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FEATURE ARTICLE

CALIFORNIA'S FIRST DISTRICT COURT OF APPEAL AFFIRMS REMAND JUDGMENT THAT INCLUDES HOUSING ACCOUNTABILITY ACT REMEDIES SOUGHT BUT NOT CONSIDERED BY PRIOR COURT OF APPEAL DECISION

By Boyd Hill

The First District Court of Appeal in *Ruegg & Ellsworth v. City of Berkeley* upheld the trial court's judgment on remand, which judgment added Housing Accountability Act (HAA) remedies on remand that were not previously addressed by the prior Court of Appeal opinion in this case addressing issues under California Senate Bill 35 (SB 35). [*Ruegg & Ellsworth v. City of Berkeley*, ___Cal.App.5th___, Case No. A164749 (1st Dist. Mar. 14, 2023).

Factual and Procedural Background

The statutes at issue in this case are among the measures the California Legislature has adopted over the years in efforts to address the crisis of insufficient housing and, in particular, affordable housing.

SB 35, Affordable Housing: Streamlined Approval Process, was signed by Governor Jerry Brown on September 27, 2017, and became effective on January 1, 2018 as Government Code § 65913.4. SB 35 specifically allows a development proponent to submit an application for a streamlined, ministerial (no public hearing) approval process for an urban multi-family housing development when the proposed development is eligible and meets specific objective standards.

The HAA prohibits local agencies from disapproving a housing development project for very low, low- or moderate-income households without making specified written findings.

In 2018, the City of Berkeley (City) denied an application by Ruegg & Ellsworth and Frank Spenger Company (Ruegg) for ministerial approval of a mixed-use development pursuant to SB 35. Ruegg challenged the denial with a petition for writ of mandate, alleging that it violated both SB 35 and the HAA.

The trial court found the City did not err in determining it was not required to approve the proposed project under SB 35 and denied Ruegg's petition for writ of mandate on that basis, without reaching the HAA issues.

Earlier Court of Appeal Decision

In 2021, the Court of Appeal reversed and directed the trial court to grant the writ petition. (*Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277 (*Ruegg I*). The prior opinion stated:

> Our conclusion that the City's denial of appellants' application for ministerial approval failed to comply with section 65913.4 makes it unnecessary for us to address [appellant's] additional contention that the City's denial violated the HAA.

On remand, Ruegg argued that in addition to granting the writ requiring the City to issue the SB 35 permit, the trial court should decide the outstanding HAA issues. The City argued the court lacked jurisdiction to do so because deciding these issues would exceed remand directions.

After briefing and a hearing, the trial court concluded that it should determine the as yet undecided HAA issues. The court reasoned that it could not avoid ruling on these issues because they had been briefed, had not been waived, and had not been determined by anybody, but rather fell by the wayside because of the denial as to the SB 35 claim.

Accordingly, the court believed it would "most closely comply with the court of appeal's instructions" by issuing a writ of mandate on the first cause of action (violation of SB 35) and bifurcating the remainder of the causes of action (violation of the HAA, injunctive relief, declaratory relief) for determination on the existing record.

Thus, the trial court granted the writ petition with respect to the first cause of action and ordered issuance of a peremptory writ commanding the City to issue the permits required by section 65913.4 and to file a return to the writ within 30 days. Its order further concluded that it had jurisdiction, and was obligated, to address the merits of the remaining causes of action and set a briefing schedule and hearing date. The writ issued the same day.

The City rescinded its denial of Ruegg's permit application and, on December 8, 2021, issued the permit and filed its return to the writ in the trial court.

The trial court hearing on the merits of the HAA claims then took place, and the court concluded that the City's denial of the sb 35 permit application violated the HAA. The court found that the City's disapproval of the project application violated the HAA; found the necessary action for compliance was for the City to grant the permit and otherwise comply with the November 2021 order and writ of mandate; and stated it was exercising continuing jurisdiction to determine whether to order further remedies pursuant to section 65589.5, subdivisions (k) and (l), or other applicable law, if the City did not comply with the court's writ and orders. The City appealed.

The sole issue on this appeal is whether the trial court exceeded the scope of our remand instructions in. In that prior appeal, we reversed the trial court's denial of a petition for writ of mandate by which developers sought to compel the City of Berkeley (City) to grant a permit they had applied for pursuant to Government Code1 § 65913.4, which provides for streamlined approval of certain affordable housing projects. Holding that denial of the permit violated § 65913.4, we remanded the case with directions for the trial court to grant the writ petition.

On remand, in addition to granting the writ petition, the trial court found that denial of the permit application violated the Housing Accountability Act (HAA) (§ 65589.5) as well as § 65913.4. The developers' writ petition had alleged violation of both statutes, but the trial court did not address the HAA issues in its first judgment and we found it unnecessary to address them in our *Ruegg I* opinion.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's judgment under *de novo* review, concluding as a matter of law that the trial court had jurisdiction to entertain and decide the HAA issues.

Limitations of Trial Court Jurisdiction on Remand

A reviewing court has authority to affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. (Code Civ. Proc., § 43.) The order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void.

The Judgment Properly Decides the Entire Relief Under the Petition

The City cited to several cases in support of its argument that the trial court went beyond the remand order. All those cases involved obvious departures from remand instructions: introduction of a new theory of recovery, not previously presented to the trial or appellate court, by the party against whom the appellate court ordered judgment to be entered; reconsideration of a prior trial court order so as to allow a trial when the remand instructions called for entry of a default judgment; request for an evidentiary hearing on changed circumstances after the appellate court ordered specific injunctive relief; re-litigation of the entire case on a remand for retrial solely on specified damages issues

Here, the trial court did, as directed in *Ruegg I*: It issued the writ of mandate compelling issuance of the permit required under SB 35. The City took too narrow a position in arguing that it was not necessary to decide the HAA issues because, pursuant to the remand instructions, the City would have to, and did, issue a SB 35. While the trial court did not need to decide the HAA issues in order to compel the City to issue a permit under SB 35, deciding those issues was

necessary to fully resolve whether Ruegg was entitled to the relief sought by its petition—that is, the extent of the relief afforded by granting the writ petition.

The Remand Order Did Not Prevent Consideration of HAA Claims

Contrary to the City's characterization, *Ruegg I* did not hold that "further litigation of the HAA claims is not necessary" or that "consideration of the HAA claims is unnecessary to the outcome." *Ruegg I* said it was "unnecessary for us to address" the HAA claims. There is nothing unusual about an appellate court declining to resolve in the first instance issues that a trial court's initial erroneous ruling made it unnecessary for the trial court to address. *Ruegg I* resolved the merits of the § 65913.4 issues upon which the trial court based its decision to deny Ruegg's writ petition and left the undecided HAA issues undecided.

Had *Ruegg I* simply reversed the trial court's judgment, all issues in the case would have been subject to relitigation. This principle is equally applicable to a partial reversal of a judgment.

Accordingly, once the trial court found that the City violated the HAA, it modified its judgment to include that it was "exercis[ing] continuing jurisdiction to determine whether to order further remedies pursuant to Gov. Code § 65589.5, subds. (k) and (l), or other applicable law, if the City were not to comply" with the court's writ and orders, and that Ruegg "may seek such post-judgment relief as may be available for a violation of the HAA as well as for a violation of SB 35."

