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LAND USE NEWS

CALIFORNIA SET TO OPEN NEW STATE PARK FOR FIRST TIME IN OVER A DECADE AT THE CONFLUENCE OF THE TUOLUMNE AND SAN JOAQUIN RIVERS

Thanks to the hard work of the Chico-based conservation group River Partners, Californians in the San Joaquin Valley and its surrounding areas will soon be able to enjoy the great outdoors in a new, uniquely situated California State Park. The new site will be located at the Dos Rios Ranch property, also referred to as "Twin Rivers," and sits along the confluence of the Tuolumne and San Joaquin rivers, about ten miles west of downtown Modesto. The 2,500-acre property was once used for dairy pastures and almond orchards, but with the efforts of River Partners to restore the area to its former glory as a riparian woodland, the Dos Rios Ranch property is now set to join the California State Parks system as California's 280th state park. Once the deal has been finalized between River Partners and the state, Dos Rios Ranch will be the first new state park to open since Fort Ord Dunes opened outside Monterey in 2009.

Ten-Years in the Making

Since acquiring the property back in 2012, River Partners and its partners—an alliance of dedicated public, private, and nonprofit organizations—have put in substantial efforts towards restoring the property.

A major part of the Dos Rios Ranch project involved restoring the property's riparian woodland by planting native trees, brush, and grass on fields that used to grow dairy feed and other crops. More specifically, the partnership's Dos Rios Ranch project has culminated in the planting of more than 350,000 native trees and vegetation along nearly eight miles of riparian corridors around the confluence of the San Joaquin and Tuolumne Rivers.

Another key component of the Dos Rios Ranch project was the restoration of former flood plains that had been blocked by a system of flood-control berms. Inside the Dos Rios Ranch property, there used to be an area roughly 1,500 acres in size that served as a floodplain for the nearby Tuolumne River. During the property's development, however, a levee system was built so that farmers could grow crops there and the crops would be protected from floods. By knocking down the flood-control berms along the rivers, the project has been able to reconnect the historic floodplains on the property with the Tuolumne River, allowing the floodwater spread out, slow down, and sink underground.

While the flood control benefits of the project are obvious, another hugely important benefit is how the restored floodplains will help recharge local aquifers in the critically-overdrafted Delta-Mendota groundwater basin as well as the Modesto and Turlock groundwater basins of the San Joaquin Valley—regions that often rely on groundwater sources for domestic and agricultural use during dry years.

In addition to these major benefits, River Partners has also reported great success in that the restoration of riparian habitat throughout the property has reverted the site to a thriving ecosystem for many species including brush rabbits, woodrats, hawks, Central Valley chinook salmon, steelhead trout, yellow warblers, sandhill cranes, and neotropical migratory songbirds.

This effort was made possible thanks to the cooperation of both public and private funding partners at the local, state, and national levels. In total, more than $45 million in funding was secured for the Dos Rios Ranch project, including funding from the California Department of Fish & Wildlife, Department of Water Resources, and Natural Resources Agency, the National Fish and Wildlife Foundation, the Natural Resources Conservation Service, Pacific Gas & Electric, the San Francisco Public Utilities Commission, Stanislaus County's Public Works Department, the Tuolumne River Trust, the Wildlife Conservation Board, the U.S. Bureau of Reclamation and Fish and Wildlife Service, and even received funding from New Belgium Brewing and Sierra Nevada Brewing.

What's In Store for the Park's Future

While the state had allocated $5 million to be put towards the purchase price of the park, River Partners has offered instead to donate the property to the state, rather than selling it, so that the earmarked funds for the park can be used for amenities. As of now, the state expects the new park to open sometime in 2023.

Before the park's opening, however, the state plans on engaging the public for input on what the vision for the park should be. For starters, the state has already expressed that the park will be named through a participatory process with the public and the California State Parks Commission. Additionally, the state has also noted that it will decide what services the park will offer in collaboration with the general public. Currently, it looks like Dos Rios is likely to see walking trails, picnic areas, restrooms and other basic services as well as opportunities for swimming and fishing on the San Joaquin and Tuolumne Rivers. The State Parks Department has expressed optimism that these features could be established within five years of the park's opening, with campgrounds being another possibility sometime in the future thereafter.

Conclusion and Implications

Despite the unique setting of the new state park at the confluence of two major rivers, the property is located just twenty minutes west of downtown Modesto, serving an area that has been in need of new parks as the San Joaquin Valley has the fewest state parks and least open space per capita in the entire state. Other notable areas nearby include Stockton and Pleasanton, both about half an hour from the new park, and even residents of San Jose and San Francisco will be able to reach the park in just over an hour.

The new park at Dos Rios Ranch presents the state with a diverse array of benefits, ranging from habitat restoration and flood control to increased drought resilience and even benefits as simple, yet vitally important, as increased outdoor space for recreation. The work put in by River Partners and the many cooperation organizations may serve as model moving forward for how multi-benefit projects can serve Californians' needs while simultaneously protecting the environmental attributes.
(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

U.S. SENATORS INTRODUCE FINANCIAL A BILL TO PROVIDE ADDITIONAL FUNDING FOR WATER PROJECTS IN THE WEST

In May 2022, U.S. Senators Feinstein (D-CA), Kelly (D-AZ), and Sinema (D-AZ) introduced Senate Bill 4231, the Support to Rehydrate the Environment, Agriculture, and Municipalities Act or *STREAM Act*. The bill's purpose is to increase water supply and update water infrastructure in the West by providing funding for new water projects.

Background

California and the West have been dealing with years of unprecedented drought. The *STREAM Act* attempts to address the issues of historic drought, climate change, and aging water infrastructure by providing financial assistance to new water projects that improve water resiliency in the West. (*See,* Press Release, Dianne Feinstein, United States Senator for California, Feinstein, Kelly, Sinema Introduce Bill to Increase, Modernize Water Supply (May 18, 2022), https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=1783E95E-F02C-4CFC-9E81-AEFF7AAAC3AF#:~:text=yesterday%20introduced%20S.,California%20and%20throughout%20the%20West.

In introducing the bill, Senator Feinstein expressed concern about the ongoing drought by stating that "… the past two years have painfully demonstrated, severe and prolonged drought exacerbated by climate change is the stark reality for the West." (*Id.*) She also said:

> . . .if we don't take action now to improve our drought resilience, it's only going to get worse. We need an 'all-of-the-above' strategy to meet this challenge, including increasing our water supply, incentivizing projects that provide environmental benefits and drinking water for disadvantaged communities, and investing in environmental restoration efforts. (*Id.*)

The introduction of the *STREAM Act* is also part of an ongoing effort to provide financing for future infrastructure projects in the West. Senator Kelly said:

> As Arizona continues to navigate this historic drought, it's more important than ever to build infrastructure that promotes a secure water future. Combined with the investments made in the bipartisan infrastructure law, this legislation will help Arizona and the West expand drought resiliency projects, increase groundwater storage, and better manage and conserve our water resources. (*Id.*)

The Bill's Proposed Funding and Appropriations

The *STREAM Act* provides funding for water storage, water recycling, and water desalination projects. (Support to Rehydrate the Environment, Agriculture and Municipalities Act, S 4231, 117th Cong. (2022).) The bill also provides financial incentives for storage and conveyance projects that enhance environmental benefits and expand drinking water access to disadvantaged communities.

The *STREAM Act's* largest appropriation would provide $750 million for the Secretary of the Interior to spend on eligible water storage and conveyance projects from 2024 to 2028. Section 103 of the bill establishes a competitive grant program for non-federal projects. Entities eligible to obtain grant funding include any state, political subdivision of a state, public agency, Indian tribe, water users' association, agency established by an interstate compact, and an agency established under a state's joint exercise of powers law.

To qualify for grant funds, a project proposed by an eligible entity must involve either a surface or groundwater storage project, a facility that conveys water to or from surface or groundwater storage, or a natural water retention and release project as defined by the proposed law. Other requirements include that the federal cost-share cannot exceed $250 million,

the project must be in a Bureau of Reclamation state, the eligible entity must construct, operate, and maintain the project, and there must be a federal benefit.

A federal benefit is defined as public benefits provided directly by a project. These public benefits can be fish and wildlife benefits that provide excess water to environmental mitigation or compliance efforts, flood control benefits, recreational benefits, or water quality benefits.

The Secretary of the Interior may provide a grant to an eligible entity for an eligible project under the program "for the study of the eligible project… or for the construction of a non-federal storage project that is not a natural water retention project." (*Id.*) However, for the Secretary to provide a grant for the construction of a non-federal storage project, the eligible entity must conduct a feasibility study, and the Secretary must concur that the eligible project is technically and financially feasible, provides a federal benefit, and is consistent with applicable federal and state laws. The Secretary must also determine that the eligible entity has sufficient non-federal funding to complete the project and is financially solvent. Lastly, the governor, a member of the cabinet of the governor, or the head of a department in the Bureau of Reclamation state where the proposed project is located must support the project or federal funding of the project.

Prioritizing Projects

The *STREAM Act* would prioritize funding projects that meet two or more of the following criteria: 1) provides multiples benefits, such as water reliability for states and communities that are frequently drought-stricken, fish and wildlife benefits, and water quality improvements; 2) reduces impacts on environmental resources from water projects owned and operated by federal or state agencies; 3) advances water management plans across a multi-state area; 4) is collaboratively developed or supported by multiple stakeholders; 5) the project is within a watershed where there is a comprehensive watershed management plan that enhances the resilience of ecosystems, agricultural operations, and communities.

