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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

FIRST DISTRICT COURT OF APPEAL UPHOLDS GENERAL PLAN STANDARDS WHEN PROJECT APPLICATION DEEMED COMPLETE—RATHER THAN NEW STANDARDS RELEASED WHILE PROJECT APPROVAL WAS PENDING

By Veronika Morrison and Bridget McDonald

In the *published portion* of an opinion the First District Court of Appeal in *Save Lafayette v. City of Lafayette*, ___Cal.App.5th___, Case No. A164394 (1st Dist. Nov. 30, 2022) held that, in approving a residential housing development under the Housing Affordability Act, the City of Lafayette (City) properly applied the general plan and zoning standards that were in effect at the time it deemed the project application "complete." The court concluded the Permit Streamlining Act's statutory time limits did not deprive the City of its power to act on the application many years later, such that the project application must be treated as "resubmitted" and governed by later-adopted zoning standards.

Factual and Procedural Background

The Original Project

In March 2011, O'Brien Land Company, LLC (Applicant) applied for approval of the Terraces of Lafayette Project (Original Project)—a 315-unit residential apartment development located on a 22.27-acre site in the City of Lafayette. The Project included 14 residential buildings, a clubhouse, a leasing office, parking in carports and garages, and internal roadways.

The City notified the Applicant that its application was deemed complete on July 5, 2011. At that time, the underlying zoning of the Project site was designated to allow multi-family developments with a land use permit. The City certified an Environmental Impact Report (EIR) for the Project on August 12, 2013 (2013 EIR). The City's Design Review Commission, however, recommended that the Planning Commission deny the application for a land use permit.

The Alternative Project

The Applicant and the City subsequently considered a lower-density alternative to the Project, consisting of 44–45 single-family detached homes, public parkland, and other amenities (Alternative Project).

On January 22, 2014, the Parties entered into an Alternative Process Agreement that provided the City would "suspend" its processing of the Original Project while it processed the Alternative Project; but if the Alternative Project was not approved, the Applicant could terminate the Agreement and immediately resume the City's processing of the Original Project. The Agreement also stated that, because the Parties mutually agreed to toll processing the Original Project, the City had not failed to either approve or disapprove the Project under the Permit Streamlining Act (PSA), thus suspending the Act's "automatic approval" provision.

On August 10, 2015, the City approved the Alternative Project and certified its supplemental EIR (SEIR). In doing so, the City also adopted a general plan amendment and ordinance that changed the Project site's land use designation from Multi Family resident, which allowed 35 dwelling units per acre, to Low Density Single Family Residential, which allowed only two units per acre.

Save Lafayette's First and Related Lawsuits

On September 8, 2015, Save Lafayette filed a petition for writ of administrative mandate (2015

Lawsuit), challenging the approval of the Alternative Project based on alleged California Environmental Quality Act (CEQA) violations. In January 2016, the parties entered into a settlement agreement and petitioner dismissed the action with prejudice. The Applicant proceeded to demolish existing structures and trees on the Project site pursuant to its permits.

Shortly after, a referendum petition was filed to separately challenge the City's approval of the zoning ordinance that reduced housing developments to two units per acre. The City declined to repeal the ordinance or submit it to a vote. Petitioner thus sued, and the First Appellate District Court of Appeal ultimately held the City could not properly keep the referendum off the ballot. (*Save Lafayette v. City of Lafayette*, 20 Cal.App.5th 657, 662, 671–672 (2018).)

On June 5, 2018, the voters subsequently rejected the ordinance. The following month, the City adopted a new zoning ordinance that would now allow lot sizes more than three times larger than those the voters had rejected.

The 'Resumed' Original Project

On June 15, 2018, the Applicant notified the City that it was terminating their Agreement, withdrawing its application for the Alternative Project, and requesting that the City resume its review of the Original Project application, with modifications. The newly "resumed" Original Project slightly differed from the initial iteration, as it would preserve ten fewer trees and plant approximately 68 more new trees than originally planned. The Applicant's consultant thus prepared an addendum to the Original Project's EIR, which, after further analysis, City staff deemed appropriate.

In August 2020, the City certified the final Addendum and approved the Project. As part of its approval, the City determined the Project qualified as a housing development project for very low-, low-, or moderate-income households under the Housing Accountability Act (HAA). The HAA thus preempted any conflicting requirements with the City's Municipal Code and exempted the Project from certain findings typically required for permitting.

Save Lafayette's Second Lawsuit

In September 2020, Safe Lafayette filed a new suit alleging the Project was inconsistent with general plan and zoning requirements, and that an SEIR was required to adequately analyze several of the Project's impacts, including those related to special status species, wildfire risk, and mature tree destruction. The trial court denied the petition's CEQA claims on their merits, but nevertheless found that the 2015 Lawsuit did not bar petitioner from challenging the 2013 EIR. The court also concluded that, under the HAA, the Applicant was entitled to the benefit of the site's zoning in place at the time the Project application was deemed complete in 2011. Petitioner appealed.

The Court of Appeal's Decision

The First District Court of Appeal affirmed the trial court's decision. In the *published portion* of the opinion, the court held that, in harmony with the principles of the HAA, the PSA's time limits did not strip the City of its power to act on the Project application and that the general plan and zoning standards in effect at the time the application was deemed complete in 2011 still applied.

Permit Streamlining Act and Housing Affordability Act

Recognizing the undisputed facts that the Project was consistent with the general plan and zoning designations in 2011, and inconsistent with the designations in effect in 2018 when the applicant asked the City to resume processing its original application, the appellate court rejected petitioner's argument that the application was deemed "disapproved" once the statutory time limit under the PSA passed.

The court explained that the PSA does not permit consideration of a project to be suspended in the manner contemplated by the Agreement between the City and the Applicant. For the purposes of its analysis, the court therefore assumed that the years-long delay following the Agreement violated the PSA. The court emphasized, however, that this assumption was not dispositive of whether the City's "substantially complete" determination lapsed under the PSA. Moreover, the court explained that, under the PSA, an agency's failure to act on an application within the statutory time limits results in a project being deemed approved if notice requirements are met—not disapproved, withdrawn, or resubmitted.

The court further elaborated that any "resubmittal" of an application under the PSA refers to resubmission in response to a notice that an application is

incomplete, after which the agency must assess the application's completeness within 30 days. This rule therefore did not apply here because the City deemed the Original Project application "complete" in 2011. As such, resubmission was not required, and no re-evaluation of the application's completeness occurred.

The court rejected petitioner's construction of the PSA because it conflicted with the statute's express provision that an agency must specify the reasons why it disapproved a development, other than failure to timely act. Here, any "disapproval" would have been improperly silent under the PSA because the City never specified its reasons for initially disapproving the Project.

Lastly, the First District highlighted the interaction between the PSA and HAA, particularly based on the specific facts at bar. Notably, the HAA promotes the development of housing. Therefore, in the context of the PSA, the HAA's principles weigh in favor of finding that the date the City deemed the application "complete" was when the City actually made that determination in 2011, rather than some later date. This is particularly compelling given that the City later significantly reduced the allowable amount of housing that could be developed on the Project site. The court rejected petitioner's argument that this construction of the PSA conflicts with the California Legislature's subsequent prohibition on waiving the PSA's strict time limits, which it did in response to the Supreme Court's decision in *Bickel v. City of Piedmont*, 16 Cal.4th 1040 (1997). The court explained that the Legislature did not intend for an agency to lose power to act on an application after the time limits have passed and that petitioner failed to provide any legal authority to the contrary.

The court therefore held that the Project's inconsistencies with the general plan and zoning designations that were in effect in June 2018 were immaterial. Rather, the City properly applied analyzed the Project's consistency with those in effect in 2011—*i.e.*, when the City first deemed the development application "complete."

In an *unpublished* portion of the opinion, the court likewise rejected petitioner's CEQA challenges, concluding that the EIR and modified Project description were adequate, and that an SEIR was not required to address the new numbers of trees that would be preserved and planted.

PSA Context

The court rejected petitioner's argument that, because the PSA requires projects to be approved or disapproved within specific times—e.g., the longest of which is 180 days after an EIR is certified, plus one extension for up to 90 days—the 2013 EIR was "stale" and an SEIR was required. The court reasoned that CEQA's statute of limitations for challenging an EIR begins to run only when the agency files its notice of determination after approving a project, which does not prevent an agency from allowing substantial time to elapse between its decision to certify an EIR and approve the project. Further, the court explained that the Legislature forbids it to impose requirements—such as a 180- or 270- day limit on a Project's approval following certification of an EIR—beyond those explicitly stated in CEQA.

Special Status Species

The court rejected petitioner's arguments that the presence of protected species seen at or heard from the Project site constituted new information requiring an SEIR. The court explained that the EIR appropriately anticipated the occasional presence of special status species, as no special status species were determined to inhabit the Project site. The court also rejected petitioner's attacks of the EIR's underlying analysis, concluding that the fact that the Project site contains habitat suitable for special status species does not amount to new information justifying preparation of an SEIR.

Wildfire Risk

The court rejected petitioner's challenge to the EIR's wildfire risk analysis because it was based on a factually mistaken interpretation and misreading of the EIR. First, the site's re-designation to Very-High hazard went into effect several weeks before the EIR was certified—thus factually debunking petitioner's assertion that the site was re-designated after the EIR's certification. Second, petitioner misread the EIR by claiming attacking its conclusion that wildfires were not a significant risk because the Project does not include any Very High-Risk areas. To the contrary, the EIR concluded that the measures required to address the area's High-Risk designation are what rendered impacts less than significant—not the outdated High-Risk designation itself. Moreover, the

EIR concluded that the Project would not interfere with emergency response and evacuation plans.

