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LAND USE NEWS

CALIFORNIA SENATE LOOKS TO REVIVE EFFORTS TO REDUCE URBAN WATER USE OBJECTIVES FOR INDOOR RESIDENTIAL WATER USE

On February 17, 2022 State Senator Hertzberg introduced "An act to amend Section 1069.4 of the Water Code relating to water." Distilled to its essence the bill would eliminate the option of using the greater of 52.5 gallons per capital daily and the greater of 50 gallons per capita daily but would instead require that from January 25, 2025 to January 1, 2030, that standard for indoor residential use be lowered. On May 5th the bill was referred to the Assembly Committee on Water, Parks and Wildlife.

Background

Section 10609 of the California Water Code establishes a method to estimate the aggregate amount of water that would have been delivered in the previous year by an urban retail water supplier if all water actually used had been used efficiently. In order to calculate this figure, Urban Water Use Objectives for several use types were created, including standards for Indoor and Outdoor Residential water uses. These Urban Water Use Objectives do not set any hard-limits on the amount of water urban retail water suppliers may actually provide. Instead, by comparing the amount of water actually used in the previous year with the urban water use objective, the goal is that local urban water suppliers will be in a better position to cut back on unnecessary or wasteful uses of water.

For Indoor Residential Water Use, the standard set by the Urban Water Use Objectives is currently 55 gallons per day per capita. This standard is set to last through January 1, 2025 where the standard will then be lowered to 52.5 gallons per day per capita, then lowered again to 50 gallons per day per capita on January 1, 2030.

What the Bill Seeks to Change

Last year, the California Legislature had before it AB 1434, which sought to effectuate more or less the same changes that SB 1157 now seeks: to have the Indoor Residential Water Use standards reduced to reflect the recommendations of the Department of Water Resources and the State Water Resources Control Board. Former AB 1434, however, never made it past the Assembly. This time around, SB 1157 has now made its way through the California Senate and back to the assembly.

SB 1157 does not plan on making any radical changes to Urban Water Use Objectives as a general scheme. With that said, the proposed reduction for Indoor Residential Water Use may very well be a drastic enough change.

Prior to AB 1434's defeat in the assembly, the predecessor bill sought to drop the Indoor Residential Water Use standards by 20 percent and implement a more staggered timeline for reducing the water use standard. The first change under AB 1434 would have almost been upon us, beginning on January 1, 2023, where the Indoor Residential Water Use standard would have been dropped to 48 gallons per day per capita. In 2025, this standard would have dropped again to 44 gallons per day per capita and by 2030 the standard would have dropped again to a mere 40 gallons per day per capita.

This time around, SB 1157 takes a more conservative approach to the lowering of Indoor Residential Water Use standards. The first major change comes in the form of the total removal of a 2023 reduction. Rather, the first reduction for Indoor Residential Water Use standards would not come until the next reduction under the current scheme, set for January 1, 2025. At that time, SB 1157 would have the Indoor Residential Water Use standard drop from the current standard of 55 gallons per day per capita down to 47 gallons per day per capita. For reference, the current schedule is only set to have the standard reduced to 52.5 gallons per day per capita as of 2025. As for the final reduction date, set to come on January 1, 2030, SB 1157 would seek to set the standard at just 42 gallons per day per capita, down from the currently scheduled standard of 50 gallons per day per capita come 2030.

Conclusion and Implications

Although the drop from 55 to 47 gallons per day per capita may seem significant at a glance, the current median water use throughout the State is already as low as 48 gallons per day per capita, so this reduction does not set an unreasonable goal. Instead, the more realistic concern comes from the reduction of the 2030 Indoor Residential Water Use standard from 50 gallons per day per capita down to just 42 gallons per day per capita. Indoor residential water use has already seen a significant drop, particularly following the major drought years lasting through 2014-2015, so a question that really needs to be considered prior to implementing any significant rampdowns to Indoor Residential Water Use standards is where the point of diminishing returns lies with respect to indoor residential water conservation.

With that said, and as noted above, these Urban Water Use Objectives do not set absolute limits on urban retail water suppliers when it comes to providing water for indoor residential water uses. What it does do, however, is ensure that discussions can continue between urban retail water suppliers and their customers with respect to how these water use standards can be achieved.

The Legislature has maintained that Local urban retail water suppliers should have primary responsibility for meeting standards-based water use targets, and that they are to retain the flexibility to develop their water supply portfolios, design and implement water conservation strategies, educate their customers, and enforce their rules. SB 1157 continues to place the burden of urban water conservation on urban retail water suppliers along with the responsibility of engaging the community and encouraging conservation on a more personal household level.

Last year, AB 1434 was defeated, at least in part, because it sought to drastically cut Indoor Residential Water Use standards with only a 10-year planning horizon. With SB 1157 coming up so soon after AB 1434's defeat, the question now is whether the changes made herein to the predecessor bill will be enough to push SB 1157 past the finish line. To track the status of SB 1157 *see:* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1157.
(Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

STATE WATER RESOURCES CONTROL BOARD PROPOSES EMERGENCY REGULATIONS FOR RUSSIAN RIVER WATERSHED

In May 2002, the State Water Resources Control Board (State Water Board) readopted emergency regulations authorizing the board to curtail diversions in Sonoma and Mendocino counties to protect drinking water supplies and migrating fish in the Russian River watershed. The State Water Board subsequently provided notice of its proposed rulemaking for the revised emergency regulations, which the board submitted to the Office of Administrative Law on May 18th.

Background

The Russian River begins in Mendocino County and flows south over one hundred miles into Sonoma County before emptying into the Pacific Ocean. Water stored in Lake Mendocino is released to maintain flows in the upper section of the Russian River. Supplemental water from the lake is used for the benefit of municipal, agricultural, and environmental uses.

In April 2021, Governor Gavin Newsom issued a drought state of emergency and recommended modifications to reservoir releases and limitations and curtailments of diversions within the Russian River watershed to redress acute drought impacts and to protect the availability of drinking water. The 2021 proclamation directed the State Water Board to consider adopting:

> . . .emergency regulations to curtail water diversions when water is not available at water rights holder's priority of right or to protect releases of stored water.

Accordingly, the State Water Board adopted emergency regulations on June 15, 2021, which are set to expire on July 12, 2022.

The 2022 Russian River drought emergency regulations seek to renew the State Water Board's emergency authority related to the 2021 regulations. However, the 2022 regulations make novel amendments to the 2021 regulations.

Emergency Conditions in the Russian River Watershed

In proposing to adopt the 2022 regulations, the State Water Board found that an emergency continues in the Russian River watershed due to the third consecutive year of severe drought conditions. The State Water Board determined that it was unable to address the situation through non-emergency regulations given the ongoing drought emergency. The State Water Board further reasoned that it was immediately necessary to reassert the board's authority to prevent the unreasonable use of water in the Russian River watershed in light of "severely limited water availability." According to the regulations, the State Water Board has regulatory jurisdiction over permitted water rights issued after 1914, but also has jurisdiction to regulate the reasonable uses of water regardless of the basis of right, including riparian and pre-1914 water rights.

Curtailment of Water Diversions

The primary objective of the State Water Board's emergency regulations is to authorize curtailment of water diversions due to decreased natural flows so water will be available for: 1) senior water right users; 2) minimum flow requirements for fish and wildlife; and 3) minimum human health and safety needs. The 2022 emergency regulations apply to the entire Russian River watershed, as opposed to the Lower Russian River watershed as occurred in the 2021 regulations. The regulations authorize the State Water Board to issue curtailment orders to water rights holders requiring the limitation or cessation of water diversion.

New in the 2022 regulations is a "curtailment status list." Specifically, the State Water Board will publish and regularly update a curtailment status list showing all water rights for which diversions are required to cease or be reduced due either to insufficient flows in the Russian River watershed or to diversions unreasonably interfering with augmented

stream flows or releases made in certain Russian River tributaries. Notably, updates to the curtailment status list constitute binding orders from the State Water Board to cease or limit diversions. Such orders are effective the day after they are posted. In other words, water rights holders are responsible for checking the curtailment status list daily in order to avoid potentially violating a curtailment order should their water right or rights be included in the curtailment list the day before.

In updating the curtailment status list, the State Water Board is required to consider the priority date of a water right, monthly water demand projections, water availability projections, and any other pertinent information. To that end, the regulations provide for the use of a Water Rights Allocation Tool, which automates calculations of water availability at certain points along the Russian River via mathematical formulation of sub-watershed supplies; user demands and dates of priority; and maximization of water allocation in accordance with the formulations document for the Water Rights Allocation Tool dated January 2022. The State Water Board would also continue to send curtailment orders to each water right holder, claimant, or agent of record on file with the board.

Riparian rights users are also subject to curtailment orders by the State Water Board if their use of water is deemed unreasonable. Specifically, "uncoordinated diversions" of surface water under riparian claims constitute an unreasonable use of water. The regulations do not specify what constitutes "uncoordinated" diversions. However, diversions pursuant to riparian rights are required by the regulations to be incorporated into the water availability analysis described above. Riparian users who disagree with an assigned water budget based on the water availability analysis and associated curtailment orders have 14 days to inform the State Water Board of their actual planned diversion and use under the riparian claim, and must include information estimating planned diversion quantities by month over the following 12 months, a summary of water uses, and previous water usage data. Riparian users who previously failed to inform the State Water Board of their planned uses, and who also failed to report diversions and use for the 2017 through 2019 period, are treated as having junior-most priority for the duration of the emergency regulations' effect.