Conclusion and Implications

Senator Feinstein introduced the STREAM Act in the Senate on May 17, 2022, and the bill was referred to the Senate Committee on Energy and Natural Resources. On May 25, 2022, before the Senate Committee on Energy and Natural Resources Subcommittee on Water and Power, Senator Feinstein testified in support of the bill and introduced letters supporting the bill. Supporters of the bill in its current form include the Association of California Water Agencies and the Nature Conservancy. The Committee of Energy and Natural Resources will consider the bill in its current form and make changes it deems necessary before deciding whether to release the bill to the Senate floor. To track updates and changes to the bill, *see:* https://www.congress.gov/bill/117th-congress/senate-bill/4231.

(Jake Voorhees; Meredith E. Nikkel)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS U.S. FOREST SERVICE ACTED ARBITRARILY AND CAPRICIOUSLY IN APPROVING PLAN OF OPERATIONS FOR COPPER MINE

Center for Biological Diversity v. U.S. Fish and Wildlife Service, 33 F.4th 1202 (9th Cir. 2022).

Environmental conservation organizations and Native American tribes brought actions against the U.S. Forest Service (Forest Service), challenging its approval of an open-pit copper mining operation under the National Environmental Policy Act (NEPA), the federal Endangered Species Act (ESA), the National Historic Preservation Act (NHPA), the Mining Law of 1872, and related statutes. The U.S. District Court granted summary judgment on some claims and the Forest Service and intervenor appealed. The Ninth Circuit affirmed, finding among other things that the Forest Service's approval of the mining operation without considering whether the claimant held a valid mining claim to certain areas was arbitrary and capricious.

Factual and Procedural Background

Rosemont Copper sought to dig a large open-pit copper mine in the Santa Rita Mountains, south of Tucson, Arizona. The mining operation would be partly within the Coronado National Forest. The proposed pit would be 3,000 feet deep and 6,500 feet wide, and it would produce over 5 billion pounds of copper. There was no dispute that Rosemont holds valid mining rights on the land where the copper pit itself would be located.

In connection with this use, Rosemont proposed to dump 1.9 billion tons of waste rock near its pit, on 2,447 acres of National Forest land. The pit itself would occupy just over 950 acres. When operations cease after 20 to 25 years, waste rock on the 2,447 acres would be 700 feet deep and would occupy the land in perpetuity.

The Forest Service approved Rosemont's proposed mining plan of operations (MPO) on two grounds. First, it found that § 612 of the Surface Resources and Multiple Use Act of 1955 (Multiple Use Act) gave Rosemont the right to dump waste rock on open National Forest land, without regard to whether it has any mining rights on that land, as a "use[ ] reasonably incident" to its operations at the mine pit. Second, the Forest Service assumed that under the Mining Law of 1872 (Mining Law) Rosemont had valid mining claims on the 2,447 acres it proposed to occupy with its waste rock.

Relying on these grounds, the Forest Service approved the MPO, finding under § 612 of the Multiple Use Act and under the Mining Act it only had the authority contained in its "Part 228A" regulations to regulate Rosemont's proposal to occupy its mining claims with its waste rock. The Forest Service suggested that if it had greater regulatory authority than that provided by its Part 228A regulations, it might not have approved the MPO in its proposed form.

Environmental organizations and Native American tribes brought suit and the separate cases were consolidated. The U.S. District Court found that neither ground supported the Forest Service's approval of the MPO. It found that § 612 grants no rights beyond those granted by the Mining Law. It also held that there was no basis for the Forest Service's assumption that Rosemont's mining claims were valid under the Mining Law; to the contrary, it found that the claims actually were invalid. The U.S. District Court therefore found the Forest Service acted arbitrarily and capriciously in approving the MPO and vacated the Final Environmental Impact Statement and Record of Decision. Both the Forest Service and Rosemont appealed.

The Ninth Circuit's Decision

The Ninth Circuit first agreed with the District Court's holding that § 612 grants no rights beyond those granted by the Mining Law. It also noted that, although the Forest Service had defended this position during the U.S. District Court proceedings, the

Forest Service ultimately abandoned this argument on appeal. Rosemont also did not rely on § 612 on appeal.

The Ninth Circuit also agreed with the U.S. District Court holding that the Forest Service improperly assumed Rosemont's mining claims were valid under the Mining Law, rejecting the Forest Service's claim that it was not required to assess the validity of the claims. Although its reasoning differed from the District Court, the Ninth Circuit also agreed that the claims themselves were invalid. Where the District Court found that no valuable minerals exist on the claims, however, the Ninth Circuit found the claims invalid because no valuable minerals have yet been found on the claims. This distinction, however, the Ninth Circuit noted, was legally irrelevant, as the relevant question was whether valuable minerals have been "found."

The Ninth Circuit further noted that it did not know what the Forest Service would have done if it had understood that Se§ction 612 grants no rights beyond those granted by the Mining Law and that Rosemont's mining claims were invalid under the Mining Law. These were decisions, the Ninth Circuit found, that must be made in the first instance by the Forest Service. Accordingly, it remanded to the Forest Service for such further proceedings as the Forest Service may deem appropriate, informed by the conclusions of the Ninth Circuit's opinion.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the Mining Law, including the validity of claims made thereunder. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/05/12/19-17585.pdf.
(James Purvis)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT FINDS CITY'S 15 PERCENT AFFORDABLE HOUSING SET-ASIDE INOPERATIVE

AIDS Healthcare Foundation v. City of Los Angeles, 78 Cal.App.5th 167 (2nd Dist. 2022).

In an opinion published on May 2, 2022, the Second District Court of Appeal rejected activist groups' claims challenging the City of Los Angeles' decision to approve development of a large mixed-use apartment building in Hollywood. The Court of Appeal upheld the trial court's holding, finding that a 15 percent low-income set-aside requirement prescribed by the Community Development Law had been voided by legislation in 2011; and, even if it had not, the set-aside requirement had applied only to the aggregate amount of dwelling units within a planning area, not to individual projects.

Factual and Procedural Background

The Community Redevelopment Law

In 1986, the (now dissolved) Community Redevelopment Agency of the City of Los Angeles (CRA-LA) established the "Hollywood Redevelopment Plan" (HRP) in accordance with the City's "Community Redevelopment Law" (CRL). Both the HRP and CRL included a requirement that at least 15 percent of all new and rehabilitated dwelling units within a total project area be reserved for families of "low or moderate income." However, the local redevelopment agencies charged with preparing and executing these plans had no power to tax, and instead funded their activities using "tax increment" financing.

Under this financing scheme, public entities that were entitled to receive property tax revenue (*e.g.*, cities and school districts) received tax revenues from properties within the planning area based on their assessed value prior to the effective date of the applicable redevelopment plan. Any tax revenue received in excess of that amount was a "tax increment." However, tax increment financing proved to be incompatible with the funding of school districts through property taxes. Thus, in 2011, the California Legislature enacted the "Dissolution Law," which dissolved redevelopment agencies and repealed any provisions of the CRL that depended upon tax increment financing. "Successor agencies" acquired the former redevelopment agencies' "housing functions and assets," but were to have no:

> . . .legal authority to participate in redevelopment activities, except to complete any work related to an approved enforceable obligation.

The Project

In January 2019, the City's advisory agency approved a tentative tract map for a 26-story mixed-use building on a 0.89-acre plot within the HRP planning area (developed by 6400 Sunset, LLC, the real party in interest). The project expects to have approximately 200 dwelling units, of which 5 percent will be reserved for "very low-income households." Coalition to Preserve LA (CPLA) appealed the Advisory Agency's approval to the City planning commission (Commission), arguing that a reservation of only 5 percent of units for affordable housing would violate the CRL/HRP requirement of 15 percent. The Commission denied CPLA's appeal in March 2019. CPLA's appeal of that decision, to the City council's planning and land use management committee, was also denied in June 2019.

At the Trial Court

In July 2019, CPLA (joined by AIDS Healthcare Foundation) filed a petition for writ of mandate in the Superior Court of L.A. County. The Superior Court denied the petition on the grounds that the pertinent provisions of the CRL had been repealed and, even under the CRL's language, the 15 percent requirement "need not be imposed on each individual project," but only to buildings within the planning area "in the aggregate." CPLA and AIDS Healthcare Foundation timely appealed.

The Court of Appeal's Decision

The Second District Court of Appeal agreed with the Superior Court on both counts, holding that the Dissolution Law had effectively repealed the 15 percent requirement and that, even if it had not, the requirement applied to the number of dwelling units within the CRL planning area as a whole—not individual projects.

Under the Dissolution Law:

> . . .all provisions of the [CRL] that depend on the allocation of tax increment to redevelopment agencies . . . shall be inoperative.

The court agreed that because compliance with and enforcement of the 15 percent requirement depended upon redevelopment agencies, and redevelopment agencies in turn depended upon the funds supplied by the tax increment, this requirement was also rendered inoperative. The appellants countered that redevelopment agencies could raise funds by issuing bonds, but the court reasoned that:

> . . .bonds . . . have to be repaid, and the former agencies repaid the bonds, generally, from the same source of funds used to pay other obligations—from the tax increment.

