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LAND USE NEWS

GOVERNOR NEWSOM SUSPENDS DELTA OUTFLOW REGULATIONS TO BOLSTER WATER STORAGE, UPDATES PRIOR RESTRICTIONS ON NEW AND REPLACEMENT WELLS

On February 13, 2023, California Governor Gavin Newsom issued Executive Order N-3-23 (Order) designed to help California adapt to rapidly changing environmental conditions. The Order allows the State Water Resources Control Board (SWRCB) to waive environmental regulations setting minimum outflows for the Sacramento-San Joaquin Delta (Delta) in order to provide for greater storage.

Background

Following the heavy precipitation and sever flooding that California experienced in January 2023, Governor Newsome faced growing criticism that too much of this water was allowed to flow out of the Delta instead of being stored in the state's reservoirs. Over the past three years, periods record breaking wet and dry periods have made water and drought resilience planning increasingly difficult.

Building Water Resilience

Governor Newsom cited the need to protect California's water supplies from the increasingly extreme weather patterns facing the state. The Governor acknowledged that recent storms have helped bolster California's water supply, but observed that the state needs to be prepared for longterm resilience. The Order is designed to expand the state's ability during wet periods to capture storm runoff and to recharge groundwater aquifers. The Order includes directives addressing: (1) ongoing collaboration among state agencies to expedite permitting for groundwater recharge projects; (2) Delta outflow requirements; (3) new well permitting; and (4) soliciting recommendations from state agencies regarding further actions that may be necessary to address future drought conditions.

Suspension of Environmental Regulations

The Order directs the State Water Resources Control Board (SWRCB) to:

> . . .consider modifying requirements for reservoir releases or diversion limitations in the federal Central Valley Project or state Water Project facilities.

This would allow the SWRCB to release less water through the Delta and store more water in California reservoirs such as Lake Oroville and Lake Shasta. The Order would allow the SWRCB to suspend environmental requirements that mandate minimum outflow requirements from the Delta into the San Francisco Bay.

To facilitate this directive, the Order suspends California Water Code § 13247 and applicable provisions of the California Environmental Quality Act (CEQA). Section 13247 requires state agencies to comply with certain water quality rules. CEQA sets forth environmental review and protection standards.

State Water Board Decision

Eight days after Governor Newsom issued the Order, the SWRCB approved a petition filed by the U.S. Bureau of Reclamation and the California Department of Water Resources (DWR) to reduce Delta outflows and allow water to be diverted to expand inland water supplies. Currently, the minimum outflow requirement for the Port Chicago Delta is 29,200 cubic feet per second. By granting the petition, the SWRCB effectively removed the outflow requirement for the remainder of February and March 2023.

In making this decision, the SWRCB determined that these changes: (1) would not operate to the injury of any other lawful user of water; (2) would not have an undesirable effect upon fish, wildlife, or other instream beneficial; and (3) are in the public interest. The SWRCB order will remain in effect until March 31, 2023. This is not the first time the SWRCB has waived Delta flow standards; however, historically such waivers have been utilized in response to severe drought conditions.

Updated Restrictions on Well Permits

The Order also directs changes to well permitting processes throughout the state. Under a previous executive order, N-7-22, well permitting agencies are prohibited from approving permits for new wells or to alter existing wells in "high-" and "medium-priority" regulated under the Sustainable Groundwater Management Act (SGMA) absent written findings from the local groundwater sustainability agency that the new or altered well will not negatively impact achieving sustainability.

The new Order replaces and expands the exemptions previously contained in Section 9 of N-7-22. The new Order exempts from these requirements: (1) domestic wells that provide less than two acre-feet per year of groundwater; (2) wells that exclusively provided groundwater to public water supply systems; and (3) wells that are replacing existing, currently permitted wells with new wells that will produce an equivalent quantity of water as the well being replaced when the existing well is being replaced because it has been acquired by eminent domain or acquired while under threat of condemnation.

Conclusion and Implications

The Order and subsequent State Water Resources Control Board decision signal an increased focus on fortifying the state's reservoirs and ability to recharge groundwater supplies. The timing of the Order has occurred in the midst of an extremely wet winter with extensive snowpack. It may open the door for welltimed projects and management actions to divert valuable stormwater and runoff for the benefit of groundwater basins. The Order's expanded exemptions from well-permitting restrictions provide some additional relief in certain circumstances, but the ongoing restrictions will likely continue to draw concerns from well operators and inconsistent regulation at the intersection of well permitting agencies and groundwater sustainability agencies.
(Scott Cooper, Derek Hoffman)

STATE LEGISLATURE INTRODUCES ANOTHER BILL THAT WOULD PROMOTE CONVERSION OF UNDERPERFORMING AND OBSOLETE OFFICE PROJECTS INTO HOUSING

On February 17, 2023, State Assemblymember Matt Haney (D-17) introduced Assembly Bill (AB) 1532, the "Office to Housing Conversion Act," which would make an "office conversion project," as defined and that meets certain requirements a by-right use on all properties regardless of zoning.

Background

On September 28, 2022, Governor Newsom signed two bills—AB 2011, the "Affordable Housing and High Road Jobs Act of 2022," and Senate Bill (SB) 6, the "Middle Class Housing Act of 2022"—that are designed to help address the State's acute housing crisis by requiring local governments to approve residential development that meets certain requirements as a by-right use in zones where office, retail, or parking are principally permitted.

AB 1532, *as proposed*, would build on the trajectory set by AB 2011 and SB 6 in addressing the state's housing crisis through the repurposing of underperforming commercial properties by requiring local governments, inclusive of charter cities, to approve office conversion projects as a by-right use in all areas regardless of zoning.

By-Right Approval of 'Office Conversion Projects' Into Housing

Under AB 1532, *as proposed*, an:

> . . .office conversion project, meaning the conversion of a building used for office purposes or a vacant office building into residential units that meets the following requirements would be considered a by-right use in all zones regardless of the underlying zoning of the site.

The office conversion project would need to set aside at least 10 percent of the total amount of units in the project to low- or moderate-income households. The project proponent would need to provide

the local government with an enforceable commitment that all contractors and subcontractors performing work on the project will use a skilled and trained workforce for any proposed rehabilitation, construction, or major alterations in accordance with Chapter 2.9 of Part 1 of Division 2 of the Public Contract Code, which sets out specified requirements for a skilled and trained workforce.

An office conversion project would not be subject to any review by a city council, county board of supervisors, planning commission, or other planning oversight board. Rather, if the local government determines that a project is consistent with the aforementioned requirements, it shall ministerially approve the project. To the extent the local government determines the project is inconsistent with any of the aforementioned requirements, it must provide the project proponent written and specified comments on which standard(s) the project conflicts with as well as an explanation(s) supporting the inconsistency determination. The local government must complete this review within 60 days (for projects containing 150 or fewer units) or 90 days (for projects containing more than 150 units).

The local government may not impose any new parking requirements nor any new open space requirements that were not imposed on the original office use on the office conversion project. An office conversion project would be exempt from all impact fees that are not directly related to the construction of an office building into residential dwelling units. Nor could a local government impose any fee on an office conversion project to cover the cost of code enforcement or inspection services or other similar fees. Furthermore, any impact fees imposed on the project shall, at the request of and upon execution of an enforceable, recorded commitment to pay by the project proponent, be collected, in even distributions, over a ten-year period.

A local government may adopt an ordinance to specify the process and requirements applicable to office conversion projects so long as the ordinance is consistent with, and does not inhibit the objectives of, AB 1532. To that effect, a local government may not adopt or impose any requirement, such as increased fees or inclusionary housing requirements, that apply to a project solely or partially on the basis of being an "office conversion project."

Conclusion and Implications

The proposed bill is significant because it contains another potential tool that may become available to, and should warrant consideration by, residential developers when evaluating residential development on office properties. The current version of AB 1532 is available online at: https://legiscan.com/CA/text/AB1532/2023.
(Eric Cohn)

REGULATORY DEVELOPMENTS

DEPARTMENT OF WATER RESOURCES APPROVES NEW GROUNDWATER SUSTAINABILITY PLANS FOR NORTHERN CALIFORNIA BASINS

In January 2023, the California Department of Water Resources (DWR) approved Groundwater Sustainability Plans (GSPs) for four northern California groundwater basins pursuant to the Sustainable Groundwater Management Act (SGMA): Napa Valley Subbasin, Santa Rosa Plain Subbasin, Petaluma Valley Basin, and Sonoma Valley Subbasin. The Groundwater Sustainability Agencies (GSAs) for each subbasin adequately demonstrated to DWR that the GSPs would achieve sustainability for each subbasin as required by SGMA, but DWR identified several corrective actions the GSAs should consider moving forward.

Background

Due to the constant changes in drought conditions and flood water levels, groundwater management is of the utmost importance to water agencies throughout the state. By capturing the groundwater and storing it, agencies can keep water available during drought periods. But to do so, local Groundwater Sustainability Agencies must implement groundwater management plans in accordance with the Sustainable Groundwater Management Act (SGMA).

In 2014, then-Governor Jerry Brown signed SGMA into law. SGMA emphasizes local agencies' expertise of local groundwater conditions and ability to manage those basins, either singly or jointly. Among other things, SGMA requires local agencies to form GSAs for basins experiencing moderate to severe overdraft, which occurs when groundwater withdrawal exceeds recharge and can lead to negative impacts like subsidence (sinking of land), poor groundwater quality, and insufficient water supplies for beneficial uses. GSAs are required under SGMA to develop and implement Groundwater Sustainability Plans to achieve sustainability in overdrafted groundwater basins within a 20-year time horizon. Each GSP has its own goals specific to the covered groundwater basin and must be accomplished within the 20-year period. To achieve the sustainability goal for the Subbasin, the GSP must demonstrate that implementation of the Plan will lead to sustainable groundwater management, which means the management and use of groundwater in a manner that can be maintained during the planning and implementation horizon without causing undesirable results, such subsidence, water quality degradation, and lowering of groundwater levels. Undesirable results must be defined quantitatively by the GSAs.

To date, the Department of Water Resources, which is tasked with reviewing GSPs, has approved several GSPs but has also deemed many to be inadequate, thus requiring additional plan development to achieve sustainability. Many more GSPs are still under review. DWR's review considers whether there is a reasonable relationship between the information provided and the assumptions and conclusions made by the GSA, including whether the interests of the beneficial uses and users of groundwater in the Subbasin have been considered; whether sustainable management criteria and projects and management actions described in the GSP are commensurate with the level of understanding of the Subbasin setting; and whether those projects and management actions are feasible and likely to prevent undesirable results. To the extent overdraft is present in a subbasin, DWR evaluates whether a GSP provides a reasonable assessment of the overdraft and includes reasonable means to mitigate the overdraft. DWR also considers whether a GSP provides reasonable measures and schedules to eliminate identified data gaps. DWR is also required to evaluate whether the GSP will adversely affect the ability of an adjacent basin to implement its GSP or achieve its sustainability goal.

