Volume 31, Number 11
August/September 2022

CALIFORNIA LAND USE™
LAW & POLICY Reporter

CONTENTS

Continued on next page

ARGENT COMMUNICATIONS GROUP

WWW.ARGENTCO.COM

CALIFORNIA LAND USE™
LAW & POLICY Reporter

Publisher's Note: Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222, schuster@argentco.com.

WWW.ARGENTCO.COM

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

 CLU

FEATURE ARTICLES

CALIFORNIA SUPREME COURT HOLDS FEDERAL POWER ACT DOES NOT PREEMPT APPLICATION OF CEQA TO STATE'S AUTHORITY OVER DAM LICENSING

By Bridget McDonald

On August 1, 2022, the California Supreme Court issued its highly anticipated decision in *County of Butte v. Department of Water Resources*. In a 5-2 opinion, a divided court held that the Federal Power Act (FPA) does not entirely preempt the California Environmental Quality Act's (CEQA) application to the state's participation, as an applicant, in the FPA's licensing process for hydroelectric facilities. The Court agreed, however, that CEQA could not be used to challenge a settlement agreement prepared by the Department of Water Resources (DWR) as part of FPA proceedings conducted by the Federal Energy Regulatory Commission (FERC). Finally, the Court also held that claims challenging the sufficiency of an Environmental Impact Report (EIR) that DWR prepared pursuant to that agreement were not preempted because DWR's CEQA decisions concerned matters outside of FERC's jurisdiction. [*County of Butte v. Department of Water Resources*, ___Cal.5th___, Case No. C071785 (Cal. Aug. 1, 2022).]

Statutory Background

The Federal Power Act

The Federal Power Act facilitates development of the nation's hydropower resources, in part by removing state-imposed roadblocks to such development. Under the FPA, the construction and operation of a dam or hydroelectric power plant requires a license from the Federal Energy Regulatory Commission. A FERC license must provide for, among other things, adequate protection, mitigation, and enhancement of fish and wildlife, and for other beneficial public uses, such as irrigation, flood control, water supply, recreational, and other purposes. The FPA expressly grants FERC authority to require any project be modified before approval.

Federal Preemption

The Supremacy Clause of the U.S. Constitution provides that federal law is "the supreme Law of the Land." Congress may explicitly or implicitly preempt (*i.e.*, invalidate) a state law through federal legislation. Three types of preemption could preclude the effect of a state law: "conflict," "express," and "field" preemption. As relevant here, "conflict" preemption exists when compliance with both state and federal law is impossible, or where state law stands as an obstacle to achieving compliance with federal law. To prove a conflict exists, the challenging party must present proof that Congress had particular purposes and objectives in mind, such that leaving the state law in place would compromise those objectives. The inquiry is narrowly focused on whether the conflict is "irreconcilable"—hypothetical or potential conflicts are insufficient to warrant preemption.

Factual and Procedural Background

The California Department of Water Resources operates the Oroville Facilities—a collection of public works projects and hydroelectric facilities in Butte County. FERC issued DWR a license to operate the facilities in 1957. In anticipation of the license's expiration in 2007, DWR began the license application process under the FPA in October 1999.

At the time DWR undertook the relicensing process, FERC regulations allowed applicants to purpose the traditional licensing process or an "alternative

licenses process" (ALP)—a voluntary procedure designed to achieve consensus among interested parties before the application is submitted. The ALP requires stakeholders with an interest in the project's operation to cooperate in a series of hearings, consultations, and negotiations, in order to identify and resolve areas of concern regarding the terms of the license. The process also combines the consultation and environmental review process required by the National Environmental Policy Act (NEPA), as well as the administrative processes associated with the federal Clean Water Act (CWA) and other applicable federal statutes. Ideally, ALP participants conclude the process by entering into a settlement agreement that reflects the terms of the proposed license. That agreement becomes the centerpiece of the license application and serves as the basis for FERC's "orderly and expeditious review" in settling the terms of the license.

DWR elected to purse the ALP. FERC approved DWR's request in January 2001. The ALP process consumed the next five years. ALP participants included representatives from 39 organizations, including federal and state agencies, government entities, Native American tribes, water agencies, and nongovernmental organizations. In September 2001, DWR issued a document combining a CEQA notice of preparation (NOP) and a NEPA "scoping document," which sought comments on the scope of a preliminary draft environmental assessment (PDEA)—a document mandated by the ALP. DWR issued the PDEA for the Facilities in January 2005. Partially relying on the PDEA, FERC issued a draft environmental impact statement (EIS) in September 2006. And from April 2004 to March 2006, the ALP participants negotiated and ultimately signed a settlement agreement. The Counties of Butte and Plumas declined to sign the agreement because they were dissatisfied with its terms.

In May 2007, DWR issued a draft EIR that considered the same project and alternatives that FERC considered in its draft EIS. The EIR characterized the project under review as "implementation of the settlement agreement," which would allow "the continued operation and maintenance of the Oroville Facilities for electric power generation." DWR undertook CEQA procedures because the State Water Resources Control Board (Water Board) required preparation and certification of an EIR under the Clean Water Act, and the CEQA process could inform whether DWR would accept the license of the terms of the settlement agreement, or the alternative proposed by FERC in the EIS (both of which were analyzed in the EIR). DWR issued a NOD approving the EIR in July 2008; and the Water Board certified the Project's compliance under the CWA in December 2010.

At the Trial Court

In August 2008, the Counties of Butte and Plumas (Counties) filed separate petitions for writ of mandate challenging DWR's compliance with CEQA in connection with the relicensing. The Counties raised similar claims regarding the adequacy of the EIR's project description, analysis of environmental impacts and alternatives, and its adoption of feasible mitigation measures. In May 2012, after consolidating the two cases, the trial court rejected the Counties' claims and found the EIR complied with CEQA. The Counties appealed.

Initial Review by the Court of Appeal and California Supreme Court

On appeal, the Third District Court of Appeal declined to reach the merits of the Counties' CEQA claims. Instead, the court held the Counties' actions were preempted because FERC had exclusive jurisdiction over the settlement agreement. The court also deemed the claims premature to the extent they challenged the Water Board's certification, which had not been filed yet.

The Counties petitioned the California Supreme Court for review, which the Court granted in 2019. The Court subsequently transferred the matter back to the Third District for reconsideration in light of the Supreme Court's decision in *Friends of the Eel River v. North Coast Railroad Authority,* 3 Cal.5th 677 (2017) (*Friends of the Eel River*). The Court in *Friends of the Eel River* held that the Interstate Commerce Commission Termination Act (ICCTA) did not preempt a state railroad authority's application of CEQA to its own rail project, for such application "operates as a form of self-government" because the agency is, in effect, regulating itself.

Following the Supreme Court's remand, the Third District Court of Appeal considered the *Friends of the Eel River* ruling, and ultimately reached the same conclusion: the FPA preempts the Counties' chal-

lenge to the environmental sufficiency of the settlement agreement. Because FERC has sole jurisdiction over disputes concerning the licensing process, an injunction would be akin to prohibited "veto power." In light of this preemption, the Third District maintained the FPA preempted the Counties' CEQA challenges to the sufficiency of the EIR.

The California Supreme Court's Decision

The California Supreme Court, again, granted the Counties' petition for review to determine: (1) whether the FPA fully preempts application of CEQA when the state is acting on its own behalf and exercising its discretion in relicensing a hydroelectric dam; and (2) whether the FPA preempts challenges in state court to an EIR prepared under CEQA to comply with the CWA. The Court concluded the second issue was not properly presented and thus declined to address it.

Turning to the first issue, the Court agreed with the Court of Appeal that the Counties' claims were preempted by the FPA to the extent they attempted to:

> unwind the terms of the settlement agreement reached through a carefully established federal process and seek to enjoin DWR from operating the Oroville Facilities under the proposed license.

As to the Counties' claim against the EIR, the Court rejected the Third District's finding that those were also preempt, instead concluding that nothing:

> in the FPA suggests Congress intended to interfere with the way the state as owner makes these or other decisions concerning matters outside FERC's jurisdiction or compatible with FERC's exclusive licensing authority.

The FPA Does Not Categorically Preempt CEQA

To consider whether Congress intended for the FPA to categorically preempt CEQA, the Court applied a presumption that "protects against undue federal incursions into the internal, sovereign concerns of the states." In the absence of unmistakably clear language, the Court would presume that Congress did not intend to deprive the state of sovereignty over its own subdivisions to the point of upsetting the constitutional balance of state and federal powers, or intend to preempt a state's propriety arrangements in the marketplace, absent evidence of such a directive.

Here, the FPA's Savings Clause does not evince an "unmistakably clear" intent by Congress to preempt California's environmental review of its own project, as opposed to its regulation of a private entity. The issue here rests on whether Congress intended to preclude the state from trying to govern *itself*—therefore, it would be contrary to the "strong presumption against preemption" to assume the existence and/or scope of preemption based on statutory silence. In particular, neither the FPA's legislative history nor its language suggests that Congress intended it to be one of the "rare cases" where it has "legislative so comprehensively" that it "leaves no room for supplementary state legislation" on the issues at bar.

The fact that the FPA has a significant preemptive sweep says nothing about congressional intent to prohibit state action that is non-regulatory. Instead, CEQA operates as a form of self-government, therefore, application of CEQA to the public entity charged with developing state property is not classic "regulatory behavior," especially when there is no encroachment on the regulatory domain of federal authority or inconsistency with federal law. Rather, application of CEQA here constitutes self-governance on the part of a sovereign state and owner.

But the FPA Does Preempt CEQA Claims Against DWR and FERC's Settlement Agreement

Although the FPA does not *categorically* preempt CEQA, that does not mean that *no* applications of CEQA are preempted. To the contrary, CEQA—in this instance—cannot be used to challenge the terms of the settlement agreement.

The overriding purpose of the FPA is to facilitate the development of the nation's hydropower resources by centralizing regulatory authority in the federal government to remove obstacles posed by state regulation. Therefore, a CEQA challenge to the terms of the agreement would raise preemption concerns to the extent the action would interfere with the federal process prescribed by the ALP or with FERC's jurisdiction over those proceedings. Were the Court to enjoin DWR from executing the terms of the agreement, the injunction would stand as a direct obstacle

to accomplishing Congress' objective of vesting exclusive licensing authority in FERC.

The FPA Does Not, However, Preempt CEQA Review of DWR's EIR

While the Court of Appeal correctly held the FPA preempted the Counties' challenge to the environmental sufficiency of the *settlement agreement*, the appellate court erred in also finding the FPA preempted the Counties' CEQA challenge to the environmental sufficiency of the *EIR*.

Here, the EIR explained that the project subject to CEQA was the implementation of the settlement agreement. It therefore analyzed the environmental impact of the settlement agreement, as well as the alternative FERC identified in the related EIS. At this stage, review of DWR's EIR would not interfere with FERC's jurisdiction or its exclusive licensing authority. Federal law expressly allows applicants to amend their license application or seek reconsideration once FERC has issued a license. There is no federal law that limits an applicant's ability to analyze its options or the proposed terms of the license before doing so. Accordingly, DWR can undertake CEQA review, including permitting challenges to the EIR it prepares as part of that review, in order to assess its options going forward. Nothing about DWR's use of CEQA is incompatible with the FPA or FERC's authority.

