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CONTENTS

Continued on next page

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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

FIRST DISTRICT COURT OF APPEAL'S DENIAL OF ANTI-SLAPP MOTION ALLOWS MALICIOUS PROSECUTION ACTION TO PROCEED AGAINST PETITIONER'S ATTORNEY WHO FILED CEQA SUIT AGAINST SINGLE-FAMILY HOME PROJECT

By Veronika Morrison and Bridget McDonald

In an opinion certified for publication on December 28, 2022, the First District Court of Appeal in *Charles Jenkins et al. v. Susan Brandt-Hawley et al.* upheld the trial court's denial of a petitioners' attorney's anti-SLAPP motion to a malicious prosecution suit—an action that stemmed from petitioners' earlier California Environmental Quality Act (CEQA) lawsuit that challenged a homeowner's application to demolish and reconstruct a single-family residence in San Anselmo. [*Charles Jenkins et al. v. Susan Brandt-Hawley et al.*, 86 Cal.App.5th 1357 (1st Dist. 2022).]

Factual and Procedural Background

Project Approval

In 2017, Charles and Ellen Jenkins (Jenkins) bought a one-bedroom home with a small accessory cottage on a residential property in the Town of San Anselmo (Town). The original Craftsman-style home was built in 1909, while the accessory unit was built sometime thereafter. The couple met with an architect and contractors, who ultimately concluded the main house was not worth saving due to poor structural integrity and other reasons. Before embarking on a design for the new house, the Jenkins met with the Town's Planning Director, who confirmed the house had not been designated as "historic." The couple therefore applied for permits to demolish the existing structures and construct a new three-bedroom home with a small, detached studio (Project).

In January 2018, the couple learned that planning staff had completed its review of the original design and were preparing a report that recommended approval, subject to a few conditions. The report also explained that the project was not a historic resource and was categorically exempt from CEQA under Guidelines § 15303, subdivision (a), for new construction of a single-family residence.

Neighbors on an adjacent street, however, objected to the design, claiming that the house would not fit in with the neighborhood and would intrude on their privacy. Following an initial hearing and several meetings with neighbors, the Jenkins agreed to several modifications, which included planting a privacy hedge, reducing the accessory unit to a single story, and increasing the setback of the back cottage from the property line. The Planning Commission approved the project with those changes and once again found the project categorically exempt from CEQA and the structures slated for demolition "not historic."

A week after the Planning Commission's decision, several neighbors appealed the Commission's approval to the Town Council, arguing that a Historic Resource Analysis of the site's existing structures was required before the Town could categorically exempt the Project from CEQA. The Jenkins obliged and conducted the analysis, which affirmed the structures were not historic. The Council thus denied the appeal and approved the Project. The neighbors sued.

CEQA Litigation

Save Historic San Anselmo and an individual (collectively: petitioners), jointly represented by Susan Brandt-Hawley of the Brandt-Hawley Law Group, filed a petition with two causes of action that alleged violations of CEQA and the Town Municipal

Code. After amending the petition, counsel for the Jenkins—Rick Jarvis—sent Ms. Brandt-Hawley a meet-and-confer letter, which explained his view that the petition was frivolous and listed over ten reasons why the claims lacked merit. Ms. Brandt-Hawley did not respond in writing to Mr. Jarvis's letter, but later explained via telephone why she held a different legal opinion.

The trial court denied the petition on the merits, finding that petitioners advanced an unfounded interpretation of the Town's Municipal Code and the General Plan with respect to the old house's historic status, and that they failed to exhaust their administrative remedies regarding their claim that the conditions of approval constituted "mitigation measures," thus rendering the Project ineligible for a categorical exemption.

The trial court stayed the order, during which the Jenkins received a demolition permit. In response, Ms. Brandt-Hawley filed a petition for writ of supersedeas seeking an emergency stay, but withdrew the petition the same day following correspondence from the Jenkins' attorney. Petitioners nevertheless appealed the trial court's denial, but then offered to dismiss the appeal if the Jenkins would waive fees and costs. The Jenkins declined. And on the date petitioners' opening brief on appeal was due, Ms. Brandt-Hawley voluntarily dismissed the appeal.

Malicious Prosecution Lawsuit

After the appeal was dismissed, the Jenkins filed a complaint against Brandt-Hawley and her firm for malicious prosecution. Brandt-Hawley and her firm responded with a special anti-strategic litigation against public participation (anti-SLAPP) motion to strike and accompanying declarations.

The Jenkins opposed the anti-SLAPP motion, explaining that Mr. Jenkins reviewed the underlying CEQA petition and identified over nine passages that were misleading or that materially misrepresented facts. Mr. Brandt-Hawley's reply memorandum did not dispute Mr. Jenkins' declaration.

The trial court denied the anti-SLAPP motion, concluding that the Jenkins had met their burden under "step two" of the anti-SLAPP analysis by demonstrating a probability of prevailing on their claim for malicious prosecution. Of the requisite factors for a malicious prosecution claim, the trial court concluded the Jenkins established a probability of succeeding on their claims that the Municipal Code and CEQA causes of action were legally untenable, and that the litigation had been pursued with malice. Ms. Brandt-Hawley appealed.

The Court of Appeal's Decision

The Anti-SLAPP statute (Code of Civil Procedure, § 425.16, subd. (b)(1)) protects an individual from litigation that arises from any act that is taken in furtherance of that person's right of petition or free speech, unless the plaintiff has demonstrated a probability of prevailing on the claim from which the action arose.

Courts employ a two-step process for determining whether an action is a "SLAPP." First, the court decides whether the defendant has made a threshold showing that the challenged action is one that arises from protected activity, as set forth under the statute. If the court finds that such a show has been made, it must then determine the second step—*i.e.*, whether the plaintiff has demonstrated a probability of prevailing on the underlying claim.

Here, the parties and the First District Court of Appeal agreed that there was no dispute that the first step of the anti-SLAPP analysis was satisfied, as the statute specifically identifies claims of malicious prosecution as causes of action that arise from a protected activity. As to the second step of the analysis, the court concluded that Jenkins demonstrated the "minimum level of legal sufficiency and tribality" required to show a probability that they would prevail on their malicious prosecution claim.

Probability of Prevailing on Malicious Prosecution Claim

To establish a claim for malicious prosecution, a plaintiff must establish that the prior action was: (1) commenced by or at the direction of the defendant and was pursued to a legal termination in the plaintiff's favor; (2) brought without probable cause; and (3) initiated with malice. Where the prior action alleges more than one cause of action, a malicious prosecution suit can succeed if any of those claims were brought without probable cause.

Here, the court determined that the Jenkins adequately pleaded the "favorable termination" element, as there was no discrepancy that the CEQA and Municipal Code actions were commenced at

the direction of the defendant (Brandt-Hawley) and pursued to a legal termination in plaintiff's (the Jenkinses') favor. The court thus considered whether the Jenkins satisfied the second and third elements regarding probable cause and malice.

Probable Cause

Where there is no dispute as to the facts upon which an attorney acted before filing the prior action, the question of whether there was probably cause to bring the action is purely legal and one for the court to resolve. But where there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolving that dispute, there becomes a question of fact that must be resolved before the court can determine the legal question of probable cause.

Here, the face of the Jenkinses' pleading adequately established that the Municipal Code and the CEQA claims were legally untenable, and thus brought without probable cause.

As to the Municipal Code claim, the court determined that the Town satisfied the Municipal Code's requirements for issuing a demolition permit. Contrary to Brandt-Hawley's arguments, the Code did not require that the Town make a finding that "immediate and substantial hardship" would result without the demolition. The court explained that it would be unreasonable and arbitrary for the Town to prevent itself from ever issuing a demolition permit absent immediate and substantial hardship. Moreover, the court emphasized that the Town's interpretation of its own Code is entitled to considerable deference and Brandt-Hawley failed to demonstrate that the Town had ever previously required a showing of immediate and substantial hardship before approving a demolition permit.

The court also pointed to Brandt-Hawley's failure to fairly present the record. For example, Petitioner's brief failed to quote the actual text of the Municipal Code, and instead relied on a summary of the Code that omitted key permissive phrasing. The briefing also made misleading statements regarding the record and failed to cite to the evidence therein to substantiate claims that the project would have unmitigated environmental impacts.

For these reasons, the court also concluded that the Jenkins demonstrated they would prevail on their claim that the CEQA cause of action was maliciously prosecuted. The court agreed that petitioners failed to exhaust their assertion that the "unusual circumstances" exception applied to the project's categorical exemption because they never raised the issue to the Town during the administrative proceedings.

And even if petitioners *had* exhausted this argument, the claim would still fail because:

> . . .any reasonable attorney would conclude that the modifications [made to the project in response to neighbors' concerns] were not 'mitigation measures' under CEQA as they did not meet the two-part test required by [the] Supreme Court in a 2015 case in which Ms. Brandt-Hawley was the attorney for plaintiffs—*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086.

But Ms. Brandt-Hawley "fail[ed] to come close" to satisfying this test by failing to show that the Town's exemption determination was not supported by substantial evidence or a significant effect on the environment resulting from the project.

The court thus held that Ms. Brandt-Hawley knew the claims in the petition were untenable, "especially given her extensive CEQA and land use law experience and the law from *Berkeley Hillside*."

Malice

In a malicious prosecution action, malice relates to the subjective intent or purpose with which the defendant acted. Malice is therefore not limited to hostility or ill will, but can exist when proceedings are instituted primarily for an improper purpose or where a party continues to pursue a case after learning the claims were untenable (indifference).

Here, the Jenkins showed a probability of prevailing on the "malice" element of their malicious prosecution claim. The court explained that Brandt-Hawley's failure to respond to the factual claims made by Mr. Jarvis' letter (counsel for the Jenkins) regarding the frivolity of the petition, as well as his numerous allegations that Brandt-Hawley made misleading statements as to material facts, demonstrated her indifference to the matter. This indifference and knowledge that the action lacked merit was sufficient to establish malice.

Moreover, the trial court's determination that Brandt-Hawley failed to present the record fairly and

made misleading arguments also constitutes evidence of malice. The court noted that Ms. Brandt-Hawley's declaration in support of the anti-SLAPP motion—which recounted the steps she took before filing the CEQA petition—failed to include any testimony that showed she thoroughly investigated and researched the propriety of the claims before petitioners filed suit. The absence of legal research is also relevant to the question of whether or not an attorney acted with malice.

Because the Jenkins adequately plead facts sufficient to establish a probability of prevailing on the second two elements of their malicious prosecution claim against Ms. Brandt-Hawley, the First District affirmed the trial court's order denying the anti-SLAPP motion.

Comments on *Amicus* Briefs

In closing, the court responded to three *amicus* briefs that were filed in support of Ms. Brandt-Hawley. The court rejected the briefs' urgings that CEQA-related cases should be "insulated" from malicious prosecution cases, despite the uncertainty and complexity of such actions. The court reiterated that nothing in its opinion would preclude public participation or deter citizen involvement. Here, the malicious prosecution claim was advanced only against an attorney—not the underlying administrative process or the individual neighbors—and the record showed that the underlying suit had "nothing to do with significant or negative environmental effects under CEQA."

Conclusion and Implications

The First District Court of Appeal's opinion marks a stark judicial warning that could be seen as an effort to curb overuse of the statute to delay or stop projects, particularly those related to housing. The court's conclusion did not mince words when it noted that the underlying CEQA petition "involved a group of well-off, 'NIMBY' neighbors living in one of the most expensive zip codes in the country trying to prevent their fellow neighbor from rebuilding a decrepit and dangerous residence on their property because the neighbors were concerned about privacy and the design aesthetics of the new build." As the opinion noted, just last year this same panel also authored the opinion in *Tiburon Open Space Committee v. County of Marin*, 78 Cal.App.5th 700 (2022), which similarly warned against "the possible misuse of CEQA actions and the harm they could cause." Now, the First District Court of Appeal has sent a potent reminder to plaintiffs' attorneys that filing legally untenable CEQA suits carries large risks that are not immune from other tortious actions.

A copy of the First District's opinion is available at: https://www.courts.ca.gov/opinions/documents/A162852.PDF.

Editor's Note: An attorney from the authors' firm filed an *amicus* brief in support of Ms. Brandt-Hawley in the above litigation.