The court further explained that courts analyzing whether new information exists necessitating an SEIR look to the physical characteristics and actual environmental effects of a project—not mere regulatory changes. As such, the Project site's re-designation did not warrant an SEIR, nor did it render the environmental setting description deficient, because the changed designation did not relate to the EIR's description of the Project site's *physical* conditions.

Tree Removal

The court finally held that the Project's removal of ten additional protected trees beyond that contemplated by the Original Project did not render the EIR's project description inaccurate and did not require an SEIR. The court found it sufficient that the addendum's new mitigation measure of planting additional replacement trees would result in similarly significant and unavoidable impacts as those identified in the 2013 EIR.

Conclusion and Implications

The First District Court of Appeal's decision provides guidance on the interpretation of, and interaction between, the PSA and the HAA. Specifically, it clarifies that the failure of an agency to act on an application within the PSA's time limits does not result in the application being deemed disapproved, especially in the context of applications for affordable housing developments. Moreover, the court's opinion indicates that agencies and applicants cannot unilaterally agree to "suspend" the processing of an application to toll or bypass the PSA's time limits. Finally, and though part of an unpublished portion of the opinion, the PSA's statutory deadlines do not alter the existing procedural or statutory requirements of CEQA. A copy of the First District Court of Appeal's opinion is available at: https://www.courts.ca.gov/opinions/documents/A164394M.PDF.

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LAND USE NEWS

FEDERAL GOVERNMENT TO PROVIDE $250 MILLION IN FUNDING TO LOCAL AGENCIES FOR SALTON SEA RESTORATION PROJECTS

In late November, southern California's Imperial Irrigation District (IID) officially announced that they would be partnering with the U.S. Department of the Interior, the California Natural Resources Agency, and the Coachella Valley Water District in an effort to clean up the dilapidated Salton Sea (Sea).

The Sea has been hit particularly hard by the effects of climate change and persistent drought, so much so that the nearby communities have even experienced health problems caused by algae blooms and dust storms due to wins kicking up drying sediment along the Sea's widening shores. The new partnership plans to alleviate some of these problems with $250 million in funding from the federal government. These funds will go towards environmental restoration projects, including air quality improvements, public health programs, and ecosystem restoration projects, with the local agencies providing the land necessary for the implementation of such projects and the California Natural Resources Agency assisting in the permitting processes.

The State of the Salton Sea

Occupying nearly 350 square miles of southern California's Riverside and Imperial counties, the Salton Sea is California's largest lake by surface area, dwarfing even Lake Tahoe—California's largest *fresh water* lake—which has a surface area just under 200 square miles. The Sea's formation is also an anomaly itself, as it was originally formed over an old and empty lakebed in 1905 when Colorado River floodwaters breached an irrigation canal being constructed in the Imperial Valley. This flooding filled the area then known as the Salton Sink, and the Sea has since been maintained by irrigation runoff from the Imperial and Coachella valleys—largely fueled by Colorado River water—and local rivers.

As the Salton Sea is a terminal lake, meaning there are no outflows from the lake, the Sea has faced increasing salinity and other water quality issues, including temperature extremes, eutrophication, and related anoxia and algal productivity. Salinity levels in the Sea have reached such high levels that they exceed those of the Pacific Ocean by 50 percent. In fact, salt levels are so high that the Sea's sole native fish is the desert pupfish, a fish known for its capacity to resist the changing salinity levels in the Salton Sea and now classified as a federally endangered species.

Furthermore, climate change, water-conservation measures, and water transfer agreements shifting the use of Colorado River water have all led to a decrease in irrigation runoff that previously fed the Sea. With less irrigation runoff, the Salton Sea has experienced increased evaporation, exposing dry lakebed saturated in contaminants such as pesticides and farming byproducts. These contaminants are then kicked up into the air as toxic dust clouds and the communities surrounding the Sea have suffered disproportionately from negative health effects as result, including asthma and other respiratory conditions, allergies and nosebleeds.

Funding for Restoration Projects

The multi-agency partnership will take aim at addressing these concerns and will also focus on meeting the contingency placed on the funding—namely that the state must conserve 400,000 acre-feet of Colorado River water each year starting in 2023.

The first $22 million will be provided by the Department of the Interior's Bureau of Reclamation between now and the end of the summer of 2023 for restoration projects around the Salton Sea, research on current and future cleanup projects, and to hire two representatives from the Torres Martinez Desert Cahuilla Indian Tribe to help implement those projects. The rest of the funding, $228 million in total, will be contingent on the state following its commitment to conserve 400,000 acre-feet of Colorado River water annually. Per the terms of the partnership's agreement, this will require IID to conserve 250,000 acre-feet of Colorado River water per year as part of the state's larger goal.

Conserving that much water, however, will only exacerbate the problems the partnership seeks to remediate. An IID projection shows that by 2027, the required conservation measures will expose an additional 8,100 acres of dry shoreline. It is the aim of the partnership, however, for the additional $228 million in funding to not only mitigate these impacts, but to help restore the Salton Sea beyond any mitigation efforts. The agreement involves expanding and expediting existing projects that will flood portions of the lakebed to protect human health by limiting dust emissions while also providing increased aquatic habitat.

Additionally, the California Natural Resources Agency agreed to accelerate any permitting processes. Although most lakes fall under the jurisdiction of their state, the Salton Sea's lakebed is broken up into a large puzzle of separate landowners, creating the need for expedited land access as land access issues have historically popped up as an obstacle in the way of restoration efforts. To this end, both IID and Coachella Valley Water District have also pledged that they would provide expedited land access for the projects.

Conclusion and Implication

The Salton Sea's condition has grown worse and worse over the past decade and is well on its way to becoming nothing more than a toxic cesspool of agricultural waste. Furthermore, the state's persistent drought is accelerating that process, making it all the more important to get these restoration projects going in any fashion. Even if more can be done—or needs to be done—to keep the Salton Sea from becoming a wasteland, the efforts undertaken by the Department of the Interior, Imperial Irrigation District, Coachella Valley Water District, and the California Natural Resources Agency in this agreement put pen to paper and creatively combine two of the region's major efforts in one agreement: water conservation efforts and restoration projects in and around the Salton Sea. Although most of the funding is conditioned on IID's conservation of 250,000 acre-feet of water each year, assuming this goal is met and the funding is provided, the partnership's efforts could result in impactful projects to clean up the Salton Sea and at least slow the decline of the health of both the lake and its surround communities.
(Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

IN A MAJOR REGULATORY STEP, FERC APPROVES REMOVAL OF FOUR DAMS ON THE KLAMATH RIVER

On November 17, 2022, the Federal Energy Regulatory Commission (FERC) issued an order approving the surrender of license and removal of project facilities for four dams on the Klamath River. The four dams—the J.C. Boyle Dam, Copco Dam No. 1, Copco Dam No. 2 and Iron Gate Dam—restrain the lower reaches of the Klamath River. Owned and operated by PacifiCorp, a subsidiary utility company of Berkshire Hathaway Energy, the dams were built to provide hydroelectric power to customers in California and Oregon. Stakeholders in the effort to remove the dams include PacifiCorp, the states of California and Oregon, and the Yurok and Karuk tribes, and a number of environmental interest groups, including American Rivers, California Trout, Northern California Council Federation of Fly Fishers, Salmon River Restoration Council, Sustainable Northwest, Trout Unlimited, and Pacific Coast Federation of Fishermen's Association.

Background

The Klamath River runs through southern Oregon and northern California before emptying into the Pacific Ocean near the town of Klamath, California. Prior to the arrival of European settlers during the California Gold Rush in the 1840s and the construction of the dams in the following century, the Yurok and Karuk tribes populated the region and fished the Klamath River. The salmon from the Klamath River was a primary food source for the Tribes and holds great cultural significance. Between 1903 and 1964, a number of dams were built on the Klamath River as part of the Klamath River Hydroelectric Project (Klamath Project). Both Tribes—already decimated and displaced by European settlement—were severely impacted by the damming of the Klamath River. In addition to blocking the passage of anadromous fish to the upper reaches of the Klamath River, the dams slow the flow of the river, which results in higher water temperatures that increase the mortality of fish eggs and the growth of toxic algae blooms. A massive die-off of salmon in the lower reaches of the Klamath River in 2002 has been attributed to these effects.

FERC Relicensing Leads to Decision to Allow Removal of Klamath Dams

FERC has responsibility for licensing and inspecting hydroelectric projects such as the Klamath Project. FERC issued the original license for the Klamath Project in 1954, and the license expired in 2006. PacifiCorp has been operating the Klamath Project under an annual license since that time. In 2004, PacifiCorp filed an application to relicense the Klamath Project. The final Environmental Impact Statement (EIS) for the relicensing of the Klamath Project issued in 2007. The EIS recommended issuing a new license, but recommended that the new license include mandatory conditions from the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to mitigate environmental impacts. PacifiCorp determined that the costs of complying with such conditions would be cost-prohibitive. PacifiCorp thereafter asked FERC to put the relicensing application in abeyance and commenced negotiations with federal, state, and tribal authorities to consider alternatives to relicensing the four lower dams of the Klamath Project.