Conclusion and Implications

This opinion by the First District Court of Appeal helps clarify that, upon reversal of a narrow decision denying administrative writ relief, all remedies sought that are not expressly disallowed may be back on the table. Indeed, the Housing Accountability Act remedies are intended to be broad and applicable to enforce compliance with the State's panoply of affordable housing statutes. Developers would do well to include HAA claims where applicable in challenges to housing development denials and to continue to press those claims throughout the appellate and remand process. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A164045.PDF.

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REGULATORY DEVELOPMENTS

DEPARTMENT OF WATER RESOURCES APPROVES 12 GROUNDWATER SUSTAINABILITY PLANS FOR NON-CRITICALLY OVERDRAFTED BASINS

On April 27, 2023, the California Department of Water Resources (DWR) announced its approval of the Groundwater Sustainability Plans (GSPs) for 12 non-critically overdrafted groundwater basins under the Sustainable Groundwater Management Act (SGMA). With this announcement, DWR has now issued GSP determinations for 36 out of the 94 medium- or high-priority groundwater basins in the state. Of that total, the GSPs for six basins have been deemed "inadequate" and are now subject to pending intervention by the State Water Resources Control Board (State Water Board), while the plans for eight more basins are presently considered "incomplete." As with the previously approved GSPs, DWR's latest approvals include recommended corrective actions for the Groundwater Sustainability Agencies (GSAs) to consider implementing before the first five-year review.

Background

The California Legislature enacted SGMA in 2014 to achieve long-term sustainability of the state's groundwater basins by requiring that each medium- and high-priority basin be managed pursuant to an adopted and approved GSP or alternative plan that maps out how the basin can reach its sustainability goals and avoid undesirable results such as critical overdraft and subsidence. GSAs are special entities formed to develop and adopt GSPs or alternative plans. The GSPs for critically overdrafted basins and non-critically overdrafted basins were due to DWR by January 31, 2020 and January 31, 2022, respectively. In addition to its GSP determinations for 36 basins, DWR has approved alternative management plans for nine others.

Within two years of a GSP submittal, DWR is charged with evaluating compliance with the statutory and regulatory requirements of SGMA, and determining whether implementation of the GSP is likely to achieve the identified sustainability goals for that basin. DWR's GSP review can result in one of three potential determinations: (1) approved with recommended corrective actions; (2) incomplete with required corrective actions; or (3) inadequate.

When DWR approves a GSP, it has found a reasonable likelihood that groundwater sustainability can be achieved for that basin within the prescribed 20-year horizon. Where a particular GSP could benefit from additional details or minor improvements, DWR will propose corrective actions to be taken within the following five years. The GSA may proceed with further implementation of its GSP upon approval.

A GSP may be deemed incomplete if it is missing information that DWR needs to conduct its review or to find that sustainability of the basin can be achieved within 20 years. Prior to an incomplete determination, DWR will notify the GSA of the identified deficiencies with an opportunity to cure. An incomplete determination will prompt the GSA to go back and submit a revised plan within 180 days. If problems persist or the GSA does not resubmit, then the GSP may be reclassified as inadequate. Earlier this year, DWR issued "incomplete" determinations for GSPs in the Westside, Paso Robles Area, Merced, Kings, Eastern San Joaquin, Cuyama Valley, and Madera groundwater basins.

DWR will find a GSP inadequate if it finds significant omissions or deficiencies that will take the GSA more than 180 days to correct. An inadequate determination acts as a referral to the State Water Board, which may then notice a public hearing to consider designating the basin as probationary and intervening with an interim plan. In March of 2023, DWR issued "inadequate" determinations for six critically overdrafted basins, including the Kern County, Tule, Tulare Lake, Kaweah, Delta-Mendota, and Chowchilla basins. The State Water Board has not yet issued a notice of hearing for the inadequate GSPs.

Approval of 'Single Plan' GSPs

DWR's latest approval covers 12 "single plan" GSPs that comprehensively manage the following basins or subbasins: San Jacinto; Upper Ventura River; Santa Margarita; San Luis Obispo Valley; Monterey; Langley Area; Upper Valley Aquifer; Forebay Aquifer; East Side Aquifer; Shasta Valley; Scott River Valley; and Big Valley.

Each approval includes a statement of findings and an attached staff report recommending approval and corrective actions. For the 12 approved basins, DWR finds that each GSP is complete, was prepared and submitted in compliance with the Water Code and SGMA regulations, and accounts for management of the entire basin. Sustainability goals and undesirable results have been reasonably formulated using appropriate thresholds and criteria, and the proposed projects and management actions are commensurate with the level of understanding of basin conditions. In each instance, DWR concludes its findings that the GSP is acceptable and DWR adopts the recommendations in its staff report.

The corrective actions DWR recommends differ slightly among the GSPs, but generally include suggested revisions of certain terms and definitions relating to sustainability metrics, the collection of additional information from well surveys and pumping meters, and refinements of how GSAs will investigate and enforce compliance with applicable management criteria. SGMA requires GSAs to evaluate their GSPs and submit written assessments to DWR every five years, by which point they are strongly encouraged to incorporate all suggested corrective actions.

DWR wrote in their news release on this topic that they were "impressed with the effort that local agencies have put into their groundwater sustainability plans." Highlighting the diligence of the local agencies in implementing their plans, DWR expressed optimism about the local agencies' ability to act proactively and to continue adapting and updating as necessary to face changing circumstances brought on by climate change and drought. More recently, DWR also released its determination for the Cuyama Valley basin's groundwater sustainability plan on May 25, recommending it for approval.

Out of the 94 total groundwater basins that were required to submit plans under SGMA, DWR has now provided determinations for 37 basins with 31 of those basins recommended for approval. According to DWR's online SGMA Portal, review is currently in progress for the groundwater sustainability plans for the Cosumnes, South American, and North American basins. As for the rest, DWR anticipates issuing determinations for the remaining basins throughout 2023.

Conclusion and Implications

With the 10th Anniversary of SGMA's passage fast approaching, DWR is continuing to make progress on the onerous task of reviewing and providing determinations for each and every groundwater sustainability plan across the state.. About a third of all groundwater basins have had their sustainability plans so far and as the summer months move along the real question will be whether DWR can keep pace and finish the task at hand by the year's end. 63 basins are still awaiting approval from DWR, and with just over six months until 2024, DWR staff will no doubt have their work cut out for them.

Following DWR's approval, GSAs are free to proceed with the funding and implementation of the projects and management actions contemplated in their plans. GSPs will need to be updated as new data and information become available, or as physical conditions change over time. DWR will review annual progress reports and five-year plan updates to monitor continued compliance with SGMA and its regulations. As noted on DWR's SGMA website portal, determinations for the GSPs in 47 additional basins are forthcoming in 2023.

The SGMA portal with an up to date list of DWR's GSP evaluations is available at: https://sgma.water.ca.gov/portal/gsp/status.

