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CALIFORNIA LAND USE™ LAW & POLICY Reporter

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CALIFORNIA LAND USE™
LAW & POLICY Reporter

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LAND USE NEWS

BIDEN ADMINISTRATION ANNOUNCES $300 MILLION IN BIPARTISAN INFRASTRUCTURE LAW SPENDING TOWARDS CALIFORNIA WATER INFRASTRUCTURE

Early last month, the Biden administration announced that nearly $585 million from the Bipartisan Infrastructure Law—signed into law back in 2021—would be put towards infrastructure repairs on water delivery systems throughout the western United States. Specifically, the funding will be provided to 83 projects across 11 states with the stated purpose of improving water conveyance and storage, increasing safety, improving hydroelectric power generation, and providing water treatment.

The projects selected for funding are all located within major watersheds with ongoing U.S. Bureau of Reclamation (Bureau) operations, including the Colorado River Basin and the San Francisco Bay Delta watershed. Much of the funding will be provided to projects that seek to increase canal capacity, provide water treatment for tribal entities, replace equipment for hydroelectric power production, and provide maintenance to aging facilities. The list of western states benefitting from this allocation of funds includes California as well as Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota and Washington.

California's Share of the Funds

Out of all the states receiving funding for water infrastructure improvements, perhaps it comes as no surprise that California is set to receive the largest share of the funding. With over $300 million in funding provided to California projects alone, the Golden State will be getting a little over half of the $585 million announced last month.

The long list of projects set to receive funding was broken up by project area in the Bureau's description of the Fiscal Year 2023 Aging Infrastructure Projects. Among the project areas listed are the federal Central Valley Project, the Klamath Project, and the All-American Canal System, among other smaller project areas throughout the state.

The Central Valley Project

The vast majority of the funds will be dedicated to the maintenance and modernization of facilities in the Central Valley Project. Of California's 24 projects that were allocated funds in the recent announcement, 12 of them are located along the Central Valley Project and will be receiving a whopping $279 million out of the $307 million allocated for California projects in total. These funds will predominantly be used for projects in the Shasta-Trinity area, which will see roughly $133 million in total funding. On the Shasta side, the dam will receive $25 million in funding for the refurbishment of tube valves and replacement of parts for the Shasta Dam Temperature Control Device.

The Trinity River

Along the Trinity River, two major projects will be funded by the recent allocation: the Trinity River Fish Hatchery and the Spring Creek Power Facility. The Trinity River Fish Hatchery will be getting a massive overhaul thanks to its $65.9 million allocation. As part of this overhaul, the project will utilize the funds to install a Supervisory Control and Data Acquisition (SCADA) system, replace corroded and leaking pipes, install new filtration systems and incubation jars, implement sound dampening measures to reduce hazardous noise from hatchery operations, and replace deteriorated iron supports for 150 shallow troughs and 26 deep tanks. The Spring Creek Power Facility will likewise see a substantial injection of funds, totaling $42.25 million, earmarked for the replacement of the transformers that provide power to pumps at the Spring Creek, J.F. Carr and Trinity pump generation units, all of which are used to move water from the Trinity River into the Sacramento River for using the Central Valley Project.

Folsom and Nimbus Reservoirs

Further south, the Folsom and Nimbus reservoirs will be receiving $31 million in combined funding for refurbishment and upgrades to facilities as well as modernization of the Nimbus Fish Hatchery. The Jones Pumping Plant, which moves water from the Delta into the Delta-Mendota Canal, will be getting $25 million worth of refurbishments while the Delta-Mendota and Friant-Kern canals will be getting nearly $50 million to combat the impacts of land subsidence in the Central Valley. Lastly for the Central Valley Project, the Gianelli Power Plant at the San Luis Reservoir is set to receive $43 million in funds for the refurbishment of the San Luis Unit 8 motor generator, turbine, and butterfly valve.

All-American Canal and Other Colorado River Project

Although the funding for the Central Valley Project overshadows the remaining project funds by a wide margin, the All-American Canal and other Colorado River facilities was allocated a healthy $10 million in funding for the five projects named in that region. Among these projects, the announcement including funding for maintenance work along the Colorado River and its levee system in addition to allocations of $5.67 million towards the replacement of the All-American Canal's Desilting Basin's Clarifier Arms and another $2.57 million for necessary repairs at the Imperial Dam.

Klamath and Truckee River Areas

Other recipients of funding under the recent announcement included projects along the Klamath and Truckee rivers as well as projects located within the Bureau of Reclamation's Yuma Project area. For the Klamath Project, $8.75 million was dedicated to implementing upgrades on canal systems. Along the Truckee River, roughly $3 million each was dedicated to maintenance at the Stampede Dam and for studying the benefits of replacing the Lake Tahoe Dam which helps regulate the flow of water from Lake Tahoe into the Truckee. As for the Yuma Project, a modest $4.1 million will be provided for the refurbishment of the Laguna Dam gate, installation of governor controls at the Siphon Drop Power Plant, and to assist in the replacement of some 220 power pole structures for the Yuma County Water Users' Association.

Conclusion and Implications

The Bipartisan Infrastructure Law included $8.3 billion for water infrastructure projects in fiscal years 2022-2026 to improve drought resilience and expand access to clean water. The Inflation Reduction Act brought another $4.6 billion in funding to further address these issues. Together, the two initiatives represent the largest investment in climate resilience in the history of the United States. Building on the $240 million allocated through the Bipartisan Infrastructure Law in fiscal year 2022, the $585 million represents a significant ramp up in funding for much needed infrastructure repairs and improvements. The next application period for funds is expected to take place in October 2023, and given the significant jump from 2022 to 2023 and the pool of funds remaining it is not unlikely the total funding provided increases even more in 2024. For more information on the Bipartisan Infrastructure Law, *see:* https://www.congress.gov/bill/117th-congress/house-bill/3684/text
(Wesley A. Miliband, Kristopher T. Strouse)

ARGENT COMMUNICATIONS GROUP HOSTS JUNE CALIFORNIA WATER LAW & POLICY MCLE CONFERENCE—IN PERSON

If your practice overlaps with water law and regluatin issues, join us for the California Water Law & Policy Conference—in-person this year at the Hilton Santa Barbara Beachfront Resort, June 8-9, 2023. This year's theme is "California Water Law, Policy, and Management in This Time of Extremes." Our Conference Co-Chairs, Steven Anderson, Esq. of Best, Best & Krieger and Sam Bivins, Esq. of Downey Brand have assembled for you a comprehensive and practical 1.5-day Conference focusing on developments in water supply, rights, management, and regulation.

Conference Highlights

This year's conference is designed to hone in on the issues that will most impact your water-related practice and the governance of water in the state. As an attendee, you will gain practical knowledge on the legal, policy, and regulatory sides of the issues, including:

- Water Supply in the Era of Climate Change
- Water Management Planning for Extremes
- The Colorado River Runs (Nearly) Dry—What's the Next Step?
- Desalination to the Rescue?
- Tribal Water Rights at the U.S. Supreme Court
- The Clean Water Act—Scope of §404 and the U.S. Supreme Court
- Water/Land Use Connection Updates
- Pending Major Water Rights Proceedings—How Is the AHO Working Out?
- Changes to the Authority of the SWRCB?
- Pending Water Rights Legislation to Implement Changes from the PCL Report
- The Delta—Update on the Various Litigation Matters

… And a full half-day on Sustainable Groundwater Management Act (SGMA) Updates.

Our expert faculty of over 20 speakers consists of representatives of federal and state regulatory agencies, local agencies, consultants, the academic community, and top water attorneys from throughout the state—and includes a Keynote Presentation from Ernest Conant, Regional Director of the Mid-Pacific Region of the U.S. Bureau of Reclamation, "Doing Multipurpose Water Project Management in This Time of Extremes."

You'll also have plenty of invaluable networking opportunities with the faculty and your colleagues, including a conference reception following the presentations on Day 1.

Conference Registration

Conference tuition of $995 includes participation in all sessions, continental breakfasts, refreshment breaks, hosted conference networking reception, as well as all program materials prepared by the Faculty. Discounts apply for individuals from government agencies, public interest groups, or academia, or when you register two or more attendees from the same firm or organization.

Hotel Registration

Book your room at the Hilton Santa Barbara Beachfront Resort early to take advantage of our special negotiated rate of $319 per night (single or double occupancy). To reserve your room and get the discounted room rate, simply go to the hotel booking available on the Conference Webpage, below. Or call 805-564-4333 and ask for the "California Water Law Conference" discount. The number of rooms at this rate is limited, so make your reservations early.

For full program and registration details, visit the Conference Website at: https://argentco.com/2023cwlconference

We look forward to seeing you in-person in Santa Barbara, June 8-9!

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION RELEASES SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON COLORADO RIVER OPERATIONS AT LAKE MEAD AND LAKE POWELL

On April 14, the United States Bureau of Reclamation (Bureau) released for comment a draft Supplemental Environmental Impact Statement (SEIS) for proposed modifications to interim guidelines pertaining to the management of the Colorado River. The SEIS focuses on modifications to operational guidelines for Lake Powell and Lake Mead, and specifically on those guidelines governing shortage conditions, elevation and release tiers for the reservoirs, and mid-year reviews of reservoir operating conditions. The Bureau expects to release a final SEIS by late summer 2023.

Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the United States Bureau of Reclamation. The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States.

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states (lower Basin states) are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. Lake Powell, which is formed by the Glen Canyon Dam upstream of Lake Mead where the upper and lower Colorado River basin meet, is operated to affect Lake Mead lake levels and to meet electricity and water supply demands in the region. In response, the Bureau, with the support and agreement of the seven basin states, developed and implemented the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007 Interim Guidelines) to, among other things, provide incentives and tools to store water in Lake Mead and to delineate annual allocation reductions to Arizona and Nevada for elevation-dependent shortages in Lake Mead beginning at 1075 feet. The 2007 Interim Guidelines are currently set to expire by January 1, 2027.

The 2007 Interim Guidelines have four operational elements: shortage guidelines, coordinated reservoir operations, storage and delivery of conserved water, and surplus guidelines. Relevant here, the shortage guidelines determine conditions under which the Bureau will reduce the annual amount of water available for consumptive use from Lake Mead. Cutbacks under the 2007 Interim Guidelines only affect Arizona and Nevada. When Lake Mead is projected to be at or below 1,075 feet but at or above 1,050 feet, the Bureau will apportion the lower basin 7.167 maf, rather than 7.5 maf. To meet this amount, reductions will be made to Arizona and Nevada's allocations, but not California's allocation. Additional shortages will further reduce Arizona and Nevada's allocations.

Also, in 2019, the lower Basin states entered into a Lower Basin Drought Contingency Plan Agreement

(DCP) to promote conservation and storage in Lake Mead. Importantly, the DCP established elevation dependent contributions and required contributions by each lower basin state. This includes implementation of a Lower Basin Drought Contingency Operations rule set (LBOps). The LBOps provides that the lower basin states and the Bureau must consult and determine what additional measures will be taken by the Bureau and the lower basin states if Lake Mead levels are forecast to be at or below 1,030 feet during the succeeding two-year period, and to avoid and protect against the potential for Lake Mead to decline below 1,020 feet. The Bureau makes annual determinations regarding the availability of water from Lake Mead by considering factors including the amount of water in system storage and forecasted inflow. To assist with these determinations, the Bureau releases operational studies called "24-Month Studies" that project future reservoir contents and releases.

Analysis

The SEIS focuses on the 2024 operating year. The operating year for Glen Canyon Dam, which forms Lake Powell, begins October 1. For Hoover Dam, which forms Lake Mead, the operating year begins January 1. The modified guidelines will also take into account the August 2023 24-month study. The SEIS nonetheless will inform operating guidelines for 2025 and 2026, although guidelines for those years may be further refined based on the outcome of the 2024 operating year. The Bureau will release a new environmental impact statement for post-2026 operations in the future.

The SEIS proposes three alternatives: a No Action Alternative, Alternative Action 1, and Alternative Action 2. The No Action Alternative would continue the existing 2007 Interim Guidelines without change. Notably, under the existing guidelines, reservoir releases are assessed at a scheduled mid-year review, and any changes to projected releases must only be for increasing, not reducing, releases.

Alternative Action 1

Alternative 1 proposes reduced releases from Lake Mead based on the concept of priority, *i.e.*, the Law of the River. Reductions are limited to a total of 2.083 million acre-feet from Lake Mead because that is the maximum amount of reductions analyzed in the final EIS for the 2007 Interim Guidelines. According to the Bureau, using that previously analyzed figure will help finalize the SEIS by late summer, before the 2024 operating year begins.

