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CONTENTS

FEATURE ARTICLE

REGULATORY DEVELOPMENTS

RECENT FEDERAL DECISIONS

RECENT CALIFORNIA DECISIONS

Continued on next page

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FEATURE ARTICLE

FIRST DISTRICT COURT AFFIRMS CAMPUS PLAN EIR THAT DOES NOT CONSIDER LIMITED ENROLLMENT ALTERNATIVE FOR ANCILLARY HOUSING PROJECT

By Boyd Hill and Bridget McDonald

In a highly publicized reversal, the First District Court of Appeal in *Make UC A Good Neighbor v. Regents of University of California* held that the Regents' Program Environmental Impact Report (EIR) for UC Berkeley's Long Range Development Plan (LRDP) failed to adequately analyze potential noise impacts caused by students in residential neighborhoods near campus.

The First District Court of Appeal upheld the trial court's decision denying a writ of mandate for failure to analyze alternatives to University of California Berkeley's (Berkeley) long range development plan (Plan) in the Plan's Environmental Impact Report, but reversed the trial court's decision upholding the EIR's alternatives and noise impacts analysis for an ancillary housing project. [*Make UC a Good Neighbor v. Regents of University of California* ___Cal. App.5th___, Case No. A165451 (1st Dist. Feb. 24, 2023).]

Factual and Procedural Background

This case concerns the adequacy of an EIR, for (1) the Plan; and (2) one of Berkeley's two immediate student housing projects (Project 2) on the site of the historic People's Park, famous for political activity and protest. The EIR is both a program EIR with respect to the Plan, and a project EIR, with respect to Project 2.

The Plan is required by statute as a long-range guide to each UC campus decisions on land and infrastructure development. Significantly, the 2021 Berkeley Plan estimates future enrollment for planning purposes (through 2037), but does not determine future enrollment levels or set a limit on the campus's future population. It does, however, establish a maximum amount of new growth that the university may not substantially exceed without amending the Plan and conducting additional environmental review.

Berkeley currently provides housing for only 23 percent of its students. For years, enrollment increases have outpaced new student housing (beds). The prior long range development plan, adopted in 2005, called for construction of just 2,600 beds through 2021. This was 10,000 beds short of the projected enrollment increases over the same period. The university only constructed 1,119 of those planned beds.

By the 2018-2019 academic year, student enrollment exceeded the 2005 projections by more than 6,000 students. With a population of 39,708 students, the university provides housing for fewer than 9,000. The UC Berkeley chancellor's office then launched a housing initiative to improve existing housing and construct new housing for students, faculty, and staff.

The 2021 Plan encompasses a general strategy for meeting the housing goals identified in the chancellor's initiative. The university anticipates (but is not committed to) constructing up to 11,731 net new beds to accommodate a projected increase in the campus population (students, faculty, and staff) of up to 13,902 new residents. In addition, the Plan projects that another 8,173 students, faculty and staff will be added to the population by the 2036-2037 academic year who will not be provided with university housing.

The EIR lists 14 Plan objectives, mostly comprising broad goals for land use, landscapes, open space, mobility, and infrastructure. Based on the purpose and objectives, the EIR identified eight alternatives for the plan, and analyzed four of those alternatives.

Alternative A (the no project alternative) would entail continuing to implement the old (2005) development plan, constructing up to 1,530 additional beds as well as 2,476,929 square feet of academic and other space, far less than the proposed development plan (11,731 beds and over three million square feet of other space). It omits Housing Project Nos. 1 and 2 as well as features to reduce vehicle miles traveled, upgrade utilities, increase energy efficiency, and add renewable energy systems.

Alternative B (a reduced development plan) is a 25 percent reduction in Plan undergraduate beds and academic square footage (9,479 total new beds and 1,713,441 square feet of academic space). The two housing projects would be included but would be reconfigured with a reduction in beds.

Alternative C focuses on features that would reduce vehicle miles traveled and greenhouse gas emissions through numerous projects to increase remote learning and working, limit parking, and build 500 more faculty and staff beds to reduce commuting.

Alternative D prioritizes more housing for faculty and staff compared to the Plan—an additional 1,000 beds in two campus locations.

The EIR concludes that alternative A (no project) would be the environmentally superior alternative, followed by alternative C (reduced vehicle miles). Except for alternative A, which would conflict with many of the Plan's objectives, the remaining alternatives would meet most of the objectives.

In comments on the draft EIR, members of the public urged the Regents to consider an alternative that reduced, capped, or otherwise limited undergraduate enrollment. The Regents responded, in the final EIR, that the plan does not set undergraduate enrollment, increase enrollment, or commit the campus to any particular enrollment level; enrollment is determined annually in a separate process. As the EIR explains, the process for setting enrollment levels in the UC system is complicated and established by statute, with multiple players, interests, and trade-offs.

Petitioners did not contest the EIR's alternatives, but instead argued that range of alternatives was too narrow without at least one alternative that would limit student enrollment. Petitioners argued that the number of students is a major driver of environmental impacts. Fewer students would mean, for example, fewer cars and new buildings, which, in turn, would mean fewer impacts to resources protected by the California Environmental Quality Act (CEA) such as air, water, and cultural resources.

The EIR was approved in September 2021, and petitioners filed a writ of mandate challenge in 2021, challenging the scope of Plan alternatives and the lack of analysis of Housing Project 2 with respect to noise impacts and alternatives. After trial, the trial court denied the writ in August 2022.

At the Trial Court

In October 2021, petitioners Make UC a Good Neighbor and The People's Park Historic District Advocacy Group filed a petition for writ of mandate alleging the EIR violated CEQA. Following several procedural skirmishes, the trial court denied the petition and entered judgment in favor of the Regents.

At the Court of Appeal

Make UC a Good Neighbor appealed and filed a petition for writ of supersedeas and request for immediate stay in the First District Court of Appeal. The Court of Appeal granted the stay and issued a writ ordering that all construction and demolition at People's Park be stayed pending resolution of the appeal.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's judgment regarding the EIR's analysis of Plan alternatives under the substantial evidence standard of review, but reversed the judgment regarding adequate analysis of Housing Project 2 noise impacts and alternatives under the de novo standard of review.

Requirement of Alternatives Analysis

The purpose of an EIR is to provide the government and the public with enough information to make informed decisions about the environmental consequences of a project and ways to avoid or reduce its environmental damage. (*Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 564-565 (1990) (*Goleta*).)

Thus, an EIR must consider potentially feasible alternatives to a project. The lead agency—not the public—is responsible for proposing the alternatives. The lead agency need not consider every conceivable alternative, but instead a reasonable range of alterna-

tives to the project, or to the project's location, that could reduce a project's significant environmental impacts, meet most of the project's basic objectives, and are at least potentially feasible.

Courts presume an EIR alternatives analysis complies; it is a petitioner's burden to demonstrate it does not.

The Plan Alternatives Analysis

The problem with petitioner's argument that the Plan should have considered a lower enrollment alternative is that it ignores the plan's limited purpose and scope. The plan deliberately keeps separate the complex annual process for setting student enrollment levels. An agency is generally not required to consider alternatives that would change the nature of the project. Here, the Regents adopted a program EIR for a limited, high-level land use plan and made a reasoned decision to exclude the enrollment process from the scope of the project.

The EIR is quite clear that setting enrollment levels is not the plan's purpose. The purpose is to guide future development regardless of the actual amount of future enrollment. The plan leaves enrollment decisions to the existing long range and annual planning processes. It estimates future enrollment only for purposes of developing a land use and infrastructure plan that could meet its future needs, consistent with the California Legislature's instruction to develop long range plans based on the campus's academic goals and projected enrollment levels.

While the EIR must consider and mitigate projected campus population increases for the Plan, which it did, Public Resources Code § 21080.09 does not force the UC Regents to consider alternatives to its process for setting enrollment levels whenever they adopt a new development plan. Indeed, in a recent amendment to the statute, the Legislature exempted enrollment and enrollment increases from the definition of a project under CEQA

Lack of Analysis for Housing Project 2

Petitioners contended the EIR failed to analyze any alternative locations for Housing Project No. 2 that would spare People's Park from demolition. While the Regents need not study an alternative site or sites for the People's Park project in all cases, the Regents not only declined to analyze any alternative locations; they failed to provide a valid reason for that decision.

The court described the Regents' strategy as "puzzling" and concluded that the EIR's reasons for declining to consider alternative sites were insufficient because they were vague, unequivocal, and did not demonstrate that no feasible alternatives existed. For example, the Regents argued that developing another site would fail to meet one of the project's primary objectives—to revitalize the People's Park site—and the record demonstrated that this was one of the project's main purposes. The court, however, noted that the cited objective referred generally to "a UC Berkeley property" and not to People's Park, specifically.

There is plenty of evidence that alternative sites exist—the development plan identifies several other university-owned properties as potential student housing sites. Under those circumstances, the EIR failed to consider and analyze a reasonable range of alternatives.