Moreover, any preemption concerns related to DWR's ability to adopt additional mitigation measures in the EIR are premature. At this stage, the Counties challenge only the sufficiency of the EIR. They do not ask the Court to impose or enforce any mitigation measures, much less any that are contrary to federal authority. Therefore, a CEQA challenge to DWR's EIR is not inherently impermissible, nor is it clear that any mitigation measures will conflict with the terms of the license that FERC ultimately issues. If anything, federal law provides avenues for DWR to employ the mitigation measures identified in the EIR. If FERC concludes those measures interfere with the agency's federal authority, it has the discretion to dictate the scope and extent of those measures in the license it issues.

For these reasons, the majority affirmed the Third District Court of Appeal's ruling that the Counties could not challenge the environmental sufficiency of the settlement agreement or seek to unwind it, for doing so would pose an unnecessary obstacle to the exclusive authority Congress granted to FERC. That rationale does not, however, extend to the Counties' challenge to the environmental sufficiency of the EIR, insofar as a compliant EIR can still inform the state agency concerning actions that do not encroach on FERC's jurisdiction. Nothing precludes courts from considering a challenge to the sufficiency of an EIR in these circumstances and ordering the agency, such as DWR, to reconsider its analysis.

The Concurring and Dissenting Opinion

The Chief Justice of the Court, who also authored the *Friends of the Eel River* opinion, concurred, and dissented. The Chief Justice agreed that any CEQA challenge to FERC's licensing process, including the settlement agreement, was preempted. The Chief Justice disagreed, however, that broader CEQA challenges were not similarly preempted.

The dissenting opinion reasoned that, in addition to "field" and "conflict" preemption, state law that presents an obstacle to the purposes and objectives of federal law would be similarly preempted. Here, CEQA presents an obstacle to the FPA given standing federal precedent and the statute's "savings clause." The FPA's licensing process notably includes "CEQA-equivalents" via the ALP and NEPA, but does not contemplate the delays created by state court review of CEQA litigation.

Moreover, CEQA is subject to "field" preemption because CEQA does not involve state regulation of water rights. While federal FPA preemption cases addressed state-operated projects, the concept of "field" preemption is broad enough preempt all state regulation, regardless of who the operator is.

With respect to the *Friends of the Eel River* decision, the dissent explained that the opinion portrayed an example of "self-governance" when it held CEQA was exempt from ICCTA preemption. Because the ICCTA sought to deregulate railroads, and thus allow greater "self-governance" by railroad operators, the state's voluntary compliance with CEQA was not preempted. In contrast here, the FPA's purpose and objectives is to vest exclusive regulation of hydroelectric facilities to FERC and to exclude all state regulation, with the exception of water rights. Unlike the ICCTA, the language of the FPA made it "unmistakably clear" that *all* state regulation of hydroelectricity facilities (except regulation of water rights) is preempted.

Finally, the dissent noted that the majority's "partial preemption" determination was unworkable. Finding DWR's CEQA compliance deficient would still not impact FERC's decision to issue a license. Instead, forcing DWR to perform additional analyses, or consider additional mitigation or alternatives, would be an impractical paper-generating exercise. As the majority acknowledged, FERC retains complete discretion to deny or alter the terms of a license, regardless of whether those changes are necessary to comply with CEQA. Therefore, requiring CEQA compliance would merely be redundant given the environmental studies FERC performed pursuant to NEPA.

Post-Script

On August 24, 2022, the Supreme Court modified its opinion following a letter signed by numerous CEQA practitioners, which asked the court to correct an erroneous statement in its opinion about the topics an EIR is required to discuss. The Court's opinion previously stated that an EIR was required to discuss the "economic and social effects of [a] project." Following the practitioners' letter, the Court corrected the opinion to remove this phrase from its list of mandatory EIR discussions, but noted that an EIR may—but is not generally required to—discuss such topics.

Conclusion and Implications

The Supreme Court's long-awaited, but divided decision, clarifies the scope of CEQA and its concurrent relationship to federal environmental statutes. Here, the Court demonstrated that federal preemption must be explicit. Absent unmistakably clear language from Congress, federal statutes should not interfere with a state government's right to self-govern—particularly in matters concerning environmental protection. However, the scope of state regulation is not unlimited. Where such regulation would interfere with jurisdiction plainly vested in federal agencies, a state statute cannot serve as an obstacle thereto.

The Supreme Court's opinion is available at: https://www.courts.ca.gov/opinions/documents/S258574.PDF.

Bridget McDonald, Esq. is an Associate at the law firm, Remy Moose Manley, LLP, practicing from the firm's Sacramento, California office. Bridget's practice focuses on land use and environmental law, handling all phases of the land use entitlement and permitting processes, including administrative approvals and litigation. Her practice includes the California Environmental Quality Act, the National Environmental Policy Act, the State Planning and Zoning Law, natural resources, endangered species, air and water quality, and other land use environmental statutes. Bridget serves on the Editorial Board of the *California Land Use Law & Policy Reporter*.

CALIFORNIA COURT OF APPEAL ISSUES IMPORTANT PROPOSITION 218 DECISION IMPACTING LOCAL GOVERNMENT'S ABILITY TO ISSUE SPECIAL ASSESSMENTS TO ADDRESS COASTAL EROSION AND RESTORATION

By Boyd Hill

California's Second District Court of Appeal in *Broad Beach Geologic Hazard Abatement District* affirmed the trial court's decision invalidating under Proposition 218 a special assessment by a geologic hazard abatement district of homeowners along the beach for the costs of sand restoration for a public access beach, holding that such costs are for general and not special benefit. [*Broad Beach Geologic Hazard Abatement District v. 31506 Victoria Point LLC*, ___Cal.App.5th___, Case No. B309396 (2nd Dist. Aug. 2, 2022).] The decision may have a significant impact on other municipalities which seek to address the preservation of coastal homes in the face of coastal erosion.

Factual and Procedural Background

Broad Beach is a one-mile-long public beach in the City of Malibu (City). Along the beach are 121 private parcels, most of which contain homes, as well as two county-owned parcels containing public-access stairs. Historically a wide beach, Broad Beach has been consistently narrowing since the early 1970s, with its shoreline retreating about 65 feet between 1974 and 2009. It now consists of a narrow strip of sand, and little to no dry beach is present at high tide levels. Continuing erosion threatens the homes along the beach, and several homes were lost or damaged during storm events over the years.

In 2010, a voluntary association of Broad Beach residents (Trancas) constructed a temporary rock revetment to protect 78 of the homes at the central and eastern parts of the beach. The temporary revetment was constructed partly on state land, apparently without sufficient authorization.

In June 2011, seeking a long-term solution to the erosion of the beach and the threat to Broad Beach homes, Trancas petitioned the City to form a geologic hazard abatement district (District) under Public Resources Code § 26500 *et seq*. The city obliged by forming the District, which encompasses all of Broad Beach.

After its formation, the District adopted a plan to provide "sand nourishment" for the beach, proposing to import hundreds of thousands of cubic yards of sand to restore the width of the beach and provide a protective barrier for the District's parcels. The District also sought to obtain a permit for the permanent retention of the temporary revetment.

Following extensive negotiations with the California Coastal Commission (Commission) to obtain required permitting for the project, the Commission provided a conditional permit for an initial ten-year period, imposing many limitations and requirements on the District. Among other things, the Coastal Commission prohibited the District from placing sand at the west end of the beach, due to environmental concerns.

While allowing the District to retain the revetment, the Coastal Commission required it to ensure the relocation of its eastern portion landward, onto homeowners' lands. Affected landowners agreed to bear the costs of the revetment's relocation and to contribute lands for its new placement. Like the temporary revetment, the planned permanent revetment would not protect all of the homes on the beach.

To mitigate environmental impact from the project's features, including the revetment, the Coastal Commission required the District to create and maintain a system of sand dunes to serve as habitat areas for certain plant and animal life. The Coastal Commission also imposed various conditions intended to ensure convenient public access to the beach.

Shortly after its formation, the District proposed an annual assessment on parcels within its boundaries to fund its project on Broad Beach, and the assessment was approved by the property owners. It proposed an adjusted assessment in 2015, after learning that the Coastal Commission would not allow it to deposit sand at the west end of the beach, and this assessment was also approved by the property owners.

In late 2017, after learning of additional regulatory requirements and receiving updated cost estimates,

the District proposed another adjusted assessment. In support of its proposed assessment, the District produced an engineer's report describing the project and discussing special and general benefits to be generated by it.

The District divided assessed parcels into three assessment tiers (100 percent, 75 percent, and 25 percent of base rate), based on the expected added beach width in the area in front of a parcel. Parcels on the west end, which were to receive no direct sand nourishment, were placed in the 25 percent tier, as the report projected they would benefit from westward migration of sand placed elsewhere on the beach. Vacant parcels were to receive a discounted rate. The District did not assess the county-owned parcels. Whether properties would be protected by the revetment was not a factor in the District's methodology.

The engineer's report identified six special benefits from the project: (1) protection from erosion due to wave action; (2) protection from flooding associated with storms; (3) protection from sea-level rise; (4) access to the beach; (5) prevention of blight; and (6) "consequential protection of properties to the west of the beach improvements to the extent of natural littoral movement."

It concluded the project would not provide substantial general benefits for purposes of Proposition 218. While acknowledging the advantage to the public in the project's addition of publicly accessible beach area, the report stated this result was "legally compelled" in order to satisfy the requirements of state agencies, and thus did not constitute a general benefit for purposes of Proposition 218.

However, seeking to employ a conservative analysis, the report assumed these benefits would constitute general benefits, and estimated they would amount to no more than 2 percent of the total benefit generated by the Project.

The report asserted that non-assessment resources would fund the general benefits, pointing to the revetment homeowners' agreement to fund and contribute land for the relocation of the revetment. As for the county-owned parcels, which encompassed thousands of square feet each, the report stated that the unassessed special benefits enjoyed by them would also be funded through the revetment homeowners' contribution. The District's 2017 proposed assessment was approved by a weighted majority of the voting homeowners.

A number of homeowners challenged the assessment, claiming that the District violated Proposition 218 by: (1) failing to properly quantify and separate general benefits from the project, (2) failing to consider special benefits from the revetment, (3) failing to assess the county-owned parcels, and (4) assigning unsupported special benefits to the west end properties.

The trial court invalidated the assessment. It concluded the District had failed to properly quantify general benefits from the project, finding no support for the argument that "legally compelled" benefits could be disregarded, and finding the District had intentionally sought to recreate the wide sandy beach that existed in the 1970s. As to the engineer's estimate of up to 2 percent in general benefits, the court noted it was unsupported by any analysis and found it arbitrary. Second, the court agreed with the challengers that the District was required to consider the additional special benefits from the revetment to the homes protected by it. Third, the court found the District was required to assess the county-owned parcels.

Finally, the court concluded the assessment of west end properties was unsupported, finding unreliable the model used by the engineer's report to estimate the amount of added beach expected on the west end of the beach, and faulting the report for providing no analysis of the degree of added protection from projected sand additions.

The Court of Appeal's Decision

The Court of Appeal, using the independent review standard applicable to validity of an assessment, affirmed the trial court ruling, holding that Proposition 218 required the District to separate and quantify general benefits from the widened beach, regardless of whether those benefits imposed additional costs and without regard to the District's subjective intent in designing the project. That state agencies precluded the District from hindering public access to the improved beach neither removed its general benefits nor exempted them from consideration. It further held that the District was required to consider special benefits from the revetment to relevant homes, and to assess the county-owned parcels.