Alternative Action 1 also contemplates 6-8.23 maf of releases from Lake Powell when Lake Powell is below 3,575 feet elevation. In particular, Alternative Action 1 modifies coordinated reservoir operations at Lake Powell and Lake Mead. When elevations at Lake Powell (projected as of January 1) are below 3,575 feet, an initial annual release in the amount of 6 maf would be set. Adjustments based on the April 24-Month Study would be made depending on projected end-of-year lake levels. Depending on end-of-year projections, releases could total from 6 maf to 8.23 maf. However, Alternative Action 1 preserves water levels of 3,500 feet at Lake Powell because the minimum power pool at that reservoir, *i.e.* the lowest lake level where power can still be generated from Glen Canyon Dam, is 3,490 feet. If lake levels are below 3,500 feet in any month, the Bureau would impose a 6 maf maximum release limit and such releases would be set to maintain or increase lake elevations consistent with existing operating criteria for Glen Canyon Dam. Finally, under Alternative Action 1, the mid-year review would allow for further reductions in deliveries.

Alternative Action 2

Under Alternative Action 2, the Bureau proposes to reduce releases from Lake Mead in the same amount as contemplated by Alternative Action 1, *i.e.*, to a maximum of 2.083 maf. However, reduced releases would not be based exclusively on the concept of priority. Instead, reductions are distributed in the same percentage across all lower Basin water users. Depending on levels at Lake Mead, additional percentage reductions (*i.e.* in excess of reductions already contemplated by the 2007 Interim Guidelines and DCP), range from 2.67 percent to 13.11 percent for each lower Basin state. Coordinated reservoir operations and allowances for further reductions following mid-year review are the same under Alternative Action 2 as they are for Alternative Action 1.

Conclusion and Implications

The draft SEIS is not a final document. Written comments are due May 30. At this time, the Bureau does not have a preferred alternative. It remains to

be seen which action the Bureau adopts, or whether additional changes will be made based on public responses. Nonetheless, the likelihood of further reductions in releases for water users in likely in operating year 2024. The Supplemental Environmental Impact Statement is available online at: https://www.usbr.gov/ColoradoRiverBasin/documents/NearTermColoradoRiverOperations/20230400-Near-termColoradoRiverOperations-DraftEIS-508.pdf
(Miles Krieger, Steve Anderson)

RECENT FEDERAL DECISIONS

FOURTH CIRCUIT UPHOLDS VIRGINIA'S CLEAN WATER ACT SECTION 401 PERMIT FOR NATURAL GAS PIPELINE

Sierra Club v. State Water Control Board, 64 F.4th 187 (4th Cir. Mar. 29, 2023).

The United States Court of Appeals, Fourth Circuit upheld Virginia's grant of a section 401 water quality certification for an in-stream natural gas pipeline.

Background

This appeal is the latest installment in a series of challenges to Mountain Valley Pipeline, LLC's (MVP) plans to build a natural gas pipeline (Pipeline) that will span approximately 304 miles from Wetzel County, West Virginia to Pittsylvania County, Virginia.

In February 2021, MVP submitted an application requesting both a Virginia Water Protection individual permit (VWP Permit) from Virginia's Department of Environmental Quality (DEQ) and the State Water Control Board (Board) (collectively: the Agencies) and a certification from the United States Army Corps of Engineers (Corps) pursuant to Section 404 of the federal Clean Water Act (CWA). On December 14, 2021, the Board adopted DEQ's recommendation to approve MVP's application.

The Sierra Club, Appalachian Voices and eight other conservation groups (collectively: Petitioners) sued the Agencies and several individuals associated with the Agencies (Respondents), alleging that its approval of a state water protection permit and water quality certification violated the Clean Water Act.

Petitioners asserted that the VWP Permit should be vacated because the Agencies failed to: (1) evaluate whether alternative crossing locations would be environmentally preferable and practicable; (2) independently verify whether each of MVP's proposed water crossing methods was the least environmentally damaging practicable alternative (LEDPA); and (3) determine whether the Pipeline will comply with Virginia's narrative water quality standards. In addition, Respondents contended that the court lacked jurisdiction to review the petition.

The Fourth Circuit's Decision

Petitioners argued that the Agencies' issuance of the VWP Permit was not in accordance with the law because the Agencies failed to: (1) evaluate alternative crossing locations; (2) verify MVP's crossing methods were the least environmentally damaging practicable alternative (LEDPA); and (3) evaluate whether the Pipeline will comply with Virginia's narrative water quality standards. The court rejected each argument.

Evaluation of Alternative Crossings

Petitioners' first argument turned on whether the Agencies were required to ask:

> . . .on a crossing-by-crossing basis, whether alternative sites for MVP's proposed crossings would avoid or result in less adverse impact to state waters.

Respondents explained that the Pipeline is a large, contiguous project, and, as such, changing one stream crossing would alter the Pipeline's siting in other places. The Court of Appeals found that Petitioners failed to present any evidence indicating that any crossing could be moved without altering the Pipeline's siting elsewhere and concluded that the Agencies correctly applied Virginia law by approving MVP's proposed crossing locations.

Least Environmentally Damaging Practicable Alternatives Analysis

Petitioners next argued that the Agencies acted arbitrarily and capriciously by failing to independently verify whether each of MVP's proposed water crossing methods was the LEDPA. Specifically, that the Agencies failed to address Petitioners' expert report. The court noted that DEQ did not simply grant MVP's application without considering its merits.

Rather, the agency held multiple public meetings where it heard directly from the public, considered nearly 8,000 public comments, addressed several recurring issues raised by the commenters, and provided a Final Fact Sheet detailing its reasons for recommending that the Board grant MVP's application for a VWP Permit. The court found evidence in the record indicating that the Agencies asked a number of clarifying questions to ensure they were satisfied that the project minimizes the impact on the environment. The court was satisfied that the Agencies considered the relevant data and provided a satisfactory explanation for their conclusion. The court concluded that the Agencies' review of MVP's proposed crossing methods was neither arbitrary nor capricious.

Compliance with Virginia's Narrative Water Quality Standards

Lastly, Petitioners argued that the Agencies acted arbitrarily and capriciously by failing to address whether the Pipeline would comply with Virginia's narrative water quality standard. DEQ addressed this issue in its responses to the public comments, in which it listed a host of conditions that it placed on the VWP Permit to ensure that Virginia's water quality is protected both during and after construction. In addition, DEQ described the indicators it uses to measure water quality, which Petitioners have not challenged. The court concluded that the Agencies did not act arbitrarily and capriciously by determining that the Pipeline will comply with Virginia's narrative water quality standard.

Federal Court Jurisdiction

Finally, the court addressed Respondents' argument that the court lacked jurisdiction. Respondents argued that the court lacked jurisdiction because (1) Petitioners' claims were rooted in state law and (2) Virginia did not waive sovereign immunity by participating in the regulatory schemes of the Natural Gas Act and Clean Water Act.

The court explained that DEQ was acting pursuant to the authority granted to it through the CWA when it issued the VWP Permit, which provided the court jurisdiction to hear this case. As for the second argument, the court explained that a state's voluntary participation in the NGA and CWA's regulatory schemes resulted in federal jurisdiction over the state's decisions made pursuant to that scheme and concluded that the State waived the defense of sovereign immunity by issuing the VWP Permit.

Conclusion and Implications

This case provides a reminder that large projects with multiple layers of regulatory oversight typically undergo extensive public review and evaluation. A challenge based on a deficiency of the factual record is difficult to prove. The Court of Appeals' opinion is available online at: https://www.ca4.uscourts.gov/opinions/212425.P.pdf
(Tiffany Michou, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT AFFIRMS JUDGMENT REJECTING CEQA CHALLENGES TO OAKLAND A'S PROPOSED BALLPARK EIR—ADDRESSES WIND IMPACTS MITIGATION

East Oakland Stadium Alliance v. City of Oakland, ___Cal.App.5th___,
Case No. A166221 (1st Dist. Mar. 30, 2023).

The First District Court of Appeal has affirmed the trial court's judgment, which upheld the Environmental Impact Report (EIR) prepared for the Oakland Athletics' proposed Howard Terminal ballpark and related development project. On all but one issue—the EIR's wind impacts analysis and mitigation measures—the Court of Appeal and trial court ruled in favor of the A's. The court's opinion analyzed several issues under the California Environmental Quality Act (CEQA) raised by petitioners and provided helpful guidance to project proponents and CEQA professionals.

Factual and Procedural Background

The Oakland Athletics sought to redevelop the 50-acre Howard Terminal site and five contiguous acres in the Port of Oakland within the City of Oakland (City). The project sought to construct a 35,000-seat ballpark, 3,000 residential units, 270 square feet of retail space, 1.5 million square feet of space for other commercial uses, a performance venue, up to 400 hotel rooms, and 20 acres of publicly accessible open space.

The Howard Terminal borders an estuary southwest of the City's downtown. Portions of the site are used for commercial maritime activities with most of the site dedicated to truck parking and container storage. A rail line runs down the middle of Embarcadero West, a street that runs at the northern border of the Howard Terminal.

The City started preparing the EIR for the project in 2018 and certified a final EIR in 2022. In the city's findings certifying the EIR, it adopted a statement of overriding considerations, concluding that the project's benefits outweighed several significant environmental impacts that could not be fully mitigated.

Petitioners filed three writ petitions that the trial court consolidated for hearing, which made numerous challenges that were resolved by the trial court. Except with respect to one wind mitigation measure, the trial court rejected petitioners' claims, finding the EIR adequate and and in compliance with CEQA. The judgment directed the City to reconsider its adoption of a wind mitigation measure, but otherwise rejected the petitions.

The Court of Appeal's Decision

The Court of appeal upheld the trial court's decision and included a lengthy discussion of each of petitioners' CEQA claims.

Railroad Impact Mitigation

On appeal, petitioners argued that the EIR's plan to avoid impacts to ballpark visitors from rail traffic was infeasible and ineffective. The railroad tracks at the north of the project site ran down the middle of an urban street and were used by an average of 46 trains daily between 11 a.m. and 11 p.m. To address safety concerns and access issues related to crossing the tracks, the EIR included a number of mitigation measures such as construction of overcrossings, elimination of one intersection and enhanced safety features at others, and a fence to accommodate a multi-use path on railroad property separating the freight line from vehicle traffic for three blocks. Despite these mitigation measures, the EIR found significant and unavoidable impacts due to safety hazards.

The court rejected petitioners' challenge that the proposed multi-use path was "infeasible mitigation." Although the proposed path was located on the railroad's right-of-way and was rejected by the railroad, this was not really a mitigation measure. The real mitigation measure was the fencing, which the railroad accepted. The path was merely an amenity, that if eliminated would not impact the effectiveness of

the fencing. Substantial evidence supported the city's conclusion that the mitigation measure was feasible.

The court moved on to reject petitioners' challenge that the proposed pedestrian and bicycle overcrossing was infeasible on the basis that substantial evidence, comprised of public comments criticizing the location of the overcrossing, showed it will be ineffective. The substantial evidence standard of review evaluates the sufficiency of evidence supporting the EIR, not evidence supporting petitioners' challenge. Substantial evidence therefore supported the City's determination that the overcrossings would significantly mitigate the rail crossing hazard by diverting thousands of visitors from at-grade intersections.

Displacement of Existing Howard Terminal Activities

The court rejected petitioners' claim that the EIR's air quality analysis assumption that overnight truck parking would relocate to nearby lots was not supported by substantial evidence. Although the EIR did not need to evaluate economic impacts of relocated activities, it needed to make reasonable assumptions about relocation to evaluate the associated potential environmental impacts. Despite petitioners' challenges, the court concluded that the EIR's approach and analysis was reasonable and supported by substantial evidence. Petitioners' challenge alleging that the EIR failed to analyze air quality impacts from displaced Howard Terminal users relocating to other areas outside the port was also rejected. Because no reliable methods existed to determine the number of truckers who would relocate and to what locations, the EIR correctly concluded that such impacts were speculative and did not need to be further analyzed.

Air Quality Analysis Related to Emergency Generators

The court also rejected petitioners' challenge to the EIR's air quality analysis related to the project's 17 emergency generators. The court concluded that the project was not in a high fire risk area where regular power shut-offs requiring predictable generator use will occur. The EIR assumed that each of the generators would run for 50 hours a year, which is the maximum allowed by the Bay Area Air Quality Management District (BAAQMD) for testing and maintenance. The EIR also included a mitigation measure restricting annual testing and maintenance of each generator to 20 hours per year. Petitioners argued the EIR should have assumed 150 hours of generator operation, but the court rejected this argument. CEQA does not require an agency to assume an unlikely and worst-case scenario. Here, the EIR reasonably estimated the likelihood of power shutoffs in high fire risk areas and the 50-hour assumption included a 30-hour cushion.

GHG Emissions Analysis

The court rejected petitioners' claim that the EIR improperly deferred mitigation of the project's greenhouse gas emissions (GHG). The EIR's only mitigation measure for GHG impacts prohibits the city from approving any construction related permit for the project unless the sponsor retains an air quality consultant to develop a project-wide GHG reduction plan to meet the standard of significance for GHG emissions for the project. The mitigation measure describes its contents in detail, including how emissions are to be measured and estimated, and requires verifiable and feasible reduction measures, monitoring requirements, and incorporates the EIR's air quality measures.

The court rejected petitioners' claim that all mitigation measures finalized after project approval are invalid. It further observed that the CEQA Guidelines have recently been updated to allow for deferral of mitigation measures where specific standards are met. The court also rejected petitioners' argument that "no net increase" can not be an acceptable performance standard.