The court further determined that the Regent's arguments for rejecting other locations, even if potentially valid, were not reflected in the EIR and instead based on a "nonexistent conflict" with the LRDP. Because the LRDP dd not set a minimum number of beds to be built, the EIR did not support the Regents' argument that all of the proposed housing sites would need to be developed to achieve the EIR's objectives.

CEQA includes noise as an environmental impact that must be addressed. The EIR does not analyze the noise impacts. It does not address the relevant baseline noise conditions in the neighborhoods afflicted with loud parties, the effect of increasing the student population in those neighborhoods, or the efficacy of the noise reduction efforts it identified, and it makes no findings on whether adding thousands more students to the area would cause a significant noise increase as part of the environment.

Conclusion and Implications

The projects at issue in *Make UC a Good Neighbor* were highly controversial, and the First District's opinion was no different. The case highlights the growing tension between CEQA and planning for future housing development. In this specific instance, university students and housing are once again at the epicenter of this heated debate. The court uncharacteristically conceded this by acknowledging that it was "aware of the public interest in this case—the controversy around developing People's Park, the uni-

versity's urgent need for student housing, the town-versus-grown conflicts in Berkeley on noise, displacement, and other issues, and the broader public debate about legal obstacles to housing."

This opinion by the First District Court of Appeal emphasizes the need to apply an appropriate alternatives analysis that takes into account the objectives of the plan/project and takes into account alternatives and impacts that may be apparent from the record of proceedings, such as the record's discussion of alternative sites and of student noise problems. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A165451.PDF

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REGULATORY DEVELOPMENTS

CALIFORNIA WATER COMMISSION RECEIVES STATUS UPDATE ON MULTI-BENEFIT LAND REPURPOSING PROGRAM

The California Water Commission (Commission) recently received an overview and update on the California Department of Conservation's (Department) Multi-benefit Land Repurposing Program (MLRP). The MLRP is designed to encourage regions to repurpose lands, including agricultural land, to deliver multiple benefits, in response to evolving groundwater management programs.

Background

In late 2021, California Governor Gavin Newson signed legislation that created the MLRP. The purpose of the MLRP is to increase regional capacity to repurpose agricultural land in order to reduce regional reliance on groundwater while also improving community health, economic wellbeing, water supply, renewable energy, and climate benefits. The MLRP aims to provide low-income rural communities and smaller-scale agricultural operators more involvement in land and water use planning.

One of the Department's stated concerns is to protect farmland and long-term water availability. The Department states that as water availability decreases, it anticipates seeing simultaneous reductions in quality farmland to produce food. The Department is also concerned that if land use decision-making at the parcel level is left to traditional processes, agricultural lands will become scattered across the State.

Description of the Multi-Benefit Land Repurposing Program

The stated goals of the MLRP are: (1) to support coordinated regional efforts; (2) provide short and medium-term drought response strategies; (3) repurpose agricultural lands; (4) sustain land-based economies; (5) reduce groundwater use; (6) create and restore habitat; and (7) provide benefits to disadvantaged communities.

The MLRP works through issuing regional block grants in an attempt to reach its goals. The Department grants up to $10 million to regional or basin-scale organizations to develop and implement land repurposing programs. The types of projects that the MLRP funds include habitat preservation, multi-benefit recharge areas, facilitation of renewable energy projects, re-establishment of tribal land uses, transitioning to dryland farming or rangeland or less waterintensive crops, planting cover crops, creation of parks or community recreation areas, incentive payments to landowners, farmers, and ranchers to implement multi-benefit projects, land acquisitions, and pumping allocation acquisitions.

The MLRP requires several deliverables from participants. The first is a Multi-benefit Agricultural Land Repurposing Plan, which grantees must develop after they receive grant funds. A Multi-benefit Agricultural Land Repurposing Plan is a strategic plan to utilize landscape to achieve the different benefits identified as most important. Additionally, the MLRP provides for repurposing project development, permitting, and implementation requirements. The MLRP also provides funding to support the capacity needs of partners, as well as outreach and training and monitoring.

The program also includes a Statewide Support Entity that is meant to coordinate technical assistance and outreach for the program. The Department seeks to encourage meaningful Tribal involvement in the MLRP and similar programs. To do so, the Department offers a rolling, non-competitive $5 million grant carve out for Tribes. All funds not granted to other organizations through the MLRP will roll back into the program through the carveout for Tribes.

Current Status of MLRP

The Department has awarded Round-1 awards through the MLRP. The Department originally received applications seeking a total $113 million in funds, of which it awarded a total $40 million in May 2022, through four grants in the amount of $10 million per grant. Grant awardees and regions included: (1) Pixley Irrigation District, (2) Madera County,

(3) Kaweah Subbasin, and (4) Upper Salinas Valley. Grant awards will fund habitat and groundwater recharge projects, agricultural conservation and fallowing programs, flood managed area recharge (Flood MAR) programs.

The Department recently received MLRP Round 2 applications. The Department has also modified its guidelines for the program to include adding disadvantaged community benefits as its own selection criterion, as well as clarifying project eligibility, the application review process, project monitoring expectations, and eligible costs.

Conclusion and Implications

The Multi-Benefit Land Repurposing Program states that it is designed to engage low-income rural communities and smaller-scale agricultural farmers in long-term land and water use planning. The Department of Conservation has already awarded the first round of funds to certain communities, which are already developing plans to manage agricultural lands and local habitats. While some of the MLRP objectives are understood, many local agricultural operators remain understandably frustrated by the challenges, programs and management actions arising from SGMA implementation. In some areas, a lack of Groundwater Sustainability Agency transparency in the development and implementation of Groundwater Sustainability Projects and management actions has undermined trust and cooperation in implementation. Many local operators may understandably question why re-purposing is required at all. In some areas, repurposing or multi-purposing may serve both local landowners and long-term benefits to groundwater basins. Implementation of the MLRP is evolving and its effect (and effectiveness) remains to be seen. (Christina Suarez, Derek Hoffman)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT HOLDS 2020 EPA RULE ON CLEANWATER ACT, SECTION 401 CERTIFICATION TO REMAIN IN EFFECT DURING AGENCY RECONSIDERATION

In re Clean Water Act Rulemaking, ___F.4th___,
Case Nos. 21-16958, 21-16960, 21-16961 (9th Cir. Feb. 21, 2023).

The Ninth Circuit has overruled a U.S. District Court order that set aside a Trump-era U.S. Environmental Protection Agency (EPA) rule that severely limited state's authority in the Section 401 water quality certification process, and required states to take final action on certification requests no later than one year from the initial application.

Background

The federal Clean Water Act (33 U.S.C. § 1251 *et seq*., CWA) delegates to the states the duty to set their own water quality standards and requires state certification, known as Section 401 certification, that the applicable standards have been complied with prior to issuance of "a Federal license or permit to conduct any activity … which may result in any discharge to into the navigable waters" of the United States. 33 U.S.C. § 1341(a)(1). States are required to act on certification requests "within a reasonable period of time (which shall not exceed one year) after the receipt of such request" then "the certification requirements … shall be waived." *Ibid*.

The certification process can be complex. In order to allow state regulators sufficient time to complete the certification process, a practice had developed in which states would request that applicants withdraw and resubmit their applications in order to extend the one-year deadline to act on an application.

In 2020, EPA promulgated the Clean Water Act Section 401 Certification Rule (85 Fed. Reg. 42210 (July 13, 2020), 40 C.F.R. pt. 121 (2021), the 2020 Rule). The 2020 Rule narrowed the substantive scope of Section 401 certification by providing that:

> . . .certification is 'limited to assuring that a *discharge* from a Federally licensed or permitted activity will comply with water quality requirements [as defined in the 2020 Rule.'(Emphasis in opinion.)

This change was intended "to focus the certification on 'discharges' affecting water quality, not 'activities' that affect water quality more generally." With respect to the timing of the Section 401 certification process, the 2020 Rule provided that:

> . . .a state 'is not authorized to request the project proponent to withdraw a certification request and is not authorized to take any action to extend the reasonable period of time' beyond one year from the date of receipt.

Several states, environmental groups and tribes challenged the 2020 Rule; other states and energy industry groups intervened to defend the Rule. Before the district court could decide any dispositive motions, newly-elected President Biden directed federal agencies to review regulations concerning the protection of public health and the environment that were enacted under the previous Administration. EPA first asked the district court to stay the litigation, and then announced its intent to revised the 2020 Rule. It then moved for remand of the 2020 Rule for agency reconsideration, requesting that the court leave the Rule in effect during the pendency of the remand. The plaintiff-challengers asked that the court either deny remand and decide the merits of their challenge, or, if remand were granted, vacate the 2020 Rule, arguing that:

> . . .keeping the 2020 Rule in place during a potentially lengthy remand would severely harm water quality by frustrating states' efforts to limit the adverse water quality impacts of federally licensed projects.

The District Court remanded and vacated the 2020 Rule.

The intervenors obtained a stay of the vacatur rule from the Supreme Court pending this appeal.