GSAs are required to evaluate their GSPs at least every five years and whenever a GSP is amended, and to provide a written assessment to DWR. Accordingly, DWR will evaluate approved GSPs and issue an assessment at least every five years. To that end, SGMA provides a process for local GSAs to follow to ensure water data is gathered and stored properly to facilitate adaptation of groundwater management based on climate and water level changes, which in

turn allows local agencies to better curate plans for their specific region as conditions shift. The process helps ensure groundwater management accounts for uncertainties resulting from climate changes and drought shifts.

The Approvals

DWR approved GSPs for the Santa Rosa Plain Subbasin, Petaluma Valley Subbasin, Napa Valley Subbasin, and Sonoma Valley Subbasin. A single GSP was submitted by the applicable GSA for each subbasin. Each approval was based on DWR's determination that the GSP satisfied the objectives of SGMA and substantially complied with GSP regulations. Specifically, DWR issued a statement of findings for each GSP. Notably, DWR found that the Santa Rosa Plain Subbasin GSP would be closely coordinated with the neighboring GSAs in Petaluma Valley and Sonoma Valley, and that the GSP did not appear to adversely affect the ability to implement the GSPs for those subbasins or impede achievement of sustainability goals in those adjacent basins. DWR also recognized that the eight member agencies of the Santa Rosa GSA historically implemented numerous projects and management actions to address problematic groundwater conditions in the subbasin, and that the GSA reasonably demonstrated it had the legal authority and financial resources to implement the GSP. DWR made similar findings for the other GSPs.

However, DWR also recommended a number of corrective actions for each GSP and strongly encouraged each GSA to consider and implement those actions. For instance, DWR recommended that each GSA: (1) identify certain surface water imports; (2) provide additional details and discussion related to specific components the GSA used to establish chronic lowering of groundwater levels sustainable management criteria; (3) continue to fill in data gaps, collect additional monitoring data, coordinate with resource agencies and interested parties to understand beneficial uses and users that may be impacted by depletions of interconnected surface water caused by groundwater pumping, and potentially refine sustainable management criteria; and (4) provide additional details related to monitoring networks. DWR's recommendations, while different for each GSP, are focused on obtaining increasingly detailed information about the relationship between surface water availability and groundwater use (e.g., from the Russian River), operational responses to chronic lowering of groundwater levels exacerbated by prolonged periods of drought, and impacts on interconnected surface and groundwater related to pumping.

DWR emphasized that this type of information be captured and made available to assist DWR in its five-year review of the GSPs to ensure that the GSPs are on target for achieving sustainability of the groundwater basins within the time horizon set under SGMA. In sum, DWR approved the GSPs but clearly indicated its focus on detailed hydrological information demonstrating whether sustainability would be achieved moving forward as required by SGMA.

Conclusion and Implications

The Department of Water Resource's approval of the four GSPs in northern California are a positive sign for groundwater sustainability management in the region. However, DWR's continuing oversight role in actually achieving sustainability is clear in its approval of the GSPs. It remains to be seen to what extent the GSAs will pursue or satisfy the corrective actions recommended by DWR, and what role accomplishing those actions will play in DWR's subsequent review of the GSPs in five years. For more information, *see: DWR Approves GSPS For Four Northern California Basins* (Jan. 26 2023) https://water.ca.gov/News/News-Releases/2023/Jan-23/DWR-Approves-Groundwater-Sustainability-Plans-for-Four-Northern-California-Basins/.
(Elleasse Taylor, Steve Anderson)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT HOLDS RULEMAKING PETITION REGARDING GRIZZLY BEAR RECOVERY PLAN IS NOT SUBJECT TO JUDICIAL REVIEW

Center for Biological Diversity v. Haaland, ___F.4th___, Case No. 21-35121 (9th Cir 2023).

A divided panel of the Ninth Circuit Court of Appeals, on January 19, 2023, ruled that the U.S. Fish and Wildlife Service's denial of an environmental group's petition to expand protected areas for endangered grizzly bears was not was not subject to judicial review under the Administrative Procedure Act (APA). In *Center for Biological Diversity v. Haaland* the court held that a decision to not modify a recovery plan was not a "final agency action" subject to review, affirming, on different grounds, a Montana District Court's summary judgement against the Center for Biological Diversity. Judge Sung wrote in dissent disagreeing with both the U.S. District Court's and her colleagues' reasoning.

Background

The federal Endangered Species Act (ESA) requires the Secretary of the Interior develop recovery plans "for the conservation and survival of endangered species and threatened species." (16 U.S.C § 1533(f)(1).) The U.S. Fish and Wildlife Service (Service) approved a Grizzly Bear Recovery Plan in 1982 and revised it in 1993. The Recovery Plan aims to "identify actions necessary for the conservation and recovery of the grizzly bear," which "ultimately will result in the removal of the species from threatened status." The Plan identifies "recovery zones," or "areas needed for the recovery of the species," and sets subgoals for each zone. The ESA does not require the Secretary to update recovery plans. And yet, since 1993, the Service has issued several Plan Supplements that provide habitat-based recovery criteria for identified recovery zones.

In 2014, the Center for Biological Diversity (Center) filed a petition with the service requesting that the Service evaluate the recovery potential of areas in Arizona, New Mexico, California, and Utah in a revised recovery plan. The Service denied the petition, stating that neither the ESA nor APA authorizes petitions to revise recovery plans. While the APA allows petitions for issuance, amendment, or repeal of a "rule," the Service's position was that a recovery plan was not a "rule." (*See* 5 U.S.C. § 553(e).)

At the District Court

The Center filed suit in the U.S. District Court for Montana seeking judicial review of the Service's denial of its petition under the APA and ESA. The District Court granted summary judgement to the Service, agreeing with the Service that recovery plans are not "rules" under the APA and thus not subject to petitions for amendment under 5 U.S.C. § 553(e).

The Ninth Circuit's Decision

The Ninth Circuit took a different approach than the District Court and assumed in its analysis that recovery plans are "rules" because rules under the APA are broadly defined, but found that recovery plans are not "final agency actions" subject to judicial review. In reaching this conclusion, the court employed the criterion for "final agency action" articulated in *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). Under *Bennett*, an agency action is final if it both: (1) marks the consummation of the agency's decision making process, and (2) determines rights or obligations from which legal consequences flow. The court did not reach a conclusion as to whether recovery plans meet the first criterion—representing the consummation of the agency's decision making process—but noted that the Service has not treated the 1993 Plan as the last step because it has repeatedly issued Plan Supplements. The court found that recovery plans do not meet the second criterion—determining rights or obligations from which legal consequences flow—because the ESA does not mandate compliance with recovery plans. The Service does not initiate

enforcement actions based on recovery plans, nor do recovery plans impose any obligations on or confer any rights to anyone. Recovery plans operate as more "roadmaps for recovery."
The court held that because recovery plans do not meet one of the two Bennett criterion, they are not "final agency actions." The Service's decision not to amend the grizzly bear Recovery Plan, like the plan itself, was not a "final agency action." And the District Court was not authorized to review denial of the Center's petition under the APA.

The Dissenting Opinion

In dissent, Judge Sung argued that an agency's denial of a rulemaking petition is a final agency action subject to judicial review, disagreeing with both the District Court and the majority. Judge Sung argued that a recovery plan is a rule because the term is broadly defined under the APA. She further argues that recovery plans are "final agency action" because they interpret and implement the requirements of the ESA, even if they are non-binding. And Judge Sung argues that even if a rule is not a "final agency action," an agency's denial of a rulemaking petition regarding the rule is a reviewable final agency action.

Conclusion and Implications

The decision in *Center for Biological Diversity v. Haaland* represents a setback for environmental groups. The decision forecloses an avenue for challenging recovery plans and the Service's decision to deny rulemaking petitions regarding recovery plans. However, environmental groups continue to pursue other avenues of securing additional protections for grizzly bears. For example, in January 2023, Wildearth Guardians, among other environmental groups, filed a lawsuit in Montana District Court (Case No. 9:23-cv-00010) alleging that the U.S. Department of Agriculture's wildlife service violated the ESA and the National Environmental Policy Act by failing to consider the impacts of its decision to continue a predator removal program for grizzly bears in Montana. Despite the adverse ruling in *Center for Biological Diversity*, it appears that environmental groups will continue to employ creative legal theories to pursue additional protections for grizzly bears. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2023/01/19/21-35121.pdf.
(Breana Inoshita, Darrin Gambelin)

TENTH CIRCUIT FINDS BLM NEEDS TO TAKE A HARD LOOK UNDER NEPA FOR NEW MEXICO FRACKING PERMITS

Diné Citizens Against Ruining Our Environment et al. v. Bernhardt et al., ___F.4th___ , Case No. 21-2116 (10th Cir. Feb. 1, 2023).

On February 1, 2023, the Tenth Circuit for the United States Court of Appeals barred the United States Department of the Interior's Bureau of Land Management (BLM) from issuing fracking permits in New Mexico's Mancos Shale formation in *Diné Citizens Against Ruining Our Environment et al. v. Bernhardt et al.* because BLM failed to adequately examine climate change and air pollution impacts of these permits under the National Environmental Policy Act (NEPA). The Court found that the BLM analysis, preceding its drilling permit approvals, was "arbitrary and capricious" because it failed to take a hard look at the environmental impacts from greenhouse gas (GHG) emissions and hazardous air pollutant emissions.

Background

NEPA "requires agencies to consider the environmental impact of their actions as part of the decision-making process and to inform the public about these impacts." (*Citizens' Committee to Save Our Canyons v. U.S. Forest Services* (10th Cir. 2002) 297 F.3d 1012, 1021.) Specifically, NEPA requires agencies to "take a hard look at environmental consequences" of a proposed action by considering the direct, indirect, and cumulative environmental impacts of the proposed action. (40 C.F.R. §§ 1502.16 (environmental consequences), 1508.7 (cumulative impact), 1508.8 (direct and indirect effects).) When an agency is unsure if an action will significantly affect the environment,

it prepares an Environmental Assessment (EA) to determine whether an Environmental Impact Statement (EIS) is necessary. (*See,* 40 C.F.R. § 1501.5.) But if the EA determines that a proposed project will not significantly impact the human environment, the agency issues a Finding of No Significant Impact (FONSI), and the action may proceed without an EIS. (*Id.*; see also *Citizens' Committee to Save Our Canyons*, 297 F.3d at 1022–23.)