Requirements for Proposition 218—Special Benefits Only

Approved by the voters in 1996, Proposition 218 was intended to significantly tighten the kind of benefit assessments an agency can levy on real property and to protect taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent. Proposition 218's substantive provisions tended to significantly restrict assessments, requiring assessing agencies to: (1) demonstrate special benefits to assessed properties, (2) separate and quantify general benefits, and (3) ensure the assessment is proportionate to a property's special benefit. It also prohibits the exemption of public entities from applicable assessments.

An assessment may be imposed only for a special benefit conferred on a particular property. A special benefit is a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large, and a general enhancement of property value does not constitute special benefit. A project confers a special benefit when the affected property receives a direct advantage from the improvement funded by the assessment. By contrast, general benefits are derivative and indirect.

The key is whether the asserted special benefits can be tied to particular parcels based on proximity or other relevant factors that reflect a direct advantage enjoyed by the parcel. Because virtually all public improvement projects provide general benefits, in addition to any special benefit, an assessing agency must therefore separate the general benefits from the special benefits conferred on a parcel and impose the assessment only for the special benefits.

An assessment on any given parcel must be proportional to the special benefit conferred on that parcel. No assessment may be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. The proportionate special benefit derived by each identified parcel must be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property-related service being provided

Analysis of Assessment Compliance with Proposition 218

The Court of Appeal found that it is undisputed that the project would create a much wider, sandy public beach. It is likewise undisputed that the added recreational benefit of a wider beach to the general public would ordinarily constitute a general benefit. Accordingly, the District was required to properly quantify this benefit, apportion costs to it, and exclude those costs in determining the allowable assessment.

The District made three arguments that the wide sandy beach restoration for public purposes was not a general benefit.

First, the District argued that the District need not consider general benefits unless they impose additional costs. However, Proposition 218 requires cost apportionment for general benefits when, as here, an improvement directly confers both special and general benefits. Under the District's proposed rule, any special benefit, no matter how small, would support an assessment for the entire cost of a project that provides general benefits, no matter how substantial, so long as the project is indivisible and costs cannot be directly attributed to the general benefits. Such a rule would constitute a return to pre-Proposition 218 law and thus be inconsistent with Proposition 218's separation and quantification requirements.

Second, the District argued the general benefits should be disregarded because the purpose of the project is to protect the beach properties, rather than to widen the beach for recreational purposes. Nothing in the text of Proposition 218, however, suggests that the assessing agency's subjective intent in undertaking a public improvement project is relevant. Instead, the measure's defining a special benefit simply as "a particular and distinct benefit over and above general benefits," while excluding a mere increase in property values, suggests a focus on real-world effects.

Third, the District contended that any general benefit from public access to a wide beach should not be considered because state agencies required it to provide this benefit, either as a condition of the project's approval or as consideration for the revetment's use of state lands. It noted that the Coastal Commission required it to ensure public access, stating, "The restored beach is public because the Coastal Commission made it a condition of project approval." It further noted that the State Lands Commission

agreed to forgo payments for the use of state lands, conditioned on the maintenance of enough dry sand seaward of the revetment to allow public access. The District claimed the enhanced public beach should therefore be seen as part of the costs of the project, rather than general benefits.

The Court of Appeal disagreed. The benefit here —the provision of a wide sandy beach—is the heart of the District's proposed project, not a mere condition for approval or required consideration by a state agency. That state agencies acted to ensure the project does not cut off the public's access to a public beach does not transform the improvement project's general benefits into costs. Were it otherwise, virtually any improvement to a public street or public park that provided a degree of special benefits could be fully funded by a special assessment based on the claim that public access to the improvement could not be restricted, and thus that any benefit to the public should be seen as a cost rather than a general benefit. That is not the law.

The Court of Appeal summed it all up, as follows:

> In sum, we conclude the 2017 assessment violated Prop. 218 because in formulating it, the District failed to properly separate, quantify, and apportion costs to general benefits from the project, failed to consider special benefits from the revetment, and failed to assess county-owned parcels. Accordingly, we affirm the court's judgment invalidating the assessment.

Conclusion and Implications

This opinion by the Second District Court of Appeal may have significant implications on the Coastal Commission and local governments seeking to encourage permitting for coastal neighborhood coastal erosion protections and coastal restoration through means of geologic hazard abatement districts. The Coastal Commission and local governments are encouraging formation of geologic hazard abatement districts and thereby causing homeowners who need coastal erosion protection permits to foot the bill for restoring public access beaches, claiming that the Coastal Commission sand restoration requirements are private benefits. This ignores that natural sand replenishment of those beaches is being prevented by local government flood control works. Proposition 218 as interpreted by this opinion presents a major thorn in the side of punitive government exactions to obtain these clearly public benefits from private landowners. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B304699.PDF.

Boyd Hill is a Shareholder at the law firm, Jackson Tidus, a law corporation, located in Irvine, California. Boyd is a member of the firm's Land Use Group, and focuses on real estate and land use entitlement matters. Boyd has significant experience in commercial leasing, purchase and sale, title review, escrow and financing matters. He has worked on municipal organization (LAFCO), general and specific plans, use permit, variance, development fees and environmental (CEQA, RWQCB) matters. As a former water district attorney, he also has experience with water transfers, water rights, water management plans, groundwater recharge and storage, conjunctive use, water sales, water treatment, groundwater remediation, certificates of participation, financing, the Clean Water Act and water fees. Boyd serves on the Editorial Board of the *California Land Use Law & Policy Reporter*.

LAWSUITS FILED OR PENDING

ENVIRONMENTAL ORGANIZATIONS FILE LAWSUIT CHALLENGING THE NATIONAL MARINE FISHERIES SERVICE'S APPROVALS OF ENHANCEMENT OF SURVIVAL PERMITS FOR SHASTA RIVER LANDOWNERS

On June 15, 2022, the Environmental Protection Information Center and Friends of Shasta River (collectively: plaintiffs) filed a complaint alleging that the National Marine Fisheries Service (NMFS) unlawfully issued four categories of documents related to the Shasta River and the Southern Oregon and Northern California Coast (SONCC) coho salmon:

> (1) 14 Enhancement of Survival Permits (ESPs); (2) a Biological Opinion; (3) an incidental take statement; and (3) an Environmental Assessment. (*Environmental Protection Information Ctr., et al. v. van Atta, et al.*, Case No. 3:22-cv-03520-JSC, N.D. Cal. [complaint].)

In the documents, NMFS analyzed the issuance of the ESPs, which allow for incidental take of the SONCC coho salmon during specified conservation and agricultural activities. NMFS concluded that the actions would not jeopardize the species or adversely impact its habitat. Plaintiffs disagree.

Background

Shasta River flows for 58 miles in Siskiyou County, California, before it meets the Klamath River. The Shasta River Basin is spawning ground for the SONCC coho salmon. The SONCC coho salmon are federally-protected as threatened with extinction under the Endangered Species Act (ESA). The SONCC coho salmon require sufficient cold water to support spawning and passage back to the ocean. The agricultural activities of landowners on the Shasta River involve diversion of water that contributes to the SONCC coho salmon habitat.

Under Section 10 of the ESA, NMFS may issue an ESP to non-federal landowners who participate in voluntary agreements to take actions to benefit species and in exchange receive assurances that the landowners will not be subject to additional regulatory restrictions as a result of their conservation actions. NMFS may issue such permits only after finding that each permit was applied for in good faith, that granting the permit would not be to the disadvantage of the listed species, that the proposed activities would benefit the recovery or the enhancement of survival of the species, and that the terms and conditions of the permits are consistent with the purposes and policy set forth in the ESA. (ESA § 10(a)(1)(A); 50 C.F.R. § 222.308.)

In 2019, NOAA proposed a Template Safe Harbor Agreement (Agreement) and Site Plan Agreements for 14 landowners in the Shasta Valley. The Agreement:

> . . .establishes the general requirements for [NMFS] . . . to issue [ESPs] to non-federal landowners in the Shasta River Basin.

The Agreement allows the recipients of the ESPs to incidentally take listed species via land and water management activities meant to conserve the SONCC coho salmon, enhance their survival, and assist in their recovery.

On July 28, 2020, NMFS initiated intra-agency consultation to assess the potential effects of entering into the Agreement and Site Plan Agreements, and issuing the ESPs. NMFS issued a Memorandum, which included a Biological Opinion and an Incidental Take Assessment evaluating those effects. The Biological Opinion analyses of critical habitat include in the baseline current diversions and inputs. In stream flow, for example, the baseline includes the operation of the Dwinnell Dam and diversions and spring inputs. The Biological Opinion defines the relevant action area as consisting of:

> . . .[t]he Enrolled Properties . . . adjacent to the Shasta River, Parks Creek, or Big Springs Creek, and primarily managed for agricultural production and rural residences.

The Memorandum found that the proposed actions would neither jeopardize the SONCC coho salmon nor result in adverse impacts to their habitat.

Similarly, in its Environmental Assessment, NMFS reviewed a no action alternative to issuing the ESPs. NMFS concluded that issuing the ESPs would:

> . . .protect and enhance aquatic and riparian habitat through implementation of [the Agreement's Beneficial Management Activities], including barrier removals, instream flow enhancement strategies, and physical habitat enhancements for the conservation of the SONCC coho salmon in the Covered Area.

Therefore, NMFS made a finding of no significant impact for approval of the ESPs.

On August 10, 2021, NMFS issued the 14 ESPs, each with 20-year terms, subject to the conditions of the Agreement, NOAA's Safe Harbor Policy, and the Permittees' relevant Site Plan Agreements. The ESPs exempted the Permittees' activities from the "take" provisions of Section 9 of the ESA, including the "routine agricultural activities."

On June 15, 2022, plaintiffs sued NMFS and other federal defendants (Federal Defendants) in the U.S. District Court, San Francisco Division of the Northern District of California alleging violations of the ESA, the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA).

The Claims

In the complaint, plaintiffs argue that the Biological Opinion is unlawful under the ESA for multiple reasons: (1) the environmental baseline improperly "includes the permittees' existing and ongoing water diversions and deliveries"; (2) the action area is improperly limited to the Shasta River Basin's area "at the farthest downstream portion of the "properties"; (3) the Biological Opinion does not use the best available science related to, among other matters, river flows; (4) the Biological Opinion relies on improper and uncertain mitigation measures to make a no-jeopardy determination; and (5) the Biological Opinion incorrectly—as a factual and a legal matter—concludes that the routine agricultural activities will not jeopardize the continued existence of the SONCC coho salmon, or destroy or adversely modify their habitat. (Complaint at ¶¶ 113-118 .)

Plaintiffs also argue that NMFS violated NEPA for a number of reasons. First, plaintiffs assert that NMFS' Environmental Assessment "fails to include 'high quality' information and '[a]ccurate scientific analysis' as required by NEPA[,] 40 C.F.R. § 15001, subd. (b)," and fails to take the required "hard look" at the effects of NMFS' approvals of the landowner activities. (Complaint at ¶ 125.) Plaintiffs also contend that NMFS violated NEPA by not analyzing an alternative involving issuance of an incidental take permit instead of an ESP and by preparing a "Finding of No Significant Impact." (*Id.* at ¶¶ 125, 126.) Finally, plaintiffs argue that NMFS' approvals are arbitrary and capricious and an abuse of discretion in violation of the APA, 5 U.S.C. §§ 704, 706, subd. (2)(A).