Hazardous Materials Analysis

The court also rejected petitioners' claims that the EIR's hazardous substances discussion inadequately recognized and addressed potential risks from project development penetrating a concrete cap that covers the site and prevents the escape of fairly extensive soil contaminants.

The court also rejected petitioners' claims that the EIR's hazardous materials description and Health Risk Assessment were deficient for failing to discuss the presence of "hydrocarbon oxidation oxidation products."

Recirculation of the Draft EIR

The court also rejected petitioners' argument that the draft EIR (DEIR) should have been recirculated to provide information about soil and groundwater contamination remedial measures contained in a draft remedial action plan (RAP) completed after certification of the FEIR. The DEIR anticipated preparation of a removal action workplan (RAW) for mitigation and the FEIR changed this requirement to refer to a RAP. A RAP and RAW serve the same essential purposes and a RAP is more thorough. As the court noted:

> . . .[p]etitioners provide no authority suggesting that a private party's preparation of a draft report or plan required by a mitigation measure constitutes the addition of new information to an environmental impact report as required by [Public Resources Code] section 21092.1.

Substantial evidence supported the city's decision not to recirculate the EIR.

Deferred Mitigation of Contaminants

The court also rejected petitioners' claims that the DEIR's deferral of formulation of the specifics of hazardous substances mitigation to a required, later-prepared RAP was an improper deferral lacking a specific performance standard. The EIR's first mitigation measure for handling site contamination required preparation of a RAP, approval by the state Department of Toxic Substances Control (DTSC), land use covenants, and associated plans to identify, and develop and implement remedial measures to clean up areas with COC concentrations above the HRA's target cleanup levels. Another mitigation measure required DTSC concurrence before grading or construction permit issuance, that proposed construction activity was consistent with the required plans referenced above. A third measure required preparation of health and safety plans consistent with applicable regulations to protect workers and the public during remediation activities.

The court concluded that these mitigation measures satisfied CEQA Guidelines requirements.

Cumulative Impacts

The court also rejected petitioners' argument that the EIR's cumulative impacts analysis failed to consider the impact of using a portion of the project site to expand the port's turning basin for large vessels, which would be permitted at the port's discretion. An agreement was being negotiated with the port at the time of the draft EIR regarding the turning basin. Because the expansion would be analyzed as a separate project in the future, the EIR did not consider it to be a future project requiring inclusion in the cumulative impact analysis. The court found this determination was supported by substantial evidence as it was not probable that expansion of the port would be expanded before there was an official determination, through approval of the agreement, that it was feasible.

Cross-Appeal Wind Impacts

The court upheld the trial court's one finding in petitioners' favor that the EIR improperly deferred mitigation of wind impacts, which was cross appealed by respondents.

Standalone buildings, or buildings that are significantly taller than surrounding buildings can redirect and increase wind speeds that might be incompatible with ground-level pedestrian areas. Project site winds averaged 27 miles per hour and the EIR's threshold of significance was creation of winds in excess of 36 mph. A wind tunnel study suggested that the project could cause winds exceeding the threshold for a minimum of 100-150 hours annually. The only mitigation measure was to require a wind tunnel analysis for each building over 100 feet tall before building issuance to determine whether such construction would create a net increase in hazardous wind hours or locations compared to standard conditions. If so, it required the project proponents to work with a wind consultant to:

> . . .identify feasible mitigation strategies, including design changes. . .to eliminate or reduce wind hazards to the maximum feasible extent without unduly restricting development potential.

The court concluded the above mitigation measure employed vague, subjective, and undefined terms, and

failed to fully identify the types of potential actions that would feasibly achieve it.

Conclusion and Implications

The *East Oakland Stadium Alliance* decision was a significant victory for the A's plan to develop the Howard Terminal ballpark, although it did require additional analysis related to wind impacts. The opinion provides helpful guidance for project proponents and CEQA professionals in a wide range of CEQA issue areas. The court's decision can be found online at: https://www.courts.ca.gov/opinions/documents/A166221.PDF
(Travis Brooks)

SIXTH DISTRICT COURT FINDS THAT CITY'S FAILURE TO TIMELY MAKE MITIGATION FEE ACT FIVE-YEAR FINDINGS NECESSITATES REFUND OF UNEXPENDED IN-LIEU PARKING FEES

Hamilton & High, LLC v. City of Palo Alto, 89 Cal.App.5th 528 (6th Dist. 2023).

The City of Palo Alto (City) established an in-lieu parking fee for new non-residential development that was to be used to finance the construction of new parking facilities, which would offset the demands caused by such development. Plaintiffs paid over $900,000 of in-lieu parking fees in connection with the City's approval of their development project, which fees went into a specified fund. When the City failed to make five-year findings for the specified fund, as required under the Mitigation Fee Act (MFA), Plaintiffs requested a refund of the unexpended in-lieu parking fees. The City denied the refund request. Plaintiffs, then, filed an action alleging that the City failed to comply with its mandatory duty under the MFA to refund the fees. The trial court entered judgment in favor of the City, finding, amongst other things, that the in-lieu parking fee was not a fee subject to the MFA. Plaintiffs appealed and the Court of Appeal reversed the trial court's judgment.

Factual and Procedural Background

In 1995, the City of Palo Alto adopted an ordinance establishing an in-lieu parking fee for new non-residential development in the City's University Avenue parking assessment district (District) as an alternative to fulfilling parking requirements. These in-lieu parking fees went into the University Avenue parking assessment district in-lieu parking fund (Parking Fund) to be used to finance the construction of new parking facilities to meet the increased parking demand caused by new non-residential developments in the District.

In 2013, plaintiffs Hamilton and High, LLC, the Keenan Family Trust, and Charles J. Keenan III (collectively: Plaintiffs) obtained approval from the City to develop a mixed-use building (Project) on property within the District. The City approved the Project subject to various conditions of approval including requiring compliance with the City's parking requirements and requiring payment of development impact fees prior to issuance of building permits. In December 2013, Plaintiffs paid the City over $1.5 million in development impact fees, including over $900,000 in in-lieu parking fees, which went into the Parking Fund.

The City made findings in 2003, 2009, and 2014 addressing the Parking Fund in connection with the Mitigation Fee Act's five-year reporting requirement for fees collected, but which have not yet been expended. In January 2019, the City made various transportation and traffic impact fee findings but omitted the Parking Fund from such five-year findings. In January 2020, due to the City's failure to make the applicable five-year findings, one of the Plaintiffs requested that the City refund the unexpended in-lieu parking fees paid in connection with the Project (Fees). In February 2020, the City, through the City attorney, denied the refund request. In May 2020, the City adopted five-year findings that addressed the Parking Fund.

On May 22, 2020, Plaintiffs filed an action against the City alleging that the City failed to comply with its mandatory duty to refund the Fees after the City failed to make the applicable five-year findings. The trial court denied relief—finding: (1) that Plain-

tiffs' claims were barred by the one-year statute of limitations for penalty actions under Code of Civil Procedure § 340(a); and (2) that the in-lieu parking fee was not a fee subject to the MFA. The trial court also, assuming the applicability of the MFA to the in-lieu parking fee, addressed the merits of Plaintiffs' MFA refund claim and concluded: (1) that the City's May 2020 five-year findings was untimely as a matter of law; and (2) that the harmless error standard of Government Code § 65010 did not apply to a failure to make five-year findings. After the trial court entered judgment in favor of the City, Plaintiffs appeal followed.

The Court of Appeal's Decision

On appeal, Plaintiffs contented that the trial court erred in: (1) concluding the in-lieu parking fee is exempt from the requirements of the MFA; and (2) determining the claim was barred under the one-year statute of limitations for penalty actions. The City urged the Court of Appeal to uphold the trial court's judgment for the reasons provided by the trial court, but argued that to the extent the Court of Appeal declined to do so, the trial court erred as to its decisions on the merits of Plaintiffs' MFA refund claim.

In-Lieu Parking Fee, Notwithstanding Its Elective Aspect, was a Fee Subject to the MFA

The Court of Appeal first addressed whether the in-lieu parking fee was a "fee" under the MFA. The City contended that the MFA does not apply to this type of in-lieu fee, which a developer voluntarily elected to pay in exchange for being relieved of a statutory requirement. The Court of Appeal, however, disagreed in holding that the in-lieu parking fee—as established by the City and imposed on Plaintiffs to mitigate the impact of their development project on the District—is a fee subject to the MFA.

The Court of Appeal determined that, by its plain language, the MFA applies broadly to any action in which a monetary exaction is imposed as a condition of approval of a development project in order to defray the cost of public facilities related to the project. The Court of Appeal found that the ordinance adopting the in-lieu parking fee met these characteristics—*i.e.*, that such was a monetary exaction required as a condition of approval to defray the related cost of public facilities—making such a fee under the MFA. The City's conditioning of the Project approval on Plaintiffs' compliance with applicable parking requirements, such as by payment of the in-lieu fee, additionally confirmed this determination.

The Court of Appeal discussed that its review of case law revealed no case in which the "in lieu" or elective aspect of the imposition changes, as a matter of law, the nature of the fee (or exaction) for purposes of the MFA. The Court of Appeal distinguished *616 Croft Ave., LLC v. City of West Hollywood*, 3 Cal. App.5th 621 (2016) (*616 Croft*), which held that a developer's election to pay an in-lieu fee as an alternative to on-site affordable housing requirements was not a fee under the MFA. The Court of Appeal reasoned that here the in-lieu parking fee was to defray the related cost of public parking facilities to meet the increased parking demand caused by new non-residential development in the District whereas in *616 Croft* the in-lieu fee was not to defray the cost of increased demand on public facilities resulting from the developer's project, but rather was to combat the overall lack of affordable housing, which took the form of a use restriction imposed for non-mitigation purposes.

Statute of Limitations Accrued When the City Denied Plaintiffs' Refund Request Making the Action Timely Under Any of the Discussed Statute of Limitations Periods

The Court of Appeal next addressed the trial court's ruling that Plaintiffs' action was barred by Code of Civil Procedure § 340's one-year statute of limitations applicable to claims based on penalty. Plaintiffs asserted that even if that statute of limitations applied, the action is timely when accrual of the cause of action was properly measured from the City's denial of Plaintiff's request for a refund in February 2020. In asserting such, Plaintiffs maintained that the action was one for refund relief. The Court of Appeal agreed, reasoning that as the MFA does not specify a time period for refund based on a local agency's failure to make the required five-year findings, only upon the City's refusal to issue a refund could Plaintiffs maintain an action based upon a refund demand for noncompliance with the MFA's findings requirement.

Plaintiffs filing of the action in May 2020, less than three months after the City's denial of the refund request in February 2020, was timely regardless of

whether the Code of Civil Procedure § 340 one-year statute of limitations was the applicable statute of limitations or whether the three- of four-year statute of limitations under Code of Civil Procedure §§ 338 and 343, respectively, applied. As such, the Court of Appeal saw no need to determine whether the trial court erred in applying the one-year statute of limitations of Code of Civil Procedure sect§ion 340.

Five-year Findings Applies to the Fund Itself Rather than to the Deposit of Individual Fees, and City's Belated Findings Did Not Satisfy the MFA

The Court of Appeal next addressed the merits of Plaintiffs' refund claim. The City argued that when making five-year findings under the MFA, it must account only for that portion of unexpended fees in a fund that were deposited more than five years earlier. And that, as such, the City did not fail to comply with the MFA—because the Parking Fund did not hold any in-lieu parking fees for more than five years when it addressed other categories of development fees, but omitted the Parking Fund, in the five-year findings made in January 2019. The Court of Appeal disagreed. The Court of Appeal held that, based on the plain language of Government Code § 66010(d) and the Legislature's direction that a local agency maintain all fees received for a specified improvement in a single, designated fund, the five-year finding requirement applies to the fund itself rather than to the timing of the deposit of individual fees—and that five-year findings must report all unexpended fees in the fund, irrespective of the date at which the fees were deposited, as long as the fund during the five-year period contained a positive balance of unexpended fees.

The City next contended that even if it were required to make the five-year findings, it satisfied such obligation when it made such findings, following Plaintiffs' refund request, in May 2020. The City argued that a strict interpretation of the statutory deadline by which to make the five-year findings was not supported by the plain language or intent of the MFA. The Court of Appeal disagreed—finding that a refund was the statutorily mandated remedy for the City's failure to timely make the required five-year findings. As the Court of Appeal concluded that the city's May 2020 five-year findings were untimely, the Parking Fees were subject to refund.

Harmless Error of Government Code Section 65010(b) Did Not Apply

Finally, the Court of Appeal addressed the City's contention that a refund of the in-lieu parking fees is not appropriate under the "harmless error" provision of Government Code § 65010(b). The City contended that the Court of Appeal could not invalidate the City's action or omission based on the failure to make the required findings unless Plaintiffs demonstrated that the error was prejudicial, they suffered substantial injury from the error, and a different result would have been probable had they error not occurred. The Court of Appeal disagreed—and decided that the harmless error standard of Government Code § 65010(b) does not apply here, given the mandatory nature of the refund provision in Government Code § 66001(d) and because Plaintiffs' action sought to enforce the refund requirement rather than seeking to hold invalid or set aside the City's findings, or any other action by the City under the MFA (apart from its continued retention of the Parking Fees), as required for Government Code § 65010(b) to apply.