In 2003, BLM prepared a Resource Management Plan Amendment and an Associated Environmental Impact Statement(RMP/EIS) that considered the New Mexico's Mancos Shale and Gallup Sandstone zones in the San Juan Basin to be "a fully developed oil and gas play." (79 Fed. Reg. 10548, 10548 (Feb. 25, 2014).) Since then, advanced hydraulic fracturing technologies, "made it economical to conduct further drilling for oil and gas in the area," and BLM started issuing applications for permits to drill (APDs) in the shale formation using individual, site-specific EAs tiered to the 2003 RMP/EIS. But in 2019, several citizen groups challenged the site-specific EAs for hundreds of APDs approved by BLM from 2012 through 2016. (*See, Dine Citizens Against Ruining Our Environment v. Bernhardt*, 923 F.3d 831 (10th Cir. 2019).) While most of the EAs were affirmed by the Tenth Circuit, the Court of Appeals remanded to the lower court "with instructions to vacate five EAs analyzing the impacts of APDs in the area because BLM had failed to consider the cumulative environmental impacts as required by [NEPA for APDs associated with these EAs]," by failing to consider the water needs of new oil and gas wells from fracking in the shale formation.

Following that decision, BLM prepared an EA Addendum to correct the deficiencies in those five EAs and the potential defects in 81 other EAs supporting the approvals of 370 APDs in the shale formation. BLM allowed the previously approved APDs to remain in place while it conducted additional analysis in EA Addendum to consider the air quality, GHG emissions, and groundwater impacts of issuing the APDs. Based on the EA Addendum analysis, BLM then certified the 81 EAs and the EA Addendum and issued the FONSIs. But the citizens groups sued BLM again for these 81 EAs and the EA Addendum alleging NEPA violations:

> . . .because BLM (1) improperly predetermined the outcome of the EA Addendum [by approving APDs before completing the EA Addendum and failing to suspend approvals while gathering additional information] and (2) failed to take a hard look at the environmental impacts of the APD approvals related to [] GHG [] emissions, water resources, and air quality.

The District Court affirmed BLM's action determining: (1) citizen groups' claims based on APDs that had not been approved were not ripe for judicial review, (2) BLM did not unlawfully predetermine the outcome of the EA Addendum, and (3) BLM took a hard look at the environmental impacts of the APD approvals. The citizen groups appealed.

The Tenth Circuit's Decision

In *Dine Citizens,* the Tenth Circuit panel affirmed the District Court ruling that out of the 370 APDs considered by BLM, 161 APDs were in non-final status and were not ripe for judicial review. The Court also agreed with the District Court in holding that BLM did not improperly predetermine the outcome of the EA Addendum when it did not withdraw the prior approved APDs because BLM acted in good-faith by maintaining status quo and taking no new actions on the APDs pending the completion of its voluntary EA addendum analysis. The petitioners here did not meet the high burden of showing that agency engaged in unlawful predetermination by irreversibly and irretrievably committing itself to the action " that was dependent upon the NEPA environmental analysis producing a certain outcome."

The Analysis in the EA Addendum was Arbitrary and Capricious

But, the Tenth Circuit reversed the District Court to hold that BLM's analysis in the EA Addendum and 81 EAs was arbitrary and capricious because it failed to take a hard look at the environmental impacts from GHG emissions and hazardous air pollutant emissions. The court found the BLM's decision to use the estimated annual GHG emissions from the construction and operations of the drilling wells to calculate the estimated direct emission emissions for all 370 wells over 20 year lifespans was unreasonable, arbitrary and capricious. BLM unreasonably used one year of direct emissions from the wells to represent twenty years' worth of total emissions of the well in the EA Addendum. BLM's justification for not calcu-

lating the direct GHG emissions over the lifetime of the wells that it was not possible to estimate the total lifespan of an individual well or "to incorporate the decline curve into results from declining production over time," was inconsistent with the record.

Cumulative Impacts Analysis Defective

Furthermore, the Court found BLM's cumulative impacts analysis of GHG emissions tied to the APDs was defective because "[t]he deficiencies identified in the EAs and EA Addendum necessarily render any new APDs based on those documents invalid." The BLM's cumulative analysis of comparing the wells' emissions to all New Mexico and U.S. emissions rather than comparing the wells' total GHG emissions to the global carbon budget—a widely accepted method of analysis—rendered the EA and EA Addendum to conclude the cumulative GHG impacts as relatively small. The Court found that this comparative analysis only showed that:

> . . .there are other, larger sources of [GHG emissions], and did not show that these APDs, 'which [are] anticipated to emit more than 31 million metric tons of carbon dioxide equivalents, will not have a significant impact on the environment.'

While the BLM need not use a particular methodology:

> . . .it is not free to omit the analysis of environmental effects entirely when an accepted methodology exists to quantify the impact of GHG emissions from the approved APDs.

The Tenth Circuit also found that BLM similarly failed to sufficiently consider the cumulative impacts of the wells' hazardous air pollutant emissions on air quality and human health by only accounting for short-term emissions from a small number of wells, and not the multiyear reality. However, the Court held that BLM's analysis of the cumulative impacts to water resources and methane emissions was sufficient under NEPA.

Conclusion and Implications

As a result of the court's findings, the Tenth Circuit reversed the District Court and remanded the case back to them to consider the appropriate remedy, including if vacatur and injunction is necessary moving forward. The panel also blocked the BLM from issuing any further APDs until the District Court renders a decision.

This NEPA decision provides a good overview of how the courts apply the hard look doctrine to the agency's decision and the record supporting the agency decision, and how a court's analysis can vary based on the record. The decision also underlines the importance for the agencies to carefully select the methodologies used to analyze the GHG and hazardous air pollutants emissions, as well as ensuring the record includes proper evidence to support the agency conclusions, particularly for fossil fuels-related projects. The court's opinion is available online at: https://ca10.washburnlaw.edu/cases/2023/02/21-2116.pdf.

(Hina Gupta)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT REJECTS CHALLENGE TO EIR PREPARED FOR PROJECT TO CONNECT THE CITY OF BUENAVENTURA TO THE STATE WATER PROJECT

California Water Impact Network v. City of San Buenaventura, *Unpub.*, Case No. B315362 (2nd Dist. Jan. 4, 2023).

In an *unpublished* decision filed on January 4, 2023, the Second District Court of Appeal rejected a wide range of claims raised by an environmental group that challenged an Environmental Impact Report (EIR) prepared for a water pipeline project to connect the City of San Buenaventura's water supply to the California State Water Project (SWP). The project's primary objective was to make up for growing shortages in the city's locally sourced water supply. Ultimately, the court found that the EIR provided sufficient information and analysis to allow the city and the public to make an informed decision on the project.

Factual and Procedural Background

The City of Buenaventura has a contractual right to water from the SWP, however the city was never able to use the SWP because of a lack of infrastructure to deliver water allocations to the city. The project sought to remedy this by constructing a pipeline to connect to the SWP. The project, termed the State Water Interconnection Project (SWI Project) was necessitated by diminishing local water resources that it sought to replace. The project proposed a pipeline approximately seven miles long. The city prepared an EIR for the SWI Project that concluded that with mitigation measures, the project would not have any significant environmental impacts.

The city was concurrently working on a parallel project, called the Ventura Water Supply Projects (Water Supply Projects), that sought to develop a "supplemental" supply of water from local resources such as wastewater and groundwater treatment. Whereas the SWI Project was intended to replace diminishing local water sources, the goal of the Water Supply Projects was to increase the overall supply of potable water in the city. The city prepared a separate EIR for the Water Supply Projects.

An environmental organization called the California Water Impact Network (CWIN) challenged the adequacy of the EIR for the SWI Project and filed petition for writ of mandate. The trial court denied the petition.

The Court of Appeal's Decision

In its appeal, CWIN reiterated its myriad claims that the SWI Project EIR was inadequate. The Second District court rejected each of them.

The SWI Project EIR Did Not Exclude Essential Analysis'

Petitioners argued that the SWI Project EIR improperly excluded a separate environmental review of the Water Supply Project. Specifically, petitioners alleged that the city should have included a separate environmental review of the Water Supply Projects in the SWI Project EIR. The court noted that the EIR for the Water Supply Projects discussed the SWI Project and the variability of its water supply. The court found that the SWI Project's discussion of the amount of SWP water each year, and acknowledgement that it would vary each year, was sufficient to inform the city and the public about the reliability of the SWP water. It was not necessary for the SWI Project EIR to explicitly state that that the SWP project is not a reliable supply of water, sufficient information was provided in the EIR for the city to make that determination.

Petitioners also claimed that the SWI Project EIR violated the California Environmental Quality Act's (CEQA) prohibition on piecemealing single project into multiple projects because it did not discuss the Water Supply Projects in the same EIR. Here, although both projects concerned the city's water, each project involved a different source of water, different

infrastructure, and neither project is dependent on the completion of the other. As the court noted:

> . . .different projects may properly undergo separate environmental review when the projects can be implemented independently.

Petitioners also challenged some of the project objectives discussed in the EIR as a "fait accompli." However, the court noted that CEQA does not restrict an agency's discretion to identify and pursue a particular project designed to meet a particular set of objectives.

Petitioners also argued that the EIR did not consider project alternatives that include other local sources of water. Local sources were insufficient to meet the city's water supply and the court noted that an EIR does not need to consider alternatives that cannot achieve the basic goal of the project.

The SWI Project EIR's Discussion of the No Project Alternative Was Sufficient

Petitioners also alleged that the EIR's no project alternative "evaded the foreseeable need to reduce reliance on the Sacramento River Delta and protect public trust resources." However, as the court noted, the purpose of the no project alternative is to provide a "factually based forecast of the environmental impacts of preserving the status quo." The SWI Project EIR did this. Moreover, because there is not enough SWP water for every entity entitled to it, if the city did not use its allocation, the allocation would be used by another entity as a result the Delta would not be aided if the city decided not to build the pipeline.

Conclusion and Implications

The decision in *California Water Impact Network* helps highlight the principle that an EIR need not be perfect, it only needs to provide the important and pertinent information to allow a local agency to make an informed decision on a project. A copy of the court's *unpublished* opinion can be found here: https://www.courts.ca.gov/opinions/nonpub/B315362.PDF. (Travis Brooks)

THIRD DISTRICT COURT REJECTS CEQA PETITION CHALLENGING EIR FOR STATE HIGHWAY 70 ROADWAY IMPROVEMENT PROJECT

Keep 70 Safe v. Department of Transportation, *Unpub.*, Case No. C095543 (3rd Dist. Jan. 30, 2023).

In an *unpublished* decision filed January 30, 2023, the Third District Court of Appeal rejected a range of claims raised by petitioners under the California Environmental Quality Act (CEQA) challenging an Environmental Impact Report (EIR) for a highway improvement project. As an initial matter, the court found that petitioner's claims were not barred by CEQA's 30-day statute of limitations to challenge an EIR after a Notice of Determination is filed. Here, the statute of limitations was equitably tolled while petitioner pursued CEQA claims in federal court, which were subsequently dismissed on Eleventh Amendment grounds. The court then went on to reject each of petitioner's substantive claims that the project EIR was improperly piecemealed, the EIR failed to sufficiently analyze alternatives, and that its findings of no significant environmental impacts in various impact categories were not supported by substantial evidence.

