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FEATURE ARTICLE

U.S. SUPREME COURT RULES MAJOR QUESTIONS DOCTRINE PROHIBITS BROAD DELEGATION OF CONGRESSIONAL AUTHORITY TO REGULATE GREENHOUSE GAS EMISSIONS SYSTEMS

By Deborah Quick and Lucille Flinchbaugh

The United States Supreme Court has considered whether the "best system of emission reduction" identified by the U.S. Environmental Protection Agency (EPA) in its Clean Power Plan (Plan) was within the authority granted to the EPA by § 111(d) of the federal Clean Air Act (CAA or Act). Analyzing the question under the "major questions doctrine," the Court concluded that the emissions shifting building blocks of the Plan lacked any clear congressional authorization, and therefore exceeded the EPA's regulatory authority under the Act. [*West Virginia v. Environmental Protection Agency*, ___U.S.___, 142 S.Ct. 2487 (2022).]

Background

In 2015, the EPA promulgated the Plan, which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. *West Virginia*, 142 S. Ct. at 2592. The EPA cited the scarcely utilized Section 111 of the Act as its source of authority, which directs the EPA to: (1) determine, considering various factors, the best system of emission reduction which has been adequately demonstrated, (2) ascertain the degree of emission limitation achievable through the application of that system, and (3) impose an emissions limit on new stationary sources that reflects that amount. 42 U.S.C. §7411(a)(1); *see also* 80 Fed. Reg. 64510, 64538 (Oct. 23, 2015); *West Virginia*, 142 S. Ct. at 2601. Under this provision, the States have authority to set the enforceable rules restricting emissions from sources within their borders, while the EPA decides the amount of pollution reduction that must ultimately be achieved. *Id.* at 2601–02. That standard may be different for new and existing plants, but in either case, it must reflect the "best system of emission reduction" or "BSER" that the EPA has determined to be "adequately demonstrated" for the category. §§7411(a)(1), (b)(1), (d). 142 S. Ct. at 2602.

In its Plan, the EPA determined that the BSER for existing coal-fired power plants included three types of measures which the EPA called "building blocks." *Id.* at 2602–03; *see* 80 Fed. Reg. 64662, 64667 (Oct. 23, 2015). The first building block consisted of "heat rate improvements" that coal-fired plants could undertake to burn coal more efficiently. 142 S. Ct. at 2693; 80 Fed. Reg. at 64727. This type of source-specific, efficiency improving measure was similar to those that the EPA had previously identified as the BSER in other Section 111 rules. However, in this case, the EPA determined that this measure would lead to only small emission reductions because coal-fired power plants were already operating near optimum efficiency. 142 S. Ct. at 2603; 80 Fed. Reg. at 64727. The EPA explained, in order to control carbon dioxide from affected plants at levels necessary to mitigate the dangers presented by climate change, it could not base the emissions limit on measures that only improve power plant efficiency. 142 S. Ct. at 2611; 80 Fed. Reg. at 64728.

As such, the EPA included two additional building blocks in its Plan. The second building block would shift electricity production from existing coal-fired power plants to natural-gas-fired plants (*Id.*) and the third building block would shift from both coal- and gas-fired plants to new low- or zero-carbon generating capacity, mainly wind and solar. *Id.* at 64729, 64748; 142 S. Ct. at 2603. In other words, both measures would involve what the EPA called "generation shift-

ing from higher-emitting to lower-emitting" producers of electricity as a means of reducing carbon emissions. *Id.*; 80 Fed. Reg. at 64728. The EPA explained that such methods for implementing this shift may include reducing the plant's own production of electricity, building a new natural gas plant, wind farm, or solar installation, investing in an existing facility, or purchasing emissions allowances. *Id.* at 64731–32; 142 S. Ct. at 2603.

In determining "the degree of emission limitation achievable through the application" of the system, as required under the Act, the EPA settled on what it regarded as a "reasonable" amount of shift, projecting that by 2030, it would be feasible to have coal provide 27 percent of national electricity generation, down from 38 percent in 2014. 80 Fed. Reg. at 64665, 64694; 142 S. Ct. at 2604. From these projections, the EPA determined the applicable emissions performance rates, which were so strict that no existing coal plant would have been able to achieve them without engaging in one of these three methods of generation shifting discussed above. *Id.*

Following a stay on the Plan in 2016, the EPA repealed the Plan in 2019 following a change in administration, concluding that the EPA had exceeded its own jurisdiction under the Act. *Id.* On January 19, 2021, the D.C. Circuit reviewed the EPA's actions and determined that the EPA had misunderstood the scope of its authority under the Act. The court vacated the EPA's repeal of the Plan and remanded to the EPA for further consideration. *Id.* at 2605–06 (citing *Am. Lung Ass'n v. EPA*, 985 F. 3d 914, 995 (D.D.C. 2021, *rev'd and remanded by West Virginia*, 142 S. Ct. 2587). The court's decision was followed by another change in administration, and the EPA moved the court to partially stay its mandate. 142 S. Ct. at 2606. Westmoreland Mining Holdings LLC., North American Coal Corporation, and the States filed petitions for certiorari defending the repeal of the Plan. *Id.*

The Supreme Court's Decision: Majority Opinion

The Court explained that the main issue under consideration in this case was whether restructuring the nation's overall mix of electricity generation, to transition from 38 percent coal to 27 percent coal by 2030, can be the BSER within the meaning of Section 111. *Id.* at 2595. In analyzing this issue, the Court looked to a variety of cases where agencies were found to have exceeded their regulatory power because, under the circumstances, common sense as to the manner in which Congress would have been likely to delegate such power to the agency at issue, made it very unlikely that Congress had actually intended to do so. *Id.* at 2609. The Court explained that extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]," *Whitman v. Am. Trucking Ass'ns*, 531 U. S. 457, 468 (2001), and the Court presumes that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Ass'n v. FCC*, 855 F. 3d 381, 419 (D. D.C. 2017); 142 S. Ct. at 2609. Accordingly, the Court determined that this question must be analyzed under the body of law known as the "major questions doctrine." *Id.*

The Major Questions Doctrine

In arguing that Section 111(d) empowered it to substantially restructure the American energy market, the EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Utility Air Regul. Grp. v. EPA*, 573 U. S. 302, 324 (2014). 142 S. Ct. at 2610. Prior to 2015, the EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly, but it had never previously devised a cap by looking to a "system" that would reduce pollution simply by shifting polluting activity from dirtier to cleaner sources. 80 Fed. Reg. at 64726. 142 S. Ct. at 2610. Under its prior view of Section 111, the EPA's role was limited to ensuring the efficient pollution performance of each individual regulated source, and if a source was already operating at that level, there was nothing more for the EPA to do. *Id.* at 2612.

In contrast, the Court argued that under the Plan, the EPA was able to demand much greater reductions in emissions based on its own policy judgment that coal should make up a much smaller share of national electricity generation. *Id.* The EPA would be able to decide, for instance:

> . . .how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high energy prices can go as a result before they become unreasonably 'exorbitant.' *Id.*

The Court asserted that under this view, the EPA could go even further, perhaps forcing coal plants to "cease making power altogether." *Id.* The Court explained that Congress:

> . . .certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. . .[and and the]. . .last place one would expect to find it is in the previously little-used backwater of Section 111(d). *Id.* at 2613.

As such, the Court determined it would be highly unlikely that Congress intended to leave to agency discretion the decision of how much coal-based generation there should be over the coming decades.

Under the major questions doctrine, to overcome the Court's skepticism, the Government must point to "clear congressional authorization" to support its assertion of regulatory power. *Utility Air*, 573 U. S., at 324. 142 S. Ct. at 2614. The Government looked to other provisions of the Act for support, such as where the word "system" or similar words to describe cap-and-trade schemes or other sector-wide mechanisms for reducing pollution are used, such as in the Acid Rain program or Section 110 of the NAAQS program. *Id.* at 2614–15. However, the Court rejected the Government's argument, differentiating these sections and finding that the references to "system" in other provisions do not equate to the kind of "system of emission reduction" referred to in Section 111. *Id.* at 2615. The Court concluded that these provisions do not provide adequate support to make a finding of clear congressional authorization. *Id.* at 2615–16. Notably, however, the Court refused to answer the question of whether the statutory phrase "system of emission reduction" refers *exclusively* to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER. *Id.* at 2616.

Congress Had Not Intended to Give EPA Such Broad Authority

In total, the Court determined that while capping carbon emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day," based on the language of the statute and the lack of any other clear congressional directive, it is not plausible that Congress intended to give the EPA the authority to adopt a regulatory scheme of such magnitude in Section 111(d). The Court reversed the D.C. Circuit's decision and remanded for further proceedings.

The Concurrence

Justice Gorsuch's concurrence, joined by Justice Alito, builds on Gorsuch's prior opinions in *Gundy v. United States*, 139 S. Ct. 2116 (2019) (dissenting) and *Nat'l Fed. of Ind. Bus. v. OSHA*, 595 U.S. ___ (2022) (concurrence) (*NFIB*), in which Gorsuch has argued for an expansive application of the major questions doctrine.

In *Gundy*, Gorsuch traced the asserted deterioration of the "intelligible principle" doctrine by which courts determine "whether Congress has unconstitutionally divested itself of its legislative responsibilities." *Gundy* (Gorsuch, dissenting), Slip Op. at 15, quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) ("[A] statute 'lay[ing] down by legislative act an intelligible principle to which the [executive official] is directed to conform' satisfies the separation of powers."). Gorsuch identifies the "traditional" separation of powers test as providing that "as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details." *Gundy* (Gorsuch, dissenting), Slip Op. at 10 (citing *Wayman v. Southard*, 10 Wheat. 1, 46 (1825). Subsequent cases were consistent with the:

> . . .theme that Congress must set forth standards 'sufficiently definite and precise to enable Congress, the courts, and the public to ascertain' whether Congress's guidance has been followed. *Gundy* (Gorsuch, dissenting), Slip Op. at 11 (quoting *Yakus v. United States*, 321 U.S. 414, 426 (1944).

However, beginning in the 1940s, according to Gorsuch, the intelligible principle doctrine "mutated" far from its origins in the constitutional principle of separation of powers into a toothless box-ticking exercise, so that it was relied on "to permit delegations of legislative power that on any other conceivable account should be held unconstitutional." *Gundy* (Gorsuch, dissenting), Slip Op. at 17.

