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# CALIFORNIA LAND USE™ LAW & POLICY Reporter

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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

# FOURTH DISTRICT COURT FINDS STREAMLINED REVIEW PROCESS UNDER CEQA GUIDELINES SECTION 15183 APPLIED TO INDUSTRIAL FACILITY THAT WAS CONSISTENT WITH GENERAL PLAN UPDATE EIR

*By Bridget McDonald*

In an important opinion published on February 16, 2024, the Fourth District Court of Appeal in *Hilltop Group, Inc. v. County of San Diego* reversed the lower court's denial of a project owner's California Environmental Quality Act (CEQA) petition that challenged the County of San Diego's (County) decision to reject a development application for a construction debris recycling facility on a parcel designated for industrial uses. The court held that the streamlined environmental review process under CEQA Guidelines section 15183 applied because the facility was consistent with the County's General Plan Update and would not result in more severe impacts than those analyzed in the update's certified program Environmental Impact Report (EIR). [*Hilltop Group, Inc. v. County of San Diego*, 99 Cal.App.5th 890 (4th Dist. 2024).]

## Factual and Procedural Background

### The County's General Plan Update

In 2011, the County of San Diego certified a program Environmental Impact Report (PEIR) for its General Plan Update (GPU), which programmatically analyzed the potential environmental impacts associated with the built-out and implementation of the GPU. The PEIR determined that development from the GPU's land use designations could cause significant environmental impacts that would require mitigation measures; but, even with those measures, certain impacts to aesthetics, air quality, noise, and traffic would remain significant and unavoidable.

### The NCER Project

In 2012, Hilltop Group, Inc. applied to the County to develop the North County Environmental Resources Project (NCER Project)—a construction, demolition, and inert debris recycling facility located on a parcel of land that the GPU designated for "high impact industrial" uses. The Project plan included an open space easement intended to protect 44 acres of natural habitat and maintain visual separation from nearby local landmarks and residential communities.

### Environmental Review Process

In early 2014, after submitting the Project application, Hilltop Group asked the County to proceed with a Mitigated Negative Declaration (MND) that incorporated some of the analyses conducted in the GPU PEIR. The County conducted an initial study, which acknowledged that the Project was consistent with the GPU and its zoning designation, but also found potentially significant impacts related to aesthetics, air quality, biological resources, greenhouse gas (GHG) emissions, hydrology and water quality, hazards and hazardous materials, and noise. The County thus declined to proceed with an MND and instead issued a notice of preparation (NOP) of an EIR.

In 2015, Hilltop Group submitted an initial draft EIR and accompanying technical studies. The County reviewed the draft and determined it needed to be revised. In response, Hilltop Group asked the County to process the Project as a CEQA Exemption under Guidelines section 15183, noting that the Project would not have any specific environmental

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impacts beyond those already assessed and mitigated for in the GPU PEIR. The County initially disagreed, finding that the Project presented peculiar issues that were not sufficiently analyzed in the PEIR. But the County advised Hilltop Group that if they revised the proffered technical studies to address issues identified by staff, the County would analyze the Project under section 15183.

After Hilltop Group submitted the revised studies, County staff concluded that the Project could be processed under section 15183's streamlining exemption. Staff found that: (1) the Project was consistent with the GPU's zoning designations; (2) there were no project-specific impacts peculiar to the site or that were otherwise not analyzed in the PEIR; (3) there were no potentially significant and unanalyzed off-site or cumulative impacts; (4) there was no substantial new information that the Project would result in more severe impacts than those anticipated in the PEIR; and (5) the Project would undertake feasible mitigation measures from the PEIR.

### Project Approval

In June 2020, the County's Zoning Administrator (ZA) conducted a public hearing on the Project. Staff recommended that the ZA grant the section 15183 exemption, subject to conditions. The Project was met with staunch public opposition, with many commenters contesting the Project's proximity to nearby residential communities. The ZA nevertheless approved the Project, finding that it was consistent with the GPU and the PEIR. The County's Planning and Development Services (PDS) then approved the Project's site plan and conditions of approval, which ensured environmental impacts remained less than significant.

Four groups appealed PDS' approval to the Planning Commission. Planning Commission unanimously denied the appeals and approved the Project with conditions, finding that the Project still qualified for streamlining under section 15183 because its impacts to aesthetics, air quality, GHG emissions, noise, and traffic would be less than significant.