Conclusion and Implications

Plaintiffs request rescission of the Biological Opinion and the Environmental Assessment, and ask the court to require NMFS to prepare an adequate environmental impact statement under NEPA. It remains to be seen how the Federal Defendants will respond to the complaint as no responsive pleading had been filed as of August 25, 2022.

(Tiffanie A. Ellis, Meredith Nikkel)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT UPHOLDS EIS AND COMPREHENSIVE CONSERVATION PLAN FOR TWO NATIONAL WILDLIFE REFUGES

Audubon Society of Portland v. Haaland, 40 F.4th 917 (9th Cir. 2022).

The Audubon Society of Portland sued the U.S. Fish and Wildlife Service (FWS or Service), alleging the service's Record of Decision (ROD) adopting a combined Environmental Impact Statement (EIS) and Comprehensive Conservation Plan (CCP) for two national wildlife refuges violated the Kuchel Act, National Wildlife Refuge System Improvement Act, Administrative Procedure Act, National Environmental Policy Act, and the Clean Water Act. The U.S. District Court, adopting the report and recommendation of the Magistrate Judge, granted summary judgment in favor of the FWS, and the Audubon Society appealed. The Ninth Circuit Court of Appeals in turn affirmed, finding that the FWS had not violated any of the various statutory regimes.

Factual and Procedural Background

In January 2017, the Service issued a ROD adopting a combined EIS and Comprehensive Conservation Plan (EIS/CCP) for five of the six refuges in the Klamath Basin National Wildlife Refuge Complex in southern Oregon and northern California. In its combined EIS/CCP, the Service considered three agricultural habitat management alternatives for the Tule Lake Refuge and four alternatives for the Lower Klamath Refuge. In both instances, the FWS adopted what was analyzed as "Alternative C," which in each case continued many of the agricultural management strategies that already were in place, with some attendant changes.

This case was one of four consolidated appeals from a U.S. District Court decision that rejected various challenges. Here, the Audubon Society of Portland claimed the EIS/CCP violated the Kuchel Act of 1964, the National Wildlife Refuge System Improvement Act as amended by the Refuge Improvement Act (Refuge Act), the Administrative Procedure Act (APA), the National Environmental Policy Act (NEPA), and the federal Clean Water Act (CWA) with respect to the Tule Lake and Lower Klamath Refuges. Briefly, it claimed the EIS/CCP: violated the Refuge Act because it failed to provide sufficient water for the Lower Klamath Refuge; violated the Kuchel Act, the Refuge Act, and the APA because it did not prioritize the preservation of wildlife habitat over agricultural uses of leased agricultural land in the refuges; violated the Refuge Act because it delegated day-to-day administrative responsibilities to the Bureau of Reclamation; and violated NEPA because it did not adequately evaluate an alternative that would reduce the acreage of lease land in the Tule Lake and Lower Klamath Refuges

The U.S. District Court, adopting the report and recommendation of the Magistrate Judge, granted summary judgment to the Service. The Audubon Society in turn appealed.

The Ninth Circuit's Decision

On appeal, the Audubon Society did not pursue its argument that the EIS/CCP violated the CWA, however, it continued to pursue its other claims. The Ninth Circuit addressed each.

Failure to Provide Sufficient Water for the Lower Klamath Refuge

The Ninth Circuit first considered the claim that the FWS failed to provide sufficient water for habitat needs in the Lower Klamath Refuge, in violation of the Refuge Act. While the Ninth Circuit sympathized with Audubon Society's concerns that the water available for the Lower Klamath Refuge was inadequate to serve the habitat purposes of the Refuge, the Ninth Circuit ultimately was satisfied on the record (particularly given the constraints on the Service, whose ability to provide water was severely limited) that the EIS/CCP fulfilled the Service's obligations under the Refuge Act to:

> . . .assist in the maintenance of adequate water quantity . . . to fulfill the mission of the [Refuge]

System and the purposes of each refuge. . .[and to]. . .acquire, under State law, water rights that are needed for refuge purposes.

Continuation of Present Pattern of Agricultural Leasing in the Tule Lake and Lower Klamath Refuges

The Ninth Circuit next considered the argument that the EIS/CCP's continuation of the present pattern of agricultural leasing in the Tule Lake and Lower Klamath Refuges violated the Kuchel Act and the Refuge Act and was arbitrary and capricious in violation of the APA. The primary contention was that the EIS/CCP authorized an improper mix of agricultural land and natural habitat land and, effectively, prioritized commercial agricultural crops over natural foods and wetland habitats. The Ninth Circuit found the FWS had considered these arguments and that, as the reviewing court, nothing authorized it to make different choices. The Ninth Circuit concluded that the balance struck by the EIS/CCP was consistent with the various statutes.

Delegation to the U.S. Bureau of Reclamation

The Ninth Circuit next addressed the claim that the EIS/CCP improperly authorized the Bureau of Reclamation to administer lease land in the Tule Lake and Lower Klamath Refuges in violation of the Refuge Act. The Ninth Circuit disagreed, finding the U.S. Bureau of Reclamation's responsibilities under the EIS/CCP were not "administration" within the meaning of the Refuge Act's anti-delegation provision. Here, the Bureau was assigned specified management functions and was, in all respects, subject to the supervision and approval of the Service.

Failure to Consider a Reduced-Agriculture Alternative

Finally, the Ninth Circuit considered the claim that the lack of a reduced-agriculture alternative violated NEPA. The Ninth Circuit again disagreed, finding the Service sufficiently considered whether to reduce the acreage devoted to lease-land farming and explained why it did not list such reduction as an alternative in the EIS/CCP. The Ninth Circuit also found that, to the extent the current pattern of agricultural leasing in the Tule Lake and Lower Klamath Refuges was consistent with proper waterfowl management in those refuges, the Kuchel and Refuge Acts directed the FWS to continue that pattern of leasing. The Ninth Circuit generally recognized the constraints on the Service and deferred to the Ninth Circuit's reasoned explanations.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding various statutory regimes regarding the management of National Wildlife Refuges. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/07/18/20-35508.pdf.

D.C. CIRCUIT UPHOLDS FERC'S APPROVAL OF ADELPHIA PIPELINE ACQUISITION UNDER NEPA

Delaware Riverkeeper Network v. Federal Energy Regulatory Commission, ___F.4th___, Case No. 20-1206 (D.C. Cir. Aug. 2, 2022).

On August 2, 2022, the United States Court of Appeals for the D.C. Circuit upheld the Federal Energy Regulatory Commission's (FERC or Commission) approval of the acquisition of a natural gas pipeline located in Pennsylvania and Delaware. In *Delaware Riverkeeper Network v. FERC*, the Court of Appeals dismissed several claims brought by petitioners arguing that the environmental review performed for the project was inadequate under the National Environmental Policy Act (NEPA). The dismissed challenges included claims that the analysis of upstream, downstream and greenhouse gas impacts were deficient.

Background

Adelphia Gateway, LLC (Adelphia) applied to FERC for a certificate of public convenience and necessity to acquire an existing natural gas pipeline system located in Pennsylvania and Delaware. In addition, it sought FERC authorization to construct two lateral pipeline segments, connected to the existing pipeline and to construct facilities necessary to operate the pipeline, including a compressor station. FERC prepared an Environmental Assessment (EA) to analyze the pipeline acquisition's environmental effects under NEPA, including the effects of the project on greenhouse gases, air quality, noise and residential properties near the project. The EA found that the project would lead to global increases in greenhouse gases but declined to calculate upstream or downstream greenhouse gas emissions because it found that any impacts were not reasonably foreseeable. Based on the EA conclusion that the project would have no significant impact on the environment, FERC approved the project.

The D.C. Circuit's Decision

Delaware Riverkeeper challenged the FERC's approval of the pipeline acquisition by Adelphia alleging it violated NEPA. Riverkeeper argued that the EA was deficient in its analysis of the upstream and downstream impacts of the pipeline, the downstream impacts on climate change, the cumulative impacts of the pipeline, and the impacts of the proposed compressor station.

First, the Court of Appeals examined the FERC's conclusion in the EA that upstream impacts of the pipeline, including possible increases in drilling of new natural gas wells, were not reasonably foreseeable and therefore, were not addressed. The EA noted that the project would receive gas from another interstate pipeline and that there was no evidence that additional wells would be drilled as a result of the project. That court upheld the EA's conclusions regarding upstream impacts, finding no evidence in the record that would have helped FERC consider the number of new wells that may be drilled, and finding that the petitioners did not point to any evidence questioning this finding.

Next, the court examined FERC's approach to the pipeline's downstream impacts. FERC analyzed the downstream emission impacts resulting from the use of much of the gas that would be delivered by the pipeline. However, FERC declined to analyze emissions from gas that would be delivered from the pipeline to the Zone South system. The EA concluded that because this Zone South gas would be further transported on the interstate grid, the final use of the gas was not foreseeable. The court found that FERC's analysis of downstream impacts was sound, based on the information that was available to the Commission. Petitioners argued that FERC should have requested Adelphia provide additional information on downstream users; however, the Court of Appeals dismissed this argument finding petitioners did not raise this issue in front of the Commission.

On the issue of the potential impacts of the project's greenhouse gas emissions on climate change, FERC concluded in the EA that there was no scientifically-accepted methodology available to correlate specific amounts of greenhouse emissions to discrete changes in the human environment. In addition, FERC rejected the Social Cost of Carbon methodology for assessing climate change impacts. Delaware Riverkeeper argued that the FERC was required to use the Social Cost of Carbon by NEPA regulations. Petitioners cited the requirement at 40 C.F.R. 1502.21(c)(4) which provides that where information is not available to perform an analysis regarding reasonably foreseeable impacts in an Environmental Impact Statement (EIS), an agency shall use generally accepted theoretical approaches or research methods. The court dismissed this argument, however, finding again that petitioners had failed to sufficiently raise this issue in front of FERC. Specifically, the court found that petitioners failed to raise the issue that FERC should have used the Social Cost of Carbon in an EA when the regulation cited provides that generally accepted theoretical approaches or research methods shall be used in the more rigorous EIS approach.

To round out its opinion, the court upheld FERC's analysis of the potential impacts of the proposed compressor station and noted that any potential errors resulting from FERC's failure to consider the cumulative impacts associated with the PennEast Pipeline were rendered moot by the cancellation of that project. The court also dismissed several claims unrelated to NEPA.

Conclusion and Implications

The D.C. Circuit Court of Appeals dismissed all claims brought by petitioners that FERC's environmental review of potential upstream and downstream impacts of a pipeline, as well as the impacts on climate change, was insufficient. However, because the petitioners failed to exhaust administrative remedies on several key topics during the administrative proceedings, the issues of whether FERC or another agency must solicit additional information from pipeline operators to determine the end use of the natural gas and whether agencies must use the Social Cost of Carbon to determine impacts on climate change from increases to greenhouse gas emissions were not resolved by this case. The D.C. Circuit's opinion is available online at: https://www.leagle.com/decision/infco20220802127.
(Darrin Gambelin)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT HOLDS JUDICIAL REVIEW IS UNAVAILABLE FOR PROCEDURAL CHALLENGES TO REGIONAL HOUSING NEEDS ASSESSMENT ALLOCATION

City of Coronado v. San Diego Association of Governments, 80 Cal.App.5th 21 (4th Dist. June 20, 2022).