The Ninth Circuit's Decision

At issue in this appeal is whether the District Court has authority under the Administrative Procedure Act (5 U.S.C. § 561 *et seq*., the APA) to vacate a rule on remand without having decided on the merits of the challenge to the rule.

The APA:

> . . .instructs courts to 'set aside' (*i.e*., to vacate) agency actions held to be unlawful. 5 U.S.C § 706(2) (instructing courts to 'set aside' those actions 'found to be,' for example, 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.')

The Court of Appeals applied the:

> . . .basic canon of construction establishing that an 'explicit listing' of some things 'should be understood as an *exclusion of others*' not listed—even when a statute 'does not expressly say that *only*' the listed things are included.

Under this interpretative rubric, courts are authorized to vacate only those agency actions held to be unlawful.

The court relied as well on the APA's definition of "rulemaking"—the "agency process for formulating, amending or *repealing* a rule" (5 U.S.C. § 551(5)), held to require that "agencies use the same procedures within they amend or repeal a rule as they used to issue the rule in the first instance." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015).

Endorsing the practice of voluntary-remand-with-*vacatur* where there is no merits ruling would essentially turn courts into the accomplices of agencies seeking to avoid this statutory requirement, as it would allow agencies to repeal a rule merely by requesting a remand with vacatur in court. Because Congress set forth in the APA a detailed process for repealing rules, we cannot endorse a judicial practice that would help agencies circumvent that process.

The court rejected various equitable and policy arguments urged by the plaintiffs, holding that federal courts' equitable powers can only be exercised against "*illegal* executive action," and that neither equitable nor policy considerations cannot "trump the best interpretation of the statutory text." *Patel v. Garland*, 142 S.Ct. 1614, 1627 (2022).

Conclusion and Implications

In light of the Supreme Court's stay of the *vacatur* order, plaintiffs would be unwise to seek *certiorari* and provide the Court with an opportunity to definitively foreclose consideration of their equitable and policy arguments in a different factual context. The new Section 401 rule is anticipated to be released in Spring 2023.

(Deborah Quick)

DISTRICT COURT FINDS FEDERAL ENDANGERED SPECIES ACT PREEMPTS STATE AGENCY ORDER ON KLAMATH PROJECT OPERATIONS

Yurok Tribe, et al., v. U.S. Bureau of Reclamation, et al., ___F.Supp.4th___, Case No. 19-cv-04405-WHO, (N.D. Cal. Feb 6, 2023).

The U.S. District Court for the Northern District of California has issued a decision in *Yurok Tribe, et al., v. U.S. Bureau of Reclamation, et al.*, (*Yurok Tribe*) finding that the federal Endangered Species Act (ESA) preempted an order from the Oregon Water Resources Department (OWRD) prohibiting the U.S. Bureau of Reclamation (Bureau) from releasing water from Upper Klamath Lake except for irrigation purposes. The District Court found that the OWRD order presented an obstacle to the Bureau's compliance with the ESA and therefore could not be enforced. The ruling resolved four motions for summary judgment in favor of the United States, as well as the Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources.

Factual Background

The Klamath River originates in the high desert of Oregon, flowing southwest into California and eventually the Pacific Ocean. The Klamath River drains into the Klamath Basin, where its waters are relied on by numerous stakeholders including Native American tribes, fish and wildlife, and irrigators.

The Reclamation Act of 1902 (43 U.S.C. § 391 *et seq.*) authorized the Secretary of the Interior to construct and operate works for the storage, diversion, and development of water in the western United States. In 1905, the Secretary of the Interior authorized the Klamath Project (Project) pursuant to the Reclamation Act. Today the Project consists of an extensive series of canals, pumps, diversion structures, and dams capable of routing water to approximately 230,000 acres of irrigable land in the upper Klamath River Basin.

The Bureau is in charge of operating the Project, which includes managing water levels and distribution from Upper Klamath Lake. Upper Klamath Lake is the Project's primary storage facility with a capacity to store approximately 562,000 acre-feet of water. The Bureau's operations of Upper Klamath Lake are influenced by Oregon state law, Tribal water rights, and the federal ESA.

Litigation involving the Klamath Project has a long and complex history. Although the case as a whole originated as a challenge to 2019 biological opinion for the Project, this ruling stems from the Bureau's management of Upper Klamath Lake amid severe drought conditions in 2020. In 2020, the Bureau did not fully allocate Project water to irrigators. But the Bureau continued to release water from the Upper Klamath Lake pursuant to the ESA, which requires that federal agencies ensure their actions are "not likely to jeopardize" the continued existence of a listed species or destroy or modify its habitat. (16 U.S.C. § 1536(a)(2) ("ESA Section 7(a)(2)").) On April 6, 2021, the OWRD issued an order that the Bureau "immediately preclude or stop the distribution, use or release of stored water from the UKL" except for water that would be used by irrigators. The United States then filed a crossclaim against OWRD and the Klamath Water Users Association seeking to overturn the OWRD order.

The District Court's Decision

In its February 6, 2023 order in *Yurok Tribe*, the court granted summary judgment in favor of the United States as well as the Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources. The court denied summary judgment motions filed by OWRD, Klamath Water Users Association, and Klamath Irrigation District. The central issue in the case was whether the ESA preempted the OWRD order, making it invalid in violation of the Supremacy Clause.

The Bureau and the ESA

The court first addressed the threshold question of whether the Bureau must comply with the ESA in operating the Project. Section 7(a)(2) of the ESA only applies to discretionary agency actions, and does not apply to actions that "an agency is required by statute to undertake once certain specified triggering events have occurred." (*National Association of Home*

Builders v. Defenders of Wildlife, 551 U.S. 644, 669 (2007).) The court held that here "Congress gave [the Bureau] a broad mandate in carrying out the Reclamation Act, meaning it has discretion in deciding how to do so." Therefore, section 7(a)(2) applies and the Bureau must comply with the ESA when releasing stored water from Upper Klamath Lake.

Federal Preemption

Finding that the ESA applies to the Project, the court then addressed the issue of preemption. The Supremacy Clause of the U.S. Constitution grants Congress "the power to preempt state law." (*Arizona v. United States*, 567 U.S. 387, 399 (2012).) One form of preemption occurs where a state law "stands as an obstacle to the accomplishment and execution" of the federal law. (*Id.* at 399-400.) This is referred to as "obstacle preemption." (*United States v. California*, 921 F.3d 865, 879 (9th Cir. 2019).)

The court found that the OWRD order stood as an obstacle to the accomplishment and execution of Congress' intent in enacting the ESA to "halt and reverse the trend toward species extinction, whatever the cost." The OWRD order prohibited the Bureau from releasing water from Upper Klamath Lake except for irrigation purposes, which prevented release of water to avoid jeopardizing endangered species. The District Court granted summary judgment in favor of the United States on preemption grounds, concluding that the OWRD is preempted by the ESA and therefore invalid.

Conclusion and Implications

The court declined to opine on other arguments related to the OWRD order, including an argument based on the doctrine of intergovernmental immunity. At the time of this writing, it remains unclear whether any parties will appeal the court's ruling. The court's ruling highlights the ongoing challenges associated with balancing the needs of different stakeholders in times of drought.
(Holly E. Tokar, Sam Bivins)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT HOLDS PETITIONER FAILED TO EXHAUST ADMINISTRATIVE REMEDIES TO CITY'S DETERMINATION THAT CATEGORICAL EXEMPTION APPLIED

Arcadians for Environmental Preservation v. City of Arcadia, ___Cal.App.4th___, Case No. B320586 (2nd Dist. Feb. 2023).

A neighborhood group filed a petition for writ of mandate challenging the City of Arcadia's determination that a single-family home expansion was exempt from the California Environmental Quality Act (CEQA) under the "Class 1" categorical exemption. The trial court denied the petition, holding as a threshold matter that Petitioner had failed to exhaust administrative remedies. Petitioner appealed, and the Court of Appeal affirmed the trial court's judgment.

Factual and Procedural Background

In June 2018 a homeowner applied to the City of Arcadia (City) to expand her single-family home (Project). Following multiple rejections by the City's architectural review board, in April 2020, the homeowner appealed the matter to the City's Planning Commission. The City prepared a staff report that recommended the City conditionally approve the Project and identified that the Project qualified for an exemption from CEQA under the "Class 1" categorical exemption of section 15301 of the CEQA Guidelines. Following a noticed public hearing, in May 2020, the Planning Commission conditionally approved the Project finding the Project was exempt from CEQA under the Class 1 exemption. The homeowner's neighbor appealed the Planning Commission's approval to the City Council. The documents prepared for the City Council hearing, again, identified reliance on the Class 1 exemption. Following a noticed public hearing, in August 2020, the City Council upheld the Planning Commission's conditional approval determining that the Project was exempt from CEQA under the Class 1 exemption.