Conclusion and Implications

The Court of Appeal reversed the trial court's judgment.

The case is significant because it contains substantive discussion of the MFA as applied to in-lieu fees as well as of issues related to the five-year findings requirement under the MFA. The published decision is available online at: https://www.courts.ca.gov/opinions/documents/H049425M.PDF
(Eric Cohn, E.J. Schloss)

SECOND DISTRICT COURT UPHOLDS DISMISSAL OF DEVELOPER'S ANTI-SLAPP MOTION AGAINST LAWSUIT CHALLENGING MIXED USE PROJECT

Mountaingate Open Space Maintenance Association v. Monteverdi, LLC, *Unpub.*, Case No. B308496 (2nd Dist. Mar. 24, 2023).

In an *unpublished* decision filed on March 24, 2023, the Second District Court of Appeal reaffirmed a trial court decision rejecting developer defendants' anti-SLAPP motion against a plaintiff lawsuit challenging a proposed mixed-use project that allegedly violated a Memorandum of Understanding (MOU) with an open space maintenance association. To prevail in an anti-SLAPP motion, a moving defendant must show that a lawsuits allegations or claims arise from constitutionally protected, First Amendment activity. It is not enough that such protected activity is ancillary or constitutes evidence related to claims not arising from constitutionally protected activity. Here, the gravamen of plaintiff's complaint was a breach of contract allegation arising from a supposed breach of the MOU, not a challenge of the defendants' planning application itself.

Factual and Procedural Background

Mountaingate was a master-planned luxury community in the Santa Monica Mountains of Brentwood and located next to hundreds of acres of undeveloped land (property). In 1998, the City of Los Angeles rejected a proposal by a homebuilder seeking to develop 117 homes on the property. The homebuilder sued the city, and during that litigation an open space maintenance association named the Mountaingate Open Space Maintenance Association (MOSMA) intervened and negotiated a memorandum of understanding (MOU) limiting the development to 29 units on the property.

The city approved the reduced density development but the project was put on hold. In 2014, the homebuilder sold a portion of the property to a nonresidential developer. The nonresidential developer sought to develop a private nonresidential facility and MOSMA opposed the plan as violating the MOU.

In 2019 MOSMA filed an entitlement application to develop a portion of the property with the nonresidential facility and another portion of the property in a manner consistent with the reduced density MOU.

MOSMA sued the project developers alleging seven causes of action alleging that the MOU was binding and limited construction on the property to the 29 homes on the property, other causes of action were related to the developers' alleged breach of contract for a supposed violation of the MOU.

Developer defendants filed a special motion to strike the entire amended complaint arguing that their causes of action were a direct response to defendants' filing their entitlement application. Defendants argued that their entitlement application fell within the scope of speech protected by the state's anti-SLAPP statute.

The trial court denied defendants' anti-SLAPP motion finding that "plaintiffs are really asserting their rights under the MOU not attacking the petitioning activity" of the entitlement application.

The Court of Appeal's Decision

The court began by setting forth the applicable standards involved in evaluating an anti-SLAPP motion. First, the moving defendant must establish that the challenged allegation or claim arises from a "protected activity in which the defendant has engaged." Then, for each claim that does arise from a protected activity, the plaintiff must show the claim has at least minimal merit.

The court went on to conclude that developer defendants failed to show that plaintiffs' claims arose from a protected activity. Defendants sought to strike plaintiffs' allegations concerning the filing of the entitlement application for the residential and large nonresidential facility, arguing that application was the basis for all of plaintiffs' claims.

Looking to Protected Activity

The court noted that the complaint contained allegations of both protected and unprotected activity. The question was whether any of plaintiffs' claims arise from the protected activity and must be

stricken. To answer this question, the court must look to whether:

defendant's actual underlying the plaintiff's cause of action must *itself* have bene an act in furtherance of the right of petition or free speech.

It is not enough that some protected activity by the defendant *precedes* that action or decision, that some protected activity is the means of communicating that action or decision, or that some protected activity constitutes evidence of that action or decision.

Here, the court concluded the complaint did not arise from protected activity. Plaintiff's contract and declaratory relief claims challenged defendants' repudiation and anticipatory breach of the MOU and not the filing of their entitlement application. As a result, defendants' failed to meet their burden and the anti-SLAPP motion must fail. Here, the entitlement application was only relevant from an evidentiary standpoint, plaintiffs were not challenging the filing of the application itself, but a contractual breach of the MOU.

Applying the Gravamen Test in *Bonni*

The court also rejected defendants' claims that the trial court erroneously applied "gravamen" to determine whether the first factor was met. In *Bonni v. St. Joseph Health System*, 11 Cal.5th 995 (2021), the California Supreme Court affirmed the use of the gravamen test to determine:

> . . .whether particular acts alleged within the cause of action supply the elements of a claim or instead are incidental background

Here the protected activity is not the wrongful acts that give rise to plaintiffs' claims and the instant action was not a SLAPP lawsuit.

Conclusion and Implications

The *Mountaingate* decision provides a helpful discussion of the legal principles involved when analyzing anti-SLAPP motions in the land use context. Although the filing of entitlement or land use applications is protected First Amendment activity, an anti-SLAPP motion that focuses on contractual claims and not the contents or filing of an entitlement application itself will not support a successful anti-SLAPP motion. The court's *unpublished* decision is available online at: https://www.courts.ca.gov/opinions/nonpub/B308496.PDF
(Travis Brooks)

FIRST DISTRICT COURT UPHOLDS CITY'S RENT BOARD'S FINDING THAT COSTA-HAWKINS ACT DID NOT EXEMPT RENOVATED RENTAL UNITS FROM CITY'S RENT CONTROL ORDINANCE

NCR Properties, LLC v. City of Berkeley, 89 Cal.App.5th 39 (1st Dist. 2023).

In an opinion published on March 9, 2023, the First District Court of Appeal in *NCR Properties, LLC v. City of Berkeley* affirmed the City of Berkeley Rent Board's determination that two single-family homes that were remodeled into multi-family triplexes were not "new" residential units and therefore not exempt from local rent control under the Costa-Hawkins Rental Housing Act. Because four of the six total units had been carved from space previously rented for residential use before new certificates of occupancy were issued, the units merely constituted a conversion from one form of residential use to another, rather than an expansion of the housing stock.

Legal Background

The Costa-Hawkins Rental Housing Act (Civil Code § 1945.50 *et seq.*) was enacted in 1995 to moderate what it considered the excesses of local rent control. One primary portion of the act affords California landlords the right to set the rent on vacant units at whatever price they choose, with limited exceptions. To enjoy an exemption from rent control, a certificate of occupancy must have been issued after February 1, 1995; buildings that were certified for residential use before then are not excluded from a local jurisdiction's rent control ordinance. (Civil Code § 1954.52(a)(1).)

In 2014, the Second District Court of Appeal in *Burien, LLC v. Wiley*,320 Cal .App.4th 1039 (2014), clarified whether the exemption under § 1954.52(a)(1) applied to buildings converted from residential rental units to condominiums. The court held that the exemption:

> . . .excludes buildings from rent control that are certified for occupancy after February 1, 1995. Buildings that were certified for occupancy prior to February 1, 1995, are not excluded.

'The court reasoned that:

> . . .interpreting section 1954.52, subdivision (a)(1) to apply to any certificate of occupancy after 1995 would circumvent the tenant protection enacted by the Legislature. . . [because]. . .[a] certificate of occupancy based solely on a change in use from one type of residential housing unit to another does not enlarge the supply of housing.

The City of Berkeley's Rent Ordinance

Chapter 13.76 of the Berkeley Municipal Code codifies the City's "Rent Stabilization ad Eviction for Good Cause Ordinance" to effectuate the rent control provisions of the Costa-Hawkins Act. In June 2017, to ensure consistency with the *Burien* decision, the City's Rent Stabilization Board (Rent Board) enacted Resolution 17-13, which provided that the rent control exemption for "new construction" did not apply to any certificate of occupancy issued for a rental unit that was previously used for residential purposes.

Factual and Procedural Background

In 2012, corporate landlords (Landlords) purchased two dilapidated residential single-family homes on Dana and Warring Streets in the City of Berkeley. Since 2006, the three-story, Dana Street property operated as an unpermitted rooming house, with renters and the owner occupying 12 of the home's 14 units. Similarly, the three-story Warring Street home had been registered with the Rent Board as an 11-unit rooming house since 2000. Both homes were severely deteriorated, so much so that the Dana Street property could no longer be legally inhabited, and the Warring Street home faced numerous building code violations. As such, Landlords purchased the properties with the understanding that the remaining tenants would move out before closing.

In late 2012, Landlords applied for a permit to convert both properties into multi-family triplexes. The Dana Street home would transform each floor and the attic into separate units that included a total of 9 bathrooms, 19 bedrooms, and 5,500 square feet of living space, 1,245 square feet of which would be new. The Warring Street property would be converted into a triplex via the addition of a basement unit and transforming the existing three floors into two apartments.

The City issued certificates of occupancy for the triplexes in December 2014 and January 2015, and tenants subsequently moved in. Because the certificates changed the classified use from "single family dwelling" to "multi-family," City staff concluded that the triplexes' new rental units were exempt from rent control. But in May 2017, the City's Rent Board reversed course, finding that two of the three Warring Street units and all three of the Dana Street units were not "exempt" from rent control as "new construction" under Costa-Hawkins. In an administrative decision sent via letter to the Landlords, the Board cited *Burien* to explain that, but for the newly excavated basement unit at Warring Street, all of the other new units remained subject to rent control because they were carved from spaces that had previously been used for residential uses.

In January 2018, the Landlords contested the Board's determination by filing petitions seeking to determine the exempt status of the units. A Rent Board hearing officer denied the petitions in December, citing Resolution 17-13 and *Burien*. Landlords appealed and the Board modified its determination, finding that the third-story unit of the Dana Street property constituted a "new unit" exempt from rent control because Landlords had created it by raising the roof. The four other units, however, remained subject to rent control.

In Jun 2019, Landlords filed petitions for writ of mandate contesting the Board's decisions. The petitions alleged the Board exceeded its jurisdiction and abused its discretion by misapplying *Burien* and Resolution 17-13, and by making regulatory findings inconsistent with the Costa-Hawkins exemption. The petitions also sought a declaration that Costa-

Hawkins exempts Resolution 17-13. The trial court consolidated and denied the petitions in May 2021, finding that Resolution 17-13 and the Board's decision accurately reflected the *Burien* holding. Landlords timely appealed.

The Court of Appeal's Decision

Division Three of the First District Court of Appeal agreed with the trial court and upheld denial of Landlords' petitions. In applying the *Burien* decision to the facts at bar, the appellate concluded that the four units in dispute were converted from space long dedicated to rental use, therefore Costa-Hawkins does not exempt them from local rent control as "new construction." And because Resolution 17-13 interprets the City's Rent Ordinance in a manner consistent with *Burien* and Costa-Hawkins, neither the resolution nor the ordinance is preempted by state law.

Burien Rule Applies to the Costa-Hawkins Rent Control Exemption

The central dispute between the parties rested on how broadly the court should read and apply the rule articulated in *Burien*. Landlords maintained that the plain language of § 1954.52(a) unambiguously and categorically exempts properties that receive a certificate of occupancy after 1995. The court disagreed, noting that the Landlords' construction of the statute cannot be squared with the interpretation proffered by the *Burien* holding. Though *Burien* involved applying the exemption to residential units that were converted to condominiums, the nature of the residential use before or after conversion does not justify a different construction of the statute; particularly where, as here, a single-family home or rooming house is converted to a residential triplex.

Finding support in the legislative history, the court explained that the Costa Hawkins Act only intended to exempt from rent control newly *constructed* units, rather than units with newly *issued* certificates of occupancy. The court explained that nothing in the legislative history or the language of the statute:

> . . .suggests the Legislature considered that a certificate of occupancy would issue when space, already in residential use, was converted to a different category of residential use.

To the contrary, the legislative history reveals that the purpose of § 1954.52(a)(1) was to exempt new construction from local rent control, "so long as a property owned played by the rules and obtained a certificate of occupancy"; and thus applies to certificates of occupancy issued prior to residential use of the affected property. The court reasoned that this interpretation furthers the purpose of the act and the exemption by encouraging construction of new buildings and new conversions that add to residential housing supply.

Based on this, the court disagreed with Landlords' rationale that the triplexes were "new construction" that added additional units to the housing supply. Landlords reasoned that, as a result of the renovations, each building had more or larger bedrooms, additional kitchens, living rooms, and bathrooms, and more square footage of habitable space. The court noted, however, that the Rent Board did properly determine one unit in each building was exempt from rent control. But by emphasizing the amount of square footage added for living space, the Landlords ignored that the square footage of residential space added was less than the square footage of the two units the Rent Board had already exempted from rent control.