In both *Gundy* and *NFIB*, Gorsuch proposed utilizing the major questions doctrine as a corrective to shore up the intelligible principle doctrine where an agency relies on a "statutory gap" concerning "a question of deep 'economic and political significance' that is central to the statutory scheme." *Gundy*

Gorsuch, dissenting), Slip Op. at 20 (quoting *King v. Burwell*, 576 U.S. ___, ___ (Slip Op. at 8). In *NFIB*, Gorsuch concurrent champions the major questions doctrine as "guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power," in contrast with the nondelegation doctrine's rule "preventing Congress from intentionally delegating its legislative powers to unelected officials." *NFIB* (Gorsuch, concurring), Slip Op. at 5.

In *West Virginia*, Gorsuch cited to his opinions *Gundy* and *NFIB* and then articulated his understanding of the "good deal of guidance" provided by prior opinions of the Courts on application of the major questions doctrine. *West Virgina v. EPA* (Gorsuch, concurring), Slip Op. at 9. The doctrine is to be applied when:

> . . .an agency claims the power to resolve a matter of 'great political significance,' or end an 'earnest and profound debate across the country.'
>
> Further, the major question doctrine requires:
>
> . . .that an agency. . .point to clear congressional authorization when it seeks to regulate 'a significant portion of the American economy.' *Id.* at 10.

And the doctrine "may apply when an agency seeks to 'intrud[e] into an area that is a particular domain of state law." *Id.* at 11. This list of "triggers" for application of the major questions doctrine is, per Gorsuch, not exclusive, but in any event are all present when considering the constitutionality of the Plan. A history of Congressional failure to regulate greenhouse gas emissions from coal-fired plants, the dominance of the electricity sector in the national economy, and that the regulation of utilities is a matter traditionally left to the states, all support, in Gorsuch's view, application of the doctrine here.

The Dissent's Argument

Justice Kagan's dissent, joined by Justices Breyer and Sotamayor, relies on traditional principles of statutory interpretation and points to the purposefully broad delegation of authority in the Act allowing EPA to define a "system," characterizing this grant of broad authority as typical, but noting that while broad the delegation is not vague:

> Congress used an obviously broad word (though surrounding it with constraints) to give EPA lots of latitude in deciding how to set emissions limits. And contra the majority, a broad term is not the same thing as a "vague" one. A broad term is comprehensive, extensive, wide-ranging; a "vague" term is unclear, ambiguous, hazy. (Once again, dictionaries would tell the tale.) So EPA was quite right in stating in the Clean Power Plan that the "[p]lain meaning" of the term "system" in Section 111 refers to "a set of measures that work together to reduce emissions. Another of this Court's opinions, involving a matter other than the bogeyman of environmental regulation, might have stopped there. *West Virginia v. EPA* (Kagan, dissenting), Slip Op. at 8 (internal citations omitted).

The dissent also notes that the Court has previously described cap and trade schemes to regulate acid rain and greenhouse gases as "systems," in the course of affirming their constitutionality. *Id.* at 9.

The dissent argues that the Court's statutory interpretation precedents have typically found an impermissible delegation of legislative authority "an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience," and where "the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress's broader design."

> In short, in assessing the scope of a delegation, the Court has considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design. *Id.* at 15.

Criticizing the majority and concurrence for their reliance on the major question doctrine, the dissent argues that Congress appropriately relies on delegation to expert agencies in order to implement complex policies across an advanced industrial economy in a rapidly evolving world. Congress, in the dissent's view, appropriately looks to expert agencies staffed with "people with greater expertise and experience" to implement broad policy goals, including "to keep regulatory schemes working over time." *Id.* at 30.

The Inflation Reduction Act

In mid-August, Congress passed and President Biden signed the Inflation Reduction Act of 2022. The Act defines various greenhouse gases as pollutants under the Clean Air Act in the course of authorizing numerous subsidies and incentive programs to

support moving away from reliance on fossil fuels. Widespread commentary to the contrary, nothing in the Inflation Reduction Act nullified the Court's central holding in *West Virginia v. EPA* that Congress cannot delegate to EPA the authority to mandate generation shifting away from fossil fuels.

It remains to be seen whether the Inflation Reduction Act's minute specification of numerous, specific subsidy and incentive programs will illustrate or undercut Justice Kagan's observation of the necessity for Congress to delegate broad and continuing authority to expert agencies in order to meet evolving challenges with appropriately evolving regulations.

Conclusion and Implications

The Court's embrace of the major questions doctrine as a robust constraint of Congressional delegation raises questions as to whether the Securities and Exchange Commission's proposed climate-related disclosure rules are at risk (see https://corpgov.law.harvard.edu/2022/08/03/west-virginia-v-epa-casts-a-shadow-over-secs-proposed-climate-related-disclosure-rule/), and further afield casts doubt on evolving agency regulation in numerous technical fields not related to climate change, such as healthcare (see https://oneill.law.georgetown.edu/unpacking-west-virginia-v-epa-and-its-impact-on-health-policy/).

The Inflation Reduction Act—adopted on a party-line vote in the House of Representatives—illustrates the path forward for federal regulation: minute, specific and explicit direction to agencies to implement detailed legislatively-mandated programs. The disadvantages of this approach include that it requires an enormous expenditure of political capital, is vulnerable to repeated reversals on the House's two-year election cycle, and cannot be expected to keep pace with the pace of social, economic and scientific change that is an inevitable consequence of a modern, advanced economy. Individual states, meanwhile, may choose to delegate broadly to expert agencies and thereby exceed the federal regulatory threshold, perpetuating a patchwork approach.

Climate change is the paradigmatic collective action problem writ a global scale. *West Virginia v. EPA* throws into stark relief the question of whether there is a constitutionally sound and politically viable path to collective action sufficient to meet the demands of moment?

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LAND USE NEWS

GOVERNOR NEWSOM RELEASES CALIFORNIA'S WATER SUPPLY STRATEGY

As the summer of 2022 has now passed, Governor Gavin Newsom has unveiled a new strategic plan titled California's Water Supply Strategy. The nearly 20-page document contains a surprisingly concise walkthrough of the pressing issues the state faces on the water supply side of things and outlines California's strategy and priority actions to adapt and protect water supplies in an "era of rising temperatures." With a heavy emphasis on enhancing resiliency in the future to withstand the impacts of climate change—thus the subtitle Adapting to a Hotter, Drier Future—the Water Supply Strategy showcases recent highlights in improving the state's water infrastructure and sets a series of goals and milestones for the state in the years to come and how we can work towards them.

Developing New Water Supplies

The first milestone addressed in the Water Supply Strategy focuses on increased utilization of wastewater recycling and desalination as well as increased stormwater capture and conservation, generally. Specifically, this section proposes two main goals moving forward.

First, the Water Supply Strategy sets a short-term goal to increase recycled water use that would utilize at least 800,000 acre-feet (AF) of recycled water annually by 2030. Currently, recycled water offsets about 9 percent of the state's water demand, right around 728,000 AF annually, and with over $1.8 billion invested in recycled water projects statewide over the last five years, the state has already laid the groundwork for reaching this goal as those projects are expected to generate an additional 124,000 AF of new water supply. To meet the proposed long-term goal, however, the state will need to redouble its efforts as the goal more than doubles that 800,000 figure, jumping to a whopping 1.8 million AF annually in recycled water use throughout the state.

The second specific goal discussed in this section is two-part in nature, focusing on an increase in yield and in the efficiency of doing so. To meet this second goal, the state would expand brackish groundwater desalination production by 28,000 AF per year by 2030 and 84,000 AF per year by 2040. The kicker to this goal comes in its second part, however, as the state will also work to help guide the placement of seawater desalination projects where they are cost effective and environmentally appropriate, an issue that has stood in the way of many proposals.

Expanding Water Storage Capacity

While admitting that creating more space to store water in reservoirs and aquifers does not create more precipitation, the Water Supply Strategy addresses expanding the water supply storage side of things, looking at efforts both above ground and below.

Above ground, the strategic plan highlights seven locally-driven projects supported by Proposition 1 that would create an additional 2.77 million AF of water storage statewide. Also discussed is the opportunity—or even need—to improve water storage infrastructure throughout the state by rehabilitating dams in need to regain storage capacity and even expanding the San Luis Reservoir by 135,000 AF.

Below ground, the strategic plan endeavors to expand annual groundwater recharge by at least 500,000 AF. Local efforts have been a huge part of the increased utilization of groundwater reservoirs, and by the end of next year the state will have invested around $350 million in local assistance for recharge projects. To help bolster these local efforts, the Water Supply Strategy proposes a coordinated, state-level approach to provide for orderly, efficient disbursement of rights to high winter flows by providing incentives to local agencies emphasizing such projects and by streamlining regulatory roadblocks and speedbumps that may be hindering the expansion of such projects.

Reducing Demand

At this point, many Californians are tired of hearing the "C" word—conservation. But reducing demand has simply become a continuing effort of the

state and conservation efforts won't be slacking up any time soon. Without beating the dead horse for too long, the Water Supply Strategy reiterates the importance, and importantly the success, of our conservation efforts statewide, especially with a potential fourth dry-year on the horizon.

Improving Conveyance Systems and Modernizing Water Rights

The final section of the Water Supply Strategy tackles two distinct auxiliary issues relating to water supply management: the movement of water throughout the state and the management of water rights.

California depends upon—to an undesirable extent—aging, damaged, or increasingly risk-prone infrastructure to transport water between different areas of the state. It comes as no surprise then that the strategic plan discusses plans to both repair damaged facilities in the San Joaquin Valley—specifically those of the federal and state water projects—and modernize existing conveyance facilities by getting the ball rolling with respect to the Delta Conveyance Project.

Closing out the final section, the strategic plan expresses the state's desire "to make a century-old water rights system work in this new era" of aridification in the west. Calling out how other western states such as Washington, Oregon, Nevada, and Idaho manage water diversions much more "nimbly" than California, the strategic plan looks at what it can do to get the California State Water Resources Control Board more accurate and timely data, modern data infrastructure, and increased capacity to halt water diversions when the flows in streams diminish.