The homeowner's neighbor subsequently formed a neighborhood group (petitioner), which filed, in September 2020, a petition for writ of mandate challenging the City's approval of the Project and alleging violations of CEQA (as well as of the State's Planning and Zoning Law, which allegations were abandoned on appeal). The trial court, in February 2022, denied the petition holding as a threshold matter that petitioner had failed to raise at the administrative level the issue it raised in court that the City's determination that the Project was exempt from CEQA under the Class 1 exemption was made in error and thus had not exhausted its administrative remedies. The trial court also rejected petitioner's argument that the City had failed to proceed in a manner required by law by making an exemption determination without expressly considering whether any exceptions to the exemption existed. Petitioner's appeal then followed.

The Court of Appeal's Decision

On appeal, petitioner contended that the trial court erred by failing to find (1) petitioner exhausted its administrative remedies and (2) the City had failed to proceed in a manner required by law by not expressly considering whether any exceptions to the Class 1 exemption existed.

Failure to Exhaust Administrative Remedies That the Class 1 Exemption Determination Was Made in Error

Petitioner had alleged that the City erred in determining that the Project fell within the Class 1 exemption. Petitioner claimed that statements made during the City's administrative proceedings, which generally referenced potential environmental impacts of the Project, satisfied the exhaustion requirement on this issue. The Court of Appeal disagreed. The Court of Appeal dispensed with petitioner's insistence, holding, based on established case law, that the generalized statements did not apprise the City of the contention that the Project fell outside the scope

of the Class 1 exemption to satisfy the exhaustion requirement. The Court of Appeal held such notwithstanding statements made during the administrative proceedings requested an Environmental Impact Report (EIR) be prepared for the Project and the three-step CEQA decision tree only requires an EIR when a project is not otherwise exempt. The Court of Appeal held this logic fundamentally misapprehended the purpose of the exhaustion requirement—to fairly apprise the public agency of the challenged factual issues and legal theories before the action is subject to judicial review. While the Court of Appeal agreed with petitioner that the statements did not need to cite a particular statute or CEQA Guideline, it was nonetheless incumbent on the statements to at least articulate why application of the exemption might be incorrect.

Petitioner next argued that it was excused from the exhaustion requirement because the City agendas for the Project hearings referred generally to a CEQA exemption without reference to the specific Class 1 exemption. The Court of Appeal held that petitioner's argument incorrectly portrayed the facts—as both the City's notices for the Project hearings and the staff reports identified the City's consideration of the Class 1 exemption. The Court of Appeal held that while the City referenced differing subdivisions of CEQA Guidelines section 15301 (subdivisions (a) and (e)) in different publicly circulated documents, such discrepancies were immaterial—as the discrepancies neither negated proper notice of the City's intent to apply the Class 1 exemption nor caused any prejudice. Specifically, the Court of Appeal held that because CEQA Guidelines § 15301, by its terms, provides that the subdivisions are merely examples of Class 1 exemptions proper notice was not negated. Furthermore, because no statements during the City's administrative proceedings challenged the Class 1 exemption at all no prejudice was caused.

No Failure to Proceed in Manner Required by Law by Implied Finding No Exception to the Class 1 Exemption Applied

Petitioner argued that the City failed to proceed in the manner required by law because the record was devoid of any evidence the City ever considered whether any exception (enumerated in CEQA Guidelines § 15300.2) to the Class 1 exemption applied. The Court of Appeal rejected petitioner's argument, relying on established case law that a categorical exemption determination includes an implied finding that no exception bars the exemption. As such, the City did not err by not making an express determination that no exception applied.

Challenge that Cumulative Impacts Exception Barred Application of the Class 1 Exemption Failed on the Merits, Even Assuming Such Contention was Preserved

The Court of Appeal, last, acknowledged doubts about whether statements made during the City's administrative proceedings that the Project had the potential for significant cumulative impacts preserved an argument against applying the Class 1 exemption based on the cumulative impacts exception found in CEQA Guidelines § 15300.2(b). Nonetheless, the Court of Appeal determined that even assuming the argument had been preserved, it would fail on the merits. Specifically, the Court of Appeal found that the general references made during the City's administrative proceedings to "cumulative environmental effects caused by multiple large-scale projects" nearby did not constitute evidence of actual impacts from the Project and other nearby projects. The Court of Appeal held the references to be pure speculation, which did not satisfy petitioner's burden to produce evidence that the cumulative impacts exception barred application of the exemption.

The Court of Appeal, thus, affirmed the trial court's judgment.

Conclusion and Implications

The case is significant because it contains substantive discussion of CEQA's exhaustion of administrative remedies requirement in the context of generalized statements to an agency's categorical exemption determination. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B320586.PDF

(Eric Cohn, Edward Schloss)

FOURTH DISTRICT COURT REVERSES DISMISSAL RULING AS TO ACTION BROUGHT UNDER VEHICLE AND MUNICIPAL CODES, AND CEQA CHALLENGING CITY'S DISPLAY OF 26-FOOT STATUE OF MARILYN MONROE

Committee to Relocate Marilyn v. City of Palm Springs, 88 Cal.App.5th 607 (4th Dist. 2023).

A citizens group called Committee to Relocate Marilyn (Committee) filed a petition for writ of administrative mandate (Petition) challenging the City of Palm Springs' (City) closure of a street for three years to allow the installation and display of a statue of Marilyn Monroe. The Committee claimed that neither the Vehicle Code nor the City's Municipal Code authorized the City to close the street for three years and that the City erroneously declared the street closure as categorically exempt from the California Environmental Quality Act (CEQA). The trial court sustained the City's demurrer to the Petition without leave to amend and entered a judgment of dismissal in favor of the City. On appeal, the Fourth District Court of Appeal reversed the judgment of dismissal and instructed the trial court to enter a new order overruling the demurrer.

Factual and Procedural Background

Forever Marilyn is a 26-foot-tall statue portraying Marilyn Monroe in an iconic scene from the 1955 film *The Seven Year Itch* where Monroe is standing on a subway grate as her white dress is blown upwards by a gust of wind from an underground subway train.

In October 2020, PS Resorts, a nonprofit organization that promotes tourism in the City, requested the City Council to permit it to place *Forever Marilyn* on Museum Way, a public street located immediately west of the Palm Springs Art Museum. The proposal would thus render that portion of Museum Way accessible only to pedestrians and inaccessible to automobiles.

On November 12, 2020, the City Council voted in favor of supporting the proposal of PS Resorts. In furtherance of the proposal, the City Council took action to authorize the City Engineer to proceed with the process of vacating the public's vehicular access rights on Museum Way within the vicinity of the statue. The City further executed a license agreement with PS Resorts allowing the installation of the statue at the proposed location for a period of three years.

On December 29, 2020, the City filed a Notice of Exemption indicating the project was categorically exempt from CEQA under the Class 1 (Existing Facilities) exemption. The Notice of Exemption further identified that the City would act to "vacate the public's vehicular access rights on a portion of Museum Way." Thereafter, on February 24, 2021, and in response to questions raised by the Committee, the City Attorney clarified that the City would not vacate the portion of Museum Way, and would instead only temporarily restrict vehicular access to the street.

On March 19, 2021, the Committee filed its request for a petition for writ of mandate requiring the City to void its approval of the project and an injunction prohibiting the City from taking any further action to install the statue.

Three days later, on March 22, 2021, the City's Development Services Director issued a determination authorizing the temporary closure of Museum Way pursuant to the City's authority under Vehicle Code § 21101(e) and the corresponding provisions of the City's Municipal Code in § 12.18.010.

In April 2021, the Committee filed the operative first amended petition for writ of mandate alleging the three-year closure of Museum Way violated the City's authority under Vehicle Code § 21101(e); the three-year closure similarly violated the City's Municipal Code at § 12.80.010; and the City violated CEQA because the City failed to conduct adequate environmental review of the project. The City demurred, claiming that the Committee's Vehicle Code and Municipal Code causes of action failed to state a claim and that the CEQA cause of action was untimely since the Committee failed to assert it within the 35-day statute of limitation triggered by the City's filing of the Notice of Exemption on December 29, 2020.

The trial court sustained City's demurrer without leave to amend and entered judgement of dismissal in favor of the City. The Committee appealed.

The Court of Appeal's Decision

On appeal, the Committee again argued that the trial court erred in sustaining the demurrer without leave to amend because the City acted in excess of its authority under the Vehicle Code and the City's Municipal Code. The Committee also argued that the trial court erred in finding Committee's CEQA claims time-barred because the project was subject to CEQA's 180-day statute of limitations, rather than the 35-day statute of limitations triggered by the filing of a valid Notice of Exemption.

Trial Court Erred in Sustaining the Demurrer to the Vehicle Code and Municipal Code Causes of Action

The critical question before the court was whether the City had the authority to close Museum Way for a period of three years.

The court began its analysis by describing the statutory framework of the Vehicle Code, which establishes that the state has preempted the field of traffic control such that a city has no authority over traffic control unless expressly provided by the state legislature. The court then analyzed the scope of the City's per Vehicle Code § 21101(e), pursuant to which the City claimed it was authorized to close Museum Way for a period of three years. Vehicle Code § 21101(e) provides that local authorities may adopt rules and regulations regarding highways under their jurisdiction on various matters including:

> (e) Temporarily closing a portion of any street for celbrations, parades, local special events, and other purposes when, in the opinion of local authorities having jurisdiction or a public officer or employee that the local authority designates by resolution, the closing is necessary for the safety and protection of persons who are to use that portion of the street during the temporary closing.