The Fourth District Court of Appeal in *City of Coronado has* held that a group of southern California cities (Cities) could not seek judicial review of a procedural due process claim that alleged the San Diego Association of Governments (SANDAG) deprived the Cities of a fair hearing in allocating their Regional Housing Needs Assessment (RHNA). The Court of Appeal held that the rationale in *City of Irvine v. Southern California Assn. of Governments*, 175 Cal.App.4th 506 (2009), coupled with the California Legislature's elimination of judicial review from the underlying RHNA statute, extended to procedural challenges to an RHNA allocation and thus barred the Cities' claim.

Statutory Background

The Housing Element (Gov. Code, § 65583)

A General Plan's housing element must identify and analyze existing and projected housing needs, and contain a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing. The element must contain an assessment of housing needs (existing and projected) for all income levels that includes the locality's share of the regional housing need in accordance with the "regional housing need allocation" set forth under Government Code § 65584. The element must also contain an inventory of resources and constraints relevant to meeting those housing needs.

The Regional Housing Needs Assessment (Gov. Code, § 65884, *et seq.*)

The Legislature enacted the RHNA procedure to address the state's ongoing housing crisis. As part of this process, various regional councils of governments, in conjunction with the cities and counties within their jurisdictions, and the California Department of Housing and Community Development (HCD), devise methods for distributing existing and projected housing needs within their regions and for allocating a share of the regional housing needs to each local jurisdiction.

As part of this administrative process, the RHNA statute requires HCD to consult with each council of governments to determine the region's existing and projected housing needs. The councils, in consultation with HCD, must then develop a proposed methodology for distributing the existing/projected regional housing needs to the cities and counties within their jurisdiction. Once complete, the councils must provide notice of its adoption of the methodology to the jurisdictions within the region.

After adopting a methodology, councils must prepare and circulate a draft RHNA allocation plan to each local government at least 1.5 years before the next scheduled housing element update. The draft allocation must include the allocation of regional housing needs to each locality, along with the underlying data and methodology upon which that determination is based.

The RHNA authorizes local governments to file an administrative appeal of the RHNA draft allocation, and sets forth a procedure that facilitates a public administrative hearing before the council, after which the council must make a final decision in writing with findings as to how its determination is consistent with the RHNA statute. Based on upon the results of the appeals process, the council must adjust allocations to local governments—the total distribution of which shall not equal less than the regional housing need.

A council of government's final decision on an RHNA appeal is final and not subject to judicial review. In 2004, the Legislature repealed a statutory provision that authorized judicial review of RHNA allocations. Five years later, the Court of Appeal in

City of Irvine v. Southern California Ass. of Governments, 175 Cal.App.4th 506 (2009) (*City of Irvine*), held that the repeal demonstrated the Legislature's clear intent to eliminate judicial remedies for challenging a municipality's RHNA allocation. The court in *City in Irvine* thus concluded that the administrative procedures prescribed by the statute are intended to be the exclusive remedy for challenging an RHNA determination.

Factual and Procedural Background

The Cities' Appeal of SANDAG's RHNA Allocation

In January 2020, the Cities of Coronado, Imperial Beach, Lemon Grove, and Solana Beach administratively appealed the draft RHNA allocation that was circulated by the San Diego Association of Governments (SANDAG). The Cities outlined several bases for their appeals, including "lack of land use authority" and "unreachable development expectations." Before SANDAG heard their appeals, the Cities submitted a joint letter objecting to SANDAG's use of weighted voting and urging the use of tally voting to decide their appeals.

In June 2020, SANDAG nevertheless used a weighted vote to ultimately reject the Cities' appeals. A few weeks later, SANDAG approved the final RHNA allocation, once again based on a weighted vote.

At the Trial Court

The Cities filed a combined petition for writ of administrative mandate against the SANDAG and its board of directors, seeking a judgment rescinding the Final RHNA allocation on grounds that SANDAG abused its discretion in carrying out its duties under the statute by denying the Cities a fair hearing. The Cities specifically alleged that: (1) SANDAG unfairly used a "weighted vote" rather than a "tally vote" procedure to decide their appeals, which, in turn, violated tenants of procedural due process, fairness, and equity; and (2) certain SANDAG Board members were biased against the Cities, therefore, votes cast by those members were "predetermined" and invalid.

SANDAG filed a demurrer that argued the trial court lacked jurisdiction based on the holding in *City of Irvine*. SANDAG explained that the Legislature specifically insulated the RHNA from litigation attacks when it rescinded the statute's judicial review provision and instead provided an administrative process to serve as the exclusive remedy for any RHNA challenge. As to the Cities' "weighted" versus "tally" voting claims, SANDAG requested judicial notice of its bylaws, which explained the weighted voting procedure.

The Cities opposed SANDAG's demurrer and reliance on *City of Irvine*. The Cities countered that *City of Irvine* only related to a claim "aimed at recalculating an allocation," not one challenging a council's conduct or obligation to provide a fair hearing under the statute's administrative procedure. The Cities maintained that they did not seek to set aside the draft allocation, but instead wanted SANDAG to rehear their appeals under a "tally voting" structure.

SANDAG replied that the crux of the Cities' lawsuit was to obtain a judicial order vacating the Final RHNA allocation. SANDAG reiterated that the *City of Irvine* court specifically concluded courts lack jurisdiction to provide such relief. SANDAG also highlighted that entertaining the Cities' petition would disrupt the RHNA process by delaying allocation for the entire region, and in turn bottlenecking the entire process while a particular city's case makes its way through the courts. The Cities' attempt to distinguish their claims as procedural instead of substantive allegations was still unavailing based on the Legislative intent of the RHNA statute, as explained by the court in *City of Irvine*.

The trial court agreed with SANDAG, finding that the elimination of judicial review of the RHNA allocation barred the Cities' claims for judicial relief. The court explained that, if the Cities were to hypothetically prevail on their claims, the result would be rescission of the housing determinations SANDAG made in the Final RHNA Allocation. That the Cities' claims were procedural was irrelevant—the ultimate judicial relief they sought was analogous to that which the *City of Irvine* held was barred by the statute.

The trial court thus sustained SANDAG's demurrer without leave to amend based on the court's "lack of jurisdiction." The Cities timely appealed.

The Court of Appeal's Decision

On appeal, the Cities argued the trial court erred in sustaining demurrer because the *City of Irvine*

decision does not appeal to the procedural claims at bar. Under a *de novo* standard of review, the Fourth District held that the Cities' claim was unpersuasive.

City of Irvine Does Not Distinguish Between 'Procedural' vs. 'Substantive' Claims

First, the court of appeal held that the Cities' distinction between "procedural" versus "substantive" claims was irrelevant and not drawn in *City of Irvine*. Instead, the *City of Irvine* court held broadly that:

> . . .the statutes governing the RHNA allocation procedure. . .reflect a clear intent to preclude judicial intervention *in the process*.(175 Cal. App.4th at p. 522.)

Contrary to the Cities' claims, the underlying writ petition in *City of Irvine* explicitly contemplated a failure to conduct a fair hearing. Therefore, the opinion's sweeping holding directly applied to the Cities' claims here.

The *City of Irvine* Opinion Applies with Equal Force Here

Even if the Cities were correct that the *City of Irvine* court did not consider "procedural claims" as to the fairness of the RHNA allocation and appeals process, the opinion's reasoning applies with equal force in this case.

First, because the Legislature only provided for an administrative appeals process, it is reasonable to conclude that the Legislature would not have intended to authorize judicial review for other claims that would still delay, and potentially result in, the same allocation.

Second, the rationale in *City of Irvine* also supports the proposition that "a governmental entity has no vested, individual rights in the administration of a particular program," including against a council of governments in its determination of a RHNA allocation.

Third, the *City of Irvine* court identified other remedies outside the judicial system as a reason for concluding that judicial review is barred. For example, the RHNA administrative appeals process allows municipalities to object to their allocations. Here, the Cities objected to SANDAG's use of a weighted vote. But—and pursuant to the statute—HCD approved SANDAG's appellate methodology, including its weighted vote system. Thus, municipalities are not without recourse in challenging an RHNA allocation.

Finally, the *City of Irvine* court concluded that the Legislature's *removal* of the statute's judicial review provision evinced its intent that claims challenging an RHNA allocation could not be raised in court. Nothing in the Legislature's removal of that provision or the statutory amendment distinguished between "procedural" versus "substantive" claims.

In sum, all of the reasons precluding judicial review that the *City of Irvine* court identified apply equally to the Cities' claims here.

The Cities' Claims are Unpersuasive

The Fourth District Court of Appeal rejected the rationale underlying the Cities' claims as unpersuasive. First, the Cities maintained that the *City of Irvine's* reasoning does not apply when the RHNA administrative process, itself, is the subject of a writ. The appellate court rejected this, finding that entertaining this logic:

> . . .would eviscerate *City of Irvine's* core holding preclude judicial review in this context, given the relative ease with which a particular claim may be characterized as 'procedural.'"

Instead, the *City of Irvine* court noted that judicial review of RHNA allocations: (1) would interfere with the administrative process, become unmanageable, and result in unreasonable delays; (2) was not warranted given the intergovernmental nature of the RHNA allocation process; and (3) was not intended by the Legislature.

The court was also unpersuaded by the Cities' argument that judicial review should be permitted because "no procedural defect would be sufficient to trigger judicial review." The court rejected the Cities' hypothetical examples of instances where a council of governments directly violated certain statutory provisions, and instead reiterated that the Legislature intended for the RHNA administrative process to be the "exclusive remedy" for challenging an allocation.

Finally, the court rejected the Cities' interpretation of the statute's former judicial review provision. The Cities' argued that the provision provided for

review of substantive, rather than procedural claims. The court declined to read the former statute as such, noting that nothing in the plain language limited the scope of review to substantive claims or the type of challenge that may be brought in court. Instead, the former statute is most naturally read as authorizing both procedural and substantive challenges to an RHNA allocation, therefore, the statute's subsequent repeal likewise evinces the Legislature's intent to bar judicial review of both types of challenges.

Conclusion and Implications

The Fourth District's opinion in *City of Coronado v. SANDAG* resolves any uncertainty that loomed following the *City of Irvine* decision. Though the *City of Irvine* decision did not specifically adjudicate a "substantive" challenge to an RHNA allocation, the principles articulated therein demonstrably applied to the "procedural challenges" raised here. As the Fourth District explained, the Legislature clearly intended to insulate the RHNA from litigation, regardless of the "type" of claim advanced. The court's opinion follows a growing judicial trend of deferring to the Legislature's intent in crafting legislation that specifically addresses the state's ongoing housing crisis. The Fourth District's opinion is available at: https://www.courts.ca.gov/opinions/documents/D079013.PDF.

FIRST DISTRICT COURT FINDS WATER ALLOCATION DID NOT CONSTITUTE A NEW 'PROJECT' UNDER CEQA—LAWSUIT WAS BARRED BY THE STATUTE OF LIMITATIONS

County of Mono v. City of Los Angeles, 81 Cal.App.5th 657 (1st Dist. 2022).