Factual and Procedural Background

The California Department of Transportation (Caltrans) approved a project to improve approximately 9.6 miles of State Route 70 north of Marysville. Plans to improve the segment of highway were included in a 2014 transportation concept report, which proposed several different projects to "improve SR 70 to freeway and expressway standards along some segments and maintain conventional highway standards along others." For the stretch of highway affected by the project, the transportation concept

report recommended improving the segment by constructing passing lanes and a center two-way left turn lane to improve operational conditions from an E level to an A level of service.

The draft EIR prepared for the project indicated that its purpose was "to achieve the ultimate facility as outlined in the 2014 transportation concept report. The draft EIR analyzed two build alternatives that would construct an additional 12-foot lane with an eight-foot shoulder to achieve a continuous passing lane in each direction throughout the project limits.

During the public comment period for the draft EIR, petitioners submitted a comment letter arguing that the draft EIR improperly separated the current project from several other State Route 70 improvement projects discussed in the 2014 transportation concept report. The comment letter also claimed that the EIR failed to analyze a reasonable range of alternatives and failed to adequately disclose, analyze, and mitigate various environmental impacts.

Caltrans prepared a final EIR and filed a notice of determination finding that the project would have no significant impact on the environment.

In October of 2020, petitioners filed a writ action seeking to compel Caltrans to vacate its approval of the project and certification of the final EIR. Petitioners claimed that the EIR improperly piecemealed its analysis and did not analyze a reasonable range of alternatives. Petitioners also argued that Caltrans failed to make required findings or incorporate mitigation measures. Petitioners also argued that the EIR inadequately analyzed potential impacts to hydrology, water quality, and transportation, resulting in insufficient evidence to support Caltrans' determination that the project would not significantly impact the environment in these areas.

The trial court denied the petition and rejected each of petitioner's claims, concluding that they failed to meet their burden of showing that the EIR was inadequate.

The Court of Appeal's Decision

The Third District Court rejected each of petitioner's claims on appeal.

Statute of Limitations

However, first it had to address a claim by Caltrans that petitioner's suit was barred by CEQA's 30-day statute of limitations to challenge an EIR after a Notice of Determination is filed. Petitioner initially challenged the project and the EIR in federal court within 30 days of the date that Caltrans filed the Notice of Determination for the EIR. However, soon thereafter it became clear that the CEQA claims would be dismissed under the Eleventh Amendment unless Caltrans consented to federal supplemental jurisdiction, which it did not.

Ultimately, the court determined that it was appropriate to apply equitable tolling doctrine to toll the statute of limitations. Caltrans filed a motion to dismiss the CEQA claims in the lawsuit and others on October 10, 2020. Petitioner filed their state lawsuit on October 23, 2023. The court determined that it was not unreasonable for petitioner to wait until 13 days after Caltrans filed their motion to dismiss the federal CEQA claims after performing necessary legal research.

Piecemeal Coverage of the Environmental Review

The court then moved on to address the substance of petitioner's claims. The court rejected petitioner's claims that Caltrans improperly piecemealed its review because it did not analyze the other projects in the 2014 transportation concept report. The court rejected this argument, finding a prior piecemealing case, *Del Mar Terrace Conservancy, Inc. v. City Council,* Cal.App.4th 712 (1992), also involving highway improvements instructive. That case set forth a test for determining whether highway improvement projects are improperly piecemealed:

> The segment of highway under review must be (a)of a substantial length and (b) between logical terminal points…;(2) the segment must have independent utility; (3) the segment must provide adequate opportunity for the consideration of alternatives; and (4) it must be addressed whether the segment under consideration seems to fulfill important state and local needs such as relieving particular traffic congestion.

The court found that each of the above requirements were met. The project was of far greater length than the segment in issue in the *Del Mar Terrace* case, the project had independent utility, and the EIR

provided an adequate opportunity to consider alternatives.

Alternatives Analysis

The court then rejected petitioner's claims that the project EIR failed to adequately analyze alternatives to the project. Here, the project analyzed a no project alternative and two project alternatives which were very similar. The court rejected each of petitioner's claims because the project EIR properly analyzed reasonable alternatives to the project and met the requirements of the "rule of reason" in completing an alternatives analysis that sufficiently allowed decisionmakers to weigh project alternatives.

'Findings and Mitigation Measures'

Petitioner alleged that because the EIR referenced various mitigation measures that would be required pursuant to other applicable environmental laws but were but not to mitigate potentially significant effects of the project, the EIR implicitly recognized that the project would have significant environmental impacts. Here, although state law might require compensation for loss of riparian habitat, the EIR's acknowledgement of this did not amount to an acknowledgement that the project would result in significant biological or other impacts.

Substantial Evidence Supported the EIR's Conclusions that the Project Would Not Have Significant Impacts

The court then went on to reject each of petitioner's claims that the EIR's conclusions that the project would not have significant: (1) biological, (2) cultural, (3) aesthetic, (4) geological, (5) hydrological/water quality, (6) transportation and emergency response/evacuation plans, or (7) hazardous materials impacts were not supported by substantial evidence. In each instance, petitioners failed to adequately set forth the EIR's impacts analysis and make an adequate showing that the analysis was not supported by substantial evidence. As such, petitioner's claims failed.

Conclusion and Implications

The *Keep 70 Safe* decision provides an illustrative discussion of equitable tolling principles and also includes an illustrative discussion of CEQA standards related to piecemealing, alternatives analyses, and substantial evidence, especially in the context of environmental review performed for highway improvement projects. A copy of the court's unpublished opinion can be found here: https://www.courts.ca.gov/opinions/nonpub/C095543.PDF.
(Travis Brooks)

SECOND DISTRICT COURT UPHOLDS DENIAL OF MOTION FOR ATTORNEYS' FEES FINDING PETITIONER FAILED IN PRODUCING SUBSTANTIAL EVIDENCE OF HIS PERSONAL FINANCIAL STAKE IN THE LITIGATION

Kracke v. City of Santa Barbara, *Unpub.*, Case No. B316993 (2nd Dist. Jan. 12, 2023).

A proprietor of vacation rentals (Petitioner) prevailed in an action claiming the City of Santa Barbara (City) illegally banned short-term vacation rentals, when the City did not seek a Coastal Development Permit (CDP) or an amendment to its certified Local Coastal Program (LCP) prior to instituting the ban. Having prevailed, Petitioner motioned for attorneys' fees under the private attorney general statute of Code of Civil Procedure § 1021.5. The trial court denied Petitioner's motion, finding that Petitioner failed to meet his burden of producing substantial evidence of his personal financial stake in the litigation in order to support that his costs of litigation outweighed his personal financial interest in the litigation. Petitioner appealed and the Court of Appeal affirmed the trial court's judgment in an *unpublished* opinion.

Factual and Procedural Background

Petitioner Theodore Kracke, a proprietor of vacation rentals in the City of Santa Barbara sued claim-

ing it had illegally banned short-term vacation rentals within the California coastal zone portion of the City (STVR Ban), when the City did not seek a Coastal Development Permit (CDP) or an amendment to its certified LCP prior to instituting the STVR Ban. Petitioner prevailed in the trial court and the City appealed. Prior to the Court of Appeal hearing the matter, Petitioner motioned for attorneys' fees under the private attorney general statute of Code of Civil Procedure § 1021.5, which the trial court denied. Following the Court of Appeal affirming the trial court's judgment on the merits, and a published opinion, in favor of Petitioner, Petitioner brought a second motion for attorneys' fees in the trial court. The trial court denied Petitioner's motion, finding that Petitioner failed to meet his burden of producing substantial evidence of his personal financial stake in the litigation in order to support that his costs of litigation outweighed his personal financial interest in the litigation. Petitioner's appeal on attorneys' fees then followed.

The Court of Appeal's Decision

On appeal, Petitioner contended that the trial court abused its discretion by: (1) considering only the financial burden element in denying his motion for attorneys' fees; and (2) finding that the evidence presented failed to establish his personal financial burden in the litigation.

The Court of Appeal first dismissed Petitioner's first contention, citing to established precedent that all of the elements must be satisfied for a court to award attorneys' fees under Code of Civil Procedure § 1021.5 and that if the court finds that one of the elements has not been met, it is unnecessary to make findings regarding the remaining elements.

Proving Financial Burden

The Court of Appeal next dismissed Petitioner's second contention. At the outset, the Court of Appeal set forth the established precedent on evaluating the element of financial burden—that the inquiry before the trial court is whether there were insufficient financial incentives to justify the litigation in economic terms. The Court of Appeal then found on the evidence presented, including Petitioner's undisputed financial interest in rental properties in the California coastal zone portion of the City, that the trial court was justified in finding that Petitioner had a substantial financial incentive to challenge the STVR Ban. Petitioner contended that the evidence he produced of his actual rental earnings from the time period after the STVR Ban went into effect, and during which litigation decisions were being made, constituted substantial evidence to have established his personal financial stake in the litigation. The Court of Appeal, however, disagreed. The Court of Appeal stated that earnings after the date the STVR Ban went into effect could not qualify as substantial evidence of his personal financial stake, as the relevant stake is what Petitioner would have expected to earn during that period in the absence of the STVR Ban. The Court of Appeal enumerated the trial court's suggestion that evidence of Petitioner's historical earnings from his vacation rentals could satisfy his burden of proving his personal financial stake, but Petitioner declined to produce that evidence and offered no other means of estimating his personal financial stake.

The Court of Appeal, in turn, affirmed the trial court's ruling that in the absence of Petitioner producing substantial evidence of his personal financial stake in the litigation, it would constitute an abuse of discretion to award Petitioner attorneys' fees under Code of Civil Procedure § 1021.5.

Conclusion and Implications

The case is significant because it contains substantive discussion of the financial burden element required for attorneys' fees under the private attorney general statute of Code of Civil Procedure § 1021.5. The unpublished decision is available online at: https://www.courts.ca.gov/opinions/nonpub/B316993.PDF.

(Eric Cohn)

SECOND DISTRICT PARTIALLY DENIES ANTI-SLAPP MOTION IN ACTION CHALLENGING CITY INITIATIVES APPROVED BY VOTERS

Oxnard v. Starr, ___Cal. Court App.5th___, Case No. B314601 (2nd Dist. Jan. 19, 2023).

In an opinion published on January 19, 2023, the Second District Court of Appeal in *City of Oxnard v. Starr* held that the City of Oxnard (City) had standing to sue the proponent of two voter-approved initiatives in an action seeking to have the measures declared void. In so holding, the court denied the proponent's anti-SLAPP motion, finding that there was no reason why he could not be named as a defendant. The court further upheld the merits of one initative, which established procedures for the conduct of city council meetings, but denied the other, which required the City to maintain its streets to a specified level of repair.