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LAND USE NEWS

GOLDEN STATE WIND SECURES LEASE FOR OFFSHORE FLOATING WIND FARM ALONG CALIFORNIA'S CENTRAL COAST

A new joint venture from Ocean Winds (OW) and Canada Pension Plan Investment Board (CPP Investment), called Golden State Wind, has been awarded an 80,000-acre lease by the United States Office of Ocean Energy Management (OEM) in the Morro Bay area off California's Central Coast for the development of an offshore wind project. The lease area awarded by OEM is one of just five areas located off the California coast that OEM has offered as the subject of recent auctions. This auction stands out from the rest, however, as it is the first floating offshore wind lease sale in the country and the first offshore wind lease sale of any type on the West Coast.

Floating Offshore Renewable Energy Comes to California

California has long had the goal of reaching 100 percent renewable energy, and to do so the state will need to have a diverse portfolio of sources. One of the newest areas of renewable energy development has come in the form of floating offshore wind energy.

In early December, the Golden State Wind joint venture put up $150.3-million to secure a lease for oceanic management rights, with OW and CPP Investment each maintaining a 50 percent investment in the project. The site of the lease, OCS-P 0564, covers over 80,000 acres of deep ocean waters and is located about 20 miles off the coasts of Morro Bay. Although the project is still years away from being realized, when it is fully built out and operational the lease area could accommodate roughly two gigawatts of offshore wind energy facilities. That amount of power would provide electricity equal to about 900,000 homes and make a sizeable impact on California's renewable energy portfolio.

Offshore wind energy production is still a relatively new idea as a whole, but the floating variant of wind technology that Golden State Wind is bringing to California is as promising as it is complex. With floating offshore wind, the facilities involve wind turbines as tall as 120 meters fixed to floating platforms, which in turn are anchored by cables to the sea bed hundreds of meters below. The technology required for these floating farms to generate clean power is still advancing and getting cheaper, but at the end of the day floating offshore is fairly novel compared to other renewable sources, such as traditional wind and solar, and is years away from becoming a popular option.

Floating offshore wind projects have been implemented elsewhere, such as the Windfloat Atlantic project of the coast of Portugal, but Golden State Wind's project is notable as being part of the first floating offshore lease sale in the United States, and one of the first offshore wind leases of any kind awarded on the West Coast. Importantly, projects such as this fit right into California's plan to generate 140 gigawatts of renewable energy by 2045, including 10 gigawatts from offshore wind. The rest of this total is expected to come from a wide array of renewable energy sources, although it seems the bulk of these sources could include solar power complemented by long-duration energy storage and traditional wind energy.

Interest in floating wind farms has been growing in countries such as Britain, France and Japan. While conventional offshore wind is limited to shallow waters with sea beds suitable to installing turbines, floating platforms open the door to moving the turbines much farther offshore, where winds are higher and more consistent, and the environmental effect could be lower.

The duo working together on the Golden State Wind project both stand out in the arena of renewable energy development. OW has expertise spanning over a decade in offshore wind, including its role in the above mentioned Windfloat Atlantic project near Portugal. CPP Investment also comes into the project with familiarity in the world of renewables and power generation, having significant investments in Calpine Energy Solutions, a producer of gas and geothermal energy, and in Pattern Energy Group LP, specializing in wind and solar energy.

Conclusion and Implications

Obtaining the lease area itself was a major step towards floating offshore coming to California, but there are still significant hurdles that stand in the way of Golden State Wind's success. On the technological side of things, developing floating platforms capable of supporting turbines and distributing their weight in the water comes as an obvious challenge. Coming as a bigger challenge, however, is the development of floating substations at sea that can be used to gather power from offshore turbines and transport that power back to shore.

In addition to the technological challenges the project will have to overcome, there are also hurdles in the form of regulatory approvals and permits to transfer the power onshore and connect it with California's energy grid, not to mention the process of arranging power purchase agreements with local utilities. Furthermore, the project will undoubtedly need to prepare for environmental challenges along the way as some environmental groups have already raised concerns about the effect the cables and turbines might have on oceanic life.

Despite the challenges the future has in store for the Golden State Wind project, the securing of the lease area represents a huge step forward in California as it means a new technology has found its way to the state. In order for California to build an energy grid fueled by renewables that is sufficiently stable, the state will have to become host to many different kinds of renewable energy-based projects, and Golden State Wind's new project is certainly one to keep an eye on as it comes to fruition. For more information on the project, *see:* https://www.oceanwinds.com/news/uncategorized/golden-state-wind-a-joint-venture-of-ocean-winds-and-cpp-investments-wins-2-gw-california-wind-energy-lease/.

(Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

BIDEN ADMINISTRATION FINALIZES PART 1 OF NEW 'WATERS OF THE UNITED STATES' RULE

On January 18, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army, Army Corps of Engineers (Corps) (collectively: Agencies) published the final Revised Definition of Waters of the United States (WOTUS) rule (2023 WOTUS Rule) that sets forth a new definition of WOTUS. (Revised Definition of Waters of the United States, 88 Fed. Reg. 3004 – 3144 (Jan. 18, 2023).) The rule is expected to take effect on March 20, 2023 based on a January 18, 2023 publication date in the Federal Register.

The 2023 WOTUS Rule relies on the earlier 1986 WOTUS regulatory framework and associated caselaw, while simultaneously reinvigorating the "significant nexus" standard enunciated by Justice Kennedy in the U.S. Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006) and the "relatively permanent" standard concurrently articulated by the plurality of the Justices in *Rapanos*. The Agencies assert the 2023 WOTUS Rule is to "effectively and durably" protect the quality of the nation's waters while balancing the needs of water users, *e.g.*, farmers, ranchers, and industry. (88 Fed. Reg. at 3020.)

Relevant Background Information

The federal Clean Water Act (CWA) prohibits the discharge of pollutants from a point source into "navigable waters" unless otherwise authorized under the CWA. (33 U.S.C. §§1311 and 1362(12).) Navigable waters are defined in the CWA as "the waters of the United States, including territorial seas," but WOTUS is not further defined by statute. (33 U.S.C. §1362(7).) Federal programs protecting water quality under the CWA—*e.g.*, National Pollutant Discharge Elimination Systems (NPDES) permits under CWA section 402 and dredge and fill permits under CWA section 404—rely on the term "navigable waters" in establishing their program scope and applicability.

The Agencies have separate regulations defining WOTUS, but their interpretations have been similar and remained largely unchanged from 1977 to 2015 (referred to in the 2023 WOTUS Rule as the 1986 regulations). Since 2015, however, the Agencies have revised the WOTUS definitions via two rule changes under separate political administrations (2015 Clean Water Rule, 80 FR 37054 (June 29, 2015); 2020 Navigable Waters Protection Rule, 85 FR 22250 (April 21, 2020)).

Then, on January 20, 2021, President Biden signed Executive Order 13990, directing all executive departments and agencies to review and, as appropriate, take action to address Federal regulations in order to improve public health, protect the environment, and ensure access to clean air and water. (Exec. No. 13990, 87 Fed. Reg. 23453 (Jan. 20, 2021).) On June 9, 2021, after reviewing the Trump administration's 2020 Navigable Waters Protection Rule and its administrative record, the Agencies announced their intent to revise or replace that rule with a new and "durable" WOTUS definition. The 2020 WOTUS Rule was subsequently vacated by two District Courts. (*See, Pascua Yaqui Tribe v. EPA*, 557 F.Supp.3d 949 (D. Ariz. 2021); *see also, Navajo Nation v. Regan*, 563 F.Supp.3d 1164 (D. New Mex. 2021).)

Jurisdictional Waters of the United States

The 2023 WOTUS Rule provides jurisdiction over waterbodies that include traditional navigable waters (*e.g.*, rivers and lakes), territorial seas, and interstate waters as WOTUS. (*See*, 33 C.F.R. § 238.3, (a)(1); 40 C.F.R. § 120.2, (1)(i).) Specifically, the Agencies interpret WOTUS to further include:

- Impoundments of WOTUS;
- Tributaries to WOTUS or impoundments when the tributaries meet either the "relatively
- Permanent" standard or the "significant nexus" standard;
- Wetlands adjacent to WOTUS, wetlands adjacent to and with a continuous surface connection to "relatively permanent" impoundments, wetlands

adjacent to tributaries that meet the "relatively permanent" standard, and wetlands adjacent impoundments or jurisdictional tributaries when the wetlands meet the "significant nexus" standard; and intrastate lakes and ponds, streams, or wetlands not identified above that meet either the "relatively permanent" standard or the "significant nexus" standard.

To determine jurisdiction for tributaries, adjacent wetlands, and additional waters, the 2023 WOTUS Rule applies two standards—waters are jurisdictional if they meet either the "relatively permanent" standard or "significant nexus" standard as noted below.

The "relatively permanent" standard provides that waterbodies must be relatively permanent, standing, or continuously flowing waters connected to (a)(1) waters or waters with a continuous surface connection to such relatively permanent waters or to (a)(1) waters. (88 Fed. Reg. at 3006.) The "significant nexus" standard considers waters such as tributaries and wetlands jurisdictional based on their connection to, and effect on, larger downstream waters that Congress fundamentally sought to protect. A "significant nexus" exists if the waterbody (alone or in combination) *significantly affects* the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters. (*Id.*)

Adjacent Wetlands

Where a wetland is adjacent to a traditional navigable water, the territorial seas, or an interstate water, no further inquiry is required—the wetland is jurisdictional. (88 Fed. Reg. at 3006.) The 2023 WOTUS Rule does not specify a particular distance when defining "adjacent" but, rather, considers wetlands "adjacent" if one of three criteria is satisfied: (1) there is an unbroken surface or shallow subsurface connection to jurisdictional waters; (2) they are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like; or (3) their proximity to a jurisdictional water is reasonably close such that adjacent wetlands have significant effects on water quality and the aquatic ecosystem. (88 Fed. Reg. at 3089.)

Where a wetland is adjacent to a covered water that is not a traditional navigable water, the territorial seas, or an interstate water, such as a tributary, the 2023 WOTUS Rule requires an additional showing for that adjacent wetland to be considered jurisdictional; in that case, the wetland must satisfy either the "relatively permanent" standard or the "significant nexus" standard. (*Id.* at 3006.) According to the Agencies, that inquiry fundamentally concerns the adjacent wetland's relationship to the relevant (a)(1) water and not the relationship between the adjacent wetland and the covered water to which it is adjacent. The adjacent wetland must have a continuous surface connection to a relatively permanent, standing, or continuously flowing water connected to an (a)(1) water *or* must either alone, or in combination with similarly situated waters, significantly affect the chemical, physical or biological integrity of an (a)(1) water. (*Ibid.*)

Thus, to be jurisdictional under the 2023 WOTUS Rule, wetlands must meet both the definition of adjacent *and* either be adjacent to a traditional navigable water, the territorial seas, or an interstate water, *or* be adjacent to a covered water *and* meet either the "relatively permanent" or "significant nexus" standard as to a traditional navigable water.

Exclusions

The Agencies' 2023 WOTUS Rule does not affect the longstanding activity-based permitting exemptions provided to the agricultural community by the Clean Water Act. Additionally, the final rule codifies eight exclusions from the definition of WOTUS in the regulatory text to provide consistency to a broad range of stakeholders. However, the 2023 WOTUS Rule exclusions do not apply to paragraph (a)(1) waters, and therefore, a traditional navigable water, the territorial seas, or an interstate water cannot be excluded under the 2023 WOTUS Rule, even if the water would otherwise meet the criteria for an exclusion. (88 Fed. Reg. at 3067.) The codified exclusions are:

- Prior converted cropland;
- Waste treatment systems;
- Ditches (including roadside ditches), excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water;
- Artificially irrigated areas that would revert to dry land if the irrigation ceased;

- Artificial lakes or ponds;
- Artificial reflecting pools or swimming pools;
- Waterfilled depressions; and
- Swales and erosional features that are characterized by low volume, infrequent, or short duration flow.

Some exclusions that appeared in prior iterations of WOTUS rules, or were accepted practice, have not been codified in the 2023 WOTUS Rule (*e.g.*, stormwater control features and groundwater recharge, water reuse, and wastewater recycling structures). The Agencies will now assess jurisdiction for these features on a case-specific basis. (88 Fed. Reg. at 3104.)