The appellants also argued that the 15 percent requirement was an "enforceable obligation" under the Dissolution Law, which the successor agency (here, the City of L.A.) was required to perform. After reviewing the law's relevant provisions, however, the court found that such obligations related only to "monetary and existing contractual obligations," not to statutory affordable housing requirements. The appellants again countered that the City, as the former CRA-LA's successor agency, is not limited to the statutory powers enumerated under the CRL and, therefore, the 15 percent requirement could be enforced under the City's "inherent police power." The court remained unpersuaded. Even assuming that the City is CRA-LA's successor agency, the Dissolution Law did not grant the successor any powers the former redevelopment agency did not have (such as general police powers).

The court also rejected appellants' argument that, even if the Dissolution Law rendered the CRL's 15 percent requirement inoperative, the HRP's own 15 percent requirement remained intact. According to the court, the HRP and its powers applied only to CRA-LA (not the City), and that agency was dissolved by the Dissolution Law.

Finally, beyond the nullifying effects of the Dissolution Law, the court held that under the plain language of both the CRL and HRP, the 15 percent requirement would apply only:

> . . .in the aggregate. . .[and]. . .not to each individual case of rehabilitation, development, or construction of dwelling units, unless an agency determines otherwise.

Because CRA-LA never determined otherwise, individual projects were not subject to a strict 15 percent minimum.

Conclusion and Implications

The Second District's opinion erases any doubt over whether the affordable housing set-asides created by the Community Redevelopment Law (or subsequent redevelopment plans) remain operational. More broadly, it provides some clarity as to the "enforceable obligations" successor agencies in the wake of the Dissolution Law: wrapping-up existing projects, not imposing requirements on new ones. The court's opinion is available at: https://www.courts.ca.gov/opinions/documents/B309892.PDF.

(Griffin Williams; Bridget McDonald)

THIRD DISTRICT COURT FINDS BUMBLE BEES MAY BE CLASSIFIED AS 'FISH' UNDER THE CALIFORNIA ENDANGERED SPECIES ACT

Almond Alliance of California v. Fish & Game Commission,
___Cal.App.5th___, Case No. C093542 (3rd Dist. May 31, 2022).

In May, the Court of Appeal for the Third District of California held that the meaning of "fish" under the California Endangered Species Act (CESA) extends to terrestrial invertebrates, such as certain species of bumble bee, and thus are eligible for listing as endangered or threatened under the CESA. The Court of Appeal also affirmed a prior holding that the general definition of "fish" in the California Fish and Game Code supplies the meaning of that term in the CESA, despite invertebrates not being specifically listed in the act.

Background

The California Endangered Species Act is intended to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat. (Fish & Game Code, § 2052.) Threatened or endangered species under the CESA include a "bird, mammal, fish, amphibian, reptile, or plant." The CESA became law in 1984 and is codified in Fish and Game Code § 2050 *et seq*. The Fish and Game Code provides general definitions for terms used within the code, including "fish" as set forth in § 45. Prior to 1969, § 45 defined fish as "wild fish, mollusks, or crustaceans, including any part, spawn or ova thereof." In 1969, the California Legislature amended § 45 to add invertebrates and amphibia to the definition of fish. The definition remained unchanged until 2015, when the Legislature made stylistic changes to the definition to read "a wild fish, mollusk, crustacean, invertebrate, amphibian, or part, spawn, or ovum of any of those animals." (Stats. 2015, ch. 154, § 5.)

Prior to the CESA, the Fish and Game Commission (Commission) had listed several species of invertebrates as endangered or rare under existing state law that prohibited the importation, possession, or sale of "any endangered or rare bird, mammal, fish, amphibian, or reptile." While the Office of Administrative Law had previously rejected the Commission's attempt to codify certain snails and butterflies (terrestrial invertebrates) as endangered because it did not view terrestrial invertebrates as fish—a position the Attorney General agreed with regarding inspects in an opinion in 1998—certain of those species and other vertebrates were subsequently listed as endangered or rare.

The CESA repealed and replaced existing state law related to endangered or rare animals. Specific inclusion of "invertebrates" in the act's legislation had been proposed but subsequently eliminated from the text of the bill. Nonetheless, in support of the CESA, the Department of Fish and Wildlife (Department—the bureaucratic parent of the Commission), submitted a bill analysis indicating that the inclusion of the term "invertebrate" in the act was unnecessary. The Department reasoned that the definition of "fish" in the Fish and Game Code already includes the term "invertebrates," and thus including the term "invertebrates" in the CESA could create confusion by necessitating amending other provisions of the Fish and Game Code to include that class of animal, where necessary. The Department noted that it had already included invertebrates to be endangered or rare prior to the CESA.

Listing Endangered and Threatened Species

The CESA directs the Fish and Game Commission to establish a list of endangered and threatened species, and to add or remove species from either list if it finds, upon receipt of sufficient scientific information, that the action is warranted.

Under the act, any interested person may petition the Commission to add a species to, or to remove a species from, the Commission's lists. A multi-step process applies to such petitions. First, the Department evaluates a petition on its face and in relation to other relevant information the Department possesses or receives, and prepares a written evaluation report that includes a recommendation as to whether the Commission should reject the petition or accept and consider it, depending on whether there is sufficient information to indicate that the petitioned action may be warranted. During this evaluation, any person may submit information to the Department relating to the petitioned species.

Second, the Commission, after considering the petition, the Department's written report, and written comments received, determines whether the petition provides sufficient information to indicate that the petitioned action may be warranted. Upon finding that the petition does not provide such information, the Commission rejects it. Upon finding that the petition doesprovide such information, the Commission accepts it for consideration.

Third, as to an accepted petition, the Department then conducts a more comprehensive review of the status of the petitioned species and produces a written report, based upon the best scientific information available to the Department, which indicates whether the petitioned action is warranted. Finally, after receiving the Department's report, the Commission determines whether the petitioned action is warranted or is not warranted.

2018 Petition to List Four Species of Bumble Bee

In 2018, several public interest groups petitioned the Commission to list the Crotch bumble bee, the Franklin bumble bee, the Suckley cuckoo bumble bee, and the Western bumble bee as endangered species under the act. The Commission ultimately determined that the four species of bumble bee qualified as candidate species for listing purposes.

In 2019, various agricultural associations and interest groups (petitioners) challenged the Commission's decision by filing a writ of administrative mandate, which the trial court granted. The trial court determined that the word "invertebrates" in § 45's definition of "fish" extended only to aquatic invertebrates, and that the legislative history of the Act supported its conclusion that the legislature did not intend to protect invertebrates categorically. The Court of Appeal reviewed the trial court's ruling *de novo*.

The Court of Appeal's Decision

On appeal, petitioners argued that the definition of "fish" in § 45 of the Fish and Game Code does not supply the meaning of that term in the CESA because the language of the act indicates the legislature intentionally included amphibians but did not include invertebrates. Including invertebrates within the purview of the act would, according to petitioners, render the inclusion of amphibians and other specified types of animals meaningless, which is disfavored by the rule of statutory construction against surplusage.

The Court of Appeal rejected petitioners' argument in part because the court had previously ruled in an earlier case that § 45's definition of fish supplies the meaning of that term within the act, and the court did not deem it necessary to depart from that prior decision. The court also reasoned that the Legislature amended § 45 of the CESA in 2015 and took no action in changing the statute, meaning that § 45 of the act expressly included invertebrates within the definition of "fish."

The court also rejected the petitioners' argument that legislative history of the CESA supports the exclusion of invertebrates. According to the court, the legislature could have disagreed with the Department's bill analysis that the Department had authority to list invertebrates under the act but instead took no action against that position. As the court explained, the legislature believed that invertebrates were already included in the definition of "fish" by application of § 45 and did not feel the need to have the Department report on including invertebrates. The court concluded that the balance of the CESA's legislative history did not indicate the legislature intended to exclude invertebrates from coverage under the act. The court also determined that the Attorney General opinion of 1998 was not persuasive since it was issued after the CESA was adopted, made no mention of § 45, and did not recognize that the Commission had already listed several species of invertebrates before 1984.

The court also held that terrestrial invertebrates may be listed as an endangered or threated species under the CESA, thus rejecting the trial court's conclusion that the definition of "fish" under § 45 only extended to aquatic invertebrates. The Court of Appeal determined that a liberal, *i.e.* more expansive, interpretation of the CESA was appropriate; the legislative history and prior listings by the Commission supported including terrestrial species under the purview of the act; and the express language in § 2067 supported a determination that the term "fish" is not limited to solely aquatic species. Instead, the court concluded that as a term of art—as opposed to common parlance—a terrestrial invertebrate may be considered as an endangered or threatened species under the CESA. Thus, the Court of Appeal held

that the four bumble bee species are considered to be fish and thus capable of being protected under the CESA.