Finally, the emergency regulations allow for voluntary water sharing agreements in lieu of a curtailment order. Specifically, water rights holders in the Russian River watershed may propose a voluntary water sharing agreement that authorizes an exception to curtailment and would thus allow a water rights holder whose water right is listed in the curtailment list to continue diverting water under the terms of the sharing agreement. The State Water Board must approve the agreement, which requires that the board find the agreement will not adversely affect the availability of water for non-signatories in Mendocino and Sonoma counties. Water made available by a signatory to a water sharing agreement is not available to non-signatories to the agreement and is treated as a prohibited unreasonable use of water.

Conclusion and Implications

The State Water Resources Control Board's Russian River emergency regulations employ new data analytics to determine water availability, maintain a list of water rights subject to curtailment, but allow for voluntary agreements that allow listed water rights holders to continue diverting under the terms of the agreement. Specifically, riparian rights holders might be best positioned to continue diverting under the curtailment orders if they can coordinate water diversions through voluntary agreements. Water rights management in the drought-stricken Russian River watershed appears to be increasingly automated yet offers the prospect of flexibility based on the negotiating acumen of individual water rights holders. The Revised Notice of Proposed Rulemaking is available at: https://www.waterboards.ca.gov/drought/russian_river/docs/2022/russian-river-revised-notice-proposed-rulemaking.pdf.
(Miles Krieger, Steve Anderson)

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES DRAFT UPDATE CENTRAL VALLEY FLOOD PROTECTION PLAN

On April 21, 2022, the California Department of Water Resources (DWR) released for public comment the Draft Update Central Valley Flood Protection Plan (Draft Update). The Draft Update sets forth DWR's and the Central Valley Flood Protection Board's (Board) approach to manage flood risk in the Central Valley over the next five years. The Central Valley Flood Protection Board held three public hearings in May 2022. The public comment period ended on June 6, 2022.

Background of the Central Valley Flood Protection Act

The Central Valley is characterized by the risk of significant flooding, and the history of managing that flood risk is at least as long as the history of European settlement of the Central Valley. In 1911, the California Legislature created the State Reclamation Board, the predecessor to the Central Valley Flood Protection Board, to manage and implement flood protection measures in the Central Valley. The mission of the Board is "to reduce the risk of catastrophic flooding to people and property within the California central valley."

The Central Valley Flood Protection Act of 2008 (Act) was part of a legislative package following Hurricane Katrina that addressed the significant vulnerability of the Central Valley to catastrophic flooding. The legislative package addressed planning and funding for a substantial effort to address concerns about flood risks, including tying land use approvals to minimum flood protection levels in urban areas. The Act was intended to address the planning side of the equation, and accordingly requires DWR to prepare a plan for managing flood risk in the Central Valley. (Wat. Code, § 9600, *et seq.*) While DWR is tasked with preparing an initial plan and updating that plan every five years, the Board is tasked with adopting the plan and its five-year updates. The Board adopted the first plan in 2012 and the first update in 2017. The Act details the specific elements required in the plan, including means for improving the performance of flood control infrastructure. The original plan and both updates have been drafted in coordination with local and regional flood management agencies.

Details of the Draft Update Central Valley Flood Protection Plan

DWR acknowledges in the Draft Update the Central Valley's ongoing risk to high floods and identifies notable events that have affected flood risk since the last update in 2017. These events include high-flow events in 2017, 2019, and 2021, ongoing drought, increased wildfire impacts, the COVID-19 pandemic, and a renewed focus on social justice issues. Framed by those events, the Draft Update addresses how climate change has increased the risk and unpredictability of major flooding. The Draft Update notes that research "suggests socially vulnerable communities face some of the highest flood risks, especially in the San Joaquin Valley," and addresses the impact of increased flood risk on vulnerable communities.

An important function of the Draft Update is to facilitate the development, operation, and maintenance of flood control infrastructure. Toward that end, the Draft Update includes an update to the State Systemwide Investment Approach (SSIA). The updated SSIA estimates the annual costs of ongoing investments—including operation and maintenance costs—to range between $315 million and $384 million. The Draft Update estimates capital investments costs of $19 to $23 billion over the next thirty years, and notes that the traditional source of funding for flood management projects has historically been general obligation bonds. The Draft Update acknowledges that reliance on bonds has had the effect of displacing general fund contributions. In light of the effect of inconsistent general fund contributions on the ability of state and local entities to consistently manage flood risk and fund operations and maintenance, the 2017 update recognizes the need for more consistent general fund appropriations. The SSIA component of the Draft Update continues that reliance on increased general fund appropriations, but also identifies a number of other funding sources, including federal programs, local matches for capital investments, and local assessments for operations and maintenance costs. The Draft Update encourages the development of new funding sources, such as formation of a Sacramento/San Joaquin Drainage District, adoption of a contemplated State River Basin As-

sessment or tax, and development of a State Flood Insurance Program to address the high costs of insurance premiums under the National Flood Insurance Program.

DWR issued the Draft Update on April 21, 2022. The Board thereafter scheduled three public hearings on the Draft Update. The Board accepted public comments until June 6, 2022. No timeline for release of a final draft has been announced, but the Act requires the Board to adopt an updated plan in 2022.

Board President Issues Statement on the Draft Update

Jane Dolan, president of the Board, stated the following about the Draft Update:

> It's been a decade since the Board adopted the first Central Valley Flood Protection Plan. Since 2007, California has invested $3.6 billion in managing floods, with another $500 million recently committed. We've reduced flood risk, but we must double down. It's not a matter of 'if' but 'when' we experience extreme flood, just as climate change has pushed us beyond the historical record on drought.

Conclusion and Implications

Through the Draft Update, the Department of Water Resources and the Central Valley Flood Protection Board acknowledge the increased risk posed by climate change and the state's policy of climate change resilience, and attempt to reconcile the particular risks of flood on vulnerable communities in the Central Valley. The final shape of those efforts remains pending, and the Board has until the end of this year to adopt an updated plan.
(Brian Hamilton, Meredith Nikkel)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS FOREST SERVICE FAILED TO EXPLAIN HOW PROJECT COMPLIED WITH THE ROADLESS AREA CONSERVATION RULE

Los Padres ForestWatch v. U.S. Forest Service, 25 F.4th 649 (9th Cir. 2022).

The State of Alaska and Safari Club International (a hunting organization) filed suits under various federal statutes against the Secretary of the Interior, seeking declaratory relief, injunctive relief, and *vacatur* of portions of the U.S. Fish and Wildlife Service's (FWS) "Kenai Rule," which limited certain hunting practices in the Kenai National Wildlife Refuge, even though the State of Alaska had approved them. After the cases were consolidated and environmental organizations intervened, the U.S. District Court entered summary judgment for the FWS. After Alaska and the hunting organization appealed, the Ninth Circuit affirmed.

Factual and Procedural Background

In 2013, the State of Alaska Board of Game expanded the availability of brown bear hunting permits, extended the brown bear hunting season, increased relevant harvest limits, and approved the taking of brown bears through baiting at registered black bear stations in the Kenai Refuge. The Board of Game also opened a specific area of the Kenai Refuge called the Skilak Wildlife Recreation Area (WRA) to the seasonal hunting of coyotes, lynx, and wolves. The FWS disagreed with these actions and acted to block the Board of Game's authorization of brown bear baiting at black bear stations in 2013 and 2014. It also closed the Skilak WRA to the newly approved coyote, lynx, and wolf hunting before the season started. In May 2016, it then adopted a rule to codify its ban on baiting of Kenai brown bears and its closing of the Skilak WRA to coyote, wolf, and lynx hunts. Under the National Environmental Policy Act (NEPA), FWS found that the Kenai Rule fit the agency's categorical exclusion for regulations that maintain permitted levels of use.

The State of Alaska and Safari Club International separately sued the Secretary of the Interior under the theory that FWS violated the Alaska National Interest Lands Conservation Act (ANILCA), National Wildlife Refuge System Improvement Act of 1997 (Improvement Act), Administrative Procedure Act (APA), and NEPA by enacting the Kenai Rule. The premise of the lawsuits was that the State of Alaska, and not the federal government, has the ultimate regulatory authority over hunting on federal lands in Alaska. The U.S District disagreed and entered summary judgment in favor of FWS. Alaska and Safari Club International then appealed

The Ninth Circuit's Decision

The ANILCA Claims

The Ninth Circuit first addressed Alaska and Safari Club's arguments that FWS exceeded its statutory authority in enacting the Kenai Rule. First, they asserted that the Alaska Statehood Act and ANILCA strip FWS of the power to restrict the means, methods, or scope of State-approved hunting on federal lands in Alaska. Second, they contended that even if FWS could preempt the State's hunting regulations on federal lands in Alaska, the Kenai Rule violated a 2017 congressional joint resolution revoking a Refuges Rules, which had expanded the ban on brown bear hunting to all Alaskan wildlife refuges and restricted certain State-authorized hunting.

The Ninth Circuit disagreed with these arguments, finding that ANILCA gives the Secretary of the Interior the power to manage the public lands in Alaska, and all hunting therein is to be carried out in accordance with ANILCA and other applicable state and federal law. In this context, the Ninth Circuit found, hunting within the Kenai Refuge is subject to federal law, including any regulations imposed by the Secretary of the Interior under the delegated statutory authority to manage federal lands. The Ninth Circuit

also rejected the argument that the 2017 congressional joint resolution canceling the Refuges Rule substantively amended ANILCA and other statutes such that it voided the Kenai Rule.