A number of parties reached an agreement to remove the four dams in February 2010. In April 2016, the states of California and Oregon, the U.S. Department of the Interior, PacifiCorp, NMFS, and the Yurok and Karuk Tribes entered an amended settlement agreement whereby PacifiCorp would seek permission from FERC to transfer the four dams to a new entity called the Klamath River Renewal Corporation (Renewal Corporation), a nonprofit established to oversee dam removal and river restoration. The Renewal Corporation is funded by contributions from the states of California and Oregon, as well as rate surcharges on PacifiCorp customers. The Renewal Corporation's board of directors are appointed by various stakeholders, including the states of Califor-

nia and Oregon, the Karuk and Yurok Tribes, and a number of environmental interest groups.

FERC required PacifiCorp to remain a co-licensee to assure sufficient funding and responsibility for the surrender and removal process and any impacts therefrom. PacifiCorp resisted this requirement, fearing the effect of such continued, open-ended involvement on its rate-payers. Following further negotiations, the states of California and Oregon agreed to step in as the co-licensee with the Renewal Corporation in place of PacifiCorp. While the parties negotiated the co-licensee issue, PacifiCorp and the Renewal Corporation submitted a new application to surrender the license.

FERC approval of the license surrender has involved a litany of approvals from and coordination with other federal and state regulators. FERC prepared an EIS with cooperation from the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency. The final EIS was issued on August 26, 2022. In consultation with FWS and NMFS, FERC prepared a Biological Assessment pursuant to Section 7 of the federal Endangered Species Act. FERC also engaged in consultation with NMFS to review adverse effects on Essential Fish Habitat under Section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act. The Renewal Corporation received water quality certifications from the Oregon Department of Environmental Quality and the California State Water Resources Control Board pursuant to the federal Clean Water Act (CWA). In February 2022, the California Coastal Commission has determined that the dam removal would not have a substantial effect on California's coastal zone. The National Park Service, U.S. Forest Service, and the U.S. Bureau of Land Management determined that dam removal was consistent with Section 7 of the Wild and Scenic Rivers Act. The Renewal Corporation has also applied to the Corps for a dredge-and-fill permit pursuant to Section 404 of the CWA. That application remains under consideration.

Based on these regulatory actions, as well as review and analysis of other federal, state, and local requirements, FERC found that dam removal is in the public interest. FERC granted the license surrender application and approved the removal of the four dams. Although the Section 404 permit application remains under consideration with the Corps, dam removal is expected to start in summer 2023, with Copco Dam No. 2 the first dam scheduled to be razed. Renewal Corporation expects the removal of all four dams to be completed by the end of 2024.

Opposition to the Projects

Removal of the dams is not without opposition. Farmers and municipalities that rely on the Klamath River for irrigation and drinking water expressed concerns about the effect of dam removal on water deliveries. Others have expressed concern with the loss of flood control and fire protection, the release of downstream sediments and toxic material as a result of the removals (including potential Clean Water Act violations), the impacts on recreation, and the potential destruction of wildlife habitat.

On December 3, 2022, the Siskiyou County Water Users Association (SCWUA) filed a complaint in the Siskiyou County Superior Court seeking an injunction against the State of California to stop the dam removal project on the basis that removal will result in sedimentation and channel modifications in violation of the federal Wild and Scenic River Act. At this early stage of the litigation, it is unclear what effect it may have on the removal effort.

Conclusion and Implications

The removal of the four dams on the lower reach of the Klamath River is seen by many as an important and long-sought victory for salmon and the Tribes that depend on them. Others remain skeptical about the consequences of removing the dams. A few hurdles remain, including local permitting, the pending Section 404 application, and a pending lawsuit. But many view FERC approval of the license surrender application as the final significant regulatory obstacle before dam removal can proceed.
(Brian E. Hamilton, Meredith Nikkel)

CALIFORNIA COASTAL COMMISSION APPROVES SUBSTANTIAL DESALINATION PROJECT

The California Coastal Commission (Commission) recently approved a consolidated Coastal Development Permit (CDP) to support the construction of a desalination plant in Marina, California and its source water wells located beneath the Monterey Bay seafloor. Approval of the permit was conditioned on limiting the harm to dunes and wetlands, groundwater stores and local communities.

Background

Western states continue to face an extended period of drought conditions, which increasingly impacts available drinking water supplies. For the past three years, California has faced some of the driest years on record with another dry year currently anticipated in 2023. In an effort to bolster local drinking water supplies, water suppliers and stakeholders continue to explore and advance construction of desalination plants. There are currently just four desalination facilities providing drinking water in the state.

Two proposed plants recently received Commission approval. One of the facilities is the California-American Water Company (Cal-Am) development located in Marina, California. Cal-Am intends to use this plant to bolster local supplies following recent directives from the California State Water Resources Control Board to cease diverting excess water from the Carmel River.

The Project Summary

Cal-Am proposes to construct and operate desalination components of its overall Monterey Peninsula Water Supply Project that would consist of a desalination facility, a well field, water transmission pipelines, pump station and other related infrastructure. The desalination facility will be located inland in the City of Marina with slant wells located partially in the CEMEX sand mining facility and produce initially about 4.8 million gallons of water per day (mgd). At full scale, the facility would produce 6.8 mgd. The intake wells will be located beneath the Monterey Bay seafloor. The brine will be discharged through an existing outfall after modification. Ratepayers in the Monterey Peninsula (Carmel-by-the-Sea, Pacific Grove and Pebble Beach) and the City of Castroville would receive the desalinated water.

Discussion and Differing Views

Elected officials, state agencies and local businesses have expressed support the approval of the desalination facility in order to develop drought-resistant water supplies. The Monterey Peninsula relies exclusively on groundwater, the Carmel River, and highly treated wastewater for its supplies. Additionally, regulators believe the new source will assist with easing housing shortages in the region. Because of the area's limited water supply, parts of the peninsula have been under a moratorium for new water connections for over a decade.

While the project aims to resolve water security issues, project opponents have voiced concerns. First, opponents assert the project raises environmental justice issues for designated disadvantaged neighborhoods within the City of Marina and that city residence should receive water from the facility. Opponents also assert that construction and operation of the facility may cause environmental impacts including to sensitive species, wetlands and vernal pools, and that the intake wells could degrade groundwater supplies and cause saltwater intrusion into the aquifer.

Project estimates peg the cost of the desalinated water supplies to be approximately $6,000 per acre-foot. Project proponents point to the reliability of and need for these additional supplies. Opponents assert that additional recycled water should instead be pursued.

Coastal Commission Approval

Commission staff (Staff) recommended approval of the permit based on the addition of 20 special conditions. Staff found that uncertainty surrounding the groundwater, environmental and environmental justices concerns can be addressed through a number of prior-to-issuance conditions. To address the sensitive species concerns, Staff required closure of areas during certain periods of the year, biological and habitat monitoring, compensatory mitigation for habitat, and establishment of conservation easements for dune

habitat. Regarding protection of water resources, Staff required the production of a groundwater monitoring plan and a wetlands and vernal pool adaptive management plan. Staff further required Cal-Am to annually produce an environmental justice report providing the status of project-related measures to reduce costs to low income-ratepayers and a community engagement plan for the residents and representatives of the City of Marina.

During the public hearing for consideration and approval of the permit, the Commissioners modified some of the conditions and imposed additional obligations. Per the Commission, Cal-Am must update plans for assisting low-income ratepayers and cap monthly water rate increases for eligible customers. Additionally, the Commission requires Cal-Am to pay $3 million to the City of Marina and fund employment of persons to oversee a public access and amenities plan.

Conclusion and Implications

Cal-Am originally proposed a larger desalination plant in 2020. At the time, Coastal Commision Staff recommended denial of the permit for the larger facility as Staff had identified the expansion of the water recycling facility as a feasible alternative. However, three years later, Staff have found that updated supply and demand models reasonably demonstrate the need to supplement existing supplies in the current 20-year planning period, with desalination comprising an integral component.

As drought conditions continue in California, it is likely that additional coastal cities will reevaluate their existing demand and supply models. While water recycling is an alternative, it is often inextricably linked to surface water supplies that vary from year to year. Cities facing water supply constraints will likely look to the development of new sources such as desalination. The Commission will continue to face complex environmental, resource, and environmental justice issues as demand for desalination likely increases. Future developers can glean some insight from the Cal-Am permit process as to what the Commission will require for the construction of additional desalination facilities.
(Christina Jovanovic, Derek Hoffman)

RECENT CALIFORNIA DECISIONS

FIFTH DISTRICT COURT FINDS CEQA CHALLENGE OF A NOTICE OF EXEMPTION FOR A DEPARTMENT OF TOXIC SUBSTANCES CONTROL CHEMICAL LISTING WAS UNTIMELY

American Chemistry Council v. Department of Toxic Substances Control, ___Cal.App.5th___, Case No. F082604 (5th Dist. Nov. 18, 2022).

In a decision filed November 18, 2022 but certified for publication on December 12, 2022, the Fifth District Court of Appeal reversed the trial court in finding that a chemical company's claims under the California Environmental Quality Act (CEQA), regarding the Department of Toxic Substances Control's (DTSC) issuance of a Notice of Exemption (NOE) were untimely. The court determined that the applicable 180-day statute of limitations began to run at the time the DTSC approved a hazardous chemical listing and this was not tolled while petitioner pursued administrative remedies that did not implicate any CEQA issues.