Conclusion and Implications

Under this decision, invertebrates like the species of bumble bee at issue in the case are eligible to be listed as endangered or threatened under the California Endangered Species Act. Presumably, additional petitions for listing other species of terrestrial invertebrates will be submitted to the Commission for potential protection under the CESA, although it is not clear whether any of the petitioned species will ultimately be listed. The court's published opinion is available online at: https://www.courts.ca.gov/opinions/documents/C093542.PDF.
(Miles B. H. Krieger, Steve Anderson)

SIXTH DISTRICT COURT HOLDS CEQA CLAIMS WERE TIME-BARRED DESPITE AMBIGUOUS DEADLINES INDUCED BY COVID-19 PANDEMIC

Committee for Sound Water and Land Development v. City of Seaside, ___Cal.App.5th__, Case No. H049031 (6th Dist. June 1, 2022).

The Sixth District of Appeal has upheld a trial court's decision that causes of action under the California Environment Quality Act (CEQA) filed nearly a month after the expiration of a pandemic-related emergency tolling period were time-barred. The court also upheld the trial court's ruling that a cause of action alleging due process violations was moot, since the agency that allegedly breached its duty to provide notice ceased to exist during pendency of the case.

Factual and Procedural Background

The Campus Town Project

In 2017, KB Bakewell Seaside Venture II (KB Bakewell) proposed the "Campus Town" development project (Project)—"a Mixed-Use Urban Village" to be built on 122 acres of the decommissioned Fort Ord military base. The proposed project included 1485 housing units, 250 hotel rooms, 75 hostel beds, 150,000 square feet of retail, dining and entertainment space, 50,000 square feet of office space, and park/recreation areas.

On March 6, 2020, the City of Seaside (City) issued a Notice of Decision (NOD) that it had approved the Project and certified the Environmental Impact Report (EIR) for the related Specific Plan. The NOD triggered a 30-day statute of limitations, wherein all challenges to the Project were to be made by April 6, 2020. The Project also required the Fort Ord Reuse Authority (FORA) to issue a project consistency determination with the Fort Ord Reuse Plan. FORA was the quasi-governmental entity that managed the decommissioned military base and enabled its transition to civilian use.

On April 5, 2020, petitioner Committee for Sound Water and Land Development (the Committee) submitted two written requests to FORA to receive prior written notice of: (1) the City's submission for a consistency determination of the Campus Town project with the Fort Ord Reuse Plan, and (2) the public hearing to determine whether the Project is consistent with the Plan. The Committee received neither notice. And on June 6, 2020, FORA determined the Campus Town Project was consistent with the Fort Ord Reuse Plan.

The COVID-19 Pandemic and Emergency Rule 9

On March 4, 2020, in response to spread of the COVID-19 virus, Governor Newsom declared a state of emergency. On March 27, 2020, he issued a related Executive Order suspending limitations on the Judicial Council's ability to issue emergency orders and rules. Soon after, the Judicial Council adopted 11 emergency rules. Emergency Rule 9, as originally adopted on April 6, 2020, tolled all statutes of limitation for civil causes of action until 90 days after the Governor declared that the state of emergency related to COVID-19 was lifted.

After receiving comments about Emergency

Rule 9's negative impact on CEQA actions and the statute's intentionally brief statutory windows, the Judicial Council amended Emergency Rule 9 on May 29, 2020, to include the provision:

> Notwithstanding any other law, the statute of limitations and repose for civil causes of action that are 180 days or less are tolled from April 6, 2020, until August 3, 2020. (Subdivision (b).)

The First Writ Petition

On April 6, 2020, the Committee filed a petition for writ of mandate challenging the City's approval of the Campus Town Project and FORA's determination that the Project is consistent with the Fort Ord Reuse Plan. The Committee subsequently filed a request for dismissal of the writ petition, without prejudice, which was entered on August 4, 2020.

The Second Writ Petition

On September 1, 2020, the Committee filed a second petition for writ of mandate challenging the Project. The petition named the City and FORA as respondents, and KB Bakewell as real party in interest. The petition alleged 11 CEQA causes of action, and one claim alleging that FORA's failure to provide the requested notices to the Committee constituted a violation of the Committee's due process rights.

KB Bakewell demurred, arguing that the Committee's CEQA causes of action were time-barred, since the second writ petition was filed after the tolling period expired on August 3, 2020. KB Bakewell also argued the Committee's due process claim was moot because FORA had ceased to exist. In response, the Committee argued its counsel relied on the original Emergency Rule 9, which had an open-ended tolling period. The Committee further asserted that its counsel had been unaware of the Emergency Rule 9 amendment, which "cut off" its remedy by severely truncating the tolling period. The Committee thus reasoned that its delay in filing the writ petition should be excused because its confusion was caused by pandemic-related disruptions. Finally, the Committee argued that its due process claim was not moot because the City was FORA's successor in interest and could provide the Committee's requested relief.

The City also demurred, arguing that the Committee's second writ petition was a sham pleading, which was only filed to cure the Committee's procedural mistake of failing to request a hearing within 90 days of filing the first petition. Additionally, the City argued that refiling the petition unreasonably delayed this CEQA litigation. The Committee contested each of the City's claims, arguing its first petition was not subject to mandatory dismissal, its second petition was not a sham pleading, and that it did not unreasonably delay CEQA litigation.

The trial court sustained both demurrers without leave to amend. The court agreed with KB Bakewell that all CEQA actions were time-barred because the Committee filed its petition on September 1, 2020, even though the statutory tolling period expired on August 3, 2020. The court further held that the Committee's due process claim was moot for three interrelated reasons: 1) FORA had ceased to exist; 2) the Committee failed to show the City had an obligation to cure FORA's deficiencies in providing notice; and 3) the legislation requiring notice of FORA's consistency hearings had been repealed. Finally, the court determined that the Committee's second writ petition was a sham pleading filed to circumvent the procedural deficiencies of its former petition.

The Committee appealed.

The Court of Appeal's Decision

The CEQA Causes of Action are Time-Barred

On appeal, the Committee contested the trial court's determination that the CEQA causes of action were time-barred. The Committee argued the shortened limitations period was unreasonable and arbitrary, as evidenced by lengthier tolling periods enacted by other states in the midst of the pandemic. The Committee also explained that its counsel would not have dismissed the first writ petition if it had been aware of the Emergency Rule 9 amendment, which effectively "truncate[d]" the time to file its second writ petition.

The City and KB Bakewell maintained that the Committee's September 1, 2020 petition was untimely because the statutory window expired on August 3rd. They further argued the Committee had ample time (75 days) to file its petition after the Judicial Council announced that Emergency Rule 9 was amended to shorten the tolling period.

The Court of Appeal ultimately affirmed the trial court's judgment that the Committee's CEQA causes

of action were time-barred. Contrary to their argument, the Committee was not "cut off" from pursuing a remedy because it had a reasonable time to file a petition before the shortened limitations period took effect. The court emphasized that the shortened statute of limitations enacted by the amendment to Emergency Rule 9 is consistent with CEQA's policy for keeping the statutory window brief.

Because the second petition was time-barred, the court did not address the City's alternative allegation that the petition was a sham pleading or the Committee's arguments about the unreasonableness of California's pandemic-related tolling provisions.

The Due Process Claim was Moot

The Committee also argued that the trial court erred in sustaining the demurrers to its due process violation claim. The Committee argued the claim was not moot because the City is the successor in interest to FORA's obligations and could thus cure FORA's due process violation by conducting a new Fort Ord Reuse Plan consistency hearing after providing appropriate notice. The City maintained the claim was moot because FORA had been dissolved, and the statutory requirement that FORA determine the consistency of development projects with the Fort Ord Reuse Plan had been repealed.

The Sixth District agreed with the City and concluded that the Committee's due process claim was rendered moot by: 1) the dissolution of FORA; 2) the fact that no statutory obligation imposed a responsibility on the City to cure FORA's mistakes; and, 3) the repeal of the statutory requirement that development projects proposed for the military base be consistent with the Fort Ord Reuse Plan. Accordingly, the court held:

> . . .no effectual relief [could] be provided for the alleged violation of due process with respect to the Campus Town consistency hearing.

An Amendment to the Writ Petition Would Not Cure its Defects

Finally, the Committee contended the trial court erred in denying leave to amend its writ petition so that it could expand its due process claim by adding a request for declaratory relief with respect to FORA's alleged violations.

The Sixth District affirmed the trial court ruling denying the Committee's request for a leave to amend. The court explained that declaratory relief is appropriate to clarify the rights or duties of a party "with respect to another….in cases of actual controversy." Yet, here, the Committee did not meet its burden to show how amending its petition would make declaratory relief available. Specifically, the court saw no actual controversy between the Committee and FORA because FORA had ceased to exist. For these reasons, the Committee could not amend its petition to cure this outstanding defect.

Conclusion and Implications

The Sixth District's opinion provides important insight into the carefully considered policy considerations underlying CEQA's brief statute of limitations. It demonstrates that, even in the midst of a global pandemic, courts attempt to strike a reasonable balance between providing the public notice and an opportunity to challenge a project, and enabling developers to move forward with projects without the threat of future litigation. This, in turn, comports with CEQA's longstanding policy of ensuring certainty and finality through shortened statutory timeframes. The Sixth District Court of Appeal's opinion is available at: https://www.courts.ca.gov/opinions/documents/H049031.PDF.

(Jordan Wright, Bridget McDonald)

SECOND DISTRICT COURT FINDS COASTAL COMMISSION PROPERLY DENIED APPLICATION FOR FAMILY RESIDENCE SEEKING WATER SERVICE CONNECTION

McCarthy v. California Coastal Commission, *Unpub.*, Case No. B309078 (2nd Dist. June 1, 2022).