The City argued that its closure of Museum Way, for a period of three years, qualified as a "temporary" street closure permitted under Vehicle Code § 21101(e) and the City's corresponding and mirroring Municipal Code provision in § 12.18.010.

Engaging in a statutory interpretation analysis, the court found that the term "temporarily," as used in Vehicle Code § 21101(e), refers to street closures that are "brief in duration." The court found that such interpretation would be consistent with the other proceedings ("…celebrations, parades, local special events, and other purposes…") referenced in the statute, which the court noted would "take place over the course of a few hours, days, or perhaps weeks." The court further disregarded the City's claim that the legislature could have specifically delineated the amount of time that would qualify as a temporary closure had it intended to impose a limitation as such. The court instead found that the legislature's failure to impose a definite time limit simply evinced the legislature's desire to not impose a rigid time limitation on temporary closures.

While the court did not clearly establish the amount of time that would qualify as a "temporary" closure, the court held that the three-year closure of Museum Way would not qualify as such a temporary closure. Accordingly, the court found that the City's proposed three-year closure of Museum Way was neither authorized under the Vehicle Code nor the corresponding provisions in the City's Municipal Code.

Trial Court Erred in Sustaining the Demurrer to the CEQA Cause of Action

The critical question before the Court of Appeal on the CEQA claims was whether the Committee's claims were time-barred by the Committee's failure to bring a cause of action within 35-days of the City's filing of the Notice of Exemption on December 29, 2020. The City claimed that its filing of the Notice of Exemption applied to the Committee's action challenging the City's CEQA review, while the Committee argued that the Notice of Exemption was inapplicable because "the project materially changed *after* the City filed [the Notice of Exemption]."

The Court of Appeal again agreed with the Committee, finding that the City's premature filing of the Notice of Exemption (*i.e.*, prior to the approval of the City's action approving the three-year closure of Museum Way) rendered CEQA's 35-day statute of limitations for the filing of valid Notices of Exemption inapplicable to the City's actions.

The court's analysis specifically turned on the action contemplated in the filed Notice of Exemption and the City's subsequent action. The City's Notice of Exemption filed on December 29, 2020 pertained to the City's approval to "proceed with the process of

vacating the public's vehicular access rights…" Subsequently, on March 22, 2021, the City's Development Services Director, finding that the City would not vacate Museum Way, instead authorized the temporary closure of Museum Way to vehicular traffic. In effect, the City ultimately approved a different project than that previously described in the filed Notice of Exemption. Since the project had materially changed after the filing of the Notice of Exemption, the court found that the Committee's action was not subject to CEQA's 35-day statute of limitations, and was instead subject to CEQA's 180-day statute of limitations, which applies where a public agency does not file a Notice of Exemption; files an invalid or premature Notice of Exemption; or where there is no formal project approval.

Finding that the City's current action was timely filed within such 180-day statute of limitations, the Court of Appeal found that the Committee's CEQA cause of action filed April 22, 2021 was not time-barred.

Conclusion and Implications

This case is significant because it contains substantive discussion regarding the limits of the Vehicle Code's authorization to permit temporary closures of streets. Further, the case also provides additional clarity regarding the applicable statute of limitations where a project changes subsequent to the filing of a Notice of Exemption. The published decision is available online at https://www.courts.ca.gov/opinions/documents/D080907M.PDF
(Edward Schloss, Eric Cohn)

FOURTH DISTRICT COURT AFFIRMS TRIAL COURT RULING SETTING ASIDE ADDENDUM TO PROGRAM EIR AND RELATED APPROVALS FOR OFFICE COMPLEX

IBC Business Owners for Sensible Development v. City of Irvine, 88 Cal.App.5th 1000 (4th Dist. 2023).

In a decision filed on February 5, 2023, the Fourth District Court of Appeal affirmed a trial court judgment setting aside an addendum to a 2010 program Environmental Impact Report (PEIR) and related approvals for a 275,000 square foot office complex on a 4.95-acre parcel within the Irvine Business Complex (IBC), a 2,800-acre development originally constructed in the 1970s. The court also concluded that given the unusual size and density of the project, the unusual circumstances exception applied, meaning that a Class 32 urban infill exemption was not available.

Factual and Procedural Background

The Irvine Business Complex is roughly 2,800 acres in size and was originally developed in the 1970s as a regional economic and employment based. Most of the land in the IBC is currently developed with office uses, with substantial amounts of industrial and warehouse uses, as well as scattered residential uses in mid-to high-rise condominiums.

In 2010, the City of Irvine (City) adopted the IBC Vision Plan which amended the City's General plan to establish a development guide to create a mixed-use community in the IBC and adopted a Program Environmental Impact Report (2010 PEIR) to analyze the environmental effects of the vision plan. The 2010 PEIR studied the environmental effects from a buildout of the entire vision plan and was designed to "provide environmental clearance for future site-specific development projects within the IBC." Any future projects not consistent with the assumptions in the PEIR may require additional environmental review.

The Vision Plan capped buildout of the IBC at 17,038 residential units and 48,787square feet of non-residential development, with full buildout to occur after 2030. To stay within this cap, each parcel in the IBC was assigned a development budget or "development intensity value" (DIV). DIV allocations for each parcel were tracked in a database and within the IBC a parcel could transfer a portion of its DIV budget to another parcel using transfers of development rights (TDRs) subject to City approval.

The 2010 PEIR included several assumptions about existing conditions, conditions for 2015, and conditions for post-2030. The PEIR only assumed TDRs for projects that had applications pending when it was

prepared. Therefore, the PEIR assumed that additional TDRs were possible, but noted that additional traffic analysis and California Environmental Quality Act (CEQA) review would be necessary if such additional TDRs were proposed.

In 2019, real party in interest and developer Gemdale filed an application to develop a 4.95-acre parcel in the IBC in a manner that would convert an existing two story, 69,780 square foot office building into a 275,000 square foot office complex with a five-story office building, a 6-story office building, and a seven-story parking structure. To do this, the project required TDRs from a site on the other side of the IBC equivalent 221,014 square feet of office space and nearly double the largest approved TDR in IBC's history.

Staff initially believed that the project could be CEQA exempt, but then prepared an addendum concluding its impacts were adequately analyzed and mitigated in the 2010 PEIR, meaning that no further environmental review was required. The City Council found the addendum adequate and approved the project.

Petitioner filed a petition for writ of mandate, which the trial court granted, ordering the City to set aside the project approvals, the TDR, the addendum, and any CEQA exemption finding.

The Court of Appeal's Decision

The Court of Appeal agreed with the trial court, finding that the project was not adequately analyzed and mitigated in the 2010 PEIR and that a CEQA exemption did not apply.

The Gemdale Project Was Not Analyzed and Mitigated in the 2010 PEIR

The court held that the City correctly determined that the project would not cause any new significant traffic impacts, but that substantial evidence did not exist in the record to support the conclusion that the project's Greenhouse Gas (GHG) would not be greater than assumed in 2010 PEIR.

With regard to traffic impacts, the addendum found that the project would not cause new traffic impacts because the project would not result in significant vehicle delays at any of the intersections or roadway segments analyzed in the addendum traffic study. This was the same methodology for analyzing traffic impacts as employed by the 2010 PEIR. A VMT analysis was not conducted and petitioner argued that a VMT analysis was required.

The court concluded that § 15064.3 of the CEQA guidelines, added in 2018 and giving rise to the requirement for a VMT analysis, did not apply to the addendum. The Guidelines state that agencies do not need to comply with Guideline 15064.3 until July 1, 2020. Here, although the addendum was not adopted until July 14, 2020, the City began preparing the addendum in 2019, which was well before the effective date of Guideline 15064.3.

With regard to GHG impacts, the addendum noted that the project would incorporate all climate change mitigation measures included in the 2010 PEIR and would therefore achieve the 2010 PEIR's "net zero" emissions vision plan. Moreover, the addendum concluded that the project would not change the overall development intensity for the IBC and would not increase GHG emissions beyond those assumed in the 2010 PEIR. The project was able to reach its development intensity through TDRs from other parcels. A shift in development intensity from one site to another would not result in a substantial increase in GHG impacts.

The court disagreed, finding that the addendum concluded, without substantial evidence, that transferring development intensity from one site to another would only change the source of GHG emissions without changing the total amount of emissions. As the court noted:

> . . .[i]t is unclear from the record whether TDRs simply shift the source of [GHG] emissions or may impact total emissions…. [w]e have not been cited anything in the record to support this assertion…. Which is beyond common knowledge.

The court also noted that there was contrary evidence in the record indicating that the project might have significant emissions that could not be mitigated to a less-than-significant level. Although this specific analysis was not included in the addendum, the court found that the addendum had failed to show that the IBC would remain on track to achieve its "net zero" emissions goal.