Factual and Procedural Background

In 2018, The California Department of Toxic Substances Control (DTSC) enacted a regulation listing spray polyurethane foam systems as a priority product under the state's "Green Chemistry Law." Priority products are those of highest concern due to health and safety risks and DTSC regulations prescribe a process such listings. In March of 2018, DTSC submitted its final regulatory package for the listing to the Office of Administrative Law, with the Office of Administrative Law approving the listing on April 26, 2018.

During the listing process, DTSC made a draft a NOE available indicating that the listing was exempt from CEQA under the commonsense exemption. DTSC received public comments stating that it was not "properly complying with CEQA as part of its overall regulatory process." However, the DTSC made no changes and formally issued the NOE when it issued its "final statement of reasons" in February of 2018. DTSC did not forward the NOE to the Office of Planning and Research and did not file the NOE with the county clerk, which would trigger a shorter 35-day statute of limitations.

On May 30, 2018, petitioner the American Chemistry Council administratively appealed the DTSC's listing, and DTSC formally rejected the appeal on February 25, 2019. Petitioner then filed a petition alleging that the DTSC exceeded its authority, that it failed to comply with the Administrative Procedure Act, and that the DTSC violated CEQA when it relied on the NOE in its listing. The trial court found the DTSC listing was within its legal authority and that DTSC complied with the APA. Regarding petitioner's CEQA claim, the trial court held that the CEQA claims were timely and that DTSC violated CEQA. The DSTC cross-appealed the trial court's CEQA holding.

The Court of Appeal's Decision

The Fifth District Court of Appeal upheld the trial court's findings that the listing was within the DTSC's authority and that it complied with the APA. Regarding petitioner's CEQA claim, the court determined that petitioner's claims were untimely filed outside of the relevant 180-day statute of limitations.

On appeal, neither party contested that CEQA's 180-day statute of limitation applied, they disagreed on when the 180-day limitations period began. Plaintiffs argued that the statute of limitations should only have begun to run after they exhausted their administrative remedies under the applicable Safe Consumer Products' regulatory structure or February 25,2019. DTSC argued that the 180-day period began to run when it issued the NOE in February of 2018.

The court first addressed whether petitioner's administrative appeal process tolled the statute of limitations until it was complete. In its review of prior case law, the court recognized that CEQA's exhaustion requirements only apply, and toll CEQA statutes of limitations, when a lead agency has adopted

administrative applicable procedures that invoke CEQA issues. The court determined that the DTSC appeal provisions did not implicate CEQA.

The court then analyzed when the statute of limitations had begun to run. The DTSC argued that even if it was not required to exhaust its administrative remedies before filing a CEQA action, the statute of limitations should not begin to run until after the regulatory appeal was complete. The court disagreed:

> . . .[t]he limitations period starts running on the date the project is approved by the public agency and is not retriggered on each subsequent date that the public agency takes some action toward implementing the project. . . .Under the CEQA Guidelines, 'approval' means the decision by the public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person.

Here, although the court agreed that the project was approved for CEQA purposes:

> . . .no later than the point at which the regulatory packet was approved and filed by the Office of Administrative Law.

By the time the OAL approved the regulatory packet, the DTSC had indicated that it believed the project was exempt from CQEA and released its final statement of reasons for the action. At this point the DTSC had "clearly made a firm commitment to its planned listing" thus triggering the statute of limitations under CEQA.

Conclusion and Implications

Although *American Chemistry Council* includes several pages of discussion regarding issues that do not implicate land use or CEQA matters, the decision's CEQA discussion is important because it makes clear that CEQA's statute of limitations runs from project approval. It is not tolled while a petitioner exhausts administrative remedies not implicating CEQA issues. The decision also provides helpful guidance as to when an "approval" occurs triggering CEQA limitations deadlines. A copy of the court's decision can be found here: https://www.courts.ca.gov/opinions/documents/F082604.PDF.
(Travis Brooks)

THIRD DISTRICT COURT UPHOLDS REGIONAL WATER BOARD'S CLEANUP ORDER THAT DIRECTED REMEDIATION OF HAZARDOUS WASTE ASSOCIATED WITH AN ABANDONED MINE

Atlantic Richfield Co. v. California Regional Water Quality Control Bd., 85 Cal.App.5th 338 (3rd Dist. 2022).

The California Regional Water Quality Control Board, Central Valley Region (Regional Board) issued a cleanup order (Cleanup Order), under Water Code § 13304, directing Atlantic Richfield Company (ARCO) to remediate hazardous waste associated with a now abandoned mine, which was owned by a subsidiary of ARCO's predecessors in interest (Subsidiary). Following remand from the Court of Appeal on a case involving the same Cleanup Order directing the trial court to apply the proper test on a parent's derivative liability for a subsidiary's hazardous waste, the trial court entered judgment in favor of the Regional Board finding that ARCO as a parent company was liable for the pollution of the Subsidiary. ARCO appealed on several grounds and the Court of Appeal affirmed the trial court's judgment.

Factual and Procedural Background

In March 2014, the Regional Board issued the Cleanup Order that sought to impose liability on ARCO for remediation of hazardous waste from a now abandoned mine, the owner of which was the Subsidiary. In June 2014, Arco petitioned the trial court to overturn the Cleanup Order. In January 2018, the trial court granted ARCO's petition. The Regional Board appealed contending that the trial

court applied the wrong legal standard to determine a parent's derivative liability for a subsidiary's hazardous waste. In September 2019, the Court of Appeal—in *Atlantic Richfield Co. v. Central Valley Regional Water Quality Control Bd.* 41 Cal.App.5th 91 (2019)—reversed the trial court finding that the trial court employed too restrictive a standard, and therefore remanded the matter to the trial court for reconsideration under the proper standard for a parent's derivative liability articulated in *United States v. Bestfoods,* 524 U.S. 51 (1998) (*Bestfoods*)—that of a parent company having eccentric control over any category of mining activity resulting in hazardous waste discharge.

On remand, the trial court entered judgment in favor of the Regional Board concluding the record supports a determination of the ARCO predecessors' eccentric control of mining operations resulting in the discharge of hazardous waste. ARCO's appeal then followed.

The Court of Appeal's Decision

On appeal, ARCO contended that: (1) the trial court improperly applied *Bestfoods* to the facts of this case, resulting in a finding of liability that is unsupported by substantial evidence; (2) the Regional Board abused its discretion by failing to exclude certain expert testimony as speculative; (3) the Regional Board's actual financial bias in this matter requires invalidation of the Cleanup Order for violation of due process; and (4) the Cleanup Order erroneously imposed joint and several liability on ARCO. Furthermore, in arguing the finding of liability was unsupported by substantial evidence, ARCO contended that the trial court erroneously denied its request for a statement of decision.

Substantial Evidence Supported ARCO's Derivative Liability

The Court of Appeal first addressed ARCO's claim that the trial court erred because substantial evidence did not support its finding of liability under *Bestfoods*. The Court of Appeal disagreed, finding that there was substantial evidence to support the trial court's conclusion that ARCO's predecessors directed operations at the mine specifically related to pollution, so as to subject ARCO to direct liability under *Bestfoods*.

ARCO contended that the evidence presented merely established a typical parent-subsidiary relationship of advice, consultation, and financial oversight that could not constitute eccentric control under *Bestfoods*. However, the Court of Appeal disagreed, finding that correspondence between ARCO's predecessors and the Subsidiary made clear that mining activity was being done at the active direction of the agents of ARCO's predecessors, which was precisely the sort of eccentric control that was at issue in *Bestfoods*, and which went beyond the activities typical of a parent-subsidiary relationship (*e.g.*, providing administrative assistance, offering financial and legal advice, and monitoring the activities of their investment).

ARCO further contended that even if its predecessors directed operations at the mine, the mining activities directed did not result in pollution, which would preclude liability under *Bestfoods*. Again, the Court of Appeal disagreed, finding that the activities directed by ARCO's predecessors were specifically related to the causes of pollution at issue in the Cleanup Order.

Request for Statement of Decision was Untimely

In arguing that there was no substantial evidence to support derivative liability, ARCO contended that the trial court erroneously denied its request for a statement of decision, which, pursuant to Code of Civil Procedure § 634, would not allow the Court of Appeal to imply any findings of the trial court in favor of the Regional Board. The Court of Appeal disagreed, holding that ARCO did not carry its appellate burden to demonstrate its request for a statement of decision was timely.

ARCO contended that its request was timely because under *Bevli v. Brisco,* 165 Cal.App.3d 812 (1985) (*Bevli*) the time the trial court spent reviewing the administrative record was included in trial time for purposes of making the threshold of determination of when the request for a statement of decision needed to be made under Code of Civil Procedure § 632. The Court of Appeal analyzed amendments made to Code of Civil Procedure § 632 after *Bevli* was decided and case law discussing same, and then called into question the continuing validity of *Bevli* and in turn ARCO's reliance on it. The Court of Appeal further found, that even assuming *Bevli* remains good law, ARCO did not carry its appellate burden to suf-

ficiently demonstrate on the evidence presented that its request for a statement of decision was timely.

Expert Testimony Before the Regional Board was Properly Admitted

The Court of Appeal next addressed ARCO's claim that the Regional Board abused its discretion by failing to exclude certain expert testimony and that therefore such could not support the trial court's liability finding. The Court of Appeal first explained that even without this challenged opinion testimony, the evidence was sufficient to support the trial court's finding of liability under *Bestfoods*, and accordingly was only addressing this contention solely as a claim of evidentiary error. This would only warrant reversal if there was an abuse of discretion in admitting the challenged evidence and a corresponding reasonable probability of a more favorable outcome had the evidence not been considered by the trier of fact.