### Appeals to the Board of Supervisors

The groups, along with the nearby City of Escondido, appealed the Planning Commission's decision to the County Board of Supervisors (Board), arguing that additional environmental review via an EIR was required due to substantial new information about the Project's potentially significant impacts and its incompatibility with surrounding land uses. The responding staff report rejected each contention.

At the public hearing, Board members expressed concern about the Project's potentially significant impacts. Though they did not identify which specific aspects of the Project created these impacts, the Board found that an EIR was warranted and voted to grant the appeals. The Board's findings concluded the GPU PEIR did not analyze Project-specific impacts to traffic, air quality, noise, and aesthetics that stemmed from the proximity of its industrial operations to nearby sensitive residential uses. The Board also found that implementing the PEIR's uniformly applied development standards would not substantially mitigate these peculiar impacts, particularly given the site's unique topographical and climactic conditions. Thus, further study was required to inform the public of and identify ways to mitigate these impacts.

### At the Trial Court

Hilltop Group filed a petition against the County that asked the court to set aside the Board's decision and direct the Board to affirm the ZA's decision approving the section 15183 streamlining exemption. Although the trial court recognized that the Board's findings were inconsistent with staff's determination that the Project qualified for streamlining under section 15183, it nevertheless denied the petition. The court held that there was a fair argument that the Project may have significant, non-mitigable effects on the environment that were peculiar to the Project and that were otherwise not addressed as significant in the GPU PEIR. Hilltop Group appealed.

### The Court of Appeal's Decision

The Fourth District Court of Appeal reversed the trial court, finding that the Project was eligible for the streamlined environmental review process under CEQA Guidelines section 15183, and that any additional review must be limited to the circumstances prescribed by subdivisions (b)(1)–(4). The court concluded that the Board failed to proceed in a manner required by law by requiring a comprehensive EIR that was not appropriately limited to these provisions. The court also found that substantial evidence did

not support the Board's finding that previously adopted mitigation measures and uniformly applicable applied policies and procedures would not mitigate Project-specific impacts.

### Standard of Review

While the parties agreed that the County's determination is reviewed for abuse of discretion, they disagreed as to whether the substantial evidence or fair argument standard applied. The Fourth District confirmed that the substantial evidence standard governed its review of CEQA exemptions, including when an agency determines that a project is or is not consistent with a prior program EIR. The court would therefore resolve all evidentiary conflicts in favor of the Board's decision and indulge all reasonable inference in favor of its findings.

### CEQA Guidelines Section 15183 Applies to the Project

The court first considered whether Guidelines section 15183 applied to the Project by focusing on the statutory language of the exemption. Subdivision (a) provides that projects consistent with the development density established by the existing zoning, community plan, or general plan policies for which an EIR was certified "*shall not* require additional review, *except as might be necessary* to examine whether there are project-specific significant effects which are peculiar to the project or its site." Subdivision (b) provides that an agency must limit its examination of significant impacts if it determines those impacts: (1) are peculiar to the project; (2) were not otherwise addressed or sufficiently analyzed as significant impacts in the prior EIR; (3) are potentially significant off-site or cumulatively; or (4) would have more severe adverse impact based on substantial new information.

The court therefore rejected the County's argument that subdivisions (b)(1)–(4) functioned as disqualifying circumstances that render a project entirely ineligible for the exemption. The court reasoned that such a narrow interpretation would render the exemption unusable. Instead, section 15183 provides a *partial* exemption that limits the scope of a project-level EIR to those aspects not covered in a prior PEIR. Here, the record demonstrated that the Project was consistent with the GPU for which the PEIR was certified, which is why staff elected to utilize section 15183. Therefore, the issue was not whether the Project qualifies for streamlining at all, but instead the extent to which the subsequent environmental review process is streamlined and what further review is required based on substantial evidence of the Project's peculiar environmental impacts.

### Initial Study Did Not Preclude Application of Section 15183

The County argued that the Project was altogether ineligible for section 15183 because the initial study concluded an EIR was required. The court noted that the initial study did not indicate whether the Project was eligible for streamlining under section 15183, but instead found that further analyses were required to determine the extent of potential impacts. That the County lacked sufficient information to determine whether the Project would have peculiar impacts at the time the initial study was prepared did not preclude a later determination that the Project qualified for streamlining under CEQA. The court cautioned that unequivocally requiring preparation of an EIR based on the initial study would elevate form over substance, particularly given staff's later findings.