Factual and Procedural Background

Aaron Starr, a resident of the City of Oxnard, gathered signatures for Measures M and N—two City initiatives that the voters ultimately approved.

Measure M modified the City's "Sunshine Ordinance," which largely codified and supplemented the Brown Act. The ordinance provides how the time and place for meetings of the City's legislative bodies shall be established by resolution; specifies when meeting agendas must be posted; requires policy body meetings to adjourn by 10:00 p.m.; and provides for public comment but does not specify how long each member of the public can speak.

Under Measure M, regular City Council meets would be required to be held on the first and third Tuesday of every month; meetings shall start no earlier than 5:00 p.m. on workdays and no earlier than 9:00 a.m. on weekends; staff presentations to legislative bodies shall be videotaped in advance and posted on the City's website for viewing at the time the agenda is posted; staff's primarily role at meetings is to answer questions posed by the legislative body, not reenact pre-recorded meetings; each member of the public shall have no less than 3 minutes to comment on any agenda item or item considered by a legislative committee; Robert's Rules of Order shall govern the City's legislative bodies; and the City must use a professional parliamentarian to train members on Robert's Rules.

Measure N amended Measure O, which was adopted in 2008 to increase sales taxes by 0.5 percent. Measure N amended Measure O's sunset date from March 31, 2029 to September 30, 2022 to ensure the City spends an adequate amount to maintain the City's streets and alleys, unless a civil engineer finds otherwise, based on specified conditions. Measure N also stated that, beginning April 1, 2028, the City Council shall have the authority to extend the expiration date by 20 calendar quarters, provided than 110–365 days before each expiration date, a civil engineer finds the Pavement Condition Index of City-owned streets and alleys is at least 80.

At the Trial Court

After the City's voters passed Measures M and N, the City brought an action against Mr. Starr to have the measures declared void as "administrative" rather than "legislative" in nature. Starr sought dismissal of the suite by responding with an anti-SLAPP motion that claimed the City was not a proper party to bring the action, that he was not a proper defendant, and that the City could not prevail on the merits. The court denied the motion on all three grounds, and further found Measures M and N invalid because they constituted administrate rather than legislative acts.

The Court of Appeal's Decision

The Sixth Division for the Second District Court of Appeal reversed denial of the anti-SLAPP motion as to Measure M, but affirmed as to Measure N.

Anti-SLAPP Motion

To resolve an anti-SLAPP motion, courts must engage in a two-party inquiry: (1) whether the defendant has established the challenged action is protected activity; and (2) the plaintiff has demonstrated a probability of prevailing on the challenged cause of action.

Under the first prong, the City maintained that its post-election lawsuit does not implicate protected activity. Unpersuaded, the Court of Appeal noted that "there can be no doubt that being a proponent

of an initiative is an exercise of a person's rights of petition and free speech." The relevant inquiry is determining what the defendant's activity is that gives rise to the asserted liability and whether that activity is protected. Here, Starr was sued as the proponent of two initiatives—an activity that clearly constitutes protected speech and petitioning.

Under the second prong, the probability of a plaintiff's success does not necessarily hinge on the merits of the claim, but instead may be based on whether the court has jurisdiction to review the claim. Starr therefore maintained that the City had no power to sue him to invalidate the two initiatives because elected representatives may not use taxpayer funds to enlist the judiciary in an attempt to overturn the will of the electorate. The court countered, cautioning that "the will of the electorate as expressed through the initiative process is not plenary[;] there are limitations," including prohibiting the City to comply with initiatives that concern administrative matters and are thus invalid.

Here, the City "unequivocally" has standing to challenge the validity of Measures M because it constitutes a "person" who may seek "a declaration of his or her rights or duties with respect to another." (Code Civ. Proc., § 1060.) Contrary to Starr's defense, public officials are not required to defend a voter initiative, particularly those they consider to be facially invalid. To this end, Starr is the proper defendant because the City is seeking only declaratory relief regarding Measures M and N—the two initiatives he vigorously and voluntarily defended. Therefore, there is no reason why Starr cannot be named as a defendant, particularly where there is no other logical defendant.

Measures M and N and the Exclusive Delegation Rule

The City maintained that Measure M violated the exclusive delegation rule because Government Code sections 36813 and 54952 establish rules for how the City must conduct its legislative proceedings. The appellate court countered, however, by observing that nowhere does either statute evince the Legislature's intent to preclude related action by the electorate. To the contrary, the Brown Act specifically provides that the electorate "do not yield their sovereignty to the agencies which service them," thus indicating the people do have such power.

Moreover, although the Brown Act establishes the floor, rather than a ceiling, for statewide standards for public access to local agency meetings. Thus, standards that allow greater access—such as Measure M's—are purely a municipal affair. Measure M is therefore not invalid under the exclusive delegation rule.

Measures M and N: Legislative vs. Administrative Acts

The trial court found that Measures M and N were invalid administrative acts because they violated the rule barring the electorate from annulling administrative conduct in a manner that would destroy efficient administrative of the municipality's business affairs.

An initiative that is administrative in nature is invalid, whereas an initiative that is legislative in nature is not. An initiative is "legislative" if it prescribes a new policy or plan. An initiative is "administrative" if it merely pursues a plan that the legislative body or other superior power already adopted.

The Court of Appeal disagreed with the trial court's conclusion that Measure M was "administrative" in nature. Instead, the measure could be interpreted as "legislative" because it does not carry out a plan already adopted; rather, it created new reasonable rules for how the City Council must conduct meetings. The Brown Act and state Constitution endorse Measure M's policies by encouraging public agencies to openly deliberate on any actions it takes in conducting the people's business. Measure M similarly intends to increase the public's ability to have information about and participate in the decision made by its public agencies, and is thus permissibly legislative in nature.

Measure N, on the other hand, requires the City to expand general fund monies for road maintenance by setting specific dates and criteria for compliance. If the City fails to comply with Measure N, it will lose Measure O taxes. The manifest purpose of Measure N is to ensure that the City expends Measure O revenue for road repair. To fulfill this purpose, Measure N tells the City how it must administer general tax revenue, even by setting precise dates by which that work must be completed.

For these reasons, the Court of Appeal agreed that Measure N was clearly administrative in nature. Contrary to Starr's defense, although Measure N says nothing about how the City must spend Measure O

tax receipts, its purpose and effect is to do just that. Measure N is tied to Measure O funds and effectively determines how those O funds should be spent based on criteria the voters considered the "proper administration of street maintenance." That the City may choose not to maintain streets to Measure N's requisite level and instead let Measure O sunset, as Starr contended, does not make the measure any less administrative. Nor does crafting a properly constructive initiative that could cancel Measure O entirely. The court would not entertain what a measure might or might not have done—Measure N simply attempts to control Measure O funds, not terminate the tax. Therefore, the measure is improperly administrative and thus invalid.

Conclusion and Implications

The Second District's opinion provides helpful insight into various pockets of municipal law including voter initiatives, public meeting requirements, and agency standing. Notably, the court reiterated that agencies such as the City can seek declaratory relief of voter initiatives and name the initiatives' individual proponent as a defendant. The City's standing ultimately proved fatal to proponent/defendant's anti-SLAPP motion, which was premised on the defense that the City had no standing at all, and thus had no probability of succeeding on its claims. As to the merits of the contested measures, the court offered a straight forward analysis of what constitutes a "legislative" vs. "administrative" initiative. Simply put, initiatives are permissible so long as they create a new policy or program for the municipality to carry out; but become impermissible if they dictate how the municipality must carry a preexisting program or other administrative affairs.

The Second District's opinion is available at: https://www.courts.ca.gov/opinions/documents/B314601.PDF.
(Bridget McDonald)

SECOND DISTRICT COURT SUSTAINS CITY'S DEMURRER TO COMPLAINT ALLEGING COMMON LAW AND CONSTITUTIONAL PROPERTY CLAIMS

Ventura29LLC v. City of San Buenaventura, ___Cal.App.5th___, Case No. B313060 (2nd Dist. Jan 26, 2023).

In an opinion certified for publication on January 26, 2023, the Second District Court of Appeal in *Ventura29LLC v. City of San Buenaventura* sustained the City of San Buenaventura's demurrer to a developer's second amended complaint, which alleged causes of action for inverse condemnation, private nuisance, trespass, and negligence, for a property on which the developer was building a multi-unit townhome. The court held that the developer forfeited its claims because they were barred by the statute of limitations and the developer failed to exhaust its administrative remedies and.

Factual and Procedural Background

In 2006, V2V Ventures, Inc. received Tentative Tract Map approval from the City of San Buenaventura (City) to construct 29 townhomes on property it owned on East Thompson Boulevard. Thereafter, V2V Ventures retained a geotechnical engineering firm, Earth Systems Pacific, to conduct soil tests on the property.

In 2015, Ventura29, LLC, purchased and took title to the property, and began developing the 29-unit townhouse project pursuant to V2V Venture's City-approved Tentative Tract Map. As a condition of approval, the City required Ventura29 to construct a pedestrian-only walking path across an adjoining City-owned property—which the City acquired in 1967—in order to connect Ventura29's property with a nearby City park.

In 2018, Earth Systems prepared a Geotechnical Engineering Report for Ventura29, noting it encountered extensive uncertified fill in test trenches excavated on the property and buried beneath the entirety of the City-owned parcel where the walking path was to be constructed. The buried material consisted of asphalt, rebar, and concrete curb, gutter, street sec-

tions, and footings—all of which were consistent with waste from public works projects.

As part of the City-approved Grading Report, Earth Systems proposed an engineering solution to use geofabric to stabilize the areas with uncertified fill. The City inspector, however, orally informed Ventura29 that the City Engineer rejected the proposal and stated that Ventura29 was required to excavate its property and the entire City parcel, otherwise the City would revoke all Project grading approvals.

Based on this, Ventura29 removed approximately 80 million pounds of uncertified material, majority of which was on the City's parcel. Ventura29 orally negotiated with City representatives for reimbursement of that excavation, but those requests were denied. Ventura29 thus hired a construction forensics firm, Xpera Group, to research the uncertified fill. Xpera concluded that the fill constituted waste from City public works projects that was dumped on the City's parcel and Ventura29's property in or around 1977.

At the Trial Court

After the City refused its reimbursement requests, Ventura29 filed suit alleging four causes of action: (1) inverse condemnation; (2) private nuisance; (3) trespass; and (4) negligence. The inverse condemnation claim alleged the City's dumping of uncertified fill, along with its requirement that Ventura29 remove the fill, resulted in a taking that damaged the property's value by more than $1million. The remaining three claims were based on the City's dumping of uncertified fill on the property and City's parcel.

The City demurred to each cause of action, which the trial court sustained without leave to amend. The trial court concluded the inverse condemnation claim was barred because Ventura29 had not exhausted its administrative remedies by failing to appeal the City's oral modification of the grading permit. Instead, and because Ventura29 accepted the permit's benefits without resorting to the available means of contemporaneously challenging it, Ventura29 could not now sue for inverse condemnation.

