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FEATURE ARTICLE

CALIFORNIA COURT OF APPEAL FINDS CONSTRUCTION OF LOS ANGELES METRO'S REGIONAL PROJECT DID NOT SUFFICIENTLY IMPAIR A HOTEL TO RESULT IN A COMPENSABLE TAKING

By Bridget McDonald, Esq.

In an opinion published on October 5, 2022, the Second District Court of Appeal held that the owner and operator of the Westin Bonaventure Hotel failed to state a claim for inverse condemnation and private nuisance stemming from the Los Angeles County Metropolitan Transportation Authority's (Metro) construction of the new light rail Regional Connector Transit Project in Downtown Los Angeles. The court found that impairment of access and noise and dust impacts were not sufficiently particular to the Bonaventure's parcel so as to constitute a compensable taking. [*Today's IV, Inc. v. Los Angeles County Metropolitan Transportation Authority*, ___Cal. App.5th___, Case No. B306197 (2nd Dist. Oct. 5, 2022).]

Factual and Procedural Background

Los Angeles County Metropolitan Transportation Authority is the local public transportation agency responsible for planning, building, and operating public transit projects in Los Angeles County. One such project is the Regional Connector Transit Project, which will directly link the Metro Gold, Blue, and Expo Lines in Downtown Los Angeles to ultimately allow continuous train operations between Long Beach, Montclair, East Los Angeles, the San Gabriel Valley, and Santa Monica so that passengers do not have to transfer subway lines. After nearly 20 years of planning and environmental review, Metro determined the Project would improve the region's public transit service and mobility, allow for greater accessibility, and serve population and employment growth in Downtown by reducing transfers and traffic congestion and improving travel times and air quality.

Metro selected Regional Connector Constructors (RCC) to build the Project, which includes constructing a 1.9-mile tunnel to connect the underground subway system, along with three new underground stations in Downtown. A portion of the Project runs along and under Flower Street between 4th and 5th Streets. Also located on that stretch is the Westin Bonaventure Hotel and Suites (the Bonaventure), which is owned and operated by Today's IV, Inc. (Today's IV). The hotel occupies the entire city block between Flower and Figueroa streets and is bounded on the north and south by 4th and 5th streets. The Bonaventure's parking garage, loading dock, and main guest drop-off area is located on Flower Street, with limited access from Figueroa. Based on its location, the Bonaventure would inevitably be affected by Project construction.

Environmental Review

In January 2009, Metro completed an Alternatives Analysis that considered 30 light rail transit mode and alignment alternatives for the Project. In September 2010, Metro published a draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS), which contemplated constructing the subway via a "cut-and-cover" technique on a portion of Flower Street that immediately faces Bonaventure's east exterior. In 2011 and 2012, Metro circulated a supplemental EIR and continued public engagement with stakeholders. On April 26, 2012, Metro's Board of Directors approved the Project and certified the EIR, finding that it complied with the California

Environmental Quality Act (CEQA) and National Environmental Policy Act (NEPA).

The EIR defined alternatives to the project and identified mitigation for impacts such as transit, traffic, parking, land use, air quality, noise and vibration, and safety and construction impacts. As to noise, the EIR required a construction mitigation plan that prohibits noise levels generated during construction from exceeding the Federal Transit Administration's (FTA) construction noise criteria, and required the presence of onsite noise monitoring in the vicinity of the area. The EIR also prescribed a Mitigation Monitoring and Reporting Program (MMRP), to mitigate potential traffic and transit impacts. The MMRP required Metro to devise a traffic management and mitigation plan in coordination with impacted local stakeholders, and prohibited construction from hindering public access to public parking lots.

Project construction would entail a mixture of the "cut-and-cover" technique and use of an underground tunnel boring machine (TBM). Based on the design of the 1.9-mile tunnel, Metro concluded that the portion of the tunnel extending under Flower Street from 4th Street to 7th Street would be built using cut-and-cover (rather than TBM) due to unsuitable soil, shallowness, and tiebacks long the route.

At the Trial Court

On May 25, 2012, Today's IV filed a CEQA petition against Metro to halt construction of the Project. The mandamus action was tried in May 2014, and the petition was denied the following November. On appeal, Division Five of the Second Appellate District affirmed the trial court's denial and affirmed Metro's certification of the EIR. The Court of Appeal held that substantial evidence supported the EIR's conclusion that use of the TBM under Flower Street was infeasible and that Today's IV failed to sustain its burden of proof in establishing otherwise. The court also held that the EIR adequately analyzed and mitigated for the Project's impacts to noise from nighttime construction.

On March 17, 2016, Today's IV filed a separate action against Metro and RCC. On October 31, 2018, Today's IV filed the operative fourth amended complaint (4AC), which alleged causes of action for: (1) declaratory relief under CEQA; (2) equal protection violations; (3) private nuisance; (4) trespass; and (5) inverse condemnation.

As to the first cause of action, the complaint alleged that, because Metro determined the Project was not exempt from CEQA, Metro should be estopped from now claiming an exemption that would allow Metro to avoid CEQA compliance. As to the remaining claims, the 4AC alleged that, in an effort to resolve ongoing litigation, Metro misleadingly conspired with the Bonaventure's neighbor (a commercial office building) to perform more construction work at night and on weekends than what was contemplated in the EIR and MMRP, thus resulting in a disproportionate amount of traffic and noise damage to Bonaventure—so much so that Bonaventure lost a long-term $3.3M airline contract due to construction interrupting the flight crew's sleep

The 4AC also alleged Metro inappropriately utilized cut-and-cover construction instead of TBM, even though Metro "knew" that cut-and-cover was slower, more expensive, and would cause unnecessary and unreasonable adverse impacts that would have been substantially avoided by tunneling with TBM. Similarly, Metro failed to produce a timely or proper Traffic Management Plan, even though the MMRP required one, which in turn resulted in Metro consistently and unreasonably rerouting traffic in the area surrounding the Bonaventure, thereby making it difficult for guests to reach the hotel. Finally, Metro conspired to intentionally violate noise standards by placing noise monitors in unreasonable and misleading locations, which resulted in ambient noise measurement standards to allow for much higher daytime/nighttime noise generation.

Based on the above factual allegations, the 4AC's trespass claim asserted Metro's intentional, reckless, and negligent actions and failures to act constituted a continuing nuisance by unlawfully interfering with, obstructing, and preventing the full and free enjoyment and use of the Bonaventure, and ordinary persons would find Metro's conduct unreasonable, annoying, and disturbing. As to inverse condemnation, the complaint alleged Metro's conduct constituted an invasion of Bonaventure's valuable property right and caused unnecessary and substantial damage that directly and specifically affected the Bonaventure, thereby resulting in a decline in sales, sustained loss of business, and loss of significant contracts, which were tantamount to an unlawful and uncompensated taking.

From 2018 to 2019, Metro and RCC filed a series of motions against the complaint. Ultimately, the trial court sustained RCC's motion to strike, Metro's demurrer to the inverse condemnation claim without leave to amend, Metro's motion for judgment on the pleadings (MJOP) and RCC's motion for summary adjudication as to the nuisance cause of action.

The Court of Appeal's Decision

Inverse Condemnation

Today's IV claimed the trial court erroneously sustained Metro's demurrer to the inverse condemnation cause of action without leave to amend. The Second District disagreed, holding that the 4AC did not and could not allege a sufficient takings claim.

To adequately allege an inverse condemnation claim that survives the pleading stage, Today's IV needed to establish that Metro had, in fact, taken or damaged the underlying property before the issue of just compensation can be broached. Property is constitutionally "taken" or "damaged" when: (1) the property has been physically invaded in a tangible manner: (2) no physical invasion has occurred, by the property has been physically damaged; or (3) an intangible intrusion on the property has occurred, which has caused no damage but places an otherwise direct, substantial, and peculiar burden on the property itself. To succeed under the third "intangible intrusion" test, there must be an invasion or appropriation of some tangible, valuable property right, wherein the landowner's property is singled out for singular and unique treatment in contrast to other landowners who could be adversely affected by the contested conduct. Because the first two theories were inapplicable, Today's IV alleged its property suffered from an intangible intrusion in the form of impaired access and excessive noise and dust, which directly, substantially, and peculiarly burdened the property itself.

Impairment of Access

The Second District rejected the compensable deprivation/impairment of access claim for four reasons. First, the propriety of Metro's cut-and-cover construction technique could not be relitigated because that issue was previously decided on the merits in two other actions. The courts in both matters found that substantial evidence established the closed-and open-faced TBM methods were not feasible alternatives to the cut-and-cover technique in that area of the Project. Second, the 4AC's allegation that Metro's construction caused "unreasonable and unnecessary" access restriction to the Bonaventure was not a material fact, but rather a conclusion of law that could be disregarded in evaluating the sufficiency of the complaint.

Third, Metro's act of temporarily rerouting traffic to facilitate construction did not unreasonably interfere with access to the Bonaventure because those types of temporary interferences and personal inconveniences are not actionable injuries that warrant compensation. Here, the 4AC's allegations about impacts relied on ambiguous facts that failed to establish how construction impairing access to the Bonaventure overwhelmingly and disproportionately burdened the property itself—*e.g.*, how difficult it would be for the guests to reach the hotel, the length of time by which the delay was caused, when and how frequently the detours happened, etc. Fourth, and relatedly, the 4AC's allegation that Metro's equipment blocked customer entry and pedestrian access only formed conclusions of fact, but lacked the requisite specificity to meet the requirements for an inverse condemnation claim—*e.g.*, how long equipment blocked access, the necessity (or lack thereof) of placing that equipment there, whether placement was accompanied by actual construction work, *etc*.

Excessive Noise and Dust

Today's IV also claimed the 4AC sufficiently plead an inverse condemnation claim based on the timing and extent of noise and dust intrusion that uniquely interfered with the Bonaventure's operation. The Second District, again, disagreed, finding the complaint did not sufficiently plead that this alleged intrusion was unique, special, or peculiar to the Bonaventure in comparison to other stakeholders in the area.

Per the facts alleged, the 4AC conceded that other nearby business owners necessarily suffered the same noise and dust as a result of constructing the light rail in that area. While noise and dust can be sufficient support a claim, Today's IV failed to establish that the levels from Metro's construction were unreasonable given the size and scope of the project. To the contrary, such loss of peace and quiet is a fact of urban

life that must be endured by all who live in the vicinity. And to this end, the Bonaventure's "high density of sleepers" did not render noise and dust intrusion unique and peculiar to the property itself. Property damage is compensable when there is damage to the property itself—mere infringement of the owner's personal pleasure or enjoyment, or rendering private property less desirable for certain purposes, will not constitute the damage contemplated by the constitution.

Private Nuisance

Today's IV appealed the trial court's order granting Metro's MJOP, which found Civil Code § 3482 conferred Metro with immunity from 4AC's claim that Project construction constituted a private nuisance.

Under an independent standard of review, the Second District first considered whether the 4AC adequately stated facts sufficient to constitute a private nuisance claim—*i.e.*, a non-trespassory interference with the private use and enjoyment of land. To do so, Today's IV needed to: (1) prove an interference with use and enjoyment of its property; (2) the invasion was so substantial that it caused Today's IV to suffer actual damage; and (3) the interference was of such a nature, duration, or amount as to constitute an unreasonable interference with use and enjoyment of its property.

Under this test, the court found the 4AC adequately pleaded facts that established substantial damage and interference. In addition to allegations about impairments to Bonaventure's right to access and noise/dust levels, Today's IV submitted a claim form to Metro in 2017 stating it had suffered $27.3M in damages from lost lodging, dining, parking, and other revenues associated with the hotel. However, to constitute a nuisance claim upon which relief can be granted, Today's IV must also establish these interferences were "unreasonable." To do so, the 4AC must show that the gravity of harm suffered by the Bonaventure outweighs the social utility of Metro's conduct and the Project. Here, the 4AC contained no such allegation—it neither alleged that loss of business to the Bonaventure nor loss of a lucrative airline contract outweighed the social utility of constructing light rail lines to build a major public transit project. The complaint thus failed to state a prima facie case of private nuisance.