Mono County and the Sierra Club filed a petition for writ of mandate directing the City of Los Angeles (City) to comply with the California Environmental Quality Act (CEQA) before curtailing or reducing deliveries of irrigation water to certain lands the City leased to agricultural operators in the County of Mono (County). The Superior Court granted the petition and the City appealed. The Court of Appeal reversed, finding that the City's reduction was permitted under the existing leases and did not otherwise constitute a new "project" subject to additional CEQA review. Thus, the County's new lawsuit was barred by CEQA's applicable statute of limitations.

Factual and Procedural Background

In 2010, the City approved a set of substantively identical leases (2010 Leases) governing about 6,100 acres of land it owned in Mono County. The 2010 Leases included various provisions regarding water, including irrigation. For instance, they stated they were:

> . . .given upon and subject to the paramount rights of [the City] with respect to all water and water rights" and that the City reserved "all water and water rights. . .together with the right to develop, take, transport, control, regulate, and use all such water and water rights.

They further provided that:

> . . .[t]he availability of water for use in connection with the premises leased herein . . . is conditioned upon the quantity in supply at any given time. . . . The amount and availability of water, if any, shall at all times be determined solely by [the City]. The availability of water is further dependent upon [the City's] continued rights and ability to pump [groundwater].

In addition, the 2010 Leases stated that:

> Lessee further acknowledges and agrees that pursuant to Section 220(3) of the City of Los Angeles City Charter, any supply of water to the leased premises by [the City] is subject to the paramount right of [the City] at any time to discontinue the same in whole or in part and to take or hold or distribute such water for the use of [the City] and its inhabitants. Lessee further acknowledges and agrees that there shall be no

> claim upon [the City] whatsoever because of any exercise of the rights acknowledged under this subsection.

The 2010 Leases' initial term ran from 2009 through 2013, but the leases allowed the lessees to hold over as tenants at will after the expiration of the initial term, and the City and the lessees proceeded under the 2010 Leases in this holdover status after 2013. From 2009-2010 through 2017-2018, the City allocated a certain amount of irrigation water under the 2010 Leases.

In March 2018, the City sent the lessees copies of a proposed new form of leases (Proposed Dry Leases). Regarding irrigation water, the Proposed Dry Leases stated that the City:

> . . .shall not furnish irrigation water to Lessee or the leased premises, and Lessee shall not use water supplied to the leased premises as irrigation water.

They also stated that from time to time, based on its "operational needs," the City might spread or instruct the lessees to spread excess water on the leased properties. Like the 2010 Leases, the Proposed Dry Leases also stated that any water spreading would be:

> . . .subject to the paramount right of [the City] at any time to discontinue the same in whole or in part and to take or hold or distribute such water for the use of [the City] and its inhabitants. Lessee further acknowledges and agrees that there shall be no claim upon [the City] whatsoever because of any exercise of" such rights.

In April 2018, the City sent letters to the lessees informing them that it was "performing an environmental evaluation" of the Proposed Dry Leases, and the 2010 Leases would be in holdover status until the evaluation was complete and the Proposed Dry Leases took effect. That same month, Mono County wrote to the City's mayor asking for reassurance that the lessees would receive sufficient irrigation water that season. In May 2018, the City sent the lessees an e-mail stating it had evaluated the snowpack and anticipated runoff and determined it would provide a certain, relatively low amount of water that year. The County in turn claimed that the decision to divert and export almost all the irrigation water the City had historically provided was affecting the lessees and the environment, including the sage grouse, without CEQA review.

The Petition for Writ of Mandate

The County filed a petition for writ of mandate shortly thereafter, alleging that the City's decision to curtail or reduce water deliveries to the lessees in order to export additional water to the City failed to comply with CEQA. Around that same time, the City issued a notice of preparation that it would prepare an environmental impact report for the Proposed Dry Leases. The County later filed a first amended petition in which the Sierra Club joined.

During Superior Court proceedings, after the court issued a tentative order granting the County's petition but before the hearing, the City filed a declaration from a manager at the Department of Water and Power asserting the City diverted higher amounts of water to the leased properties in 2019 and 2020. At the hearing, the parties disputed whether the Superior Court should consider the declaration.

On the merits, the Superior Court found the City implemented a "project" in 2018 without complying with CEQA when: (i) it proposed new leases that, unlike prior leases, would not provide or allow water to be used for irrigation; and (ii) while claiming it would study the environmental effects of the new leases, it still implemented that policy of reducing water for irrigation by allocating less water than usual under the prior leases that were still in effect. The City in turn appealed the Superior Court's grant of the petition for writ of mandate.

The Court of Appeal's Decision

Extra-Record Evidence

The Court of Appeal first considered the City's contention that the Superior Court erred in partially excluding the submitted declaration. The Court of Appeal agreed with the City that the declaration was admissible, extra-record evidence, noting that while extra-record evidence is generally inadmissible in administrative *mandamus* cases, it may be admitted in traditional mandamus actions challenging ministerial or informal administrative actions if the facts are in dispute. The court found this rule applied here. It also found the declaration was relevant to the consideration of the merits of the CEQA claims. The

court, however, found the declaration was untimely. Nonetheless, because the Superior Court considered the declaration for some purposes, and because it had given the County an opportunity to respond, the Court of Appeal found that the timeliness concerns were not as significant and therefore considered the declaration.

CEQA Compliance

The Court of Appeal next considered the merits of the CEQA claim, characterizing the core question as whether the 2018 water allocation was part of the 2010 Leases project or a new, reduced water project (either on its own or as part of the Proposed Dry Leases). The court found that the 2018 allocation was part of the 2010 Leases, as it came after years of similar allocation actions under an ongoing leasehold relationship and was the latest in a string of discretionary water allocations that the 2010 Leases allowed the City to make. The court also rejected the County's claim that the lessees had reasonable expectations that the 2010 Leases obligated the City to continue to deliver water for sustainable grazing uses and did not allow it to curtail water deliveries for the purposes of increasing water deliveries to the City's residents. The Court of Appeal found that the plain language of the leases afforded the City this right. The court also noted that the City had increased the allocations in 2019 and 2020 (as set forth in the submitted declaration), refuting the claim that the 2018 allocation represented a new low- or zero-water delivery policy.

The Court of Appeal also rejected the claim that the 2018 water allocation constituted the City's improper implementation of the project embodied in the Proposed Dry Leases prior to completion of the requisite CEQA review. Contrary to this claim, the Court of Appeal found that the sequence of events supported the conclusion that the 2018 water allocation was within the scope of the 2010 Leases. The timing of the Proposed Dry Leases, the court also found, was consistent with the City's explanation that it issued the Proposed Dry Leases, agreed to complete the requisite environmental review for those leases, and committed to maintaining its allocation practice under the 2010 Leases while proceeding with the environmental review.

Statute of Limitations

Given its conclusion that the 2018 water allocation was part of the 2010 Leases, the Court of Appeal found that the County's writ petition challenging the 2018 implementation of that project was time-barred under CEQA's applicable statute of limitations. If the County believed that a decision to reduce the lessee's water allocation in a specific year would be a substantial change in practice and have significant effects on the environment, the Court of Appeal found, it should have raised that argument when the City approved the 2010 Leases giving the City the authority to make such reductions. The Court of Appeal therefore reversed the Superior Court decision.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the definition of a "project" for CEQA purposes and applicable statutes of limitations. The decision is available online at: https://www.courts.ca.gov/opinions/documents/A162590.PDF.
(James Purvis)

FIRST DISTRICT COURT REJECTS HOMEOWNER'S CONSTITUTIONAL CHALLENGES TO CITY RESOLUTION DESIGNATING PROPERTY LINES IN CONJUNCTION WITH NEIGHBORING PARCEL

Green Tree Headlands v. City of Sausalito, Unpub., Case. No. 1904567 (1st Dist. July 21, 2022).

In an *unpublished* decision, the First District Court of Appeal rejected a range of arguments raised on constitutional and statutory interpretation grounds by a homeowner petitioner challenging a proposed adjacent residence in the coastal town of Sausalito. Petitioner challenged city staff's determination of an appropriate front lot line without a noticed public hearing. However, the city gave the petitioner the

constitutionally required opportunity to have their appeal of this staff level decision heard before the planning commission and city council, which conducted a *de novo* review. The court also noted that petitioner's constitutional arguments were moot because concerns regarding the adjacent home's impacts on petitioner's property (most notably ocean views) would be adequately addressed during the design review process, which would require a noticed public hearing.

Factual and Procedural Background

Real Parties in Interest (RPI) were the owners of an undeveloped lot in the Marin Headlands and planned to build a home there. The lot is irregularly "C" shaped, wrapping around a home owned by petitioners. Petitioner had sweeping views of the San Francisco skyline and the bay. Petitioner also entered into a settlement agreement that increased setbacks on RPI's property to ten feet more than what is required by the city's zoning ordinance. The settlement agreement restricted the height of a permitted building to one story, with an exception for a second story provided the building footprint was located in a rectangle on the northwest portion of RPI's lot.

RPI's architect wrote a letter to the city community development director (CDD) requesting a written front property line determination for RPI's lot. The city's municipal code provides that a front property line:

> Means the line separating the parcel from the street. In case a lot abuts on more than one street, the parcel owner may elect any street parcel line as the front parcel line; provided, that such notice in the opinion of the Community Development Director will not be injurious to adjacent properties.

In November of 2017, the CDD issued a planning division memorandum designating the front property line of RPI's lot as the western property line which abutted petitioner's property. Petitioner appealed the city's lot line decision and on March 13 and April 3, 2019 the city planning commission considered these appeals. At the second planning commission meeting, the commission concluded that the CDD's decision was void because the property line selected by CDD was not a "street parcel line" because it was actually two lines that could not be combined.

RPIs appealed the planning commission's decision to the city council, which conducted a de novo review in two public hearings. During the second public hearing, the city council determined that RPI's selected front property line met the requirements of the city's municipal code because it found: (1) no injury to adjacent properties, (2) no other unusual circumstances, and (3) that other types of supposed impacts to views were speculative and would be assessed in the design review process.

Petitioner filed a writ petition alleging that the city council's decision approving the lot line was an abuse of discretion and lacked required notice and hearing. Petitioner sought a peremptory writ directing the city to set aside its lot line decision. Petitioner also asserted two causes of action for declaratory relief with a declaration concerning when and by whom setbacks and property lines for a new home can be set, and also the proper interpretation of what is "injurious to adjacent properties" in the municipal code.

After briefing and a hearing, the Superior Court denied the petition in its entirety finding that the front property line could be properly determined by the CDD and not during the design review process. The court also rejected petitioner's claims that the city's municipal code provisions regarding front setbacks were unconstitutional facially and as applied.

The Court of Appeal's Decision

The First District Court of Appeal rejected each of the petitioner's claims, thus upholding the trial court decision.

The Court Rejected Petitioner's Constitutional Claims

With regard to petitioner's constitutional claims, the court noted that petitioner failed to clarify whether its constitutional challenges were a "facial" challenge or an "as applied" challenge to the city's setback ordinance. A facial challenge:

> . . .considers only the text of the measure itself, not its individual application or the particular circumstances of an individual…

To succeed in a facial challenge, the petitioner must demonstrate that the act's provisions inevitably

(or in the generality or great majority of cases) pose a present total and fatal conflict with applicable constitutional prohibitions. An as applied challenge on the other hand:

> May seek (1) relief from a specific application of a facially valid statute or ordinance to an individual…who is under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied, or (2) an injunction against future application of the statute in the allegedly impermissible manner it is shown to have been applied in the past.