The court also rejected Landlords' urging that, because the buildings were unfit for habitation, those improvements rendered the units "new." The court cautioned that, notwithstanding the lack of legal or legislative support for this interpretation, any other:

> . . .interpretation of Costa-Hawkins that allows the renovation of properties in poor condition [or unoccupied] to remove them from the reach of local rent control would perversely reward landlords for allowing rental units to decay to the point the buildings need extensive rehabilitation.

Nor was the court swayed by the Landlords' interpretation of the triplexes' certificates of occupancy, which Landlords contended were issued as a result of complete structural changes that resulted in highly expanded residential uses. The court noted that neither certificate made any reference to any expansion of residential uses. Moreover, Landlords have not established that modestly expanding living space or extensively removing the buildings is sufficient

enough to remove all six of the new units from the reach of local rent control, rather than the single unit in each building that was properly deemed exempt.

For these reasons, the court saw no reason to abandon the statutory construction of the Costa-Hawkins's exception that was adopted in *Burien*, and that, when applied here, only one of the three units in each of Landlords' buildings is exempt from rent control.

Costa-Hawkins Does Not Preempt Resolution 17-13

The court also rejected Landlords' argument that Resolution 17-13 conflicts with Costa-Hawkins on its face and as applied, thus resulting in an application of the Rent Ordinance that is contrary to the act. The court explained that local governments may make and enforce rent control ordinances, so long as they do not conflict with state law. Here, when properly construed, Resolution 17-13 does not conflict with Costa-Hawkins. The Resolution interprets the Rent Ordinance in terms drawn directly from the *Burien* holding by stating "a rental unit with a certificate of occupancy issued after residential use of the unit began shall not qualify as exempt" from Berkeley rent control. There is thus no conflict between that stated principle and the Costa-Hawkins exemption articulated under § 1954.52(a).

Conclusion and Implications

The First District's opinion applies, for the first time, the rule articulated by *Burien* regarding the extent of the Costa-Hawkins exemption to rent control ordinances. Where units are converted from space long dedicated to residential space, the *Burien* rule necessitates the conclusion that Costa-Hawkins does not exempt them from rent control as "new construction." Here, the court made clear that the physical space from which a residential unit is derived dictates whether it constitutes "new" construction, regardless of the amount of work or rehabilitation required to transform the prior units. For these reasons, the attic and basement units were properly exempt from local rent control, but the remaining units were properly deemed non-exempt because the units were created from space that had been rented for residential use before the current certificates of occupancy were issued. A copy of the court's opinion is available at: https://www.courts.ca.gov/opinions/documents/A163003.PDF
(Bridget McDonald

SECOND DISTRICT COURT UPHOLDS CITY'S DETERMINATION THAT ELDERCARE FACILITY QUALIFIED FOR CEQA'S CLASS 32 'URBAN INFILL' EXEMPTION

Pacific Palisades Residents Association v. City of Los Angeles, 88 Cal.App.5th 1338 (2nd Dist. 2023).

In an opinion published on March 8, 2023 (modified March 27, 2023), the Second District Court of Appeal in *Pacific Palisades Residents Association v. City of Los* held that substantial evidence supported the City of Los Angeles' determination that a proposed eldercare facility was compatible with the surrounding Pacific Palisades neighborhood and thus qualified for a Class 32 categorical exemption under the California Environmental Quality Act (CEQA) for infill projects. The court further held that the record supported the California Coastal Commission's related determination that the facility presented no substantial issue under the Coastal Act.

Factual and Procedural Background

In 2013, developer and real party in interest purchased a vacant one-acre lot in Pacific Palisades, a coastal neighborhood within the City of Los Angeles (City). The site, which was graded and zoned for commercial use in the 1970s, is in a densely developed 740-unit residential subdivision and surrounded by numerous single and multifamily units. The immediately surrounding area includes a restaurant, office and business center, and nearby hiking trails and public parks.

In early 2017, following conversations with neighborhood groups, the developer proposed a four-story

senior living project (Project) to help meet the lack of options for older adults who wished to age in place. The 64,646 square foot building would range from 25 to 45 feet and contain 82 residential rooms with an underground parking lot.

Administrative Proceedings

In June 2017, the developer applied for a Coastal Development Permit (CDP) and a Class 32 infill project exemption from CEQA. The City's zoning administrator held a public hearing in October 2017. Community members who favored the Project cited the dearth of local senior living options for the area's increasingly aging population. Those who opposed the project raised issues concerning parking, traffic, fire hazards, construction, and aesthetic impacts. In January 2018, the zoning administrator granted the CDP and concluded the Project qualified for the Class 32 exemption.

Project opponents appealed the zoning administrator's decision to the City's West Los Angeles Area Planning Commission (APC) in February 2018. The appeal maintained the Project was not categorically exempt because it would be inconsistent with the surrounding neighborhood, would exacerbate the area's existing fire hazards, would impact aesthetics and protected species, and would bring excessive density, traffic, and noise to a neighborhood that is not highly urbanized. The appeal also argued the development would defy the zoning code's setback requirements and violate the Coastal Act because it would be visually incompatible with the neighborhood. The APC rejected the appeal two months later.

In June 2018, opponents appealed the APC's decision to the City Council's Planning and Land Use Management (PLUM) Committee, reiterating that the site was not substantially surrounded by urban uses given its proximity to state and local parks. The developer's lawyer rebutted these points, noting that the site was located in the middle of a residential community that had been established for decades. The PLUM Committee agreed and unanimously voted to recommend the City Council deny the appeal and approve the Project. The City Council subsequently adopted the PLUM Committee's recommendation by approving the Project, granting the CDP, and adopting the Class 32 exemption.

At the Coastal Commission

The opponents protested the City Council's decision to the Coastal Commission (Commission), arguing that the CDP and claimed exemption presented a "substantial issue" under the Coastal Act. Recommendations prepared by Commission staff concluded that public views from nearby trails would not be significantly impacted due to the Project's design and location in a developed and urbanized area. Staff further found concerns regarding fire protection, traffic, parking, and protected species were insubstantial, particularly given that the Project was not in an environmentally sensitive habitat.

The Commission held a public hearing on the appeal in July 2018, during which attorneys for both sides reiterated their positions and Commission staff responded to complaints about the Project's effect on views. The Commission unanimously rejected the appeal, noting that the Project fulfilled an "extremely needed service" for an area that has historically lacked eldercare services.

At the Trial Court

Project opponent Pacific Palisades Residents Association (Association) filed a petition for writ of mandate in July 2018, which alleged the City violated CEQA, the Commission violated the Coastal Act, and both agencies failed to provide a fair hearing. The trial court denied the petition in April 2020, finding that substantial evidence supported the City's determination that the Project qualified for the Class 32 exemption; the Commission's findings were supported by substantial evidence; and the Association had enjoyed a full and fair opportunity to present their evidence to both agencies.

The Court of Appeal's Decision

The Second District Court of Appeal affirmed the trial court's ruling, holding that the Project complied with the City's zoning code, qualified for the Class 32 exemption, and did not present a substantial issue under the Coastal Act.

Compliance with the Zoning Code

The Association alleged the Project's proposed building would be larger than that allowed under the zoning code's yard setback requirements. The code

provision at issue provided that no yard requirements shall apply to the residential portions of buildings located on lots used for combined commercial and residential uses if such portions are used exclusively for residential uses, abut a street or alley, and the first floor at ground level is used for commercial uses or for access to the residential portions of the building.

The court held that the zoning code's yard requirements do not apply to the Project because it satisfied the plain language of the statute—*i.e.*, (i) the proposed first floor café/bistro and upstairs residential units would ostensibly be used for combined commercial and residential uses; (ii) the building would have exclusively residential portions; (iii) those residential portions would abut streets to the east and north; and (iv) the public bistro would be operated commercially.

The court rejected each of the Association's five arguments, which largely challenged the applicability and interpretation of the yard requirement provision to the Project. Of those arguments, the court rejected the Association's contention that a different provision of the zoning code authorizing eldercare facilities in particular commercial zones applied over the yard requirement provision. The court noted that the cited provision works in tandem with—rather than against—the yard requirement provision, and therefore did not command a different outcome. The court similarly rejected the Association's request for judicial notice of extra-record evidence, which attempted to introduce the City's purportedly "new" interpretation of amendments to the contested zoning code provisions. The court denied judicial notice because the Association failed to present it to the trial court and improperly attempted to use it to moot a future appeal.

Compliance with CEQA

The Association claimed the Project did not qualify for CEQA's Class 32 categorical exemption because its proposed architecture and adverse aesthetic impacts would render it incompatible with the Brentwood and Pacific Palisades Community Plan, and thus fail to satisfy the first requisite criterion of the exemption. (Guidelines § 15332, subdivision (a).)

The court disagreed, noting that it needed to defer to the City's determination that "adding this urban building to this urban building was compatible with the [Community Plan]," unless no reasonable person could have reached the same conclusion. Here, the City's decision was "eminently reasonable" given that "mandatory architectural uniformity" between the proposed building and adjacent two and three-story townhomes was not required to find community plan compatibility. The Court of Appeal reiterated that, under this deferential standard, elected officials—not the courts—have "latitude to weigh competing subjective notions of beauty and blight."

Substantial evidence also supported the City's conclusion that the Project would not be inconsistent with the community plan's policy of preserving and protecting views from hillsides, public lands, and roadways. The record established that the views of nature from high trails were already obstructed by urban structures that surround the proposed facility; therefore, adding another urban building would not result in additionally adverse aesthetic impacts.

Compliance with the Coastal Act

The Association's last claim alleged the Commission improperly found no "substantial issue" under the Coastal Act. The Association posited that the Project would be visually incompatible with the neighborhood by blocking views of the ocean and coastal scenic areas. (Pub. Resources Code § 30251.) The court disagreed, finding that the substantial evidence that supported the City's aesthetic impact determination also supported Commission's decision for the same reasons.

The Association also maintained that the Project would create significant traffic and parking impacts. The court declined to reweigh a traffic study relied on by the Commission, which concluded that daily trips to and from the eldercare facility would not have a significant effect on nearby intersections. Similarly, the facility's underground parking structure was evidence that the nominal increase in traffic would not displace street parking for hikers. For these reasons, substantial evidence supported both the Commission's and the City's decisions that the Project would not have significant environmental impacts thus rendering it ineligible for the claimed exemption.

Conclusion and Implications

The Second District Court of Appeal's opinion reaffirms the longstanding principle that courts owe

agencies considerable deference on issues that require agencies to interpret and apply their own zoning codes and land use plans. In the context of CEQA's Class 32 categorical exemption, this deference extends to the "reasonableness" of an agency's determination that a proposed "urban infill" project satisfies the exemption's first requirement, which requires consistency with applicable general plan policies and zoning designations. And when arguments center on subjective issues, such as aesthetics and blight, this heightened deference is particularly apt given the latitude afforded to elected officials—not the judiciary—to weigh competing interests. The court's opinion is available at: https://www.courts.ca.gov/opinions/documents/B306658M.PDF
(Bridget McDonald)

FIFTH DISTRICT COURT ORDERS VACATING ORDER OF PREJUDGMENT POSSESSION SOUGHT BY AN INVESTOR-OWNED PUBLIC UTILITY—HOLDS PUBLIC UTILITY WAS NOT REQUIRED TO COMPLY WITH CEQA

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

Southern California Edison Company (Edison), an investor-owned public utility, filed a complaint in eminent domain seeking to condemn two easements on a private property. Edison further filed a motion for prejudgment possession. The Superior Court granted the motion for prejudgment possession. On appeal, the Fifth District Court of Appeal issued a peremptory writ directing the trial court to vacate its order of prejudgment possession and conduct further proceedings that are not inconsistent with the Court of Appeal's opinion.

Factual and Procedural Background

Edison, which is an *investor-owned public utility corporation*, filed a complaint in eminent domain against husband-and-wife landowners Clyde David Robinson and Kathryn Ann Devries (collectively: Robinson) seeking to condemn easements across the Robinson's 5-acre property in Kern County. Edison sought the easements for purposes of accessing and maintaining existing power transmission lines. The first easement requested by Edison was 50 feet in width, located under the existing power transmission lines, and would have provided Edison with the right to maintain and repair the lines. The second easement requested by Edison was 16 feet in width, looped across the Robinson property, and would have provided Edison with the right to construct and maintain a road to access the area underneath the power transmission lines.

In addition to filing a complaint in eminent domain, Edison also filed a motion for prejudgment possession as permitted under Code of Civil Procedure § 1255.410. Robinson failed to file an opposition to the motion for prejudgment possession within the required 30-day period. Following the 30-day period however, Robinson filed its opposition and a request for relief for the untimely opposition. Robinson's opposition argued Edison was not entitled to take the easements because it had failed to adopt a resolution of necessity; had failed to comply with the California Environment Quality Act (CEQA); and had failed to satisfy the requirements for exercising the power of eminent domain in Code of Civil Procedure § 1240.030 subdivisions (a) through (c). Following Edison's filing of a reply to Robinson's opposition, the trial court adopted its tentative ruling granting Edison's motion for prejudgment possession. In so doing, the Court of Appeal did not make any explicit findings other than stating that "all of the criteria seems to be satisfied."