Notwithstanding these shortcomings, the court also concluded the 4AC states adequate facts that establish Metro's conduct is immune from liability. Civil Code § 3482 provides:

> Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

Public Utilities Code § 30631 provides that transit districts, such as Metro, may construct rights-of-ways, rail lines, and any/all other facilities necessary for facilitating convenient rapid transit service, including those above or underground or over public streets. Taken together, § 30631 statutorily authorizes Metro to construct the Project—an underground subway line with three new stations that will transfer passengers between other rail lines and provide new access to the Downtown corridor—thus invoking the liability protection prescribed by § 3482. Because the burdens Today's IV complains of (noise, dust, access limitation) are unavoidable byproducts of statutorily authorized acts, Metro's acts do not constitute an unreasonable interference with the Bonaventure.

Conclusion and Implications

The Second District Court of Appeal's opinion marks the end of decades-long litigation fraught with numerous property and land use implications. The decision above highlights another example of the uphill battle property owners face when alleging a compensable inverse condemnation claim. Because constructing large scale public projects, such as the Regional Connector, will usually yield widespread or far-reaching impacts such as dust, noise, vibration, traffic, and congestion, an individual property owner bears the heightened burden of establishing that those impacts are direct, substantial, and peculiar to the landowner's individual parcel. Here, the Bonaventure's particularly sensitive use (*e.g.*, a hotel with sleeping guests instead of an office building) is not sufficient to establish peculiarity, particularly when the complaint acknowledged other neighboring businesses would equally feel the effects of the Project's construction. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B306197.PDF

Editor's Note: Attorneys from the author's law firm represented respondent Los Angeles County Metropolitan Transportation Authority (Metro) in the litigation summarized in this article.

Bridget K. McDonald is an associate attorney in the Sacramento-based boutique law firm of Remy Moose Manley, LLP, which specializes in environmental law, land use and planning, water law, initiatives and referenda, and administrative law generally.

Bridget's practice focuses on land use and environmental law, handling all phases of the land use entitlement and permitting processes, including administrative approvals and litigation. Her practice includes CEQA, NEPA, State Planning and Zoning Law, natural resources, endangered species, air and water quality, and other land use environmental statutes.

Bridget serves on the Editorial Board of the *California Land Use Law & Policy Reporter*.

REGULATORY DEVELOPMENTS

U.S. DEPARTMENT OF THE INTERIOR ANNOUNCES $210 MILLION FOR DROUGHT RESILIENCE PROJECTS IN THE WEST

On October 17, 2022, the United States Department of the Interior announced that $210 million from President Biden's Bipartisan Infrastructure Law will be allocated to drought resilience projects in the West. The funding is aimed at bringing clean drinking water to western communities through various water storage and conveyance projects. These projects are anticipated to add 1.7 million acre-feet of storage capacity to the West, which can support around 6.8 million people for an entire year. In addition to these projects, the allocation will fund two feasibility studies on advancing more water storage capacities.

Background

On November 15, 2021, President Joe Biden signed the Bipartisan Infrastructure Law, also known as the Bipartisan Infrastructure Investment and Jobs Act, into law. This is a different funding source for drought resilience projects than the Inflation Reduction Act that President Biden signed into law in August 2022. The overall focus of the Bipartisan Infrastructure Law is to rebuild the country's infrastructure, create good jobs, and grow the economy. There are six main priorities guiding the law's implementation: (1) investing public funds efficiently with measurable outcomes in mind; (2) buy American and increase the economy's competitiveness; (3) create job opportunities for millions of people; (4) invest public dollars equitably; (5) build infrastructure that withstands climate change impacts; and (6) coordinate with state, local, tribal, and territorial governments to implement these investments.

President Biden's Executive Order for the Bipartisan Infrastructure Law also established a Task Force to help coordinate its effective implementation. Members of the Task Force include the following agencies: Department of the Interior; Department of Transportation; Department of Commerce; Department of Energy; Department of Agriculture; Department of Labor; Environmental Protection Agency; and the Office of Personnel Management. The Office of Management and Budget, Climate Policy Office, and Domestic Policy Council in the White House are also on the Task Force.

For its part under the Bipartisan Infrastructure Law, the Bureau of Indian Affairs, U.S. Geological Survey, Bureau of Reclamation (Bureau), Office of Wildland Fire, U.S. Fish and Wildlife Service, and the Office of Surface Mining Reclamation and Enforcement submitted spend plans to Congress detailing how the funds, in creating new programs and expending existing ones, will meet the Bipartisan Infastructure Law's overall goals and priorities. The Department of the Interior also submitted a spend plan outlining how it would restore ecosystems, protect habitats, and plug and reclaim orphaned gas and oil wells.

The Bureau's spending plan outlined in detail what programs the Bipartisan Infrastructure Law will fund. This includes $8.3 billion set aside for water and drought resilience across the country. The water and drought resilience programs are aimed at protecting water supplies for both the natural environment and people. The funds will support water recycling and efficiency programs, rural water projects, dam safety, and WaterSMART grants.

The Bureau's spend plan also provide $1.5 billion for wildfire resilience, with investments aimed at federal firefighters, forest restoration, hazardous fuels management, and various post-wildfire restoration activities. Further, the spend plan outlines a $1.4 billion investment in ecosystem restoration and resilience, with funding allocated to stewardship contracts, invasive species detection and prevention, ecosystem restoration projects, and native vegetation restoration efforts.

Finally, the spend plan allocates $466 million to tribal climate resilience and infrastructure. This includes investment in community-led transitions for tribal communities, such as capacity building and adaptation planning. The funds will also help the construction, repair, improvement, and maintenance of irrigation systems.

Drought Resilience Projects in the West

The Bipartisan Infrastructure Law's allocation of $8.3 billion to drought resilience will help important water infrastructure projects across the United States. Of the $8.3 billion, $210 million is set aside for projects in the West. The money will support various groundwater storage, water storage, and conveyance projects. In particular, it will help secure dams, finalize rural water projects, repair water delivery systems, and protect aquatic ecosystems. The selected projects in the West are scattered throughout Arizona, California, Colorado, Montana, and Washington. The projects receiving funding in California include the B.F. Sisk Dam Raise and Reservoir Expansion Project; the Sites Reservoir Project; and Phase II of the Los Vaqueros Reservoir Expansion Project.

$25 million is allocated to the San Luis and Delta Mendota Authority to pursue the B.F. Sisk Dam Raise and Reservoir Expansion project. The project would add an additional ten feet of dam embankment across the entire B.F. Sisk Dam crest to increase the storage capacity of the San Luis Reservoir. It is estimated that this project will create around 130,000 acre-feet of additional water storage.

The Sites Reservoir Project will receive $30 million for its off-stream reservoir project on the Sacramento River system, just west of Maxwell, California. This project is capable of storing 1.5 million acre-feet of water. The reservoir uses existing and new facilities to pump water into and out of the reservoir, with ultimate water releases into the Sacramento River system through a new pipeline near Dunnigan, existing canals, and the Colusa Basin Drain.

Finally, the Bipartisan Infrastructure Law allocates $82 million to the Los Vaqueros Reservoir Expansion Phase II, which will add roughly 115,000 acre-feet of additional water storage. The Los Vaqueros Reservoir, located in Contra Costa County, will expand from 160,000 acre-feet to 275,000 acre-feet. Increased capacity in the Los Vaqueros Reservoir will help improve Bay Area water supply and quality, increase water supplies for the Central Valley Project Improvement Act refuges, add flood control benefits, increase recreational opportunities, and provide additional Central Valley Project operational flexibility.

Conclusion and Implications

The Biden administration's Bipartisan Infrastructure Law will allocate much needed funds to important water infrastructure projects throughout the West, especially in California. However, similar to the Inflation Reduction Act, it is unclear whether this funding will offset any current drought impacts. The Bipartisan Infrastructure Law, P.L. 117-58 is available online at: https://www.congress.gov/bill/117th-congress/house-bill/3684/text.
(Taylor Davies, Meredith Nikkel)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS INTERIOR'S ENVIRONMENTAL ASSESSMENT FOR COAL MINE EXPANSION PROJECT VIOLATED NEPA BY FAILING TO PROVIDE SCIENCE-BASED METHODOLOGY IN ITS FONSI

350 Montana v. Haaland, 50 F.4th 1254 (9th Cir. Oct. 14, 2022).

The United States Court of Appeals for the Ninth Circuit recently affirmed in part and reversed in part a lower court's ruling that the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (Interior) violated the National Environmental Policy Act (NEPA) by failing to provide a science-based methodology in its finding of no significant impact (FONSI) for its coal mine expansion project. The Court of Appeals reversed the lower court's determination that Interior is required to use the Social Cost of Carbon (SCC) metric in quantifying the environmental harms that may occur from the project's greenhouse gas (GHG) emissions, but nevertheless ruled that Interior's 2018 Environmental Assessment violated NEPA.

Factual and Procedural Background

Signal Peak Energy, LLC operates Bull Mountains Mine No. 1 (Mine) approximately 30 miles north of Billings, Montana. In 2008, Signal Peak applied to the Bureau of Land Management (BLM) to lease approximately 2,679.76 acres of federal coal. BLM processed Signal Peak's application, prepared an Environmental Assessment in conjunction with Interior, and issued a FONSI in 2011.

In 2013, Signal Peak requested approval of a mining plan modification for its federal coal lease from the Office of Surface Mining Reclamation and Enforcement (OSMRE). The modification sought to expand coal development and mining operations into 2,539.76 acres of the remaining federal coal lands. Interior prepared an Environmental Assessment (EA), issued a FONSI, and approved the mining plan modification in 2015. Plaintiffs subsequently brought suit in the U.S. District Court for the District of Montana challenging Interior's 2015 EA, FONSI, and approval of the mine expansion.

The plaintiffs argued that Interior arbitrarily and capriciously quantified the socioeconomic benefits of the mine expansion by failing to use the SCC metric to quantify the costs of GHG emissions. The District Court agreed with the plaintiff, vacated the 2015 EA, and enjoined Signal Peak from mining in the expanded mining area pending Interior's compliance with NEPA.

On remand from the District Court, Interior prepared a third EA and FONSI and once again approved Signal Peak's Mine Expansion in 2018. Interior decided again to not utilize the SCC to quantify the costs of the project's expected GHG emissions. Interior supported this decision by claiming four justifications: (1) the SCC was originally developed for use in rulemakings, not individual adjudications, (2) the technical supporting documents and associated guidance underlying the SCC had been withdrawn; (3) NEPA does not require agencies to perform cost-benefit analyses; and (4) the 2018 EA did not fully quantify the social benefits of coal-fired energy production, and therefore using the SCC to quantify the costs of GHG emissions from the mine expansion would yield information that is both potentially inaccurate and not useful.

Plaintiffs again filed suit in District Court challenging Interior's 2018 EA, FONSI, and approval of the mine expansion. Plaintiff's main argument was that Interior violated NEPA again by refusing to use the SCC analysis in the 2018 EA. The district sided with Interior citing that their decision to not use the SCC was supported by the record and satisfied NEPA. The District Court granted summary judgment in favor of Interior on all but the plaintiffs' claim that Interior failed to consider the risk of coal train derailments. The District Court vacated the 2018 EA, but not Interior's approval of the mine expansion, and remanded the matter to Interior for it to consider the risk of train derailments. Plaintiffs subsequently appealed to the Court of Appeals for the Ninth Circuit.

The Ninth Circuit's Decision

The court first considered plaintiffs' argument that Interior violated NEPA by failing to adequately consider the actual environmental effects of the mine expansion and by not providing a convincing statement of reasons for its finding that the mine expansion would not have a significant effect on the environment.

Greenhouse Gas Emissions

The court reasoned that the 2018 EA's consideration of the mine expansion's domestic and global contributions of GHG lacked a science-based standard for significance. The court noted that Interior claimed GHG emissions generated over the life of the mine expansion would total approximately 0.44 percent of annual global GHG emissions, and summarily concluded the mine expansion's contribution relative to other global sources would be minor in the short and long term on an annual basis. The court also noted the domestic comparisons only accounted for emissions associated with mining the coal and transporting it to Vancouver, but failed to account for the emissions that would result from coal combustion in Japan and the Republic of Korea, even though the 2018 EA stated that 97 percent of the project's GHG emissions would stem from coal combustion, The project's estimated domestic emissions jumped from 0.04 percent of annual U.S. based GHG emissions to approximately 3.33 percent if combustion-generated emissions are included. Because the 2018 EA relied on an opaque comparison to total global emissions and failed to account for combustion-related emissions in its domestic calculations, the 2018 EA frustrated NEPA's purpose.