In an *unpublished* decision filed on June 1, 2022, the Second District Court of Appeal affirmed a trial court judgment finding that the Coastal Commission (Commission) properly denied a Coastal Development Permit for a proposed single family residence on a prominent hillside outside of Pismo Beach. After finding that the Commission properly did not make procedural errors, the court upheld the Commission's findings that the project violated various provisions of San Luis Obispo County's Local Coastal Program (LCP). The decision provides a helpful illustration of the procedural and substantive rules that govern local agency, Coastal Commission, and judicial review of Coastal Development Permit applications.

Factual and Procedural Background

In 2010, the applicant applied to San Luis Obispo County (County) for a Coastal Development Permit to construct a 5,500 square-foot single family residence and a 1,000 square foot secondary residence above a 1,000 square foot garage. Project improvements proposed grading and paving of an access road, a 10,000-gallon water tank for fire suppression, and extension of a water line to connect the proposed residence to water service from the County. The project was proposed within the boundaries of the coastal zone thus requiring a coastal development permit.

In July 2011, the County approved the applicant's permit application subject to conditions. The permit allowed extension of water lines for public water service to the project.

Two planning commissioners appealed the county's permit approval to the Coastal Commission. The appeal alleged that the permit violated County's LCP provisions regarding: 1) visual and scenic standards, 2) archeological resource standards, 3) geologic hazard standards, and 4) environmentally sensitive habitat standards. The commissioners also alleged that the project violated the Coastal Act's public access provisions.

In response, the applicants filed a claim with the Coastal Commission alleging they had vested rights for public water service at the site that predates the Coastal Act and that the Coastal Development Permit was properly issued. The Coastal Commission agreed to hear the vested rights claim and permit appeal at the same hearing.

Before the hearing, Coastal Commission staff recommended that the Commission deny the applicant's vested rights claims because the applicants did not undertake substantial work and incur substantial liability in reliance on governmental permits prior to adoption of the Coastal Act. However, staff recommended that the Commission approve the development permit subject to conditions, including a condition that water be provided to the residence by an on-site well, and not the County service area.

After a hearing, the Commission voted to deny the applicant's claim for vested rights and their application for a coastal development permit. The Commission adopted the following findings: 1) the project has no water supply and the reliability of the on-site water well has not been established; and 2) the visual impact of the project on public places violates LCP visual and scenic resources policies.

The applicant timely filed a writ petition and complaint. The petition sough a writ of administrative *mandamus* to overturn the Commission's decision to deny the applicant's coastal development permit. The Superior Court denied the writ, finding that the Commission's determination that the project violated the LCP's public works and visual and scenic resources policies was supported by substantial evidence. The court also found that the Commission's finding that the project's proposed on-site water well was unsuitable was not supported by substantial evidence.

The Court of Appeal's Decision

The Court of Appeal began by setting out the procedural rules governing appeals of local agency decisions on coastal development permits. Such decisions may be appealed to the Coastal Commission, but the grounds for such appeal are limited to whether the proposed development conforms with the applicable

LCP and the Coastal Act's public access provisions. Judicial review of the Commission's decision is limited to whether the Commission proceeded in excess of its jurisdiction and whether it abused its discretion.

Ultimately the Court would reject each of petitioner's claims.

Coastal Commission Timely Acted on the Project

Petitioner first claimed that it's project was approved by operation of law because the Commission "failed to act on the project within 21 days as required by Public Resources Code [§§] 30622 and 30625, subdivision (a)."

Per the Public Resources Code, the Commission hears a project application *de novo*, as if no local government was previously involved. Therefore the 21 day period in question began running from the date that the Commission held its hearing on the project. Here, the Commission acted well before this 21 day period had run.

Findings Adopted By the Commission Were Adequate

The Court of Appeal also rejected petitioner's arguments that findings adopted by the Commission were unlawful for "fail[ing] to reflect the grounds for denial of the permit."

Here, the Commission's findings were accurate and there was more than sufficient evidence in the record upon which the findings could be based. The applicable test is "whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision." This test was met here. The court petitioner's claim that the findings included misstatements, the petitioner failed to cite any place in the record where such misstatement can be found.

Commission's Findings As to Visual Impacts In Violation of the LCP Were Supported By Substantial Evidence

The Court of Appeal went on to reject petitioner's various claims that the Commission incorrectly found that the project would result in adverse visual impacts to LCP-protected viewsheds. In each instance the court found that substantial evidence supported the Commission's findings that the project would in fact violate various policies set forth in the County's LCP. Here, the project would be located on a prominent hillside that would be visible from both Avila Beach and Pismo Beach and substantial evidence supported the Commission's decision that the project would negatively impact public views and the rural character of the area.

Commission Findings that On-Site Water Well Was Inadequate Were Supported By Substantial Evidence

As part of the writ proceedings, the Coastal Commission also contended that the trial court erred in determining that the Commission's finding relating to the suitability of the on-site water well was not supported by substantial evidence. Here the Court of Appeal rejected the trial court's finding. Instead the court found that the record showed that "the Commission could not have reasonably reached any conclusion" regarding the suitability of the on-site water well to serve the water well for the life of the project. Although petitioners alleged that the water well would produce 20 gallons per minute, they produce no evidence or "recovery data" to verify these results.

Conclusion and Implications

The *McCarthy* decision provides a helpful discussion of the various procedural and substantive provisions involved when Coastal Commission decisions regarding the issuance of a Coastal Development Permit are challenged in writ proceedings. The decision highlights the steep hurdles applicants face when trying to develop in sensitive location in coastal zones, this is especially true in prominent areas visible from multiple locations.

The Court of Appeal's *unpublished* decision can be found here: https://www.courts.ca.gov/opinions/nonpub/B309078.PDF.

(Travis Brooks)

FIRST DISTRICT COURT AFFIRMS HOUSING ACCOUNTABILITY ACT DOES NOT APPLY TO SINGLE-FAMILY HOME PROJECT

Reznitskiy v. County of Marin, ___Cal.App.5th___, Case No. A161813 (1st Dist. June 15, 2022).

The First District Court of Appeal in *Reznitskiy v. County of Marin* affirmed the trial court's decision that the Housing Accountability Act (HAA) does not apply to a project to build a single-family home.

Factual and Procedural Background

In 2016, plaintiffs applied to build a single-family home and accessory dwelling unit (ADU) totaling 5,145 square feet on a 1.76-acre lot they own in San Anselmo. The lot is "heavily wooded" and slopes "steeply" upward from a creek. It has no vehicular access, and the project included a driveway that bridged the creek, a concrete parking deck with an emergency access/ turnaround area, and a temporary access road to enable construction of the house and driveway. Plaintiffs also sought a tree-removal permit because the project proposed removing approximately 19 trees classified as either 'protected' or 'heritage' per the Marin County (County) Development Code (Code).

After receiving preliminary comments from the planning division of the County's community development agency (Agency), plaintiffs revised the project to remove the ADU and reduce the house's floor plan to 3,872 square feet. In February 2019, the planning division issued an administrative decision approving the project and granting the tree-removal permit. The decision found that as redesigned, the project was compatible with the surrounding neighborhood and consistent with the Marin Countywide Plan and the Code's mandatory findings for design review.

The following month, neighbors appealed the planning division's decision to the County planning commission (Commission). They argued that the size of the project rendered it incompatible with the neighborhood, and they provided a survey showing that "[t]he average size of the nearest 25 residences [was] 1,544 square feet," significantly smaller than plaintiffs' proposed house. The neighbors also argued that the creek would be negatively affected, questioned the need for a large bridge, and urged that fewer trees be removed.

Before the Commission hearing on the appeal in May 2019, the planning division prepared a report recommending that its administrative decision be upheld. At the hearing, an array of evidence was considered, including the staff report, project plans, testimony by Reznitskiy, and written and oral opposition from the public. After several commissioners expressed concern about the project's scale and environmental impacts, the Commission unanimously voted to grant the neighbors' appeal and deny the project.

Plaintiffs appealed the Commission's decision to the County board of supervisors (Board). Among other arguments, plaintiffs claimed that "further downsizing" of the project was unnecessary and that the project's denial violated the HAA. The Agency submitted a letter to the Board recommending that the project's denial be upheld, now agreeing that the project was outsized for the neighborhood and would unduly impact the creek and environment. The letter contended that the HAA applied only to large-scale housing projects such as mixed-use, multiple residential unit projects, transitional and supportive housing, and the project did not qualify as such a higher density residential project.

In August 2019, the Board heard plaintiffs' administrative appeal. Additional evidence was presented, including the testimony of two of plaintiffs' civil engineers and further testimony by neighbors opposed to the project. One Board supervisor observed that although plaintiffs had a right to develop" the property, the project was "not ready for prime time yet" and needed to be scaled down and the design refined. The Board then unanimously voted to uphold the Commission's decision denying the project. The Board also issued a resolution summarizing its reasons for denying plaintiffs' appeal. The resolution affirmed that the proposed residence was oversized and concluded that the HAA did not apply to the project.