Petitioner made no showing that their petition facially challenged the city's setback ordinance on constitutional grounds, and petitioner did not request that the court invalidate the ordinance.

As Applied Challenge

The court then turned to petitioner's "as applied" claim that the city's decision regarding the front setback violated their procedural due process rights. Petitioner asserted that the city council's decision violated their procedural due process rights because no notice or hearing was provided regarding injuries that may result to neighboring properties from its front property line determination. However, the court noted that any due process violation with respect to notice and a hearing was remedied when the city council held de novo hearings on the front line property determination.

The court noted that even if an actual controversy did exist when petitioner's appeal was filed, in the interim, design review of the new residence concluded. In the design review process, the city was required to consider the location, size, and scale of the building RPIs intended to construct and how the new building would impact views, privacy, light, air and noise for adjacent properties.

Even if petitioner's claim was not moot, petitioners were entitled to notice and a hearing when a significant or substantial deprivation of property rights is at issue. Constitutional notice and a hearing is required when a governmental action will result in:

> . . .significant r substantial deprivations of property, and this category does not include an agency decision having only a de minimis effect on land.

Here, petitioners did not show a significant or substantial deprivation of their property rights without hearing. The CDD's determination and resulting city council decisions were a necessary preliminary determination in order for RPI's architect to obtain the minimum setbacks to begin a design review application.

The design review process that RPI's project would require, provided ample notice and an opportunity to be heard about injuries to plaintiffs' property rights prior to authorization of new construction. Among other things, the design review process would require the city planning commission to determine that the "proposed project has been located and designed to minimize the obstruction of public views from private property"

Court Rejects Petitioner's Statutory Interpretation Arguments Related to the Sausalito Municipal Code

The court went on to reject petitioner's claim that the city's municipal code "has two conflicting provisions governing the setting of property lines." First, the court noted that petitioner forfeited this claim by failing to raise it in their opening or reply brief—instead attempting to incorporate the argument by reference through trial court materials. The court noted that even if petitioner had not forfeited this argument, it could find no conflict in the city's municipal code.

Conclusion and Implications

The *Green Tree Headlands* decision provides a helpful discussion of constitutional issues occasionally raised in land use litigation. With regard to procedural due process rights, the case highlights that so long as a local planning agency provides a property owner with notice and an opportunity to be meaningfully heard regarding the property right in question, it is unlikely that a procedural due process violation will be found. A copy of the court's decision can be found here: https://www.courts.ca.gov/opinions/nonpub/A162387.PDF.

(Travis Brooks)

THIRD DISTRICT COURT OVERRULES TRIAL COURT DECISION BARRING BUSINESS LICENSE CHALLENGE BECAUSE OF PRIOR JUDGMENT DENYING A CEQA AND ZONING PROJECT CHALLENGES

Parkford Owners for a Better Community v. Windeshausen, ___Cal.App.5th___, Case No. C094419 (3rd Dist. 2022).

The Third District Court of Appeal in *Parkford Owners for a Better Community* overruled the trial court's decision barring a challenge to a business license for a storage facility expansion under the doctrine of *res judicata* because of an earlier judgment denying plaintiffs' California Environmental Quality Act (CEQA) and zoning challenges to the storage facility expansion.

Factual and Procedural Background

Treelake Village is a planned unit development in Granite Bay approved more than 30 years ago for over 1,000 residential units and various amenities, including a number of lakes and waterways, with storage for boats and recreational vehicles to be owned by residents of the Village. The storage was to be located on a power line easement that crossed the property.

Treelake Village was approved pursuant to a 1987 Environmental Impact Report (EIR), which contained mitigation measures. In 1998, an addendum to the 1987 EIR with mitigation measures was approved for modifications to the Treelake Village Master Plan, which modifications included increasing the minimum lot size and subdividing certain parcels into smaller lots. In 1999, the final subdivision map for Treelake Village was recorded.

The authorization of a commercial self-storage facility within the Treelake Village development occurred through modification of the conditional use permit for the Treelake Village project. In 1993, the county planning department approved ministorage as an appropriate use within the power line easement. In 1996, the County Planning Commission approved a requested modification of condition to remove the residents-only restriction on use of the planned storage facilities.

In 1997, a building permit was issued for construction of Treelake Storage. A building permit for "Phase II" of the construction was issued in 1998. After construction was completed, a certificate of occupancy was issued in 1999.

In 2001, and again in 2004, two additional phases of construction to expand Treelake Storage's facilities were approved, and building permits were issued for each phase of expansion. Certificates of occupancy were issued in 2002 and 2005, respectively, after construction of each expansion phase was completed.

Finally, in 2016, plans for the most recent expansion of Treelake Storage were approved. The building permit for this expansion was issued in October 2016; it authorized construction of a 28,240-square-foot building and associated utilities. After construction was completed, a certificate of occupancy was issued in October 2017.

In February 2017, plaintiff filed a separate but related lawsuit (Parkford I). Parkford I challenged the County's issuance of the October 2016 building permit under CEQA and the Planning and Zoning Law and sought a writ of mandate directing the County to set aside its approval of the building permit and all related approvals, prepare and certify an adequate EIR for the expansion project, and suspend all construction activity until the County complied with CEQA and all other applicable laws.

In April 2018, the trial court concluded that the County did not violate CEQA because the issuance of the challenged building permit was a ministerial action. Thereafter, the trial court concluded that Parkford's Planning and Zoning Law claim was barred by the 90-day statute of limitations set forth in Government Code section 65009. Plaintiff appealed the decision in Parkford I.

Plaintiff filed the present lawsuit in July 2018 (*Parkford II*), less than three weeks after judgment was entered against it in *Parkford I*. *Parkford II* challenged the (Placer County's issuance of a business license to Treelake Storage on the ground that a ministorage facility was not an allowable use for property zoned "Residential-Ag" under the county code. Plaintiff asserted that Treelake Storage was operating without a valid business license because a ministorage facility was not an allowable use in residentially zoned

districts, even by special permit such as a conditional use permit. Plaintiff sought a writ of mandate directing the County to vacate and set aside the current business license, an order declaring that the issuance of any renewals of the business license would be in violation of the county code, and a permanent injunction prohibiting the County from issuing any further renewals of the business license.

At the Trial Court

In January 2019, the trial court stayed *Parkford II* pending the outcome of the appeal in *Parkford I*. In August 2020, the court of appeal dismissed the appeal in *Parkford I*, finding that completion of the challenged expansion of Treelake Storage prior to entry of judgment rendered moot Parkford's challenge to the County's issuance of the building permit authorizing construction of the expansion.

The trial court lifted the stay of *Parkford II* in February 2021. In April 2021, defendants and real parties filed a motion for judgment on the pleadings, asserting that *Parkford II* was barred by both aspects of the doctrine of *res judicata*—claim and issue preclusion. In response, plaintiff argued that neither claim nor issue preclusion applied because there was no final judgment on the merits. The trial court granted the motion.

The Court of Appeal's Decision

The Court of Appeal, using the *de novo* standard applicable to issues of law, overruled the trial court judgment, finding that there was no final judgment on the merits in Parkford I due to the disposition of the case on the ground of mootness.

Requirements for Claim and Issue Preclusion

Claim preclusion prevents re-litigation of the same cause of action in a second suit between the same parties or parties in privity with them. Claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit. If claim preclusion is established, it operates to bar causes of action that were, or could have been, litigated in the first suit.

Issue preclusion prohibits the re-litigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. There is a limit to the reach of issue preclusion, however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party. Issue preclusion applies only: (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.

Both Types of Preclusion Require a Final Judgment on the Merits of Any Appeal of the First Case

As noted, claim preclusion requires a final judgment on the merits, while issue preclusion requires a final adjudication of an issue. A judgment or adjudication is on the merits if the substance of the claim or issue is tried and determined. A trial court judgment determined to be moot on appeal and dismissed has not been fully litigated, as appellate review of the merits was never completed.

Plaintiff's reliance on the *Parkford I* trial judgment was not availing. While, the original judgment remains intact despite the dismissal of the appeal in *Parkford I*, that is not the dispositive question in *Parkford II*. The question on appeal is whether the judgment is final "on the merits" for purposes of *res judicata*, where the merits of the trial court's rulings evaded appellate review despite their being argued on appeal. Simply put, an appeal was taken that challenged trial court rulings, but the validity of those rulings was never adjudicated on appeal. A ground reached by the trial court and properly challenged on appeal, but not embraced by the appellate court's decision, should not affect the judgment's preclusive effect.

Conclusion and Implications

This opinion by the Third District Court of Appeal is not surprising from a legal standpoint. It adopts the reasoning of the recent California Supreme Court decision in *Samara v. Matar,* 5 Cal.5th 322 (2018).

What is unique about this opinion is that it demonstrates how a diligent plaintiff can circumvent dismissal of an untimely CEQA and land use challenge by incorporating the same issue into a later challenge to a business license for a project.

In a future situation involving dismissal of a land use appeal on grounds of mootness, perhaps it might be wise to consider whether the issue might resurface under subsequent permitting and to argue that the issue is not moot and capable of being reasserted in order to obtain *res judicata* effect. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C094419.PDF.
(Boyd Hill)

FOURTH DISTRICT COURT OVERTURNS LOWER COURT'S GRANT OF DEMURRER FOR DISMISSAL DUE TO FAILURE TO TIMELY JOIN REAL PARTIES IN INTEREST

Save Our Students-Safety Over Sorry v. County of San Diego, *Unpub.*, Case No. D079464 (4th Dist. July 26, 2022).

In an *unpublished* decision filed on July 26, 2022, the Fourth District Court of Appeal overturned the lower court's granting of respondent County of San Diego's demurrer on the grounds that petitioner failed to timely join and serve the real party in interest (RPI). Petitioner's failure to name the RPI in the caption was not fatal where the petition made clear in the body of the document who the RPI was. Moreover, petitioner's failure to serve RPI with a summons was not fatal where petitioner served RPI with a copy of the petition within the 90-day limitations period. In writ proceedings such as the one before the court, a service of a summons was not required.

Factual and Procedural Background

Petitioner Save Our Students-Safety Over Sorry (petitioner) was a nonprofit organization opposed to construction of a high school at a location it claimed was dangerous. Construction of the school required planning commission approval of a "major use permit." After the planning commission approved the use permit, petitioner appealed to the board of supervisors, which rejected the appeal and approved the permit with a mitigated negative declaration.

Petitioner filed a verified petition for writ of mandate and complaint for violation of the Brown Act, and for declaratory and injunctive relief. The caption of the petition named the county and board of supervisors as respondents and defendants, but did not name RPI. In the section of the petition named "Parties" petitioners identified the RPI and proponent of construction of the school.

Petitioner served the county with a summons and the petition. The proof of service indicated that the petition without a summons was served on an attorney for RPI, with service also made on RPI's designated agent for service of process.

The county filed a demurrer to the petition on the ground that it had failed to timely join an indispensable party, the RPI. The county argued that in order to be timely joined, the RPI had to be named in the petition, specifically in the caption, and must served with the summons and petition within the 90-day limitations period.