Social Cost of Carbon

The court next considered plaintiffs' argument that Interior arbitrarily and capriciously failed to use the Social Cost of Carbon (SCC) metric to quantify the environmental harms that may result from the project's GHG emissions. The court noted that NEPA does not require a court to decide whether an EA is based on the best scientific methodology, but only that an agency provides high quality information and accurate scientific analysis. Thus, the court ruled that Interior was not required to use the SCC method but must use some methodology that satisfies NEPA.

The Ninth Circuit affirmed the District Court's order in part, reversed in part, and the case was remanded to the District Court for further proceedings consistent with its opinion.

Conclusion and Implications

This case affirms the central intent behind NEPA which requires agencies to seriously and adequately consider the environmental effects associated with a given project. Agencies do not have to utilize a specific scientific method in quantifying emissions resulting from a project, however, the rationale used in an EA must be based in adequate scientific reasoning that is not arbitrary. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/10/14/20-35411.pdf
(Jovahn Wiggins, Rebecca Andrews)

D.C. CIRCUIT ISSUES EXTRAORDINARY WRIT RELIEF COMMANDING EPA TO COMPLY WITH ENDANGERED SPECIES ACT

In re: Center for Biological Diversity, ___F.4th___, Case No. 21-1270 (D.C. Cir. Nov. 22, 2022).

Taking unusually aggressive action under the All Writs Act, the D.C. Circuit Court of Appeals issued a writ of *mandamus* directing the U.S. Environmental Protection Agency (EPA) to complete an effects determination under the federal Endangered Species Act (ESA, 16 U.S.C. § 1531 *et seq*.) in connection with the agency's registration of a pesticide. The order was issued in the context of EPA's longtime, flagrant flouting of its clear statutory duties under the ESA, including in this case five solid years of failure to take any action in compliance with the Court of Appeals previous order regarding the pesticide registration at issue.

Background

In 2014, EPA registered cyantraniliprole, a pesticide that "provides protection from pests that feast on

citrus trees and blueberry bushes," under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, 7 U.S.C. § 136 *et seq.*). FIFRA provides that "[n]o pesticide may be sold in the United States unless it is first registered with EPA." 7 U.S.C. § 136a(a). The statutory standards for registration provide that "EPA must approve the application if it meets composition and labeling requirements" and will "perform its intended function without unreasonable adverse effects on the environment" if used in accordance with widespread practices. 7 U.S.C. § 136a(c)(5)."

EPA's Environmental Fate and Ecological Risk Assessment for the registration of the new chemical *Cyantraniliprole* at the time of registration:

> . . .indicate[d] that it is 'slightly to very highly toxic to freshwater invertebrates; moderately to highly toxic to estuarine/marine invertebrates[;] highly toxic to benthic invertebrates; [and] highly to very highly toxic to terrestrial insects.'. . . [Nonetheless]. . . EPA classified cyantranilipole as a 'Reduced Risk' pesticide, a special category for pesticides it determines have a lower risk to human health and many non-target organisms.

EPA did not, prior to the 2014 registration, carry out an initial review or make an effects determination of the registration, let alone consult with the National Marine Fisheries Service or the Fish and Wildlife Service, to "insure that [the registration] … is not likely to jeopardize the continued existence of any endangered or threatened species or result in [their habitat's] destruction," pursuant to the ESA. 16 U.S.C. § 1536(a)(2)).

The Center for Biological Diversity and the Center for Food Safety (Centers) in 2017 obtained from the D.C. Circuit Court an order remanding the registration to EPA with instructions:

> . . .to replace the registration order with. . .a new registration order signed after an effects determination and any required consultation.

In those initial proceedings, EPA freely admitted it had not complied with the ESA. In the ensuing five years:

> EPA made no progress toward completing cyantraniliprole's effects determination--that is, no progress until earlier this year. Only then did EPA schedule cyantraniliprole's effects determination, thought it took no steps to complete it.

The Centers therefore returned to the Circuit Court, seeking relief under the All Writs Act, 28 U.S.C. § 1651.

The D.C. Circuit's Decision

The bar petitioners must meet to obtain *mandamus* relief is set extremely high:

A petitioner seeking *mandamus* must first establish that the agency has violated "a crystal-clear legal duty." *In re National Nurses United*, 47 F.4th 746, 752 (D.C. Cir. 2022).

A *mandamus* petitioner must show that it "has no other adequate means to attain the relief it desires." *In re Core Communications*, 531 F.3d 849, 860 (D.C. Cir. 2008) (internal quotation marks and alteration omitted). Moreover, a court may grant *mandamus* relief only when it also "finds compelling equitable grounds." *In re Medicare Reimbursement Litigation*, 414 F.3d 7, 10 (D.C. Cir. 2005) (internal quotation marks and alteration omitted). On the equities, the central question is "whether the agency's delay is so egregious as to warrant mandamus." *Core Communications*, 531 F.3d at 855 (internal quotation marks omitted).

The Circuit Court noted as well that:

> . . .this case arises from relatively unique circumstances that implicate two distinct sources of *mandamus* jurisdiction under the All Writs Act: our power to compel unreasonably delayed agency action and our power to require compliance with our previously issued orders.

Specifically with the respect to the latter issue:

> . . .[w]hen an agency ignores a court order. . .[i]t nullifie[s] [the court's] determination that its [action is] invalid and 'insulates its nullification of our decision from further review.'

In that circumstance, the equitable inquiry may be satisfied on a "lesser showing" by the petitioner.

Applying this test, the Court of Appeals easily found that EPA has a clear statutory duty to discharge its duties under the ESA prior to registering cyantra-

nilipole. EPA did not contest that the Centers have no adequate alternative remedy. Thus:

> . . .[t]he sole question, then, is whether EPA's delay in undertaking an effects determination is 'so egregious as to warrant mandamus.'

This equitable question is generally subject to analysis under the "'hexagonal *TRAC* factors" articulated in *Telecommunications Research & Action Center (TRAC) v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984):

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed. (Internal quotation marks and citations omitted.)

Here, Congress has "set a plain deadline" (factor 2), and the Court found that the human health and welfare interests sought to be protected by the ESA (*e.g.*, "'it is in the best interests of mankind to minimize the losses of genetic variations.'") would prejudiced by further delay, satisfying factors 3 and 5.

Factors 1 and 4

Focusing on factors 1 and 4, the Court of Appeals examined EPA's "fraught relationship with the ESA," during which the agency "has made a habit of registering pesticides without making the required effects determination." "EPA has faced at least twenty lawsuits covering over 1,000 improperly registered pesticides," a failure to comply with statutory mandates so flagrant that since 2014 EPA and the U.S. Fish and Wildlife Service have been subject to regular Congressional committee reporting requirements. In that context, EPA's assurances to the Court in this case that it would proceed with the required effects determination by September 2023 rang hollow, particularly given those assurances were undermined by the agency's recent statement that until 2030 it will only make effects determinations for pesticide registrations when subject to a court order requiring it to do so. Therefore, the Court of Appeals issued the requested relief, mandating that the effects determination and replacement of the registration order be completed by September 2023 and adding "bite" by retaining jurisdiction to monitor EPA's progress by requiring that progress reports be submitted by the agency every 60 days.

Conclusion and Implications

This case provides a useful illustration of the lengths to which an executive agency must go in defying Congressional and judicial commandments before a court will issue a writ of mandamus of this breadth. The court's retention of jurisdiction and interim progress report elements are particularly unusual. Nonetheless, in this polarized era examples of such stark executive defiance may well become more common.
(Deborah Quick)

D.C. DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF PIPELINE PROJECT

Red Lake Band of Chippewa Indians v. U.S. Army Corps of Engineers, ___F.Supp.4th___, Case No. 20-3817, No. 21-0189 (D. D.C. Oct. 7, 2022).

The United States District Court for the District of Columbia recently granted summary judgment in favor of the United States Army Corps of Engineers (Corps) against challenges to their Environmental Assessment (EA) for an underwater oil pipeline project that allegedly violated the National Environmental Policy Act (NEPA) and the federal Clean Water Act (CWA). The Corps sufficiently assessed the environmental consequences associated with granting Enbridge, an oil pipeline and energy company, a permit to discharge dredged and fill material into waters of the United States.

Factual and Procedural Background

Enbridge Energy, LP sought a CWA section 404 permit that authorized the discharge of dredged or fill materials into waters of the United States and a permit to cross waters protected by the Rivers and Harbors Act in an effort to replace 282 miles of existing crude oil pipeline with 330 miles of new pipeline, crossing 227 waterways (Project). The Corps, after preparing an EA, granted Enbridge the permit to discharge material and concluded that issuing the permit would not significantly affect the environment.

Red Lake Band of Chippewa Indians, White Earth Band of Ojibwe, Honor the Earth, and Sierra Club argued that issuing the permits violated various sections of NEPA, CWA, and the Rivers and Harbors Act. Separately, Friends of the Headwaters challenged the permits as well, arguing that the Corps violated NEPA and the CWA. The cases against the Corps were consolidated and the parties' cross-motions for summary judgment are before the court.

The court's analysis focused on the NEPA and CWA claims.

The District Court's Decision

The NEPA Claims

The court first considered plaintiffs' argument that the Corps arbitrarily and capriciously limited the scope of the EA to the construction-related activities authorized by the permit, rather than the construction and operation of the entire pipeline. The court found that the Corps was only required to consider the environmental impacts associated with the specific activity requiring a permit: the discharge of fill material into wetlands. In addition, the Corps did not have sufficient control and responsibility over the entire project, because the Corps does not regulate the siting of pipelines or any substance being transported within a pipeline.

The court next considered plaintiffs' argument that the Corps improperly relied on an environmental impact statement prepared under Minnesota state law instead of conducting an independent analysis. However, evidence showed that the Corps coordinated with various Minnesota state agencies during the entire project review. Moreover, the Corps was free to evaluate and incorporate the state's Environmental Impact Statement (EIS) findings into their own assessment and was not required to duplicate studies or analyses already completed by the state.

The court next considered plaintiffs argument that the Corps failed to take a "hard look" at all aspects of the project, including climate change and reasonable alternatives. In response to the argument that the Corps failed to consider the project's contribution to climate change, the court concluded the Corps were not required to consider the effects on climate change arising from the construction of the entire pipeline and its operation. They were only required to review the effects with a reasonably close causal relationship with the discharge of dredged or fill materials, and the Corps EA satisfied this standard. In addition, the Corps' decision to limit its discussion of reasonable alternatives to a route previously designated by the State of Minnesota was appropriate. The state already considered numerous alternatives and the proposed route was the only one in which Enbridge was legally authorized to construct the project under Minnesota law, so the Corps' failure to consider routes that were rejected by the state made little practical sense.

The final challenge to the NEPA review was that

the Corps' finding of "no significant impact," and consequently not preparing an EIS, was arbitrary and capricious because the Project was highly controversial and its impacts remained uncertain. To be "highly controversial," "something more" must exist. The court refused to equate "something more" with simply any criticism of the proposed project, or the fact that some people might be highly agitated. On the other hand, criticism of scientific methodologies by experts in the respective fields may be sufficient. The court found that the various criticisms of the Project that the plaintiffs relied on did not rise to the level of scientific and methodological criticism

Thus, the Corps did not act arbitrarily and capriciously in its NEPA review and did not violate NEPA.

The CWA Claims

Plaintiffs argued the Corps' analysis of alternatives, potential "degradation" of waters of the United States, and its public interest review was insufficient under the CWA.

The court first considered plaintiffs' argument that the Corps violated the CWA by failing to consider "status quo" or "no alternative" alternatives or less environmentally damaging route alternatives. The "no action" alternative in this case would have been to decommission the existing pipeline completely or continue using the pipeline. The court reasoned that the Corps' EA sufficiently discussed both of the "no action" alternatives and concluded neither would be practicable because the pipeline was deteriorating and risked greater environmental harm if it was left in its current condition. Regarding route alternatives, the Corps was only required to consider practicable routes, which did not include routes that the state agency previously rejected.