At the Trial Court

The following month, plaintiffs filed a petition for a writ of administrative *mandamus* in the trial court

to challenge the County's denial of the project. They claimed that the project constituted a "housing development project" under the HAA and complied with all applicable objective general plan and zoning standards and criteria, including design review standards, in effect at the time of the Project application under § 65589.5, subdivision (j)(1). Alternatively, plaintiffs argued that even if the HAA did not apply, the County's findings were not supported by substantial evidence. In December 2020, the trial court rejected these arguments and denied the petition.

The Court of Appeal's Decision

The Court of Appeal, using the independent review standard applicable to statutory interpretation, held the HAA does not apply to a project to develop a single-family residential home.

HAA Provision Preventing Disapproval of Complaint Housing Development Projects

The HAA (Gov. Code, § 65589.5) was enacted 40 years ago as part of broad legislative efforts to address California's housing crisis. The statute aims:

> . . .to significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects and emergency shelters. (§ 65589.5, subd. (a)(2)(K).)

The HAA is part of the Housing Element Law (§ 65580 *et seq.*), which sets forth in considerable detail a municipality's obligations to analyze and quantify the locality's share of the regional housing need and to adopt and to submit to California's Department of Housing and Community Development (Department) a multiyear schedule of actions the local government is undertaking to meet these needs.

In 1982, the California Legislature enacted the HAA to address the dearth of housing in the state. Under § 65589.5, subdivision (j) (§ 65589.5(j))—the provision that plaintiffs contend applies to the project—"[w]hen a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time the application was deemed complete," the local agency cannot "disapprove the project or . . . impose a condition that the project be developed at a lower density" unless it finds that: 1) the project "would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density" and 2) "[t]here is no feasible method to satisfactorily mitigate or avoid [that] adverse impact, other than disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density." (§ 65589.5(j)(1).) A project must be "deemed consistent, compliant, and in conformity with" applicable standards and criteria "if there is substantial evidence that would allow a reasonable person to [so] conclude." (§ 65589.5, subd. (f)(4).)

Plain Meaning of 'Housing Development Project'

Subdivision (h) of the HAA defines "housing development project" as a use consisting of any of the following: (A) Residential units only; (B) Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use; (C) Transitional housing or supportive housing.

The Court of Appeal noted that the statutory definition is imprecise because it does not describe what a "housing development project" is. The provision does not explicitly define the words "housing," "development," or "project," either individually or collectively. (See § 65589.5, subd. (h)(2).) Rather, the provision states that the term "means a use" consisting of one of three types, thus focusing only on the purpose a project must have to be subject to subdivision (j)'s stricter requirements for disapproval. (§ 65589.5, subd. (h)(2))

The plain text of § 65589.5, subdivision (h)(2)(A), which uses the words "residential units," in the plural form, has some force, as the ordinary meaning of "residential units" is more than one residential unit. However, given that the definition also uses mixed use developments in the plural, the Court of Appeal was not able to conclude that the use of the plural, standing alone, establishes that only the plural was intended.

Statutory Context of 'Housing Development Project'

The Court of Appeal turned to the broader meaning of "housing development project." The HAA falls under chapter 3 of the Planning and Zoning Law (§ 65000 *et seq.*). Although the words "housing," "development," and "project" are not individually defined in this chapter, the term "development, project" is defined in another chapter of the Planning and Zoning Law, chapter 4.5, relating to the review and approval of development projects. But that term still does not resolve the issue of whether a development project could constitute only one single-family home.

Since the definition of "housing development project" is ambiguous, the Court of Appeal turned to the more specific statutory context in which it appears. Other parts of the HAA use "development" as a concrete noun when referring to housing development projects, suggesting that the phrase means a project to construct a housing development, not a project to develop housing.

Section 65589.5(j)(2)(A) provides that:

> . . .[i]f the local agency considers a proposed housing development project to be inconsistent, not in compliance, or not in conformity with an applicable . . . provision . . . , it shall provide the applicant with . . . an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity.

Subdivision (k), which addresses litigation to enforce the HAA, provides that a:

> . . .court may issue an order or judgment directing the local agency to approve the housing development project or emergency shelter if the court finds that the local agency acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter in violation of this section. (§ 65589.5, subd. (k)(1)(A)(ii), italics added.)

Other examples are found in subdivision (l), addressing increased fines for failing to comply with a court's order, and subdivision (o), addressing the ordinances, policies, and standards that apply to a housing development project depending on when a preliminary application is submitted.

Legislative History Regarding 'Housing Development Project'

The legislative history of Senate Bill No. 2011 (1981–1982 Reg. Sess.) (Senate Bill No. 2011), which enacted the HAA, also supports the conclusion that "housing development project" refers to a project to build a housing development. Committee reports uniformly described the bill as pertaining to "housing developments."

The Court of Appeal also noted that a major impetus for the HAA is to provide affordable housing, and those individual single-family home projects normally are not for affordable housing.

Conclusion and Implications

This opinion by the First District Court of Appeal holds that at least one type of residential units, individual single-family homes, are not protected by the HAA. The Legislature seems to be divided on whether the HAA intends to protect also individual single family home projects. Given this decision, it will now be up to the California Legislature to clarify whether it intended to include also individual single-family homes. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A161813.PDF.

(Boyd Hill)

SECOND DISTRICT COURT AFFIRMS EQUITABLE EASEMENT IN NEIGHBOR DISPUTE

Romero v. Shih, 78 Cal.App.5th 326 (2nd Dist. 2022).

Landowners brought a lawsuit against their neighbors, alleging causes of action for wrongful occupation of real property, quiet title, trespass, private nuisance, wrongful disparagement of title, and permanent injunction with respect to an eight-foot strip of land on the neighbors' side of a block wall fence but which was part of the landowners' property. The neighbors cross-complained for an implied easement, equitable easement, quiet title, and declaratory relief. Following trial, the Superior Court entered judgment for the neighbors on the implied easement and equitable easement claims. Landowners appealed, and the Court of Appeal affirmed the equitable easement finding.

Factual and Procedural Background

This case involved a property dispute between the owners of two adjacent real properties—the "643 Property" and the "651 Property." In 1941, the Cutlers purchased both properties. At the time of purchase, the 643 Property was improved with a home, while the 651 Property was a vacant lot. The Cutlers resided at the 643 Property. Some years later, the Cutlers applied for a property lot line adjustment to increase the width of the 643 Property by about eight feet and make the same decrease in the 651 Property. While the City planning department approved the request and the new line was surveyed and described by a civil engineer, there is no evidence the City ultimately reviewed or approved the new survey or legal description. Nor is there indication the lot line adjustment ever was recorded. However, the Cutlers acted as though it was operative.

The Cutlers later built a house on the 651 Property. Part of this involved construction of a six-foot-tall block wall between the two properties located along the "new" legal boundary line that had been surveyed and described but never certified by the City. In 1986, the Cutlers recorded a grant deed transferring title to the 651 Property that incorporated the original legal description, not the "new" boundary that would have reduced the width of the 651 Property. The 651 Property later was transferred on a few occasions, each time with the original lot description. The 643 Property also was transferred without the new legal description.

In 2016, the owners of the 651 Property (Romero) filed a civil lawsuit against the owners of the 643 Property (Shih), alleging causes of action for wrongful occupation of real property, quiet title, trespass, private nuisance, wrongful disparagement of title, and permanent injunction. The owners of the 643 Property in turn cross-complained for an implied easement, equitable easement, quiet title, and declaratory relief. The owners of the 643 Property alleged they would suffer irreparable harm if they were not granted an easement over the improvements located on their property because otherwise the driveway would not be wide enough to access the property. They argued this created an equitable easement in the area of the improvements. They also argued the acts of the prior owners created an implied easement given the Cutlers' actions.

At the Trial Court

A five-day bench trial took place in mid-2020. Evidence and testimony largely focused on: 1) the City's lot line variance and zoning requirements and the extent of the encroachment; and 2) the effect of the encroachment on the properties. In September 2020, the Superior Court filed its statement of decision, finding that the owners of the 643 Property possessed an implied easement over the eight-foot strip of land that ran with the land, consistent with the original grantor's intent, and which would terminate if the 643 Property ceases to use the easement for a driveway, planter, and wall/fence. The Superior Court further concluded that, if there were no such implied easement, an equitable easement would arise, finding that the owners of the 643 Property were innocent parties with no knowledge of the encroachments and no basis to know of them, and that the owners of the 651 Property would not suffer irreparable harm from continued encroachment. The Superior Court found that the owners of the 651 Property were entitled to compensation equal to the diminution in value of

their property, which the court found was $69,000. After the Superior Court entered judgment, the owners of the 651 Property appealed.

The Court of Appeal's Decision

Implied Easement

The Court of Appeal first addressed the challenges to the Superior Court's finding of an implied easement, noting that this presented an issue of first impression regarding the propriety of an "exclusive" implied easement (because the owners of the 651 Property would essentially have no ability to use the easement area on the 643 Property, the easement was characterized as being "exclusive" in nature). The Court of Appeal noted, however, that in most cases involving prescriptive easements the courts have not allowed exclusive easements, and it found that the same rationale in those cases should apply in the context of implied easements. Based on its analysis of the case law, the Court of Appeal held that an exclusive implied easement cannot be justified or granted unless: 1) the encroachment is "de minimis"; and 2) the easement is necessary to protect the health or safety of the public or for essential utility purposes. Finding neither to be satisfied here, the Court of Appeal reversed the finding of an implied easement.