Conclusion and Implications

The Water Supply Strategy covers a lot of forward-facing information—far too much to cover this concisely. Many of the issues and proposed solutions addressed are the same we see broadcasted on an almost daily basis—aging infrastructure, the need for increased storage capacity, heightened conservation efforts—but other areas stand out and illicit a closer look into the topic—such as the how part in how the state plans to modernize its Gold Rush era water rights system. With the main topics noted herein, and with the full publication being a comparatively short read for a statewide strategic plan, the Water Supply Strategy may not be the most revolutionary publication the state has released, but it at least provides Californians with a bit of transparency as to the pet projects the state will focus on in the years to come. For more information, *see:* https://www.gov.ca.gov/2022/08/11/governor-newsom-announces-water-strategy-for-a-hotter-drier-california/
(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

FEDERAL INFLATION REDUCTION ACT PROVIDES ADDITIONAL FUNDING FOR DROUGHT RELIEF EFFORTS

In August, President Biden signed the Inflation Reduction Act that included $4 billion for the United States Bureau of Reclamation (Bureau) to mitigate the impacts of drought in the western United States, with priority given to the Colorado River Basin and others experiencing similar levels of drought. The funds are available to public entities and Indian tribes until 2026.

Background

The Bureau of Reclamation was established in 1902 and manages and develops water resources in the western United States. The Bureau is the largest wholesale water supplier and manager in the United States, managing 491 dams and 338 reservoirs. The Bureau delivers water to one in every five western farmers on more than 10 million acres of irrigated land. It also provides water to more than 31 million people for municipal, residential, and industrial uses. The Bureau also generates an average of 40 billion kilowatt-hours of energy per year.

The western United States is facing historic drought conditions, particularly in the Colorado River Basin. Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the Bureau. The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States.

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines, collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows:

California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. In 2019, lower basin states entered into a Lower Basin Drought Contingency Plan Agreement (DCP) to promote conservation and storage in Lake Mead. Importantly, the DCP established elevation dependent contributions and required contributions by each lower basin state. However, in August of this year, the Bureau announced additional reductions in releases from Lake Mead for 2023 following first-ever cutbacks in Colorado River allocations to Arizona and Nevada this year. The cutbacks were necessary despite significant investment in western water infrastructure beginning last year.

Under the Bipartisan Infrastructure Law of 2021, the Bureau became eligible to receive roughly $30.6 billion over five years. The 2021 law provided a total of $8.3 billion for Western programs and activities, with an initial $1.66 billion allocated to the Bureau in fiscal year 2022. Funding included $250 million for implementation of the DCP and could be used for projects to establish or conserve recurring Colorado River water that contributed to supplies in Lake Mead and other Colorado River water reservoirs in the Lower Colorado River Basin, or to improve the long-term efficiency of operations in the Lower Colorado River Basin. Despite these investments, Congress recently determined that additional drought funding relief was necessary in the form of the Inflation Reduction Act (Act).

The Inflation Reduction Act

The Act appropriates $4 billion for the Bureau to make available to public entities and Indian tribes until September 30, 2026. Funding is available via grants, contracts, and other financial assistance agreements. Eligible states include Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming.

There are a variety of drought mitigation activities for which funding is available. These activities include temporary or multiyear voluntary reduction in diversion of water or consumptive water use, voluntary system conservation projects that achieve verifiable reductions in use of or demand for water supplies or provide environmental benefits in the Lower Basin or Upper Basin of the Colorado River, and ecosystem and habitat restoration projects to address issues directly caused by drought in a river basin or inland water body. Regarding the Colorado River, the Act provides temporary financial assistance to farmers who voluntarily fallow their lands to adjust to reduced levels of river flow, coupled with funding for water conservation and efficiency projects intended to keep more water in the river system. Efficiency projects for which funding is available could include turf and lawn removal and replacement, and funding for drought-resilient landscaping programs.

The Act also provides $12.5 million in emergency drought relief for tribes. Funding is intended for near-term drought relief actions to mitigate drought impacts for tribes that are impacted by Bureau water projects, including direct financial assistance for drinking water shortages and the loss of tribal trust resources held on behalf of tribes by the federal government. Recently, the Bureau awarded $10.3 million to 26 tribes for drought response water projects in various Colorado River Basin states including Arizona, California, Colorado, Nevada, and Utah.

The Act also provides $550 million for disadvantaged western communities to fund up to 100 percent of the cost of planning, designing, or constructing water project the primary purpose of which is to provide domestic water supplies to communities or households that do not have reliable access to domestic water supplies.

Finally, the Act provides for up to $25 million for the design, study, and implementation of projects to cover water conveyance facilities with solar panels to generate renewable energy, including those that increase water efficiency and assist in implementing clean energy goals.

Conclusion and Implications

The Inflation Reduction Act is another substantial effort to provide adequate funding to redress drought impacts. However, as drought conditions in the west worsen, it is unclear if funding for drought mitigation activities will offset ongoing drought impacts. Moreover, it is not clear if funding is available for the development of alternative water supplies, like desalination. The Inflation Reduction Act, P.L. 117-169 is available online at https://www.congress.gov/bill/117th-congress/house-bill/5376/text
(Miles B. H. Krieger, Steve Anderson)

REGULATORY DEVELOPMENTS

REVERSAL OF CRITICAL HABITAT EXCLUSION REGULATION UNDER ENDANGERED SPECIES ACT BECOMES FINAL

The U.S. Fish & Wildlife Service (FWS or Service), on July 21, issued a final rule rescinding a rule previously adopted in December 2020 that changed the process for excluding areas from critical habitat designations under the federal Endangered Species Act (ESA). (87 Fed. Reg. 43,433.) Under the final rule, the Service will resume its previous approach to exclusions. The final rule became effective on August 22.

Background

When a species is listed under the ESA, Section 4(b)(2) requires that the Service designate critical habitat for the species. Critical habitat designations identify areas that are essential to the conservation of the species. The FWS may also exclude areas from designation based on a variety of factors. Critical habitat designations affect federal agency actions or federally funded or permitted activities. Federal agencies must ensure that actions they fund, permit, or conduct do not destroy or adversely modify designated critical habitat.

When designating critical habitat, the FWS considers physical and biological features that the species needs for life processes and successful reproduction, including, but not limited to: cover or shelter, food, water, air, light, minerals or other nutrients, and sites for breeding. The Service must also take into account several practical considerations, including the economic impact, the impact on national security, and any other relevant impacts. Section 4(b)(2) further provides that the Service may exclude areas from critical habitat if the "benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," provided that exclusion will not result in the extinction of the species concerned.

2020 Critical Habitat Exclusions Rule

In September 2020, under the previous administration, the FWS proposed "Regulations for Designating Critical Habitat," which provided a process for critical habitat exclusions partially in response to the U.S. Supreme Court's opinion in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service* (2018) 139 S. Ct. 361. In *Weyerhaeuser*, the Court held that the Service's decision to exclude areas from critical habitat is subject to judicial review under the arbitrary and capricious standard.

The 2020 rule was meant to provide guidelines for the FWS in weighing the impacts and benefits of critical habitat exclusions, with the aim of providing transparency in the process. (85 Fed. Reg. 82,376.) The rule provided a non-exhaustive list of impacts that can be considered "economic," including the economy of a particular area, productivity, jobs, opportunity costs arising from critical habitat designation, or possible benefits and transfers, such as outdoor recreation and ecosystem services. The rule further provided a non-exhaustive list of "other impacts" the Service may consider, including impacts to tribes, states, and local governments, public health and safety, community interests, the environment, federal lands, and conservation plans, agreements, or partnerships.

The 2020 rule provided a process for how exclusion determinations under section 4(b)(2) were to be made. If an exclusion analysis was conducted, the rule explained how the information was to be weighed and assessed. The Service's judgement controlled when evaluating impacts that fell within the agency's scope of expertise, such as species biology. With respect to evaluating impacts that fell outside of the Service's expertise, outside experts' judgment controlled.

Rescission of 2020 Critical Habitat Exclusions Rule

In a July 2022 press release the Service announced it was rescinding the 2020 critical habitat exclusion rule "to better fulfill the conservation purposes" of the ESA. [https://www.fws.gov/press-release/2022-07/service-rescinds-endangered-species-act-critical-habitat-exclusion]

This decision was in accordance with Executive Order 13990, which directed all federal agencies to review and address agency actions to ensure consistency with the current administration's objectives.

The final rule, gives three main points of rationale supporting the rescission. First, the 2020 rule potentially undermined the Service's role as the expert agency responsible for administering the ESA by giving undue weight to outside parties in guiding the Secretary's statutory authority to exclude areas from critical habitat designations. Second, the rule employed a set process in all situations, regardless of the specific facts, as to when and how the Secretary would exercise the discretion to exclude areas from critical habitat designations. Finally, the rule was inconsistent with National Marine Fisheries Service's critical habitat exclusion process and standards, which could confuse other federal agencies, tribes, states, other potentially affected stakeholders and members of the public, and agency staff responsible for drafting critical habitat designations.

Conclusion and Implications

Effective August 22, the Service will resume its previous approach to exclusions of critical habitat under regulations at 50 C.F.R. § 424.19 and a joint 2016 Policy with the National Marine Fisheries Service. [https://www.federalregister.gov/documents/2016/02/11/2016-02677/policy-regarding-implementation-of-section-4b2-of-the-endangered-species-act]

The Service decided to rescind the critical habitat exclusions rule because it found the rule unnecessary and confusing. Now, the Service will resume its previous approach to exclusions. Although rescinding the critical habitat exclusions rule, the Service recognizes the impact of the *Weyerhaeuser* holding and reiterated a commitment to explaining its decisions regarding critical habitat exclusions in the final rule. The Final Rule is available online at: https://www.federalregister.gov/documents/2022/07/21/2022-15495/endangered-and-threatened-wildlife-and-plants-regulations-for-designating-critical-habitat

(Breana Inoshita, Darrin Gambelin)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT LIMITS WAIVERS OF CLEAN WATER ACT SECTION 401 CERTIFICATIONS

California State Water Resources Control Board v. FERC, 43 F.4th 920 (9th Cir. 2022).

The United States Court of Appeals for the Ninth Circuit recently vacated and remanded several decisions by the Federal Energy Regulatory Commission (FERC)/U.S. Environmental Protection Agency (EPA) holding that the California State Water Resources Control Board (State Water Board) waived its certification authority for certain hydroelectric projects. The court held that FERC's findings that the State Water Board participated in coordinated schemes with applicants to delay certification and to avoid making a decision on certification requests was unsupported by substantial evidence.

Factual and Procedural Background

Under Section 401 of the Clean Water Act (CWA), states are required to provide a water quality certification before a federal license can be issued for activities that may result in discharge into intrastate navigable waters. States can adopt water quality standards that are stricter than federal laws—an effective tool in addressing the broad range of pollution. Accordingly, states may impose conditions on federal licenses for hydroelectric projects to make sure that that those projects comply with state water quality standards. Section 401 provides for a one-year deadline by which states must act on request for certification. If states do no act on a request for water quality certification within one year of receipt, their Section 401 certification is waived.