Implementation of 2023 WOTUS Rule in CWA Section 404 Permitting Process and Approved Jurisdictional Determinations

As part of the regulatory process of implementing the 2023 WOTUS Rule, the Agencies sought to clarify how the rule will affect the regulated public who may be in the process of securing an approved jurisdictional determination (AJD) or implementing a project that has received an AJD, and has dedicated a webpage to the "Current Implementation of WOTUS" to provide guidance. (*Current Implementation of Waters of the United States*, United States Environmental Protection Agency (January 18, 2023) https://www.epa.gov/wotus/current-implementation-waters-united states.) The Agencies note that actions are governed by the definition of WOTUS that is *in effect at the time the Corps completes an AJD*, not by the date of the request for an AJD. Further, the Corps clarifies it will make new permit decisions pursuant to the currently applicable regulatory regime (*i.e.*, the 2023 WOTUS Rule) irrespective of the date of an AJD.

Conclusion and Implications

The U.S. Supreme Court is expected to soon issue a ruling in *Sackett v. EPA*, 142 S. Ct. 896 (2022); an issue in that case is the legal sufficiency of the "significant nexus" test for purposes of determining WOTUS, a critical component of the 2023 WOTUS Rule as discussed further below. The 2023 WOTUS Rule may require further revision or interpretation if the Court modifies the scope of the "significant nexus" test. The Biden administration also plans to consider further refinements to its 2023 WOTUS Rule in the form of a second rule, taking into account "additional stakeholder engagement and implementation considerations, scientific developments, litigation and environmental justice values." (Executive Office of the President, Regulatory Affairs Agenda (December 2022) RIN 2040-AG13, www.reginfo.gov/public/do/eAgendaViewRule?) No date has been provided for this secondary action.
(Nicole E. Granquist, Jaycee L. Dean, Sam Bivens)

LAWSUITS FILED OR PENDING

PLACER COUNTY WATER AGENCY SUES PG&E FOR DAMAGES SUSTAINED FROM THE MOSQUITO FIRE

In December 2022, Placer County Water Agency (PCWA) filed suit against the Pacific Gas and Electric Company and its parent corporation (collectively: PG&E) related to the Mosquito Fire of 2022. PCWA alleges ten causes of action, including for negligence, inverse condemnation, and statutory violations related to monetary and operational damages to PCWA facilities such as the Middle Fork American River Project (MFP). [*Placer County. Water Agency v. Pacific Gas & Electric Company, et. al.*, Case No. S-CV-0049591, *filed Dec. 20,* 2022 (Placer County Super Ct.).]

Background

According to the California Department of Forestry and Fire Protection (Cal Fire) and the United States Forest Service (USFS), on September 6, 2022, a wildfire known as the Mosquito fire ignited near OxBow Reservoir in Placer County, California. The fire burned east of Foresthill, California, predominantly on the Tahoe and Eldorado National Forests in Placer and El Dorado counties. The fire was fully contained on October 27, 2022. According to USFS, the fire had consumed 76,781 acres, destroyed 78 structures, and damaged 13 structures. The incident update did not indicate that injuries or fatalities had occurred in connection with the fire.

On September 24, 2022, USFS indicated to PG&E that it would undertake an initial assessment regarding whether the fire started in the area of PG&E's power line on National Forest System lands, and that the USFS would be performing a criminal investigation into the fire. That same day, the USFS removed and took possession of one of PG&E's transmission poles and attached equipment. The investigation is ongoing.

The Complaint

In its complaint, PCWA alleges that it is the primary water resource agency for Placer County and operates the Middle Fork American River Project (MFP). According to PCWA, the MFP is a hydro-electric power project encompassing several dams and powerhouses in Placer and El Dorado counties which generate approximately 1,039,078 MWh annually, and is the eighth largest public power project in California. PCWA alleges that operations of the MFP were interrupted by the Mosquito Fire, which also resulted in the evacuation of PCWA employees as well as damage or destruction to other PCWA structures. PCWA alleges that it has since incurred recovery costs in the aftermath of the fire.

According to PCWA's complaint, the MFP is located on the Middle Fork of the American River, the Rubicon River, Duncan Creek, and the North and South Fork Long Canyon creeks. It includes seven dams and five powerhouses. The MFP seasonally stores and releases water to meet consumptive demands within western Placer County and to generate power. Water for consumptive purposes is released from the MFP and re-diverted at two locations: (1) the American River Pump Station, located on the North Fork of the American River near the City of Auburn; and (2) Folsom Reservoir. 24. PCWA alleges that, for over 50 years, it has operated the MFP as a multi-purpose project pursuant to four objectives: (1) to meet Federal Energy Regulatory Commission (FERC) license requirements that protect environmental resources and provide for recreation; (2) to meet the consumptive water demands of western Placer County; (3) to generate power to help meet California's energy demand and provide valuable support services required to maintain the overall quality and reliability of the state's electrical supply system; and (4) to maintain project facilities to ensure their continued availability and reliability. According to PCWA, all electricity generated by the MFP is delivered to the California Independent System Operator (CAISO) balancing authority area through PG&E's transmission system at switchyards and substations, typically located near the powerhouses. PG&E's transmission system is not part of the MFP. PCWA generates hydro-electric power but requires electrical

interconnections with transmission lines via interconnection agreements with PG&E and the CAISO.

PCWA alleges that the Mosquito Fire damaged it a variety of ways, including additional costs and damages to property and facilities. In particular, PCWA alleges that it incurred costs associated with operation of maintenance performed during and in the aftermath of the fire, from the loss of its power systems workforce (which had been evacuated) while they could not access the project facilities during closures resulting from the Mosquito Fire, and for watershed, waterway, and water body management and protection. PCWA also alleges that it incurred damages related to delayed FERC license implementation and capital projects, lost access to facilities to perform operations and maintenance, emergency inspection and evacuation costs, and damages related to water debris and turbidity loading.

Ten Causes of Action

PCWA's complaint against PG&E contains ten causes of action, including negligence, public and private nuisance, inverse condemnation, premises liability, trespass, and the alleged violation of various statutes under the Public Utilities Code and Health and Safety Code of California. However, PCWA's complaint focuses on theories of negligence. PCWA alleges that PG&E was solely responsible for ensuring its electrical equipment was properly maintained and in safe, working condition and operated by properly trained and supervised personnel. In support of that argument, PCWA references a 2014 resolution and various General Orders issued by the California Public Utilities Commission, all of which directed utilities' to reduce the risk of wildfires caused by utility facilities. Further, the complaint includes references regulations and statutes that govern the construction, installation, operation, and maintenance of electrical utility equipment. PCWA also alleges that PG&E had actual knowledge about the risk of wildfire from its electrical equipment, and cites a host of past instances of wildfires allegedly sparked by PG&E's electrical equipment. Despite that knowledge, according to the complaint, PG&E failed to properly maintain their electrical equipment, including the surrounding vegetation, and allegedly caused the Mosquito Fire and the resulting damages to PCWA.

PCWA's complaint also includes a cause of action for inverse condemnation. PCWA alleges that the law requiring compensation when private property is appropriated for public use applies to investor-owned utilities such as PG&E. The complaint reiterates the claim that PG&E was solely responsible for the safe and reliable operation of its electrical equipment and its alleged failure to do so directly resulted in damage to PCWA's property. PCWA claims that, because supplying electricity is in furtherance of a public objective, the damage to PCWA's property constitutes a taking by PG&E, thus requiring compensation.

Damages Sought

PCWA is suing for damages resulting from the Mosquito Fire, including damages to real and personal property, damages to land, increased expenses incurred in the aftermath of the Mosquito Fire, and all applicable legal fees. Moreover, PCWA is seeking punitive and exemplary damages against PG&E for what they describe as "despicable conduct" and "conscious disregard" for the safety of the community. In addition to damages, PCWA is seeking a permanent injunction against PG&E to cease their alleged violations of various statutes and regulations governing the safety and condition of their electrical equipment.

Conclusion and Implications

PCWA's suit is the latest in a series of lawsuit against PG&E alleging that the company's infrastructure, and their failure to properly maintain or operate it, caused the Mosquito Fire. Neither Cal Fire nor the U.S. Forest Service have reached a final determination regarding the cause of the fire. The complaint is available online at: https://docs.pcwa.net/mosquito-fire-complaint.

(Miles Krieger, Steve Anderson)

RECENT FEDERAL DECISIONS

D.C. CIRCUIT VACATES HYDROELECTRIC DAM LICENSE OVER DEFICIENCIES WITH THE CLEAN WATER ACT WATER QUALITY CERTIFICATION

Waterkeepers Chesapeake v. Federal Energy Regulatory Commission, 56 F.4th 45 (D.C. Cir. Dec. 20, 2022).

The United States Circuit Court of Appeals for the District of Columbia recently determined that the State of Maryland could not retroactively waive its previously-issued water quality certification for a license for a hydroelectric dam. The license was vacated and remanded to the Federal Energy Regulatory Commission (FERC).

Background

Constellation Energy Generation, LLC is the operator of Conowingo Dam, a hydroelectric dam on the Susquehanna River in Maryland. In 2014, Constellation Energy submitted a request for a water quality certification under Section 401 of the Clean Water Act to Maryland's Department of the Environment. After years of negotiation, public notice, commenting, and a public hearing, Maryland issued a section 401(a)(1) water quality certification in 2018.

The water quality certification required Constellation to develop a plan to reduce the amount of nitrogen and phosphorus in the dam's discharge, improve fish and eel passage, make changes to the dam's flow regime, control trash and debris, provide for monitoring, and undertake other measures for aquatic resource and habitat protection. Constellation challenged the certification and its conditions, calling the conditions unprecedented and extraordinary.

As part of settling Constellation's challenge to the water quality certification, Maryland and Constellation agreed to submit a series of proposed license articles to FERC for incorporation into the dam's license. If those articles were incorporated into the license, Maryland agreed to conditionally waive any and all rights it had to issue a water quality certification. FERC issued a 50-year license that included the proposed license articles.

Several environmental groups, collectively referred to as "Waterkeepers," filed a petition for rehearing with FERC. They argued that Maryland had no authority to retroactively waive its 2018 water quality certification and that FERC therefore exceeded its authority under the federal Clean Water Act by issuing a license that failed to incorporate the conditions of that certification. FERC rejected Waterkeepers' argument and denied the petition. Waterkeepers petitioned for review.

The D.C. Circuit's Decision

Retroactive Waiver Argument

The court first considered Waterkeepers' argument that the Clean Water Act does not allow a retroactive waiver of the kind Maryland has attempted. In opposition, FERC argued that Section 401 of the Clean Water Act does not prevent a state from affirmatively waiving its authority to issue a water quality certification. The court rejected FERC's argument, reasoning that the Clean Water Act provides two routes for a state to waive a water quality certification: failure or refusal to act on a request for certification, within a reasonable period of time. If a state has not granted a certification or has not failed or refused to act on a certification request, section 401(a)(1) prohibits FERC from issuing a license. Because the state acted when it issued the water quality certification in 2018, the subsequent backtracking of that issuance through a settlement agreement was not a failure or refusal to act. In the end, the court agreed with Waterkeepers.

Remedy

The court next considered what the appropriate remedy should be. FERC argued that the appropriate remedy would be to remand the license back to FERC without vacating the license. This would allow the license to remain in place while a new permit was

issued and would avoid disruptive consequences that result from vacating a license with environmental protections in place. The decision whether to vacate depends on the seriousness of the license's deficiencies and the disruptive consequences of an interim change that may itself be changed.

The court determined *vacatur* was appropriate. First, the license had serious deficiencies because FERC issued it without statutory authority. Second, disruptions to the environmental protections can be avoided through issuance of interim, annual licenses until a permanent license can be issued. Further, Waterkeepers' brought the action for the very purpose of strengthening the environmental protections, and Waterkeepers agreed with vacatur. Finally, vacating the license would allow the administrative and judicial review to be completed after being interrupted by the settlement agreement.