In response, Robinson filed a petition for writ of mandate requesting the Court of Appeal's take action to vacate the trial court's order granting Edison prejudgment possession.

The Court of Appeal's Decision

Edison, a Privately Owned Public Utility, Is Authorized to Exercise the Power of Eminent Domain

The first issue before the Court of Appeal was whether Edison, a privately owned public utility,

had the authority to exercise the power of eminent domain. The Court of Appeal first looked to Code of Civil Procedure § 1240.020, which provides that:

> . . .[t]he power of eminent domain may be exercised to acquire property for a particular use only by a person authorized by statute to exercise the power of eminent domain to acquire such property for that use.

Turning next to the Public Utilities Code, the Court of Appeal found that under the express provisions of the Public Utilities Code and the legislative history to the pertinent sections, Edison qualified as a "public utility" for purposes of the Public Utility Code's provisions that permit a public utility to condemn property. The Court of Appeal thus found that Edison was authorized under Code of Civil Procedure § 1240.020 to exercise the power of eminent domain.

Edison Is Not a 'Public Entity' Required to Adopt a Resolution of Necessity Before Initiating Condemnation of an Easement

The second issue before the Court of Appeal was whether Edison was required to adopt a "resolution of necessity" prior to initiating its condemnation action. Under Code of Civil Procedure § 1240.040, "[a] public entity may exercise the power of eminent domain only if it has adopted a resolution of necessity…"

Turning first to the plain meaning of the statute, the Court of Appeal found that Edison, which is an investor-owned public utility corporation, did not qualify as a "public entity" because the relevant provisions of the Code of Civil Procedure distinguished between public entities and corporations. The Court of Appeal also found that disregarding the plain meaning would produce unintended consequences, such as allowing a privately owned public utility to make its own determination about the public necessity of a condemnation and thereby subvert the ordinary burden of proof imposed on the issue of necessity under Code of Civil Procedure § 1240.030.

Accordingly, the Court of Appeal found that Edison was not a public entity for purposes of the requirement for a resolution of necessity, and therefore Edison was not required to adopt a resolution of necessity prior to initiating its condemnation action.

Edison Not Required to Obtain CPUC Approval Before Filing the Condemnation Action

The third issue before the Court of Appeal was whether the Public Utilities Code required Edison to obtain the approval of the California Public Utilities Commission (CPUC) prior to filing the condemnation action. Under Public Utilities Code § 625(a)(1)(A), "a public utility that offers competitive services" is prohibited from condemning any property "for the purpose of competing with another entity in the offering of those competitive services" unless the CPUC approves the condemnation.

The Court of Appeal found that the prohibition in Public Utilities Code § 625(a)(1)(A) did not apply to the Edison's proposed condemnation regarding the existing transmission lines because such condemnation was not for competitive purposes.

Edison Not Required to Comply with CEQA Because it is Not a Public Agency—No Public Agency Approval Was Required to Condemn the Easement

The fourth issue before the Court of Appeal was whether Edison was a "public agency" that is required to comply with CEQA before commencing an eminent domain action.

The definition of a public agency is set forth in the CEQA Guidelines at § 15379 as well as in Public Resources Code § 21063, which provides that a public agency:

> . . .includes any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision.

Based on the definitions set forth in the CEQA Guidelines and the Public Resources Code, the Court of Appeal determined that CEQA's definition for a "public agency" does not include investor-owned public utilities such as Edison.

The Court of Appeal did note that had Edison been required to obtain the approval of the CPUC prior to condemning the easement, then the CPUC would have been a public agency for purposes of CEQA and would have been responsible for CEQA compliance. Here however, where no such approval

was required, the Court of Appeal found that the proposed condemnation and subsequent maintenance activity would fall outside the scope of CEQA.

Prejudgment Possession

The Court of Appeal then reviewed then reviewed the trial court's granting of Edison's motion for prejudgment possession to determine whether the procedural requirements for granting prejudgment possession were met.

As authorized under the California Constitution, the Code of Civil Procedure at § 1255.410 permits an eminent domain plaintiff to move the court for an order of prejudgment possession, thereby allowing the plaintiff to more quickly take possession of a property that is the subject of the eminent domain proceedings.

Under Code of Civil Procedure § 1255.410, if the defendant fails to timely oppose a motion for prejudgment possession, then the trial court is required to make an order for possession of the property if it makes the findings set forth in § 1255.410(d)(1). Robinson argued that the trial court failed to make such findings.

In analyzing this claim, the Court of Appeal turned to the requirements for taking a particular property set forth in Code of Civil Procedure § 1240.030, which provides that the power of eminent domain to acquire property requires "all" of the following to be established: the public interest and necessity require the project; the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and the property sought to be acquired is necessary for the project.

In reviewing the trial court's decision, the Court of Appeal first found that the trial court failed to make explicit findings on its review of the motion for prejudgment possession. The Court of Appeal stated that while generally a trial court is not required to issue a statement of decision in ruling on a motion, the trial court was required to do so here based on the significance of the deprivation of the property rights at issue. The Court of Appeal thus held that the trial court was required to make explicit findings either "in writing or orally on the record" in order to grant the motion for prejudgment possession.

Further, the Court of Appeal found that even if the trial court was not required to make explicit findings (*i.e.*, if the doctrine of implied findings instead applied), there was no substantial evidence in the record to support such required findings. The Court of Appeal thus found that:

> . . .[t]he absence of substantial evidence…[is] sufficient to carry Robinson's burden of showing prejudicial error.

Consistent with these holdings, the Court of Appeal issued a peremptory writ directing the trial court to vacate its order of prejudgment possession and conduct further proceedings that are not inconsistent with the Court of Appeal's opinion.

Conclusion and Implications

This case is significant because it (1) contains substantive discussion regarding how a privately owned public utility will be characterized for purposes of an eminent domain action; (2) establishes that a privately owned public utility exercising its eminent domain power is not a public agency for purposes of CEQA; and (3) establishes new requirements for a trial court's review on a motion for prejudgment possession. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/F085211.PDF (E.J. Schloss, Eric Cohn).

FIRST DISTRICT COURT HOLDS INVERSE CLAIM FOR ALLEGED FAILURE OF SUBDIVISION DRAINAGE IMPROVEMENTS NOT ACCEPTED BY THE COUNTY

Shenson v. County of Contra Costa ___Cal.App.5th___, Case No. A164045 (1st Dist. Mar. 30, 2023).

The First District Court of Appeal in *Shenson v. County of Contra Costa* upheld the trial court's decision granting summary judgment to the County after drainage improvements the subdivision developers had constructed 40-plus years earlier failed and serious erosion and subsidence damaged homeowners' properties.

Factual Background

Plaintiffs and appellants (collectively: Owners) are two couples who purchased residential properties in neighboring subdivisions within Contra Costa County (County) in 2010 and 2016. Both properties are adjacent to a creek. Owners sued the County and a flood control district for inverse condemnation and parallel tort causes of action after drainage improvements the subdivision developers had constructed 40-plus years earlier failed and serious erosion and subsidence damaged Owners' properties.

In the mid-1970s, the County approved subdivision maps for two subdivisions containing the parcels later acquired by Owners. Murderers Creek (Creek) that runs along Owners' properties is a natural watercourse that functions as the main receptacle for storm runoff emanating from the watershed above Owners' properties and is the only reasonable means of collecting and conveying that runoff.

Pursuant to the Subdivision Map Act, the County required the developers to make certain drainage improvements to collect and convey water from the two subject subdivisions as well as one adjacent subdivision, to the Creek. Among the properties that contribute runoff to the Creek by way of the improvements were three roads, two private roads serving as ingress and egress to the subdivisions and one county owned road that is adjacent to one of the subdivisions.

The developers designed and constructed the improvements, not the County. However, a county ordinance required developers to submit plans for required improvements to the County's Public Works Department for review and required the Department to inspect the work and, when satisfied it was complete and met county requirements, to recommend that the County Board of Supervisors (Board) accept the improvements. The limited purpose of such acceptance was to establish an end date for the contractor's liability under a provision requiring it to guarantee performance of the work and repair of defects for a one-year period after acceptance.

The Board by resolution accepted the improvements as completed for the purpose of establishing a terminal period for filing liens in case of action under the subdivision agreement. As also required by ordinance, the Board adopted a resolution at the end of the one-year period finding the improvements have satisfactorily met the guaranteed performance standards for one year after completion and acceptance.

As provided by the Subdivision Map Act, the County also required the subdivision developers to offer to dedicate drainage easements to the County. The offer of dedication expressly states that the County:

> . . .shall incur no liability with respect to such offer or dedication, and shall not assume any responsibility for the offered parcel of land or any improvements thereon or therein, until such offer has been accepted by appropriate action of the Board of Supervisors, or of the local governing body of its successor or assign.

When it approved the subdivision maps, however, the County *did not* accept the offers of dedication for the drainage improvements, which remained in the ownership of the developers and later the homeowners who purchased the property.

There is no record of the County indicating it has ever performed maintenance or repair of the drainage improvements. Nor are there any County records indicating the County performed maintenance of or repairs to the Creek at or upstream of the subdivisions.

In early 2016, the spillway the developer had constructed four decades earlier failed and collapsed

into the Creek bed. The uncontrolled discharge of water into the Creek caused a scour hole to form and expand, eventually onto the neighboring private subdivisions. Owners allege the scour hole caused erosion and subsidence damage to their respective properties. Owners contend the County and the Contra Costa County Flood Control and Water Conservation District (District) are responsible for the formation of the scour hole because they failed to maintain the Creek's bed and banks and refused to repair or replace the spillway after it failed.

Lawsuit Allegations of County Ownership/ Control

Owners alleged the County was responsible for the damage the Creek and drainage improvements caused to their properties for several reasons. First, the County approved the subdivisions; second, it required the developer of that subdivision to construct the drainage improvements, including a pipeline, a spillway and a catch basin; third, it used those facilities to discharge water from another subdivision and from city streets into the Creek; fourth, it required the developer to offer to dedicate to the County an easement over the property containing those improvements and portions of the bed and banks of the Creek; and fifth, it permitted and encouraged private development of properties upslope from Owners' properties.

Owners further alleged that the County accepted the drainage improvements from the developer, used them for public purposes, approved subdivision maps depicting the drainage easements and now "owns and controls" the land within the drainage easements. They alleged that the County "approved, owned, operated, controlled, repaired and/or maintained a public drainage system" of which the Creek is a part and that the drainage system caused damage to Owners' properties.

Owners alleged that the Contra Costa County Flood Control and Water Conservation District incorporated the Creek into the public drainage system through its establishment of a statutory drainage area known as Drainage Area 46 that includes the Creek, Owners' properties and other properties in the area. They alleged the County and District assessed and continue to assess "storm drainage fees" from property owners within Drainage Area 46 to offset the increased burden that new and expanding development in the area has put on the public drainage system. They further alleged that the District chose to hold the funds from the collected drainage fees to be used for a future project instead of using them to install mitigation measures against the increased water runoff or to repair the spillway.

The County and the District filed motions for summary judgment or summary adjudication. The County argued it was not liable to Owners for inverse condemnation because: (1) the Creek was not a public improvement owned or controlled by the County; (2) its acts in approving the subdivisions and requiring drainage improvements and offers of dedication did not transform the Creek into a public storm drain system or otherwise make it or the improvements a public work; (3) it had not accepted the offers of dedication of drainage easements after they were made; and (4) it had not made repairs or maintained the improvements or otherwise impliedly accepted the offers.

The Superior Court granted the motions for summary judgment, concluding there was insufficient evidence to support the assertion that the County and District exerted control over or assumed responsibility for either the Creek or the drainage system and that the County's use of the Creek to drain surface water from county roads and to require other riparian owners in the watershed to do the same did not transform the Creek into a public drainage system.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's judgment under the *de novo* standard of review to decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. Under that standard, the undisputed facts did not establish any public entity exercise of actual ownership or control over a waterway or drainage improvements to render them public works for which the public entity is responsible.

Local Government Authority over Drainage Improvements under the Subdivision Map Act

The Subdivision Map Act (Map Act) vests the regulation and control of the design and improvement of subdivisions in the legislative bodies of local agencies, which must promulgate ordinances on the subject. The Map Act generally requires all subdivid-

ers of property to design their subdivisions in conformity with applicable general and specific plans and to comply with all of the conditions of applicable local ordinances.

Ordinarily, subdivision under the Map Act may be lawfully accomplished only by obtaining local approval and recordation of a tentative and final map. A local agency will approve a tentative and final map or a parcel map only after extensive review of the proposed subdivision and consideration of such matters as the property's suitability for development, the adequacy of roads, sewer, drainage, and other services, the preservation of agricultural lands and sensitive natural resources, and dedication issues.