Waiver of Section 401 certification authority can have significant consequences. If a state waives their authority to impose conditions through Section 401's certification procedure, projects run the risk of being noncompliant with a state's water quality standards for significant periods of time. Federal licenses for hydroelectric projects can last for decades; the default term is forty years.

California's requirement under the California Environmental Quality Act (CEQA) poses an obstacle for a certification to be issued within one year of a project applicant's submission. Under CEQA, the State Water Board must receive and consider a project's environmental impact prior to granting a certification request. If materials required by CEQA are submitted late in the State Water Board's review period, the State Water Board is unlikely to be able to issue a certification within the one-year deadline. Consequently, California's regulations would require the State Water Board to deny the certification without prejudice unless the applicant in writing withdraws the request for certification. Given the infeasibility of the State Water Board issuing a 401 certificate within the one-year deadline, it became common for project applicants to withdraw their certification requests before the one-year deadline and resubmit them as new request – avoiding having their original request denied.

In 1963, the Federal Energy Regulatory Commission issued three 50-year licenses for three hydroelectric projects: (1) Nevada Irrigation District's (NID) Yuba-Bear Hydroelectric Project; (2) Yuba County Water Agency's (YCWA) Yuba River Development Project; and (3) Merced Irrigation District's (MID) Merced River Hydroelectric Project. Before each of these licenses expired, each licensee submitted a request for a Section 401 Certification to the State Water Board.

In each case, the licensee failed to complete the environmental review requirements under CEQA. Each agency filed a letter with the State Water Board withdrawing and resubmitting its application for water quality certification. NID and MID continued to withdraw and resubmit their certification requests annually between 2014 and 2018, and the State Water Board continued to issue new deadlines for certification action.

In 2019, the United States Court of Appeals for the District of Columbia found that that California

and Oregon had entered into a formal contract with a project applicant to delay federal licensing proceedings, via continual withdrawal-and-resubmission, and held that the states had waived their Section 401 certification authority. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019). After *Hoopa Valley*, the State Water Board ultimately denied without prejudice NID, YCWA, and MID's requests for certification, relying on their failure to begin the CEQA process.

Each licensee then sought a declaratory order from FERC that the State Water Board had waived its Section 401 certification authority. Relying on *Hoopa Valley*, FERC took the position that even without an explicit contractual agreement, the State Water Board coordinated with NID, YCWA, and MID on the withdrawal-and- resubmission of Section 401 certification requests. As evidence of coordination, FERC pointed to: (1) MID withdrawing and resubmitting its applications for four-years; (2) its assertion that California's regulations "codify" the withdrawal-and-resubmission practice; and (3) the State Water Board's failure to "request additional information regarding the Section 401 requests. Because of that alleged coordination, FERC held that the State Water Board had failed or refused to act on the certification requests and therefore, waived its Section 401 certification authority under the CWA.

The State Water Board submitted a petition for review on all three orders, alleging the decisions were no supported by substantial evidence.

The Ninth Circuit's Decision

The court first considered but did not determine whether FERC's standard for waiver was consistent with the text of Section 401. FERC argued that a waiver exists under *Hoopa Valley* when a state coordinates with a project applicant to afford itself more time to decide a certification request. The court did not determine whether this test is consistent with the text of Section 401 because it held that FERC's findings of coordination were not supported by substantial evidence in the record.

The court then discussed the sufficiency of the evidence to conclude that the State Water Board only acquiesced in the applicants' own decisions to withdraw and resubmit their applications rather than have them denied. The court noted that FERC's ruling against NID relied almost entirely on comments that the State Water Board submitted in response to FERC's draft environmental impact statement, which provided that the CEQA process had not yet started and that the most likely action would be that NID would withdraw and resubmit is certification request, because otherwise, the State Water Board would deny certification without prejudice. Similarly, the court noted that FERC's rulings against YCWA and MID relied on an email from a State Water Board staff member to each applicant reminding them that the final CEQA document had not been filed and that a "deny without prejudice" letter may be the consequence.

For all three projects, the court found the State Water Board's anticipation or prediction that the applicants would withdraw and resubmit their certification applications did not amount to coordination. There was nothing to indicate that the State Water Board was working to engineer that outcome but rather, the evidence showed only that the State Water Board acquiesced in the applicants' own unilateral decisions to withdraw and resubmit their applications rather than have them denied. The court further reasoned that the State Water Board's mere acquiescence in the applicants' withdrawals-and-resubmissions could not demonstrate that the State Water Board was engaged in a coordinated schemed to delay certification.

The court went on to reason that FERC wrongly concluded California's regulations codified withdrawal-and-resubmission practice, providing that the regulations just acknowledge applicants' longstanding practice—accepted by FERC for decades—of withdrawing and resubmitting Section 401 certification requests to avoid having them denied for failure to comply with state environmental-review requirements. Finally, the court found that FERC incorrectly relied on statements by the applicants that the State Water Board had all of the information it needed or to request additional information. According to the court, the State Water Board continually reminded NID, YCWA, and MID that the board did not have the information it would need to grant a request—namely, the CEQA evaluation that California law required.

Conclusion and Implications

This case limits the holding of *Hoopa Valley* and clarifies that the long-standing withdrawal-and-resub-

mission process for a Section 401 certification does not amount to coordination if states merely acquiescence in a project applicant's actions. The court's opinion is available online at:

http://cdn.ca9.uscourts.gov/datastore/opinions/2022/08/04/20-72432.pdf
(McKenzie Schnell, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT UPHOLDS DEMURRER TO UNLAWFUL DETAINER SUIT BROUGHT UNDER THE ELLIS ACT, HOLDING STRICT COMPLIANCE WITH LOCAL RENT CONTROL ORDINANCE IS REQUIRED

2710 Sutter Ventures LLC v. Millis, ___Cal.App.5th___, Case No. A162439 (1st Dist. Aug. 31, 2022).

In an opinion published on August 31, 2022, the First District Court of Appeal upheld judgment sustaining defendants-tenants' demurrer to a San Francisco landlord's unlawful detainer action brought under the Ellis Act. The Court of Appeal held that the Ellis Act does not preempt the City of San Francisco's Rent Ordinance, therefore the landlord was required to strictly comply with the ordinance's noticing and relocation requirements before the defendants-tenants could be evicted.

The Ellis Act

The Ellis Act (Gov. Code § 7060 *et seq.*) permits landlords to remove all residential rental units from the market, consistent with the guidelines therein and those adopted by local jurisdictions. The act confers local authorities with power to mitigate any adverse impact to persons displaced by the withdrawal of a rental unit. For example, the local authority may require landlords to provide notice to tenants of the landlord's intent to withdraw a rent-controlled property from the market, limit a landlord's ability to re-rent a property once a notice of withdrawal has been filed, or require the landlord notify tenants regarding their rights to the re-rental.

The act authorizes landlord/property owners to file an unlawful detainer action against any holdover tenant that fails to vacate a property that was removed from the rental market. The defendant-tenant may answer or demur to the complaint and may assert, as a defense, that the landlord has not complied with the applicable provisions of the Act or local implementing ordinance.

San Francisco's Rent Ordinance

In 1979, the City of San Francisco enacted its Rent Ordinance (San Fran. Admin C., ch. 37) to limit rent increases against tenants and restrict the grounds on which landlords could evict tenants. In 1986, following the passage of the Ellis Act, the City amended its Rent Ordinance to add § 37.9(a)(13), which recognizes a landlord's right to withdraw rental units from the market and confers rights on certain displaced tenants, including relocation assistance payments to elderly, disabled, and low-income tenants.

In 2005, the City amended § 37.9(a)(13), by enacting an ordinance that expanded relocation assistance payments to all displaced tenants. The ordinance prescribed the payment amounts landlords were required to pay per unit (which are continuously adjusted for inflation), including additional payments for evicted elderly and displaced tenants. The ordinance stated that any notice to quit under § 37.9(a)(13) shall also notify any tenants entitled receive relocation payments and the amount which the landlord believes those tenants are owed.

In 2017, the City amended § 37.9A(e)(4) of the Rent Ordinance to further require landlords to pay relocation assistance to each authorized occupant (regardless of age), one-half of which shall be paid at the time the notice of termination of tenancy is served, and the other half of which shall be paid when the eligible tenant vacates the unit.

Factual Background

Plaintiffs 2710 Sutter Ventures LLC and Sutter Partner Holdings, LLC (plaintiffs) own a three-unit residential rental property at 2710 Sutter Street in San Francisco. Defendants Sean Millis and Michelle Mattera are long-term tenants of one of those units. In 1999, Millis entered into a written tenancy agreement for the unit with plaintiffs' predecessor. In 2005, Mattera moved into the rental unit as a co-tenant. Millis and Mattera are the only occupants of the unit

and the only tenants entitled to relocation assistance payments under the City's Rent Ordinance.

On November 13, 2019, plaintiffs served defendants with a 120-Day Notice of Termination of Tenancy (Termination Notice), which informed defendants of their rights to renew and relocation payments, as set forth in § 37.9A of the Rent Ordinance, a copy of which was attached as an exhibit to the notice. Plaintiffs also paid defendants one-half of the $6,985.23 they were owed in relocation assistance. In response to the Termination Notice, defendants both claimed disability status. Plaintiffs therefore provided one-half of the $4,656.81 in additional relocation assistance payment each were owed, the second half of which would be paid upon defendants vacating the unit.

On November 15, 2019, plaintiffs filed a Notice of Intent to Withdraw Residential Units from the Market (NOI) with the City's Residential Rent Stabilization and Arbitration Board and served defendants with a similar Notice of Intent to Withdraw the units. In response, defendants exercised their right under the Ellis Act to a one-year extension of the withdrawal date of the premises based on their claimed disability statuses.

At the Trial Court

By November 15, 2020, defendants had not vacated the property. Plaintiffs therefore filed an unlawful detainer suit seeking to recover possession of the premises under § 37.9(a)(13) of the Rent Ordinance. Defendants demurred on grounds that the Termination Notice was defective because it quoted a superseded version of § 37.9(a)(13), and thus provided an inaccurate ground for eviction and did not properly advise defendants of the right to relocation assistance payments.

The trial court sustained defendants' demurrer, holding that strict compliance with the Rent Ordinance's noticing provisions was required to bring an unlawful detainer suit. The trial court also agreed that the Notice was faulty because it cited the outdated 2004 version of § 37.9(a)(13) as the ground for eviction and did not provide the required information regarding the right to receive relocation payments.