Conclusion and Implications

This decision is another case reminding states and project proponents to proceed with caution when attempting to resolve disputes surrounding Section 401 water quality certifications. Under the Clean Water Act. The court's opinion is available online here: https://www.cadc.uscourts.gov/internet/opinions.nsf/3A0ACFE0A2A87BFE8525891E00572389/$file/21-1139-1978279.pdf.
(Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT FINDS 90-DAY STATUTE OF LIMITATIONS FOR DEVELOPMENT APPROVALS BARS UNWINDING APPROVALS UNDER THE POLITICAL REFORM ACT

Aids Healthcare Foundation v. City of Los Angeles,
___Cal.App.5th___, Case No. B311114 (2nd Dist. Dec. 14, 2022).

The Second District Court of Appeal in *Aids Healthcare Foundation v. City of Los Angeles* affirmed the trial court's decision dismissing a case seeking to unwind development approvals dating back eleven years under the Political Reform Act (PRA) because of government official corruption and bribery, holding that the more specific shorter 90-day statute of limitations for development approvals under California Planning and Development Law applied to bar the action.

Factual and Procedural Background

The PLUM committee consists of five councilmembers from the 15-member Los Angeles City Council. It oversees the City Planning Department's development of land use plans and zoning and environmental review laws.

The PLUM committee also reviews and votes on proposed real estate projects that seek discretionary approvals. These approvals often require overruling the usual planning and zoning rules that apply to average residents and small businesses of the City.

The PLUM committee holds considerable sway over the hearing of real estate development projects because, after the PLUM committee issues its recommendation to the city council, the clerk puts the item on a consent-type section of the meeting. From there, if no councilmember requests the full City Council hold a hearing about the project, the City Council approves the item in a quick mass vote without public comment. These votes happen so fast that often times the public attending the hearing does not even realize it has occurred.

The chair of the PLUM committee has particular power because the chair exercises control over the committee agenda and can be a single bottleneck for whether or not a real estate project receives a hearing and goes on to City Council with a positive recommendation.

In 2020 a federal criminal investigation revealed that two former city councilmembers, Jose Huizar and Mitchell Englander, allegedly engaged in bribery and other corruption in connection with their work on the PLUM committee.

Englander sat on the PLUM committee from 2012 until his resignation in October 2018. In January 2020, after a five-year investigation, a federal grand jury indicted Englander for falsifying material facts, making false statements, and witness tampering. Englander pleaded guilty to federal charges for obstruction of justice.

Huizar sat on the PLUM committee as a member and/or its chair from 2007 until his removal in November 2018. In June 2020 federal law enforcement arrested Huizar on corruption charges, including racketeering, bribery, and money laundering. Huizar stands accused of accepting $1.5 million in bribes, gifts, and other inducements from real estate developers "to steer their projects for approval" through the PLUM committee and ultimately the City Council.

Around the same time as Huizar's arrest, the City commenced revocation proceedings of approvals as to one real estate development project in downtown Los Angeles linked to the criminal charges. Soon, prosecutors identified another project implicated in Huizar's illicit behavior.

Aids Healthcare Foundation (AHF) provides affordable housing to formerly homeless and low-income individuals and advocacy on issues of affordable housing, homelessness, and gentrification. AHF alleges the corruption taints at least two other projects. In addition, the Los Angeles City Attorney is investigating other real estate development projects with possible ties to the scandal, and other city

councilmembers have requested a formal review of such projects.

On August 4, 2020, nearly two years after either Englander or Huizar last sat on the PLUM committee or took any official act, AHF filed this action against the City with two causes of action: (1) injunctive relief for violation of the Political Reform Act (PRA), and (2) taxpayer action to prevent waste.

In the first cause of action, AHF alleged that Huizar and Englander violated the PRA, in order to approve or disapprove real estate projects. AHF asserted that the PRA empowers the court to restrain the execution of any official action in relation to which such a violation occurred and that this includes the restraining of permits. AHF thus seeks an order restraining building permits granted by the City of Los Angeles during the period of time when Huizar and/or Englander sat on the PLUM committee and engaged in violations of the PRA.

In its taxpayer waste cause of action, AHF also seeks an Order restraining the City from utilizing any further taxpayer funds, personnel efforts, or resources with respect to these projects.

On September 23, 2020, the City demurred to AHF's complaint, identifying a number of purportedly incurable deficiencies. Central to this appeal, the City sought dismissal on the ground that the 90-day statutes of limitation for development approvals contained in Government Code §§ 65009 and 66499.37 barred AHF's claim.

AHF opposed the demurrer, AHF asserted the PRA's four-year statute of limitations contained in Government Code § 91011, subdivision (b), governed. AHF argued that applying the 90-day time bar applicable to land use permit challenges would constitute an impermissible amendment of the PRA and decimate the PRA's robust enforcement mechanisms" including its "four-year statute of limitations."

AHF also argued that even if the 90-day statute of limitations applied, Huizar's fraudulent concealment of his criminal acts tolled the commencement of the limitations period until his June 2020 arrest, making AHF's August complaint timely even under the shorter statute of limitations.

On December 7, 2020, the trial court heard and sustained the City's demurrer without leave to amend, and on December 29, 2020, dismissed AHF's action. AHF timely appealed.

The Court of Appeal's Decision

The Court of Appeal, under independent *de novo* review as to the legal issue of the applicable statute of limitations, affirmed the trial court's decision.

The Political Reform Act Statute of Limitations

The voters approved the PRA in 1974 as an initiative measure. The PRA concerned elections and different methods for preventing corruption and undue influence in political campaigns and governmental activities.

Government Code § 81700 of the PRA provides that a public official shall not make, participate in making, or in any way attempt to use the public official's official position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest.

Government Code § 91003 provides that upon a showing that a violation occurred, the court may restrain the execution of any official action in relation to which such a violation occurred, pending final adjudication. If it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved, the court may set the official action aside as void. In considering the granting of preliminary or permanent relief under this subsection, the court must accord due weight to any injury that may be suffered by innocent persons relying on the official action.

As originally enacted, the PRA included a two-year statute of limitations, but in 1980, the California Legislature extended the statute of limitations to four years.

The Land Use Permit Approval Statute of Limitations

In contrast to the four-year statute of limitations contained in the PRA, Government Code § 65009 prescribes a 90-day statute of limitations to challenge certain land-use decisions. The shortened limitations period found in § 65009 predates the PRA by nearly a decade. With specific exceptions not relevant here, § 65009 provides that no action or proceeding shall be maintained in any of the following land use permit approval cases by any person unless commenced and served within 90 days after the legislative body's decision.

Confirming that "no action" means no action, the statute reiterates that upon the expiration of the time limits provided for in this section, all persons are barred from any further action or proceeding. The statute includes a statement of the underlying legislative intent and policy rationale for the 90-day bar:

> The Legislature further finds and declares that a legal action or proceeding challenging a decision of a city, county, or city and county has a chilling effect on the confidence with which property owners and local governments can proceed with projects.

The statute further makes clear "[t]he purpose of this section is to provide certainty for property owners and local governments regarding decisions made pursuant to this division."

Lack of Substantial Evidence for a Fair Argument

By its plain language, § 65009's 90-day limitation on a broad variety of challenges to land use and zoning decisions encompasses AHF's action to challenge and set aside certain unidentified building permits granted by the City over an 11-year period that:

> . . .would not have been approved in their current form but for the misconduct of Councilmembers Huizar and Englander.

An action or proceeding under the PRA challenging a development permit must comply with the specific limitation provisions of Government Code § 65900. A similar decision was reached by the Third District Court of Appeal in a similar case challenging a development permit under the PRA in *Ching v. San Francisco Bd. of Permit Appeals*, 60 Cal.App.4th 888 (1998).

To avoid § 65009, AHF contends that, notwithstanding its ultimate goal of invalidating any illicitly-obtained building permits, the gravamen of its action is not principally a challenge to the permit decision, but instead is a challenge to the corruption. However, while AHF may challenge corruption under the PRA, the gravamen of AHF's action is an attack on, or review of, the PLUM committee's decisions related to permitting and real estate project approvals. Section 65009 applies directly to that challenge. AHF cannot escape the statutory time bar by couching its claim as "necessarily dependent on a finding of a violation of the PRA" when the violation itself involves challenging the PLUM committee's project approvals.

Conclusion and Implications

This opinion by the Second District Court of Appeal follows several other Court of Appeal decisions upholding the strict nature of the statute of limitations for challenging development approvals for the benefit of the developer and benefit of governmental certainty. Where bribes and fraud has been alleged, the law provides other criminal and civil remedies, but generally not the injunctive relief of the PRA or other statues to unwind the development approvals. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B311144.PDF.
(Boyd Hill)

FIRST DISTRICT COURT AFFIRMS LACK OF SUBSTANTIAL EVIDENCE TO SUPPORT FAIR ARGUMENT THAT A GAS STATION WOULD RESULT IN URBAN DECAY AND PETROLEUM LEAKS

Brentwood Auto Spa, Inc. v. City of Brentwood, *Unpub.*, Case No. A163380 (1st Dist. Dec. 9, 2022).

The First District Court of Appeal in an *unpublished* opinion in *Brentwood Auto Spa, Inc. v. City of Brentwood* affirmed the trial court's decision upholding a mitigated negative declaration (MND), rejecting as speculative an expert report which asserts that a gas station approval would result closure of nearby gas stations, petroleum leaks and urban decay.

Factual and Procedural Background

Robinson Oil Company (Robinson) is the project applicant. The proposed project consists of a gas

station, convenience store, and car wash, the construction of numerous parking spaces, sidewalk and frontage improvements, and landscaping with 38 new trees. The project would be located on a street with several existing gas stations spaced out along a three-mile stretch of road.

The project site is a vacant 2.46-acre property containing vegetation and assorted shrubs. The site is adjacent to residential housing and a self-storage facility, and it is across the street from the Brentwood-operated Chevron gas station and convenience store.

The City of Brentwood (City) identified potentially significant impacts of the project to biological resources, geology and soils, hydrology and water quality, noise, cultural resources, transportation, and tribal cultural resources. But it also identified mitigation measures to avoid the impacts.

The City found that adherence to the mitigation measures, municipal code standards, and other applicable local and state regulations would reduce the project's potential environmental impacts to a less-than-significant level. The City, thus prepared a MND rather than an Environmental Impact Report (EIR). The mitigated negative declaration did not address urban decay.

According to Brentwood, the area surrounding the project suffers from urban decay, thus requiring consideration of that impact in an EIR. Brentwood asserted the project site is adjacent to property already exhibiting physical signs of deterioration, such as boarded-up windows, trash, and abandoned construction.

Brentwood claimed the project may cause the closure of one or more car wash and gas stations, leading to physical deterioration. The City indicated it had lost 10 to 15 percent of its business volume when the City previously approved a car wash. Brentwood anticipated a loss of an additional 20 to 30 percent if the project was approved, which would render Brentwood unprofitable and force it to completely or partially close. Brentwood insisted that if it ceased operations, its property would likely remain vacant and would need to be demolished for a new tenant.

The Planning Commission disagreed, finding there is no substantial evidence in the record supporting a fair argument the project may result in environmental impacts. It adopted the MND and issued a conditional use permit to Robinson.

Brentwood appealed the Planning Commission's decision to the City Council, arguing the MND was inadequate because it did not consider the urban decay that would result from opening a competing gas station and car wash.

In support, Brentwood submitted a report from Dr. Philip King, an economics professor, who analyzed the potential for urban decay resulting from the project. According to Dr. King, reduction in gasoline consumption would likely lead to the closure of one to two gas stations in the City between now and 2030, and the City's gasoline needs are sufficiently served without the project.

Dr. King opined that closed gas stations would result in brownfields, a significant environmental impact, because of potential leaking underground storage tanks. Because brownfields constitute urban decay and blight, Dr. King recommended the City weigh the limited benefits of a new gas station against the potential for urban decay.

The City Council denied Brentwood's appeal, finding there is no substantial evidence in the record supporting a fair argument that the project may result in environmental impacts, including urban decay.

Brentwood filed a writ of mandate, which the trial court denied. The trial court concluded Dr. King was qualified to explain how the project would affect the surrounding businesses, including nearby gas stations, but that Dr. King lacked the expertise to opine on the environmental impacts of closed gas stations. It deemed speculative his opinions that the project would result in the closure of at least one gas station in the next five years or that closed gas stations will remain unused and become brownfields.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's decision upon independent review to determine whether substantial evidence supports a fair argument the proposed project may have a significant effect on the environment, finding no such substantial evidence in the speculative opinions of Dr. King.