By generally requiring local review and approval of all proposed subdivisions, the Map Act aims to control the design of subdivisions for the benefit of adjacent landowners, prospective purchasers and the public in general. The Map Act defines design to include, among other things, drainage and sanitary facilities and utilities, including alignments and grades thereof. Indeed, requiring the subdivider to install drainage has been described as one of "several salutary purposes" of the Map Act.

It is typical for a subdivision agreement to require a subdivider to perform the work constructing improvements in accordance with plans and specifications previously approved by the local agency and to require security to ensure performance of the work Another common condition is that the subdivider dedicate or make an irrevocable offer of dedication for such purposes such as streets, drainage, public utilities or public access.

Inverse Condemnation with Respect to Drainage Improvements Requires Public Acceptance or Use of Improvements

A public entity may be liable as a property owner when alterations or improvements to its own upstream property result in the discharge of an increased volume of or velocity of surface water in a natural watercourse causing damage to the property of a downstream owner. As with any upstream property owner, whether public or private, a government entity is only liable if, considering all of the circumstances, its conduct was unreasonable and the lower property owner acted reasonably.

Further, a government entity may be liable in inverse condemnation where the increased volume or velocity of surface waters and resulting damage are caused by discharge of increased surface waters from public works or improvements on publicly owned land or if it has incorporated the watercourse or public improvements into a public drainage system.

A storm drainage system constructed and maintained by a public entity is a public work To convert an existing watercourse into a public work, a governmental entity must exert control over and assume responsibility for maintenance of the watercourse if it is to be liable for damage caused by the streamflow on a theory that the watercourse has become a public work

The same is true of converting privately constructed improvements into public works. Official acts of dominion and control constituting acceptance of the private drainage system can be shown if the public entity does maintenance and repair work. Use of land for a public purpose over time may constitute implied acceptance of the offer of dedication.

On the other hand, where there is no acceptance of a street or the drainage system within it, there is no public improvement, public work or public use and therefore there can be no public liability for inverse condemnation.

Drainage Improvements' Conveyance of Off-Property Flows did not Convert Them to Public Works

Owners argue that the required drainage improvements served an adjacent subdivision and an adjacent street owned by the County (Gloria Terrace) by diverting surface water to catch basins and pipelines to convey it to the Creek. Thus, according to Owners, the County in effect converted the improvements into public works.

The Court of Appeal referred to the California Supreme Court case of *Locklin v. City of Lafayette*, 7 Cal.4th 327 (1994) (*Locklin*), which held that using an existing natural watercourse for drainage of surface water runoff and requiring other riparian owners to do so does not transform the watercourse into a public storm drainage system. The Court of Appeal likewise held that requiring and using drainage improvements within a subdivision to convey water, including from an adjacent public road and adjacent subdivision, does not convert the improvements into public works either.

As noted by the County, drainage improvements

in all developments are designed to accommodate the anticipated storm water runoff quantities to be received by the development—including any runoff flows emanating from beyond a subdivision's boundary. Because developments disrupt the natural drainage patterns, installation of artificial drainage facilities that collect and convey the runoff that before may have been conveyed as natural sheet flows is necessary to ensure the waters will safely pass through the community without causing damage.

Contrary to Owners' arguments, requiring artificial drainage facilities and conveying water across properties over which it might not have flowed when the area was undeveloped does not convert those improvements into public works. Development requires that drainage systems be constructed to channel water beneath or around the obstacles development creates. A government could not require owners whose properties are not adjacent to a natural watercourse (*i.e.*, landlocked) to drain waters from their properties into such a watercourse without allowing them to flow through properties that are closer to and/or adjacent to the watercourse. Thus, waters from landlocked properties must at least sometimes be conveyed through drainage improvements on other properties to reach a natural watercourse.

For these reasons, it is not surprising that the Act contemplated that improvements would be used for the good of the subdivision and properties beyond it. Its aim was to require local governments to exercise control over the design of subdivisions for the benefit of adjacent landowners as well as prospective purchasers and the public in general. It defined improvement to include work necessary for the general use of the lot owners in the subdivision and local neighborhood needs. (Govt. Code, § 66419, subd. (a),)

Conclusion and Implications

This opinion by the First District Court of Appeal helps define the broad extent to which local government can regulate subdivision improvements for the broader public benefit under the Map Act, without incurring liability should it choose not to accept such improvements. A rule that government-required improvements on one subdivision are public if they serve drainage needs of properties outside that subdivision or convey water that might not naturally have flowed through the servient subdivision would undermine the purposes of the Subdivision Map Act. Indeed, local governments would be reluctant to facilitate orderly community development, coordinate planning with the community pattern and assure proper improvements are made. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A164045.PDF
(Boyd Hill)

LEGISLATIVE UPDATE

Editor's Note: 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)—This bill was amended on April 5, 2023 and re-referred to the Committee on Appropriations. 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. This bill would also expand the definition of exempt surplus land to include land that is owned by a California public-use airport on which residential use is prohibited pursuant to specified federal law. The bill would also require a local agency to provide a written notification to the Department of Housing and Community Development of its declaration and findings 30 days before disposing of land declared "exempt surplus land." The bill would also recast that provision and would exempt a local agency, in specified instances, from making a declaration at a public meeting for land that is "exempt surplus land" if the local agency identifies the land in a notice that is published and available for public comment at least 30 days before the declaration exemption takes effect. Numerous other changes are proposed to the law.

•SB 747 (Caballero)—This bill was amended on April 13, 2023 and re-referred to the Committee on Appropriations. Current law authorizes a city, county, or city and county, with the approval of its legislative body by resolution after a public hearing, to acquire, sell, or lease property in furtherance of the creation of an economic opportunity, as defined. This bill would authorize a city, county, or city and county, in addition to a sale or lease, to otherwise transfer property to create an economic opportunity. The bill would make related, conforming changes. Current law provides that the creation of an economic opportunity under that law is subject to certain notice and disclosure provisions. This bill would subject the creation of an economic opportunity under the above-described provisions to only certain requirements regarding providing information to the public on that economic opportunity. In addition, this bill would define the term "dispose" for these purposes to mean the sale of the surplus property or a lease of any surplus property entered into on or after January 1, 2024, for a term longer than 35 years, including renewal options, as specified. The bill would also redefine the term "agency's use" to include use for transit or transit-oriented development, property owned by a port that is used to support logistics uses, airports, state tidelands, sites for broadband equipment or wireless facilities, and waste disposal sites. The bill would define a district relative to an "agency's use" to include infrastructure financing districts, enhanced infrastructure financing districts, community revitalization and investment authorities, affordable housing authorities, transit village development districts, and climate resilience districts. This bill would also revise and recast certain of the provisions related to exempt surplus land, including surplus land that is not contiguous to land owned by a state or local agency, that is used for open space or low- and moderate- income housing purposes

and meets specified conditions, surplus land that is a former parking lot that is conveyed to an owner of an adjacent property, and provisions related to mixed-use developments, among others. The bill would also specify that certain legal restrictions are valid legal restrictions and would require that for surplus land that is subject to valid legal restrictions to be considered exempt surplus land, the valid restrictions must be included as part of the local agency's above-described written findings. The bill would also include as exempt surplus land, land that is jointly developed or used for a joint development, land that was purchased using federal funds, land transferred to a community land trust, as specified, and additional categories of land determined by the department, including sites that are not suitable for housing. And, this bill would authorize a local agency to administratively declare that land is exempt surplus land, if the declaration and findings are posted on the local agency's internet website, published and available for public comment, including giving notice to specified entities, at least 30 days before the declarations take effect. In addition, this bill would create an exception from that notice requirement if the prospective transferee is an affordable housing developer proposing to develop an affordable housing project on the site which that will meet or exceed a 25 percent affordability threshold, as described. Numerous other changes are proposed to the law.

•SB 229 (Umberg)—This bill was amended on February 23, 2023 and has been set for hearing. 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. The bill would require the local agency's governing body to provide prescribed notice no later than 14 days before the public session. The bill would prohibit the local agency's governing body from taking final action to ratify or approve the proposed disposal until a public session is held as required.

•AB 837 (Alvarez)—This bill was amended on April 27, 2023. This amended 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. This bill would provide, until December 31, 2033, that land that is subject to a sectional planning area, as described, that is acquired prior to January 1, 2019, and that met one of several specified conditions on January 1, 2019, is not subject to certain requirements for the disposal of surplus land.

General Plans

•AB 911 (Schiavo)—This bill was amended on April 13, 2023 and re-referred to the Committee on Appropriations. 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

continue to 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)—This bill was amended on March 16, 2023 and re-referred to the Appropriations Committee. 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 was amended to 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 provisions relating to hearings for specified variances, ministerial approval of applications for accessory dwelling units or junior accessory dwelling units, permitting for unpermitted accessory dwelling units constructed prior to January 1, 2018, sale or conveyance of accessory dwelling units, ministerial approval of proposed housing developments, ministerial approval of parcel maps for urban lot splits, or housing development projects being deemed an allowable use of parcels within a zone where office, retail, or parking are a principally permitted use, as provided..

•SB 405 (Cortese)—This bill was amended on April 26, 2023 and re-referred to the Appropriations Committee. 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 was amended to expand the requirement to submit an electronic copy of the above-described inventory to the department to additionally require the planning agency to submit a housing element or amendment prepared on or after January 1, 2021. The bill would additionally require a planning agency to post the most recent version of the inventory on its internet website, as specified. The bill would require the posting to include a notice describing how property owners and other members of the public can submit information to the planning agency indicating an interest in adding a site to the land inventory and developing the site for housing. The bill, on or before an unspecified date, would require the department to establish a pilot program to develop a methodology to analyze if the inventory of suitable land has identified adequate sites to accommodate a city or county's regional housing need, as specified. The bill would require the pilot program to include: (1) methods for estimating the likely number of units that can be accommodated on sites in the land inventory during the planning period using a probability analysis and (2) methods for estimating the likely number of units that can be accommodated on the sites in the land inventory during the planning period under existing conditions and potential policy and other changes.

Subdivision Map Act

•SB 684 (Caballero)—This bill was amended on April 26, 2023 and re-referred to the Appropriations Committee. 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 previously authorized a local body to extend certain expiration dates. It has been amended to require a local agency to ministerially approve, without discretionary review or a hearing, a parcel map or a tentative and final map for a housing development project that consist of ten or fewer single-family residential units, meet certain minimum density requirements, and be located on a lot zoned for multifamily or single-family residential development that is no larger than five acres and is substantially surrounded by qualified urban uses. The bill would also require a local agency to issue a building permit for a subdivision if, among other requirements, the applicant received a tentative map approval or parcel map approval for the subdivision pursuant to the bill's provisions described above.

Accessory Dwelling Units

•AB 932 (Ting)—This bill was amended on March 30, 2023 and is currently with the Appropriations Committee for a future hearing. Current law establishes the Accessory Dwelling Unit Program, which assists homeowners in qualifying for loans to construct ADUs and JADUs, among other purposes. CalHFA is required to, and has convened a working group to develop recommendations for the purposes of the ADU Program. This bill would require that the working group report its recommendations to the Legislature by April 1, 2024 and that CALHFA conduct an evaluation of the program and shall report its findings to the Legislature by no later than January 1, 2025

•AB 671 (Ward)—This bill was amended on April 13, 2023. 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. This bill was not substantively changed would continue to provide that neither the CalHome Program nor any administrative rule or guideline implementing the CalHome Program precludes a community land trust, as defined, that is a recipient of program from using CalHome Program funds to purchase residential real property in fee simple, to construct accessory dwelling units or junior accessory dwelling units on the property, and to separately lease or convey each dwelling unit on the property to separate households. households or separately convey the dwelling units on separate parcels created pursuant to specified law.

•AB 1661 (Bonta)—This bill has not been amended and is currently in the Committee on Utilities & Electricity. 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 continue to 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)—This bill has not been amended and is in Committee for third reading. 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, making permanent the existing prohibition on local government's ability to require owner-occupancy on a parcel containing an ADU.

Affordable Housing

•AB 1490 (Lee)—This bill was amended on April 19, 2023 and re-referred to the Committee on Appropriations. 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, and current law also establishes various streamlined, ministerial review processes for housing development proposals meetings specified standards.The bill would require a local government to approve a development proposal for a multifamily housing development project that is an adaptive reuse project and that meets specified affordability and site requirements, including that 100 percent of the units be made available for lower income households, 50 percent of which shall be made available to very low income households, pursuant to a streamlined, ministerial review process. The bill would declare a project meeting these requirements to be a use by right. The bill would require a project approved by a local government pursuant to this ministerial review process to meet specified labor standards and would prohibit a local government from imposing certain requirements on the project, including a maximum density requirement or floor area ratio requirement.

•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)—This bill was amended April 17, 2023 and re-referred to the Committee on Governance & Finance. 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 prohibits a city from applying any development standard that will have the effect of physically precluding the construction of a development meeting specified criteria at the densities or with the concessions or incentives permitted by the Density Bonus Law. Existing law defines "development standard" as including a site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, a minimum lot area per unit requirement, or a parking ratio that applies to a residential development pursuant to any ordinance, General Plan element, Specific Plan, charter, or other local condition, law, policy, resolution, or regulation.