The Improvement Act Claims

The Ninth Circuit next addressed Safari Club's claim that the Skilak WRA aspect of the Kenai Rule violated the Improvement Act by disfavoring the compatibility priority use of hunting relative to the other compatibility priority uses and compatibility non-priority uses of the Skilak WRA. The Ninth Circuit again disagreed, finding that the Improvement Act does not require FWS to allow all state-sanctioned hunting throughout the Kenai Refuge. Nor did the Improvement Act's statement that FWS hunting regulations "shall be, to the extent practicable, consistent with [s]tate fish and wildlife laws, regulations, and management plans" alter this analysis. The Ninth Circuit found that ANILCA authorizes FWS to enact regulations preempting State-approved hunting in the Kenai Refuge, and when ANILCA and the Improvement Act are in tension, the former prevails.

The APA Claims

The Ninth Circuit next addressed a series of arguments that FWS violated the APA by acting arbitrarily and capriciously in issuing the Kenai Rule. These claims are described and addressed in detail in the Ninth Circuit opinion. Regarding the brown bear baiting aspect of the Kenai Rule, the State and Safari Club claimed that FWS acted arbitrarily and capriciously because: 1) the Rule conflicts with a different regulation; 2) FWS improperly considered a predator control factor not contemplated by Congress; 3) the Rule's conservation basis was improper; and 4) the Rule's public safety justification was not grounded in evidence in the record and constituted an unexplained change in position by FWS.

Regarding the Skilak WRA hunting part of the Kenai Rule, Safari Club also argued that: 1) FWS did not articulate any sufficient basis for banning coyote, lynx, and wolf hunting in the Skilak WRA; 2) the record undercuts FWS' finding that hunting in the Skilak WRA will curb other recreation; 3) FWS did not explain the basis for its changed position on coyote, lynx, and wolf hunting within the Skilak WRA; and 4) the U.S. District Court applied the incorrect legal standard in disposing of the APA claims concerning the Skilak WRA. Finally, Safari Club also claimed that enactment of the Kenai Rule was procedurally improper because FWS did not make necessary predicate findings that the baiting of brown bears and the hunting of coyotes, lynx, and wolves in the Skilak WRA were incompatible with refuge purposes The Ninth Circuit disagreed with all of these claims, in each instance finding that FWS had acted properly.

The NEPA Claims

Finally, the Ninth Circuit addressed Alaska and Safari Club's NEPA arguments. First, they claimed that the Kenai Rule changed the environmental status quo in the Kenai Refuge such that NEPA review is required. Second, they claimed that FWS improperly fulfilled its NEPA obligations for the Kenai Rule through categorical exclusions. Even assuming that NEPA's procedures applied to the Kenai Rule, the Ninth Circuit found that the disputed parts of the Kenai Rule codified longstanding constraints on hunting in the Kenai Refuge, and the fact that these limitations changed from state to federal restrictions did not alter the permitted levels of use in the Kenai Refuge. Within the context, the Ninth Circuit concluded, FWS had sensibly decided that the Kenai Rule fit a categorical exclusion for:

> . . .issuance of special regulations for public use of [FWS]-managed land, which maintain essentially the permitted level of use and do not continue a level of use that has resulted in adverse environmental impacts.

The Ninth Circuit also rejected the claim that any "extraordinary circumstances" existed to preclude reliance on a categorical exclusion, rejecting the claim that public controversy constituted such circumstance

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding a variety of federal statutes as they regard the management of National Wildlife Refuge lands in Alaska, including a detailed analysis of various claims made under the APA. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/04/18/21-35030.pdf.
(James Purvis)

NINTH CIRCUIT FINDS U.S. FISH AND WILDLIFE SERVICE ACTED PROPERLY IN ADOPTING 'KENAI RULE,' LIMITING HUNTING PRACTICES IN THE KENAI NATIONAL WILDLIFE REFUGE

Safari Club International v. Haland, 31 F.4th 1157 (9th Cir. 2022).

The State of Alaska and Safari Club International (a hunting organization) filed suits under various federal statutes against the Secretary of the Interior, seeking declaratory relief, injunctive relief, and vacatur of portions of the U.S. Fish and Wildlife Service's (FWS) "Kenai Rule," which limited certain hunting practices in the Kenai National Wildlife Refuge, even though Alaska had approved them. After the cases were consolidated and environmental organizations intervened, the U.S. District Court entered summary judgment for the FWS. After Alaska and the hunting organization appealed, the Ninth Circuit affirmed.

Factual and Procedural Background

In 2013, the State of Alaska board of game (Board) expanded the availability of brown bear hunting permits, extended the brown bear hunting season, increased relevant harvest limits, and approved the taking of brown bears through baiting at registered black bear stations in the Kenai Refuge. The Board also opened a specific area of the Kenai Refuge called the Skilak Wildlife Recreation Area (WRA) to the seasonal hunting of coyotes, lynx, and wolves. The FWS disagreed with these actions and acted to block the Board's authorization of brown bear baiting at black bear stations in 2013 and 2014. It also closed the Skilak WRA to the newly approved coyote, lynx, and wolf hunting before the season started. In May 2016, it then adopted a rule to codify its ban on baiting of Kenai brown bears and its closing of the Skilak WRA to coyote, wolf, and lynx hunts. Under the National Environmental Policy Act (NEPA), FWS found that the Kenai Rule fit the agency's categorical exclusion for regulations that maintain permitted levels of use.

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ANILCA Claims

The Ninth Circuit first addressed Alaska and Safari Club's arguments that FWS exceeded its statutory authority in enacting the Kenai Rule. First, they asserted that the Alaska Statehood Act and ANILCA strip FWS of the power to restrict the means, methods, or scope of state-approved hunting on federal lands in Alaska. Second, they contended that even if FWS could preempt the state's hunting regulations on federal lands in Alaska, the Kenai Rule violated a 2017 congressional joint resolution revoking a Refuges Rules, which had expanded the ban on brown bear hunting to all Alaskan wildlife refuges and restricted certain state-authorized hunting.

The Ninth Circuit disagreed with these arguments, finding that ANILCA gives the Secretary of the Interior the power to manage the public lands in Alaska, and all hunting therein is to be carried out in accordance with ANILCA and other applicable state and federal law. In this context, the Ninth Circuit found, hunting within the Kenai Refuge is subject to federal law, including any regulations imposed by the Secretary of the Interior under the delegated statutory authority to manage federal lands. The Ninth Circuit also rejected the argument that the 2017 congressional joint resolution canceling the Refuges Rule substantively amended ANILCA and other statutes such that it voided the Kenai Rule.

Improvement Act Claims

The Ninth Circuit next addressed Safari Club's claim that the Skilak WRA aspect of the Kenai Rule

violated the Improvement Act by disfavoring the compatibility priority use of hunting relative to the other compatibility priority uses and compatibility non-priority uses of the Skilak WRA. The Ninth Circuit again disagreed, finding that the Improvement Act does not require FWS to allow all state-sanctioned hunting throughout the Kenai Refuge. Nor did the Improvement Act's statement that FWS hunting regulations "shall be, to the extent practicable, consistent with [s]tate fish and wildlife laws, regulations, and management plans" alter this analysis. The Ninth Circuit found that ANILCA authorizes FWS to enact regulations preempting state-approved hunting in the Kenai Refuge, and when ANILCA and the Improvement Act are in tension, the former prevails.

APA Claims

The Ninth Circuit next addressed a series of arguments that FWS violated the APA by acting arbitrarily and capriciously in issuing the Kenai Rule. These claims are described and addressed in detail in the Ninth Circuit opinion. Regarding the brown bear baiting aspect of the Kenai Rule, the state and Safari Club claimed that FWS acted arbitrarily and capriciously because: 1) the Rule conflicts with a different regulation; 2) FWS improperly considered a predator control factor not contemplated by Congress; 3) the Rule's conservation basis was improper; and 4) the Rule's public safety justification was not grounded in evidence in the record and constituted an unexplained change in position by FWS.

Regarding the Skilak WRA hunting part of the Kenai Rule, Safari Club also argued that: 1) FWS did not articulate any sufficient basis for banning coyote, lynx, and wolf hunting in the Skilak WRA; 2) the record undercuts FWS' finding that hunting in the Skilak WRA will curb other recreation; 3) FWS did not explain the basis for its changed position on coyote, lynx, and wolf hunting within the Skilak WRA; and 4) the U.S. District Court applied the incorrect legal standard in disposing of the APA claims concerning the Skilak WRA. Finally, Safari Club also claimed that enactment of the Kenai Rule was procedurally improper because FWS did not make necessary predicate findings that the baiting of brown bears and the hunting of coyotes, lynx, and wolves in the Skilak WRA were incompatible with refuge purposes The Ninth Circuit disagreed with all of these claims, in each instance finding that FWS had acted properly.