The Court of Appeal stated its narrow role in deciding admissibility of expert testimony—which "[i]n short, [] 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field'"—and on that basis then factually determined that there was no abuse of discretion by the Regional Board in allowing the admission of the challenged expert testimony.

No Due Process Violation Because Regional Board Did Not Have Financial Bias

The Court of Appeal next addressed ARCO's argument that the Regional Board's actual financial bias in this matter requires invalidation of the Cleanup Order for violation of due process. The Court of Appeal disagreed. After analyzing the applicable case law on due process claims against adjudicators with financial interests in the outcome of a proceeding, the Court of Appeal found that here the asserted financial bias does not stem from the Regional Board imposing fines or penalties to fund its own executive functions (because the Cleanup Order did not impose a fine or penalty but rather only ordered remediation) and as such did not amount to a violation of due process.

ARCO also contended that because the State Water Resources Control Board (State Water Board) had been funding—from the State Water Pollution Cleanup and Abatement Account in the State Water Quality Control Fund (Fund)—the remediation activities at the mine in question that requiring ARCO to remediate provided the Regional Board with a strong financial incentive to issue the Cleanup Order. The Court of Appeal again disagreed, finding that the Fund was not controlled by the Regional Board and that there was no evidence the Cleanup Order benefits any fund or budget over which the Regional Board exercises any amount of discretion. Accordingly, ARCO's assertion of a due process violation from financial bias based on State Water Board funding (and the Fund) also failed.

Cleanup Order's Imposition of Joint and Several Liability was Appropriate

Finally, the Court of Appeal addressed ARCO's contention that the Cleanup Order erroneously imposed joint and several liability. ARCO argued that Water Code § 13304(a), which statutorily authorized the Cleanup Order, did not authorize making one party jointly and severally liable for all liabilities of all potentially responsible parties. The Court of Appeal found that nowhere in the statutory language does § 13304 say the polluting entity must clean up or abate only its proportionate contribution to the hazardous waste. Accordingly, the Court of Appeal held that the Regional Board was authorized to impose joint and several liability on ARCO in the Cleanup Order (but that to the extent ARCO cleans up more than its proportionate share of hazardous waste, ARCO can seek contribution from other parties it believes also contributed to the pollution).

Conclusion and Implications

The case is significant because it contains substantive discussion of a parent's derivative liability for a subsidiary's hazardous waste as well as of financial bias in the due process context and holds that imposition of joint and several liability on one party in a cleanup order issued under Water Code section 13304 is permissible. The case also calls into question prior case law on timeliness of requesting a statement of decision from the trial court. The decision is available online at: https://www.courts.ca.gov/opinions/documents/C093124.PDF.
(Eric Cohn)

SECOND DISTRICT COURT AFFIRMS LACK OF CLAIM FOR LOSS IN VALUE OF A SECURITY ALREADY ENCUMBERED BY A COASTAL DEVELOPMENT PERMIT

Farzam v. Anthony Mason Associates, Inc., Unpub., Case No. B311890 (2nd Dist. Nov. 21, 2022).

The Second District Court of Appeal in *Farzam v. Anthony Mason Associates, Inc.*, in an *unpublished* decision, affirmed the trial court's decision dismissing a complaint for negligent impairment of security when the security had already been impaired with a Coastal Development Permit (CDP) issued by the California Coastal Commission (CCC).

Factual and Procedural Background

In 2009, appellants' son—on behalf of the property owner—applied for, and the CCC authorized pursuant to a CDP, construction of a "low to moderate priced Travelodge." In 2011, appellants, Siroos and Gina Farzam, loaned $58 million (Loan) to their own entity, Sunshine Enterprises, L.P. (Sunshine), to finance construction of the Shore Hotel on Ocean Avenue in Santa Monica. The Loan is secured by a first deed of trust on the hotel. Sunshine built and operates the hotel.

Respondent Anthony Mason Associates, Inc. (AMA) is a manager hired to oversee construction of the hotel. AMA allegedly represented that it has extensive experience navigating the approval process and would oversee and coordinate planning approvals, building permits, and similar jurisdictional agency requirements. AMA promised to continually oversee the quality of work generated by the entire team throughout the duration of the project.

Relying on these assurances, Sunshine constructed the hotel under the alleged mistaken belief that Defendants had secured all appropriate permits, approvals, and authorizations from the City of Santa Monica and the CCC. Contrary to Sunshine's alleged belief, the permits were never issued.

On January 15, 2014, the CCC issued a Notice of Violation (NOV) of the California Coastal Act stating that no coastal permits had been issued for the demolition of two previous motels or for the construction of the Shore Hotel, and that, rather than the moderately priced Travel Lodge that had been conditionally permitted, the Shore Hotel was an unauthorized luxury boutique hotel that did not serve the Coastal Act's goal of assuring affordable overnight accommodations along the coast.

The NOV threatened a cease-and-desist order and penalties of up to $15,000 per day of violation. The CCC encouraged Sunshine to negotiate a resolution including payment of an appropriate penalty and conditions on future operation of the Shore Hotel designed to foster public access to the coast.

The CCC and Sunshine negotiated a resolution of their dispute. In May 2019, the CCC set the monetary penalty at $15,581,000, which Sunshine paid in August 2019. The CCC issued an after-the-fact coastal development permit (Second CDP) allowing Hotel to operate, subject to conditions that run with the land and are binding on future owners. One condition is that Sunshine is limited to charging $150 per night for 72 of Hotel's 164 rooms. Appellants allege, "These perpetual Conditions—caused by Defendants' negligent failures to timely obtain all required government agency permits and approvals—impaired the Farzams' security by significantly reducing the market value" of the hotel.

Sunshine and appellants filed suit in April 2020 against AMA, the contractor that built Hotel, and the architect who designed it. Appellants' sole claim against AMA is for negligent impairment of security.

At the Trial Court

AMA demurred. As to the impairment of security claim, AMA asserted that appellants failed to show the elements of actionable negligence because there is no duty of care, breach of a duty, causation, or injury. AMA asked the court to take judicial notice of the NOV as official government acts and records. The court granted the request for judicial notice.

At the hearing on the demurrer, counsel agreed that in 2009 the CCC conditionally authorized a CDP, which limited room rates, before appellants made the Loan.

The trial court sustained demurrers, without leave to amend. The court observed that there is no contract between appellants and AMA, and no facts

were alleged or could be alleged that would be beyond speculation that somehow the Loan has suffered some detriment. Appellants argued that loss in value of a security is a question of fact. The court noted that the room rate restrictions dated to 2009, so "this was always established, always going to be the deal," regardless of what the defendants did.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's decision upon *de novo* review, holding that appellant lenders cannot state a claim, because after their son obtained CCC approval of a low to moderate priced Travelodge; thus, appellants had no reasonable expectation their loan would be secured by a boutique luxury hotel.

Existing Impairment Under Prior CDP

Low to moderate room rates were a feature of Sunshine's application to build Hotel and were central to the CCC's authorization of a CDP in 2009, two years before appellants made the Loan.

The NOV shows that Michael Farzam signed an application in 2009, proposing to replace two small motels with a single limited-amenity moderate priced Travelodge Hotel that will increase the number of affordable moderate-priced guestrooms from 87 to 164.

His letter to the CCC states:

> [T]he Farzams, consistent with City and State policies for the Coastal Zone, elected to pursue a replacement moderately-priced Travelodge rather than yet another new luxury hotel in the Coastal Zone. The Farzams made this decision even though . . . a luxury hotel would be more profitable than a moderately priced Travelodge.

Coastal Act regulations required that the CDP application had to contain proof that all holders or owners of any interests of record in the affected property have been notified in writing of the permit application and each invited to join as a co-applicant Thus, before loaning $58 million, appellants had constructive knowledge of the limitations imposed by the publicly available CDP. The pleading does not show AMA had anything to do with the CDP.

On June 11, 2009, the CCC approved a CDP conditionally authorizing "demolition of two existing motels and construction of a low to moderately priced hotel." Michael Farzam agreed to the terms.

The NOV states:

> [R]ather than the affordable, moderately-priced Travelodge proposed in [the] CDP application and considered by the Commission, a 'luxury boutique' hotel was constructed on the properties.

The CCC wrote, "The fact that the applicant proposed an affordable, moderately priced hotel was central to the Commission's review of the project."

Amendment of the CDP would not have been possible. Coastal Act regulations require the Director of the CCC to:

> . . .reject an application for an amendment to an approved permit if he or she determines that the proposed amendment would lessen or avoid the intended effect of an approved or conditionally approved permit

Sunshine violated the CDP, created a luxury hotel, and charged high rates. The CCC discovered the bait-and-switch and held Sunshine to the terms of its agreement. This is not an unforeseeable impairment of appellants' security.

Furthermore, appellants were not damaged. They funded construction of a hotel with few amenities and 164 moderately priced rooms. Under the negotiated settlement with the CCC including the Second CDP, the Hotel has amenities and the low-to-moderate rate applies to 72 rooms, not 164 rooms.