The Court of Appeal's Decision

On appeal, plaintiffs argued that judgment sustaining the demurrer must be reversed because: (1) the Ellis Act preempted § 37.9A(e)(4) of the Rent Ordinance; (2) defendants could not assert a defense under Government Code § 7060.6 of the Ellis Act for plaintiffs' alleged failure to comply with the Rent Ordinance; (3) the trial court improperly found plaintiffs' Termination Notice was required to strictly comply with the Rent Ordinance; and (4) plaintiffs should be allowed to amend their complaint to state a cause of action for ejectment.

The Ellis Act Does Not Preempt the City's Rent Ordinance

Plaintiffs argued the Ellis Act preempted § 37.9A(e)(4) of the Rent Ordinance because the provision imposed a prohibitive price that conflicted with a landlord's right to exist the rental market. Plaintiffs relied on the holdings in *Johnson v. City and County of San Francisco*, 137 Cal.App.4th 7 (2006), and *Coyne v. City and County of San Francisco*, 9 Cal. App.5th 1215 (2017), which interpreted the propriety of the Rent Ordinance in relation to the Ellis Act. In *Johnson*, the court struck down portions of the Ordinance that made landlords state whether they believed tenants were entitled to relocation payment based on age or disability, by finding that it placed a prohibitive price on a landlord's right to exit the rental market. In *Coyne*, the court similarly struck the Ordinance's "rent differential" payment requirement, finding that it improperly imposed a condition on landlords otherwise not found in the act.

The First District held that, unlike the belief requirement in *Johnson*, or the rent differential requirement in *Coyne*, § 37.9A(e)(4)'s requirement that landlords provide notice to tenants of their right to relocation payments validly served to mitigate the adverse impacts on displaced tenants, as expressly contemplated by the Ellis Act. (Gov. Code § 7060.1, subd. (c).) The provision requires landlords to simply notify tenants who clearly reside at the address about their right to relocation assistance payments under § 37.9A(e). Because this can be easily complied with, the requirement does not put a prohibitive price on a landlord's right to go out of business.

Government Code Section 7060.6 Provides a Defense for Noncompliance

Plaintiffs argued that defendants could not raise a defense under § 7060.6 of the Ellis Act to claim that plaintiffs failed to comply with § 37.9A(e)(3)–(4) of

the Rent Ordinance. Instead, plaintiffs argued that a defense under § 7060.6 can only be raised to assert noncompliance with local regulations that implement §§ 7060.2 and 7060.4. Defendants countered by arguing that § 37.9A(e)(4) of the Rent Ordinance implements the Ellis Act, therefore, a defense under § 7060.6 is not limited to noncompliance with local actions taken pursuant to §§ 7060.2 and 7060.4.

Based on the construction and intent of the statute, the Court of Appeal held that the plain language of § 7060.6 did not limit defenses to noncompliance with regulations adopted under §§ 7060.2, 7060.4, and 7060.5. The section provides that, in an unlawful detainer action:

> . . .the tenant or lessee may appear and answer or demur pursuant to Section 1170 of the Code of Civil Procedure and may assert by way of defense that the owner has not complied with the applicable provisions of this chapter, or statutes, ordinances, or regulations of public entities adopted to implement [the Act]. Had the Legislature sought to limit defenses to only those actions of noncompliance under §§ 7060.2 and 7060.4, it would have done so.

As relevant here, the current language of § 7060.1, subdivision (c), recognizes a public entity's right to enact ordinances that mitigate adverse impacts to persons displaced after their unit is removed from the rental market. The Ellis Act thus authorized the City to require landlords to provide notice of the right to relocation assistance benefits as part of the City's power to mitigate the adverse impacts on displaced persons. For these reasons, § 37.9A(e)(4) "implements" the act because it gives practical effect to the power authorized by § 7060.1, subdivision (c). Because an ordinance must "implement" the Ellis Act as a condition to asserting a noncompliance defense under § 7060.6, defendants could properly raise the defense for plaintiffs' violation of § 37.9A(e)(4).

Nevertheless, even if § 7060.6 could be interpreted as limiting a noncompliance defense to only those actions authorized under §§ 7060.2 and 7060.4, the court would still find that defendants could assert noncompliance with § 37.9A(e)(4) as a defense in this action. By enacting and amending § 37.9(a)(13), the City conditioned a landlord's withdrawal from the rental market on compliance with the notice and rental assistance payment requirements under § 37.9A(e). The defense provision is only preempted to the extent the local measure conflicts with the act. Because § 37.9A(e)'s requirements do not conflict with the Ellis Act, the noncompliance defense is not preempted. Plaintiffs' interpretation to the contrary would therefore "be absurd" because:

> . . .[a]ny construction of Government Code section 7060.6 that prohibits a tenant from defending against summary eviction based on the owner's failure to notify the tenant of the right to relocation assistance benefits or to provide such benefits would largely defeat the purpose of the notice and relocation assistance requirements, and thus undermine the mitigation measures authorized by the Act.

Plaintiffs Failed to Comply with the Rent Ordinance

Plaintiffs argued that the trial court improperly barred the unlawful detainer action for noncompliance because the Termination Notice "substantially complied" with § 37.9A(e)(4). Defendants countered that the Rent Ordinance and unlawful detainer jurisprudence require "strict compliance" to local regulations that implement the Ellis Act.

Because the Rent Ordinance's provisions for mitigating impacts from displacement do not conflict with the Ellis Act, the terms of the Rent Ordinance control. Here, the City clearly intended for the Rent Ordinance's requirements to be followed precisely. The Ordinance provides that a landlord must "comply *in full* with Section 37.9A" before the landlord can withdraw a rental unit from the market. On its face, the Ordinance thus requires complete compliance with § 37.9A(e)(4), which provides that the landlord "*shall notify* the tenant or tenants concerned of the right to receive payment."

Here, the Termination Notice did not comply with the notice requirement because it contained incomplete information about relocation payments, despite attaching a copy of § 37.9A as an exhibit. A tenant could not reasonably understand that the Exhibit, rather than the language within the Termination Notice itself, provided the accurate information. The purpose of the requirement is to ensure each tenant has the information needed to understand what payment is due. Here, the Notice failed to apprise tenants of the landlord's obligation to provide relocation

payments on behalf of all occupants, regardless of age, thereby depriving tenants of the full scope of the relocation assistance benefits they could be entitled to. Therefore, to comply with the noticing provisions of the Rent Ordinance, a landlord must apprise a tenant of the entire scope of the right to receive payments, regardless of the recipient's identity.

Conclusion and Implications

For the third time, the First District Court of Appeal revisited the effect of San Francisco's Rent Ordinance (following *Johnson* and *Coyne*). Here, the court took a literal approach to interpreting the Ordinance against the scope and intent of the Ellis Act, finding that strict compliance with the tenant-notice requirements is required before an unlawful detainer suit can be brought. The court also importantly clarified the Ellis Act in two respects: (1) the act does not preempt local ordinances/regulations that merely implement the act; and (2) a landlord/plaintiff's failure to comply with any provision of the act may serve as a defense to an unlawful detainer suit. The court's opinion is available at: https://www.courts.ca.gov/opinions/documents/A162439.PDF
(Bridget McDonald)

SECOND DISTRICT COURT UPHOLDS CEQA NEGATIVE DECLARATION ADOPTED IN CONNECTION WITH A CITY OF LOS ANGELES SHORT-TERM RENTAL ORDINANCE

Concerned Citizens of Beverly Hills/Beverly Grove v. City of Los Angeles, *Unpub*, Case No. B307226 (2nd Dist. Aug. 12, 2022)

Concerned Citizens of Beverly Hills/Beverly Grove (Concerned Citizens) challenged the City of Los Angeles's approval of an ordinance allowing limited, short-term rental activity to take place within the City. Concerned Citizens claimed the Negative Declaration prepared under the California Environmental Quality Act (CEQA) used an improper baseline and disregarded fair arguments that the ordinance would have significant environmental impacts. The Superior Court denied the writ and, in an *unpublished* opinion, the Court of Appeal affirmed.

Factual and Procedural Background

In December 2018, the Los Angeles City Council passed the Home Sharing Ordinance to allow and regulate certain short-term rentals within the City of Los Angeles. The mayor approved the ordinance on December 17, 2018. To comply with CEQA, the City adopted a Negative Declaration finding that the ordinance was not a "project" as defined by CEQA and there was no possibility that the ordinance may have a significant effect on the environment, as it would not spur new development or direct physical effects. Implementation of the ordinance, the City found, would result in fewer primary residences being offered for short-term rentals.

Concerned Citizens filed a petition for writ of mandate in January 2019, seeking both declaratory and injunctive relief. It claimed that the City violated CEQA by failing to prepare an EIR for the project, that a Negative Declaration was not the appropriate environmental clearance document, and that substantial evidence in the administrative record supported a fair argument that the project may have a significant effect on the environment. The Superior Court denied the petition, finding that there was substantial evidence supporting the conclusion that the ordinance would reduce the number of short-term rentals, and thus found the Negative Declaration was appropriate. Concerned Citizens then appealed the Superior Court's denial of the writ.

The Court of Appeal's Decision

Establishing the CEQA Baseline

The Court of Appeal first addressed Concerned Citizens' claim that the City abused its discretion in establishing the environmental "baseline" for environmental review purposes. Generally, under CEQA, a lead agency must delineate the existing environmental conditions prevailing absent the project, which defines a "baseline" against which project

impacts can be measured. Here, the City retained a consulting firm whose analysis demonstrated that the number of short-term rentals would be expected to decrease with the ordinance, compared to existing conditions.

Concerned Citizens did not take issue with this data and instead contended that the baseline failed to account for the City's historic failure to enforce its own zoning laws. Over years, it claimed, the City took no action while thousands of illegal short-term rentals operated in the City. The City, it contended, should not be able to allow an illegal, environmentally impactful activity to get out of hand and then claim that the situation that was created, despite numerous complaints that were ignored, should be the baseline against which the environmental impacts of future agency discretionary decisions should be measured.

The Court of Appeal disagreed, finding that CEQA does not require the City to make an evaluation based on a hypothetical and potentially misleading analysis of how many short-term rentals might exist had the City been able to curb those rentals through existing zoning regulations. Rather, the law requires the baseline to be determined by *existing* environmental conditions so as to accurately measure the environmental impact of the proposed project. The Court of Appeal cited several appellate decisions supporting this rationale.