NEPA Claims

Finally, the Ninth Circuit addressed Alaska and Safari Club's NEPA arguments. First, they claimed that the Kenai Rule changed the environmental status quo in the Kenai Refuge such that NEPA review is required. Second, they claimed that FWS improperly fulfilled its NEPA obligations for the Kenai Rule through categorical exclusions. Even assuming that NEPA's procedures applied to the Kenai Rule, the Ninth Circuit found that the disputed parts of the Kenai Rule codified longstanding constraints on hunting in the Kenai Refuge, and the fact that these limitations changed from state to federal restrictions did not alter the permitted levels of use in the Kenai Refuge. Within the context, the Ninth Circuit concluded, FWS had sensibly decided that the Kenai Rule fit a categorical exclusion for:

> . . .issuance of special regulations for public use of [FWS]-managed land, which maintain essentially the permitted level of use and do not continue a level of use that has resulted in adverse environmental impacts.

The Ninth Circuit also rejected the claim that any "extraordinary circumstances" existed to preclude reliance on a categorical exclusion, rejecting the claim that public controversy constituted such circumstance.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding a variety of federal statutes as they regard the management of National Wildlife Refuge lands in Alaska, including a detailed analysis of various claims made under the APA. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/04/18/21-35030.pdf.
(James Purvis)

Editor's Note: This is a separate Ninth Circuit decision from the *Los Padres* decision.

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT AFFIRMS CITY'S DISCRETION TO ISSUE PERMIT IN PUBLIC RIGHT OF WAY

Howard v City of Alameda, Unpub., Case No. A159622 (1st Dist. Apr. 27, 2022).

The First District Court of Appeal in *an upublished opinion*, affirmed the trial court's decision upholding discretionary approval by the City of Alameda (City) of a permit for a fence located within the public right of way portion of property adjacent to the property of plaintiff Mortimer Howard (Howard).

Factual and Procedural Background

Howard owns property diagonally across an intersection from Schneider. In 2015 Schneider erected a gated wooden fence along the street frontage enclosing a garden to replace an existing wooden fence of about the same size but with a newer larger gate and different design. The prior fence had been there for 25 years. Almost immediately after the fence was replaced, Howard began complaining to the City that the fence was constructed on the public right of way adjacent to the public sidewalk and encroaching three feet into the right of way.

The City did not respond to Howard, but began communicating with Schneider requesting that he remove all encroaching objects and vegetation. The City claimed that its municipal code prohibited any person from placing any object obstructing the free use or passage of City streets, ways or sidewalks.

After a code enforcement officer informed the City's department of public works (Department) that the fence encroached into the right of way and would need to be removed if not permitted, the Department's director advised Schneider that he could request an encroachment permit. Schneider and the City communicated throughout the year 2016 regarding permitting for the fence rather than its removal.

Schneider worked with the City to obtain an encroachment permit (Permit) as of November 21, 2016, which Permit was expressly temporary in nature with an indefinite time limit and revocable by the Director at any time. The Permit contained conditions regarding the size and location of plantings on the street side of the fence and regarding City permission for any alterations to the fence.

Meanwhile Howard had become impatient with the City's lack of communication and hired counsel to file a writ of mandate petition against the City to require the City to take enforcement action against Schneider in September 2016 (First Petition). The City informed Howards of the Permit on November 30, 2016, and Howard eventually dismissed the First Petition after Schneider filed a demurrer and the City filed a motion for judgment on the pleadings based upon the Permit.

In February 2018, Howard filed a second petition for writ of mandate against the City manager challenging the issuance of the Permit (Second Petition). In his trial brief, Howard argued that the Permit was void because the City lacked the authority to issue the Permit. Alternatively, Howard alleged that the City had abused its discretion in granting the Permit.

The City responded that it had authority under its municipal code (AMC) to grant the permit and that the permitting decision fell within its police power. The City acknowledged that there was no precedent for the Permit, but that the Permit was not unlawful or improper. The City also argued that the Second Petition was barred due to Howard's failure to appeal the Permit's issuance to the City Council pursuant to the AMC.

On December 16, 2019, the trial court issued its order denying Howard's Second Petition. The trail court found that the AMC authorized the City to grant the Permit and that the City had exercised its authority consistent with state law. The trial court also concluded that the City did not abuse its discretion in issuing the Permit. As a separate and independent ground for denying the Second Petition, the trial court found that Howard had failed to exhaust his administrative remedies.

The Court of Appeal's Decision

The Court of Appeal held that Howard was not required to exhaust his administrative remedies, but affirmed that the City had the authority to issue the Permit and had not abused its discretion in doing so.

The Public Interest Exception to the Exhaustion Doctrine

The doctrine of exhaustion of administrative remedies is a fundamental rule of procedure under which relief must be sought form the administrative body and this remedy exhausted before the courts will act. Howard does not dispute that he did not appeal the permitting decision to the city council. Howard asserts that he is excused form compliance with the exhaustion doctrine under the public interest exception because he was not a party in the administrative proceeding and because he is seeking to enforce rights which he holds as a member of the affected public.

Howard did not have notice of the administrative proceedings leading up to the granting of the Permit. And Howard did not receive timely notice after the Permit was issued, as the City's counsel sent his attorney a copy of the Permit the day before the ten-day appeal period expired and did not contain any information about the right to an administrative appeal. And Howard was asserting his claims on behalf of the general public. Under these circumstances, the exhaustion requirement was excused under the public interest exception.

No Ministerial Duty to Abate Public Encroachments

Applying principles of statutory interpretation to the AMC, a city is not mandated to perform a duty unless it has an unqualified mandatory duty to do so. While the City has the authority to prosecute encroachment violations, it does not have an unqualified mandatory duty to do so. The City is not forbidden from crafting a legislatively approved permit scheme.

Although the City Charter and AMC state that the City manager and City attorney shall prosecute all violations of the AMC, that does not necessarily create a mandatory duty when there may be other factors that indicate that apparent obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion.

The AMC section regarding encroachments makes then unlawful and a public nuisance, but expressly states that they "may" be abated. It does not mandate that they do so. The AMC also provides an exception to unlawful encroachments by a provision allowing for an encroachment permit. Thus, the plain language of the AMC indicates that permitted encroachments are not considered illegal public nuisances within the meaning of the AMC.

In sum, while the relevant provisions of the AMC clearly authorize the City to take enforcement actions to abate encroachments that are placed within the public right of way, these provisions do not create a ministerial duty.

No Abuse of Prosecutorial Discretion

Even if the AMC provisions could be read to mandate City enforcement, without permitting, mandamus would still be inappropriate to compel prosecution because prosecution involves the exercise of discretion that a court cannot compel absent serious abuse. A court cannot compel the exercise of the City's police power in a particular manner without violating separation of powers principles. It is only when a city enforces its regulations in a manner prohibited by law that a court may interfere and enjoin the enforcement.

Courts may override prosecutorial discretion only where a statute mandates action without regard to the prosecuting authority's own opinion or judgment. There was no such authority in this case.

Director's Proper Evaluation of the Permit Application

Howard contends that the Director improperly issued the Permit because he did not take into consideration the safety, planning requirements, and needs of the City under the AMC in issuing the Permit. As the moving party, it was Howard's burden to set forth evidence demonstrating that the Director abused his discretion in issuing the Permit.

It is presumed that official duty has been regularly performed. Howard concedes that the prior fence had been in the same location for many years and that the fence did not encroach on the paved portion of the sidewalk. Howard failed to identify any aspect of the fence that imperils the safety, planning requirements, and needs of the City. Should Howard's speculation

become realized, the City has the right to revoke the permit at any time.

Conclusion and Implications

This opinion by the First District Court of Appeal is concerning in that it opens up a broad right of challenge to a right-of-way encroachment permit by a clearly interested party who skirted the administrative process to file a later lawsuit under the public interest exception. However, the door is then almost slammed shut because the right to cause enforcement against the encroachment must be clearly spelled out in the applicable code and the right to challenge an encroachment permit is limited to safety planning requirements and needs of the city. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/A159622.PDF.
(Boyd Hill)

SECOND DISTRICT COURT HOLDS CITY'S BAN ON SHORT-TERM RENTALS IN COASTAL ZONE REQUIRED COASTAL COMMISSION APPROVAL

Keen v. City of Manhattan Beach, 77 Cal.App.5th 142 (2nd Dist. 2022).

In an April 6, 2022 decision, the Second District Court of Appeal upheld a trial court order enjoining the City of Manhattan Beach (City) from enforcing two ordinances that banned short-term rentals in the City's coastal zone. The Court of Appeal held that the City's existing zoning code authorized short-term rentals, therefore any such ban constituted an amendment to the code that required approval from the California Coastal Commission (Commission).

Background

The City's Coastal Zoning Ordinances

The Coastal Act requires coastal governments to develop a Local Coastal Program (LCP). The LCP must contain two parts: 1) a land use plan and 2) a local implementing program. The implementing program consists of zoning ordinances, maps, and other actions. The Commission must review the program and if it finds the program conforms to Coastal Act policies, it will approve it. Once approved, the local government may amend the program, but only if it submits any amendments to the Commission for subsequent approval. Absent Commission approval, program amendments have no force.

The Commission certified the City of Manhattan Beach's land use plan in 1981, and the local implementing program and underlying zoning ordinances in 1994. In the decades that followed, people rented residential units in the City on both long- and short-term bases. The City knew about this practice but only rarely received complaints about those properties.

The City's Short-Term Rental Ban Ordinances

In 2015, following the advent and popularity of online platforms such as AirBnB® and VRBO®, the City's short-term rental landscape began to noticeably change. Though the City had not received a "tremendous" number of complaints, it still sought to take an active stance on the number of short-term rentals. The City claimed its current zoning ordinances—including those enacted with the LCP in 1994—implicitly prohibited short-term rentals. The City Council thus passed two ordinances that reiterated the City's supposedly existing ban on short-term rentals (2015 ordinances).