Conclusion and Implications

This opinion by the Second District Court of Appeal is instructive in two respects. First, it demonstrates that coastal development permitting under the Coastal Act constitutes impairment of property value that cannot be restored without amendment of the permitting, if amendment can be allowed. Second, it demonstrates how judicial notice of certain public agency documents, including notices of violation, can be used to effectively establish facts to defeat a doubtful claim without having to bring a summary judgment motion or proceed to trial. The court's *unpublished* opinion is available online at: (https://www.courts.ca.gov/opinions/nonpub/B311890.PDF.
(Boyd Hill)

FIRST DISTRICT COURT FINDS SCHOOL'S INSTALLATION OF LIGHT TOWERS IN ITS ATHLETIC FIELD IS NOT EXEMPT FROM CEQA REVIEW

Saint Ignatius Neighborhood Association v. City and County of San Francisco, ___Cal.App.5th___, Case No. A164629 (1st Dist. Dec. 5, 2022).

The First District Court of Appeal in *Saint Ignatius Neighborhood Association v. City and County of San Francisco* reversed the trial court to hold that the proposed installation of four 90-foot light towers in a high school's athletic stadium was not exempt from review under the California Environmental Quality Act's (CEQA) Guidelines' Class 1 and 3 categorical exemptions.

Factual and Procedural Background

Saint Ignatius College Preparatory High School in the City San Francisco's Outer Sunset District. The school's 2,008-person capacity athletic stadium is located at the southeast corner of the campus and situated across the street from several two-story, single-family homes. In February 2018, the school submitted an application for approval of the installation of four permanent 90-foot-tall outdoor light "standards" (*i.e.*, towers) to its athletic field to enable nighttime use of the stadium.

In June 2020, the City's Planning Department determined that the project was categorically exempt from CEQA review under the Class 1 exemption for existing facilities (CEQA Guidelines § 15301) and the Class 3 exemption for new construction or conversion of small structures (CEQA Guidelines § 15303).

In July 2020, the planning commission agreed that the project is categorically exempt from CEQA review under both Class 1 and Class 3, and approved a conditional use authorization for the Project with several conditions, including that the lights: (1) be used no more than 150 nights per year; (2) be dimmed by 8:30 p.m. and turned off by 9:00 p.m.; (3) only be used for larger events until 10:00 p.m. no more than 20 evenings per year; and (4) not be used by groups unaffiliated with the school. The planning commission also required close communication with neighbors about events and the distribution of a large-event management plan and code of conduct for event attendees.

The board of supervisors affirmed the planning commission's exemption determination and approved the conditional-use authorization with stricter use conditions for the hours of light operation, including that: (1) the lights must be dimmed by 8:00 p.m., instead of 8:30, and turned off by 8:30 p.m., instead of 9:00 p.m.; (2) the lights can only be used for larger events until 10 p.m. not more than 15, rather than 20 evenings per year; and (3) the school must report the dates and times that the lights will be turned on, dimmed, and turned off. Additionally, the Board required offsite parking accommodations for at least 200 vehicles for crowds exceeding 500 people and that trees be installed to better screen the field and lights from neighboring homes.

The Saint Ignatius Neighborhood Association thereafter challenged the approval, alleging that the City erred in exempting the project from CEQA review, and that its approval was inconsistent with its planning code and General Plan. The trial court denied the petition and the neighborhood association appealed.

The Court of Appeal's Decision

The First District Court of Appeal reviewed the City's exemption determination under the abuse of discretion. In doing so, the court interpreted the statutory language and scope of each exemption de novo, but reviewed the City's exemption determination for substantial evidence.

The Class 1 Exemption Does Not Apply

CEQA Guidelines § 15301 sets forth the "Class 1" categorical exemption for "existing facilities." Under this class, projects that are exempt from CEQA review include the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of the existing or former use.

Through this lens, the City determined that the Project qualified for the Class 1 exemption because it involves negligible or no expansion of the existing use of the facility. As the planning commission explained, the Project would not result in the construction of new stadium, the expansion of existing playing surface, bleachers, or stadium capacity, or the addition of new athletic teams or new facility rental during evening hours. The City further reasoned, in part, that, because the school already uses temporary field lights up to 50 evenings per year, and because the stadium is already heavily used (albeit that use would shift somewhat from daylight to evening hours), the project would not intensify the use of the stadium or increase overall attendance of events.

The court agreed that substantial evidence supported the City's determination that the installation of the four light towers would not increase the overall capacity and use of the stadium. However, it pointed out the "undisputed" fact that nighttime use would significantly expand from the school's use of from 40 to 50 nights per year to potentially 150 nights. The court also noted that neighbors assert the current use of the temporary lights is unauthorized. Accordingly, the court found that the Class 1 exemption does not apply because of the Project's "significant expansion" of the school's current use of temporary lighting.

The Class 3 Exemption Does Not Apply

The Class 3 exemption exempts new construction or installation of small structures or facilities, or conversion of existing small structures from one use to another where only minor modifications are made to the structures' exterior. (CEQA Guidelines, § 15303.) Based on this, the City argued that the installation of the light towers fell within the Class 3 exemption as a limited number of new, small structures.

To determine what constitutes a "small" structure, the court looked to the listed examples provided with the exemption. While acknowledging that this list is not exhaustive, the court stated that "the examples do provide an indication of the type of projects to which the exemption applies." Notably, the court found that "[t]he light standards are fundamentally dissimilar from all of the examples," which primarily include residential and commercial structures below certain unit and square footage maximums, utility structures, and accessory structures such as garages and fences.

The court homed in on the commercial and residential building examples and decided that looking at only the square footage of the base of the light towers was inapposite. The court noted that such commercial and residential structures were subject to applicable zoning requirements that ensure their height will be generally consistent with the surrounding neighborhood, whereas here, the 90-foot-tall light towers will be "significantly taller than any other structure in the neighborhood," where homes in the area are typically 20 to 25 feet tall, with a zoning limitation of 40-feet tall. For this reason, the court determined that "a 90-foot-tall light standard does not qualify as 'small" within the meaning of the exemption."

The court went on to distinguish the instant case from a string of cases that allowed the Class 3 exemption to apply to several telecommunication projects, including a cell tower (*Don't Cell Our Parks v. City of San Diego*, 21 Cal.App.5th 338 (2018)) and cell transmitters on utility poles (*Aptos Residents Assn. v. County of Santa Cruz*, 20 Cal.App.5th 1039 (2018)), by again highlighting that the light towers—unlike the 35-foot-tall cell tower to be situated amongst tall trees or the installation of transmitter boxes on existing utility poles—will be 90-feet tall and "by far the tallest structure in the surrounding area." Accordingly, the court held that "the light standards cannot fairly be considered small structures within the meaning of the class 3 exemption."

The Unusual Circumstances Exception

Because the court found against the use of both exemptions based on its interpretation of exemption language and evidence in the record, it declined to address the neighborhood association's alternative argument that "unusual circumstances preclude application of the exemptions" or its claim that the City violated its code and General Plan. The court noted, specifically, that the intent of its ruling is not to "kill the project but to require careful consideration of measures that will mitigate the environmental impacts of the project." With evidence of potential "light, noise and traffic impacts on the neighborhood," the project and its conditions of approval must be "scrutinized in accordance with CEQA standards."

Conclusion and Implications

The First District Court of Appeal followed precedent by narrowly construing the terms of the

Class 1 and 3 exemptions to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. It did so with little discussion of the Class 1 exemption and by relying on a seemingly common-sense understanding that an increased use of lighting from 50 nights per year to 150 is obviously a "significant expansion." Its discussion of the applicability of the Class 3 exemption was more detailed, perhaps to try and rectify the admitted "paucity of case law applying this exemption," and dispel any notion that, where potentially significant environmental impacts exist, conditions of approval can substitute for CEQA mitigation. The First District's opinion is available at: https://www.courts.ca.gov/opinions/documents/A164629.PDF. (Casey Shorrock, Bridget McDonald)

FOURTH DISTRICT COURT UPHOLDS CITY'S CERTIFICATION OF EIR DESPITE CLAIMED DEFICIENCIES OF INADEQUATE ANALYSIS ON SPECIAL STATUS SPECIES AND PUBLIC SAFETY IMPACTS

Save North Petaluma River and Wetlands v. City of Petaluma, _ __Cal.App.5th___, Case No. A163192 (4th Dist. Dec. 13, 2022).

A neighborhood group filed a petition for writ of mandate challenging the City of Petaluma's (City) certification of an Environmental Impact Report (EIR) for a residential development on vacant land near the Petaluma River (Project). The adequacy of the EIR was challenged on the grounds it failed to properly analyze the Project's impacts on special status species and on public safety in the event of an emergency evacuation. The trial court denied the petition. The neighborhood group appealed, and the Court of Appeal affirmed the trial court's judgment.

Factual and Procedural Background

In 2003, real party in interest J. Cyril Johnson Investment Corporation (RPI) proposed a 312-unit residential development on approximately 15.45 acres of vacant land in the City of Petaluma near the Petaluma River. In 2007, the California Environmental Quality Act (CEQA) process for the Project commenced with the City publishing a Notice of Preparation (NOP). In 2008, the City adopted a new General Plan, which led the RPI to amend the Project including a reduction to 278 units. In March 2018, the City published a draft Environmental Impact Report (Draft EIR) for the Project for public review and comment. The Draft EIR included various consultant studies regarding environmental impacts, including a March 2004 study of special status species on the Project site (2004 WRA Report), which the authors of the EIR supplemented with database reviews and site visits over the years from commencement of the CEQA process. In October 2019, the City issued the "Final EIR," which analyzed a further proposed revised version of the Project including a further reduction to 205 units. In January 2020, RPI again proposed a reduced version of the Project—this time with 180 units.