The court next considered plaintiffs' argument that a potential oil spill from pipeline operation would violate CWA prohibitions against significant degradation. The court reasoned that the EA's discussion of potential degradation was appropriately tailored to the effects arising from the specific dredge and fill activities being permitted, not a potential oil spill caused by the operation of the new pipeline.

Finally, the court considered plaintiffs' argument that the Corps failed to conduct a sufficient "public interest" review under the CWA. The plaintiffs challenge the discussion of economics, energy needs, climate change and greenhouse gas emissions, wetlands, and the risk of an oil spill. The court rejected plaintiffs' arguments, reasoning the Corps' sufficiently discussed economics because there was no evidence they should have considered out of pocket costs for consumers. There was also sufficient evidence that the project was needed because there was a demand for oil. Further, the Corps adequately limited the discussion of climate change to the proposed activity, and adequately addressed the effects on wetlands because the EA discussed the measures to avoid and mitigate impacts to wetlands and short-and long-term effects of the activity on the wetlands.

Finally, the Corps sufficiently evaluated the risk of an oil spill because the EA discussed the effects on aquatic life, birds, and mammals, and coordinated with Tribes to mitigate any effects on tribal resources. Therefore, the Corps did not violate the CWA and summary judgment was appropriate.

Conclusion and Implications

This case provides a reminder of the proper scope and tailoring of NEPA and CWA analyses as well as the importance of taking a hard look at a project's impacts. The court's opinion is available online at:

http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2022/20221007_docket-120-cv-03817_memorandum-opinion.pdf

(Christina Lee, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT AFFIRMS LOWER COURT DECISION UPHOLDING LEGISLATIVELY PRESCRIBED TRAFFIC IMPACT MITIGATION DEVELOPMENT FEE

George Sheetz v. County of El Dorado, ___Cal.App.5th___, Case No. C093682 (3rd Dist. Oct. 19, 2022).

The Third District Court of Appeal in *George Sheetz v. County of El Dorado* affirmed the trial court decision upholding a legislatively prescribed traffic impact mitigation development fee because petitioner did not provide evidence of an unreasonable relationship between the fee and the development.

Factual and Procedural Background

The 2004 County of El Dorado (County) General Plan, which focused on traffic improvements, required that new development pay for road improvements necessary to mitigate the traffic impacts from such development.

In 2006, the County permanently amended the General Plan to include a traffic impact mitigation fee program (TIM fee program or program) to finance the construction of new roads and the widening of existing roads within its jurisdiction. Under the program, the County is authorized to impose a TIM fee as a condition to the approval of a building permit to mitigate the traffic impacts on state and local roads from new development.

The fee is comprised of two components: the Highway 50 component and the local road component. The amount of the fee is generally based on the location of the project (*i.e.*, the specific geographic zone within the County) and the type of project (*e.g.*, single-family residential, multi-family residential, general commercial).

The program requires that new development pay the full cost of constructing new roads and widening existing roads without regard to the cost specifically attributable to the particular project on which the fee is imposed. In assessing the fee, the County does not make any "individualized determinations" as to the nature and extent of the traffic impacts caused by a particular project on state and local roads.

In July 2016, Sheetz applied for a building permit to construct a 1,854-square-foot single-family manufactured home on his property in Placerville. The County agreed to issue the permit on the condition that Sheetz pay a TIM fee in the amount of $23,420, consisting of $2,260 for Highway 50 improvements and $21,160 for local road improvements. After Sheetz paid the fee, the project was approved and the building permit issued in August 2016.

In December 2016, Sheetz sent a letter to the County in which he protested the validity of the TIM fee under the Mitigation Fee Act on various grounds.

In June 2017, Sheetz filed a petition for writ of mandate challenging the validity of the TIM fee and the program that authorized it.

At the Trial Court

As to state law claims, Sheetz asserted that the fee violated the Mitigation Fee Act because there is no "reasonable relationship" between both: (1) the amount of the fee and the cost of the public facilities (i.e., road improvements) specifically attributable to his development project, and (2) the traffic impacts caused by his development project and the need for road improvements within the County. Sheetz further asserted that the fee violated the Mitigation Fee Act because it included costs attributable to existing deficiencies in the County's "traffic infrastructure."

As to federal claims, Sheetz asserted that the fee violated the takings clause of the United States constitution, specifically the special application of the "unconstitutional conditions doctrine" in the context of land-use exactions established in *Nollan* and *Dolan*, as the County failed to make an individualized determination that an "essential nexus" and "rough proportionality" existed between the traffic impacts caused by or attributable to his project and the need for improvements to state and local roads. Finally, Sheetz asserted that the fee was invalid under state law because the County's decision to impose the fee as a condition of issuing him a building permit

was not supported by legally sufficient findings, and the findings were not supported by legally sufficient evidence.

The trial court denied the petition for writ of mandate. In rejecting Sheetz's constitutional challenge under state law, the court found the administrative record established that the fee bore a reasonable relationship, in both intended use and amount, to the deleterious public impact of the project. The court further concluded Sheetz had failed to cite evidence in the administrative record showing that the fee was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair.

As for the federal claim, the trial court rejected Sheetz's constitutional challenge to the fee, concluding (as it did in ruling on the demurrer) that the fee was not subject to the requirements of *Nollan* and *Dolan* because it is a legislatively prescribed development fee that is generally applicable to a broad class of property owners.

The Court of Appeal's Decision

The Court of Appeal, applying the deferential traditional mandate standard applicable to quasi-legislative acts, held that the County demonstrated that development contributes to the need for the facilities and its choices as to what will adequately accommodate the new population are reasonably based, and that Sheetz did not show that the record did not support the County determinations. The Court of Appeal also held that legislatively adopted development fees are not subject to the *Nollan/Dolan* test.

The Federal Taking Claim

The U.S. Supreme Court has identified a special category of takings claims for land-use exactions when the government demands real property or money from a land-use permit applicant as a condition of obtaining a development permit.

Under the doctrine of unconstitutional conditions, the government may not ask a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. On the one hand, the government can take unreasonable advantage of landowners who seek a permit. On the other hand, the government often has legitimate interests in controlling or mitigating the effects of a particular development project.

To accommodate these competing realities, the cases of *Nollan* and *Dolan* establish that the government may condition approval of a land-use permit on the landowner's agreement to dedicate a portion of his property to the public:

> . . .so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the [landowner's] proposal. (*Nollan/Dolan* test).

The *Nollan/Dolan* test extends also to monetary exactions demanded by the government as a condition for a land-use permit as a substitute for the property owner's dedication of real property to the public.

Under California law, only certain development fees are subject to the heightened scrutiny of the *Nollan/Dolan* test. The requirements of *Nollan* and *Dolan* apply to development fees imposed as a condition of permit approval where such fees are imposed neither generally nor ministerially, but on an individual and discretionary basis. The requirements of *Nollan* and *Dolan*, however, do not extend to development fees that are generally applicable to a broad class of property owners through legislative action. Thus the TIM fee was not subject to the *Nollan/Dolan* test.

The Mitigation Fee Act Claim

The Mitigation Fee Act provides a statutory standard against which monetary exactions by local governments subject to its provisions are measured. n response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects.

A development fee is a monetary exaction other than a tax or special assessment that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project.

Under the Mitigation Fee Act, a fee shall not include the costs attributable to existing deficiencies in public facilities, but may include the costs attributable to the increased demand for public facilities reasonably related to the development project in order to: (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan.

There are two ways that a local agency can satisfy the Mitigation Fee Act's "reasonable relationship" requirement for the imposition of development fees. One way is to determine how there is a reasonable relationship between both the fee's use and the type of development project on which the fee is imposed and the need for the public facility and the type of development project on which the fee is imposed through a quasi-legislative process of adopting a fee. The second requires a more quasi-judicial specific determination of a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed, and is subject to the heightened scrutiny of the *Nollan/Dolan* test.

By adopting the quasi-legislative TIM fee under the first method, the County needed only to establish a reasonable relationship, in both intended use and amount, to the deleterious public impact of the project.

The County was able to establish a reasonable relationship because the County relied on a technical report prepared by the DOT and studies analyzing the impacts of contemplated future development on existing public roadways and the need for new and improved roads as a result of the new development. The County also relied a memorandum showing the methodology used to calculate the fee rate for each type of new development, considering factors such as the expected increase in traffic volumes form each type of new development based upon data from the Institute of Transportation Engineers.

Sheetz failed to present contrary evidence showing that the fee was arbitrary, unfair or completely lacking in support.

Conclusion and Implications

This opinion by the Third District Court of Appeal demonstrates that a challenge to a quasi-legislative type development mitigation fee should be supported by expert analysis disputing the basis and support for the fee. The developer/property owner generally cannot rely on criticism of the government agency methodology in adopting the fee. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/C093682.PDF
(Boyd Hill)

SECOND DISTRICT COURT FINDS PETITION ADEQUATELY ALLEGED BROWN ACT VIOLATION WHEN A CITY ADOPTED A CEQA EXEMPTION WITHOUT LISTING IT AS AN AGENDA ITEM FOR AT LEAST 72 HOURS

G.I. Industries v. City of Thousand Oaks,
___Cal.App.5th___, Case No. B317201 (2nd Dist. Oct. 25, 2022; *modified* Nov. 26, 2022).

In an opinion certified for publication on October 25, 2022, the Second District Court of Appeal overturned a trial court order denying Waste Management leave to amend a writ petition that alleged the City of Thousand Oaks (City) violated the Brown Act when it voted to adopt a California Environmental Quality Act (CEQA) exemption for a new waste-hauling Franchise Agreement with Athens Services. The Court of Appeal held that Waste Management stated facts sufficient to support a Brown Act claim because the City had not included the CEQA exemption as an agenda item at least 72 hours prior to the city council's regular meeting.

Factual and Procedural Background

G.I. Industries, which does business as Waste Management (WM), has historically provided solid waste management to the City of Thousand Oaks pursuant to an exclusive solid waste franchise agreement. In early 2020, the City considered entering into a new 15-year franchise agreement with Arakelian Enterprises, Inc., doing business as Athens Services (Athens), beginning on January 1, 2022.

City Council Approval

On March 4, 2021, the City posted an agenda for a March 9, 2021 regular city council meeting. One

agenda item stated the City would consider staff's recommendation to approve awarding the franchise agreement to Athens. But neither the item nor the agenda indicated the City would also consider finding the agreement exempt from CEQA. On March 5, 2021, WM submitted a comment letter stating its concern that the City had not considered the potentially adverse environmental impacts associated with approving the new agreement.

At 3:30 PM on the day of the city council meeting (March 9th), the City posted a supplemental agenda item and information packet with staff's recommendation that the City find the agreement categorically exempt from CEQA under the "existing facilities," "actions by regulatory agencies for the protection of the environment," and "common sense" exemptions. During the council meeting, the City and Athens discussed the agreement's potential vehicle and hauling yard options. Though not analyzed in the staff report, the city's attorney noted that public comments raised concerns about potential environmental impacts associated with using these alternative sites and truck hauling routes. Nevertheless, the city attorney recommended adopting staff's finding of the CEQA exemption.

The city council thus moved to adopt a motion to approve the franchise agreement. At the suggestion of the mayor, the council amended the motion to also include the corresponding CEQA exemptions. The meeting minutes, however, showed the council took separate actions in approving the agreement and finding it exempt from CEQA.

At the Trial Court

Shortly after the City filed a Notice Of Exemption (NOE) on March 15, 2021, WM sent a "cure and correct" letter (Gov. Code § 54960.1, subd. (b)) stating the City violated the Brown Act by voting to adopt the NOE before approving the franchise agreement, despite having failed to include the exemptions as an agenda item at least 72 hours before the City council meeting. The City did not respond to the letter within 30 days, thus representing a decision to not cure or correct the challenged action. (Gov. Code § 54960.1, subd. (c)(3).)

As a result, WM filed a petition seeking a writ of mandate that directed the City to vacate its approval of the franchise agreement and exemption determination. The trial court sustained the City's and Athens' demurrers without leave to amend. Although it agreed with WM that the CEQA exemption determination and franchise agreement approval were separate items of business, the trial court held that CEQA does not require a public hearing for an exemption determination, therefore the Brown Act did not apply.