The resolved to submit the ordinance that affected the coastal zone to the Coastal Commission for certification. The City met with Commission staff, who recommended that the City allow some short-term rentals to facilitate visitor access to the coastal zone. Shortly thereafter, the Commission wrote to all coastal cities, stating any municipal regulation of short-term rentals in the coastal zone required cooperation with the Commission. The Commission's 2016 letter explained that short-term rentals facilitate the Coastal Act's coastal access goals by providing an important source of visitor accommodations. The

City subsequently withdrew its 2015 request for approval, stating that the ordinance worked no change in the existing law.

In 2019, the City council adopted an ordinance that created an enforcement mechanism for its short-term rental ban (2019 ordinance). The ordinance required online short-term rental platforms to inform the City of "who was renting out what," and prohibited the platforms from collecting booking fees. Shortly thereafter, short-term rentals in the City markedly dropped from 250 to 50 units.

At the Trial Court

Petitioner, Darby Keen, owned property in the City's coastal zone that he rented on a short-term basis. In July 2019, the City sent Keen a Notice of Violation of the City's short-term rental ban ordinances. In response, Keen petitioned for a writ of mandate seeking to enjoin the City from enforcing the 2015 and 2019 ordinances. At the trial court, the City conceded that any new prohibition on short-term rentals would require Commission approval, but nevertheless maintained that its 2015 ordinances merely reiterated what the Commission had approved in 1994.

The trial court disagreed, finding that neither the history or text of the ordinance, nor the record, supported the City's position that it had always banned short-term (*i.e.*, fewer than 30 days) rentals. The court thus held that the City's ban functioned as a "new amendment" under the Coastal Act that required Commission approval, for which it did not have. The court enjoined enforcement of the ban on short-term rentals pending Commission approval. The City appealed.

The Court of Appeal's Decision

The City's Ordinance Has Always Allowed Short-Term Rentals

Under an independent standard of review, the Second District Court of Appeal agreed with the trial court and held that the plain language of the City's ordinance had always allowed short-term (and long-term) residential rentals. The City's ban on short-term rentals via the 2015 ordinances amended the status quo, thereby requiring Commission approval, which the City never got. For these reasons, the City's ban was invalid.

The only issue the court considered was whether the City's 1994 ordinances permitted short-term rentals. The statutory history of the ordinances demonstrated that they did. The court noted that the City had always permitted renters, regardless of whether they rented on a "long-term" vs. "short-term" basis. Absent some legal distinction, the law must treat long-term rentals as short-term rentals—*i.e.*, if long-term rentals are legal, so too are short-term rentals.

Because the ordinances offered no textual basis for temporally distinguishing between rental duration, the court held the City could not credibly insist that those ordinances have "always" banned short-term rentals. The court found support in the text of the ordinance, which authorized construction and habitation of "Single-Family Residential" and "Multi-Family Residential" buildings in residential zones. The ordinance's use of the word "residence" did not imply a minimum length of occupancy—likely because it is possible to reside somewhere for a night, week, or lifetime. The City failed to point to a legally precedented way to draw a line between the number of days that makes a building a "residence" vs. a non-residence. For these reasons, and in accord with common experience, the City's zoning code permits individuals to rent a house or apartment, regardless of length of stay.

The court also found the City's proposed distinction of short-term rentals as "Hotels, Motels, and Time-Share Facilities" unavailing. The ordinance defined such facilities as those that offer lodging on a weekly-or-less basis and as having kitchens in no more than 60 percent of the units. Here, on the other hand, the short-term rentals that the City sought to prohibit included single- and multi-family residences, which conventionally have kitchens. Earlier ordinances that pre-dated the 1994 ordinance did not change this distinction, nor were they relevant.

For these reasons, the court held the Commission-certified ordinances expressly authorized rentals of single- and multi-family residences in residential zones for any duration, including short-term rentals of the AirBnB variety. The City's new ban on those rentals constituted an amendment thus requiring Commission approval.

The City's Remaining Arguments Lack Merit

The court also rejected the City's four other outstanding arguments. First, as to the City's argument

that the court's statutory interpretation would be an affront to the doctrine of "permissive zoning"—*i.e.*, zoning ordinances prohibit any use they do not permit—the court held that the City's ordinances *do* permit short-term rentals in residential zones, and thus did not run afoul of the doctrine.

Second, the court was not persuaded by the claim that the City's interpretation of its own ordinance was owed deference. Here, deference was not an issue—the court gave "simple words their obvious meaning" and the City's "contrary interpretations" were "unreasonable."

Third, the court debunked the City's reliance on recent state statutes, which characterized short-term rentals as commercial uses. The court explained that those statutes dealt with different issues than the municipal ordinances here, and thus not germane to the court's interpretation

Finally, the court rejected the City's contention that the trial court interpreted the Coastal Act as to require the City to provide short-term rentals in residential areas. Here, the issue centered on the Commission's approval of amended laws within the coastal zone—not whether the Commission has required the City to allow short-term rentals. As evidenced by the record, the Commission did not review the City's ban on short-term rentals because the City had incorrectly maintained that the ban was "nothing new." Because the ban is new, it requires Commission approval. Thus, there was nothing erroneous about the trial court's interpretation of the Coastal Act.

Conclusion and Implications

The Second District Court of Appeal's opinion offers a direct interpretation of a zoning ordinance that has plainly and historically allowed such uses. The court's pointed analysis cuts through layers of nuanced arguments to find that that the City of Manhattan Beach's new ban on short-term rentals within the coastal zone required Coastal Commission approval. The court's reasoning hinged on the existing ordinances' silence on "length of stay"—a term that would otherwise distinguish a banned "short-term" rental from an authorized "long-term" rental. The court's decision follows other recent opinions that have been apprehensive to entertain outright bans on short-term rentals, particularly when such bans lack any basis in the underlying zoning code. (*See, e.g., Protect Our Neighborhoods v. City of Palm Springs*, 73 Cal.App.5th 667 (2022); *People v. Venice Suites, LLC*, 71 Cal.App.5th 715 (2021).)

A copy of the Second District's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B307538.PDF.
(Bridget McDonald)

FOURTH DISTRICT COURT UPHOLDS SUMMARY JUDGMENT CANCELLING LAND PURCHASE AGREEMENT ASSOCIATED WITH UNIT PROJECT

Kingsland Investment v. Verdi Tanriverdi, Unpub. Case No. G060272 (4th Dist. Apr. 5, 2022).

In an *unpublished* decision filed on April 5, 2022, the Fourth District Court of Appeal upheld a trial court judgment granting a buyer's motion for summary judgment cancelling an agreement to purchase 158 residential lots and ordering the seller to return the buyer's $52,000 deposit. A preliminary title report uncovered major concerns regarding seller's title to the property, including a $11,970,000 deed of trust lien, an option in favor of a third party, and a recorded notice of violation. Despite these issues, seller argued that buyer waived their right to cancel the agreement because they did not provide notice of cancellation within a 17-day due diligence and review window in the agreement. The court rejected seller's claims, finding that seller failed to provide good and marketable title to the buyer as required by law. Because the seller could not deliver insurable title to the property, escrow could not close and the intent of the agreement could not be realized, making the agreement unenforceable.

Factual and Procedural Background

In January of 2019, plaintiff buyer and defendant seller executed a vacant land purchase agreement and joint escrow instructions for the sale of 158 residential lots in Apple Valley. The agreement required the buyer to transfer an initial deposit of $52,000 to an escrow agent and required the defendant to secure a title insurance policy. The purchase and sale agreement also required the seller to provide the buyer with a current preliminary title report.

One provision of the agreement stated that seller had 90 days after execution to deliver to buyer all relevant reports, disclosures and information including a preliminary title report and insurance policy. Buyer had 17 days after execution to complete all buyer investigations and approve all disclosures, reports, and other information required from the seller. However, a contradictory provision of the agreement provided that even after buyer's 17-day review period, buyer could remove contingencies or cancel the agreement.

In May of 2019, buyer filed a complaint alleging breach of contract and seeking declaratory relief. Buyer alleged that it properly exercised its right to cancel the agreement and that seller improperly refused to execute the cancellation instructions and return buyer's $52,000 security deposit. Seller then filed a cross-complaint against the buyer and two other parties. Seller alleged that it was entitled to retain the buyer's security deposit as liquidated damages because the buyer had no right to cancel the agreement.

In February 2020, buyer moved for summary judgment arguing that it was entitled to cancel the agreement because the property was divided in violation of the Subdivision Map Act, that defendant failed to obtain a public report in violation of the Subdivided Lands Act, and that seller's failure to meet other contingencies authorized cancellation of the agreement.

In its moving papers, buyer established that on January 28, 2019, the title company issued a preliminary title report indicating that seller was not the owner of record and that the property was subject to an $11,970,000 deed of trust lien. The preliminary title report also indicated there was an option on the property in favor of a third party and a recorded notice of violation. The title company communicated to the seller that for it to issue a title insurance policy, seller would need to prevail in a quiet title action with the expiration of the related appeal period. On April 15, 2019, buyer cancelled the agreement citing various concerns regarding seller's ability to comply with the agreement.

Seller opposed buyer's motion for summary judgment arguing that although resolution of title and other issues was a contingency of the agreement, buyer's failure to cancel the agreement in writing within the 17-day review window effectively waived that contingency.