The court also clarified the purpose of section 15183: the exemption permits streamlining environmental review not because a project does not have *any* potential environmental effects or because those effects should not be analyzed, but because the project's effects were *already* sufficiently accounted for an addressed in a PEIR. The court noted that the Guidelines expressly authorize agencies to use a previously prepared EIR when the agency determines it would adequately analyze the project at hand; therefore, use of an initial study would not preclude application of the section 15183 exemption.

### Insufficient Evidence Supported Board's Findings About Mitigation

The court's final task was to determine whether substantial evidence supported the Board's finding that the Project would result in project-specific peculiar impacts that were not analyzed as "significant" in the PEIR, and therefore could not be substantially mitigated by uniformly applied standards or previously adopted mitigation measures. The court conceded that the environmental effects of constructing and operating the Project were certainly peculiar and not

expressly considered by the GPU PEIR. But section 15183, subdivision (f) provides that, unless substantial new information establishes otherwise, a project-specific environmental impact shall not be considered "peculiar" if previously adopted and uniformly applied development standards will substantially mitigate the environmental effect.

Under this lens, the court first broadly observed that the Board's findings lacked requisite specificity that bridged the analytic gap between the raw evidence and the ultimate decision. Notably, neither the Board's findings nor its final decision identified the specific nature of the Project's "peculiar" impacts that required environmental review—instead, they merely pointed to broad environmental categories. Nor did the Board specifically address the effect of uniform policies on these purported impacts. Rather, the County attempted to bridge the analytic gap on appeal by relying on various public comments that merely consisted of argument, speculation, and unsubstantiated opinion by non-experts who were qualified to proffer technical testimony. The court noted that most of these comments discussed the ways in which individuals and the broader community may be personally impacted by the Project, but altogether failed to address whether the purported Project-specific impacts will be substantially mitigated by the PEIR's uniform policies. The court thus held that, while these residents "may very well be able to hear, see, or otherwise perceive some aspects of the NCER Project, this is not the threshold for determining the applicability of Guidelines section 15183."

For these reasons, the court rejected each of the Board's individual findings that the PEIR's mitigation measures would not adequately mitigate the Project's peculiar impacts to aesthetics, noise, traffic, air quality, and GHG emissions.

## Conclusion and Implications

The Fourth District Court of Appeal's opinion in *Hilltop Group, Inc. v. County of San Diego* marks an important development in CEQA precedent, as it interprets and applies CEQA Guidelines section 15183's underutilized and rarely litigated streamlining exemption for projects that are consistent with the underlying zoning designation or general plan for which a prior EIR was certified. The opinion also clarifies that lead agencies cannot reject streamlining under section 15183 simply because the underlying project generates significant public controversy. For these reasons, the decision reflects a growing trend in recent CEQA jurisprudence that suggests the judiciary is becoming less tolerant of CEQA abuse that creates delayed or dilatory environmental review processes. The Fourth District's opinion is available at: https://www.courts.ca.gov/opinions/documents/D081124.PDF

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## REGULATORY DEVELOPMENTS

# U.S. BUREAU OF RECLAMATION RELEASES A FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE NEAR-TERM OPERATION OF THE LOWER COLORADO RIVER WATERSHED

On March 5, 2024, the U.S. Bureau of Reclamation (Reclamation) released a final Supplemental Environmental Impact Statement (SEIS) for the operation of Glen Canyon and Hoover dams in the lower Colorado River watershed. The SEIS aims to conserve at least 3 million acre-feet of water through 2026 by updating the guidelines to account for the recent drought conditions in the Colorado River Basin. In addition to the SEIS, Reclamation announced three new System Conservation Implementation Agreements that will conserve 399,153 acre-feet of water in Lake Mead through 2026. These agreements and the SEIS will guide Reclamation's water management in the lower Colorado River watershed until the end of 2026, when the current interim guidelines expire.

