significant the adverse effects on the air quality of a disadvantaged community or measures conducted in the affected disadvantaged community that directly mitigate those effects.

•**AB 1952 (Gallagher)**—This bill has had no legislative action since February 18, 2022. It 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 § and updating erroneous cross-references.

•**AB 2445 (Gallagher)**—This bill was amended on April 5, 2022. This bill would now authorize (rather than require) a court, as amended, "upon motion or upon its own motion," 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 to cover the costs and damages to the affordable housing project incurred by the respondent or real party in interest. It also now deletes reference to the amount of the bond ($500,000) and court authority 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.

•**AB 2485 (Choi)**—This bill has had no legislative action since March 10, 2022. It would continue to exempt from the requirements of CEQA emergency shelters and supportive housing, as defined.

•**AB 2719 (Fong)**—This bill has not been amended and had an April 5, 2022 hearing canceled. 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.

•**SB 922 (Wiener)**—This bill was amended on April 4, 2022. This bill continues to extend the CEQA exemption for bicycle transportation plans, an active transportation plan, a pedestrian plan, or a bicycle transportation plan for the restriping of streets and highways, bicycle parking and storage, signal timing to improve street and highway inter§ operations, and the related signage for bicycles, pedestrians. As amended, the exemption would be extended to January 1, 2030, rather than "indefinitely." This bill was further amended to specify that individual projects that are a part of an active transportation plan or pedestrian plan remain subject to the requirements of CEQA unless those projects are exempt by another provision of law.
(Melissa Crosthwaite)

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