The trial court granted buyer's motion for summary judgment, noting that because the seller did not have clear and insurable title to the property, title could never transfer to buyer and the intent of the agreement could not be realized. Buyer was entitled to cancel the agreement as a matter of law with the seller obligated to return buyer's deposit.

The Court of Appeal's Decision

The Court of Appeal began by agreeing with the trial court that considering all of the evidence, including significant title issues, the "intent of the [a] greement could not be recognized" and was therefore unenforceable.

Seller argued that buyer could not cancel the the agreement because buyer:

> . . .effectively waived the title contingency by remaining silent and failing to cancel the agreement within the permitted time period.

Seller also raised constitutional and evidentiary claims challenging the superior court's decision.

The Fourth District Court noted that a seller of real property has a duty to provide good and marketable title to a buyer and seller could not do so here. As a practical matter, even if the parties continued to negotiate, escrow would never close given the significant issues surrounding the seller's claim of ownership of the property.

Even if the agreement were enforceable, the court recognized that the above-referenced contradictory provision in the agreement expressly allowed the buyer to cancel the agreement after the 17-day review period based on seller's failure to deliver contingencies and clear title.

Conclusion and Implications

Although a contractual interpretation and enforceability case, the Kingsland decision highlights some of

the basic title and contingency issues that can impact land use related transactions. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/G060272.PDF. (Travis Brooks)

FIRST DISTRICT COURT ADDRESSES ISSUE EXHAUSTION DOCTRINE, ENDANGERED SPECIES AND CEQA ISSUES FOR PROJECT IN THE CITY OF LIVERMORE

Save the Hill Group v. City of Livermore, 78 Cal.App.5th 1092 (1st Dist. 2022).

In a decision filed on March 30, 2022, the First District Court of Appeal reversed a trial court decision upholding a Reissued Final Environmental Impact Report (RFEIR) for a project proposing 44-single family homes on a 32-acre site in the City of Livermore's Garaventa Hills area. The project site is highly valuable as a habitat for special status species and is one of the last remaining undeveloped areas of its kind in the city. The Court Of Appeal agreed with the trial court that the RFEIR's analysis of the "no project alternative" was inadequate because it failed to include relevant information about the feasibility of purchasing and preserving the property. Without this information the city was unable to make an informed, reasoned decision as to whether the project should go forward. Regarding issue exhaustion, the court disagreed with the trial court that petitioners failed to exhaust their administrative remedies. Although petitioners did not specifically refer to the RFEIR's no-project alternative analysis, public comments did voice support for preserving the project site as open space, and questions regarding the feasibility of preserving the project site were raised in response by the city council. The issue exhaustion doctrine is not rigid and has exceptions, one of which—the futility exception—applied here.

Factual and Procedural Background

Developer and real party in interest sought for more than ten years to develop a 32-acre site in the environmentally sensitive Garaventa Hills area of Livermore. As initially proposed, the project included 76 units but was reduced to 44 in response to city council and public opposition because of the project site's unique value as a habitat and one of the last remaining undeveloped areas in the City. The city council approved the project in 2019 and certified a RFEIR.

The "moderately steeply sloping" project site was characterized by two centrally located knolls and an intermittent stream, the Altamont Creek at its southern boundary. The project site provided habitat for a number of special-status species such as the California red-legged frog, tiger salamander, burrowing owl, kit fox, and others. The project site was also hydrologically connected to the Springtown Alkali Sink, a unique wetlands area owned and managed by Wetlands Exchange in cooperation with the city and state and federal wildlife agencies. Grading of the project site could affect the quantity, timing, and quality of precipitation needed to allow the ecosystem to function.

After project approval and certification of the project RFEIR, petitioners filed a writ of mandate challenging the RFEIR and project approvals. The superior court found the:

RFEIR's determination of infeasibility for the no-project alternative inadequate because it failed to disclose and evaluate the possibility of using existing mitigation funding to make the no-project alternative feasible.

However, the trial court determined based on supplemental briefing that petitioner failed to exhaust their administrative remedies on this issue, thus failing to preserve this argument.

The Court of Appeal's Decision

Petitioner's Claims Were Not Barred For Failure to Exhaust Administrative Remedies

The Court of Appeal reversed the trial court's finding that failure to exhaust administrative remedies

barred petitioner's challenge to the RFEIR's "no-project" alternative analysis. As the court noted:

> CEQA does not require public interest groups such as [petitioner], which are often unrepresented by counsel at administrative hearings, to do more than fairly apprise the agency of their complaints in order to preserve them for [litigation].

The court then concluded that:

> . . .on this record [that petitioner's] objections during the administrative process met this standard of fairly apprising the City of the RFEIR's failure to adequately flesh out the feasibility of not going forward with the Project.

The Court of Appeal cited several examples of public comments offered during the administrative process where commenters inquired about alternative locations for the project and voiced support for preserving the project site as open space in perpetuity. In response to many of these comments, city councilmembers asked whether the city could buy the site, whether anybody had offered to, and whether funds were available to do so. The City's attorneys responded that the city could not consider such options as such options were not before the council, and that such a rezoning to permanent open space would likely trigger a takings lawsuit. As the court noted:

> [t]hese discussions show the City Council was very much focused, at [petitioner's] prompting, on the feasibility of a no-project alternative. While the superior court discounted them for not specifically referring to the RFEIR's project alternatives evaluation, we conclude they sufficed to fairly apprise the City of its position.

The court also recognized that the exhaustion doctrine "has not hardened into inflexible dogma" and that the doctrine contains its own exceptions. One of these exceptions is commonly referred to as the "futility exception" to the exhaustion doctrine, which applied here. While petitioners:

> . . .did not frame [their] urging in the language of the RFEIR's no-project alternative, the evidence is overwhelming that, had it done so, the result would have been the same.

The court determined that based on the record, the city had no intention of considering the no project alternative, and declined to apply the exhaustion doctrine to bar petitioner's lawsuit.

RFEIR's 'No-Project' Alternative Analysis Was Inadequate

The court then found that the RFEIR's "no-project" alternative analysis was inadequate. Under the California Environmental Quality Act (CEQA), the no-project alternative analysis must:

> . . .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 city recognized the no-project alternative as environmentally superior to the project, but rejected that alternative because it would not meet the project's objectives of providing housing and because the site was zoned for residential uses with no purchase or preservation proposals known at the time. However, the RFEIR failed to disclose that there was up to $11 million in funding available by way of two settlement agreements that the city was party to that could be used to purchase and preserve the project site. The project site would be highly eligible for such funds based on its unique and characteristics as quality wildlife habitat. The court noted that although the site was zoned for residential, the site's zoning designation was not unalterable.

Considering the above, the court agreed with petitioner that the RFEIR failed to include relevant information discussing the feasibility of the RFEIR's no-project alternative. In the hearing approving the project and certifying the RFEIR, councilmembers were told that any attempt by the city to purchase the property could expose the city to liability under the takings clause. However, the RFEIR did not include any information indicating whether the city's acquisition of the property would be illegal or impossible.

Ultimately the court acknowledged that:

> . . .many unknown variables exist regarding the feasibility of acquiring Garaventa Hills. However drafting an EIR… involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency nonetheless must use its best efforts to find out and disclose all that it reasonably can.

Here, the fact that:

> . . .two funding sources exist for the precise purpose of enabling the City to acquire environmentally sensitive areas such as [the project site] for conservation is just the sort of information CEQA intended to provide those charged with making important, often irreversible, environmental choices on the public's behalf.

Here, without adequate information regarding the no-project alternative, the city council could not make an informed, reasoned decision whether the project should go forward.

RFEIR's Identified Compensatory Mitigation Measure For Permanent Loss of Sensitive Habitat Was Adequate

As a mitigation measure, the RFEIR required the developer to provide compensatory mitigation at a 2.5:1 to 3:1 ratio for permanent habitat loss of the project site. To accomplish this, the developer proposed an 85-acre "Bluebell site" located in the Springtown Alkali Sink area, which included part of Altamont Creek, sensitive soil, vernal pools, and numerous plant and animal species. However, petitioner argued that the Bluebell site was inadequate mitigation for two reasons. First, the Bluebell site was already protected open space under the city's General Plan.

Second, preserving an existing site through a conservation easement without creating new resources cannot adequately mitigate under CEQA for permanent habitat loss elsewhere.

The court rejected both arguments. Regarding the first argument, the court noted that the Bluebell site was only protected pursuant to the city's aspirational General Plan goals and policies to preserve the Alkali Sink. These did not go as far as the RFEIR's mitigation measure required, the "creation of a perpetual legal restraint on development of the Bluebell site supported by funding for both upkeep and enforcement." The RFEIR also provided that if the turned out not suitable for mitigation of impacts on identified species, the city could compel the developer to protect an alternative site.

Regarding the petitioner's second argument, the court cited several cases recognizing conservation easements as an acceptable component of a local agency's "mitigation toolboxes." CEQA does not require mitigation measures that completely eliminate a project's environmental impacts, and CEQA allows mitigation measures that would substantially lessen the environmental impacts of a project. Such measures "may include compensating for the impact by replacing *or providing substitute resources or environments*…"

Although not discussed in detail in this article, the court also rejected petitioner's arguments regarding the vernal pool fairy shrimp and hydrological impacts to the Springtown Alkali Sink.