Equitable Easement

The Court of Appeal next addressed the Superior Court's creation of an equitable easement, noting that courts have discretion to find an equitable easement where: 1) the trespass was "innocent" rather than "willful or negligent"; 2) the public or the property owner whose property is otherwise trespassed upon would not be irreparably injured by the easement; and 3) the hardship to the trespasser from having to cease the trespass is greatly disproportionate to the hardship caused to the owner by the continuance of the encroachment.

Here, the Court of Appeal found each element to be satisfied. The court first found the owners of the 643 Property were innocent and did not have knowledge of their encroachment on the 651 Property. The court also rejected the claim that the owners of the 643 Property were negligent, finding that neither party had taken additional steps to conduct a thorough investigation of their property prior to purchase; thus, there was a corresponding contributory negligence by the owners of the 651 Property. Regarding the second element, the court found substantial evidence supported the Superior Court's finding that the owners of the 651 Property would not suffer any irreparable harm, rejecting contrary claims as lacking in sufficient evidence. Finally, the Court of Appeal found the hardship to the owners of the 643 Property was greatly disproportionate to the hardship caused to the owners of the 651 Property. The court also rejected a claim that the decision by the owners of the 643 Property not to testify should be dispositive against their interest, finding that the record contained substantial evidence supporting the inference that the hardship experienced by the owners of the 651 Property would be greatly outweighed by the corresponding harm.

The Court of Appeal also rejected claims that the terms and scope of the Superior Court's equitable easement were not narrowly tailored. The Court of Appeal noted that the Superior Court's grant of an equitable easement would terminate if the 643 Property were to cease its continued use of the land for a driveway, planter, and wall/fence. The Court of Appeal further noted that the Superior Court had provided the owners of the 651 Property multiple opportunities to provide evidence as to how the easement could be more narrowly tailored, but they had decided to pursue an "all or nothing" approach. Thus, there was no evidence about how the easement could have been any more narrowly tailored to the use required by the owners of the 643 Property.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the law of implied and equitable easements in the context of neighboring property disputes. The decision is available online at: https://www.courts.ca.gov/opinions/documents/B310069.PDF.
(James Purvis)

THIRD DISTRICT COURT REVERSES DECISION FINDING THAT COMMUNITY ACTION AGENCY IS AN 'OTHER PUBLIC AGENCY' SUBJECT TO PUBLIC RECORDS ACT

The Community Action Agency of Butte County v. Superior Court, ___Cal.App.5th___, Case No. C093020 (3rd Dist. May 27, 2022).

The Third District Court of Appeal in *The Community Action Agency of Butte County v. Superior Court* reversed the trial court's decision requiring disclosure of records of the Community Action Agency of Butte County (CAA) under the California Public Records Act (CPRA) on the grounds that CAA, a private nonprofit, is an "other public agency" under the CPRA.

Factual and Procedural Background

A community action agency may be a public or private nonprofit agency that: 1) has been designated by the director of the California Department of Community Services and Development (Department) to operate a community action program; 2) has a tripartite board structure meeting the requirements of Government Code § 12751; and 3) has the power, authority, and capability to plan, conduct, administer, and evaluate a community action program, including the power to enter into contracts with other public and private nonprofit agencies and organizations to assist in fulfilling the purposes of the California Community Services Block Grant Program. (Govt. Code, §12750, subd. (a).)

A community action program is a locally planned and operated program comprising a range of services and activities having a measurable and potentially major impact on causes of poverty in the community or those areas of the community where poverty is a particularly acute problem. (§ 12750, subd. (b).)

Community action agencies provide services for underprivileged persons at the local level. In 1981, Congress established the Community Services Block Grant Program, which provides lump sums to state governments. One reason for adopting the block grant approach was to allow states to choose local providers of social services that the states themselves believe are best able to do the job.

In April 2019, Bussey requested from CAA access to and copies of 14 categories of records, including check registers from 2012-2017, credit card statements, 2012-2017, and records documenting CAA reimbursements to its chief executive officer for travel expenses from 2012-2017.

Bussey described herself as an involved member of the Butte County community who had worked directly with CAA to bolster funded services provided as part of the war on poverty. Bussey became concerned with CAA's operations after she heard complaints from CAA's employees about perceived accounting and spending irregularities and after CAA rejected a $150,000 private donation needed to bridge the gap between federal block grant funds and CAA's budgetary requirement because the donation requested an accounting of how the donated funds would be spent.

CAA declined Bussey's request, stating the records sought were not required to be maintained under California law, and CAA was not subject to the CPRA or to the Federal Freedom of Information Act (FOIA).

In July 2019, Bussey filed a petition for writ of mandate in the Superior Court to compel CAA to give her access to the records under the CPRA and also under the FOIA pursuant to Regulation § 100765 promulgated by the Department (Cal. Code Regs., tit. 22, § 100765 (Regulation 100765)).

According to Bussey, CAA constitutes a "local agency" subject to the CPRA as an "other local public agency" as contemplated by Government Code § 6252, subdivision (a). Furthermore, Bussey asserted that CAA was "a grantee" within the meaning of Regulation 100765, a regulation promulgated the Department, which Bussey quoted as providing:

> Any person who wishes to inspect or copy records regularly maintained by a grantee may do so after making a request. Information and records will be made available to the requestor in accordance with the Freedom of Information Act . . . .

CAA admitted that it was a Community Action Agency that worked to address poverty, but

maintained that it was a private entity, not subject to CPRA. As for Regulation 100765, CAA argued the provision applied only to records related to the administration of Community Block Grants that were required to be maintained by the grantee under that regulatory scheme, and Bussey's requests concerned records not covered under the scheme.

CAA further argued that any interpretation of Regulation 100765 imposing broader public records access requirements than federal law was an incorrect interpretation, because federal regulations prohibit a state from imposing public records access requirements on non-Federal entities, such as CAA.

In an effort to promote transparency, CAA submitted its 2015, 2016, and 2017 financial statements audited by a qualified independent auditor. Those documents showed that in 2016 and 2017 CAA had annual total expenses of around $5.6 million and received federal awards funding totaling around $3.5 million (most of it passed through the Department).

In November 2020, after oral argument, the superior court issued a written ruling, ordering CAA to produce most of the records requested by Bussey in April 2019, including CAA's check registers, credit card statements, and travel reimbursements to CAA's chief executive officer. That ruling was based on the superior court's conclusion that CAA was a "public entity" subject to both FOIA and CPRA, not as a matter of law, but based upon the factual situation presented. CAA was determined to be an "other local public agency" based upon the fact that CAA received federal grant funding and has been delegated authority to carry out public functions in Butte County.

CAA filed a petition for writ of mandate challenging the trial court ruling.

The Court of Appeal's Decision

The Court of Appeal held: 1) a nonprofit entity like CAA may be an "other local public agency" only in exceptional circumstances not present here; 2) under a four-factor test based on persuasive out-of-state authority, there is not substantial evidence for the trial court's ruling that CAA is an "other local public agency"; 3) FOIA does not apply to CAA; and 4) the Department's regulation does not require CAA to provide public access to its records generally.

Meaning of 'Other Local Public Agency'

When the California Legislature passed CPRA in 1968 it was concerned with public access to the records of governmental entities. When the Legislature wanted to subject certain local nongovernmental entities to CPRA, it did so expressly in 1991 with Assembly Bill No. 788, limiting the expansion of the definition of "local agency" to "nonprofit organizations of local government agencies and officials" that were "supported solely by public finds." When the Legislature wanted to alter the universe of local nonprofit entities subject to CPRA (to nonprofits that were legislative bodies of a local agency), it did so in 1998 with Senate Bill No. 143, careful to avoid language that might have been interpreted to include local nonprofit organizations generally. And when, in 2002, the Legislature removed the word "nonprofit" from § 6252, it did so to ensure that all entities that were legislative bodies of local agencies (nonprofit and for-profit) would be subject to CPRA; not to expand the universe of local nonprofit entities subject to CPRA.

Accordingly, in light of this legislative history, the Court of Appeal concluded the Legislature intended the "other local public agency" definition of "local agency" in § 6252 to include governmental entities, not nongovernmental entities like nonprofits.

Exceptional Circumstances for 'Other Local Public Agency' to Extend to Nonprofit

In light of the mandate to broadly construe a statute if it furthers the people's right of access, the Court of Appeal concluded a nonprofit entity may be an "other local public agency" within the meaning of § 6252, subdivision (a), but only in exceptional circumstances, such as when, as a practical matter, the nonprofit operates as a local public entity. Faced with a similar issue, the Supreme Court of Washington rejected the contention that Washington's statutory public records law could "never reach the records" of a private nonprofit entity and articulated a four-factor test for determining whether a private entity should be treated as the functional equivalent of a governmental agency.

The factors are: 1) whether the entity performs a government function, 2) the extent to which the government funds the entity's activities, 3) the extent of government involvement in the entity's activities,

and 4) whether the entity was created by the government. (*Fortgang v. Woodland Park Zoo* (2017) 187 Wn.2d 509, 512)

Applying these factors, the Court of Appeal determined that elimination of poverty is not a core governmental function, but that there was substantial government funding of CAA. However, there was not substantial evidence as to the third and fourth factors. Because only one of the four factors weighed in favor of a conclusion that CAA operates as a local public entity, the Court of Appeal did not find this to be an exceptional situation of an "other local public agency" within the meaning of § 6252, subdivision (a).