The trial court ruled the remaining claims were time-barred because the complaint failed to plead facts bringing them within the "discovery rule." Here, the limitations period expired because V2V Ventures' knowledge of the property's potential uncertified fill in 2004 was imputed onto Ventura29, thus barring Ventura29 from bringing an action in 2020.

The Court Of Appeal's Decision

Under a *de novo* standard of review, the Second District reviewed whether the trial court erred in granting the City's demurrer without leave to amend.

Inverse Condemnation Claim

The Second District Court of Appeal held that the trial court did not err in sustaining the City's demurrer for Ventura29's failure to exhaust its administrative remedies.

Ventura29's complaint stated a cause of action for inverse condemnation based on the City Engineer's oral modification of the grading permit to require the removal of uncertified fill on the property and City parcel. Ventura29 maintained that this verbal modification imposed an illegal development condition that changed the scope of the project, as approved by the City, thus resulting in an unconstitutional taking requiring just compensation. Although the City's municipal code provides permit holders with an administrative remedy to appeal the City Engineer's permit conditions to the Public Works Director, Ventura29 argued that pursuing this avenue was infeasible because it would have required stopping work on the Project, thereby resulting in catastrophic costs and losses.

Unpersuaded, the court of appeal held that "Ventura29 had nothing to lose by filing an administrative appeal." The court reasoned that, had Ventura29 appealed, it could have proceeded with those portions of the grading plan that the City Engineer had not modified while the appeal as pending. Specifically, Ventura29 could have removed the uncertified fill where the buildings were to be constructed and within a three-foot distance from the building's foundations. And if the appeal had not been decided by the time this requisite excavation was completed, then Ventura29 could have started excavating the remainder of the property, thus leaving excavation of the City's parcel for last.

The court also rejected Ventura29's reasoning that an appeal would have been a "protracted affair." Conversely, Ventura29 could have requested expedited review, particularly given that construction was ongoing. This would have alerted the City that the City Engineer's decision was being questioned, which could have allowed the City to mitigate potential damages, propose alternative measures, or allow the

Public Works Director—the final decisionmaker—to render a compromise.

Moreover, that the City Engineer orally modified the Grading Plan, or that Ventura29 was unaware of the City's appellate process, did not excuse exhaustion or equitably estop the City from asserting forfeiture. Absent authority to the contrary, the City does not possess a duty to inform a real estate developer of its right to appeal a decision by the City Engineer.

The court closed by warning that:

> . . .[p]ermitting a developer to bring an action for damages without exhausting its administrative remedies would have a chilling effect on governmental regulation of new construction. Construction is a risky business. The developer can never be certain of what it will find when it grades the construction site. Unforeseen, subsurface conditions may be discovered. Their discovery may lead public officials to believe that modifications of approved plans are necessary to assure that the project is soundly constructed and does not compromise public safety. This is what happened here. Public officials will be loath to modify approved construction plans if, without seeking available administrative review, the developer may comply with the modifications, complete the project, and then recover from the government the cost of the modifications.

Tort Claims

The Second District also held that the trial court did not err in finding Ventura29's private nuisance, trespass, and negligence claims barred by two statutory periods: the one-year limitation to presenting the claims to the City (Gov. Code § 911.2), and the three-year window to file a civil action (Code Civ. Proc., § 338(b).)

The statute of limitations will usually commence when the action "accrues," which is typically on the date of injury. Here, the statute of limitations began to run in or around 1977 when the City dumped the uncertified fill on the Ventura29's property and the City's parcel. Ventura29 argued, however, the "discovery rule" postponed accrual of its claims because it did not discover the fill until April 2019.

The court agreed with the trial court's conclusion that Ventura29 knew or should have known that the City had dumped uncertified fill on the property given V2V Venture's prior knowledge of those conditions. Tortious claims, such Ventura29's, relate to injury to the property itself—not the property owner; therefore, the statute of limitations does not commence to "run anew" every time the ownership of the property changes hands. And under the discovery rule, suspicion of one or more elements of a cause of action, coupled with knowledge of any remaining elements, will generally trigger the statute of limitations period.

Here, Ventura29's complaint failed to show that the site's previous owners would have been unable to discover the uncertified fill, even with reasonable diligence. Conversely, Ventura29 conceded that "the property owner in 1977 and its successors possibly may have been aware that the City dumped material on the City parcel and the property," given that the dumping visibly changed the topography of both sites. Ventura29's immediate predecessor, V2V Ventures, also reasonably knew about the fill based on Earth Systems' discovery of large amounts of debris and asphalt during trenching and excavation conducted in 2006.

Ventura29 maintained that its claims were not based on the primary injuries to the property, (*e.g.*, uncertified fill), but rather were based on consequences of those injuries and the ensuing actions Ventura29 was required to take—i.e., removing tons of the City's waste from the City's property. Thus, Ventura29 argued, the statutory period began to run when the City Engineer modified the grading permit.

The court rejected Ventura29's "action on the case theory" because it effectively restated its inverse condemnation claim. Because Ventura29 forfeited its right to object to the modification to the grading plan by failing to exhaust its administrative remedies, so too was it barred from asserting this theory to maintain its tort claims.

Conclusion and Implications

The Second District Court of Appeal's opinion offers a straightforward application of two common procedural hurdles to an actionable complaint: administrative exhaustion and statutes of limitations. Here, the developer's decision to forego concurrently pursuing the City's prescribed administrative appeals process—despite potential financial ramifications—ultimately proved fatal to its claim. As both the trial

and appellate courts reiterated: because exhaustion is a prerequisite to maintaining any judicial action, all administrative remedies must be pursued to finality, even if doing so would seem futile. The court's opinion serves as a helpful reminder of when property-based tort claims begin to accrue—*i.e.*, from the date of injury, unless those injuries could not have been discovered with reasonable diligence. Therefore, a predecessor's knowledge of any preexisting juries will be imparted onto subsequent owners, thus precluding those owners from relying on the "discovery rule" to survive a statute of limitations defense.

The Second District's opinion is available at: https://www.courts.ca.gov/opinions/documents/B313060.PDF.
(Bridget McDonald)

LEGISLATIVE UPDATE

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

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

Surplus Land Act

•**AB 480 (Ting):** Current law prescribes requirements for the disposal of surplus land by a local agency, and requires, except as provided, a local agency disposing of surplus land to comply with certain notice requirements before disposing of the land or participating in negotiations to dispose of the land. Current law defines the term "exempt surplus land," which includes, among other things, surplus land that is put out to open, competitive bid by a local agency, as specified, for purposes of a mixed-use development that is more than one acre in area, that includes not less than 300 housing units, and that restricts at least 25 percent of the residential units to lower income households with an affordable sales price or an affordable rent for a minimum of 55 years for rental housing and 45 years for ownership housing. This bill would modify these provisions to require that the mixed-use development include not less than 300 residential units.

•**SB 747 (Caballero):** Current law exempts the disposal of certain surplus land from the requirements of the Surplus Land Act, and defines "exempt surplus land," for purposes of the act. Current law authorizes a local agency, on an annual basis, to declare multiple parcels as "surplus land" or "exempt surplus land," for purposes of the act, as supported by written findings. Existing administrative law requires a local agency making a determination that property is exempt surplus land to provide a copy of the written determination, as specified, to the department at least 30 days before disposition. This bill would authorize a local agency to declare administratively that land is exempt surplus land if the declaration and findings are published and available for public comment, and the local public entities and housing sponsors described above are notified at least 30 days before the declaration takes effect.

•**SB 229 (Umberg):** Current law prescribes requirements for the disposal of land determined to be surplus land by a local agency. Those requirements include a requirement that a local agency, before disposing of a property or participating in negotiations to dispose of that property with a prospective transferee, send a written notice of availability of the property to specified entities, depending on the property's intended use, and send specified information in regard to the disposal of the parcel of surplus land to the Department of Housing and Community Development. Current law, among other enforcement provisions, makes a local agency that disposes of land in violation of these disposal provisions, after receiving notification of violation from the department, liable for a penalty of 30 percent of the final sale price of the land sold in violation for a first violation and 50 percent for any subsequent violation. Under current law, except as specified, a local agency has 60 days to cure or correct an alleged violation before an enforcement action may be brought. This bill would require a local agency that has received a notification of violation from the department to hold an open and public session to review and consider the substance of the notice of violation.

•**AB 837 (Alvarez):** Current law prescribes requirements for the disposal of surplus land by a local agency. Current law defines terms for these purposes, including, among others, "surplus land." Current law defines "exempt surplus land" to mean, among other things, surplus land that a local agency is exchanging for another property necessary for the agency's use

and surplus land that a local agency is transferring to another local, state, or federal agency for the agency's use. Current law provides that an agency is not required to follow the requirements for disposal of surplus land for "exempt surplus land," except as provided. This bill would add to the definition of "exempt surplus land" land acquired by a local agency for the development of a university and innovation district in accordance with a sectional plan area (SPA) plan adopted by the local agency prior to January 1, 2019, provided that the land is developed in a manner substantially consistent with the SPA plan.

General Plans

•**AB 911 (Schiavo):** Current law permits a person who holds an ownership interest of record in property that the person believes is the subject of an unlawfully restrictive covenant based on, among other things, the number of persons or families who may reside on the property, to record a restrictive covenant modification. Current law entitles the owner of an affordable housing development to establish that an existing restrictive covenant is unenforceable by submitting a restrictive covenant modification document that modifies or removes any existing restrictive covenant language. Before recording the modification document, current law requires the owner to submit to the county recorder a copy of the original restrictive covenant and any documents the owner believes necessary to establish that the property qualifies as an affordable housing development for purposes of these provisions. This bill would require an owner of an affordable housing development to mail copies of the restrictive covenant modification document and other materials described above by certified mail to anyone who the owner knows has an interest in the property. The bill would provide that failure to provide this notice does not invalidate a recorded restrictive covenant modification document, but the county recorder may require reasonable documentation to ensure compliance with this noticing requirement.

•**AB 434 (Grayson):** The Planning and Zoning Law, for housing development projects that submit a preliminary application prior to January 1, 2030, prohibits a city or county from conducting more than 5 hearings, as defined, held pursuant to these provisions, or any other law, ordinance, or regulation requiring a public hearing, if the proposed housing development project complies with the applicable, objective general plan and zoning standards in effect at the time an application is deemed complete, as defined. Current law requires the Department of Housing and Community Development to notify a city, county, or city and county, and authorizes the department to notify the Attorney General, that a city, county, or city and county is in violation of state law if the department finds that the housing element or an amendment to that element, or any specified action or failure to act, does not substantially comply with the law as it pertains to housing elements or that any local government has taken an action in violation of certain housing laws. This bill would additionally authorize the department to notify a city, county, city and county, or the Attorney General when the planning agency of a city, county, or city and county fails to comply with the above-described provision that prohibits holding more than 5 hearings for specified variances.