In response to the demurrer, petitioner brought an *ex parte* application to amend the caption of the petition and requested that the clerk issue of a new summons. The trial court denied the *ex parte* application and, after a hearing, sustained the county's demurrer without leave to amend. The trial court found that the RPI had not properly been joined as a party because the RPI was not named in the caption nor in the summons.

The Court of Appeal's Decision

The Fourth District Court began by noting that the trial court:

> . . .should have overruled the [c]ounty's demurrer because [petitioner] named the RPI as a party within the limitations period and did not have to serve it with a summons.

Real Party in Interest Was Timely Joined to the Petition

Regarding joinder of the RPI, the court noted that joinder is:

> . . .generally accomplished by naming a party with others in the pleading that initiates the lawsuit and serving the party with the process needed to subject the party to the court's jurisdiction.

Regarding petitioner's failure to add RPI to the caption of the petition, the court noted that:

> . . .this procedural misstep did not necessarily bar its lawsuit against the count. . .[t]he title of a legal pleading is of less importance than the substance of the message it conveys. It has been uniformly held in our state that in order to determine the identify of a party courts are entitled to take into consideration the allegations of the complaint as well as the title.

Here, although the caption left out the RPI, the body of the petition made clear that the RPI was the real party in interest for the project whose approval petitioner was seeking to set aside. By filing the petition within 90 days of the county's approval decision, petitioner timely named RPI.

Real Party In Interest Was Properly Served

The Court of Appeal went on to recognize that petitioner adequately served RPI with the petition within the 90-day period even though RPI was not served with a summons. First, a summons is directed to the defendant and must warn that without a timely response default may be entered. RPI was not a defendant in this action.

Next, the court noted that in mandate proceedings a traditional summons is not used. Instead, service in such is accomplished by serving the writ petition like a summons.

Lastly, the court was persuaded by the principles of statutory interpretation. The Subdivision Map Act expressly requires service of a summons on a legislative body in a proceeding challenging a decision regarding a subdivision. Planning and Zoning Law and the California Environmental Quality Act, on the other hand, which were at issue in the case, do not expressly require service of a summons. As the court noted:

> . . .[w]hen confronted with two statutes, one of which contains a term, and one of which does not, we do not import the term used in the first to limit the second.

Accordingly, petitioner was not required to serve RPI with a summons, and so long as it properly served RPI with the petition within the 90-day period, RPI had been properly served.

Conclusion and Implications

Save Our Students illustrates that a court will not necessarily find that an indispensable party was not properly named to a petition if that party is clearly named in the body of the document but erroneously left out of the caption. Moreover, a traditional summons is not typically required in a writ proceeding - service of the petition is typically sufficient to effectuate timely service. A copy of the court's *unpublished* decision can be found here: https://www.courts.ca.gov/opinions/nonpub/D079464.PDF.
(Travis Brooks)

LEGISLATIVE UPDATE

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

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

Surplus Land

•**AB 2625 (Ting)—**This bill was enrolled on August 16, 2022 and approved by the Governor on August 29, 2022. It amends the Subdivision Map Act and exempts the leasing of, or the granting of an easement to, a parcel of land, or any portion of the land, in conjunction with the financing, erection, and sale or lease of an electrical energy storage system on the land, if the project is subject to discretionary action by the advisory agency or legislative body

General Plans

•**SB 1067 (Portantino) –** As of August 30, 2022, this bill was held in committee and under submission. This bill would prohibit a city, county or city and county from imposing any minimum automobile parking requirement on specified housing development projects.

•**AB 2094 (Rivas)** – As of August 30, 2022, this bill was in the Assembly with Senate amendments pending. It requires a city or county's annual report to the Department of Housing and Community Development which requires, among other things, the city or county's progress in meeting its share of regional housing needs, including the need for extremely low-income housing, and local efforts to remove governmental constraints to the maintenance, improvement and development of housing, to include the locality's progress in meeting the housing needs of extremely low income households, as specified.

•**AB 2339 (Bloom) –** As of August 30, 2022, this bill had passed in the Senate and was awaiting a vote in the Assembly. This bill revises the requirements of the housing element in connection with zoning designations and emergency shelters. It expands the definition of emergency shelters, narrows the development and management standards that local governments can apply, requires that zoning designations identified to allow emergency shelters ministerially must allow residential uses, and amends the "no net loss" policy, as well as other substantive changes to the law.

Accessory Dwelling Units

•**AB 916 (Salas) –** On August 30, 2022, this bill was ordered to engrossing and enrolling. This bill prohibits a city or county legislative body from adopting or enforcing an ordinance requiring a public hearing as a condition of adding space for additional bedrooms or reconfiguring existing space to increase the bedroom count within an existing dwelling, for permit applications of no more than two additional bedrooms, by addition of a § 65850.02 to the Government Code.

•**SB 897 (Wieckowski) –** As of August 30, 2022, this bill continues to be in Committee. This bill makes numerous substantive changes to the laws governing accessory dwelling units (ADUs) and junior accessory dwelling units (JADUs), as specified. For example, it increases the minimum ADU height limit that a local agency may impose, as follows: a) For ADUs attached to a primary dwelling, the law increases the minimum height limit from 16 feet to the lower of 25 feet or the local agency's applicable height limit; b) For a detached ADU within a half-mile walking distance of a major transit stop or a high-quality transit corridor, it increases the minimum height limit from 16 feet to 18 feet for a detached ADU and requires that a local agency must allow an additional two feet in height to accommodate a roof pitch on an ADU that is aligned with the roof pitch of the primary dwelling unit; and c) For detached ADUs that do not meet the criteria in (a) but are on a lot that has an existing multifamily, multistory dwelling, increases the minimum height from 16 feet to 18 feet. The bill also requires that standards imposed on ADUs by local governments must be objective and specifies

that the requirement for a permitting agency to act within 60 days on an ADU or JADU application means that they must either approve or deny the application in that timeframe. It also adds that, if a permitting agency denies an application for an ADU or JADU, the permitting agency must return in writing a full set of comments to the applicant with a list of items that are defective or deficient and a description of how the application can be remedied by the applicant.

Density Bonus

•**AB 2334 (Wicks)—**On August 30, 2022, this bill was ordered to engrossing and enrolling. This bill amends Density Bonus Law to allows a housing development project in 17 specified counties to receive added height and unlimited density if the project is located in an urbanized very low vehicle travel area, at least 80 percent of the units are restricted to lower income households, and no more than 20 percent are for moderate income households. The specified counties include: Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, Solano, Sonoma, Los Angeles, Orange, Riverside, San Bernardino, San Diego, Ventura, Sacramento, and Santa Barbara.

Affordable Housing

•**AB 2295 (Bloom)**—On August 30, 2022, this bill was ordered to engrossing and enrolling. This bill provides that a housing development project be deemed an allowable use on any real property owned by a local educational agency, as defined, if the housing development satisfies certain conditions, including other local objective zoning standards, objective subdivision standards, and objective design review standards, as described.

Planning

•**AB 2234 (Rivas)—**On August 25, 2022, this bill was ordered to engrossing and enrolling. This bill requires a local agency to post information related to post-entitlement phase permits for housing development projects, process those permits in a specified time period depending on the size of the housing development, and establish a digital permitting system if the local agency meets a specific population threshold.

•**AB 2668 (Grayson)—**On August 25, 2022, this bill was ordered to third reading. This bill makes numerous, substantive changes to State law. It clarifies that an SB 35 project is not subject to a conditional use permit or any other non-legislative discretionary approval, provides that the inclusionary requirements apply to the base project, before calculating any density bonus units, it authorizes an SB 35 project to be located on a hazardous waste site if a local government has otherwise determined the site to be suitable for development or the site is an underground storage take site and has received a specified closure letter, provides that a local government shall not determine that a development seeking to use SB 35 or modify an SB 35-approved project is in conflict with its objective planning standards based on the absence of application materials, provided the application contains substantial evidence that would allow a reasonable person to conclude that the development is consistent with the objective planning standards and make other changes, including changes clarifying existing law.

•**SB 6 (Caballero)**—On August 29, 2022, this bill was ordered to engrossing and enrolling. This bill enacts, until January 1, 2033, the "Middle Class Housing Act of 2022," which establishes a housing development project as an allowable use within a zone where office, retail, or parking are a principally permitted use, so long as the parcel is not adjacent to a parcel dedicated to industrial use, as specified. It also requires a housing development project to comply with specified requirements, including, but not limited to, the following: (1) that the density for the housing development meet or exceed the applicable density deemed appropriate to accommodate housing for lower income households under housing element law, (2) that the project must comply with all local zoning, parking, design, public notice or hearing requirements, local code requirements, ordinances, and permitting procedures that apply in a zone that allows housing at the density required by this bill, that all other local requirements for the parcel, other than those that prohibit residential use or allow residential use at a lower density than provided by this, and (3) that the project site is 20 acres or less, and is located within an urban area, as specified and (4) that the developer certifies that the project either is a public work or will pay prevailing wage and use a skilled and trained workforce for all levels of contractors, as defined in existing law, except as provided in the bill.

•**AB 2097 (Friedman)**—On August 30, 2022, this bill was ordered to engrossing and enrolling. This bill

prohibits a public agency from imposing a minimum automobile parking requirement, or enforcing a minimum automobile parking requirement, on residential, commercial, or other development if the development is located on a parcel that is within one-half mile of public transit, as defined. However, it would allow a city or county to impose minimum parking requirements on developments located within one-half mile of public transit if the city or county makes written findings within 30 days stating that not imposing minimum parking requirements would have a substantially negative impact, as specified, on one of the following: a) The agency's ability to meet its share of the regional housing need for low- and very low income households; b) The agency's ability to meet any special housing needs for the elderly or persons with disabilities, as specified; c) Existing residential or commercial parking within one-half mile of the housing development project. It further provides that the ability of a city or county to impose parking requirements does not apply to a housing development project that satisfies any of the following: a) The development dedicates a minimum of 20 percent of the total number of housing units to very low, low-, or moderate-income households, students, the elderly, or persons with disabilities; b) The development contains fewer than 20 housing units; c) The development is not subject to parking requirements based on the provisions of any other state law. It also provides that this law may be enforced by the Department of Housing and Community Development (HCD) and the Attorney General, as specified.

California Environmental Quality Act

•**SB 922 (Wiener)—**This bill was enrolled on August 23, 2022. This bill expands California Environmental Quality Act (CEQA) exemptions for specified transit, bicycle, and pedestrian projects, and extends these exemptions from 2023 to 2030. Specifically, this bill would exempt from CEQA, until January 1, 2030, active transportation plans and pedestrian plans, if the lead agency holds noticed public hearings and files an NOE with OPR. It further provides that for the SB 288 projects extends the January 1, 2023 sunset until 2030, and makes several substantive changes to SB 288 general requirements: a) Allowing a local agency, instead of requiring a public agency, to carry out the project and be the lead agency; b) prohibiting a project from inducing single-occupancy vehicle trips, adding additional highway lanes, widening highways, or adding physical infrastructure or striping to highways except as specified. It also makes substantive changes to individual SB 288 project exemptions and other changes.
(Melissa Crosthwaite)

CALIFORNIA LAND USE™
LAW & POLICY Reporter

California Land Use Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108