Fair Argument Standard

The Court of Appeal next addressed Concerned Citizens' claim that the Negative Declaration improperly invoked the "common sense" exemption where Concerned Citizens had raised questions regarding whether the ordinance might have a significant impact on the environment. Alleged impacts included depletion of housing stock, noise pollution, air pollution, traffic congestion, and additional and unmanageable stress on City services. The Court of Appeal addressed each of these alleged impacts in turn, in each instance finding that Concerned Citizens had failed to raise a fair argument establishing the project might have a significant environmental impact.

The Court of Appeal also rejected the claim that the City had adopted mitigation measures but failed to acknowledge them in the Negative Declaration to avoid preparing a mitigated Negative Declaration. There was no indication, the court found, that the specifically referenced items were related to environmental concerns. Rather, the measures were intended to regulate guest behavior, which the Court of Appeal found was a valid function of police power and outside the scope of CEQA. Based on the above, the Court of Appeal then concluded that there was no error in the City's adoption of a Negative Declaration based on the "common sense" exemption.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the environmental "baseline" for purposes of CEQA analysis and the "fair argument" standard. The *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/B307226.PDF
(James Purvis)

FOURTH DISTRICT UPHOLDS SECTION 1021.5 ATTORNEYS' FEES AWARD

Elfin Forest Harmony Grove Town Council v. County of San Diego, *Unpub*, Case No. D079222 (4th Dist. Aug. 18, 2022).

Real Party in Interest RCS-Harmony Partners, LLC (Harmony) appealed a post-judgment order awarding private attorney general attorneys' fees to Elfin Forest Harmony Grove Town Council, Endangered Habitats League, and Cleveland National Forest Foundation after the trial court found merit to their claims. The Superior Court entered its order during the pendency of the appeal from the judgment on the merits. On appeal of the merits, the Court of Appeal found merit in some of Harmony's claims but rejected others and remanded to the Superior Court. On appeal of the attorneys' fees, Harmony claimed the order either must be remanded to the Superior Court or otherwise reversed. In an unpublished deci-

sion, the Court of Appeal found that it could assess the impact of its opinion on the attorneys' fees claim and affirmed the order.

Factual and Procedural Background

Respondents challenged the County of San Diego's approval of the Harmony Grove Village South project and certification of an accompanying Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA), alleging claims under CEQA, Planning and Zoning Law, and the Subdivision Map Act. They also sought declaratory relief. Although it rejected some of respondent's specific claims, the Superior Court granted the petition and ordered the County to set aside the project approvals and the EIR. Harmony in turn appealed from the Superior Court's granting of the petition for writ of mandate.

While that appeal was pending, respondents moved for attorneys' fees and costs under Code of Civil Procedure § 1021.5. They claimed they were the successful parties on the merits, enforced an important right affecting the public interest, conferred a significant benefit on the public through the litigation, and demonstrated the necessity and financial burden of private enforcement. The Superior Court granted the motion in part, awarding much of the requested fees.

On Harmony's appeal of the merits, the Court of Appeal reached some different conclusions from the Superior Court. Like the Superior Court, however, it found flaws in greenhouse gas mitigation measures and inconsistency with the County's General Plan as to affordable housing. It affirmed the judgment in part and reversed in part, and it remanded to the Superior Court to issue a new writ of mandate and judgment and to conduct further proceedings consistent with the opinion. In this case, the Court of Appeal considered Harmony's appeal of the attorneys' fees.

The Court of Appeal's Decision

Automatic Reversal

The Court of Appeal first addressed Harmony's claim that the court's decision on the merits required the court to reverse the award of attorneys' fees and costs and return the issue to the Superior Court. While the Court of Appeal acknowledged that a complete reversal of a judgment or order would nullify an accompanying attorney fee award, the circumstances in this case only involved a limited reversal. In such instances, the Court of Appeal noted, automatic reversal was not mandated; it remands for the Superior Court to consider anew the propriety of fees unless it can say with certainty the Superior Court would have exercised its discretion the same way had the successful party not prevailed on the issue on which the appellate court reversed. In doing so, the Court of Appeal explained, it keeps in mind that a plaintiff can prevail on any significant issue that achieves some of the benefit despite losses on other issues and still be a successful party within the meaning of § 1021.5. It also considers that a limited reversal does not necessarily change the respondents' overall degree of success.

Respondents' Success on Their Claims

The Court of Appeal next addressed Harmony's argument that respondents had failed to achieve dozens of goals and generally failed in an effort to "ban" the project or correct the EIR in several respects. While the Court of Appeal acknowledged that a reduced fee award may be appropriate where a claimant achieves only limited success, and that an appellate reversal of some of the relief sought on one claim could warrant a remand to the Superior Court, it found that this was not a case of partial success. Its reversal of some of respondents' theories as to the EIR's inadequacy or how the County's approval violated CEQA, the court found, did not materially affect the degree of respondent's success on either of their causes of action. Practically, there was no change in the *result* that respondents sought, that is, to vacate and set aside the EIR and project approval. Thus, the Court of Appeal concluded, the Superior Court would have exercised its discretion the same way had respondents not prevailed on the issues on which the Court of Appeal reversed. Further, because the matter turned on the effect of its own appellate opinion, the court found it was in at least as good a position as the Superior Court to judge impacts on the attorneys' fee analysis.

Balancing Benefits and Harms of the Litigation

The Court of Appeal next addressed Harmony's contention that the Superior Court failed to consider the harm caused by respondents' litigation as part of

the question of whether they were entitled to fees. In particular, Harmony claimed the lawsuit and appeal delayed for years the construction and occupancy of vitally needed housing. The Court of Appeal disagreed, finding that nothing Code of Civil Procedure § 1021.5 supported the argument. The statute, the court explained, asks whether the successful party's action has conferred a significant benefit, not whether it has conferred a *net* significant benefit. The court also found that, even assuming such balancing could be appropriate in determining the amount of fees (as opposed to entitlement to fees in the first instance), Harmony had not demonstrated that any purported harm from the litigation would impact the attorneys' fees analysis.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the relationship between appellate opinions and accompanying attorneys' fees awards. The *unpublished* is available online at: https://www.courts.ca.gov/opinions/nonpub/D079222.PDF. (James Purvis)

FIRST DISTRICT COURT UPHOLDS COASTAL COMMISSION'S FINDING THAT FEE-TO-TRUST LAND TRANSFER BETWEEN FEDERAL GOVERNMENT AND TRIBE WAS CONSISTENT WITH THE COASTAL ACT

Humboldt Alliance for Responsible Planning v. California Coastal Commission, Unpub., Case No. A162602 (1st Dist. Sept. 16, 2022).

In an *unpublished* opinion filed on September 16, 2022, the First District Court of Appeal affirmed judgment denying a petition that challenged the California Coastal Commission's ruling that the transfer of tribal coastal land into federal trust was consistent with the California Coastal Act.

The Indian Reorganization Act of 1934

Section 5 of the Indian Reorganization Act of 1934 (25 U.S.C. § 5108) authorizes the U.S. Secretary of the Interior to acquire lands in federal trust for an Indian tribe. This type of transfer is known as "fee to trust" and is intended to promote tribal self-determination.

The Coastal Zone Management Act

The Coastal Zone Management Act (CZMA) coordinates regulation between federal and state agencies in their regulation of land practices that affect the coast. If a federal agency commences an activity with foreseeable coastal effects, the agency must determine whether the activity will be undertaken in a manner fully consistent with the enforceable policies of the state's approved management programs. If the agency finds the activity is consistent, it must submit its determination to the state agency for review, after which the state agency will either concur or object.

The California Coastal Act

The Coastal Commission (Commission) is the state agency responsible for reviewing matters that invoke the CZMA in California. The Commission also implements the Coastal Act, which constitutes the state's coastal zone management program. The state's coastal zone does now, however, include lands that the federal government holds in trust.

Factual and Procedural Background

The Cher-Ae Heights Indian Community of Trinidad Rancheria owns in fee a ten-acre property site located within the California Coastal between Trinidad Bay and the City of Trinidad in Humboldt County. The property offers public access to the pier and other support functions at the pier, Trinidad Beach State Park, Launcher Beach, and a restaurant.

In connection with a project to construct a 1,300-square-foot public visitor center and related stormwater improvements, the Trinidad Rancheria applied to the U.S. Bureau of Indian Affairs (BIA) to have the property transferred into federal trust with

record title in the name of the United States and the tribe holding beneficial interest.

In December 2018, BIA notified the Coastal Commission that it had determined under the CZMA that the Project was consistent with the Coastal Act. With respect to public access, BIA found that the tribe would continue to maintain public access to the pier and beach through a tribal ordinance, and would coordinate any future changes with Commission staff to protect public recreational uses at the site.

In March 2019, the Commission held a hearing on BIA's consistency determination, and ultimately voted to concur, finding the Project was consistent with the applicable Coastal Act policies, including public access.

At the Trial Court

Humboldt Alliance for Responsible Planning (HARP) filed a petition for writ of administrative mandamus challenging the Commission's concurrence in BIA's approval. HARP alleged the tribe's commitments to public access were inadequate and the fee to trust transfer would eliminate the Commission's ability to protect public access because the Commission would only retain "a small sliver of jurisdiction that is subject to several preconditions which the Tribe [could] easily avoid."

In January 2021, the trial court denied the petition, finding that the Commission's decision was supported by substantial evidence.

The Court of Appeal's Decision

On appeal, HARP argued that: (1) the Commission's decision must be reviewed for the weight of the evidence rather than substantial evidence; and (2) the transfer of coastal tribal land into federal trust status improperly limited the Commission's ability to enforce Coastal Act policies in the area, thereby potentially threatening public access to the beach.

The Independent Standard of Review Does Not Apply

HARP urged the appellate court to review the Commission's decision under the independent judgment standard rather than for substantial evidence. Because HARP claimed the Commission's findings were not supported by evidence, the court must take one of two approaches: (1) in cases where the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the findings are not supported by the weight of the evidence; or (2) in all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record. The court is only authorized to exercise its independent judgment, and therefore consider the weight of the evidence, if the underlying administrative decision affects a vested, fundamental right.

Here, the Court of Appeal explained that the trial court was not required to subject its review to independent judgment because, contrary to HARP's claim, public access to Launcher Beach is not a fundamentally vested right. Notwithstanding its failure to cite to any legal authority to support this contention, HARP's reliance on the California Constitution's public access and trust provisions is no more availing. Here, there is no evidence that the Trinidad Rancheria's proposed project would limit public access, therefore, article X, § 4 of the California Constitution does not apply.