(Austin C. Cho, Sam Bivins, Wesley Miliband, Kristopher Strouse)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT UPENDS CURRENT WETLANDS DETERMINATIONS—*SACKETT V. EPA*

Sackett v EPA, Case No. 21-454, ___U.S.___ (May 25, 2023).

The U.S. Supreme Court has just severely cut back on the reach of the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers' (Corps) jurisdiction under the federal Clean Water Act. In an opinion issued May 25, 2023, the majority opinion upholds contentions of the Sacketts, a couple who were threatened with orders to restore a filled portion of their Idaho residential back yard, which was near a ditch that was not far from, but clearly not part of, an intrastate lake, on the grounds water seeping from their land was allegedly "waters of the United States" (WOTUS).

The Court's Decision

The five-justice majority opinion finds that the EPA's view of wetlands jurisdiction applied to the Sackett property was too expansive. It notes that the Clean Water Act (CWA or Act) prohibits discharges to "navigable waters," which is a term defined by the Act as "waters of the United States." It explains that "waters" has been defined as flowing water, or water moving in waves, as with a river's mighty waters; also: the sea or seas bordering a particular country or continent or located in a particular part of the world. It finds this dictionary meaning hard to reconcile with classifying "lands," wet or otherwise, as "waters."

The majority limits wetlands that may be called "waters of the U.S." (WOTUS) under the Clean Water Act to lands with surficial water connected to waters of the United States (i.e. traditional water bodies). They Court held in specific language as follows:

> In sum, we hold that the CWA extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States." Rapanos, 547 U. S., at 755 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent [body of water constitutes] . . . "water[s] of the United States," (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins." Id., at 742.

'Waters of the United States'

In Justice Samuel Alito's majority opinion, he parses the text of the CWA, with focus on the definition of "waters of the United States" and the fact it expressly includes "navigable waters," which is the traditional phrasing of the waters the Constitution establishes as federal jurisdiction. He takes note of other references by the Congress to the term "waters," and concludes it invariably references traditional surface water bodies that are apparent on the surface, such as rivers and lakes. He also examines the idea put forth in defense of the current definition, which is derived for Justice Kennedy's concurring opinion the *Rapanos* case, that as long as there is scientifically a "significant nexus" with surface waters, the law can extend to wetlands and other situations not visibly connected with the waters on the surface. In Kennedy's *Rapanos* opinion a "significant nexus" between wetlands and navigable waters was asserted to exist where "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of those waters.

The Concurring Opinion[s]

The final judgment of reversal of the Ninth Circuit was unanimous—9-0. However, there is a concurring opinion, written by Justice Kavanaugh and joined by Justices Kagan, Sotomayor, and Jackson that takes exception to some of the majority reasoning. There is

also a concurrence in the judgment only, written by Justice Kagan, concurred in by Sotomayor an Jackson. Justice Kavanaugh takes exception to what his concurrence opinion terms a too limited understanding of the meaning of adjacency of waters when dealing with whether a wetland is "adjacent" to a traditional surface water. The concurrence is limited to the judgement of reversal, and seems to seek to keep open the idea that adjacency does not have to be immediate and physical. Justice Kagan, joined by Sotomayor and Jackson, JJ., emphasizes that she believes Congress reacted to the SWANCC decision in amendments that expand the meaning of adjacency to reach more wetlands.

The majority Alito opinion expresses frank disagreement with the concurrences. It indicates that:

> . . .these arguments are more than unfounded. We have analyzed the statutory language in detail, but the separate opinions pay no attention whatsoever to *[33 U.S.C.]* §1362(7), the key statutory provision that limits the CWA's geographic reach.

That subsection defines "navigable waters" as "the *waters* of the United States, including the territorial seas." The majority opinion claims "Thus, neither separate opinion even attempts to explain how the wetlands included in their interpretation fall within a fair reading of "waters." Textualist arguments that ignore the operative text cannot be taken seriously."

Impacts of the Decision

The *Sackett v EPA* opinion is causing a serious reaction around the country, with states that are fighting the current rule feeling they will most certainly overturn it based on this new Sackett opinion, while environmentalist groups are castigating the Court. Also, in the case of some lands that have been classified under Corps processes as "jurisdictional" and are almost surely no longer be within the Supreme Court definition, owners and developers may perceive renewed opportunity in specific cases.

While there is certain to be hubbub over this decision, and a reaction in some states that are more worried over preservation of wetlands and groundwaters than others is to be expected. A similar phenomenon occurred when, years ago, the Supreme Court said that isolated water bodies, such as the water-filled former quarry in *SWANCC* (*Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers,* 531 U. S. 159, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001)) were not WOTUS. There the Court rejected the migratory bird rule as a proper basis to assert Clean Water Act jurisdiction over several isolated ponds located wholly inside Illinois. Many, but not all, states followed and created a regulatory scheme back in to replace the vacated federal scope.

Conclusion and Implications

As a matter of additional perspective, it seems, arguably, that the Court is consciously making a holding that preserves the traditional separation of scope of jurisdiction between the federal government and the states respecting the waters within a given state that are not expressly "waters of the United States" as defined by the Clean Water Act itself. Justice Alito's opinion basically says just that. In so doing, the majority clearly feels that its judgement is appropriate, given the wording of the CWA itself.
(Harvey Sheldon)

NINTH CIRCUIT HOLDS CITY OF BERKELEY'S NATURAL GAS PIPING INSTALLATION BAN WITHIN NEWLY CONSTRUCTED BUILDINGS IS PREEMPTED BY FEDERAL LAW

California Restaurant Association v. City of Berkeley, 65 F.4th 1045 (9th Cir. 2023)

The City of Berkeley (City) adopted an ordinance prohibiting, with some exceptions, the installation of natural gas piping, from the point of delivery at the gas meter, in newly constructed buildings (Ordinance). The California Restaurant Association (Association) challenged the Ordinance in District Court claiming that it was preempted by the federal Energy Policy and Conservation Act (EPCA), which

expressly preempts state and local regulations concerning the energy use of many natural gas appliances, as well as preempted by state law. The District Court dismissed the EPCA claim, stating that the Ordinance did not directly regulate covered appliances, which was the scope of preemption under the EPCA. The Association appealed and the Ninth Circuit reversed the District Court's judgment after determining that the plain language of the EPCA preempted the Ordinance.

Factual and Procedural Background

In July 2019, the City of Berkeley adopted an ordinance prohibiting, with some exceptions, the installation of natural gas piping, from the point of delivery at the gas meter, in newly constructed buildings. In November 2019, the California Restaurant Association challenged the Ordinance in District Court claiming that it was preempted by the federal Energy Policy and Conservation Act (42 U.S.C § 6297(c)), which expressly preempts state and local regulations concerning the energy use of many natural gas appliances, as well as preempted by state law. After the City moved to dismiss, the U.S. District Court dismissed the EPCA claim, concluding that the EPCA preempts regulations that facially or directly regulate covered natural gas appliances and because the Ordinance does not facially or directly regulate covered appliances the EPCA does not preempt the Ordinance. The District Court then declined to exercise supplemental jurisdiction and dismissed the state-law preemption claim. The Association's appeal followed.