The Project Was Not Categorically Exempt under The Class 32 Urban Infill Exemption

The court also rejected the City's argument that the project was exempt from CEQA under a Class 32 urban infill exemption. Specifically, the court held that the project did not qualify for the urban infill exemption because "unusual circumstances" existed, which is an exception to the application of any categorical exemption. The city did not make any express findings that the unusual circumstances exception did not apply, so the court had to assume that the city found the project involved unusual circumstances and then conclude that the record contains no substantial evidence supporting: (1) a finding that any unusual circumstances exist, or (2) that a fair argument giving rise to a reasonable possibility that an unusual circumstance identified by the petitioner will have a significant effect on the environment. Here neither of these findings could be made.

Substantial evidence indicated that unusual circumstances existed. The project was two times larger than the largest TDR approved in the IBC's history and was disproportionately large compared to neighboring buildings. This required a significant increase in development intensity budget, equating to more than twice the amount of office space originally allocated to the parcel, even though it would occupy a much smaller space than existing buildings.

The court also concluded that a fair argument gave rise to a reasonable possibility that the project would have significant environmental impacts. Here, there was evidence in the record that the project could have significant GHG impacts that could not be mitigated to a level of insignificance. This was a result of the unusual size and intensity of the project.

Conclusion and Implications

The *IBC* decision provides an illustrative analysis of the appropriateness of preparing and relying on a project-specific addendum to a program level EIR. Where evidence does not reasonably show that a project will not have new significant or substantially more severe impacts than analyzed in a program level EIR, an addendum is not likely appropriate. Where a project is unique in its intensity and/or scope within the context of a program EIR, the unusual circumstances exception may preclude application of a CEQA exemption. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/G060850.PDF
(Travis Brooks)

FIFTH DISTRICT COURT VACATES TRIAL COURT ORDER GRANTING SCE'S MOTION FOR PRE-JUDGMENT POSSESSION TO MAINTAIN ELECTRONIC TRANSMISSION LINES

Robinson v. Superior Court of Kern County, 88 Cal.App.5th 1144 (5th Dist. 2023).

In a decision filed on March 2, 2023, the Fifth District Court of Appeal overturned a trial court's order granting Southern California Edison's pre-judgment motion for possession under the Eminent Domain Law, which it argued was necessary to access and maintain power transmission lines. The Court of Appeal found that the trial court erred by not making the explicit findings in writing required to justify such pre-judgment possession under state law and that substantial evidence had not been established in the record to support such findings.

Factual and Procedural Background

Robinson owns a five-acre parcel in Kern County within Kawaiisu Tribal treaty territory that contains environmentally sensitive plans and animals and a wildlife research center. Southern California Edison (Edison) owns and operates aerial transmission lines that pass over the property.

Edison claimed that it had a prescriptive aerial-transmission-line easement allowing it access to the property, and on June 21, 2022, filed a complaint in eminent domain to obtain a formal, recorded easement. Edison claimed that eminent domain was required because, despite its easement, Robinson would not allow Edison access to the property to maintain and repair the lines.

The easements requested consisted of a 50 foot wide transmission line easement 115 yards long and an access road easement 16 feet wide that loops across the property.

Edison served Robinson with a motion for prejudgment possession pursuant to Code of Civil Procedure § 1255.410, which included notice that any opposition to the motion must be served and filed within 30 days of service. The 30-day period for filing an opposition expired without Robinson filing an opposition to the motion for prejudgment possession.

On August 23, Robinson filed an opposition to Edison's motion for prejudgment possession and supporting declaration. The opposition argued that the motion for prejudgment possession was unlawful because: (1) Edison had not adopted a resolution of necessity; (2) it had not complied with CEQA, and (3) Edison had not satisfied the requirements for exercising the power of eminent domain in § 1240.30 subdivisions (a) through (c). Robinson specifically argued that Edison had "not even alleged—let alone demonstrated—that the easement will cause the least private injury possible as required by section 1240.30." Robinson also alleged that prejudgment possession of the easement was not necessary because Edison had accessed and maintained all but one transmission line using a bucket truck without entering the property, and could reach the remaining line using a larger bucket truck.

After a hearing on October 19, the trial court granted Edison's motion for an order of prejudgment possession. Importantly, the trial court did not make any explicit oral findings on the record, only stating that "all of the criteria seems to be satisfied" when announcing the tentative ruling to grant the motion. The trial court then signed an order of prejudgment possession signed by Edison's counsel.

On November 4, Edison filed a petition for writ of mandate challenging the order of prejudgment possession and on November 17 the Fifth District Court of Appeal issued a stay of the order of prejudgment possession.

The Court of Appeal's Decision

The Court of Appeal ultimately vacated the order of prejudgment possession and directed the trial court to conduct further proceedings consistent with its decision.

Public Entities and Eminent Domain

The first question was whether Edison was a public entity as necessary to have the power of eminent domain. Specific provisions of the Public Utilities Code provide that power generating and transmitting companies are public utilities authorized to exercise eminent domain power.

The court then addressed provisions of the Eminent Domain Law providing that a "public entity" may only exercise the power of eminent domain if has first adopted a resolution of necessity. Within the relevant sections of the Eminent Domain Law a "public entity" is defined as including "the state, a county, city, district, public authority, public agency, and any other political subdivision of the state." According to this definition, the court concluded that Edison was not a public entity and therefore was not required to adopt a resolution of necessity.

The court proceeded with a detailed discussion of the procedural requirements by which a public agency may obtain prejudgment possession of property. In situations like the instant one where a motion for prejudgment possession does not receive a timely opposition, the court *shall* make an order for possession of the property if the court finds that: (1) the plaintiff is entitled to take the property by eminent domain, and (2) The plaintiff deposited an amount that satisfies the requirements of the Eminent Domain Law.

The court then analyzed the requirements that a condemning public utility must meet to take property by eminent domain. These requirements are set out in Code of Civil Procedure § 1240.030 which states that:

> The power of eminent domain may be exercised to acquire property for a proposed project only if all the following are established:
> (a) the public interest and necessity require the project.
> (b) The project is planned or located in a manner that will be the most compatible with the greatest public good and least private injury.
> (c) The property sought to be acquired is necessary for the project.

Explicit Findings

The Court of Appeal analyzed whether the trial court was required to make explicit findings that each of the above requirements have been met. The general rule is that a statement of decision is not required when a trial court rules on a motion did not apply. Exceptions to this rule can apply upon balancing: (1)

the importance of the issues at stake in the proceeding, including the significance of the rights affected and the magnitude of the potential adverse impact to those rights; and (2) whether appellate review can be effectively accomplished even in the absence of express findings.

In the context of the instant case, the court concluded that the property rights that could be taken away from Robinson were significant, and the adverse effects on those rights, which include the widening of an existing roadway and clearing of a 50-foot easement were potentially significant. Here, the trial court's conclusion that all the necessary criteria "seems to be satisfied" did not resolve uncertainty regarding the trial court's findings to facilitate appellate court review. As a result, the trial court was required to make explicit findings as to each of the three requirements above, and it had not done so.

A Lack of Substantial Evidence to Support Implied Findings

In the alternative, the court held that even if explicit findings were not required and the doctrine of implicit findings applied, substantial evidence did not exist to support such implied findings. Here, substantial evidence did not establish that it was necessary that (1) the roadway easement be 16 feet wide, (2) that it was necessary to clear a 50-foot wide easement, or (2) giving Edison the right to move or relocate guy wires, anchors, crossarms, and other physical fixtures onto the property.

The absence of substantial evidence on these aspects of establishing the easement were sufficient to the court to carry Robinson's burden of showing prejudicial error.

Leave to File Amended Motion Regarding the Scope of the Requested Easement

The court ordered further proceedings be held by the trial court allowing Edison to file an amended motion with additional evidence supporting the scope of easement requested or alternatively narrowing its scope. The court then issued a peremptory writ directing the Kern County Superior Court to vacate its order of post judgment possession and conduct further proceedings involving an amended motion for order of prejudgment possession that are not inconstant with the court's decision.

Conclusion and Implications

The *Robinson* decision provides a helpful discussion of the procedural requirements involved with "quick take" motions for pre-judgment possession under the Eminent Domain Law. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/F085211.PDF
(Travis Brooks)

SECOND DISTRICT COURT REVERSES JUDGMENT ON THE PLEADINGS, FINDING ALLEGATIONS SUFFICIENT UNDER COASTAL ACT

Spencer v. City of Palos Verdes Estates, ___Cal.App.5th___, Case No. B309225 (2nd Dist. February 27, 2023).

The Second District Court of Appeal in *Spencer v. City of Palos Verdes Estates* reversed the trial court's decision granting a motion for judgment on the pleadings, holding that plaintiffs' allegations that the City of Palos Verdes Estates (City) allowed local residents to build a structure on City property at the beach and to harass non-locals were sufficient allegations of violation of the California Coastal Act (Coastal Act).