Nor does the public trust doctrine vest the public with an unfettered right to access navigable waters. In fact, the Coastal Act recognizes that "maximum access" is only provided "consistent with" public safety and private property interests. HARP also fails to cite to any authority that the doctrine requires heightened judicial review. To the contrary, 40 years ago the court in *Sierra Club v. California Coastal Zone Conservation Com.*, 58 Cal.App.3d 149 (1976), expressly held that the Coastal Act did not establish a present possessory interest of the public in property lying within the coastal zone.

Judicial precedent also demonstrates that courts routinely apply the substantial evidence standard when reviewing a Coastal Commission decision that substantially affects the public's access to the shoreline. The cases HARP relies on are distinguishable because none of them involved an effort by the public to use the doctrine as a preexisting right to require public access to the beach. To the contrary, the cited cases held that private parties' title to property was subject to the doctrine.

For these reasons, HARP failed to establish that the Commission's decision involved or substantially affected a fundamental right. Therefore, the trial court correctly reviewed the Commission's decision for substantial evidence.

Substantial Evidence Supports the Commission's Decision

Because the trial court correctly applied the substantial evidence standard, the First District would apply the same standard to review the Commission's decision.

Under the CZMA, the Commission was tasked with deciding wither to concur with or object to BIA's assessment that the Tribe's project would be consistent with the Coastal Act's public access policies. The act requires public access from the nearest public roadway to the shoreline and along the coast, except as specified. Public access, however, shall be implemented in a manner that considers the need to regulate the time, place, and manner of the access, particularly depending on the facts and circumstances of each case, so that access policies can be carried out in a reasonable and well-balanced manner.

Here, the Commission found the Project, which includes the new visitor center, stormwater improvements, and fee to trust transfer, were consistent with these policies. Based on its review of the record, the Court of Appeal held that substantial evidence supported the Commission's determination. Notably, the Tribe's Project did not entail any reduction in public access to Launcher Beach. To the contrary, the Tribe would maintain access to the open space by continuing to allow the public to access and use the beaches. The Tribe also expressed its intent to adopt a Tribal Resolution that recognizes the importance of and commitment to maintaining the site's open space and public access. The Tribe also agreed to a condition that it would coordinate with BIA on any future, unanticipated development proposals that would harm public access.

Finally, the Tribe has a longstanding history of protecting public access to the site. Upon purchasing the site in 2000, the Tribe granted the City an easement and tidelands lease allowing public access to the pier by foot. The Tribe also entered into an agreement with the State Coastal Conservancy that guarantees public pier access until 2032, and placed the pier on the National Tribal Transportation Facility Inventory, which requires it to remain open and available for public use, subject to temporary federal public health regulations. Finally, the Tribe's 2011 Comprehensive Community-Based Plan for land holding explicitly commits to allowing recreational boat access at Launcher Beach.

Though the Commission recognized that the "fee-to-trust" action reduces the Commission's enforcement authority over the property, the Commission would still retain federal CZMA authority to perform any future consistency reviews. Moreover, if the BIA's consistency determination were ever significantly changed, the Commission could invoke the "re-opener" provision prescribed by CZMA's regulations, which would allow the Commission to reconsider whether the project would have adverse impacts on coastal resources.

Based on the foregoing evidence, including the lack of any obstruction to public access, coupled with the avowed commitment to maintaining such access, it was not unreasonable for the Commission to find that the proposed activity was consistent with the Coastal Act.

Sufficiency of the Evidence

As the petitioner and appellant, HARP bore the burden of demonstrating that the evidence supporting the Commission's findings was inadequate. HARP argued that the Tribe's 2000 coastal access easement was irrelevant because it applied to the pier rather than the beach, and to foot traffic rather than to trailering small boats. HARP also contended the reopener provisions were inadequate because they only provided for mediation between BIA and the Commission.

The court rejected both of HARP's arguments. Though the easement refers to the pier, it is not unreasonable to conclude that the Tribe would continue its efforts to protect other aspects of the site, including Launcher Beach. And although the reopener provisions prescribe mediation, HARP fails to establish that mediation is an unsuitable dispute resolution mechanism. HARP's reliance on an unsworn letter to the Commission penned by the former owner of the property is further unavailing. The letter which stated that, in 2000, the then-chair of the Tribe orally told the property owner that the tribe would never seek to place the property in trust, hardly shows that the Tribe cannot be trusted or that it will "renege" on its current written promises to the state and federal government.

The Commission's Retention of Authority

HARP also contended the property transfer was inconsistent with the Coastal Act's public access

policies because the Commission would retain little enforcement over the site once it is transferred into trust and no longer part of the Coastal Zone.

The court rejected this, noting that the Coastal Act does not state that the Commission must maintain all enforcement authority in order to concur with BIA's consistency determination. The Commission appropriately concluded that federal oversight coupled with the reopener provisions was sufficient. HARP failed to demonstrate substantial evidence did not support this conclusion.

Waiver of Sovereign Immunity

HARP argued that the Commission abused its discretion in not requiring the Tribe to waive its sovereign immunity, which shielded the Tribe from future suits, even if it eventually interferes with access to the beach.

Unpersuaded, the court explained that nothing in the Coastal Act's public access provisions required the tribe to waive its immunity; nor did HARP present any evidence that resorting to the courts will be necessary. Moreover, the Commission is not required to speculate what the tribe *might* do. The question is not whether requiring the tribe to waive its immunity would have better protected public access; the question is whether the Commission could have reasonable concluded, based on the evidence before it, that even without the waiver, the Project was consistent with the Coastal Act. Ample evidence supports that conclusion.

Conclusion and Implications

The First District's *unpublished* opinion reiterates the requisite standard of review that courts must employ when considering whether the Coastal Commission abused its discretion under the Coastal Act. Where the Commission presents findings and evidence in support thereof, the court must review the decision for substantial evidence. If the determination affects a fundamental vested right, the court must independently weigh the evidence. Here, the fee-to-trust transfer ostensibly invoked the substantial evidence standard, as public access to coastal resources does not constitute a fundamental vested right. The court also reiterated the collaboration between state and federal agencies, emphasizing the roles they play in regulating and managing coastal properties. The court's opinion is available at: https://www.courts.ca.gov/opinions/nonpub/A16260.
(Bridget McDonald)

FIRST DISTRICT COURT AFFIRMS TRIAL COURT DECISION DENYING CHALLENGE TO FLOOD CONTROL PROJECT PROGRAMMATIC EIR RANGE OF ALTERNATIVES

Joshua v. San Francisquito Creek Joint Powers Authority, Unpub., Case No. A163294 (1st Dist. Aug. 23, 2022).

The First District Court of Appeal in *Joshua v. San Francisquito Creek Joint Powers Authority* affirmed in an *unpublished* opinion the trial court's decision that a flood control project programmatic Environmental Impact Report (EIR), pursuant to the California Environmental Quality Act (CEQA), considered a reasonable range of alternatives and that the EIR appropriately found that the alternatives were not feasible in support of a statement of overriding considerations.

Factual and Procedural Background

This case pertains to the San Francisquito Creek Flood Protection, Ecosystem Restoration, and Recreation Project Upstream of Highway 101 (project).

San Francisquito Creek originates in the eastern foothills of the Santa Cruz Mountains and drains a watershed that is approximately 45 square miles in size, from Skyline Boulevard to San Francisco Bay. The creek flows through Stanford University and the communities of Menlo Park, Palo Alto, and East Palo Alto to San Francisco Bay. The watershed's five-square-mile floodplain is located primarily within these cities.

A Program EIR was prepared for the project pertaining to reaches 2 and 3 of the San Francisquito Creek. Reach 1 extends from San Francisco

Bay to the upstream side of U.S. Highway 101. The San Francisquito Creek Joint Powers Agency (JPA), which prepared the Program EIR, previously completed construction of improvements in Reach 1 following the completion of CEQA documentation in 2012.

Flooding from the creek is a common occurrence, including twice within the past decade. The largest recorded flooding occurred in February 1998, when the creek overtopped its banks in several areas, affecting approximately 1,700 properties.

The EIR described the JPA specific objectives of the project: (1) Protect life, property, and infrastructure from floodwaters exiting the creek; (2) Enhance habitat within the project area; (3) Create new recreational opportunities; (4) Minimize operational and maintenance requirements; and (5) Not preclude future actions to bring cumulative flood protection up to a 100-year flow event.

The JPA began with a list of 17 potential projects and three fundamental approaches to providing flood protection—contain, detain, or bypass: (a) Removing constrictions or raising the height of the creek bank in the floodplain: (b) Temporarily detain or store portions of high flows during storms through one or more floodwater detention facilities in Reach 3; and/or (c) Remove a portion of the high flows immediately upstream of Reach 2, route that portion of the flow through the flood-prone area in an underground bypass channel, and deposit this water at a location in the creek that can safely convey it to San Francisco Bay .

The JPA then screened the alternatives first for their ability to meet the project objectives and second for their cost, logistical and technical feasibility.

Three alternatives survived the screening process: Alternative 2: Replace the Pope-Chaucer Bridge and Widen Channel Downstream; Alternative 3: Construct One or More Detention Basins; Alternative 5: Replace the Pope-Chaucer Bridge and Construct Floodwalls Downstream. The alternatives were grouped according to the reaches in which the primarily occur, with Alternatives 2 and 5 occurring in Reach 2, and Alternative 3 occurring in Reach 3.

The EIR went to fully analyze 5 potential projects: the statutorily-required "No-Project" alternative, the Channel Widening Alternative, the Floodwalls Alternative, and two detention basin alternatives: the Former Nursery Detention Basin Alternative and the Webb Ranch Detention Basin Alternative.

Deep Widening Alternative as Preferred Project

Based on its analysis, the EIR deemed the Channel Widening Alternative the "Preferred Project," and adopted four separate and independent statements of overriding considerations to override the unavoidable noise and cumulative air quality impacts associated with the Preferred Project's construction:

1. The proposed project would restore San Francisquito Creek to its natural capacity throughout the project reach; this improved hydrologic functioning provides long-term benefits to aquatic species.
2. The proposed project would restore aquatic habitat by installing permanent woody debris, boulders, pools, and other features to approximately 1,800 linear feet of the channel at widening sites and the Pope-Chaucer Bridge. These elements, together with the improvements in hydrologic function in the project reach, will provide long-term benefits to salmonids and other aquatic species.
3. The proposed project will provide flood protection benefits to over 4,000 homes, businesses, and schools in the San Francisquito Creek floodplain. Although implementation of this project by itself will not completely remove the affected area from the FEMA 100-year flood zone, it will protect life, property, and infrastructure from the largest recorded flood flow and reduce damages during higher flows. Thus, it is a key piece of SFCJPA's long-term comprehensive flood protection strategy.
4. The proposed project will create recreational opportunities by connecting the new features to existing bike and pedestrian corridors and potentially constructing two creekside parks.