### Background

The Colorado River Basin covers more than 246,000 square miles from its headwaters in Wyoming and Colorado to its terminus in the Gulf of California. *Arizona v. California*, 373 U.S. 546, 552 (1963). The basin spans seven U.S. states, Wyoming, Colorado, Utah, New Mexico, Arizona, Nevada, and California and two countries, the United States and Mexico. *Id.* Reclamation must operate the Colorado River according to the "Law of the River." *Navajo Nation v. U.S. Dep't of the Interior*, 26 F.4th 794, 800 (9th Cir.); *rev'd sub nom. Arizona v. Navajo Nation*, 599 U.S. 555 (2023). The Law of the River begins with the 1922 Colorado River Compact, which split the Colorado River water equally between two groups of states: the "Upper Basin" states, consisting of Colorado, New Mexico, Utah, and Wyoming, and the "Lower Basin" states: Arizona, California, and Nevada. *Id.* Each group collectively received 7.5 million acre-feet per year of water. *Id.*

Congress approved the 1922 Compact six years later through the Boulder Canyon Project Act (BCPA). 43 U.S.C. § 617 *et seq.* The BCPA allowed the Department of the Interior to construct Hoover Dam and a reservoir at Lake Mead. *See id.* § 617. The BCPA apportioned the 7.5 million acre-feet in the Lower Basin by allocating 4.4 million acre-feet to California, 2.8 million acre-feet to Arizona, and 300,000 acre-feet to Nevada; Arizona and California would each get one-half of any surplus. *Arizona v. California*, 373 U.S. 546, 565 (1963). In addition to the BCPA, a treaty between the United States and Mexico requires the United States to supply Mexico with 1.5 million acre-feet annually, plus an additional 200,000 acre-feet when a surplus is declared. Congressional Research Service, *Management of the Colorado River: Water Allocations, Drought, and the Federal Role*, at 5 (Nov. 1, 2023). Reclamation must also follow specific priorities for managing water flows from federal structures according to the BCPA. *Arizona v. California*, 547 U.S. 150 (2006).

### 2007 Interim Guidelines

In 2007, the Department of Interior approved the Colorado River Interim Guidelines, which were supposed to be in place until the end of 2026 and provided operating criteria for Lake Powell and Lake Mead. Bureau of Reclamation, *Near-term Colorado River Operations Final Supplemental Environmental Impact Statement*, at 1-2 (Mar. 2024). Recognizing that the 2007 Guidelines needed updating due to unprecedented drought conditions in the Colorado River Basin, Reclamation, Colorado River Basin States, Mexico, Tribes, and other Basin water users negotiated new interim guidelines that would provide Reclamation with more flexibility when managing water in the lower Colorado River Basin. *Id.* Reclamation released the SEIS to analyze the environmental impacts of the new interim guidelines in accordance with the National Environmental Policy Act. *Id.* at 1-9.

Under the new interim guidelines, Reclamation can limit annual release from Lake Powell according to the volume of water in storage or the correspond-

ing elevations of Lake Powell and Lake Mead. *Id.* at 2-10. According to the "Lake Powell Operational Tiers, Proposed Action," if the elevation at Lake Powell is between 3,575-3,666 feet, then Reclamation will release 8.23 million acre-feet. *Id.* at 2-11. If the elevation at Lake Powell is between 3,525-3,575 feet, Reclamation releases 7.48 million acre-feet. *Id.* If Lake Powell is between 3,500-3,525 feet, then Reclamation must "[b]alance contents with a minimum/maximum release of 7.0/9.5 [million acre-feet]." *Id.* Lastly:

> . . .if any minimum probable Lake Powell elevation projection shows Lake Powell lower than 3,500 feet over the next 12 months, reduce releases to a minimum of 6.0 [million acre-feet] to maintain an elevation of 3,500 feet.

### Agreements

In addition to these new interim guidelines, the Department of the Interior announced three new agreements to conserve water in Lake Mead. These agreements include:

- Bard Water District, in cooperation with Metropolitan Water District: This agreement commits up to 18,090 acre-feet of conserved water through 2026
- Coachella Valley Water District: This agreement commits up to 30,000 acre-feet of conserved water through 2026
- Palo Verde Irrigation District, in cooperation with Metropolitan Water District: This agreement commits up to 351,063 acre-feet of conserved water through 2026.