Factual and Procedural Background

Lunada Bay is a premier surf spot owned by the City. Plaintiffs are two non-locals and a non-profit seeking to preserve coastal access. Plaintiffs allege that City residents and officials are not welcoming to outsiders and are sometimes openly hostile towards them.

The Lunada Bay Boys (Bay Boys) are an alleged group of young and middle-aged men, local to the

City, who consider themselves to be the self-appointed guardians of Lunada Bay. One of their tenets is to keep outsiders away from the surf location. They accomplish this through threats and violence. Plaintiffs brought suit against the Bay Boys, some of its individual members, and the City itself, for conspiracy to deny access under the California Coastal Act.

Plaintiffs allege that the City conspired with the Bay Boys essentially to privatize Lunada Bay, depriving nonlocals of access, in at least two ways: (1) by allowing the Bay Boys to build on City property a masonry and wood structure, known as the Rock Fort, which the Bay Boys used as their hangout; and (2) with knowledge of the Bay Boys' conduct, being complicit in the Bay Boys' harassing activities and tacitly approving them.

According to the complaint, those two activities involved "development" under the Coastal Act, requiring a permit. The Coastal Act defines "development" broadly, and includes, a:

> . . .change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure . . . . (Public Resources Code, § 30106)

The construction of the Rock Fort is alleged to be construction of a structure and the harassment conducted by the Bay Boys is alleged to be an activity resulting in change in the use of water or of access thereto.

Plaintiffs allege the City violated the Coastal Act by not obtaining a Coastal Development Permit for these two "development activities" occurring on its property at Lunada Bay. Plaintiffs allege these Coastal Act violations entitle plaintiffs to declaratory and injunctive relief, and render the City liable for civil and daily fines payable to the State.

As to the Rock Fort, plaintiffs allege the Bay Boys built and maintained the illegal Rock Fort. The City was long aware of it and only removed the structure in late 2016, after Plaintiffs brought attention in their federal lawsuit. With City knowledge, the Bay Boys have since undertaken efforts to rebuild a structure in its place on City property. Plaintiffs allege that the Rock Fort serves as the headquarters for the Bay Boys to harass visitors.

As to the harassment, plaintiffs allege the Bay Boys have intentionally and maliciously blocked public access to the beach at Lunada Bay for over 40 years. In what is a multi-generational practice of extreme 'localism,' the Bay Boys use physical violence, threats of bodily harm, vandalism to vehicles, verbal harassment and intimidation to prevent access to the public beach. The City has long been aware of the unlawful exclusion of outsiders and has conspired with the Bay Boys to 'protect' Lunada Bay.

Specifically, plaintiffs allege that, with City knowledge and complicity, the individual defendant members of the Bay Boys conspire to keep the public away by: (1) physically obstructing outsiders' access to the beach trails; (2) throwing rocks; (3) running people over with surfboards in the water; (4) punching outsiders; (5) stealing outsiders' wallets, wetsuits, and surfboards; (6) vandalizing vehicles, slashing tires, and waxing pejorative slurs onto vehicle windows; (7) levying threats; and (8) intimidating outsiders with pejorative and other verbal insults, gestures, and threats of serious injury.

Plaintiffs allege that in response to the Bay Boys' acts of exclusion, the City hired Jeff Kepley as its new chief of police. Kepley was quoted in the *Los Angeles Times* as saying he was going to mix up the status quo and make an example of anyone who behaves criminally at Lunada Bay. City residents, including members of the Bay Boys, criticized this plan and Chief Kepley "backtracked." In response, rather than hold the Bay Boys accountable, the City opted for a 'community policing' approach to develop an even cozier relationship with the Bay Boys.

The operative complaint alleged that the City was liable for Coastal Act violations, in that both the Rock Fort and the harassing conduct constituted "development activity" for which a Coastal Development Permit was required. On February 14, 2020, the City moved for judgment on the pleadings on the basis that neither the Rock Fort nor the harassment constituted "development" within the meaning of the Coastal Act

At the Trial Court

The trial court granted the motion for judgment on the pleadings. The court stated that the Coastal Act creates liability only against a developer who fails to comply with the permitting process, not a city on whose land the development sits. As to the Rock Fort, the court held that there were no allegations that the City built or agreed to build it. As to

harassment, the court concluded that development under the Coastal Act related to the use of buildings, structures and land as between competing uses, and not interpersonal conduct.

The Court of Appeal's Decision

The Court of Appeal reversed the trial court's judgment on the pleadings, holding that the complaint sufficiently alleged violations of the Coastal Act both as to allowing the Rock Fort on City property and as to aiding and abetting harassment.

Coastal Act Principles

The Coastal Act has six purposes, which are the basic goals of the state for the coastal zone. These include:

> Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resource conservation principles and constitutionally protected rights of private property owners. (Public Resources Code, § 30001.5, subd. (c).)

The Coastal Act purposes are implemented pursuant to local government agency local coastal programs and coastal development permits under those programs. Coastal development permits must insure that:

> Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation. (Public Resources Code, § 30211.)

Case authority confirms the importance of preserving public access to the coast:

> [T]he concerns placed before the Legislature in 1976 were more broad-based than direct physical impedance of access. For this reason, we conclude the public access and recreational policies of the Coastal Act should be broadly construed to encompass all impediments to access, whether direct or indirect, physical or nonphysical. (*Surfrider Foundation v. California Coastal Com.*, 26 Cal.App.4th 151, 158 (1994).)

"Development" for which a coastal development permit is required is thus broadly defined to include "change in the intensity of use of water, or of access thereto" and is not restricted to activities that physically alter the land or water. (Public Resources Code, § 30106)

The Rock Fort

As an undisputed structure, the Rock Fort was a development requiring a permit under the Coastal Act. But the Act requires a permit be obtained only by the person wishing to perform or undertake that development. (Public Resources Code, § 30600, subd. (a).)

The trial court concluded that, since it was not alleged that the City undertook the construction of the Rock Fort, the City was not required to obtain a permit. However, a recent Court of Appeal decision applying common law nuisance principles holds that an owner who maintains a development on his or property 'undertakes activity' that requires a permit, regardless of whether he or she constructed the development (*Lent v. California Coastal Com.* (2021) 62 Cal.App.5th 812, 832 (*Lent*).)

Bad Boys Harassment

The Court of Appeal also concluded that a change in the access to water brought about by an organized scheme of harassment of, or similar impediment imposed on, those seeking access may be just as much a change in access to water as one brought about by a physical impediment. The harassment and other conduct alleged directly interferes with, and sometimes precludes, access to the Pacific Ocean.

Given that plaintiffs sufficiently alleged an unpermitted "development" in the Bay Boys' denial of access to the beach, the Court of Appeal examined whether plaintiffs sufficiently alleged City liability for this conduct. Plaintiffs alleged the City was liable because it conspired with the Bay Boys.

Conspiracy liability may occur if defendants may engage in conduct that violates a duty imposed by statute. Conspiracies are typically proved by circumstantial evidence because such participation, cooperation or unity of action is difficult to prove by

direct evidence. Conspiracy can be inferred from the nature of the act done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.

Plaintiffs alleged sufficient circumstances for a conspiracy: Bay Boys had a decades-long practice of blocking access to Lunada Bay, both by words and acts; the City was aware of this conduct and complicit in it; the former police chief agreed to look into the situation and then "backed off"; the City had a cozy relationship with the Bay Boys; the City did not enforce its laws against the Bay Boys; instead, the City itself acted to exclude outsiders from the beach by targeting them with traffic citations, parking tickets, and towing.

Conclusion and Implications

This opinion by the Second District Court of Appeal emphasizes the broad scope of "development" under the California Coastal Act to include a right of access and to prevent collusive conduct that would impede such access. Whether the conspiracy and other unpermitted actions can be proven at trial will remain to be seen. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B309225.PDF
(Boyd Hill)

THIRD DISTRICT COURT GRANTS ANTI-SLAPP MOTION TO STRIKE MALICIOUS PROSECUTION ACTION IN WATER RIGHTS QUIET TITLE CASE

Water for Citizens of Weed California v. Churchwell White LLP,

The Third District Court of Appeal in *Water for Citizens of Weed California v. Churchwell* granted defendant law firm Churchwell White's anti-SLAPP motion to strike a complaint and "SLAPPback" motion filed by Water for Citizens of Weed California in an action to quite title to water rights. The Third District Court of Appeal held that Citizens failed to show Churchwell White lacked probable cause or acted out of malice in naming the group in the quiet title action, and therefore did not establish a probability of prevailing on their claim.

Factual and Procedural Background

In 2017, law firm Churchwell White LLP represented Roseburg Forest Products Company in an action to quite title to water rights. Roseburg alleged it owned appropriative rights to 4.07 cubic feet/second (cfs) of water from the Beaughan Creek and Spring in Siskiyou County.

In 1966, Roseburg's predecessor, International Paper, entered into an agreement that guaranteed the City of Weed (City) rights to 2.0 cfs of Beaughan Springs water for 50 years at a cost of $1/year. In 2016, Roseburg and the City entered into a ten-year lease under which Roseburg would provide the City with 1.5 cfs of water for $97,500 a year, and which required the City to identify an alternative source of water within two years and to completely cease its use of the Springs water after ten years.