The JPA certified the EIR, adopted the statement of overriding considerations, and approved the project. Petitioner filed a petition for writ of mandamus alleging violations of CEQA. The trial court denied the petition in its entirety.

The Court of Appeal's Decision

The First District Court of Appeal, using the substantial evidence standard of review with a presumption of correctness of the JPA's findings, affirmed the trial court determination that the EIR contained a

reasonable range of alternatives and that it appropriately found the alternatives were infeasible in support of a statement of overriding considerations.

Alternatives Review Under CEQA

The range of alternatives included in an EIR must be potential feasible alternatives that will foster informed decision making and public participation. An EIR should describe a range of reasonable alternatives to the project which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.

However, the statutory requirements for consideration of alternatives must be judged against a rule of reason. Courts uphold an agency's selection of alternatives unless it is manifested unreasonable or inclusion of an alternative does not contribute to a reasonable range of alternatives. The rule of reason requires the EIR to set forth only those alternatives necessary to permit a reasoned choice and to examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project.

The Alternatives Analysis

Petitioner argued that the detention basins were not true alternatives because they would complement or supplement Reach 2 channel projects. However, the evidence showed that the detention basins were considered as standalone alternatives that would provide real flood protection, either separately or following the Reach 2 channel projects.

Petitioner argued that the floodwalls alternative for Reach 2 should not have been considered as an alternative because it does not lessen the environmental impact of the project. However, Petitioner failed to exhaust his administrative remedy in making that argument to the JPA, and thus was barred from raising that argument at trial and on appeal.

Petitioner argued that there was no express finding of infeasibility of the project alternatives sufficient to allow the statement of overriding considerations. An agency may not approve a project that will have significant environmental effects if there are feasible alternatives of feasible mitigation measures that would substantially lessen those effects. An agency may find, however, that particular economic, social, or other considerations make the alternatives and mitigation measures infeasible and that particular project benefits outweigh the adverse environmental effects.

The Court of Appeal held that an express finding of infeasibility is not required as long as the EIR contains the factual information showing that the alternatives were infeasible. In the EIR, the detention basins were found to offer environmentally superior alternatives, but would not have achieved half of the perk flow reduction of the approved project, and the detention basins would not achieve the same level of benefit as the project in terms of habitat enhancement.

Conclusion and Implications

This opinion by the First District Court of Appeal illustrates the deferential review that courts typically apply to an EIR alternatives analysis that appropriately considers both project objectives and well-documented feasibility determinations. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/A163294.PDF. (Boyd Hill)

SIXTH DISTRICT COURT AFFIRMS DECISION DENYING CHALLENGE TO SUFFICIENCY OF PROJECT AESTHETIC AND VISUAL ENVIRONMENTAL IMPACT ANALYSIS

Preservation Action Council of San Jose v. City of San Jose, *Unpub.*, Case No. H048953 (6th Dist. Aug. 30, 2022).

The Sixth District Court of Appeal in an *unpublished* opinion affirmed the trial court's decision finding that a supplemental Environmental Impact Report (SEIR) for a hotel project sufficiently analyzed the potentially significant visual and aesthetic environmental impacts of the proposed project, adequately responded to comments and justifiably rejected a reduced-size alternative.

Factual and Procedural Background

Almaden Corner is the applicant for the 19 story 272 room hotel project (project) in downtown San Jose on a currently used parking lot site located directly adjacent to the De Anza Hotel. The De Anza hotel is listed in the National Register of Historic Places. The project parking will be off-site in a City of San Jose (City) garage with valet service.

The project environmental review tiered from a previous program level Environmental Impact Report for the downtown San Jose entitled "Downtown Strategy 2040 final" Environmental Impact Report (FEIR). Based upon an initial study, the City concluded that the SEIR was needed to analyze the site-specific environmental impacts of the prior that were not previously disclosed in the FEIR.

Among the environmental impacts addressed in the SEIR was the project's impact on the De Anza Hotel as a historic resource. As described in the SEIR, the De Anza Hotel presents a symmetrical heavily vertical massing at the end of a wide boulevard with a landscaped median on West Santa Clara Street. The De Anza Hotel was identified as a significant historical resource based on its architectural style, for its elaborate Spanish Colonial Revival interior design motifs, and for its historical association with the City since its construction was funded by the local business community.

The draft SEIR contained a historical architecture consultant determination that the project would be compatible with the De Anza Hotel despite altering its setting, because the setting is negligible with regard to the De Anza Hotel's significance over time. The consultant further determined that the feeling and association of the De Anza hotel would remain intact and that the project would not alter the character-defining features of the De Anza Hotel.

The City approved the SEIR and the project following a public hearing. Petitioner filed a petition for writ of mandate under the California Environmental Quality Act (CEQA) challenging the approval, claiming that the SEIR improperly determined that aesthetics impact of the project on the historic De Anza Hotel was not significant. Petitioner also argued that the City's responses to comments to the draft SEIR was conclusory and thus inadequate and that the project objectives supported a reduced-size alternative. The trial court denied the petition, finding the petitioner failed to meet its burden to show that the SEIR did not adequately discuss the project's impact to the Hotel De Anza or the reduced height alternative to the project.

The Court of Appeal's Decision

The Sixth District Court of Appeal, using the substantial evidence standard of review with a presumption of correctness of the City's findings, affirmed the trial court determination that the City's environmental review of the SEIR was adequate.

Aesthetic Environmental Impact Review Under CEQA

One of the policies of CEQA is to take all action necessary to provide for the people's enjoyment of aesthetic, natural scenic and historic environmental qualities.

Thus, aesthetic issues are studied under CEQA, including whether the proposed project would (1) have a substantial adverse effect on a scenic vista; (2) substantially damage scenic resources such as trees rock outcroppings, and historic buildings within a state scenic highway; (3) substantially degrade the existing visual character or quality of public views of the site and its surroundings.

If a project is in an urbanized area, then #3 is instead whether the proposed project would conflict with applicable zoning and other regulations governing scenic quality; and (4) whether the project would create a new source of substantial light or glare, which would adversely affect day of nighttime view in the area.

However, a lead agency has discretion to determine whether to classify the aesthetic impact as insignificant depending on the nature of the area affected. When an agency determines that a project environmental impact is insignificant, an EIR need only contain a brief statement addressing the reasons for that conclusion.

Analysis of Project Aesthetic Environmental Impact in SEIR

The Court of Appeal applying the substantial evidence test found that the conclusion in the SEIR initial study that the project had no significant aesthetic environmental impact, precluding the need to further study aesthetics in the SEIR analysis provisions was supported by substantial evidence.

The initial study found: (1) the project site was not located on a scenic state highway; (2) the project would contribute to the visual presence of the Downtown area, but would not substantially clock scenic views or modify existing scenic resource; and (3) the new hotel tower would be similar in scale and appearance to other modern structures in the site vicinity.

Regarding the aesthetics impact on the Hotel De Anza, the initial study relied on the historical architecture analysis determination that the massing and aesthetics of the proposed tower would not adversely change the historic integrity or significance of the historic hotel. Although construction would impact views of the rooftop Hotel De Anza sign, that view was already partially blocked and that sign was not part of the Hotel De Anza's historically significant nature.

In essence, there was substantial evidence in the form of expert opinion upon which the City could rely for its conclusion. Thus, the Court of Appeal rejected public opinions of the historical aesthetic nature of the hotel rooftop sign that might have given reason to require an EIR under the fair argument standard for a negative declaration. Once an EIR has been prepared, the City is entitled to rely on substantial evidence and is not required to consider contrary fair argument.

Responses to Comments Under CEQA

Responses to comments on an EIR must describe the disposition of each significant issue raised in the comments. Responses to comments need not be exhaustive; they need only demonstrate a good faith reasoned analysis. The detail required in the responses turns on the detail contained in the comment.

Analysis of SEIR Responses to Comments

Petitioners objected that responses to comments regarding valet parking, design guidelines and the De Anza Hotel were not sufficiently detailed.

With respect to comments about how the valet parking would be unsafe, the Court of Appeal held that SEIR responses were sufficient by referencing a local transportation analysis attached to the initial study which concluded that the proposed valet parking was adequate for operational purposes.

With respect to comments about how an urban design review by an engineering firm were not addressed, the Court of Appeal held that responses were sufficient by referencing an analysis of project design by a qualified historic consultant who found that the proposed design is consistent with the City's applicable design guidelines.

With respect to comments about consistency with the City's historic design guidelines, the Court of Appeal held that responses were sufficient by referencing an analysis of the historic consultant that the proposed structure is consistent with the City's historic design guidelines.

The Alternatives Analysis

An EIR must describe a range of reasonable alternatives to the project which would feasibly attain most of the basic objectives of the project, but would avoid or substantially lessen any of the significant effects of the project. Whether or not to reject or approve of any of the alternatives is a decision only for the decision makers. They may reject alternatives that are undesirable form a policy standpoint as well as alternatives that fail to meet project objectives.

Petitioner asserted that the SEIR analysis of alternatives was inadequate because a reduced size alter-

native was feasible and would be allowed under the project objectives, and because reduced profits do not render an alternative infeasible.

The Court of Appeal rejected that argument, because the record did not demonstrate that the reduced size alternative was rejected on the basis of reduced profits. Instead, the record demonstrates that the reduced size alternative was appropriately rejected from a policy standpoint of consistency with the City's general plan for high-density development and for not being the highest and best use of the site.

Conclusion and Implications

This *unpublished* opinion by the Sixth District Court of Appeal emphasizes that when there will be significant challenges to environmental review on aesthetics, massing and visual environmental impacts, it is best to avoid the fair argument standard of review applicable to negative declarations. With an EIR and expert architectural analysis covering the issues that may be raised by project opponents, the courts under the applicable substantial evidence standard of review may not substitute their own opinions with regard to whether aesthetic and visual impacts of the project have been adequately addressed. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/H048953.PDF.
(Boyd Hill)

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