In February 2020, following a public hearing, the city council certified the EIR for the final reduced version of the Project. Subsequently, Save North Petaluma River and Wetlands and Beverly Alexander (collectively: Petitioners) filed a petition for writ of mandate alleging violations of CEQA, specifically challenging the adequacy of the EIR on a number of grounds, including that the EIR failed to properly analyze the Project's impacts on special status species and on public safety in the event of an emergency evacuation. The trial court denied the petition in its entirety. Petitioners' appeal then followed.

The Court of Appeal's Decision

Petitioners contended that the trial court erred and abused its discretion in upholding the City's certification of the EIR because the EIR failed to properly analyze the Project's impacts: (1) on special status species and (2) on public safety in the event of an emergency evacuation.

The EIR Properly Analyzed Impacts to Special Status Species

Petitioners claimed that the EIR failed to properly analyze the Project's impact on special status species because the EIR: (1) did not contain a biological study from 2007—*i.e.*, the time the City published the NOP; (2) lacked evidence supporting the EIR's biological baseline used to describe the environmental setting of the Project; and (3) failed to adequately analyze or mitigate the Project's impacts on special status species, due to the first two deficiencies.

The Court of Appeal disagreed. It dispensed with Petitioners' insistence that a study conducted at the time of the NOP is indispensable for setting the appropriate baseline—finding that Petitioners cited no authority that CEQA is violated where, as here, the EIR's analysis was drawn from studies, site visits, and evaluations that were undertaken both before and after the publication of the NOP. The Court of Appeal found that the EIR's special status species baseline was supported by substantial evidence. The EIR drew not only from the 2004 WRA Report, but also from information of the Project site's environmental conditions obtained by experts who conducted subsequent evaluations and site visits over the years from commencement of the CEQA process; and Petitioners pointed to no evidence that the biological conditions existing on the Project site in 2007 materially differed from those documented in the 2004 WRA Report, or in later years when updated site visits and evaluations were undertaken.

Having rejected Petitioner's first two claimed deficiencies, the Court of Appeal rejected Petitioner's further contention that the EIR failed to adequately analyze or mitigate the Project's impacts on special status species.

The EIR Properly Analyzed Public Safety Impacts Relating to Emergencies

The EIR concluded that the public safety and emergency access impacts of the Project were less than significant as the Project was found, in line with Appendix G of the CEQA Guidelines, not to impair implementation of or physically interfere with an *adopted* emergency response plan or emergency evacuation plan. Petitioners did not identify an adopted emergency response plan or emergency evacuation plan that the EIR failed to analyze, but still claimed that the EIR was legally deficient in analyzing public safety impacts relating to emergencies under CEQA Guidelines § 15126.2 because it omitted an analysis of egress and evacuation safety in the event of an emergency notwithstanding the production of non-expert testimony (detailing the public's experiences with existing flooding and fire issues in the area) and expert testimony (stating further study on public safety impacts was needed) on the matter.

The Court of Appeal disagreed—holding that, even assuming such testimonies provided evidence of a potential public safety impact, it could not reweigh conflicting evidence. The Court of Appeal found that a City staff memo prepared for the February 2020 public hearing—which acknowledged the public concern over potential flood or fire evacuations and reflected the City's Assistant Fire Chief's assurance that the City Fire Department did not have significant flood or fire access/egress concerns—corroborated the EIR's public safety impact conclusion of less than significant. The Court of Appeal, thus, affirmed the trial court's judgment.

Conclusion and Implications

The case is significant because it clarifies the evidence required in certifying an environmental impact report for a biological resources analysis and for an analysis of public safety impacts related to emergencies. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A163192.PDF.
(Eric Cohn)

SECOND DISTRICT COURT REJECTS CEQA CHALLENGE OF PROGRAMMATIC EIR PREPARED IN ASSOCIATION WITH CITY'S SOUTH GLENDALE COMMUNITY PLAN

Save Our Glendale v. Glendale, *Unpub.*, Case No. B308034 (2nd Dist. Nov. 29, 2022).

In a *unpublished* decision filed on November 29, 2022, the Second District Court of Appeal rejected claims by a petitioner group that a programmatic Environmental Impact Report (EIR) adopted in association with the City of Glendale's South Glendale Community Plan (Community Plan) violated the California Environmental Quality Act (CEQA) and the Planning and Zoning Law. The court also rejected claims, included petitioner's amended petition, tied to a separate and later adopted Downtown Plan. Petitioner failed to comply with CEQA's mandatory requirement that an administrative record be prepared for these later claims and they were properly denied. The court also found that the trial court properly upheld the city's use of a programmatic EIR and projected baseline for impacts associated with the Community Plan.

Factual and Procedural Background

The city adopted the Community Plan as a community planning-level document to guide development in southern Glendale for 25 years. After holding 26 public hearings over a six-year period and a 60-day comment period, the city certified the program EIR on July 31, 2018. When it certified the EIR, it adopted a statement of overriding considerations and mitigation monitoring and reporting program, adopted an environmentally superior alternative for a subarea of the Community Plan, and took several other actions consistent with the community plan.

On March 27, 2018, the city adopted various amendments to the Downtown Plan with corresponding adoption of a citywide inclusionary zoning ordinance, which the Community Plan treated as standalone and governed by its own standards.

On August 30, 2018, petitioner filed its original verified petition for writ of mandate and complaint challenging the city's certification of the EIR. Petitioner also prepared notices of election to prepare the administrative record, however after delays in doing so, the trial court transferred preparation of the record to the city. At a hearing on the administrative record, the city reserved its right to file a motion to recover its costs to prepare the administrative record.

On the August 26, 2019, the same day the city certified the administrative record, petitioner filed a first amended verified petition for writ of mandate. As noted by the trial court, the amended petition:

> . . .massively expanded the allegations made in the original petition—it is 84 pages long, has 383 paragraphs and pleads 22 causes of action including causes of action against projects that were not challenged in the original petition.

These newly challenged projects included the Downtown Plan amendments and the city's inclusionary zoning ordinance. Petitioner neither asked the city to prepare the administrative record for its new CEQA claims, nor gave notice that it was electing to prepare the record for its newly filed claims.

On July 21, 2020, after a series of hearings on pretrial motions, the trial court issued a 60-page statement of decision, finding for the city on all issues and claims. Specifically, the trial court denied petitioner's motion to augment the record, and requests for judicial notice, and then dismissed petitioner's new CEQA claims for failure to comply with Public Resources Code § 21167.6's requirement that a petitioner prepare or cause an administrative record to be prepared. On the merits, the trial court found petitioner's claims against the EIR and the city's approvals of the Community Plan unmeritorious. The trial court also awarded the city its costs as a prevailing party.

The Court of Appeal's Decision

The Second District Court of Appeal proceeded to reject each of petitioner's contentions on appeal, finding in favor of the city in each instance.

Trial Court Properly Dismissed Petitioner's New CEQA Claims Related to the Downtown Plan

The court began by addressing petitioner's claims related to procedural rulings from the trial court resulting in dismissal of petitioner's new CEQA claims related to the Downtown Plan. As the court noted, the Downtown Plan amendments and inclusionary zoning ordinance are separate projects from the Community Plan. However, petitioner never elected to prepare a record or request that the city prepare a record for the new CEQA claims when it filed its amended petition. Without an administrative record of evidence to support petitioner's new allegations in compliance with § 21167.6, these claims were properly dismissed.

On an alternative basis, the court determined that the trial court properly dismissed petitioner's new CEQA claims on the grounds that petitioner pled inconsistent allegations concerning such claims. The court noted:

> . . .[i]t is well settled that a plaintiff may plead inconsistent counts or causes of action in a verified complaint, but this rule does not entitle a party to describe the same transaction as including contradictory or antagonistic facts.

Here, the amended petition alleged that the Downtown Specific Plan and inclusionary zoning ordinance "were separate independent projects and that they were part of, but severed from the Community Plan." Because these allegations were "inherently inconsistent," they were improper.

Community Plan EIR Was Properly Framed by the City as a Program EIR

Petitioner argued that the trial court erred in finding that the Community Plan warranted preparation of a program level EIR as prepared by the city. The court rejected this argument, a program-level was entirely appropriate for adoption of the Community Plan. This obviated the need for project level EIR-specificity because later physical projects would have their own environmental review where appropriate.

CEQA Guidelines § 16168 specifically authorizes program EIRs that may be prepared on a series of actions that can be characterized as one large project. Here, the Community Plan was:

> . . .the adoption of the second in a series of four community plans, involving amendments to the General Plan and zoning ordinance, which together constitute a series of actions related geographically as logical parts in a chain of actions, and individual activities having generally similar environmental effects—the very definition of a program EIR.

The court also found that the trial court properly upheld the EIR's reliance on tiering of future projects. Here tiering was appropriate and encouraged to:

> . . .eliminate repetitive discussions of the same issues and focus the later EIR or negative declaration on the actual issues ripe for decision at each level of environmental review.

EIR's Projected Baseline Was Not Flawed

The court moved on to reject petitioner's claim that the EIR baseline relied on by the city was not supported by substantial evidence to support its projected baseline based on projected future conditions. The court noted that CEQA allows projected baselines of future conditions where existing conditions are subject to change, and mandates that the:

> . . .[u]se of projected future conditions as the only baseline must be supported by reliable projections based on substantial evidence in the record.