The Court of Appeal's Decision

The Second District Court of Appeal reviewed the trial court's decision to grant the demurrers de novo by assuming the truth of all properly alleged facts to determine whether WM's complaint stated a legally cognizable cause of action. The Court of Appeal reviewed the trial court's decision to deny WM leave to amend for abuse of discretion by considering whether there was a reasonable possibility that WM could cure the petition's alleged defect with an amendment.

The Brown Act Applies

Under the Brown Act, at least 72 hours before a regular meeting, the legislative body of a local agency must post an agenda containing a brief general description of each item of business to be transacted. (Gov. Code § 54954.2, subd. (a)(1).) The agenda must provide the public with an opportunity to address the legislative body on any item of interest, thus barring the agency from acting on any item that does not appear on the agenda. (Gov. Code § 54954.2, subd. (a).) Courts therefore broadly interpret the Act to effectuate the California Constitution's goal of furthering "the People's right to access the conduct of the People's business." (Cal. Const., art. 1, § 3, subd. (b)(1)(2).)

Under this lens, the Second District held that the factual allegations in WM's petition were sufficient to state a Brown Act violation claim. By its own terms, the Act applied to the City's determination that the franchise agreement with Athens was exempt from CEQA because that decision was an item of business transacted at a regular meeting of a local legislative body. Because the City's agenda did not identify the council's consideration of the exemption as a separate item at least 72 hours in advance, WM did not receive appropriate notice and was thus deprived of a meaningful opportunity to be heard.

Citing *San Joaquin Raptor Rescue Center v. County of Merced,* 216 Cal.App.4th 1167 (2013), the court

rejected the City's contention that it adopted the CEQA exemption only as a component of the agenda item awarding the franchise agreement to Athens. Although the *San Joaquin Raptor* decision involved an agency adopting a non-agendized Mitigated Negative Declaration (MND) that was ultimately adopted, the opinion's analysis of the Brown Act directly applied here. Because members of the public are entitled to have notice of and an opportunity to participate in a local agency's determination that a MND should be issued, they are also entitled to such participate when a local agency determines a project is exempt from CEQA.

Importantly, the Second District clarified that applying the Brown Act's notice requirements do *not* alter an agency's existing obligations under *CEQA*. Rather, the Act requires only that the exemption be placed on the meeting agenda and that the public be provided an opportunity for comment. Thus, as with CEQA, the act does not require that an exemption determination be accompanied by a formal public hearing where findings must be made and supported by substantial evidence.

For these reasons, the court rejected the City's contention that applying the Brown Act to a CEQA exemption determination would place an intolerable burden on local agencies. Where an agency's legislative body intends to vote on or discuss a CEQA exemption at a regular meeting, "it will require minimal effort to include it as an agenda item." And while the agency may delegate some responsibility to staff before rendering a decision, the court cautioned that the agency cannot delegate its *entire* duty as the final decisionmaker—*i.e.*, approving the exemption—to avoid its Brown Act obligations. Accordingly:

> . . .[t]he addition of words to the agenda indicating the local agency is considering a project subject to staff determination of CEQA exemption will not unduly tax a local agency's resources.

Waste Management's Cure & Correct Letter Was Adequate

Brown Act § 54960.1, subdivision (b), requires that a prospective litigant demand, in writing, that the legislative body cure and correct its alleged Brown Act violation and the nature of the alleged violation. Here, WM's letter satisfied this obligation because it informed the City that it violated § 54954.2 by considering the CEQA exemption without describing the action in the agenda for at least 72 hours before the meeting.

The Second District thus rejected the City's claim that the letter was inadequate because it stated the City "adopted," rather than "filed," an NOE. The court reiterated that the purpose of the section is to notify the local agency of its alleged violation so that it can cure it to avoid litigation; its purpose is:

> . . .not to allow a local agency to avoid the consequences of Brown Act violations by launching nit-picking technical attacks on the language use in the cure and correct letter.

Thus, whether the City "adopted" or "filed" an NOE was immaterial—the substantive point, as the letter adequately stated, was that the City voted that the project was exempt, without the public notice required by the Brown Act.

Conclusion and Implications

While the Second District Court of Appeal's decision might seem ambiguous at first blush, a careful reading indicates the holding pertains only to an agency's public noticing obligations under the Brown Act. Parties on all sides of the aisle should exercise care because concurrent responsibilities under the Brown Act and other statutes, ordinances, and regulations will inevitably intersect. In the context of CEQA, specifically, the opinion holds: when an agency considers whether to approve a "project" (as defined by CEQA), the Brown Act notice for any hearing on the project must identify any exemption (statutory, categorical, *etc.*) on which the agency intends to rely. This requirement is true even though CEQA itself does not require a public hearing or any formal exemption determination. The court did not interpret the Brown Act to require a hearing where one is not otherwise required by another body of law. Rather, whenever an agency must conduct a hearing prescribed by statute or ordinance, that requisite Brown Act notice must at least mention the agency's consideration of a CEQA exemption. Thus, while the opinion directly affects an agency's Brown Act obligations, it only indirectly affects an agency's CEQA obligations. A copy of the Second District Court of Appeal's opinion (as modified on November 26, 2022) is available at: https://www.courts.ca.gov/opinions/documents/B317201M.PDF.
(Bridget McDonald)

SIXTH DISTRICT COURT UPHOLDS CITY'S SHORT-TERM RENTAL ORDINANCE IN THE FACE OF DUE PROCESS CLAIMS

Hobbs v. City of Pacific Grove,
___Cal.App.5th___, Case No. (6th Dist. Oct. 14 2022; *Partially Published* Nov. 14, 2022).

Property owners who held licenses for short-term property rentals brought an action against the City of Pacific Grove (City), alleging that the City violated their due process rights by adopting an ordinance that limited the number of homes that could be offered as short-term rentals and subjecting them to random selection for nonrenewal of license. The Superior Court granted summary judgment in favor of the City, and the property owners appealed. In a *partially* published opinion, the Court of Appeal affirmed, finding that the ordinance did not violate due process.

Factual and Procedural Background

In 2010, the City authorized the allowance of short-term rentals, subject to licensing, taxes, and other regulations. Licenses were issued upon application for a period of one year, subject to earlier revocation for good cause. In 2016, the City capped the overall number of short-term rental licenses at 250 and established a density cap on rentals. In 2017, the City again amended the short-term rental ordinance, including several provisions regarding renewal or revocation of short-term licenses. Among these were provisions stating that no license would be automatically renewed, and any license could be withdrawn, suspended, or revoked for any reason.

By early 2018, the City had issued 289 licenses and, in certain areas, licenses exceeded the density cap per block. The City thus resolved to select certain licenses to "sunset" after a grace period following the scheduled expiration of their existing term, ultimately settling upon a random lottery as a means to reduce the number of licenses "in a fair and equitable manner." Also in 2018, City voters approved Measure M, under which the City would prohibit and phase out all existing short-term rentals in residential districts in the City, except in the Coastal Zone.

The plaintiffs, Hobbs and Shirkey (collectively: plaintiffs), owned homes. Hobbs obtained a short-term rental license in 2013, which was renewed annually until 2019. Measure M had the effect of permanently prohibiting the short-term rental of the Hobbs property. The Shirkeys' property is located in the City's Coastal Zone. They obtained two short-term rental licenses, one for their main property and one for a separate guest quarter above the garage. The main property was chosen for nonrenewal; the license for the upstairs guest quarters was not.

At the Superior Court

Hobbs and Shirkey filed a complaint alleging that the City unconstitutionally deprived them of their right to allow guests to stay in their respective homes. Specifically, they alleged: the City was required to obtain the California Coastal Commission's approval before adopting the 2018 ordinance amendments; the 2018 amendments violated their right to due process by arbitrarily limiting the number of homes that can be offered as short-term rentals and by subjecting them to random selection for nonrenewal; and that Measure M violated the Hobbs' right to due process by prohibiting all homes outside of the Coastal Zone from being offered as short-term rentals.

Plaintiffs then moved for summary judgment or, alternatively, summary adjudication. The Superior Court issued an order on the first allegation finding that the 2018 ordinance amendments constituted "development" within the Coastal Zone, and the City needed to obtain approval from the Coastal Commission of either a Local Coastal Program or a Coastal Development Permit. The Superior Court also found that plaintiffs failed to carry their burden of proof on count two as to whether they had a substantive or procedural due process right to renew their time-limited short-term rental licenses. After entry of an order of dismissal, which plaintiffs requested after a subsequent motion was denied by the Superior Court, plaintiffs appealed. The City also cross-appealed from the Superior Court's order granting summary adjudication as to the first count.

The Court of Appeal's Decision

The Unpublished Portion of the Decision

In the *unpublished* portion of the opinion, the Court of Appeal first dismissed the City's cross-appeal because, after the Superior Court granted summary adjudication as to count one, the Coastal Commission approved the City's Local Coastal Program, including the 2018 ordinance amendments. This, the court found, rendered both the cross-appeal and count one moot.

The Court of Appeal also found that plaintiffs had lost standing with respect to the portion of count two regarding Measure M because the Hobbses had sold their residence. Allegations related to Measure M were predicated wholly upon the asserted injury to the Hobbses by virtue of their ownership of residential property outside the Coastal Zone, as the Shirkey property was within the Coastal Zone. Because plaintiffs no longer owned property subject to Measure M (which only impacted property located outside the Coastal Zone), the Court of Appeal found plaintiffs no longer had standing to pursue an appeal with respect to Measure M.

The Court of Appeal also rejected the City's contention that plaintiffs' appeal was not proper because it did not arise from a final judgment that disposed of all issues between the parties. The Court noted that, generally, appellate courts treat a voluntary dismissal with prejudice as an appealable order if it was entered after an adverse ruling by the Superior Court to expedite an appeal of a ruling. It also rejected the City's related claim that the order of dismissal was fatal to plaintiffs' appeal because the dismissal stopped short of entering judgment as to count one.

The Published Portion of the Decision

In the published portion of the opinion, the Court of Appeal addressed plaintiffs' arguments that plaintiffs' economic interests in renting their vacation homes exclusively for transient visitors was an entitlement subject to state or federal constitutional protection as a matter of law. To the extent that plaintiffs asserted a "vested right" in that particular economic use of their property, the Court of Appeal found, they had established neither a right—beyond the expressly defined terms of their respective licenses—nor vesting on the basis of the judicial record. Nor had plaintiffs established that the City's curtailment of short-term rental licenses was so unrelated to a legitimate state interest that it could be said to infringe on substantive due process. The Court of Appeal therefore upheld the Superior Court order and affirmed the order of dismissal.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding procedural and substantive due process claims, specifically in the context of short-term property rentals. The opinion is available online at: https://www.courts.ca.gov/opinions/documents/H047705.PDF
(James Purvis)

SECOND DISTRICT COURT FINDS CITY'S BUILDING PERMIT MORATORIUM ENACTED IN RESPONSE TO OWNERS' UNLAWFUL DEMOLISHMENT OF THEIR HOME DID NOT AMOUNT TO A 'TAKING' OR AN 'EXCESSIVE FINE'

LeMons v. City of Los Angeles, *Unpub.*, Case No. BS165799 (2nd Dist. Oct. 27, 2022).

In a decision filed on October 27, 2022, the Second District Court of Appeal rejected claims by plaintiff homeowners that the City of Los Angeles' imposition of a one-year moratorium on new building permits on their property violated the excessive fines clause of the Eight Amendment and an unconstitutional taking under the Fifth Amendment. Plaintiffs demolished their historically designated home without obtaining necessary permits from the city in violation of the municipal code. The city's one year moratorium was an appropriate punitive measure resulting from plaintiffs' unlawful conduct and did not amount to an unconstitutionally excessive fine or a compensable taking.

Factual and Procedural Background

Plaintiffs owned real property improved with a two-story home built in 1922. The property was in a historic preservation overlay zone and designated a "contributing element" to the zone.

The city code required rehabilitation and repair work on a contributing element to conform to a preservation plan and be approved by the city's historic preservation board. A property owner seeking to demolish, remove, or relocate must obtain a certificate of appropriateness (COA) from the city planning department. A COA can only be obtained after a plan to demolish or remove a contributing element is presented to the members of the historic preservation board and cultural heritage commission and subsequently approved by the planning department. Demolition or removal of a contributing cannot be approved without a public hearing.