Urban Decay as an Environmental Impact

Economic effects of a proposed project are typically outside the purview of the California Environmental Quality Act (CEQA). That a project may result in business closures is not an effect covered by CEQA.

CEQA obligations are triggered, however, if the business loss affects the physical environment. This can include urban decay, which the City defined as:

> . . .the 'deterioration of properties or structures that is so prevalent, substantial, and lasting a significant period of time that it impairs the proper utilization of the properties and structures, and the health, safety, and welfare of the surrounding community.'

Analyzing urban decay is required only when there is evidence suggesting that the economic and social effects caused by the proposed business ultimately could result in urban decay or deterioration. But any indirect physical change on the environment must be considered only if it is a reasonably foreseeable impact which may be caused by the project. A proposal to construct a new business does not trigger a conclusive presumption of urban decay.

Fair Argument of Environmental Effect Standard for an EIR

An EIR is a detailed statement describing and analyzing the significant environmental effects of a project and discussing mitigation to avoid the effects before approving a project. An EIR is required if substantial evidence in the record supports a "fair argument" a project may entail significant environmental effects.

Preparation of an EIR is excused if the agency determines there is no substantial evidence in light of the whole record that the project, with its mitigation measures, would have a significant effect on the environment. In those circumstances, the agency must prepare a MND, a written statement briefly describing the reasons why the project will not have a significant effect on the environment.

The agency has substantial discretion in determining the appropriate threshold of significance to evaluate the severity of a particular impact.

Lack of Substantial Evidence for a Fair Argument

Dr. King's testimony lacked foundation. Dr. King simply counted the City's existing 13 gas stations and stated in conclusory fashion that they sufficiently served the City's 63,000 residents. Dr. King did not attribute the closures to the project, but instead to California public policy seeking the reduction of greenhouse gases and increase in sales of zero emission vehicles.

More problematic is Dr. King's assumption that the unsupported closures would create brownfields. Dr. King was not qualified to make determinations about petroleum contamination from gas stations. He fails to establish that gas stations forced to close due to economic failure will cause underground petroleum leaks. Dr. King's assertion that the closed gas stations would remain unused brownfields is similarly unsupported.

Conclusion and Implications

This opinion by the Second District Court of Appeal shows the limits of using expert opinion to establish a fair argument of a substantial environmental effect, especially when the expert opinion is really a disguised attempt by a competing business demonstrating merely an economic rather than an environmental effect. An expert opinion cannot be simply a series of attenuated, unsupported intermediate steps towards establishing a project's environmental effects based upon economic harm. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/A163380.PDF.
(Boyd Hill)

FIFTH DISTRICT COURT UPHOLDS RULING THAT PLAINTIFFS WERE UNLIKELY TO ESTABLISH THAT ZOOM® LIMITATION ON NUMBER OF PARTICIPANTS WAS A VIOLATION OF THE BROWN ACT

Padilla v. City of McFarland, *Unpub.*, Case No. F082320 (5th Dist. Dec. 9, 2022).

Members of the public (plaintiffs) brought an action against the City of McFarland (City), claiming the City violated the Ralph M. Brown Act (Brown Act) because a City Council meeting conducted (at the onset of the COVID-19 pandemic) on the Zoom® videoconferencing platform (Zoom) limited

access to 100 people. The trial court denied a motion for a preliminary injunction on alternative grounds, including that plaintiffs were unlikely to prevail on the merits of its Brown Act claim and that the balance of harms weighed in the City's favor. Plaintiffs' appealed the determination on the preliminary injunction and the Court of Appeal affirmed the trial court in an *unpublished* opinion.

Factual and Procedural Background

In January 2020, a private prison company requested that the City of McFarland Planning Commission (PC) modify Conditional Use Permits (CUPs) to allow the opening of two immigration detention facilities in the City. The PC held public meetings in January 2020 and February 2020 to consider the modifications. Both meetings were open to and well attended by the public, including some of the plaintiffs (as further defined below). The PC decision on the CUPs modifications were appealed to the City Council in February 2020.

In March 2020, in response to the threat of COVID-19, the Governor declared a state of emergency in California. Governor Newsom issued an executive order suspending and waiving the Brown Act provisions requiring in-person meeting attendance, which was superseded five days later by another executive order suspending strict compliance with certain Brown Act provisions and authorizing local bodies to hold meetings via videoconference.

In April 2020, after receiving written comments, the City Council held a meeting to discuss and vote on the modifications to the CUPs. The meeting was held virtually due to the pandemic and the Zoom license the City used had limited access to 100 people. Certain interested parties (plaintiffs) attempted to access the meeting using Zoom, but due to the limitation on participants, could not access the meeting. After the City Council voted to approve the modifications to the CUPs, plaintiffs delivered a letter to the City demanding that it "cease and desist/cure or correct" its Brown Act violation. When the City failed to respond to the letter, plaintiffs sued the City alleging a violation of the Brown Act (and the California Constitution) and requesting that the City's actions on the modifications to the CUPs should be declared null and void.

Plaintiffs moved for a preliminary injunction to enjoin the City from generally giving effect to or relying on the modified CUPs. The trial court denied the motion, finding injunctive relief was procedurally improper because the City Council vote was a completed act that had no threat of recurring and, alternatively, plaintiffs had not demonstrated a likelihood of success on the merits or that the balance of harms weighed in plaintiffs' favor. Plaintiffs' appealed the trial court's denial of injunctive relief.

The Court of Appeal's Decision

The Court of Appeal reviewed the grounds on which the trial court denied the preliminary injunction. The Court of Appeal, first, reviewed the trial court's denial of the preliminary injunction on the ground the City's approval of the modified CUPs was a completed act that had no threat of recurring. The court found that the trial court was unjustified in denying injunctive relief under the completed act principle. The court reasoned that the alleged harm plaintiffs sought to prevent—namely, the City continuing to give effect to the modified CUPs which the City Council approved without providing plaintiffs access to the meeting—was not completed; and as such the harm could be prevented by ceasing to give effect to the CUPs. The Court of Appeal, therefore, found that the trial court erred to the extent it denied injunctive on the ground that the City's approval was a completed act that had no threat of recurring.

Probability of Success on the Merits

The court, next, reviewed the trial court's denial based on its finding plaintiffs failed to meet their burden of proving a reasonable probability of success on the merits. The Court of Appeal, here, agreed with the trial court. Plaintiffs contended a violation of Brown Act § 54953—calling for legislative body meetings to be open and public and providing that all persons shall be permitted to attend any such meeting—given that attendance was limited to 100 participants. Recognizing that the Brown Act provides that an act taken in violation of § 54953 shall not be determined to be null and void if the action was taken in substantial compliance with that section, the court held that the City's action should not be nullified if the City's reasonably effective efforts to provide public access to the City Council meeting served the statutory objective of ensuring actions taken and deliberations made at such meetings are open to the

public. The Court of Appeal, then, held that the trial court reasonably could find the City substantially complied with the Brown Act's public access requirement—because, given the pandemic, legislative bodies such as the City had to quickly adjust to the use of technology to provide the public with access; and the difficulties of strictly complying with the Brown Act were inherently recognized by the Governor's executive orders. Based on the record before it, the court found that even though in hindsight the City could have done more to provide greater public access to the meeting, the City acted in a manner that is consistent with the open meeting objectives of the Brown Act and thereby substantially complied with the Brown Act.

Potential Prejudice

The Court, further, held, that in any event, plaintiffs were not prejudiced (which is required for a court to set aside an agency action) because plaintiffs' positions were adequately represented and plaintiffs still could have provided written comments to the City Council.

Balancing of Harms

The Court of Appeal also upheld the trial court's determination that the balance of harms weighed in the City's favor. Plaintiffs argued the denial of their constitutional and statutory rights to participate in the City's decision-making process established irreparable harm absent a preliminary injunction. Plaintiffs further argued they and others were likely to suffer irreparable harm because of the high potential for community spread of COVID-19 from the detention facilities. The City argued that if the preliminary injunction was granted, among other things, it would threaten the continued delivery of essential public services by depriving the City of revenue it was set to receive under the modified CUPs, which revenue accounted for 20 percent of the City's annual budget. The Court of Appeal found that the trial court could reasonably find the City's economic harm outweighed any deprivation of plaintiffs' constitutional and statutory rights, including in light of the court's earlier finding that the City substantially complied with the Brown Act. As such, the Court of Appeal held there was no abuse of discretion in the trial court denying the preliminary injunction because the balance of the harms weighed in the City's favor.

Conclusion and Implications

The case is significant because it contains a unique fact pattern (introduced by the COVID-19 pandemic) for alleged violations of the public participation provisions of the Brown Act. The *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/F082320.PDF.
(Eric Cohn)

SECOND DISTRICT COURT UPHOLDS DECISION GRANTING CITY'S ANTI-SLAPP MOTION STRIKING DEVELOPER'S BREACH OF CONTRACT CLAIMS

Redondo Beach Waterfront vs. City of Redondo Beach, *Unpub.*, Case No. BC682833, (2nd Dist. Dec. 21, 2022).

In an *unpublished* decision, the Second District Court of Appeal upheld the trial court's order, on remand, granting in part and denying in part the City of Redondo Beach's anti-SLAPP motion which sought to strike petitioner developer's breach of contact claims. Petitioner's complaint alleged that the city violated a ground lease and infrastructure financing agreement when it submitted a voter approved initiative, which effectively blocked much of the project, to the California Coastal Commission (Commission) for approval of the measure's amendment of the city's local coastal program. After the city established its submittal of Measure C to the Commission was speech and/or conduct protected by the anti-SLAPP statute, petitioner was unable to meet its burden of demonstrating they were likely to prevail on their breach of contract claims. Key to the court's decision was its determination that the agreement in was not a statutory development agreement, and thus did not give rise to the sort of vested rights that

would have precluded application of new voter approved initiatives to block the project.

Factual and Procedural Background

The City of Redondo Beach long planned to revitalize its waterfront. In 2010, city residents passed Measure G authorizing the city to renovate 150,000 square feet of existing building area and create 400,000 square feet of new development in the waterfront area. The city entered a public-private partnership with petitioner's predecessor in interest which then invested more than $15 million to develop a plan for the project. In June of 2016, petitioner sought approval of the development project, including approval of a vesting tentative map. The city deemed the application complete on June 23, 2016.

In 2017, petitioner and the city entered into a new agreement which, among other things, merged the parties' prior agreements and identified specific parcels of land that the city was required to lease to petitioner (agreement). The agreement required the city to work cooperatively with petitioner to "assist in coordinating the expeditious processing and consideration of all necessary permits, entitlements, and approvals." However, the agreement provided that the city "shall retain complete discretion to amend the General Plan, land use designations or requirements applicable to the [project site]." A section of the agreement also made clear that it was not a development agreement as defined by § 65864 of the Government Code.

In 2017, city voters passed "Measure C" to stop construction of a significant portion of the project. In the same election, three councilmembers were elected on an anti-project platform. In April of that year the city notified petitioner that Measure C triggered the force majeure clause of the agreement and as a result the city's performance under the agreement would be delayed. In May of 2017, the city council passed a resolution sending Measure C to the Coastal Commission for certification.

In December of 2017, petitioner filed a petition and complaint against the city alleging that the city breached its agreement with petitioner and violated petitioner's due process rights by: (1) failing to protect petitioner's property and contractual rights, permits and vesting tentative map and or to ensure that it would be able to perform its own obligations under the agreement; (2) seeking out a new development partner when it was obligated to lease portions of the waterfront to petitioner; (3) seeking to redesign the waterfront project without petitioner; (4) allowing officials who have a "clear conflict of interest to continue to make decisions and/or participate in decisions or conduct that affect" the agreement; (5) refusing to allow petitioner access to records required under the agreement; (6) failing to submit the complete application for the project's proposed boat ramp to the coastal commission; (7) using a reimbursement agreement, which had been superseded by the subject agreement to "manufacture a breach; (8) using the filing of a separate federal complaint to "manufacture defaults" under the agreement; and (9) declaring a forfeiture of the agreement when it had no right to do so.