Here, the EIR's population and housing baseline was supported by ample evidence. The data relied on was sourced and the baseline settings were explained and supported by US Census Data, Southern California Association of Government's 2017 profile of the City of Glendale, the Housing Element, and the city's habitable dwelling unit data.

Community Plan Did Not Violate the Planning and Zoning Laws

The court went on to reject petitioner's claims that the Community Plan violated planning and zoning laws due to: (1) internal General Plan inconsistency, and (2) non-concurrent adoption of an environmen-

tal justice element to the General Plan.

The Community Plan did not result in a General Plan inconsistency. First, Government Code § 65300.5 (requiring General Plan consistency) does not impose requirements on charter cities like the city. Second, the Community Plan is not implemented yet, amendments to the General Plan will be made before the Community Plan is implemented—meaning that plaintiff's inconsistency arguments are premature.

Community Plan adoption did not require the city to adopt a community justice element immediately. The Community Plan's implementation section properly referred to later implementation actions that will include adoption of environmental justice policies to satisfy Government Code requirements.

Conclusion and Implications

Save Our Glendale provides a helpful analysis of numerous CEQA issues including mandatory administrative record preparation, programmatic EIRs, and projected baselines.

A copy of the court's *unpublished* opinion can be found here: https://www.courts.ca.gov/opinions/nonpub/B308034.PDF.

(Travis Brooks)

THIRD DISTRICT COURT AFFIRMS CEQA STATUTORY BAR TO UNTIMELY CHALLENGE OF MEMORANDUM OF UNDERSTANDING BETWEEN STATE AGENCIES

Save the Capitol, Save the Trees v. Department of General Services, Unpub., Case No. C095317 (3rd Dist. Nov. 22, 2022).

The Third District Court of Appeal in *Save the Capitol, Save the Trees v. Department of General Services* affirmed in an unpublished opinion the trial court's decision dismissing a tardy petition for writ of mandate filed beyond the 180-day statute of limitations by Save the Capital, Save the Trees (STC) challenging a memorandum of understanding (MOU) between the Department of General Services (DGS), the Joint Committee on Rules of the California State Senate and Assembly (JRC) and Department of Finance (DOF) governing their relationship in overseeing the State Capitol Annex Project (Project) without first engaging in a public review process under the California Environmental Quality Act (CEQA) and without preparing and environmental impact report (EIR).

Factual and Procedural Background

The State Capitol Building Annex is the annex to the historic State Capitol, constructed to the east of the original building. The existing annex was constructed between 1949 and 1951. Surrounding the Capitol and its annex is Capitol Park, which contains various monuments, memorials, walkways, and ornamental trees. The Capitol complex, consisting of the Capitol, its annex, and surrounding park, is a CEQA historic resource and is listed on the National Register of Historic Places.

In 2016, the California Legislature enacted the State Capitol Building Annex Act of 2016 (Act). The Act was passed to address various structural and operational deficiencies DGS had identified with the annex. Under the Act, the JRC may pursue the construction of a state capitol building annex or the restoration, rehabilitation, renovation, or reconstruction of the existing State Capitol Building Annex and any other ancillary improvements. Authorized projects, may include a visitor center, a relocated and expanded underground parking facility, and any related or necessary deconstruction and infrastructure work.

Under the Act, all work performed pursuant to the Act must be executed and managed by the JRC. Under the Act, the DGS must provide counsel and advice to the JRC. The work must be undertaken pursuant to an agreement between the JRC, the DOF, and the DGS. The agreement must establish the scope, budget, delivery method, and schedule for any work undertaken pursuant to the Act. Work approved or undertaken under the Act must comply with CEQA's requirements.

On November 9, 2018, the JRC, DGS, and DOF entered into the MOU to pursue the construction of a new, restored, rehabilitated, renovated, or reconstructed capitol building annex and associated projects (Project).

The MOU specifies that DGS shall serve as the lead agency for the purposes of CEQA. The scope of the Project is described as the design and construction, including any related studies, of a new, approximately 500,000 gross square foot State Capitol Building Annex. The Project includes the upgrade or replacement of existing site infrastructure, alterations to Capitol Park where necessary, alterations and improvements to the West Wing of the State Capitol where necessary, demolition of the current Annex and associated parking structure, and any other necessary ancillary improvements to construct a working Annex.

The MOU contains a confidentiality clause that requires the parties to keep confidential financial, statistical, personal, technical, and other data and information relating to the operations of each party. The state entities adopted the MOU without first engaging in a public CEQA review process—*i.e.*, without preparing an Environmental Impact Report (EIR) and seeking public comment in formulating the scope of and in drafting the same.

After the state parties entered the MOU, on April 11, 2019, DGS issued a Notice of Preparation (NOP) to Responsible Agencies, Interested Parties, and Organizations stating its intention to prepare an EIR for the proposed Project, including the above described Project description. The NOP set a 32-day period for public review and comment of the NOP, and invited agencies and individuals to participate in a scoping meeting on May 7, 2019.

In September 2019, DGS posted a draft EIR for the Project on its website. This was followed by a 45-day public comment period, and then the circulation of another draft in January 2020 with an attendant comment period. At the time STC filed its petition, DGS continued to make modifications to the project descript ion.

In April 2021, DGS provided a copy of the MOU to an entity in response to a Public Records Act request. STC obtained a copy of the MOU and this was the first time STC learned about what it characterizes as the "pre-commitment approval via the MOU" to proceed with demolition—as opposed to rehabilitation and/or renovation—of the existing annex.

STC filed its petition on July 9, 2021. STC alleges the MOU pre-committed the state parties to demolishing the existing annex and Capitol Park Aboretum and to building a new annex, even though the Act allows them to accomplish the goal of fixing structural and operational deficits with the current annex through other means that do not require demolition, such as restoration, rehabilitation, or renovation.

STC argued that this alleged pre-commitment required the state parties to engage in a public review process under CEQA. Because the state parties entered the MOU without a public CEQA review process, including the preparation of an EIR that would address the legislatively-mandated alternatives, STC argued that the state parties violated CEQA.

Upon demurrer by the state parties, the trial court ruled that STC's CEQA challenge to the MOU was time barred by the CEQA 180-day statute of limitations, granting the demurrer without leave to amend

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's decision, holding that STC's petition was barred by the CEQA maximum 180-day statute of limitations extending from the date of the MOU.

Overview of CEQA Principles

State policy under CEQA requires public agencies to not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects. An EIR must be prepared for any Project which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. The purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.

CEQA Statute of Limitations

Though, on the one hand CEQA seeks to ensure that public agencies will consider the environmental consequences of discretionary projects they propose

to carry out or approve, on the other hand, the Act is sensitive to the particular need for finality and certainty in land use planning decisions. Accordingly, the Act provides unusually short limitations periods after which persons may no longer mount legal challenges, however meritorious, to actions taken under the Act's auspices. (Public Resources Code, § 21167)

The shortest of all CEQA statutes of limitations applies to cases in which agencies have given valid public notice, under CEQA, of their CEQA-relevant actions or decisions. The filing and posting of such a notice alerts the public that any lawsuit to attack the noticed action or decision on grounds it did not comply with CEQA must be mounted immediately. In contrast, longer 180-day limits are provided when public notice has not been provided under a CEQA statute.

While CEQA's substantive provisions are interpreted broadly to implement the legislative intent of strong environmental protection, this does not mean that the same standard of liberality should necessarily be applied in interpreting the procedural requirements of CEQA. CEQA contains a number of provisions evidencing the clear legislative determination that the public interest is not served unless challenges under CEQA are filed promptly. Where the law is clear, the strict CEQA time requirements must be applied as written.

No Extension of Statute of Limitations for Lack of Notice

According to the petition, the MOU commits the state parties to demolishing the existing annex and constructing a new one. The petition was filed on July 9, 2021, roughly two and one-half years after the MOU was entered, well over 180 days after the November 2018 date petitioner alleges the MOU committed the parties to demolishing and rebuilding the annex.

STC argued that any statute-of- limitations defense the state parties might have invoked was defeated by the lack of public notice of the entry of the MOU. But, CEQA does not establish any special notice requirements for the commencement of the 180-day limitations period from project approval. All that is required is that the public agency make a formal decision to carry out or approve the project.

Furthermore, the Court of Appeal noted that STC had constructive notice of the MOU when DGS issued the NOP in April 2019, which NOP contemplated that an agreement had been reached between the state parties as required by the Act.

The potential claimant may not avoid the statutory time limitations simply by arguing they did not expect a violation to occur and thus did not perform due diligence once constructive notice of potential violations existed. To allow this argument to succeed would be in contravention of the legislative determination that the public interest is not served unless challenges under CEQA are filed promptly.

Conclusion and Implications

This opinion by the Third District Court of Appeal emphasizes the need to conduct due diligence of an project pre-approvals at the NOP stage and to pay close attention to statutory requirements that may govern a project, such as the Act in this case, so as to not be barred from challenge by the short CEQA statute of limitations. This case is unusual in that the Legislature could have exempted the Project from CEQA review, but chose instead to hide behind the smokescreen of a confidentiality clause in order to avoid timely CEQA challenge to its decision to build a new Capitol annex. The court's *unpublished* opinion is available at https://www.courts.ca.gov/opinions/nonpub/C095317.PDF.
(Boyd Hill)

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