The Ninth Circuit's Decision

On appeal, the Association challenged the District Court's decision that the Ordinance was not preempted by the EPCA, arguing that the Ordinance was preempted by the EPCA because EPCA preemption extends to any regulations that effectively ban covered appliances from using available energy sources, such as natural gas, which the Ordinance in fact did. The Ninth Circuit determined, first, that because the EPCA contained an express preemption clause, there was no presumption against preemption and rather the court's focus on the scope of preemption was on the plain language of the EPCA.

By examining the EPCA's text and definitions, such as "energy use," "point of use" and "covered product," the Ninth Circuit determined that the EPCA preempts regulations that impact an end-user's ability to use installed covered appliances at their intended final destinations. Consequently, the Ninth Circuit held that the Ordinance, which prohibited the installation of necessary natural gas infrastructure on premises where covered natural gas appliances were to be used, was preempted by the EPCA.

The Ninth Circuit rejected several arguments to the contrary. It rejected the District Court's interpretation that EPCA preemption only applied to facial or direct regulations of consumer products, as such an interpretation ignores that energy use is based on consumption that happens at a point of use and that accordingly the EPCA preemption extends to regulations that address the products themselves as well as the on-site infrastructure for their *use* of natural gas. Additionally, the Ninth Circuit disagreed with the interpretation of the federal government, as amicus, which interpretation sought to limit preemption to "energy conservation standards" operating directly on covered appliances. The Ninth Circuit held that the federal government's textual analysis was incorrect, as the specific phrase emphasized by the government to support its position—"effective with respect to such product"—merely restricted EPCA's preemption to a regulation's effect on covered appliances, but did not limit its scope to only regulations on covered appliances. The Ninth Circuit also addressed the City's non-textual arguments, dismissing the City's argument that finding preemption would imply the repeal of the federal Natural Gas Act. The Ninth Circuit clarified that the Natural Gas Act's oversight exemption for local gas distribution does not conflict with the EPCA's preemption provision, as they address different aspects. The Ninth Circuit also clarified that its decision did not require the City to make natural gas available everywhere, but rather held that the Ordinance could not ban new building owners from extending natural gas piping within their buildings from the point of delivery at the gas meter.

EPCA's Broad Preemption Provisions

The Ninth Circuit concluded that the EPCA preempts the Ordinance, emphasizing that states and localities cannot skirt the text of broad preemption provisions, such as the EPCA's, by doing indirectly what Congress says they cannot do directly. The EPCA would certainly preempt an ordinance that

directly prohibits the use of covered natural gas appliances in new buildings. Accordingly, the City cannot evade preemption by merely moving up one step in the energy chain and banning natural gas piping within those buildings.

The Ninth Circuit reversed the District Court's judgment and remanded for proceedings consistent with its opinion and directed the District Court to reinstate the Association's state-law preemption claims.

Conclusion and Implications

The Ninth Circuit reversed the District Court's judgment and remanded for proceedings consistent with its opinion and directed the U.S. District Court to reinstate the Association's state-law preemption claims.

The case is significant because it discusses preemption of the EPCA to local natural gas regulations, which may prove an important precedent for local agencies considering bans or restrictions on the use of natural gas. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2023/04/17/21-16278.pdf.
(Eric Cohn, E.J. Schloss)

NINTH CIRCUIT FINDS FAA FAILED TO TAKE REQUISITE 'HARD LOOK" UNDER NEPA AT NOISE IMPACTS FROM AIRPORT TERMINAL REPLACEMENT PROJECT

City of Los Angeles v. Federal Aviation Administration, ___F.4th___, Case No. 21-71170 (9th Cir. Mar. 29, 2023).

In *City of Los Angeles v. Federal Aviation Administration* the U.S. Court of Appeals for the Ninth Circuit panel (Panel), in a split 2-1 decision, held that the Federal Aviation Administration (FAA) did not comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-11 (1969), when it failed to adequately analyze simultaneous noise impacts that would accompany construction of the proposed replacement terminal for the Bob Hope "Hollywood Burbank" Airport (Project). In all other respects, the Panel agreed that the FAA's environmental review of the Project, including the agency's analysis of a reasonable range of alternatives, was adequate.

Project Background

The existing terminal at the Bob Hope "Hollywood Burbank" Airport (Airport) has been out of compliance with FAA standards for airport operations since 1980. While the FAA has determined that the existing terminal is safe to use, the Burbank Pasadena Airport Authority (Authority), who owns and operates the Airport under a Joint Powers Agreement between the cities of Burbank, Glendale, and Pasadena, has been working with the FAA to replace the terminal since 1981. Although approximately 20 percent of the Airport is within the City of Los Angeles (City), the Authority does not represent the City.

In 2015, the City of Burbank (Burbank) and the Authority entered into an agreement to build a new 14-gate terminal that was not to exceed 355,000 square feet, and Burbank residents approved the Project via ballot measure (Measure B). The Authority submitted an Airport Layout Plan for the Project to the FAA, who then prepared an Environmental Impact Statement (EIS), conducted public hearings, and took comments on the Project pursuant to NEPA's procedural requirements. The FAA issued a final EIS (FEIS) and approved the Project in a Record of Decision (ROD) in 2021, and the City filed a petition for review challenging the adequacy of the ROD directly with the Ninth Circuit, who has exclusive jurisdiction over these types of FAA actions.

The Ninth Circuit's Decision

NEPA Project Alternatives Analysis

On review, the City argued, among other things, that the FAA failed to include a detailed statement of alternatives to the Project, and that the FAA improperly eliminated viable alternatives due to conditions imposed on the Project by Measure B. Employing the

"rule of reason" standard, which only finds an abuse of discretion in violation of NEPA where the record plainly demonstrates that the agency made a clear error in judgment, the Ninth Circuit determined that the FAA employed a reasonable range of alternatives in the FEIS. In making this determination, the court found that the FAA acted reasonably in taking pertinent safety regulations and the Authority's goals into account when crafting the purpose and need statement for the Project. This reasonable purpose and need statement was then, in turn, used to eliminate a number of project alternatives from in-depth review. In response to the City's contention that the FAA impermissibly used the constraints found in Measure B to rule out potentially viable alternatives, the court found that the FAA properly cited technical and economic reasons for culling these alternatives from in-depth review. Given these independent justifications, and the City's inability to identify a viable alternative that was not considered, the court held that the FAA did not violate NEPA in consideration of a reasonable range of alternatives. Further, the court also determined that the FAA did not make an irreversible commitment to the Project by including Measure B requirements in its screening criteria as the agency could have chosen the "no action" alternative after reviewing the Project's environmental impacts.

Project Noise Impacts

NEPA requires federal agencies to consider every significant aspect of the environmental impacts of a project, and, to accomplish this objective, imposes procedural requirements forcing agencies to take a "hard look" at the environmental consequences. Although courts defer to agency decisions, the hard look requirement is not satisfied when an agency relies on "incorrect assumptions or data in an EIS."

Here, the City argued that the FAA failed to take the requisite hard look at the Project's noise impacts because its analysis rested on the "unsupported and irrational assumption" that construction equipment would not be operated simultaneously. While the FAA did conduct an analysis of construction noise, the majority of the Ninth Circuit panel agreed with the City and held that the FAA's failure to account for increased noise levels from multiple pieces of equipment running at the same time was a "fundamental error" that rendered the EIS's environmental and cumulative impacts analysis inadequate.