Non-Applicability of FOIA

The FOIA only applies to federal agencies. Thus, Regulation 100765 cannot exceed the Department's regulatory authority and cannot conflict with federal regulations limiting FOIA public disclosure to only those records that community action agencies are required to maintain as a grantee.

Conclusion and Implications

This opinion by the Third District Court of Appeal overturns what seems to be an applicable situation under its newly adopted four-factor test, only because of lack of evidence of government involvement, despite the Community Action Agency of Butte County's web site stating that it was formed by the government. Quasi-government agencies such as the Community Action Agency of Butte County should take little comfort from this holding in refusing to comply with public records requests. The court's opinion is available online at https://www.courts.ca.gov/opinions/documents/C093020.PDF.
(Boyd Hill)

FIRST DISTRICT COURT AFFIRMS JUDGMENT REJECTING CEQA CHALLENGES TO APPROVAL OF HOME DEVELOPMENT PROJECT—CRITICIZES LAWSUIT AS AN ABUSE OF CEQA

Tiburon Open Space Committee et al. v. County of Marin,
___Cal.App.5th___, Case No. A159860 (1st Dist. May 12, 2022).

In a decision filed May 12, 2022, the First District Court of Appeal affirmed a trial court judgment denying a petition under the California Environmental Quality Act (CEQA) challenging Marin County's (County) approval of a 43-unit residential subdivision on a 110-acre project site on a ridgeline above the Town of Tiburon. The decision was the culmination of nearly 50 years of attempts by the owner of the project site to develop the project, which was subject to unrelenting public opposition. The decision is important because it analyzes the limits of a lead agency's obligation to perform CEQA review for a project where the local agency's power to deny or condition approval of a project is constrained by state or federal law. The decision is also notable for its language decrying what the court characterized as petitioner's supposed "CEQA litigation abuse" reflected in the "woeful record" before the court.

Factual And Procedural Background

Since the 1970s, a developer attempted to secure approval to develop a 110-acre property it owns on a ridgeline overlooking Tiburon and the San Francisco Bay. The proposal generated intense opposition from the town of Tiburon and nearby residents. In the mid-1970s, the County downzoned the subject property from a minimum of 300 units to a maximum of 27 units. This resulted in periodic bouts of litigation in federal court, which resulted in a stipulated judgment in 1976 and another in 2007. The 1976 judgment required the County to allow developer to develop the project site with no fewer than 43 single family homes on one-half acre lots. The judgment also required the developer to dedicate approximately half of its land to the County for open space purposes and hiking trails. County Counsel explained to the County at the time of the first judgment that standard procedural and hearing requirements would be

required as well as an Environmental Impact Report (EIR). Despite the 1976 stipulated judgment, after years of study and multiple development applications submitted by the developer, the County refused to process the application and bring the project to a hearing for approval.

In 2005, the County filed a federal lawsuit against the developer and the nearby town of Tiburon for relief from the 1976 stipulated judgment. The County alleged that the 1976 judgment was "void and unenforceable because environmental laws have changed in the 30 years since the 1976 judgment…" The County also argued that it was illegal for the County to contract away its authority to evaluate the proposed development without conducting a full review under CEQA. The U.S. District Court dismissed the County's complaint and entered a second stipulated judgment in 2007. In the 2007 stipulated judgment, the County acknowledged that "it must process a subdivision map in conformance with the 1976 Judgment." The judgment also required the County to certify a full EIR under CEQA within 14 months after the developers last application. The developer also acknowledged that any alternatives or mitigation measures not allowing the developer to develop a project in accordance with the 1976 judgment were legally infeasible unless required to protect health and safety. The 2007 judgment also required the County to process and approve the project's final map promptly and defend approval of the project and certification of the EIR in any subsequent litigation.

In late 2008, the developer filed the latest development application for the Project. In early 2011 the County prepared and circulated a Draft EIR. The draft EIR analyzed the project's environmental impacts, incorporated mitigation measures, and also assessed four project alternatives including: 1) no project; 2) reduced density; 3) smaller lots with homes in different locations; and 4) reconfigured site plans with smaller lots to reduce biological impacts. In 2014 the County board of supervisors (Board) refused to certify the final EIR claiming there were "too many unknowns" regarding project mitigation measures. In 2017, the developer submitted a more specific project application. On October 3, 2017, the Board voted 3-2 to certify the EIR and conditionally approve the project.

The town of Tiburon and neighbors filed petitions in Marin County Superior Court challenging the EIR on several grounds and contending the judgments were based on unlawful agreements that illegally contracted away the county's police power. The trial court rejected the petitions, and petitioners appealed to the First District Court of Appeal.

The Court of Appeal's Decision

'How CEQA Operates'

The Court of Appeal began by discussing core CEQA principles and "how CEQA operates." As the court noted:

> . . .[t]oo much should not be expected of an EIR. It is not to have the exhaustive scope of a scientific textbook. An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences. . . .The courts have not looked for perfection but for adequacy, completeness, and a good faith effort at full disclosure.

The court also noted that insubstantial or *de minimis* errors in an EIR are not prejudicial. Under the substantial evidence standard, an appellant must provide the evidence favorable to the other side and show that it is lacking. A reviewing court will not independently review the record to make up for an appellant's failure to carry its burden in establishing that an agency's decision is not supported by substantial evidence.

County Did Not Abdicate or Compromise Its Compliance With CEQA By the 1976 and 2007 Stipulated Judgments

The court found that the county had permissibly assented to the 1976 and 2007 stipulated judgments. The court noted that there is nothing suspect about a governmental entity settling a lawsuit brought by a property developer, to the contrary "the law favors and encourages the settlement of legal disputes."

Importantly, the court recognized that under CEQA, a lead agency's discretion is limited by the agency's legal obligations:

> Accordingly where a legal obligation limits an agency's discretion, the scope of environmental

> review likewise is limited. . . .while CEQA imposes a duty on lead agencies to avoid or mitigate significant environmental impacts caused by projects, such duty exists only to the extent feasible.

Therefore mitigation measures that conflict with legal obligations are infeasible and do not need to be proposed or analyzed in an EIR. If not feasible to mitigate or avoid significant environmental effects, an agency can still proceed to approve the project with a statement of overriding considerations finding that identified project benefits outweigh significant and unavoidable impacts.

The court also rejected petitioners' arguments that the stipulated judgments impermissibly prevented county supervisors from performing their official duty, or deprived their exercise of independent judgment that substantial evidence supported approval of the project. The court noted that "[r]ecognizing unpleasant realities is often the essence of official duty for elected office-holders." The court also noted that the stipulated judgments did not prevent the county from exercising its independent judgment, and such judgment was properly exercised within the boundaries of binding federal judgments.

The court noted that a central purpose of CEQA is to inform the public why a lead agency approved a project as it did. Here, the comprehensive 800+ page:

> . . .clearly represents a considerable expenditure of both time and money, and not a pro forma exercise. It is utterly at odds with the conduct of a public entity that believed itself to blow off CEQA.

The court also rejected petitioners' challenge that the EIR's 34-page project description was "artificially narrow." In fact, the EIR's project description had more detail than required by CEQA, so much so that an attack on the project description's adequacy "would almost certainly qualify as frivolous."

Remaining CEQA Claims

The court went on to reject each of petitioners' remaining CEQA arguments. Petitioners challenged the alternatives analysis included in the EIR, claiming among other things, that it should have analyzed what petitioners claimed was an environmentally superior 32-unit project. However, the EIR was not required to analyze this alternative—a 32-unit project was not feasible because it would violate the 1976 and 2007 judgments.

The court also rejected petitioners' arguments that the County's findings regarding the mitigation of traffic impacts were insufficient. All that is required is a "reasonable plan" for mitigation of traffic and other impacts, which the EIR included. The court also rejected petitioners' arguments that the EIR was inadequate for: 1) its analysis and/or mitigation of pedestrian safety impacts, 2) mitigation of impacts to California red-legged frogs, and 3) hydrological impacts and related mitigation.

The court also rejected petitioners' claims regarding the EIR's water tank and fire flow analysis. The EIR's analysis of these project impacts and related mitigation were adequate.

The court rejected petitioners' claims regarding safety impacts stemming from the use of a planned onsite construction road that was steeper than roadway standards. Construction firms and a traffic expert concluded the road was feasible and could be safe, and this amounted to substantial evidence that the county could rely on. The court also rejected petitioners' claims that the project would have safety impacts on project workers, CEQA is concerned with impacts on the public in general, not risks posed by the existing environment to workers on a project.

Conclusion and Implications

The *Tiburon Open Space Committee* decision is important in that it demonstrates the effect of federal and state law on a local agencies obligations to conduct CEQA review and mitigate environmental impacts. The amount of review required in an EIR is limited by the agency's actual discretionary authority in the context of federal and state law, and is not required to analyze alternatives that are not feasible under such law. In its decision, the court recognized that "CEQA lawsuit abuse is worsening California's housing crisis" and that "[s]omething is very wrong with this picture" where petitioners' CEQA challenge dragged approval of the project out for *several* years.

A copy of the court's decision can be found here: https://www.courts.ca.gov/opinions/documents/A159860.PDF.

(Travis Brooks)

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