•**SB 405 (Cortese):** Current law requires a city or county to determine whether each site in its inventory of land can accommodate the development of some portion of its share of the regional housing need, as provided. This bill, for a housing element or amendment adopted as part of the seventh planning period, would require the planning agency to provide notice to the owner of a site included in the above-described inventory that the site is included in that inventory, if the owner's identity and contact information is known, as specified. If the site owner notifies the planning agency or the department that the owner does not intend to develop at least 80 percent of the number of units for the site, determined as described above, during the current planning period, the bill would provide that the site would not be considered a site that can be developed to meet the jurisdiction's share of the regional housing need, except as specified. The bill would require the planning agency to make a reasonable effort to identify an owner and the owner's contact information and to determine the intent of the owner to develop the site. The bill would require that the information be an important factor for the department in determining whether the housing element identifies sufficient sites to meet the jurisdiction share of regional housing. The bill would require the department to amend specified standards, forms, and definitions to implement these provisions.

Subdivision Map Act

•**SB 684 (Caballero):** The Subdivision Map Act vests the authority to regulate and control the design and improvement of subdivisions in the legislative body of a local agency and sets forth procedures governing the local agency's processing, approval, conditional approval or disapproval, and filing of tentative, final, and parcel maps, and the modification thereof. This bill would authorize a legislative body to extend the expiration date, by up to 24 months, of a tentative map, vesting tentative map, or parcel map that meets certain criteria, including that a tentative map or vesting tentative map was approved on or after January 1, 2017, and not later than January 1, 2022, and that it relates to the construction of single-family or multifamily housing, as specified.

Accessory Dwelling Units

•**AB 932 (Ting):** Current law provides for the creation of junior accessory dwelling units by local ordinance, or, if a local agency has not adopted an ordinance, by ministerial approval, in accordance with specified standards and conditions. Current law requires a permitting agency to either approve or deny an application for a permit pursuant to these provisions within 60 days from the date the local agency receives a completed application if there is an existing single-family dwelling on the lot. If the applicant requests a delay, existing law requires this time period to be tolled for the period of the delay. This bill would change that time period to 45 days.

•**AB 671 (Ward):** Current law establishes the CalHome Program, administered by the Department of Housing and Community Development, to support existing homeownership programs aimed at lower and very low-income households, among other purposes. Under the program, funds may be used to enable low- and very low-income households to become or remain homeowners, and to provide disaster relief assistance to households at or below 120 percent of that area median income. This bill would require the department to allow a local agency or community land trust, as defined, that is a recipient of program funds to purchase residential real property in fee simple, construct accessory dwelling units or junior accessory dwelling units on the property, and separately lease or convey each dwelling unit on the property to separate households.

•**AB 1661 (Bonta):** Existing law vests the Public Utilities Commission with regulatory authority over public utilities, including electrical corporations and gas corporations. Existing law requires the commission to require every residential unit in an apartment house or similar multiunit residential structure, condominium, or mobilehome park issued a building permit on or after July 1, 1982, with certain exceptions, to be individually metered for electrical and gas service. This bill would additionally except from that requirement an accessory dwelling unit, as defined, if the owner of the property on which the accessory dwelling unit is located elects to have the accessory dwelling unit's electrical and gas services metered through existing or upgraded utility meters located on that property. The bill would require an electrical corporation and gas corporation, if an owner of such a property elects to have the accessory dwelling unit's electrical and gas services metered through utility meters located on that property, to allow the property owner to do so.

•**AB 976 (Ting):** Current law requires a local ordinance to require an accessory dwelling unit to be either attached to, or located within, the proposed or existing primary dwelling, as specified, or detached from the proposed or existing primary dwelling and located on the same lot as the proposed or existing primary dwelling. This bill would instead prohibit a local agency from imposing an owner-occupancy requirement on any accessory dwelling unit.

Affordable Housing

•**AB 1490 (Lee):** Current law requires the Department of Housing and Community Development to give priority with respect to funding under the Multifamily Housing Program to projects that prioritize adaptive reuse in existing developed areas served with public infrastructure, as specified. This bill would define adaptive reuse as the retrofitting and repurposing of an existing building to create new residential units. The bill would require a local government to provide an affordable housing project that is an adaptive reuse project and that guarantees that 100 percent of the units be made available for lower income households, 50 percent of which shall be made available to extremely low income households or very low income households, specified benefits and exemptions by local government agencies, including, among other things, approval of all entitlements and permits applicable to the project in 30 days

or less, exemption from any minimum floor area ratio, and waiver of local building and permit fees, as specified

•**AB 11 (Jackson):** Existing law establishes various programs for the development and preservation of affordable housing, including the Affordable Housing Revolving Development and Acquisition Program and the California Dream for All Program. This bill would create the Affordable California Commission. The bill would require that the commission be composed of 11 members, including 9 members appointed by the Governor, the Speaker of the Assembly, and the President pro Tempore of the Senate, as provided, and one member each from the Assembly and the Senate, who would serve as ex officio nonvoting members, as specified.

•**AB 312 (Reyes):** This bill would establish, subject to appropriation by the Legislature, the State Partnership for Affordable Housing Registries in California Grant Program to provide technical assistance to eligible entities, as defined, for the purpose of creating a state-managed online platform of affordable housing listings, information, and applications. The bill would require the Department of Housing and Community Development to administer the program and to adopt guidelines for this purpose. The bill would require the department to develop a housing preapplication to standardize applications for affordable housing and to solicit participation of eligible entities no later than January 1, 2026, and to launch the platform no later than July 1, 2027. The bill would require the department to provide technical assistance to participating entities and to ensure equitable access to database users, as specified. The bill would authorize the department to coordinate with the Office of Data and Innovation to carry out the requirements of the program and to contract with vendors pursuant to existing provisions of state contract law, as specified. The bill would establish minimum requirements for the platform and would require a vendor selected to create and maintain the platform to demonstrate specified capabilities and implement those requirements.

•**ACA 1 (Aguiar-Curry):** The California Constitution prohibits the ad valorem tax rate on real property from exceeding 1 percent of the full cash value of the property, subject to certain exceptions. This measure would create an additional exception to the 1 percent limit that would authorize a city, county, city and county, or special district to levy an ad valorem tax to service bonded indebtedness incurred to fund the construction, reconstruction, rehabilitation, or replacement of public infrastructure, affordable housing, or permanent supportive housing, or the acquisition or lease of real property for those purposes, if the proposition proposing that tax is approved by 55 percent of the voters of the city, county, or city and county, as applicable, and the proposition includes specified accountability requirements. The measure would specify that these provisions apply to any city, county, city and county, or special district measure imposing an ad valorem tax to pay the interest and redemption charges on bonded indebtedness for these purposes that is submitted at the same election as this measure.

Density Bonus

•**SB 713 (Padilla):** The Density Bonus Law requires a city or county to provide a developer that proposes a housing development within the city or county with a density bonus and other incentives or concessions, as specified, if the developer agrees to construct certain types of housing. Current law requires a city, county, or city and county to adopt an ordinance specifying how compliance with the Density Bonus Law will be implemented and, except as provided, specifies that failure to adopt an ordinance does not relieve the city, county, or city and county from compliance with that law. This bill would specify that the provisions of the Density Bonus Law prevail in the event of a conflict between that law and an ordinance, regulation, or other local law enacted by initiative.

•**AB 637 (Low):** Density Bonus Law requires a city or county to provide a developer that proposes a housing development within the city or county with a density bonus and other incentives or concessions, as specified, if the developer agrees to construct specified percentages of units for lower income, very low income, or senior citizen housing, among other things, and meets other requirements. Current law requires a city or county to grant a proposal for an incentive or concession requested by a developer unless it would not result in identifiable and actual cost reductions, as specified, would have a specific, adverse impact on public health or safety or on specified real property and for which there is no method to avoid or mitigate that impact, as specified, or would be contrary to state or federal law. This bill would additionally except from the

requirement that a city or county to grant a proposal an incentive or concession would have an adverse impact on a policy that affirmatively furthers fair housing, as specified.

•**AB 1287 (Alvarez):** Density Bonus Law requires a city or county to provide a developer that proposes a housing development within the city or county with a density bonus and other incentives or concessions, as specified, if the developer agrees to construct specified percentages of units for lower income, very low income, or senior citizen housing, among other things, and meets other requirements. Current law requires a city or county to grant a proposal for an incentive or concession requested by a developer unless it would not result in identifiable and actual cost reductions, as specified, would have a specific, adverse impact on public health or safety or on specified real property and for which there is no method to avoid or mitigate that impact, as specified, or would be contrary to state or federal law. This bill would additionally except from the requirement that a city or county to grant a proposal an incentive or concession would have an adverse impact on a policy that affirmatively furthers fair housing, as specified.

Planning and Zoning

•**AB 529 (Gabriel):** The Planning and Zoning Law requires each county and city to adopt a comprehensive, long-term general plan for the physical development of the county or city, and specified land outside its boundaries, that includes, among other specified mandatory elements, a housing element. That law requires the Department of Housing and Community Development to determine whether the housing element is in substantial compliance with specified provisions of that law. Existing law, for award cycles commenced after July 1, 2021, awards a city, county, or city and county, that has adopted a housing element determined by the department to be in substantial compliance with specified provisions of the Planning and Zoning Law and that has been designated by the department as prohousing based upon their adoption of prohousing local policies, as specified, additional points in the scoring of program applications for housing and infrastructure programs pursuant to guidelines adopted by the department, as provided. This bill would add the expansion of adaptive reuse projects to the list of specified prohousing local policies.

•**SB 736 (Mcguire):** The Permit Streamlining Act, which is part of the Planning and Zoning Law, requires each public agency to provide a development project applicant with a list that specifies the information that will be required from any applicant for a development project. Specifically, current law establishes time limits for completing reviews regarding whether an application for a postentitlement phase permit is complete and compliant, and whether to approve or deny an application, as specified. Current law requires a local agency, if a postentitlement phase permit is determined to be incomplete, denied, or determined to be noncompliant, to provide a process for the applicant to appeal that decision in writing to the governing body of the agency or, if there is no governing body, to the director of the agency, as provided by that agency. This bill would delete the provision for the applicant to appeal a decision to the director of the local agency, as described above, and, instead, require a local agency to provide a process for the applicant to appeal that decision in writing to the governing body of the agency only.

•**AB 1308 (Quirk-Silva):** The Planning and Zoning Law authorizes the legislative body of any county or city to adopt ordinances that regulate the use of buildings, structures, and land as between industry, business, residences, open space, and other purposes. This bill would prohibit a public agency, as defined, from imposing a new minimum parking requirement on a project to remodel, renovate, or add to a single-family residence, except as specified.