In response to the dissenting opinion's contentions that the majority relied on an argument that was not raised before the agency and failed to defer to the FAA's reasonable assumptions, the majority noted that the City did, in fact, raise the construction noise issues before the FAA. Further, the majority found that, even if the comment letters were inadequate, the FAA bore the responsibility of complying with NEPA's standards. Given that the FAA's own reference materials instructed it to add sounds from multiple sources together, the majority held that the flaws in the agency's noise analysis were "so obvious" that the FAA had to address them, regardless of the alleged inadequacy of public comments. Accordingly, the majority remanded to the FAA to address the deficiencies in its noise analysis along with the resulting deficiencies in its analysis of environmental and cumulative impacts from construction noise.

Conclusion and Implications

As the dissent in this case noted, courts generally give agencies a great degree of deference when it comes to the adequacy of their environmental analysis under NEPA. But this decision may indicate that there is some disagreement, at least among the judges within the Ninth Circuit Court of Appeals, regarding the scope of deference that agencies receive regarding "reasonable assumptions" that they rely on in making environmental impact determinations. Therefore, agencies within the jurisdiction of the Ninth Circuit may in the future wish to conduct a more searching review when considering the adequacy of the assumptions made in their environmental documents, and ensure that they minimize or address any inconsistency of such assumptions with the agencies' own guidance documents and reference materials. The Ninth Circuit's panel opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2023/03/29/21-71170.pdf.
(Dustin Peterson, Hina Gupta)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT FINDS REIMBURSEMENT AGREEMENTS BETWEEN CITY AND FORMER REDEVELOPMENT AGENCY WERE 'ENFORCEABLE OBLIGATIONS' SURVIVING DISSOLUTION LAWS

City of Chula Vista v. Stephenshaw,
___Cal.App.5th___, Case No. C094237 (3rd Dist. Apr. 14, 2023, *Modified* May 10, 2023).

In a decision initially filed on April 14, 2023, and modified after denial of rehearing on May 10, 2023, the Third District Court of Appeal overturned a trial court decision finding that certain reimbursement agreements between the City of Chula Vista (City) and its former redevelopment agency were not "enforceable obligations" under redevelopment dissolution laws. Health and Safety Code § 34171 (d)(2) generally provides that an "enforceable obligation" surviving the dissolution of redevelopment agencies does not include agreements contracts, or arrangements between cities and a former redevelopment agency. However, an exception exists in § 34171(d)(2) for contemporaneous written agreements, entered (A) at the time of issuance, but not later than December 31, 2010, of the indebtedness obligations, and (B) solely for the purpose of securing or repaying those indebtedness obligations. This exception applied here. Here, the reimbursement agreements in question were not unenforceable "illusory" promises simply because reimbursement payments were contingent on future tax increment revenues.

Factual and Procedural Background

In 2011 legislation dissolved California's redevelopment agencies and established a process to wind down their affairs. As part of this process, local agencies appointed successor agencies to oversee former redevelopment agencies' "enforceable obligations" under redevelopment distribution laws.

To obtain funds to make payments required by enforceable obligations, a successor agency is required to periodically prepare "recognized obligation payment schedules" (ROPs) setting forth the minimum payment amounts for each enforceable obligation and identify one or more sources of payment, and submit the ROPs to an oversight board for approval. After the oversight board's approval, the successor agency must submit the ROPs to the state Department of Finance (Department) for approval. The Department then makes a determination regarding the enforceable obligations and the amounts and funding sources of the enforceable obligations.

The City challenged the Department's determination that certain items listed in the redevelopment agency's ROPs were not "enforceable obligations" under the dissolution law.

In particular, the city's challenge related to a lease financing structure for redevelopment projects where the City would lease an asset that it owned to a finance entity, which would lease the asset back to the City through a sublease. The finance entity would then sell fractional interests in the sublease payments, called "certificates of participation" to investors. The funds from the sale of the certificates would be used to finance a redevelopment project. Essentially, the City borrowed funds from investors to finance the redevelopment project, and the redevelopment agency promised to reimburse the City for repaying the investors.

The Department denied funding for ROPs covering the periods from July 1, 2018 to June 30, 2019 and July 1, 2019 to June 30, 2020.

At the Trial Court

Plaintiffs filed a writ petition seeking to compel the Department to approve the disputed ROPs and to compel the auditor-controller to remit sufficient funding to cover those items.

The trial court denied the petition, holding that the underling agreements did not qualify as enforceable obligations. The trial court relied primarily on Health and Safety Code § 34171, subdivision (d)(2), which generally excludes agreements between former redevelopment agencies and their former sponsoring entity (here, the city) from the definition of enforceable obligations.

The trial court did not believe that an exception to this rule applied, which excepts agreements entered into:

> (A) at the time of issuance but in no event later than December 31, 2010, of indebtedness obligations, and (B) solely for the purpose of securing or repaying those indebtedness obligations.

The trial court found that none of the relevant reimbursement agreements met these requirements, either because they were not contemporaneous agreements, or because they were contingent on tax increment revenues being available and thus "illusory".

The Court of Appeal's Decision

The Third District overturned the trial court and held that all but one of relevant reimbursement agreements fell within the exception to the general rule holding that reimbursement agreements between former redevelopment agencies and their former sponsoring entities were not enforceable obligations.

The Department argued that the relevant reimbursement agreements were not enforceable obligations because they were "contingent" on available tax increment revenues and were thus "illusory promises" thus not entered into for the "purpose of securing or repaying a debt."

The court noted that if the state legislature had intended to exclude agreements containing contingent obligations, it presumably would have made this intent explicit in the statute, and it did not do so. Instead:

> . . .the statute requires only that the agreement have been entered into (1) at the time of issuance of the debt (and prior to Dec. 31, 2010); and (2) solely for the purpose of repaying that debt.

Here, the all but one of the agreements in question met both requirements. While it was true that the timing of the Agency's reimbursement obligation was contingent on unplugged tax increment revenues being available, the Department failed to explain why this rendered the repayment obligation illusory. One of the agreements was not entered into at the same time the related debt was issued, and thus did not meet the first requirement above, and thus did not fit within to the relevant exception.

The court rejected plaintiffs related claims that the Department was estopped from denying reimbursement under the reimbursement agreements due to its approval of those items in prior ROPs. Here, the City had not shown the four elements required for the doctrine of estoppel to apply.

Conclusion and Implications

Although the state legislature dissolved the state's redevelopment agencies and the redevelopment law more than ten years ago, the *Chula Vista* decision illustrates the ongoing complexity often involved in determining what obligations, previously binding on redevelopment agencies, are "enforceable" and thus survive dissolution of the redevelopment law. The court's decision is available online: https://www.courts.ca.gov/opinions/documents/C094237.PDF. (Travis Brooks)

FIRST DISTRICT COURT REVERSES GRANTING OF ANTI-SLAPP MOTION BY NAMED REAL PARTY IN INTEREST WHO OBJECTED TO THE PROJECT AND ITS ENVIRONMENTAL REVIEW

Durkin v. City and County of San Francisco, ___Cal.App.5th___, Case No. A163639 (1st Dist. Apr. 14, 2023).