Conclusion and Implications

The most noteworthy portion of the *Save the Hill Group* decision is its finding that the RFEIR's no project alternative analysis was inadequate. Environmental consultants, applicants, and public agencies should review the decision for guidance regarding the project specific information that must be included in a no-project alternative analysis. However, the facts of the case were so unique and exceptional that it is unlikely that the same scenario would occur for most projects, unless similar facts exist. Here, the project site was a very high quality habitat for several special-status plant and animal species, there was significant local funding available to acquire and preserve land like the project site, and there was intense interest by the city council and public in preserving the project site. A copy of the court's opinion can be found here: https://www.courts.ca.gov/opinions/documents/A161573.PDF.
(Travis Brooks)

THIRD DISTRICT COURT HOLDS CITY MUST PROVIDE REQUIRED FINDINGS FOR APPROVAL OF WASTEWATER PERMIT FOR SIGNIFICANT IMPACTS IDENTIFIED IN EIR

We Advocate Through Environmental Review v. City of Mount Shasta, Unpub., Case No. C091012 (3rd Dist. Apr. 12, 2022).

The Third District Court of Appeal has reversed the trial court's decision and held [in an *unpublished* opinion] that the City of Mount Shasta's (City) issuance of a wastewater permit for the Crystal Geyser Water Company's (Crystal Geyser) bottling plant violated the City's obligations under the California Environmental Quality Act (CEQA) because it failed to make the required findings for the relevant significant impacts identified by Siskiyou County's (County) environmental review for the facility. (*see*, Pub. Res. Code, § 21081.)

Factual and Procedural Background

Crystal Geyser purchased a former water bottling facility in the County in the early 2010s, hoping to revive it and use it as a Crystal Geyser bottling facility. Crystal Geyser applied for several permits through the County and the City, including a permit from the City to allow the plant to discharge wastewater into the City's sewer system.

The County was the lead agency in evaluating the facility's potential environmental impacts and noted in its draft Environmental Impact Report (EIR) that Crystal Geyser would need to obtain a wastewater discharge permit from the City. The EIR also identified several potentially significant impacts associated with Crystal Geyser's proposed discharge of water into the City's sewer system.

After the County certified the EIR, the City finalized the wastewater permit. In doing so, the City added the following statement to the existing language of the draft permit:

> . . .[t]his wastewater also includes condensate, boiler blowdown water, [and] cooling tower blowdown water.

When the city council approved the revised permit, it noted that:

> The City council has considered the Environmental Impact Report prepared by the County of Siskiyou for the Crystal Geyser Bottling Plant and finds no unmitigated adverse environmental impacts relating to the alternate waste discharge disposal methods.

After approval, We Advocate Through Environmental Review (WATER) filed a petition for writ of mandate asserting various allegations that the City and the City council violated CEQA. Relevant here, WATER alleged that "[a]dditional environmental review was necessary as a result of the addition of three unanalyzed waste-streams in the final [wastewater permit]." The trial court denied all of WATER's arguments, and held that the City did not need to perform additional environmental review for the revised wastewater permit, and that Appellants did not show that there was an absence of substantial evidence supporting the City's decision. WATER appealed.

The Court of Appeal Decision

The Court of Appeal held that the City did not comply with the CEQA's requirements to make the required findings with respect to each significant effect, including: 1) changes or alterations in the project which mitigate or avoid the significant effects on the environment; 2) changes or alternations that are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency; or 3) specific economic, legal, social, technological, or other considerations … make infeasible the mitigation measures or alternatives identified in the environmental impact report. (Pub. Res. Code, § 21081, subd. (a).) Additionally, these findings must be accompanied by a brief explanation of the rationale for each finding. (CEQA Guidelines, § 15091, subd. (a).)

The Court of Appeal explained that not only did the County's EIR identify several potentially significant impacts associated with Crystal Geyser's pro-

posed discharge of wastewater into the City's sewer system, but it also discussed several mitigation measures to address those impacts. The City's assertion in approving its resolution of the wastewater permit, that it found "no unmitigated adverse environmental impacts related to the alternate waste discharge disposal methods," did not satisfy CEQA's findings requirement.

The trial court had held that the City did not need to make findings under Public Resources Code § 21081, reasoning that:

> . . .[i]f the responsible agency determines that there is no unmitigated significant impact to the environment, then the responsible agency is not required to make written findings.

The trial court was relying on the fact that a lead agency and responsible agency have different roles under CEQA, including that a responsible agency only needs to consider the direct or indirect environmental effects of those parts of the project that it decides to carry out or approve.

The Court of Appeal, however, explained that while a lead agency and responsible agency do have different roles, both agencies must make findings with respect to each significant effect before:

> . . .approving or carrying out a project for which an EIR has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out.

The Court of Appeal held that City was required to make one or more of the findings pursuant to Public Resources Code § 21081, subdivision (a), for each significant effect identified in the EIR associated with the City's permit. The City, according to the Court of Appeal, made none of these findings, nor did it acknowledge that the EIR identified several potentially significant effects associated with the part of the project that decided to approve. Lastly, the court explained that the City also did not provide the required "brief explanation of the rationale" for its nonexistent findings.

Conclusion and Implications

This opinion by the Third District Court of Appeal is straightforward in its interpretation of Public Resources Code § 21081, subdivision (a). Where the trial court distinguished the obligations of the lead and responsible agencies, determining that the City did not need to make further findings under CEQA, the Court of Appeal held that although the City was not the lead agency, it was still obligated to make certain findings before it could "approve or carry out" the wastewater permit because the certified EIR had identified one or more significant effects that would occur if the project is approved. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/C091012.PDF.
(Lauren Palley, Boyd Hill)

THIRD DISTRICT COURT FINDS COUNTY VIOLATED CEQA BECAUSE EIR FOR PROJECT DEFINED OBJECTIVES TOO NARROWLY AND INADEQUATELY EVALUATED CLIMATE CHANGE IMPACTS

We Advocate Through Environmental Review v. County of Siskiyou,
___Cal.App.5th___, Case No. C090840 (3rd Dist. May 20, 2022).

In a May 20, 2022 *partially* published opinion the Third District Court of Appeal in *We Advocate Through Environmental Review v. County of Siskiyou* authored a *companion piece* to its May 12, 2022 decision, *We Advocate Through Environmental Review v. City of Mt. Shasta*, Case No.C091012, regarding challenges under the California Environmental Quality Act (CEQA) to the approval of a water bottling facility. In its *County of Siskiyou* decision, the court partially reversed the trial court's denial of the petition, finding that the County's Environmental Impact Report (EIR) too narrowly defined the project's ob-

jectives and relied on a flawed analysis of its impacts to climate change.

Factual and Procedural Background

The Crystal Geyser Water Bottling Facility

In the 1990s, Dannon Waters of North America (later, Coca-Cola) constructed a bottling facility, groundwater production well (DEX-6), and a domestic groundwater well in the County of Siskiyou. Dannon operated the Plant from 2001 to 2010. In 2013, Crystal Geyser acquired the property and proposed returning the Plant to production.

In 2017, the County conducted CEQA review of Crystal Geyser's proposal. The EIR explained that the Project would renovate the former Plant to produce sparkling and flavored water, juice beverages, and teas. To facilitate this, Crystal Geyser sought several permits, including one from the County to construct an onsite caretaker's residence, one from the City to discharge the Plant's wastewater, and several from the local air quality district for the Plant's generators and boilers. The EIR evaluated the environmental impacts associated with these permits.

In December 2017, the County board of supervisors approved the Project and certified the final EIR. As part of its approval, the Board acknowledged that the Project would have some unavoidable significant environmental impacts, but found those impacts would be outweighed by the Project's benefits.

At the Trial Court

Petitioners, We Advocate Through Environmental Review (WATER) and the Winnehem Wintu Tribe filed two CEQA suits. The first challenged the City's approval of the Project's wastewater permit. The action at bar alleged the County's environmental review of the Project was inadequate because the EIR: 1) provided a misleading project description; 2) impermissibly narrowed the Project's objectives; 3) improperly evaluated impacts to aesthetics, air quality, climate change, noise, and hydrology; and 4) approved the Project even though it would violate the County's and City's General Plans.

The trial court denied each of Petitioners' arguments against the County. Petitioners timely appealed and re-raised each contention.

The Court of Appeal's Decision

As with its decision in the *companion suit* against the City of Mt. Shasta, the Third Appellate District partially reversed the trial court's complete denial of petitioners' claims against the County. In the published portions of its opinion, the court found merit to two arguments. First, the court held the County improperly defined the Project's objectives in an overly narrow manner; and second, the County's process for evaluating impacts to climate change was flawed.

Project Objectives

The court first considered whether the EIR's project objectives were impermissibly narrow. The court explained that a project description must contain a statement of project objectives, which the agency must rely upon to develop a reasonable range of alternatives and written findings. (CEQA Guidelines, § 15124.) Here, the EIR identified eight objectives for the proposed bottling facility, including to: 1) operate a beverage bottling facility and ancillary uses to meet increased market demand; 2) site the facility at Dannon's previously-operated Plant in order to take advantage of existence infrastructure and existing spring water onsite; 3) utilize the full production capacity of the existing Plant; 4) initiate Plant operation as soon as possible; 5) minimize environmental impacts by utilizing existing facilities to the extent feasible; 6) modify the existing Plant facilities in a manner that incorporates sustainable design practices, recycling efforts, and water conservation methods; 7) withdraw groundwater in a sustainable manner so has to not negatively affect nearby wells, aquifers, or the environment; and 8) create new employment opportunities, sustainable economic development, and provide for adequate services to contribute to the County's tax base.