This bill was amended to specify that "development standard" for these purposes includes these standards adopted by the local government or enacted by the local government's electorate exercising its local initiative or referendum power, whether that power is derived from the California Constitution, statute, or the charter or ordinances of the local government.

•AB 637 (Low)—This bill was amended on March 20, 2023 and is in the Committee for Housing & Community Development. 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, and prohibits a city or county from applying a development standard that would physically preclude construction otherwise authorized by Density Bonus Law and authorizes a developer to submit a proposal to waive a development standard that would do so. Existing law specifies those provisions do not require the waiver or reduction of development standards that would have an 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. This bill was amended to except from the requirement that a city or county to grant a proposal an incentive or concession a waiver or reduction of development standards that would have alter the requirements of a local program, policy, or ordinance that requires, as a condition of the development of residential units, that the development include a certain percentage of residential units that meet specified affordability requirements.

•AB 1287 (Alvarez)—This bill was last amended on April 26, 2023 and re-referred to the Committee on Appropriations. 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. This bill would require a city, county, or city and county to grant an additional density bonus, calculated as specified, when: (1) an applicant proposes to construct a housing development that conforms to specified requirements, (2) the applicant agrees to include additional units affordable to very low income households or moderate income households, as specified, and (3) the housing development provides 24 percent of the base density units to lower income households, conforms to specified requirements and provides 15 percent of the base density units to very low income households, or conforms to specified requirements and provides 44 percent of the total units to moderate-income units. The bill would require a city, county, or city and county to grant four incentives or concessions for a project that includes at least 16 percent of the units for very low-income households or at least 4five percent for persons and families of moderate income in a development in which the units are for sale. The bill would increase the incentives or concessions for a project in which 100 percent of all units are for lower income households, as specified, from four to five.

• AB 323 (Holden)—This bill was amended April 12, 2023 and re-referred to the Committee on Appropriations. Current law requires the developer and the city or county to ensure that: (1) a for-sale unit that qualified the developer for the award of the density bonus is initially occupied by a person or family of the required income, offered at an affordable housing cost, as defined, and includes an equity sharing agreement, as specified, or (2) a qualified nonprofit housing organization that is receiving the above-described welfare exemption purchases the unit pursuant to a specified recorded contract that includes an affordability restriction, an equity sharing agreement, as specified, and a repurchase option that requires a subsequent purchaser that desires to sell or convey the property to first offer the nonprofit corporation the opportunity to repurchase the property. This amended bill would instead require the developer and the city or county to ensure that: (1) the for-sale unit that qualified the developer for the award of the density bonus is to be initially sold to and occupied by a person or family of the required income, (2) the qualified nonprofit housing organization that is receiving the above-described welfare exemption to meet meets specified requirements, including having a determination letter from the Internal Revenue Service affirming its tax-exempt status, as specified, being based in California, and the primary activity of the nonprofit corporation being the development and preservation of affordable home ownership housing in California that incorporates within their contracts for initial purchase a repurchase option that requires a subsequent purchaser that desires to sell or convey the property to first offer the nonprofit corporation the opportunity to repurchase the property pursuant to an equity sharing agreement or a specified recorded contract that includes an affordability restriction. restriction, or (3) the city, county, and city and county has sent a list of buyers who are eligible to purchase the unit to the developer starting at the time the building permit is issued until 90 days after the certificate of occupancy or final inspection is issued or completed for that unit. By imposing these requirements on local agencies with respect to density bonuses, this bill would impose a state-mandated local program. This amended bill would also prohibit a developer from offering a unit constructed pursuant to a local inclusionary zoning ordinance that is intended for owner-occupancy to a purchaser that intends to rent the unit to families of extremely low, very low, low-, and moderate-income families, 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. eligibility, except as specified. The bill would specify that every unit offered in a manner inconsistent with this requirement is a violation and is subject to a civil penalty of not more than $15,000. The amended bill would authorize the civil penalty to be assessed and recovered in a civil action brought in the name of the people of the State of California by the county counsel or city attorney for the jurisdiction in which the violation occurred in a court of competent jurisdiction. The amended bill would also require a city, county, city and county, or local public housing authority that administers the local inclusionary zoning ordinance to send a list of buyers who are eligible to purchase the unit to the developer starting at the time the building permit is issued until 90 days after the certificate of occupancy or final inspection is issued or completed for that unit.

Planning and Zoning

• AB 529 (Gabriel)—This bill was amended March 30, 2023 and re-referred to the Committee on Appropriations. Existing law, for award cycles com-

menced 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 pro-housing based upon their adoption of pro-housing 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 facilitation of the conversion or redevelopment of commercial properties into housing, as specified, including the adoption of adaptive reuse, as defined, ordinances or other mechanisms that reduce barriers for these conversions, to the list of specified pro-housing local policies.

•SB 736 (Mcguire)—This bill has not been amended and was ordered to Consent Calendar. 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 post-entitlement phase permit is complete and compliant, and whether to approve or deny an application, as specified. Current law requires a local agency, if a post-entitlement 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)—This bill was amended on March 30, 2023 and re-referred to the Appropriations Committee. 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 amended bill would prohibit a public agency, as defined, from imposing a new increasing the minimum parking requirement on that applies to a single-family residence as a condition of approval of a project to remodel, renovate, or add to a single-family residence, except as specified. By imposing additional duties on local officials, the bill would impose a state-mandated local program.

•AB 821 (Grayson)—This bill was amended on April 11, 2023 and re-referred to the Committee on Appropriations. 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 and authorizes any resident or property owner to bring an action or proceeding in the superior court to enforce compliance with these provisions within 90 days of the enactment of any new zoning ordinance or the amendment of any existing zoning ordinance. This amended bill would additionally authorize any resident or property owner to bring an action or proceeding in the superior court to enforce compliance with these provisions within 90 days of the failure of a local agency to amend a zoning ordinance within a reasonable time of the zoning ordinance becoming inconsistent with the General Plan due to amendment to the plan or to any element of the plan. This amended bill, in the event that a zoning ordinance becomes inconsistent with a General Plan due to amendment and a local agency receives a development application that is consistent with the General Plan but is inconsistent with a zoning ordinance, as specified, would require the local agency to either amend the zoning ordinance within 90 days to be consistent with the General Plan, or to process the development application, as provided. If a local agency does not amend the zoning ordinance within 90 days, the bill would require the local agency to process the development application. The amended bill would also provide that a proposed development is not deemed inconsistent with any zoning ordinance or related zoning standard or criteria, and is not required to be rezoned to accommodate the proposed development, if there is substantial evidence that would allow a reasonable person to conclude that the proposed development is consistent with objective General Plan standards and criteria but the zoning for the project site is inconsistent

with the General Plan. The amended bill would authorize any resident or property owner to bring an action or proceeding in the superior court to enforce compliance with these provisions within 90 days.

•AB 894 (Friedman)—This bill was amended April 20, 2023 and re-referred to the Committee on Appropriations. Current law also authorizes the legislative body of a city or a county to adopt ordinances establishing requirements for parking. The amended bill would require a public agency to allow parking spaces identified in shared parking arrangements to be counted agreements 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)—This bill was amended April 13, 2023 and ordered to Consent Calendar. Current 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 post-entitlement phase permits for at least five 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 and establishes time limits for completing reviews regarding whether an application for a post-entitlement 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 require a special district that receives an application from a housing development project for service from a special district or an application from a housing development project for a post-entitlement phase permit, as specified, to provide written notice to the applicant of next steps in the review process, including, but not limited to, any additional information that may be required to begin to review the application for service approval. The bill would require the special district to provide this notice within 30 business days of receipt of the application for a housing development with 25 units or fewer, and within 60 business days for a housing development with 26 units or more. The bill would define various terms for these purposes.

•AB 1114 (Haney)—This bill was amended April 13, 2023 and was ordered to Consent Calendar. The amendments were non-substantive. 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. Current law establishes time limits for completing reviews regarding whether an application for a post-entitlement 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 post-entitlement phase permits to be applied for, completed, and retrieved by the applicant on its internet website, and accept applications for post-entitlement phase permits and any related documentation by electronic mail until that process has been established. This bill would continue to 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. The bills also continues to require a local agency to return an approved permit application on each post-entitlement phase permit requested for a housing development project, if the local agency determines that the complete application is compliant with the permit standards. The bill would prohibit a local agency from subjecting the post-entitlement phase permit to any appeals or additional hearing requirements once the local agency determines that the post-entitlement permit is compliant with applicable permit standards, as specified.

•AB 1630 (Garcia)—This bill was amended on March 21, 2023 and re-referred to the Committee on Housing & Community Development. The amended bill would enact The Student Housing Crisis Act of 2023. The amended bill would require a city, county, or city and county to classify student and faculty and staff housing as a permitted use on all real property within 12 mile 1,000 feet of a university campus, as defined, for zoning purposes. The amended bill would require a proposed student or faculty and staff housing project, as defined, to be considered ministerially, without discretionary review or a hearing, if specified requirements are met, including that a minimum of 20 percent of the units in the project be rented by students or faculty and staff of the university. The amended bill would prohibit a local agency from imposing or enforcing on a student or faculty and staff housing project subject to ministerial consideration certain restrictions, including a minimum automobile parking requirement. The amended bill would require student or faculty and staff housing to have certain recorded deed restrictions, except as provided, that ensure for at least 55 years that, among other things, at least 20 percent of the units are affordable to lower income households, as defined, except as provided. 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. The bill would require a proponent of a student or faculty and staff housing project subject to ministerial consideration to require in contracts with construction contracts and certify to the local government that certain standards will be met in project construction, including that a student or faculty and staff housing project that is not in its entirety a public work, as defined, shall be subject to certain requirements, including to pay all construction workers employed in the executing of the student or faculty and staff housing project at least the general prevailing rate of per diem wages for the type of work and geographic area, as specified.

•AB 1532 (Haney)—This bill has not been amended and was referred to the Committee on Housing & Community Development and Committee on Natural Resources. This bill would continue 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)—This bill has not been amended and was referred to the Committee on Governance & Finance and the Committee on Housing. 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 three to seven units, or less than 1.25 on a housing development project that consists of eight to ten 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.

•SB 450 (Atkins)—This bill was amended and re-referred to the Committee on Appropriations. Substantive changes were made.

With respect to the Housing Accountability Act, this amended bill would remove the requirement that a proposed housing development does not allow for the demolition of more than 25 percent of the existing exterior structural walls to be considered ministerially. The amended bill would prohibit a local agency from imposing objective zoning standards, objective subdivision standards, and objective design standards

that do not apply uniformly to development within the underlying zone. This amended bill would also remove the authorization for a local agency to deny a proposed housing development if the building official makes a written finding that the proposed housing development project would have a specific, adverse impact upon the physical environment. The amended bill would also require the local agency to consider and approve or deny the proposed housing development application within 60 days from the date the local agency receives the completed application, and would deem the application approved after that time. If the local agency denies an application, it must provide a full set of comments to the applicant with a list of items that are defective or deficient and a description of how the application can be remedied by the applicant.

With respect to the Subdivision Map Act, this amended bill would specify that objective zoning standards, objective subdivision standards, and objective design standards imposed by a local agency must be related to the design or improvements of a parcel. This amended bill would remove the authorization for a local agency to deny a proposed housing development if the building official makes a written finding that the proposed housing development project would have a specific, adverse impact upon the physical environment. The amended bill would also require the local agency to consider and approve or deny the proposed housing development application within 60 days from the date the local agency receives the completed application, and would deem the application approved after that time. If the local agency denies an application, it must provide a full set of comments to the applicant with a list of items that are defective or deficient and a description of how the application can be remedied by the applicant.

With respect to Planning and Zoning Law, this amended bill add the proposed housing development and urban lot split provisions to the list of statutes the department is required to notify a city, county, or city and county of when reviewing a housing element or amendment.

California Environmental Quality Act

•AB 1700 (Hoover)—This bill has not been amended. 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)—This bill has not been amended. 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)—This bill was amended on April 17, 2023 and was ordered to Consent Calendar. Under the California Environmental Quality Act (CEQA), current law 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 to January 1, 2029. The amended bill would also require the lead agency to file a notice with the Office of Planning and Research and the county clerk of the county in which the project is located if the lead agency determines that

it is not required to evaluate the aesthetic effects of a project and determines to approve or carry out that project.

•AB 978 (Patterson)—This bill was amended on April 4, 2023 and was re-referred to the Committee on Natural Resources. This bill 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 $1,000,000 (prior to amendment, $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 adjust (no longer waive, included prior to amendment) this bond requirement upon a finding of good cause to believe that the requirement does not further the interest of justice.

•AB 1633 (Ting)—This bill was last amended on April 27, 2023. 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 amended bill would continue to 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. This amended bill also contains other related provisions and other makes other non-substantive changes to the law.

•SB 91 (Umberg)—This bill has not been amended and has been set for hearing. 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 continues to extend indefinitely the above exemption.
(Melissa Crosthwaite)

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