•**AB 821 (Grayson):** The Planning and Zoning Law requires each county and city to adopt a comprehensive, long-term general plan for the physical development of the county or city, and of certain land outside its boundaries. Current law requires that county or city zoning ordinances be consistent with the general plan of the county or city by January 1, 1974. Current law requires a zoning ordinance to be amended within a reasonable time so that it is consistent with the general plan in the event that the ordinance becomes inconsistent with the plan by reason of amendment to the plan. This bill, among other things, would provide that, in the event that a city or county fails to amend an

inconsistent zoning ordinance within 90 days after receiving written notice of the inconsistency, a proposed development project shall not be deemed inconsistent with that zoning ordinance and related zoning standard or criteria and shall not be required to be rezoned, if there is substantial evidence that would allow a reasonable person to conclude that the proposed development project is consistent with objective general plan standards and criteria but the zoning for the project site is inconsistent with the general plan.

•**AB 894 (Friedman):** The Planning and Zoning Law requires each county and city to adopt a comprehensive, long-term general plan for its physical development, and the development of certain lands outside its boundaries, that includes, among other mandatory elements, a housing element. Current law also authorizes the legislative body of a city or a county to adopt ordinances establishing requirements for parking. This bill would require a public agency, as defined, to allow existing land uses with underutilized parking, as defined, to share the underutilized parking with the public, a private entity, a public agency, or other users. The bill would require a public agency to allow shared parking to be counted toward meeting automobile parking requirements for a new or existing development or use, including underutilized parking spaces, when the parking spaces meet specified conditions regarding the distance of the spaces from the applicable site. The bill would require a public agency to accept a parking analysis using peer-reviewed methodologies developed by a professional planning association, as specified, when determining the number of shared parking spaces that can be reasonably shared between different uses.

•**AB 281 (Grayson):** Current law, which is part of the Planning and Zoning Law, requires a local agency to compile a list of information needed to approve or deny a postentitlement phase permit, to post an example of a complete, approved application and an example of a complete set of postentitlement phase permits for at least 5 types of housing development projects in the jurisdiction, as specified, and to make those items available to all applicants for these permits no later than January 1, 2024. Current law establishes time limits for completing reviews regarding whether an application for a postentitlement phase permit is complete and compliant and whether to approve or deny an application, as specified, and makes any failure to meet these time limits a violation of specified law. Current law defines various terms for these purposes, including "local agency" to mean a city, county, or city and county, and "postentitlement phase permit," among other things, to exclude a permit required and issued by a special district. This bill would include a special district in the definition of "local agency" and would remove special districts from the exclusion in the definition of "postentitlement phase permit."

•**AB 510 (Jackson):** The Planning and Zoning Law requires a city or county to adopt a general plan for land use development within its boundaries that includes, among other things, a housing element. Current law requires that the housing element include an inventory of land suitable and available for residential development. If the inventory of sites does not identify adequate sites to accommodate the need for groups of all household income levels, as provided, existing law requires that the local government rezone sites within specified time periods. Current law prescribes requirements for the disposal of surplus land, as defined, by a local agency. Current law requires land to be declared surplus land or exempt surplus land, as supported by written findings, before a local agency takes any action to dispose of it consistent with the agency's policies or procedures. This bill would require each city and county to establish a local land trust, as defined, for the purposes of holding and developing real property within the jurisdiction. The bill would require the local land trust to be governed by the city council or board of supervisors of the local government.

•**AB 1114 (Haney):** Current law defines "postentitlement phase permit" to include all nondiscretionary permits and reviews filed after the entitlement process has been completed that are required or issued by the local agency to begin construction of a development that is intended to be at least 2/3 residential, excluding discretionary and ministerial planning permits, entitlements, and certain other permits and reviews. These permits include, but are not limited to, building permits and all interdepartmental review required for the issuance of a building permit, permits for minor or standard off-site improvements, permits for demolition, and permits for minor or standard excavation and grading. Current law defines other terms for its purposes. Current law establishes time limits for completing reviews regarding whether an application for a posten-

titlement phase permit is complete and compliant, and whether to approve or deny an application, as specified, and makes any failure to meet these time limits a disapproval of the housing development project and a violation of the Housing Accountability Act. Current law requires a local agency, beginning on specified dates determined by population size, to provide an option for postentitlement phase permits to be applied for, completed, and retrieved by the applicant on its internet website, and accept applications for postentitlement phase permits and any related documentation by electronic mail until that process has been established. This bill would modify the definition of "postentitlement phase permits" to eliminate the nondiscretionary aspect of permits not otherwise excluded, thereby applying the definition to those permits without regard to whether they are nondiscretionary.

•**AB 1630 (Garcia):** This bill would prohibit a city, county, or city and county from prohibiting a dormitory on any real property located within 1/2 mile of a university campus, as defined. The bill would require a city, county, or city and county to classify student housing as a permitted use on all real property within 1/2 mile of a university campus for zoning purposes. The bill would require a proposed student housing project, as defined, to be considered ministerially, without discretionary review or a hearing, if specified requirements are met, including that at least 50 percent of the unites in the project be occupied by students of the local university campus to which the project site is proximate. In connection with an application submitted pursuant to these provisions, the bill would require a city, county, or city and county to take specified actions, including, upon the request of the applicant, provide a list of permits and fees that are required by the city, county, or city and county. By imposing new duties on local jurisdictions, this bill would impose a state-mandated local program. This bill contains other related provisions and other existing laws.

•**AB 1532 (Haney):** The Planning and Zoning Law requires the legislative body of each county and city to adopt a comprehensive, long-term general plan for the physical development of the county or city that includes, among other mandatory elements, a housing element. Under that law, supportive housing, as defined, is a use by right in zones where multifamily and mixed uses are permitted if the developer provides the planning agency with a plan for providing supportive services and the proposed housing development meets specified criteria. This bill would make an office conversion project, as defined, that meets certain requirements a use by right in all areas regardless of zoning. The bill would define "office conversion project" to mean the conversion of a building used for office purposes or a vacant office building into residential dwelling units. The bill would define "use by right" to mean that the city or county's review of the office conversion may not require a conditional use permit, planned unit development permit, or other discretionary city or county review or approval that would constitute a "project" for purposes of the California Environmental Quality Act, as specified.

•**SB 294 (Wiener):** The Planning and Zoning Law requires a city or county to adopt a general plan for land use development within its boundaries that includes, among other things, a housing element. Current law prohibits a local agency, as defined, from imposing a floor area ratio standard that is less than 1.0 on a housing development project that consists of 3 to 7 units, or less than 1.25 on a housing development project that consists of 8 to 10 units. Current law prohibits a local agency from imposing a lot coverage requirement that would physically preclude a housing development project of not more than ten units from achieving the floor area ratios described above. This bill would delete the ten-unit maximum for eligible projects, and would prohibit a local agency from imposing a floor area ratio standard that is less than 2.5 on a housing development project that consists of 11 to 20 units. The bill would prohibit a local agency from imposing a floor area ratio standard that is less than 1.25 for every ten housing units, rounded to the nearest ten units, on a housing development project that consists of more than 20 units.

•**AB 323 (Holden):** Would revise the Planning and Zoning Law to prohibit a developer from submitting a petition for public hearing to a city, county, or city and county, for a change in use of a parcel intended for owner occupancy pursuant to a local inclusionary zoning ordinance or density bonus project, as defined, unless the developer can prove that none of the applicants for owner occupancy can qualify for the unit as an owner occupant pursuant to the income limitation recorded on the deed or other instrument defining the terms of conveyance eligibility.

•**SB 450 (Atkins):** The Administrative Procedure Act, in part, sets forth procedural requirements for the adoption, publication, review, and implementation of regulations by state agencies, and for review of those regulatory actions by the Office of Administrative Law. This bill would authorize the Department of Housing and Community Development to review, adopt, amend, and repeal the standards, forms, or definitions to implement the Housing Accountability Act without compliance with those procedural requirements, as provided.

California Environmental Quality Act

•**AB 1700 (Hoover):** The California Environmental Quality Act (CEQA) requires a lead agency to prepare a mitigated negative declaration for a project that may have a significant effect on the environment if revisions in the project would avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment. This bill would specify that population growth, in and of itself, resulting from a housing project and noise impacts of a housing project are not an effect on the environment for purposes of CEQA.

•**AB 340 (Fong):** The California Environmental Quality Act (CEQA) prohibits an action or proceeding from being brought in a court to challenge the approval of a project by a public agency unless the alleged grounds for noncompliance are presented to the public agency orally or in writing by a person during the public comment period provided by CEQA or before the close of the public hearing on the project before the issuance of the notice of determination. This bill would require the alleged grounds for noncompliance with CEQA presented to the public agency in writing be presented at least ten days before the public hearing on the project before the issuance of the notice of determination. The bill would prohibit the inclusion of written comments presented to the public agency after that time period in the record of proceedings and would prohibit those documents from serving as basis on which an action or proceeding may be brought.

•**AB 356 (Mathis):** The California Environmental Quality Act (CEQA) requires a lead agency to prepare a mitigated negative declaration for a project that may have a significant effect on the environment if revisions in the project would avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment. Current law, until January 1, 2024, specifies that, except as provided, a lead agency is not required to evaluate the aesthetic effects of a project and aesthetic effects are not considered significant effects on the environment if the project involves the refurbishment, conversion, repurposing, or replacement of an existing building that meets certain requirements. This bill would extend the operation of the above provision indefinitely.

•**AB 978 (Patterson):** Would require a person seeking judicial review of the decision of a lead agency made pursuant to the California Environmental Quality Act (CEQA) to carry out or approve a housing project to post a bond of $500,000 to cover the costs and damages to the housing project incurred by the respondent or real party in interest. The bill would authorize the court to waive or adjust this bond requirement upon a finding of good cause to believe that the requirement does not further the interest of justice.

•**AB 1633 (Ting):** Existing law, the Housing Accountability Act, prohibits a local agency from disapproving a housing development project, as described, unless it makes certain written findings based on a preponderance of the evidence in the record. This bill would define "disapprove the housing development project" as also including any instance in which a local agency fails to issue a project an exemption from CEQA for which it is eligible, as described, or fails to adopt a negative declaration or addendum for the project, to certify an environmental impact report for the project, or to approve another comparable environmental document, if certain conditions are satisfied. Among other conditions, the bill would require a housing development project subject to these provisions to be located within an urbanized area, as defined, and meet or exceed 15 dwelling units per acre. By imposing additional duties on local officials, the bill would create a state-mandated local program. This bill contains other related provisions and other existing laws.

•**SB 91 (Umberg):** Current law, until January 1, 2025, exempts from the California Environmental

Quality Act (CEQA) projects related to the conversion of a structure with a certificate of occupancy as a motel, hotel, residential hotel, or hostel to supportive or transitional housing, as defined, that meet certain conditions. This bill would extend indefinitely the above exemption.
(Melissa Crosthwaite)

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