The city then filed an anti-SLAPP motion challenging four of the breaches alleged in petitioner's complaint. Petitioner opposed the city's anti-SLAPP motion, arguing that the city's conduct was not "SLAPPable" because the "collective action of a government entity" is not entitled to protection under the anti-SLAPP statute. Petitioner argued that the city's alleged breaches of the agreement and violations of the government code were not "speech" or "expressive activity."

The trial court rejected the city's anti-SLAPP motion in its entirety, finding that the city's passing of a resolution to submit Measure C to the Coastal Commission was not activity protected by the anti-SLAPP statute. The trial court also held that petitioner's allegations that the city improperly allowed conflicted officials to participate in decision affecting the agreement was not protected by the anti-SLAPP statute because the allegations did not implicate any conduct by the city, but by its individual councilmembers. The conduct underlying the allegations was:

> . . .basically any official decision made by the city involving the [agreement], which… does not implicate protected activity.

The city appealed and in the Second District's first decision, it affirmed and reversed the trial court's order denying the city's anti-SLAPP motion. Specifically, the court concluded that the city's submission of Measure C to the Coastal Commission was speech protected by the anti-SLAPP statute. The city remanded to consider whether petitioner had

demonstrated a reasonable probability of prevailing on its causes of action arising out of the city's submittal of Measure C and allowing conflicted officials to participate in decisions affecting the agreement. On remand, the trial court granted the city's anti-SLAPP motion in part and denied it in part. The court found that petitioner was not likely to prevail on any of its claims arising out of the allegation that the city improperly sought to apply Measure C to the project through its submission of the initiative to the Coastal Commission. Regarding petitioner's claims that the city improperly allowed conflicted officials to participate in decisions affecting petitioner's interests under the agreement, the court found that petitioner was reasonably likely to prevail on its procedural due process and declaratory relief claims, but not its claim for breach of contract. Petitioner appealed.

The Second District Court of Appeal's Decision

The court began by discussing the two-prong test used when evaluating an anti-SLAPP motion. In the first prong, the defendant must establish that the challenged claim arises from activity protected by the anti-SLAPP statute. If the defendant establishes the plaintiff's claims arise out of protected activity, the burden shifts to the plaintiff to demonstrate a probability of prevailing on its claims. In the second prong, the plaintiff must make a "prima facie showing of facts to sustain a favorable judgment."

Since the court had already determined that the city's submittal of Measure C to the Coastal Commission, and participation by allegedly conflicted councilmembers in decisions affecting the agreement, were speech protected by the anti-SLAPP statute, the court analyzed whether petitioner had met its of establishing a probability of prevailing on their claims.

City's Submission of Measure C to the Coastal Commission Did Not Support a Claim for Breach of Contract

The court noted that petitioner failed to point to any language in the agreement expressly barring the city from asking the Coastal Commission to certify an ordinance that could affect the project. Instead, a portion of the agreement provided that "in no event shall the city be liable for breach of the agreement based on its amendment of the General Plan, zoning, or other land use designations..." The city was therefore allowed to amend its land use laws that apply to the project through amendments like Measure C.

The court also rejected petitioner's claims that the city's submittal of Measure C to the Coastal Commission "violated the spirit" of other provisions of the agreement. Provisions of the agreement made clear that it was not a development agreement under the development agreement statutes. Therefore, the agreement did not vest petitioner's right to develop the project subject to the land use regulations in effect at the time the agreement was executed. The court rejected petitioner's claims that the instant situation was analogous to *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal. App.4th 435 (2010). In *Mammoth Lakes*, a jury found that the town of Mammoth Lakes breached a development agreement by seeking help from the Federal Aviation Administration to kill a project subject to a development agreement and awarded plaintiff developers $30 million in damages. Here, petitioner was not protected by a statutory development agreement, meaning that the instant situation was fundamentally different.

City's Submission of Measure C to the Coastal Commission did Not Support a Substantive Due Process Claim

The court then addressed petitioner's claims that submittal of Measure C to the Coastal Commission violated their substantive due process rights. To prevail in such a claim, a plaintiff must (1) establish that it had a valid property interest protected by the U.S. Constitution, and (2) that the government's conduct implicating that property interest was arbitrary or irrational.

Here, petitioner's alleged vested rights in the project were constitutionally protected. However, nothing in the record supported petitioner's claim that submission of Measure C to the Commission was arbitrary or irrational. As the court noted, rejection of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. To satisfy the second prong of the substantive due process test, a challenged government action must "amount to some form of outrageous or egregious constituting a true abuse of power."

Here, it was not enough that some councilmembers were elected on a platform opposing the project.

In the land use context, a government official's motivation for voting on a land use issue "is irrelevant to determining whether there has been a due process violation." The key question is whether there is objectively a sufficient connection between the land use regulation and a legitimate governmental purpose so that the former may be said to substantially advance that purpose.

Here, the Coastal Act required to submit Measure C to the Coastal Commission—thus submittal of Measure C was neither or irrational nor arbitrary, it was required by law.

Even if it were improper for the city to ask the Coastal Commission to certify Measure C, the city's conduct was not egregious, oppressive, or shocking. Measure C was passed by voters, thus submittal of Measure C to the Coastal Commission was in the furtherance of the concerns of City residents who voted to approve Measure C. Even if not proper or justified, these concerns are an appropriate factor for consideration in zoning decisions when evaluating a substantive due process claim.

Conclusion and Implications

The *Redondo Beach Waterfront* decision provides a helpful discussion of the standards in play when a public agency files an anti-SLAPP motion when sued for a land use decision. The decision highlights the key distinguishing characteristics between a statutory development agreement—which grants potentially powerful vested rights to developers—and a standard agreement between a developer and a local agency that does not confer these vested rights.

A copy of the court's *unpublished* decision can be found here: https://www.courts.ca.gov/opinions/nonpub/B311039.PDF.
(Travis Brooks)

SIXTH DISTRICT COURT HOLDS CITY DID NOT VIOLATE CEQA OR PLANNING AND ZONING LAW IN APPROVING BICYCLE LANE PUBLIC WORKS PROJECT

Save 30th Street Parking v. City of San Diego, Unpub., Case No. D079752 (6th Dist. Dec 23, 2022).

In an *unpublished* opinion filed on December 23, 2022, the Sixth District Court of Appeal upheld the denial of a petition for writ of mandate that challenged the City of San Diego's (City) approval of a public works project to install protected bicycle lanes through the City's North Park neighborhood (Project). The court held the City did not abuse its discretion in concluding that no further review under the California Environmental Quality act (CEQA) was necessary because the project was consistent with and previously analyzed in a master plan program EIR.

Factual and Procedural Background

The Bikeway Project

In 2018, in connection with a public works project to replace a water pipeline, the City of San Diego explored a potential opportunity to implement bicycle lanes along 30th Street in the North Park Neighborhood. 30th Street has one lane of traffic in each direction with "sharrows" that indicate motorists must share the road with bicyclists.

In 2019, City engineers prepared a study setting forth multiple options to implement protected bicycle lanes along 30th Street, each of which would require the loss of some street parking spaces. In May of that year, the City's mayor issued a memo that endorsed "Option A," which would install a "Class IV" protected bikeway, thereby resulting in the loss of 420 parking spaces on 30th Street.

In August 2019, petitioner Save 30th Street Parking filed a petition against the City and the mayor in his official capacity, arguing that the City inappropriately pre-committed to the Project before conducting CEQA review, and that the Project conflicted with the North Park Community Plan, the Bicycle Master Plan, and the General Plan's Mobility Element.

In December 2019, the City's Mobility Board was presented with a revised plan called "Option A+," which would extend the bicycle lane to the north and restore some of the parking spaces that initially would have been removed.

In January 2020, the program manager of the City's planning department submitted a memo to the program manager of the City's Transportation Department, which discussed the issue of whether the Project complied with CEQA. The memo explained that: (1) the Project was not subject to CEQA because it would not result in direct or reasonably foreseeable environmental impacts, and (2) the Project would implement the goals and policies of the City's Bicycle Master Plan and the North Park Community Plan. Though the memo did not explicitly discuss the Master Plan or North Park Community Plan program Environmental Impact Reports (EIRs), it took the broader position that no further CEQA analysis was required because the Project fell within the scope of the CEQA analysis conducted in those EIRs.

In May 2020, petitioner sought, and the trial court denied, a preliminary injunction to stop the Project. The following November, the City Council approved a construction order to fund the water pipeline replacement project, which also allocated funds to implement the Bikeway Project. Petitioner again sought a preliminary injunction, which the trial court again denied.

At the Trial Court

Petitioner filed a first amended petition in April 2021, which updated the original CEQA and Planning and Zoning Law causes of action with additional facts. The trial court denied the petition by concluding the City was not required to perform a CEQA analysis because the Bikeway Project was consistent with and within the scope of the program EIRs for the Bicycle Master Plan, North Park and Golden Hill Community Plan Updates. Petitioner appealed.

The Court of Appeal's Decision

CEQA Claim

Under the substantial evidence standard of review, the Sixth District Court of Appeal considered whether the City complied with CEQA when it concluded environmental review of the Bikeway Project was not required because it fell within the scope of the program EIRs for the 2013 San Diego Bicycle Master Plan and the 2016 North Park Community Plan (NPCP).

The court noted that the 2016 NPCP program EIR described plan provisions that dealt with bicycle transportation and acknowledged that 30th Street was identified as a Class II or III bikeway. But the program EIR did not specifically analyze the potential *environmental impacts* of implementing bicycle facilities in North Park; therefore, the court concluded there was no substantial evidence to support a finding that the Bikeway Project was "within the scope" of the NPCP program EIR.

The court therefore turned to the Program EIR for the Bicycle Master Plan (BMP), which the NPCP was consistent with. Unlike the NPCP program EIR, the BMP Program EIR extensively discussed the potential environmental impacts of installing bicycle facilities throughout the City. As relevant to the contested Bikeway Project, the EIR analyzed all potential impacts from future projects that contemplated "On-Street Bikeways Without Widening"; therefore, no additional CEQA review would be required because those "projects would only require signage or pavement markings and would not necessitate other roadway modifications."

Here, petitioner's claims centered on the potential environmental impacts associated with the Project's removal of parking spaces on 30th Street. The court noted that the BMP Program EIR "directly addressed this potential environmental impact" by concluding that, although on-street bikeway projects that eliminate parking would result in some secondary effects related to cars circling and looking for spaces, those effects would be temporary and instead be offset by the long-term benefit of reduced motor vehicle use and increased bicycle use.

The court thus concluded the BMP Program EIR qualified as a sufficiently comprehensive and specific environmental document that previously and adequately analyzed the Bikeway Project's potential impacts. As such, the City properly determined that it was not required to conduct any further environmental analysis before implementing the Project.

Planning and Zoning Law Claim

The court also considered whether the Bikeway Project violated the Planning and Zoning Law because it was inconsistent with the NPCP. Whether a project is consistent with an applicable planning document is highly deferential to the local agency—therefore, the court would defer to the City's finding

unless no reasonable person could have reached the same conclusion.

The court rejected petitioner's claim that the Project conflicted with certain bikeway classifications and road designations in the NPCP. Although a map in the NPCP showed a Class III bikeway on 30th Street, that designation was tentative because the NPCP expressly indicated that bikeway designations were subject to change at implementation. The court explained that consistency with a planning document focuses not on *detail*, but on *general policies*. Thus, even though the Project implemented a different bike line classification or road designation from that tentatively indicated on the NPCP map, that variation concerned a minute detail, rather than a fundamental goal, objective, or policy. Moreover, the City could reasonably conclude that installing a Class IV bikeway that eliminated a left-turn lane was consistent with many of the NPCP's overarching principles that encouraged implementing a regional bicycle network and utilizing "road diets" to accommodate varying modes of transportation.

The court similarly rejected petitioner's claim that the Project's elimination of street parking spaces conflicted with policies in the NPCP's Mobility Element that supported access to businesses and preserving parking. The court countered by noting that other policies in the NPCP prioritized the promotion of bicycle transportation as part of a balanced transit system. By selecting "Option A+," which preserved some parking that would have been lost in "Option A," the City did not completely disregard the policy in favor of preserving on-street parking for commercial and adjacent uses. Therefore, the record supported a finding that the City reasonably used its discretion to balance a range of competing interests, in light of the plan's overarching purpose, to find the Project consistent with the NPCP.