In their operative complaint, Water for Citizens of Weed California alleged that after the City entered into the ten-year lease, the group discovered documents which purportedly established that Roseburg had no right to appropriate the City's water source for its own private gain. The group subsequently circulated flyers disputing Roseburg's claim of exclusive rights to the City's historic allocation of 2.0 cfs and seeking citizens' attendance at a public meeting regarding the lease. In disputing the claimed right, Citizens alleged that a 1932 judicial decree indicated the water was intended for the City's various uses, whereas no court had ever ruled on Roseburg's claim of ownership. Citizens further claimed that when International Paper subdivided land and sold houses to the public those homes came with a guarantee of water. Finally, Citizens maintained that International Paper sold the City its water and sewer infrastructure in 1966, but in 1982 after closing its mill, gave the City its rights to domestic and municipal water.

In March 2017, Citizens asked the Scott Valley and Shasta Valley Watermaster District to determine that the City had a right to 2.0 cfs of Beaughan

Springs water. Citizens presented the Watermaster with a letter from 1982 that showed International Paper transferred its right to 2.0 cfs to the City, which the Department of Water Resources corroborated in writing. However, in 1996, DWR changed ownership from the City to Roseburg when the 1982 letter could not be found. Citizens therefore asked the watermaster to reconsider this decision in light of the uncovered 1982 letter, stating that the City has always been and should continue to be the rightful claimant to the 2.0 cfs of Beaughan Springs water.

In May 2017, Citizens ask the City to join their request to the watermaster at a City Council meeting, to which the City agreed. At that meeting, the City adopted a resolution requesting the State Water Resources Control Board correct its records to recognize the City's ownership of the 2.0 cfs of water.

Roseburg's Complaint and Citizens' Anti-SLAPP Motion

The day after the City Council meeting, Roseburg (represented by Churchwell White) sued Citizens and the City based on the defendants' efforts to transfer or take a portion of Roseburg's water rights. The complaint pleaded causes of action for: quite title and adverse possession of 4.07 cfs of Beaughan Springs water. The complaint also sought declaratory relief regarding the contested water rights, particularly given that the uncertainty over which party had the right to exclusively use the 4.07 cfs of water clouded Roseburg's title thereto and prevented its ability to sell or encumber its right.

Citizens filed an anti-SLAPP motion to strike Roseburg's complaint, which was accompanied by declarations stating the individual plaintiffs did not and had never claimed any right, title, estate, lien, or interest in the 2.0 cfs at issue. The trial court granted the anti-SLAPP motion, finding that Citizens were named solely because they exercised their constitutional rights to free speech and none had claimed a private interest in the water.

Roseburg appealed, which the Third District Court dismissed after the parties reached a settlement. As part of their settlement, Roseburg and the City stipulated that Roseburg owns the exclusive right to divert and use 4.07 cfs of Beaughan Springs water, that the City has no ownership interest in that water, and that the City has a leasehold interest in 1.5 cfs of those rights.

Citizens' SLAPPback Action

Citizens filed the underlying "SLAPPback" action against Churchwell White for malicious prosecution for suing them on behalf of Roseburg in the quiet title action. Citizens alleged Churchwell had no probable cause to name them in the underlying complaint, and that Churchwell named them only to silence and chill their exercise of free speech.

Churchwell filed an anti-SLAPP motion against the complaint, which the trial court granted. The trial court held that the complaint arose from Churchwell's exercise of its constitutional rights. The court found that Citizens did not demonstrate a probability of prevailing on the merits because they failed to establish a prima facie case of malicious prosecution—*i.e.*, that Churchwell lacked probable cause in naming them in the underlying action and that Churchwell acted out of malice. Citizens appealed.

The Court of Appeal's Decision

Under a *de novo* standard of review, the Third District Court of Appeal considered whether Churchwell established that Citizens' claim of malicious prosecution arose from its attorney's actions in furtherance of their constitutional right of petition or free speech. If Churchwell satisfied that burden, then Citizens bore the burden of establishing a probability of prevailing on their malicious prosecution claim. To do so, Citizens needed show that Churchwell's protected activity is legally sufficient and factually substantiated, such that it would sustain a favorable judgment. Thus, Citizens had to establish that Churchwell's quiet title action was: (1) commenced by or at the direction of Churchwell and was pursed to a legal termination favorable to Citizens; (2) initiated or maintained without probable cause; and (3) initiated and maintained with malice.

On appeal, Citizens challenged only the trial court's determination that Citizens failed to establish a probability of success as to the third and second elements of their malicious prosecution claim.

Probable Cause

As to the second element, Citizens alleged Churchwell had no probable cause to name them in the quiet title action because none of the individual plaintiffs had a claim or interest in the contested water rights. Instead, each of Churchwell's causes of

action were based on the theory that Citizen's actions had created a cloud on Roseburg's title—an untenable theory because their actions did not and could not cloud title or result in an adverse claim to the water rights.

For these reasons, Citizens maintained that the only reason Churchwell sued was to silence them, and that no reasonable attorney would believe that the group's statements constituted a cloud on title. More specifically, Citizens argued that Churchwell's theory means that any person who makes a statement regarding the disposition of property clouds that property's title, even if the person has no personal interest in said property.

The Third District disagreed with Citizens. Based on the facts and circumstances, the court could not "hold that any reasonable attorney would conclude Roseburg's quiet title action was totally and completely without merit." Rather, a reasonable attorney could conclude that Churchwell had probable cause to determine that Citizen's conduct exceeded the bounds of protected speech and created an adverse claim against Roseburg's titles because Citizens' publications did precisely that—*i.e.*, they claimed Roseburg did not own the water rights, that California owned the water as part of the public trust, and that the City owned the rights after it had long been declared a public resource. Moreover, Citizens formally asked the watermaster to determine who owned the 2.0 cfs of water, and requested that the City join that request (which it did). And if the watermaster did not determine the City owned the water, Citizens threatened legal action to protect what they claimed was the public's right to the water.

Taken together, Citizens' actions constitute more than "mere verbal assertions of ownership." This is because the purpose of a quiet title action is to establish title against any adverse claims to property or any interest therein. Therefore, a quiet title action lies to address "every description of a claim" and any adverse claim that might reduce the value of the owner's property, that inconveniences the owner, or that damages the owner's assertion of title. Accordingly, a reasonable attorney could believe that Citizens' actions, particularly in seeking relief from the watermaster, created an adverse claim to Roseburg's title by depreciating its value and reducing its marketability. A third party, for example, might think twice about acquiring the water rights from Roseburg knowing Citizens had formally requested a public agency to determine whether the rights exist.

Citizens' threat of legal action also was not without impact. Even if Citizens' members did not have an individual interest in the underlying property rights or public trust resources, they nevertheless have standing to bring an action on behalf of the public to enforce a public trust asset or defend a quiet title action on behalf of the public by asserting a public right to use private property. If the watermaster were have to found the City did not have an interest in the 2.0 cfs, Citizens' threat of subsequent legal action could also affect a third person's understanding of the value and marketability of Roseburg's water rights. Accordingly, a reasonable attorney could conclude that a claim of probable cause to bring a quiet title action against Citizens was not totally and completely without merit.

Chilling Protected Speech as to Public Resources—Water

Finally, the court disagreed with Citizens' overarching argument that Churchwell's theory of probable cause will chill protected speech. Citizens reasoned that the theory puts citizens at risk of being sued merely because they publicly expressed opinions regarding the disposition of ostensibly public resources, such as water. *Amicus curiae* agreed, noting that environmental advocates often assert that the public has an interest in water where appropriations are disputed, particularly in cases involving public trust lands and waters. But the court explained that the action would not endanger the public trust doctrine, as there is no evidence any of the water Roseburg owned was owned in trust for the public. Moreover, and as previously established, while mere verbal assertions of ownership do not create a cloud on title, Citizens' specific threats of legal action created such a cloud on the marketability of those rights. Accordingly, the court could not:

> . . .say that any reasonable attorney, understanding the actions Citizens took against Roseburg's title purportedly on behalf of the public, would conclude that a claim of probable cause to bring a quiet title action against Citizens was completely and totally without merit.

Conclusion and Implications

The Third District Court's opinion offers a straightforward anti-SLAPP analysis of an otherwise nuanced fact pattern involving tangled instances of free speech. The court's opinion illustrates the bounds to which free speech is protected against malicious prosecution. Here, while Citizens' speech against a corporation's right to water would traditionally be protected, it was the group's subsequent concerted actions—*i.e.*, seeking the watermaster's determination and threatening legal action—that transformed their speech into a class that could be regarded as "clouding" the marketability to those contested water rights. For these reasons, a reasonable attorney could find that there was probable cause to bring a quiet title action that sough to establish title against those adverse claims. In sum, the opinion highlights the nuances and bounds of free speech when measured against the requisite reasonability standard for defending against an anti-SLAPP motion. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C093421.PDF
(Bridget McDonald)

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