The First District Court of Appeal in *Durkin v. City and County of San Francisco* reversed the trial court's decision that the project opponent (Kaufman), named as a real party in interest in Durkin's writ petition against the City and County of San Francisco (City), was protected by the Anti-SLAPP statute from being named as a real party in interest in the Durkin writ petition challenging the City's decision rejecting the project's proposed negative declaration upon environmental review.

Factual and Procedural Background

In 2017, Durkin filed an application with the City's Planning Department to remodel and expand a single-family home located on Green Street in San Francisco (the project). The Planning Department initially determined that the project was categorically exempt from environmental review under the California Environmental Quality Act (CEQA).

Neighbors of the project requested that the City's Planning Commission exercise its powers of discretionary review and disapprove the project. They also appealed the categorical exemption decision to the Board of Supervisors (Board) claiming the project should not be exempt from CEQA because there was contaminated soil at the location and the project would block light, air, and views to and from Kaufman's neighboring property (the historically significant Coxhead House) and undermine its foundation.

The Board reversed the categorical exemption determination, finding there was substantial evidence that the project may result in substantial adverse impacts to the historic significance of Kaufman's neighboring property that had not been sufficiently addressed in the categorical exemption for the project.

After conducting an initial study of the project and determining that the potential environmental impacts were less than significant, the Planning Department issued a preliminary mitigated negative declaration in June 2019. The preliminary mitigated negative declaration set forth mitigation measures to ensure the security and stability of the project site and adjacent historic resources.

Kaufman appealed the preliminary mitigated negative declaration to the Planning Commission. In 2020, the Planning Commission denied Kaufman's appeal and adopted a final mitigated negative declaration.

Kaufman then appealed the final mitigated negative declaration to the Board. The Board reversed the Planning Commission's decision upholding the final mitigated negative declaration and directed the Planning Department to conduct further study on slope stability and potential impacts to the structural integrity of Kaufman's property and to analyze and apply appropriate mitigation measures.

Durkin filed a petition for writ of *mandamus* against the City. The petition named Kaufman as a real party in interest and identified him as "the appellant to the underlying administrative appeal." Durkin alleged that the City repeatedly and unlawfully obstructed and delayed taking action on the project for years, instead yielding to political pressure exerted by members of the Board and well-connected neighbors who oppose the project.

According to the petition, the Board denied the project in favor of the neighbors' unsubstantiated arguments; failed to make any findings in support of its denial; and directed its *clerk* to prepare findings specifying the basis for its decision after the fact. To date, no such findings have been made. The petition further alleged on information and belief that the neighbors who oppose the project are politically well-connected and are supported by members of the Board in their opposition to the project, and that certain neighbors who filed discretionary review requests made political donations to members of the Board.

In the first cause of action under CEQA, the petition alleged that, in reversing the Planning Commission's approval of the final mitigated negative declaration without making any findings supporting its reversal, the Board failed to proceed in the manner required by law. Durkin further alleged that any evidence that was contrary to the Planning Department's findings of less-than-significant environmental impacts "was unsubstantiated, uncredible, and/or speculative argument from opposing neighbors.

In the second cause of action under Government Code § 65905.5, the petition alleged the project is a proposed housing development project within the meaning of Government Code § 65905.5, which provides that when a project complies with all applicable, objective general plan and zoning standards in effect at the time an application is deemed complete, agencies shall not conduct more than five hearings pursuant to that section, or any other law, ordinance, or regulation requiring a public hearing in connection with the approval of that housing development project.

In the petition's prayer for relief, Durkin requested a writ of mandate or other appropriate relief reversing the Board's decision to grant the mitigated negative declaration appeal and deny the project.

The Anti-SLAPP Motion at the Trial Court

Kaufman filed an anti-SLAPP motion, contending that the petition arose from his protected activity of appealing the final mitigated negative declaration to

the Board, and that appellants' claims lacked minimal merit because the Board's decision was based on substantial evidence that the project may have adverse environmental impacts requiring an environmental impact report; there is no cause of action for delay in the City's CEQA findings; Government Code § 65905.5 exempts CEQA actions from its five-hearing limit; and the requisite five hearings had not yet occurred.

The trial court granted the anti-SLAPP motion, finding that the petition arose from Kaufman's protected act of filing the administrative appeal, and that the claims in the petition lacked minimal merit. Durkin appealed.

The Court of Appeal's Decision

The Court of Appeal, upon *de novo* review, reversed the trial court's decision to grant the anti-SLAPP motion, concluding that Durkin's *mandamus* petition arose not from Kaufman's protected conduct, but from the acts or omissions of the Board. That Kaufman's administrative appeal preceded or even triggered the events leading to the petition's causes of action against the Board did not mean that the petition arose from Kaufman's protected conduct within the contemplation of the anti-SLAPP law.

Anti-SLAPP Motions

Code of Civil Procedure § 425.16 authorizes a special motion to strike a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue. (§ 425.16, subd. (b)(1).) The anti-SLAPP law allows defendants to request early judicial screening of legal claims targeting free speech or petitioning activities, and its provisions must be construed broadly The anti-SLAPP law applies to various types of claims, including, in an appropriate case, a petition for *mandamus*.

Resolution of an anti-SLAPP motion involves a two-prong inquiry. The first prong requires that the moving defendant make a *prima facie* showing that the challenged claim or claims arise from the defendant's constitutionally protected free speech or petition rights.

If the moving party meets its burden, then under the second prong of the inquiry, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. If the moving party fails to satisfy the first prong, the motion is properly denied without proceeding to second prong.

A claim arises from protected activity when that activity underlies or forms the basis for the claim. The defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech. The focus is on determining what the defendant's activity is that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.

In enacting the anti-SLAPP law, the Legislature "had in mind *allegations of protected activity that are asserted as grounds for relief*." The targeted claim must amount to a cause of action in the sense that it is alleged to justify a remedy. In ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.

Claims Do Not Arise from Kaufman's Protected Speech

There was no dispute that Kaufman's act of appealing the Planning Commission's decision to the Board constituted petitioning activity that generally is protected under the anti-SLAPP law. However, the standard is whether Durkin's *mandamus* petition *arises from* Kaufman's petitioning activity. It does not.

Here, the petition asserts two causes of action for *mandamus*.
Generally, a writ of ordinary mandate will lie when (1) there is no plain, speedy and adequate alternative remedy, (2) the public official has a legal and usually ministerial duty to perform and (3) the petitioner has a clear and beneficial right to performance.

The factual allegations of the petition that supply these elements are the Board's failure to make factual findings in support of its decision to reverse the final mitigated negative declaration; the lack of substantial evidence supporting the Board's decision; and the Board's convening of more than five hearings on the project—all acts or omissions of *the Board*.

Although the petition names Kaufman as a real party in interest and alleges he filed the appeal that led to the Board's decision, the petition seeks no coercive relief against Kaufman, and the allegations of his

petitioning activity do not supply any of the elements of the asserted causes of action. Accordingly, the petition does not arise from Kaufman's petitioning activity.