Conclusion and Implications

The Sixth District Court of Appeal's opinion is a straightforward application of basic CEQA and Planning and Zoning principles. When considering whether a project is contemplated by a program EIR, agencies and practitioners should ensure that the prior CEQA document adequately analyzes the environmental impacts of that particular project. The court's opinion also reaffirms the long-standing principle that, in determining whether a project is consistent with a governing land use plan, agencies are well-equipped to balance the plan's competing interests to ensure general consistency—inconsistencies with finite, non-mandatory details are not necessarily fatal.

Separately, and though only mentioned in footnotes, the court also identified several non-determinative details that could nevertheless be useful to practitioners who work on analogous projects. First, for example, the court noted that the City's "CEQA memo" was "not a model of thoroughness or clarity with respect to its analysis or conclusions." Though this ultimately did not harm the City's position, it would nevertheless behoove practitioners to ensure all CEQA analyses and conclusions are well documented in the administrative record. Relatedly, the court observed that the memo did not identify any statutory or categorical exemptions to CEQA. The City later noted, however, that should the court find CEQA noncompliance, the City would likely apply one or more of the bicycle-lane exemptions under Guidelines §§ 15304, subd. (h) and 15301, subd. (c). Because CEQA allows agencies to "layer" exemptions when approving a project, it serves to benefit agencies to incorporate those findings at the outset to ensure project approvals are well supported before litigation commences. As a third and final example, the court noted that, by the time this opinion was authored, the contested bicycle lanes had been installed and were in "active use" for over a year; but the City did not ask the court to dismiss the appeal on mootness grounds. Because courts have increasingly dismissed suits as moot where the challenged project has been completed by the time the action is heard on appeal, adding a mootness argument can provide an additional, albeit helpful, layer of defense. A copy of the Sixth District's *unpublished* opinion is available at: https://www.courts.ca.gov/opinions/nonpub/D079752.PDF. (Bridget McDonald)

FIRST DISTRICT COURT UPHOLDS CITY'S APPROVAL OF AFFORDABLE HOUSING PROJECT AND UPHOLDS TRIAL COURT'S GRANT OF $500,000 BOND UNDER CODE OF CIVIL PROCEDURE SECTION 529.2

Save Livermore Downtown v. City of Livermore, *Unpub.*, Case No. A164987 (1st Dist. Dec. 28, 2022).

A neighborhood group filed a petition for writ of mandate challenging the City of Livermore's (City) approval of a 130-unit affordable housing project. The group alleged the project was inconsistent with the City's Downtown Specific Plan and that the project was not exempt from the California Environmental Quality Act (CEQA). At the trial court level, the affordable housing project developer moved for a bond under Code of Civil Procedure§ 529.2 at the statutory maximum of $500,000, which the trial court granted. The neighborhood group appealed on the merits as well as to the granting of the bond. The Court of Appeal affirmed the trial court's judgment in its entirety.

Factual and Procedural Background

In 2004, the City adopted a General Plan and Downtown Specific Plan for which the City certified an Environmental Impact Report (EIR). In 2009, the City certified a subsequent EIR when it made amendments to the Specific Plan. In 2021, the City approved a 130-unit affordable housing project (Project) proposed by real party in interest Eden Housing, Inc. (Eden). The City found the Project consistent with the General Plan and Specific Plan and that the Project was exempt from the CEQA on multiple grounds, including that it was a residential project consistent with a specific plan for which an EIR had been certified (under Gov. Code § 65457). Save Livermore Downtown (SLD), a nonprofit organization, brought a petition for writ of mandate challenging approval of the Project, alleging that the Project was inconsistent with the Specific Plan and the City has inappropriately relied on CEQA exemptions in approving the Project. Eden moved for a bond under Code of Civil Procedure § 529.2, which authorizes a bond of not more than $500,000 in an action brought to challenge qualified affordable housing projects. The trial court granted the bond motion and required SLD to file an undertaking for the statutory maximum of $500,000 as security for costs and damages Eden would incur as a result of litigation-related Project delays. On the merits, the trial court denied SLD's petition, finding that "[t]his is not a close case, . . .[t]he CEQA arguments are almost utterly without merit" and that substantial evidence supported the City's conclusion that the Project was consistent with the Specific Plan. SLD's appeal then followed.

The Court of Appeal's Decision

On appeal, SLD contended that the Project: (1) was inconsistent with the Specific Plan and (2) had inappropriately relied on CEQA exemptions. SLD also contended that the trial court abused its discretion in grating the bond motion and requiring SLD to file a $500,000 undertaking.

City's Determination of Consistency with the Specific Plan was Appropriate

SLD claimed that the Project was inconsistent because the Project did not comply with certain standards found in the Specific Plan. The Court of Appeal articulated that the goal of consistency is accomplished if considering all of its aspects, a project will further the objectives and policies of the plan and not obstruct its attainment and that a given project need not be in perfect conformity with each and every plan policy. The court also articulated that it is not the role of the courts to micromanage a city's development decisions, but rather to determine whether there is substantial evidence to support the city's finding of consistency. The court then dispensed with SLD's challenge taking issue with SLD making no effort to show the Project would not further the objectives and policies of the Specific Plan. The court determined, in any event, that substantial evidence supported the City's determinations as to each of SLD's challenged standards.

SLD also claimed the City's consistency findings were legally inadequate because they were conclusory. The court again disagreed. The court found that, although the findings were relatively brief, the Court still had no difficulty discerning the bases of the City's

conclusions—and as such, they were sufficient to meet the standard of providing enough evidence to bridge the analytic gap between raw evidence and ultimate decision. Furthermore, the court stated that the Housing Accountability Act (HAA), which the Project and the City's approval were subject to, had changed the legal landscape for considering challenges to consistency findings. The HAA deems a housing development project consistent with a plan's policy, standard, or requirement if there is substantial evidence that would allow a reasonable person to conclude it is consistent; and the Court found that a reasonable person could conclude the requirements in question were satisfied in any event here.

Appropriate for City to Rely on CEQA Exemption for Project Consistent with Specific Plan

SLD claimed that it was inappropriate for the City to rely on the CEQA exemptions authorized by Gov. Code § 65457 for residential projects that are consistent with a specific plan for which an EIR has been certified. SLD, specifically, contended that this exemption did not apply because new information about soil and groundwater contamination arose after the 2009 subsequent EIR was certified. The court disagreed. The court found that the 2009 subsequent EIR assessed the information about soil and groundwater contamination raised by SLD and in turn the City could reasonably conclude that the information about soil and groundwater contamination raised by SLD did not constitute new information that was not or could not have been known when the subsequent EIR was certified. As such, the Court of Appeal found it appropriate for the City to have relied on that CEQA exemption.

Trial Court's Granting of Code of Civil Procedure Section 529.2 Bond was Not an Abuse of Discretion

Code of Civil Procedure § 529.2 authorizes the granting of a bond, as security for costs and damages that a party may incur as a result of litigation-related project delays, if a court finds: (1) the litigation was brought in bad faith, vexatiously, for the purpose of delay, or to thwart a qualified affordable housing project and (2) the plaintiff will not suffer under economic hardship by filing the bond. In the trial court, Eden argued that the action had the effect of delaying the Project and threatened its viability whereas SLD argued that a $500,000 undertaking would impose financial hardship and limit its ability to carry out its nonprofit activities. The trial court, after reviewing the evidence before it, found that the action was brought for the purpose of delay and that the SLD would not suffer undue economic hardship by filing the bond, and thus granted Eden's motion for the bond at the statutory maximum of $500,000.

SLD challenged these findings as an abuse of discretion by the trial court. The Court of Appeal disagreed. The court first discussed the plaintiff will not suffer under economic hardship prong. The court set forth the evidence presented in the trial court, including that the record showed that not only more than 50 people had contributed to SLD, but also that the organization had spent $37,000 commissioning plans for an alternative and unrealistic location for the Project. The court also took note that SLD was represented by a prominent private law firm. On this evidence, the court found that it was reasonable for the trial court to find that SLD would not suffer undue economic hardship by filing a $500,000 bond.

The Court of Appeal next determined that it was reasonable for the trial court, given the evidence before it, to find that the litigation was brought for the purpose of delay. The court focused on SLD filing the action at the end of the applicable statute of limitations period and SLD not seeking to advance preparation of the administrative record for almost two months after filing the action as indication that SLD was not prosecuting the action diligently. The court, furthermore, found that SLD's contentions regarding the Project's consistency with the Specific Plan and its CEQA arguments lacked merit, so much so that the inherent weakness of SLD's claims further supported the trial court's finding that SLD brought this action to delay the Project.

Conclusion and Implications

The case is significant because it contains substantive discussion of a court's issuance of a Code of Civil Procedure § 529.2 bond, which is an important tool to discourage meritless lawsuits that target the provision of affordable housing. The *unpublished* decision is available online at: https://www.courts.ca.gov/opinions/nonpub/A164987.PDF.
(Eric Cohn)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

THIRD DISTRICT COURT HOLDS STATE CAPITOL PROJECT EIR VIOLATED CEQA BECAUSE DESIGN CHANGES DISCLOSED FOR THE FIRST TIME IN A FEIR AND INSUFFICIENT PUBLIC INPUT

Save Our Capitol! v. Department of General Services,
___Cal.App.5th___, Case Nos. C096617 and C096637
(3rd Dist. *Initially filed* December 6, 2022, *filed* January 18, 2023, after rehearing).

In a decision initially filed on December 6, 2022, and then filed after rehearing on January 18, 2023, the Third District Court of Appeal overturned in part and affirmed in part a trial court judgment denying writ petitions filed by two petitioner groups challenging the Environmental Impact Report (EIR) prepared for a major renovation of the State Capitol. The EIR failed to disclose several design changes and components of the project until the final EIR was released. This late disclosure prevented the public from commenting on the aspects of building design that would have significant historic and aesthetic impacts and prevented decisionmakers from making an informed decision on the project under the California Environmental Quality Act (CEQA). Although the court rejected several of petitioners' claims, it agreed that the EIR's project description, analysis of impacts to cultural resources and aesthetics, and alternatives analysis were deficient.

Factual and Procedural Background

In 2016, the California Legislature enacted the State Capitol Building Annex Act of 2016 which authorized the Department of General Services (DGS) and the Joint Committee on Rules to pursue the demolition of the 325,000 square foot State Capitol Building Annex attached to the Historic Capitol. The project relied on the "construction manager at risk" delivery method, which involves a project design where a conceptual project design becomes more detailed as time goes on. The project would demolish the State Capitol Building Annex, and replace it with a larger new annex building, an underground visitor center, and an underground parking structure

DGS circulated the draft EIR for the project on September 9, 2019. After the DEIR's public review period, DGS revised the visitor center entrance making it significantly different from what was analyzed in the DEIR, thus changing the center's approach and entrance to two open-air ramps. DGS revised and recirculated affected portions of the DEIR to reflect these changes. However, DGS continued to develop more detailed designs and modifications after the recirculated DEIR, including a new exterior design for the Annex that incorporated a "Double-T" configuration, with an exterior glass curtainwall design. The location of the underground parking lot was also changed in the FEIR from south of the Historic Capitol to east of the new Annex, and parking spaces were reduced from 200 to 150. The FEIR included additional clarification on the project's impacts on trees and landscaping, and increased estimates of the number of trees requiring removal and transplantation. The FEIR determined that the project modifications would not result in any new significant impacts and that such modifications did not constitute significant new information requiring additional circulation of the EIR. DSG certified the FEIR, issued findings, and adopted a statement of overriding considerations on July 30, 2021.

Plaintiffs, two separate non-profit groups, filed two separate petitions for writ of mandate alleging violations of CEQA. The trial court denied both petitions.

The Court of Appeal's Decision

The court overturned in part and affirmed the trial court's judgment.