Plaintiffs secured approvals necessary for rehabilitation and repair work. The permit obtained was an "express permit" for repair and rehabilitation work that did not require submission of plans or a public hearing. Plaintiffs vastly exceeded the work approved in their permit and mostly demolished their two-story single-family dwelling.

The city issued multiple orders to comply, ordering plaintiffs to stop demolition work on the property. After this notice, the city held a hearing and issued a written determination that plaintiffs had acted far in excess of any work authorized by their express permits. The city then imposed a one-year moratorium on the issuance of any permits for new development on the property. Plaintiffs challenged the city's decision to the board of building and safety commissioners. After a public hearing, the board upheld the city's findings and denied the appeal.

Plaintiffs then filed a writ of mandate and complaint for inverse condemnation against the city. In the mandate petition, plaintiffs alleged that the city's one year moratorium on new permits violated the excessive fines clause of the U.S. Constitution. The inverse condemnation claim alleged that the moratorium constituted a taking without just compensation, in violation of state and federal constitutions.

The trial court held a hearing on the petition, denied it, and then entered a judgment against the plaintiff finding that the city's one year moratorium did not constitute a taking.

The Court of Appeal's Decision

The Court of Appeal upheld the trial court and rejected both of plaintiffs' claims.

Excessive Fines Clause of the Eighth Amendment

The court first rejected plaintiff's claim that the city violated the excessive fines clause of the Eighth Amendment to the United States Constitution. The excessive fines clause provides:

[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The excessive fines clause limits the government's power to exact payments whether in cash or in kind as punishment for an offense. However, the court was persuaded by a Ninth Circuit case *Kim v. United States*, 121 F.3d 1269 (9th Cir. 1997), which held that a grocery store owner's permanent disqualification from the federal food stamp program was not an excessive fine under the Eight Amendment because "it [was] not cash or in-kind payment directly imposed by, and payable to, the government." Moratoriums are not subject to the excessive fines analysis under the Eighth Amendment. Plaintiff also cited various federal cases involving excessive fines challenges to forfeitures involving government seizure of private property. Here however, the city did not attempt to seize plaintiffs' personal or real property under forfeiture laws.

Fifth Amendment Takings Claim

The court also rejected plaintiff's arguments that the city's one year moratorium on building permits at plaintiff's property was an unconstitutional taking under the takings clause of the Fifth Amendment of the United States Constitution. As the court noted:

> Courts have consistently held that [the government] need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance… Similarly, when property has been seized pursuant to the criminal laws or subjected to in rem forfeiture proceedings, such deprivations are not takings.

As the court noted, the United States Supreme

Court has a "longstanding practice" of neither requiring compensation for, nor finding unconstitutional, seizures, forfeitures, and abatements of personal property to deter illegal activity. These cases are "firmly fixed in the punitive and remedial jurisprudence of the country" and do not involve unlawful takings or recoverable inverse condemnation.

Here, the court found the one-year moratorium on new developments did not constitute a taking under state or federal constitutions:

> [t]he moratorium was a punitive measure imposed on plaintiffs for a violation of [the city code] and not a taking for public uses as traditionally understood under constitutional takings jurisprudence.

Regarding plaintiff's inverse condemnation claims, this case did not implicate the fundamental policies underlying the concept—that the costs of a public improvement benefitting the community should be spread among those benefited rather than allocated to a single member of the community. Here, the purpose of the city's moratorium was to impose particular burdens on violators. There is no benefit transferred to the public at large by temporarily withholding a building permit from plaintiffs. Rewarding plaintiffs for their unlawful conduct was not only inconsistent with the purposes of the takings clause but would reward plaintiff's unlawful conduct.

Conclusion and Implications

The *LeMons* decision is helpful because it illustrates the policy considerations and key elements of claims involving the excessive fines clause of the Eighth Amendment and takings clause of the Fifth Amendment. Unsurprisingly, when a property owner engages in unlawful conduct, punitive government actions, especially those that do not involve levying of excessive fees or forfeiture of private property, do not violate the excessive fines clause or the takings clause.

A copy of the court's *unpublished* decision can be found here: https://www.courts.ca.gov/opinions/nonpub/B310701.PDF
(Travis Brooks)

SECOND DISTRICT COURT REJECTS CHALLENGES TO EIR PREPARED FOR REHABILITATION AND HOTEL REDEVELOPMENT PROJECT

Pasadena Civic Center Coalition v. City of Pasadena, *Unpub.*, Case No. B313942 (2nd Dist. Oct. 31, 2022).

In a decision filed on October 31, 2022, the Second District Court of Appeal rejected each of plaintiff community group's claims that an Environmental Impact Report (EIR) prepared for a rehabilitation and hotel redevelopment project involving a historic YWCA building in Pasadena violated the California Environmental Quality Act (CEQA). Plaintiffs alleged that the EIR failed to disclose various inconsistencies with Specific Plan and municipal code standards, however it was well within the discretion of the City to weigh and balance the Specific Plan's policies and strict adherence to each provision in the Specific Plan was not required. Moreover, the EIR's incorporation of mitigation measures requiring the city and a consultant to analyze project designs for consistencies with the Secretary of the Interior's Standards for the Treatment of Historic Properties was an appropriate mitigation measure to reduce potential impacts to historic resources to levels of insignificance. Plaintiffs failed to demonstrate that the EIR's disclosure of potential environmental impacts or that its mitigation measures were improper under CEQA.

Factual and Procedural Background

The project sought to rehabilitate a YWCA building in Pasadena as a hotel and construct a new, three-to-six story hotel building adjacent to the YWCA building, which would become a Kimpton hotel. The project would result in a hotel with guestrooms, meeting facilities, ballroom space, hospitality parlors, and a restaurant. The YWCA building was constructed in the early 1920s but had been vacant and deteriorating since 1997.

The project site was in the Pasadena Civic Center Historic District (District) and the YWCA building was listed as a contributor to the District, on the National Register of Historic Places and California Register of Historical Monuments, and a city-designated historical monument. The project site was also located within the city's Civic Center / Midtown Sub-District of the city's Central District Specific Plan (CDSP).

On July 2012, the city issued a request for proposal for the project. After receiving six proposals, an advisory panel recommended the city begin exclusive negotiations with Kimpton hotels.

After an Initial Study determined that an EIR was necessary, the City prepared an EIR with a Draft EIR published on February 5, 2016. On August 15, 2016, the city council held a noticed public hearing and voted unanimously to certify the EIR and approve the project. As approved, the project includes several exceptions to the city's planning and zoning requirements, such as a variance reducing the required ceiling height of a building's first floor by six feet (from 15 feet to nine feet).

On September 15, 2016, plaintiffs (an unincorporated association of individuals) filed a petition for writ of mandate which asserted various violations of the California Environmental Quality Act.

On February 18, 2021, the trial court denied plaintiff's motion to augment the administrative record to include a staff report from the city's planning and community development department and denied petitioner's writ petition.

The Court of Appeal's Decision

The Second District Court of Appeal denied each of petitioner's various CEQA claims, upholding the trial court's decision.

Withdrawal of Developer Real Party in Interest from the Project Did Not Moot the Action

Sometime after plaintiff's petition was filed, Kimpton Hotels withdrew from the project. The Second District therefore had to determine whether a justiciable controversy still existed for which it could provide relief. The court noted that the city still fully intended to assess new hotel proposals similar to the instant project at the project site and could very well move forward approving a similar project. Accordingly, the EIR may be relied upon for such future projects and shape decisions the city would make about the form and scope of environmental review that may be necessary in connection to the any such new proposals. The matter before the court was not moot and:

> [if plaintiffs] were to prevail on its challenge to the validity of the EIR, then the City could not rely upon that document and may have to conduct additional environmental review on aspects of a new project that could have fit within the scope of the original project.

City Did not Rely on an 'Impermissibly Lenient Standard' in Assessing the Project's Impacts on a Historical Resource

Plaintiffs argued that the EIR relied on an "impermissibly lenient" standard when it determined that the project would not have a significant impact on an historical resource, which the court should review under a *de novo* standard of review. As the trial court noted:

> impacts to historic districts are assessed under the criteria established by the National Park Service, the federal agency that manages the National Register.

Here, the EIR considered each of the National Park Service criteria and concluded that the project's impacts to the district would be less than significant. In other words, the EIR identified and applied the correct legal standard to determine whether the project would have a significant impact on an historical resource. Plaintiffs' claim that the EIR should have analyzed the historic district's federal nomination form in determining whether the project would result in impacts to a historic district was irrelevant.

City Did Not Violate CEQA by Deferring Mitigation of Historic Impacts or by Relying on Subjective Mitigation Measures

Plaintiffs also raised various claims that by requiring the project to undergo Design Commission review after initial project approval to ensure compatibility of a new hotel building with the historic YWCA building constituted improper deferral of mitigation measures. The court rejected these claims because the

challenged mitigation measures related to impacts associated with construction of the new buildings associated with the project (not those associated with altering the historic YWCA). However, the EIR found that any potential impacts resulting from construction of the new building would be insignificant even without mitigation. CEQA does not require mitigation measures for effects that are not found to be significant.

The court also rejected plaintiffs' claims that a mitigation measure requiring the developer to hire a historic preservation consultant to oversee design development for compliance with the Secretary of Interior's Standards for rehabilitation were "too subjective" and not "fully enforceable." CEQA provides that a project following the Secretary of Interior's standards shall be considered as mitigated to a level of less than significant impact on a historical resource. This was an appropriate mitigation measure for historical impacts under CEQA.

EIR Did Not Fail to Disclose the Project's Alleged Inconsistencies with the CDSP and Pasadena Municipal Code

Plaintiffs next alleged that the EIR failed to sufficiently disclose project inconsistencies with provisions of the CDSP and municipal code that sought to protect outdoor public greenspace, tree lawns, and streetscape in the area of the project. However, the EIR did fully analyze the project's consistency with the CDSP and municipal code, finding that it was consistent with the CDSP's ultimate vision and would preserve most trees in the project area. As the court noted:

> [a]n agency is entitled to weigh and balance [a] plan's policies to determine whether the proposed project will be compatible with the objectives, policies, general land uses and programs specified in the applicable plan. In fact, an agency has the discretion to approve a plan even though the plan is not consistent with all of a Specific Plan's policies because it is nearly… impossible for a project to be in perfect conformity with each and every policy set forth in the applicable plan.

Plaintiffs also failed to controvert the trial court's conclusion that the EIR disclosed all relevant information to permit meaningful public discussion and informed decision-making regarding project consistency with the CDSP. As a result, plaintiffs waived their claim that the EIR's discussion of environmental impacts regarding conflicts with CDSP design standards failed to disclose such inconsistencies.

City Did Not Improperly Piecemeal Its Analysis of the Impacts of Removing Public Greenspace and Eliminating Symmetry from its Review of the Project

The court also rejected plaintiffs' claims that the EIR improperly piecemealed or failed to analyze the potential of additional planning efforts calling for the provision of additional landscaped space in the vicinity of the project site. In the staff report on the project, the interim director of planning and community development recommended that the planning commission forward a recommendation to the city council to direct staff to initiate a planning effort to study options for establishing additional undeveloped landscape space in the vicinity of the project site. Plaintiffs argued that because this subsequent planning activity was a possibility, it should have been analyzed in the EIR. However, plaintiffs failed to establish that the city's subsequent planning efforts were a "reasonably foreseeable" consequence of the initial project, and that the future action will be significant in that it will likely change the scope or nature of the initial project. There was no indication that the city would take these subsequent planning efforts, and the EIR did not need to analyze potential impacts resulting from this possibility.

Conclusion and Implications

Although plaintiffs raised some creative arguments in their efforts to challenge the EIR project, they ultimately failed to demonstrate shortcomings in the EIRs disclosure and analysis of the project's environmental impacts. The case provides helpful guidance to cities and project proponents in crafting mitigation measures to address potentially significant impacts to historical resources under CEQA.

A copy of the court's *unpublished* opinion can be found online at: https://www.courts.ca.gov/opinions/nonpub/B313942.PDF
(Travis Brooks)

FIRST DISTRICT COURT, APPLYING SEVERABILITY DOCTRINE, FINDS CHALLENGE TO USE-FEE PORTION OF SEWER CHARGE, AND NOT CAPACITIES FEE PORTION, DOESN'T CREATE THE SAME STATUTE OF LIMITATIONS

Raja Development Co., Inc. v. Napa Sanitary District, ___Cal.App.5th___, Case No. A162256 (1st Dist. Nov. 8, 2022).