That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such. Thus, at most, the allegation of Kaufman's protected activity merely provides context, without supporting a claim for recovery.

Conclusion and Implications

This opinion by the First District Court of Appeal demonstrates that a real party in interest who is not subject to any relief in a *mandamus* petition does not possess the extraordinary remedy of anti-SLAPP relief merely because the real party participated politically in the process that eventually led to the mandate action. More must be shown—the real party's acts of public participation must be part of the challenged conduct in the *mandamus* petition. The court's opinion is available online at: (https://www.courts.ca.gov/opinions/documents/A162859.PDF.
(Boyd Hill)

SECOND DISTRICT COURT AFFIRMS DENIAL OF MOTION TO INTERVENE BY THE CALIFORNIA COASTAL COMMISSION IN CHALLENGE TO COASTAL DEVELOPMENT PERMIT FOR OFF HIGHWAY VEHICLES

Friends of Oceano Dunes v. California Coastal Commission,
___Cal.App.5th___, Case No. B320491 (2nd Dist. Apr. 20, 2023).

The Second District Court of Appeal in *Friends of Oceano Dunes v. California Coastal Commission* affirmed the trial court's decision denying a motion to intervene by the Northern Chumash Tribal Council, Oceano Beach Community Association and Center for Biological Diversity (Appellants) on behalf of the Defendant California Coastal Commission (Commission) in a challenge by Friends of Oceano Dunes (Friends) to the Commission's Coastal Development Permit (CDP) amendment banning off highway vehicle (OHV) use of the Oceano Dunes State Vehicular Recreation Area (Oceano Dunes).

Factual and Procedural Background

The Department of Parks and Recreation (Department) established Oceano Dunes in 1974. OHVs have operated at Oceano Dunes since its founding. Since 1982, the vehicles have operated subject to a CDP issued by the Commission. The CDP has been amended several times over the years to limit access to and protect culturally and environmentally significant areas of Oceano Dunes.

In March 2021, the Commission amended the CDP to phase out the use of OHVs at Oceano Dunes over three years, restrict beach driving and camping to the north end of the park, and close one park entrance. Friends challenged these amendments in a series of petitions for writ of mandate, alleging the Commission had no authority to adopt them. Alternatively, Friends alleged that the State defendants violated the California Coastal Act of 1976 and California Environmental Quality Act when doing so.

Friends subsequently stipulated with the Department and the County of San Luis Obispo (a real party in interest) to stay implementation of specified CDP amendments pending the outcome of their lawsuits. The Commission did not oppose the stipulation, and the trial court entered an order approving it in December 2021.

Two months later, Appellants moved to intervene in Friends' lawsuits against the State defendants. The State defendants did not oppose Appellants' motion, but Friends did.

The trial court denied Appellants' motion to intervene as of right, concluding that they have the same ultimate objectives as the State defendants, objectives the State defendants will adequately protect.

First, the trial court found that Appellants do not intend to raise any new legal arguments in the

litigation or present any additional evidence. Nor do Appellants claim that the State defendants will take an undesirable legal position or otherwise fail to vigorously defend the CDP amendment.

Second, the trial court found that the amendment completely addresses and protects all of Appellants' claimed interests over competing interests, and there is no indication the State defendants might be considering a scaled-back amendment at odds with those interests.

Third, the trial court found that Appellants have no special expertise concerning the Commission's authority to amend the CDP or the procedures employed when doing so, the sole issues raised in Respondents' writ petitions.

The trial court also denied Appellants' motion for permissive intervention, finding that Appellants' reasons for intervention are outweighed by the rights of the original parties to conduct their lawsuit on their own terms. Appellants appealed.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's decision to deny intervention by Appellants, noting that, while case law is unclear as to whether the review standard is *de novo* or abuse of discretion, the decision is supportable under either standard.

Intervention as a Matter of Right

Nonparties have the right to intervene in a civil action if they: (1) file a timely application, (2) have an interest relating to the property or transaction that is the subject of the action, (3) are so situated that the disposition of the action may impair or impede their ability to protect that interest, and (4) show that their interest is not adequately represented by one or more of the existing parties. (Code Civ. Proc., § 387, subd. (d)(1)(B).)

As to the fourth requirement, California courts take guidance from federal law in evaluating whether it has been met and are guided primarily by practical and equitable considerations. The courts liberally construe the fourth requirement, resolving any doubt as to whether the existing parties will adequately represent the nonparty's interest in favor of intervention.

Three factors determine whether a party will adequately represent nonparties' interests: (1) whether the interest of a present party is such that it will undoubtedly make all the nonparty's arguments, (2) whether the present party is capable and willing to make such arguments, and (3) whether the nonparty would offer any necessary elements to the proceeding that other parties would neglect." (*Callahan v. Brookdale Senior Living Communities, Inc.*, 42 F.4th 1013, 1020 (9th Cir. 2022))

Generally, the burden of satisfying this test is minimal; it can be satisfied if the nonparties show that representation of their interest may be inadequate. If the nonparties' interests are identical to that of one of the present parties, a compelling interest is required to demonstrate inadequate representation.

The Commission Adequately Represents Appellants

Appellants' interest in the litigation is identical to that of the State defendants. Appellants, like the State defendants, assert that the Commission had the authority to amend the CDP and that the amendment process complied with both the Coastal Act and CEQA. If the CDP amendment takes effect, the Commission's decision to ban OHVs at Oceano Dunes will completely protect Appellants' concerns about negative impacts on the environment, local citizens, and the Northern Chumash. Appellants are thus required to make a compelling showing that the State defendants' representation will be inadequate.

Appellants maintain that they have different interests than the State defendants. The State defendants are public agencies that must balance relevant environmental and health interests with competing resource constraints and the interests of various constituencies, while Appellants are not required to balance any economic impact against their own considerations pertaining to health and environmental protections.

Appellants misconstrue the pertinent inquiry. The interests relevant here are not the State defendants' and Appellants' respective interests *in general*, but their interests *in this specific litigation*. The sole questions at issue are narrow had the authority to amend the CDP and, if so, whether the amendment process complied with applicable laws. Appellants and the State defendants both want these questions answered with unqualified "yeses."

Here, the State defendants are not balancing anything. The issues in this litigation do not center on what the CDP amendments should include or how

far they should go; the State defendants have already made those substantive determinations and are now defending their authority to do so in court.

The State defendants are not considering a scaled-back CDP amendment at odds with Appellants' interests, have not indicated that they will take some other undesirable legal position in the litigation, and have not indicated that they will fail to defend the amendment process. And Appellants concede that they have no specialized legal expertise concerning the Commission's authority to amend the CDP or whether the amendment process complied with applicable laws. They have thus failed to make a compelling showing of inadequate representation.

Appellants assert that they would have opposed staying implementation of the CDP amendment if permitted to intervene. But this assertion amounts to a disagreement over litigation strategy. When a nonparty has not alleged any substantive disagreement between it and the existing parties to the suit, and instead has rested its claim for intervention upon a disagreement over litigation strategy or legal tactics, courts have been hesitant to accord the nonparty full-party status. Appellants' assertion that they would not have agreed to the stay is insufficient to show that the State defendants will not adequately represent their interests.