EIR's Project Description Was Not Accurate, Stable, and Finite

Plaintiffs argued that the EIR's project description was not sufficiently "accurate, stable, and finite" as required by CEQA. Specifically, by changing the location of the underground parking structure and Annex's exterior glass design features, after the public review period, the FEIR "may have misled the public about the nature of the Annex's design and adversely affected their ability to comment on it." This precluded the public from meaningfully commenting on the project's impacts to a:

> . . .treasured historical resource. . . .[b]ecause the changed project description happened in the final EIR, the conflicting descriptions in the earlier EIR's may have misled the public about the nature of the Annex's design and materials would be consistent with the Historic Capitol. . . .When the final EIR disclosed the actual design of a glass curtain, the public was foreclosed from commenting meaningfully on the glass exterior's impact on the Capitol.

Accordingly, the court held that the EIR's project description was consistent with CEQA *except* with regard to its description of the new Annex's exterior design, which changed significantly without providing the public an opportunity to comment on it.

EIR's Analysis of Impacts to Cultural Resources was Inadequate

Petitioners argued that the EIR's analysis and finding of significant and unavoidable impacts to cultural resources was legally inadequate because of "numerous" defects in the EIR and its analysis of these impacts. Petitioners bore the burden of establishing the inadequacy of the EIR's impact analysis and the court concluded that petitioners failed to meet this burden on most of their cultural resource impact claims. However, the court found that the historical resources impacts analysis was flawed because it failed to allow for informed public comment on the Annex's new exterior design. The court further noted that a FEIR's responses to public comments are an integral part of an EIR's analysis of environmental issues with respect to the Annex's exterior design and resulting impacts on historical resources.

EIR's Analysis of Biological Impacts was Adequate

Petitioners argued that the EIR violated CEQA because it did not inventory and identify every plant or tree that the project might affect. As the court noted, no CEQA statute, guideline, or case law, requires an EIR to inventory or identify every plant and tree a project may affect. Here, the EIR disclosed the number and type of trees affected and provided a map of transplanted or removed and replaced trees on the capitol grounds. This information was sufficient to adequately inform decision-makers and the public of the project's impacts.

The court rejected petitioners' claims that the EIR's mitigation measures for trees improperly relied on a future tree protection plan and compliance with the city's tree protection ordinance. CEQA authorizes reliance on future plans for mitigation so long as a lead agency commits itself to the mitigation, adopts specific performance standards the mitigation will achieve, and identifies the types of potential actions that could feasibly achieve that performance standard. DGS's reliance on state standards and the city's tree ordinance met CEQA's requirements for future mitigation plans.

The court rejected petitioners' claims that the EIR's analysis of biological impacts was inadequate because it did not sufficiently evaluate how the project's increase in glass exterior of the Annex would result in increased bird strikes. The EIR determined that the glass exterior's "frit-pattern" would reduce bird strikes significantly. As a result, substantial evidence supported the EIR's conclusion that "substantial avian mortality is not expected to occur and there would not be a substantial increase in the severity of impacts on birds."

EIR's Analysis of Aesthetic Impacts was Inadequate

Petitioners argued that the EIR's conclusion that the primarily underground visitor's center would not impact the view of the Historic Capitol's west façade was not supported by substantial evidence. The EIR did not include elevations or other visual depictions. Noting the importance of considering the impact of aesthetic changes on the Historic Capitol and the view of its west façade "cannot be overstated," the court took issue with the EIRs failure to include a view of the Capitol's west façade from surface grade level. Although CEQA does not require visual simulations, the lack of them here did not provide decision-makers or the public with enough information to meaningfully consider the project's impact on the scenic vista of the Historic Capitol. Here, the project's aesthetic impacts to a uniquely important historic resource could not be understood unless the project was shown in a simulated view.

The court also agreed with petitioners that the EIR failed to sufficiently analyze impacts from light and glare from the Annex's glass exterior. Even though the EIR committed to use specific materials and comply with specific light standards, these commitments

did not sufficiently inform the public and decision-makers how light generated by new glass would compare to light generated by the current Annex.

EIR's Analysis of Impacts to Traffic and Utilities Was Adequate

The court rejected petitioners' claims regarding the EIR's traffic analysis. Petitioners failed to meet their burden of showing that EIR's conclusion that the number of employees and visitors to the capitol would not change as a result of the additional space created by the Annex, was not supported by substantial evidence.

Substantial evidence also supported the EIR's conclusion that utility-related impacts would be less than significant since the number of employees and visitors to the capitol would not change as a result of the project.

EIR's Alternatives Analysis was Inadequate

Petitioners argued that the EIR should have analyzed an alternative that moved the visitor center to the south lawn of the capitol to avoid significant and unavoidable impacts to the historic west façade. The court agreed, holding that the EIR failed to consider an alternative that would feasibly meet most of the project's objectives while lessening the significant impacts on the west lawn and façade. Failing to include this alternative deprived the public of the opportunity to participate in the evaluation of reasonable alternatives as required by CEQA.

After Rehearing the Court Allowed Capitol Annex Interior Demolition to Move Forward

After the court's initial decision was filed on December 6, 2022, DGS filed a request for a rehearing. Specifically, DGS argued that project activities not related to EIR deficiencies should be allowed to move forward. The court agreed, noting that CEQA allows a court to leave some project approvals in place even when finding that portions of a related CEQA document are deficient. CEQA's required writ of mandate order upon finding a violation of CEQA shall be limited to the portion of a determination, finding, or decision or specific activity found to be non-CEQA compliant if: (1) the portion or specific project activity/activities are severable, (2) severance will not prejudice the agency's CEQA compliance, and (3) the rest of the project was not found to be out of compliance.

With this in mind, the court concluded that the project's "soft demolition" (*i.e.* interior demolition) could move forward. As part of this work, DGS could not allow any project activities to proceed that would prejudice DGS' ability to alter the Annex's exterior design if it decided to do so because of its forthcoming EIR analysis.

Conclusion and Implications

The *Save Our Capitol* decision makes clear that CEQA's stable project description requirement will often preclude the delay of significant project modifications until after the public comment period on a draft or recirculated draft EIR. The decision highlights the importance of recirculating an EIR if a project description changes to an extent that it reveals project impacts that the public was never given the opportunity to comment on. The decision also provides helpful guidance regarding the inclusion of feasible alternatives that address all components of a project that will significantly impact historical resources. In the portion of the decision published after rehearing, the decision provides a helpful discussion of the standards governing "severance" of parts of a project approval not impacted by a court decision finding portions of an EIR are inadequate. A copy of the court's opinion can be found here: https://www.courts.ca.gov/opinions/documents/C096617A.PDF. (Travis Brooks)

STANISLAUS COUNTY SUPERIOR COURT ORDERS WATER DISTRICT TO VACATE APPROVAL OF THE DEL PUERTO CANYON RESERVOIR PROJECT PENDING COMPLIANCE WITH CEQA

Friant Water Supply Protection Association v. Del Puerto Water District, et al., Case No. CV-20-5164 (Stanislaus Super. Ct.); *Sierra Club, et al. v. Del Puerto Water District, et al.*, Case No. CV-20-5193 (Stanislaus Super. Ct.).

The Stanislaus County Superior Court ordered that Del Puerto Canyon Water District (District) decertify its Final Environmental Impact Report (Final EIR) for the Del Puerto Canyon Reservoir Project (Project) and vacate approval of the Project because the Final EIR failed to adequately address the planned relocation of Del Puerto Canyon Road. The court dismissed a host of other environmental challenges against the Project, as well as concerns brought by the Friant Water Supply Protection Association. The court's ruling addressed two non-consolidated cases challenging the District's approval of the Project: *Friant Water Supply Protection Association v. Del Puerto Water District, et al.*, Stanislaus County Superior Court, no.. CV-20-5164 and *Sierra Club, et al. v. Del Puerto Water District, et al.*, Stanislaus County Superior Court, no. CV-20-5193.

Factual Background

The Del Puerto Canyon Reservoir Project is a joint project between the District and the San Joaquin River Exchange Contractors Water Authority (Exchange Contractors) to increase water storage capacity in California's Central Valley. (Del Puerto Canyon Reservoir Final EIR, Executive Summary (Oct. 2020).) The proposed Project is located in Stanislaus County just west of the City of Patterson and south of the Sacramento-San Joaquin Delta. It involves construction and operation of a reservoir on Del Puerto Creek to provide approximately 82,000 acre-feet of new off-stream storage to the Central Valley Project (CVP). Project components include the reservoir (including the main dam and three saddle dams), conveyance facilities to transport water to and from the Delta-Mendota Canal (DMC), electrical facilities, relocation of Del Puerto Canyon Road, and relocation of existing and proposed utilities within the project area.

The proposed Project would divert water from the DMC to the new Del Puerto Canyon Reservoir. Water would be diverted in wetter years, stored in the reservoir, and returned to the DMC in drier years. The water stored in the reservoir would primarily be water obtained pursuant to the District's and Exchange Contractor's existing CVP contract entitlements, with a small amount of water sourced from Del Puerto Creek.

The District issued a Draft EIR for the Project on December 11, 2019 and a Final EIR on October 9, 2020. The Final EIR consists of three volumes and over 1,500 pages. Friant Water Supply Protection Association (Friant) submitted comments on the Final EIR on October 20, 2020. The District approved the Final EIR on October 21, 2020.

On November 19, 2020, Friant filed a petition for writ of mandate challenging the District's certification of the Final EIR and approval of the Project under the California Environmental Quality Act (CEQA). Friant's contentions included that the District and Exchange Contractors (1) failed to analyze whether they have sufficient legal rights to construct a new turnout from the DMC and use it to divert CVP water; (2) in fact have no rights or permits to conduct the proposed activities, which are subject to the discretion of the State Water Resources Control Board (State Water Board) and the U.S. Bureau of Reclamation (Bureau); (3) failed to sufficiently discuss the effects of the Project on other water users, including the Friant users; and (4) failed to properly identify the State Water Board as a responsible agency.

Petition for Writ of Mandate

On November 20, 2020, a coalition of environmental groups including the Sierra Club, California Native Plant Society, Center for Biological Diversity, and Friends of the River (collectively: Environmental Petitioners) filed a separate petition for writ of mandate challenging the District's certification of the Final EIR and approval of the Project under CEQA.

Environmental Petitioners argued, among other things, that the Final EIR failed to provide an adequate project description, analysis of environmental impacts, and outline of mitigation measures.

The Superior Court's Decision

The court's October 31, 2022 ruling addressed the claims of both Friant and Environmental Petitioners. In describing the basic rules of CEQA, the court explained that the EIR is the "heart of CEQA," and an EIR "must present facts and analysis; not conclusions or opinions of the agency." (Ruling, p. 5.) An EIR is "presumed legally adequate" and the "writ petitioner bears the burden of providing legal inadequacy and abuse of discretion." (*Id.*)

The court denied Friant's writ petition in full. The court found that Friant's concern that diversion of water to the Del Puerto Canyon Reservoir would substantially affect its water supply was "entirely unsupported by the record." (*Id.* at 7.) The court also refused to determine the contractual water rights of the parties, explaining that the court's remedy "is necessarily limited to decertification rather than contractual interpretation or enforcement of water rights." (*Id.* at 8.) The court found that both the Draft and Final EIR provided a sufficient description of the water use issues present in the project, and that Friant's remaining factual claims and contentions were either incorrect or did not rise to the level of decertifying the EIR. (*Id.* at 8-9.)

The court denied each of Environmental Petitioners' contentions, with one exception. The court held that the Final EIR's project description failed to adequately describe the relocation of Del Puerto Canyon Road. The court reasoned that complete relocation of Del Puerto Canyon Road is a "key element" of the Project, and that the Final EIR's failure to define a feasible road realignment "is no nit." (*Id.* at 9-10.) The court held that it was not enough to say relocation "has been discussed at a conceptual level." (*Id.*) The court therefore ordered that the District decertify the Final EIR and vacate approval of the Project until the Final EIR adequately described the relocation of Del Puerto Canyon Road consistent with the requirements of CEQA.

Conclusion and Implications

As a result of the court's ruling, the District's approval of the Project is vacated and the Final EIR decertified. The District may proceed with the Project after further compliance with CEQA, including addressing the concerns raised by the court about relocation of Del Puerto Canyon Road and recirculating the EIR for further public comment.
(Holly E. Tokar, Meredith Nikkel)

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