Condominium owners brought an action for declaratory and injunctive relief against the Napa Sanitary District (District), claiming that the use-fee portion of a sewer service charge, which also included a capacity-fee portion, was an unlawful tax. The Superior Court sustained the District's demurrer on statute of limitations grounds. The Court of Appeal then reversed, finding that the inseverability of the ordinance authorizing the sewer charge did not make a challenge to the use-fee portion subject to the shorter limitations period for challenging capacity fees.

Factual and Procedural Background

The District operates a wastewater utility through which it provides wastewater collection and treatment services to residents. The plaintiffs are owners of condominium units located within the District's jurisdiction (collectively: plaintiffs). As alleged in plaintiffs' complaint, the District has imposed an annual sewer service charge on townhomes and condominiums within its jurisdiction since at least 1975, which is imposed by the District as a single collected charge.

Following various demurrers by the District, plaintiffs filed a third amended complaint alleging that the sewer service charge (although collected in a single charge) effectively consists of two components: (1) a "use fee" (for general operations, general revenue purposes, and other non-capacity related purposes); and (2) a "capacity fee" (for maintenance and improvement of capital facilities, among other things). Plaintiffs claimed that the use fee was an invalid tax because it exceeds the reasonable cost of providing the service for which it is charged, the District has not justified the fee with a nexus study, and the fee has not been approved by two-thirds of voters. Plaintiffs sought a declaration that the use-fee portion of the service charge is unconstitutional or otherwise illegal, as well as an injunction enjoining the District from imposing/collecting it.

The District again demurred, contending that the ordinances authorizing the service charge were inseverable, and that a court would have to invalidate the entire charge (*i.e.*, both the use-fee portion and the capacity-fee portion) were plaintiffs to prevail. Thus, the District reasoned, the plaintiffs' claim necessarily challenged the capacity fee, which was subject to a 120-day statute of limitations. That is, if the only available remedy would invalidate the capacity fee along with the use fee, the lawsuit was untimely even though it only purported to challenge the use fee.

At the Superior Court

The Superior Court sustained the demurrer without leave to amend, agreeing that the use-fee and capacity-fee components were inseverable, that the lawsuit would necessarily invalidate the entire sewer service charge (including the capacity fee), and that the 120-day limitations period to challenge the capacity fee thus barred plaintiffs' challenge. Plaintiffs in turn appealed.

The Court of Appeal's Decision

For purposes of appeal, the parties agreed in principle that different limitations periods applied to challenges to the capacity-fee and use-fee components of the sewer service charge, and that a challenge to the District's capacity fee would be time-barred under the applicable 120-day statute of limitations. The question, as the Court of Appeal framed it, was whether the purported inseverability of the ordinance authorizing the charge altered the "gravamen" of the claim or the "nature of the right sued upon" so as to transform the claim (which only purported to challenge the use-fee portion of the charge) into one subject to the 120-day statute of limitations for the capacity fee. The Court of Appeal found the answer to be "no."

Severability Doctrine Determines the Scope of Remedy after Legal Flaw in an Ordinance Has Been Established—It Doesn't Alter the Nature of a Claim

Regardless of whether the ordinances authorizing the charge would be severable, the Court of Appeal found, the complaint did not allege any wrongful conduct by the District with respect to the capacity fee, the invasion of any right or interest plaintiffs possess related to the capacity fee, or any legal injury from the capacity fee.

The court found that the purpose of the severability doctrine, by contrast, is to determine the scope of the remedy after a legal infirmity in an ordinance has been established. Thus, a finding of inseverability would not alter the nature of plaintiffs' claim or the rights upon which they brought suit. Even if the District ultimately were correct that severability principles would require the invalidation of the entire sewer service charge, the Court of Appeal found that the District (rather than the plaintiffs) ultimately would bear the consequence of its decision to draft the ordinances in the manner that it had done. On this basis, the Court of Appeal reversed the Superior Court decision and remanded for further proceedings.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the severability doctrine in the context of public agency fees.The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A162256.PDF
(James Purvis)

THIRD DISTRICT COURT REVERSES DECISION ALLOWING LAFCO TO REQUIRE FUTURE ANNEXATIONS TO CITY TO DETACH FROM COUNTY FIRE DISTRICT

Tracy Rural County Fire Protection District v. Local Agency Formation Commission of San Joaquin County, ___Cal.App.5th___, Case No. C095083 (3rd Dist. Oct. 13, 2022).

The Third District Court of Appeal in *Tracy Rural County Fire Protection District v. Local Agency Formation Commission of San Joaquin County* reversed the trial court decision upholding a Local Agency Formation Commission of San Joaquin County (LAFCO) resolution requiring that all future annexation to the City of Tracy (City) detach from the Tracy Rural County Fire Protection District (District), holding that LAFCO did not have the authority to make such a decision.

Factual and Procedural Background

The City's fire department was established in 1910. In 1945, the District was established to provide fire protection services for rural areas outside the city limits. For many years, the City and the District discussed consolidating their fire protection services. They recognized that consolidating services would lower response times and eliminate the duplication of resources. By 1996, they were in final negotiations to consolidate, with the City relinquishing fire protection responsibilities to the District, but the consolidation never occurred.

Instead, in 1999, the City and the District Tracy Rural formed a Joint Powers Authority (JPA) to provide fire protection services within their respective territories. As annexations to the City began to occur, LAFCO approved twelve proposals to annex territory to the City without detaching that territory from the District.

In a 2011 LAFCO municipal services review, LAFCO explained:

> As annexations to cities and detachments from the districts occur, the district's physical boundary and financial revenue shrink. Unfortunately, the district does not always experience a corresponding reduction in service costs. The district must still maintain the same number of stations, employ the same number of firefighters, and maintain the same amount of equipment and do all of this with less revenue.

The review also noted that the policy of not detaching newly annexed territory from Tracy Rural:

> . . .maintains the necessary funding for the JPA to operate efficiently because it allows property tax revenues as well as the special assessments to continue to fund the level of service that has been calibrated for single fire protection services throughout the Tracy area and to those revenues.

However, in a section titled "Implementation Strategy," the Commission directed the City and the District to complete a plan regarding the governance model for the City's Fire Department and the District within 18 months. All subsequent annexation requests were then to be consistent with the approved plan. One reason for this directive was a concern that San Joaquin County (County) was losing revenue due to annexations occurring without detaching from the District.

The City prepared a 2014 governance report that analyzed three options: (1) maintain the status quo (annexation of territory to the City without detachment from the District); (2) require existing and/or future annexed territories to detach from the District; and (3) annex the City into the District.

In 2017, the JPA conducted a study evaluating three potential governance options. The three options considered were: (1) the City detach from the District; (2) the City annex into the District; and (3) reconstitute and strengthen the JPA. The JPA concluded the third option was the best.

In February 2018, the JPA was dissolved and a new JPA was formed to allow the City and the District to resolve outstanding financial and operational issues while also allowing them to continue to combine their resources and personnel to continue providing fire protection services through a single entity.

The new JPA submitted a governance review in December 2018 regarding the option chosen, noting that one of the primary drivers of the creation of the JPA was the strategy for the City to not detach from the District when annexations occurred. This allowed the areas that were annexed by the City to maintain the District taxing authorities at their current levels in perpetuity.

The review also identified two new annexation proposals, the Avenues with 250 homes and Tracy Village with 575 homes, for which annexation would be proposed without detachment from the District, and stated that detachment could delay the opening of future fire stations and impact service levels.

The review significantly noted that LAFCO's initiation of the governance discussion in 2011 because of the concern that the County was losing revenue due to a loss of opportunity for the County to redistribute (to itself) ad valorem property taxes when an annexation occurs without detachment "does not fall within LAFCO's purview." The review further noted that a second concern of LAFCO, that the City was not providing full municipal services to its residents unless detachment occurred, was also not "within their purpose, authority, or purview."

In response to the review, LAFCO wrote a letter to the City responding to the City's annexation proposal for Tracy Village and requiring the City to complete a plan regarding the governance for the City's Fire Department and the District subject to the approval of LAFCO and further requiring that all subsequent annexations requests must be consistent with that plan.

LAFCO's concern was that pursuant to a 2012 tax sharing agreement between the City and the County, annexations would allocate between 80 to 90 percent of the tax revenues to the County, with those that involve a consolidated fire district receiving 90 percent. According to LAFCO, by not detaching from the District or forming a consolidated fire district, the County had a significant loss of revenue in the 12 prior annexations of about $74 million.

On April 22, 2019, LAFCO held a special meeting on the detachment issue. The LAFCO Executive Officer Glaser submitted a report to the commissioners, explaining that the matter before San Joaquin LAFCO was the LAFCO 2011 requirement to come up with a plan to determine whether future annexations to the City should be detached from the District and to require subsequent annexation proposals to be consistent with that plan. Glaser interpreted this to mean that LAFCO had to decide the detachment issue in general before it could process or consider any specific annexation proposals.

Turning to detachment as a model, Glaser explained that the District's share of the property taxes would be divided between the City and the County under the tax sharing agreement. Glaser argued that the County needed that share of the property taxes

for increased service needs as a result of development, including health services, social services, enforcement, parks and recreation. He further stated that detachment was the model used by the cities Stockton, Lodi, and Manteca.

Glaser then argued that cities, not special districts, are "clearly" the most capable of providing funding for fire protection services because they have more financial resources available to devote to fire protection. He further argued that there should not be overlapping spheres of influence, but rather the LAFCO governing act declares that a single multipurpose agency is accountable for government services in a better manner and especially for urban areas.

In response the City's finance director Schneider argued that the current model provided the best fire service in the County and asked LAFCO move forward on the two annexation proposals, which she characterized as being held for "ransom" until there was some type of agreement with Mr. Glaser regarding detachment. She further pointed out that LAFCO's primary focus should be on fire service and asked LAFCO to postpone the detachment policy consideration. She pointed out that the detachment proposal would cause the City and District t lose a 3 percent assessment district that was helping fund fire services.

The City's fire chief Bradley stated that the current JPA was a very high-performing model from a service delivery perspective, with strategically located fire stations that are well-staffed and well-equipped, able to attract businesses desiring annexation.

Resolution 1402

LAFCO then adopted Resolution No. 1402 by unanimous vote, adopting the model requiring that future annexations to the City of Tracy will detach from the Tracy Rural Fire Protection District.

The District filed a petition for writ of mandate, contending that LAFCO did not have authority to adopt the Resolution. The trial court disagreed, concluding that LAFCO had expansive powers to encourage the efficient provision of government services.

The Court of Appeal's Decision

The Court of Appeal, applying the deferential traditional mandate standard applicable to quasi-legislative acts, held that the Resolution failed to follow the law and exceeded LAFCO's authority under it governing act.

LAFCO's Authority under Cortese-Knox

LAFCO's authority is governed by the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Act). The Act encourages planned, well-ordered, efficient urban development patterns with appropriate consideration of preserving open-space and agricultural lands within those patterns. It should discourage urban sprawl and encourage the orderly formation and development of local agencies based upon local conditions and circumstances.

The Act recognizes that the logical formation and determination of local agency boundaries is an important factor in promoting orderly development and in balancing that development with sometimes competing state interests of discouraging urban sprawl, preserving open-space and prime agricultural lands, and efficiently extending government services.

The Act declares that a single multipurpose governmental agency that is accountable for community service needs and financial resources may be the best mechanism for establishing community service priorities especially in urban areas.

However, also recognizing the critical role of many limited purpose agencies, especially in rural communities, the Act also declares that, whether governmental services are proposed to be provided by a single-purpose agency, several agencies, or a multipurpose agency, responsibility should be given to the agency or agencies that can best provide government services.

Being a creature of the Legislature exercising legislative functions, a LAFCO has only such powers as are bestowed upon it by the Act. A LAFCO has the discretionary power to review and approve, disapprove and apply conditions to applications for government changes in organization such as annexations, but a LAFCO does not have the power to bring applications for annexation or detachment on its own.