Permissive Intervention

A trial court may permit a nonparty to intervene in an action if the nonparty has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both. (Code Civ. Proc., § 387, subd. (d)(2).) Intervention will generally be permitted if: (1) the proper procedures have been followed, (2) the nonparty has a direct and immediate interest in the action, (3) the intervention will not enlarge the issues in the litigation, and (4) the reasons for the intervention outweigh any opposition by the parties presently in the action. (*City and County of San Francisco v. State of California*, 128 Cal. App.4th 1030, 1036 (2005))

Permissive Intervention Would Enlarge Issues

The trial court's decision to deny Appellants' permissive intervention was not unreasonable because Appellants and State defendants take the same positions. Because this case is decided on the record, Appellants can offer no new evidence. However, Appellants would enlarge the issues in this litigation should Friends succeed on their writ action, because Appellants would then be able to offer new evidence and arguments when the State defendants would reopen the environmental review for the CDP amendment, without having previously exhausted administrative remedies.

Conclusion and Implications

This opinion by the Second District Court of Appeal shows that if a person/entity has significant differential interests it wishes to preserve in support of an administrative action, that person/entity should exhaust its administrative remedies by raising those interests at the administrative level and then file suit, rather than seek to rely enforcement of those interests by the administrative agency and rather than seek intervention on behalf of the administrative agency. The court's opinion is available online at: (https://www.courts.ca.gov/opinions/documents/B320491.PDF.

(Boyd Hill)

SIXTH DISTRICT COURT FINDS 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 (MFA) 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 plaintiffs' 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—Action Timely Under the Statute of Limitations Periods Addressed

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 § 340.

Five-year Findings Applies to the Fund Itself Rather than to the Deposit of Individual Fees—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.

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

Conclusion and Implications

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 opinion is available online at: https://www.courts.ca.gov/opinions/documents/H049425M.PDF.
(Eric Cohn, E.J. Schloss)

LEGISLATIVE UPDATE

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

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

Surplus Land Act

• AB 480 (Ting)—This bill was last amended on April 5, 2023. 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 last amended on May 18, 2023. 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 "if the land is located within a city, county, or city and county that has been found to have a substantially compliant housing element and has been designated prohousing by the Department of Housing and Community Development, as specified" (the most recent amendment). 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 le-

gal 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. This bill was last amended to authorize a local agency to administratively declare that land is exempt surplus land, if the land is located within a city, county, or city and county that has been found to have a substantially compliant housing element and has been designated prohousing by the Department of Housing and Community Development, as specified, and if the local agency posted the declaration and findings on the local agency's internet website. 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 last amended on February 23, 2023. 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 last amended on May 1, 2023. This amended bill would provide that land that is subject to a sectional planning area, as described by the law, is not subject to surplus land act requirements for the disposal of surplus land. land if specified conditions are met. The bill would, commencing April 1, 2025, and annually thereafter, require a local agency that disposes of land pursuant to these provisions submit a specified report to the Department of Housing and Community Development. The bill would make a local agency that disposes of land in violation of these provisions liable for a civil penalty, as specified.

General Plans

•AB 911 (Schiavo)—This bill was last amended on May 18, 2023. This bill would require the county recorder to notify the owner or submitting party of the county counsel's determination days without delay, so that notice may be given by the owner regarding the authorization to record the modification document. The bill would permit the owner, upon receipt of that notification, to mail copies of the modification documents and related materials by certified mail to anyone who the owner knows has an interest in the property or the restrictive covenant. The bill would also establish a process by which notice by the owner to the intended recipient would be deemed given. The bill would provide that notice by the owner is optional and failure to provide it does not invalidate a recorded restrictive covenant modification document. This bill would additionally prohibit the owner from recording the modification document if the owner of the property is not yet its record title owner but is instead a beneficial owner, as specified, until the owner closes escrow on the property and becomes its record title owner. This bill would require a suit that challenges the validity of a restrictive covenant modification document that is filed by a party that has been given notice as described above to be filed within 35 days of that notice. The bill would make conforming changes to these provisions.

•AB 434 (Grayson)—This bill was last amended on March 16, 2023. 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 last amended on April 26, 2023. 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's 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 last amended on March 22, 2023. 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 671 (Ward)—This bill was last amended on April 13, 2023. 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. 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. 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 last amended on May 1, 2023. Under the amended bill, an extremely affordable adaptive reuse project on an infill parcel that is not located on or adjoined to an industrial use site would be an allowable use. The bill would authorize a local agency to impose objective design review standards, except as specified. The bill would provide that for purposes of the Housing Accountability Act, a proposed housing development project is consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if the housing development

project is consistent with the standards specified in these provisions. The bill would require a local agency to determine whether the proposed development meets those standards within specified timeframes. The bill would define an extremely affordable adaptive reuse project for these purposes to mean a multifamily housing development project that involves retrofitting and repurposing of an existing building that includes residential units, as specified, and that meets specified affordability requirements, including that 100 percent of the units be dedicated to lower income households, 50 percent of which shall be made available dedicated to very low-income households, as specified. This bill would require a local source of funding that can be used for the development of affordable housing to include adaptive reuse as an eligible project and prohibit an agency with control of a local source of funding from prohibiting or excluding a development proposal that uses an adaptive reuse model for an affordable housing project development solely on the basis that the proposal is for an adaptive reuse project. The bill would include findings that changes proposed by this bill address a matter of statewide concern rather than a municipal affair and, therefore, apply to all cities, including charter cities.

•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 last amended April 17, 2023. 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 last amended on March 20, 2023. 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. 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 45 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 last amended May 18, 2023. 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. 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. The amended bill included that "The list of buyers shall include the buyer's name and contact information, including address, email address, and phone number."

Planning and Zoning

• AB 529 (Gabriel)—This bill was last amended March 30, 2023. Existing law, for award cycles commenced after July 1, 2021, awards a city, county, or city and county, that has adopted a housing element determined by the department to be in substantial compliance with specified provisions of the Planning and Zoning Law and that has been designated by the department as prohousing based upon their adoption of prohousing local policies, as specified, additional points in the scoring of program applications for housing and infrastructure programs pursuant to guidelines adopted by the department, as provided. This bill would add the 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 prohousing local policies.

• 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 last amended May 1, 2023. 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 180 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 180 days.

• AB 894 (Friedman)—This bill was last amended on April 20, 2023 but revised on April 27, 2023. The amended bill would require a public agency to allow parking spaces identified in shared parking (as revised) "agreements" rather than arrangements, to count 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 last amended April 13, 2023. The amended 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 postentitlement 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 or 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 last amended April 13, 2023. The amendments were non-substantive. This bill would continue to modify the definition of "postentitlement phase permits" to eliminate the non-discretionary 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 postentitlement 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 postentitlement phase permit to any appeals or additional hearing requirements once the local agency determines that the postentitlement permit is compliant with applicable permit standards, as specified.

•AB 1630 (Garcia)— This bill was last amended on March 21, 2023. 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 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. 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. 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 last amended on March 16, 2023. Substantive changes were made. (1) 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. (2) 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. (3) 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. 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. 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 last amended on April 17, 2023. 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 last amended on April 4, 2023. 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. 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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