Appellants argued that these objectives were "so narrow as to preclude any alternative other than the Project." The Third District Court agreed, noting that the County largely defined the objectives based on the Project as proposed—*i.e.*, the operation of a bottling facility and ancillary uses within an approximately 118-acre site formerly developed and operated as a bottling plant in the County. Because the principal objectives mirrored the Project itself, then no alternative other than the Project as proposed would

suffice. Instead, all competing reasonable alternatives would simply be defined out of consideration.

By taking this "artificially narrow approach," the court explained the County's alternatives analysis was merely "a foregone conclusion" and "an empty formality" that rendered the EIR deficient. Consequently, by describing the principal objective as operating the Project "as proposed" and "as soon as possible," the EIR dismissively rejected anything other than the Project, thereby prejudicially preventing informed decisionmaking and public participation.

In light of this, the court also agreed with Petitioners' contention that the County failed to demonstrate that the "no project" alternative was infeasible. The court conceded that the County's reliance on "unreasonably narrow" project objectives affected its analysis of the no project alternative, thus requiring re-analysis on remand.

Impact Analysis—Climate Change

In a *published* portion of the opinion, the court considered whether the County adequately considered the Project's potential climate change impacts. Petitioners' first claim alleged the County was required to recirculate the EIR because it contained significant new information relating to the Project's anticipated greenhouse gas emissions. The draft EIR estimated the Project would result in approximately 35,486 metric tons of CO2 equivalent per year, and thus constitute a significant impact. The final EIR, however, concluded the Project would emit approximately 61,281 tons of CO2 equivalent per year—an impact that remained significant. Nevertheless, the County concluded that the discrepancy between the two emissions estimates did not constitute significant new information because the FEIR did not change the DEIR's determination that the Project's emissions would be significant and unavoidable, even with mitigation.

The court agreed with petitioners that the discrepancy between CO2 estimates in the DEIR and FEIR warranted significant new information that required recirculation. The court noted that the EIR explained that emissions in excess of 10,000 tons per year would result in a significant impact. Therefore, the County's finding that the additional 25,795 tons per year—the difference between the DEIR and FEIR's estimates—was not supported by substantial evidence. The court rejected the County's argument that the EIR's ultimate "significant and unavoidable" conclusions were left unchanged. The court analogized the rationale to a hypothetical scenario where an agency's draft EIR concludes the loss of one endangered species is significant, but then finds the loss of many more of those animals is insignificant in the final EIR. The court explained that this type of approach:

> . . .wrongly deprives the public of a meaningful opportunity to comment on a project's substantial environmental impacts.

By holding that the County will be required to allow for further public review of the EIR's discussion of greenhouse gas emissions, the Third District found petitioners' challenge to related mitigation measures premature. The court explained that the County:

> . . .may very well be required to further reevaluate its [greenhouse gas emission] mitigation measures in response to public comments.

Disposition

Though the Third District Court rejected all of petitioners' other claims, it reversed and instructed the trial court to enter a new judgment granting the petition for writ of mandate and specifying the actions the County must take to comply with CEQA, including: 1) revise the EIR's project objectives; 2) revise the alternatives analysis in light of the new project objectives; and 3) recirculate the EIR's discussion of greenhouse gas emissions to allow comment on the new emissions estimates.

Conclusion and Implications

As with its *companion decision* in *City of Mt. Shasta*, the Third District's opinion in *County of Siskiyou* similarly reversed the trial court and found the County violated CEQA by committing errors that otherwise defied the plain language of the statute. The court's opinion offers a common-sense interpretation of two controlling requirements: project objectives and recirculation. Based on the court's rationale, CEQA is clear: an EIR should not identify project objectives that are so "unreasonably narrow" that they would otherwise foreclose meaningful consideration of project alternatives. Similarly, where a notable discrepancy exists in data estimated in a draft versus

final EIR, recirculation is required if that numerical discrepancy rises to the level of "significant," as defined by the EIR. A copy of the court's opinion is available at: https://www.courts.ca.gov/opinions/documents/C090840.PDF.
(Bridget McDonald)

LEGISLATIVE UPDATE

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

We strive to be current, but deadlines require us to complete our legislative review several weeks before publication. Therefore, bills covered can be substantively amended or conclusively acted upon by the date of publication.

Surplus Land

•AB 1748 (Seyarto)—This bill is no longer under consideration by the State Legislature as it failed to meet the deadline pursuant to Rule 61(b)(6).

•AB 2625 (Ting)—This bill was amended on or about May 5, 2022. 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 discretionary action by the advisory agency or legislative body

General Plans

•SB 1067 (Portantino)—This bill was amended on or about May 19, 2022. This bill continues to prohibit a city, county or city and county from imposing any minimum automobile parking requirement on specified housing development projects. The bill was amended to provide that a "housing development project" does not include a project where any portion is designated for use as a hotel, motel, bed and breakfast inn, or other transient lodging, except where a portion of the housing development project is designated for use as a residential hotel, as defined in Section 50519 of the Health and Safety Code.

•AB 2094 (Rivas)—This bill was most recently referred to the Senate Committee on Housing, without amendment. It 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, including need for extremely low income housing, 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 amended on or about May 2, 2022. 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 contained a prohibition on a city or county from establishing overlay districts to comply with these provisions. The amended bill deletes that prohibition.

Fees

•AB 2428 (Ramos)—This bill has had not been amended and was most recently referred to committee on March 3, 2022. This bill continues to require a local agency that requires a qualified applicant, as described, to deposit fees for improvements, as described, into an escrow account as a condition for receiving a conditional use permit or equivalent development permit to expend the fees within 5 years of the deposit.

Accessory Dwelling Units

•AB 916 (Salas)—This bill was amended on May 11, 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, by addition of a § 65850.02 of the Government Code. The bill would also 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 or about May 19, 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 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 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. The amended bill adds a new Section 2 to Government Code § 65852.22 to "require owner-occupancy in the single-family residence in which [a] junior accessory dwelling unit will be permitted and that "the owner may reside in either the remaining portion of the structure or the newly created junior accessory dwelling unit" with an exception for property owned by another governmental agency, land trust, or housing organization. It also provides that a local agency may not impose an owner-occupant requirement on an accessory dwelling unit before January 1, 2025.

Density Bonus

•AB 2063 (Berman)—This bill was last amended on April 18, 2022 and was most recently re-referred to the Committee on Appropriations 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 or about May 2, 2022 and is currently with the Committee on Appropriations. 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." The amended bill adds that "area" is as "designated by the United States Census Bureau."

Affordable Housing

•AB 2186 (Grayson)—This bill was amended on or about May 2, 2022 and, on May 23, 2022, was ordered to the Senate. 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." The amended bill makes changes to terminology and adds that "an applicant shall not apply to receive reimbursement for a development impact fee reduction or deferral related to a fee benefitting an independent special district unless the applicant received the written approval of the independent special district for the reduction or deferral on or before the date on which the applicant granted the reduction or deferral."

•AB 1850 (Ward)—This bill was amended on or about April 25, 2022 and is in the Senate Committee on Housing and Committee on Local Government and Finance. 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. The amended bill, among numerous other changes, specifies that the provisions that may be adopted do not apply to a development that is or will be subject to a regulatory agreement with the California Tax Credit Allocation Committee or the Department of Housing and Community Development.

•AB 2295 (Bloom)—This bill was amended on May 2, 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 amended bill clarifies that "Real property owned by a local educational agency" means real property owned by a local education agency as of January 1, 2023" and that this section shall remain in effect only until January 1, 2033, and as of that date is repealed.

Planning

•AB 2234 (Rivas)—This bill was amended on May 2, 2022. It continues 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. The amended bill makes minor changes to terminology and adds, in Section 3, that "No reimbursement is required by this act pursuant to § 6 of Article XIII B of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act, within the meaning of Section 17556 of the Government Code."

•AB 2668 (Grayson)—This bill has not been amended and was last referred to the Committee on Rules for assignment on May 17, 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 or about May 4, 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, among other changes, add that "The Legislature does not intend this section to abrogate the decision of the Court of Appeal in *Tom vs. City and County of San Francisco* (2004) 120 Cal.App.4th 674.)" and "This section shall not be construed to enable any parcel to supersede the land use requirements of a general or specific plan."

•AB 2656 (Ting)—This bill has not amended since April 18, 2022. It continues 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 Section 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 amended on May 19, 2022. 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. The bill was amended to add a definition of "public agency" to mean "the state or any state agency, board, or commission, any city, county, city and county, or special district, or any agency, board, or commission of the city, county, city and county, special district, joint powers authority, or other political subdivision."

California Environmental Quality Act

•AB 1001 (Garcia, Cristina)—This bill has not been amended since March 22, 2002. It continues to

require 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 section and updating erroneous cross-references.

•AB 2445 (Gallagher)—This bill has not been amended since April 5, 2022. This bill would 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. The most recent action is cancellation of an April 5, 2022 hearing. 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 May 11, 2022 and is in the Assembly. The amended bill makes numerous language modification and changes the definition of "High occupancy vehicle" to means "a vehicle with three [rather than two) or more occupants." 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 intersection operations, and the related signage for bicycles, pedestrians. As previously amended, the exemption would be extended to January 1, 2030, rather than "indefinitely."
(Melissa Crosthwaite)

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