While resolution No. 1402 was issued against the backdrop of the two annexation proposals noted in the JPA's 2018 governance review, i.e., annexation of the Avenues and Tracy Village, San Joaquin LAFCO was not reviewing either of those proposals when it issued the challenged resolution. Indeed, as

Executive Officer Glaser made clear at the special meeting, those proposals would not be processed or considered until a decision was made with respect to detachment. The proposals would then have to be consistent with that decision, or they would not be considered at all.

Here, the City initially proposed annexation of the Avenues and Tracy Village without detachment from the District. Had San LAFCO accepted these proposals for consideration, amended them to detach the District, and approved the amended proposals, the Court of Appel "would have no difficulty affirming that decision, assuming, of course, that it was supported by substantial evidence."

Conclusion and Implications

This opinion by the Third District Court of Appeal confirms that a LAFCO is not a policy making body, but must act on specific proposals. However, the opinion indicates that a LAFCO can implement policy on an individual application basis by amending applications to achieve that policy, assuming the amendments are supported by substantial evidence, a burden that can be met by appropriate expert governance and financial analysis. The court's opinion is available online at https://www.courts.ca.gov/opinions/documents/C095083.PDF
(Boyd Hill)

2022 YEAR-END LEGISLATIVE WRAP UP

The 2022-2023 Legislative Session has now come to a close and a number of bills related to land use have been signed by the Governor. The following bill summaries reflect bills that have been signed by the Governor. Bills that were tracked but did not make it to the Governor's desk or were vetoed are listed at the end, if any. As expected, several bills addressed affordable housing, including changes to density bonus law and accessory dwelling unit (ADU) law.

Unless otherwise noted, all bills signed by the Governor will go into effect on January 1, 2023.

Surplus Land

•AB 2625 (Ting)—This bill was approved by the Governor and Chaptered by the Secretary of State on August 29, 2022. The new law amends the Subdivision Map Act and exempts the leasing of, or the granting of an easement to, a parcel of land, or any portion of the land, in conjunction with the financing, erection, and sale or lease of an electrical energy storage system on the land, if the project is subject to discretionary action by the advisory agency or legislative body. For the purposes of this new law, "energy storage system" has the same meaning as defined in Section 2835 of the Public Utilities Code.

General Plans

•AB 2094 (Rivas)—This bill was approved by the Governor and Chaptered by the Secretary of State on September 29, 2022. This new law requires a city or county's annual report (APR) to the Department of Housing and Community Development (HCD), which requires, among other things, the city or county's progress in meeting its share of regional housing needs, to include the locality's progress in meeting the housing needs of extremely low income (ELI) households.

•AB 2339 (Bloom)—This bill was approved by the Governor and Chaptered by the Secretary of State on September 28, 2022. This new law revises the requirements of the housing element in connection with zoning designations and emergency shelters. Specifically, the new law: (1) expands the definition of emergency shelters to include "other interim interventions, including, but not limited to, a navigation center, bridge housing, and respite or recuperative care," (2) specifies that a local government may justify permitting emergency shelters in non-residentially zoned sites that permits residential use if the site is located near health care, transportation, retail, employment and social services, (3) allows a local government to accommodate the need for emergency shelters on sites owned by the local government if it demonstrates with substantial evidence that the sites will be made available for emergency shelter during the planning period, they are suitable for residential use, and the sites are located near amenities and services that serve people experiencing homelessness, which may include health care, transportation, retail, employment, and social services, or that the local government will provide free transportation services or offer services onsite; (4) amends the "no net loss" policy by clarifying the definition of "unaccommodated portion of the regional housing need" to mean "means the portion of the local government's regional housing need from the prior planning period that is required to be accommodated onsite zoned or rezoned pursuant to Section 65584.09" as well as other changes.

Accessory Dwelling Units

•AB 916 (Salas)—This bill was approved by the Governor and Chaptered by the Secretary of State on September 28, 2022. This new law adds a new Section 65850.02 to the Government Code and prohibits a city or county legislative body, with respect to land zoned for residential use, from adopting or enforcing an ordinance requiring a public hearing as a condition for reconfiguring existing space to increase the bedroom count within an existing dwelling. This provision is to be applicable only for permit applications of no more than two additional bedrooms and is to not to be construed to prohibit a local agency from requiring a public hearing for a proposed project that would increase the number of dwelling units within an existing structure.

•SB 897 (Wieckowski)/AB 2221 (Quirk-Silva)—This bill was approved by the Governor and Chaptered by the Secretary of State on September 28, 2022. The new law makes numerous substantive changes to laws governing accessory dwelling units (ADUs) and junior accessory dwelling units (JADUs), as specified.

For example, it increases the minimum ADU height limit that a local agency may impose, as follows: a) For ADUs attached to a primary dwelling, the law increases the minimum height limit from 16 feet to the lower of 25 feet or the local agency's applicable height limit; b) For a detached ADU within a half-mile walking distance of a major transit stop or a high quality transit corridor, it increases the minimum height limit from 16 feet to 18 feet for a detached ADU and requires that a local agency must allow an additional two feet in height to accommodate a roof pitch on an ADU that is aligned with the roof pitch of the primary dwelling unit; and c) For detached ADUs that do not meet the criteria in (a) but are on a lot that has an existing multifamily, multistory dwelling, increases the minimum height from 16 feet to 18 feet. The law also defines "objective" standard to mean a standard that involves "no personal or subjective judgment by a public official" and that is "uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal." The law also adds that, if a permitting agency denies an application for an ADU or JADU, the permitting agency must return in writing a "full set of comments" to the applicant with a list of items that are defective or deficient and a description of how the application can be remedied by the applicant. The new law also adds "front yard setbacks" must yield to the extent necessary to enable the construction of an 800 square foot ADU with four-foot side- and rear-yard setbacks. The new law also make changes to JADU provisions, defining further that "within the walls" of a proposed or existing single-family dwelling includes garages.

Density Bonus

•AB 2334 (Wicks)—This bill was approved by the Governor and Chaptered by the Secretary of State on September 28, 2022. The new law amends Density Bonus Law to further define "maximum allowable residential density" or "base density" and dictates a method for determining the "base density" in terms of units in the many local jurisdictions where the general plan, specific plan or zoning does not provide dwelling unit per acre standard for density, to be "form-based" objective standards. The new law also provides that if the housing development is located in a "very low vehicle travel area," the designated county, the city, county, or city and county shall not impose any maximum controls on density. "Very low vehicle travel area" is generally defined as "an urbanized area, as designated by the United States Census Bureau, where the existing residential development generates vehicle miles traveled per capita that is below 85 percent of either regional vehicle miles traveled per capita or city vehicle miles traveled per capita." This new law also adds that a "housing development" includes "a shared housing building development," which is generally defined as a residential or mixed-use structure, with five or more shared housing units and one or more common kitchens and dining areas designed for permanent residence of more than 30 days by its tenants." It makes other substantive changes to Density Bonus law.

Affordable Housing

•AB 2295 (Bloom)—This bill was approved by the Governor and Chaptered by the Secretary of State on September 28, 2022. The new law provides that a housing development project be deemed an allowable use on any real property owned by a local educational agency, as defined, if the housing development satisfies certain conditions, including other local objective zoning standards, objective subdivision standards, and objective design review standards, as described. This new law does not take effect until Jan. 1, 2024, and the bill would require the Department of Housing and Community Development to provide a specified notice to the planning agency of each county and city on or before Jan. 31, 2023. The law sunsets Jan. 1, 2033.

•AB 1719 (Ward)—This bill was approved by the Governor and Chaptered by the Secretary of State on September 28, 2022. This new law is cited as "the Community College Faculty and Employee Housing Act of 2022" and authorizes a community college to establish and implement programs that address the housing needs to facilitate the acquisition, construction, rehabilitation, and preservation of affordable rental housing for faculty and community college district employees to allow them to access and maintain housing stability of "faculty or community college district employees." The term "faculty or community college district employees" is defined to mean any person employed by a community college district, including, but not limited to, certified and classified staff.

•AB 1695 (Santiago)—This bill was approved by the Governor and Chaptered by the Secretary of State on September 28, 2022. This new law would provide that any notice of funding availability issued by the Department of Housing and Community Development for an affordable multifamily housing loan program, such as the Building Homes and Jobs Act, the Multifamily Housing Program, and the Housing for a Healthy California Program. shall state that adaptive reuse of a property for affordable housing purposes is an eligible activity. The bill would define "adaptive reuse" for these purposes to mean the retrofitting and repurposing of an existing building to create new residential units, as specified.

Planning

•AB 2234 (Rivas)—This bill was approved by the Governor and Chaptered by the Secretary of State on September 28, 2022. This new law requires a local agency to post information related to "post- entitlement housing development permits" for housing development projects, process those permits in a specified time period depending on the size of the housing development (30 business days for developments with 25 homes or fewer or 60 days (for developments with more than 25 homes), respond within 15 business days after an agency receives an application by identifying any specific information from the published checklist that was missing from the application or else the application becomes "deemed complete" and establish a digital permitting system if the local agency meets a specific population threshold. The term "post-entitlement housing development permits" include building permits, demolition permits and permits for minor or standard excavation, grading or off-site improvements. In addition, the new law provides that a local agency's failure to comply with the specified timelines is a violation of the Housing Accountability Act (HAA), exposing the local agency to the attorney's fees, mandamus relief and potential fines provided by the HAA.

•AB 2668 (Grayson)—This bill was approved by the Governor and Chaptered by the Secretary of State on September 28, 2022. This bill makes numerous technical and clarifying changes to SB 35 (streamlined, ministerial approval of qualifying housing and mixed-use projects). It clarifies that an SB 35 project is not subject to a conditional use permit or any other non-legislative discretionary approval, provides that the inclusionary requirements apply to the base project before calculating any density bonus units, authorizes an SB 35 project to be located on a hazardous waste site if a local government has otherwise determined the site to be suitable for development or the site is an underground storage take site and has received a specified closure letter, provides that a local government shall not determine that a development seeking to use SB 35 or modify an SB 35-approved project is in conflict with its objective planning standards based on the absence of application materials, provided the application contains substantial evidence that would allow a reasonable person to conclude that the development is consistent with the objective planning standards and makes other changes, including changes clarifying existing law.

•SB 6 (Caballero)—This bill was approved by the Governor and Chaptered by the Secretary of State on September 28, 2022. This new law creates, until January 1, 2033, the "Middle Class Housing Act of 2022," which establishes a housing development project as an allowable use within a zone where office, retail, or parking are a principally permitted use, so long as the parcel is not adjacent to a parcel dedicated to industrial use, as specified. It also requires a housing development project to comply with specified requirements, including, but not limited to, the following: (1) that the density for the housing development meet or exceed the applicable density deemed appropriate to accommodate housing for lower income households under housing element law, (2) that the project must comply with all local zoning, parking, design, public notice or hearing requirements, local code requirements, ordinances, and permitting procedures that apply in a zone that allows housing at the density required by this bill, that all other local requirements for the parcel, other than those that prohibit residential use or allow residential use at a lower density than provided by this, and (3) that the project site is 20 acres or less, and is located within an urban area, as specified and (3) that the developer certifies that the project either is a public work or will pay prevailing wage and use a skilled and trained workforce for all levels of contractors, as defined in existing law, except as provided in the bill.

•AB 2097 (Friedman)—This bill was approved by the Governor and Chaptered by the Secretary of State on September 22, 2022. This new law prohibits a public agency from imposing a minimum automobile

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

California Environmental Quality Act

•SB 922 (Wiener)—This bill was approved by the Governor and Chaptered by the Secretary of State on September 30, 2022. This new law expands California Environmental Quality Act (CEQA) exemptions for specified transit, bicycle, and pedestrian projects, and extends these exemptions from 2023 to 2030. Specifically, this new law would exempt from CEQA, until January 1, 2030, active transportation plans and pedestrian plans, if the lead agency holds noticed public hearings and files an NOE with OPR. It further provides that for the SB 288 projects extends the January 1, 2023 sunset until 2030, and makes several substantive changes to SB 288 general requirements: a) Allowing a local agency, instead of requiring a public agency, to carry out the project and be the lead agency; b) prohibiting a project from inducing single-occupancy vehicle trips, adding additional highway lanes, widening highways, or adding physical infrastructure or striping to highways except as specified. It also makes substantive changes to individual SB 288 project exemptions and other changes.

Held in Committee or Under Submission

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

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P.O. Box 1135
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