[Dep't of the Interior, *Biden-Harris Administration Announces Major Milestone to Protect Short-Term Stability of Colorado River Basin*, (Mar. 5, 2024).]

These agreements comprise a total of 24 agreements across California and Arizona that are expected to conserve up to 1.58 million acre-feet of water through 2026. *Id.*

### Conclusion and Implications

At the time of this writing, Reclamation and other Colorado River stakeholders are currently engaged in efforts to establish long-term guidelines for when the 2007 guidelines expire. *See* 88 FR 72535, 72536. Reclamation anticipates releasing an Environmental Impact Statement at the end of 2024 and a Record of Decision in early 2026 for the new long-term guidelines that will replace the 2007 guidelines.
(Jake Voorhees, Sam Bivins)

## CALIFORNIA PUBLIC UTILITIES COMMISSION ESTABLISHES ITS SENATE BILL 884 EXPEDITED UNDERGROUNDING PROGRAM FOR POWER LINES

On March 8, 2024, the California Public Utilities Commission (Commission) issued Resolution SPD-15, which establishes an expedited undergrounding program under Senate Bill (SB) 884 for the large regulated electric utilities, Pacific Gas & Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E). Undergrounding is the burying of existing overhead electric facilities—which consist of poles, wires, and other equipment—in belowground. While undergrounding eliminates the risk of ignition that occurs when overhead electric facilities come in contact with other equipment or vegetation, undergrounding is more expensive to install than overhead lines or implementing alternative fire mitigation measures.

### Background on Senate Bill 884

SB 884, which took effect January 1, 2023, requires the Commission to create an expedited undergrounding program for the three electric utilities in the state with 250,000 or more customer accounts. Under this program, PG&E, SCE, and SDG&E may submit a 10-year undergrounding plan (Plan or Application) for projects located in areas with high ignition risk and areas previously affected by wildfire. The Commission

and the California Natural Resources Agency's Office of Energy Infrastructure Safety (Energy Safety) each review the utilities' Plans according to their respective requirements. Resolution SPD-15 is the Commission's governing SB 884 guidelines; Energy Safety has yet to adopt its own SB 884 guidelines.

### The Commission's SB 884 Undergrounding Program

The Commission's undergrounding program is implemented in three Phases. In Phase 1, Energy Safety will review the utility's Plan to ensure that it increases grid reliability and reduces wildfire risk. If approved, the utility submits its intended Application to the Commission's Safety Policy Division (SPD) for a completeness review.

Following this, Phase 2 begins when the utility submits its Application to the Commission, which requests approval for its Plan and forecasted costs. Upon receipt of the Application, the Commission must publish the Plan for public comment, facilitate a public workshop for presentation of the Application, and take public comments for at least 30 days. Further, the Commission has nine months to review and conditionally approve or deny the Application.

All Applications must contain information related to, among other things, cost forecasts, wildfire mitigation cost reductions, ratepayer impacts, data for all undergrounding projects in the Plan, forecasted cost–benefit ratios (CBR) across all projects and for each individual or combination of alternative wildfire mitigation measures, and third-party funding to reduce ratepayer impact. The Commission also has the ability to establish a cost cap for the projects proposed in the utility's Plan.

If the Commission conditionally approves a Phase 2 Application, the utility will implement its Plan in Phase 3. During Phase 3, the utility must file a progress report with Energy Safety and the Commission every six months. The progress reports include total recorded costs, third-party funds received, average recorded CBR and unit cost per mile of undergrounding for completed projects in any two-year period, the total miles of overhead infrastructure replaced by undergrounding, geographic information system data showing the location and status of each project and avoided costs. The utility can seek to include its undergrounding costs in customer rates via a new Phase 3 application each year. The Commission may also assess financial penalties if the utility has not complied with the Commission's Phase 2 decision.

### Conclusion and Implications

The Public Utilities Commission's framework adopted in Resolution SPD-15 is a critical component of SB 884 and further evidence of the state's commitment to reduce wildfire risk by hardening the electrical grid. Once Energy Safety's guidelines are finalized and effective, the electric utilities will be eligible to participate in the SB 884 undergrounding program. Given the expedited timeframe in which Energy Safety and the Commission must review and approve or deny electric utilities' Plans, the Commission's new framework contains robust oversight and cost-approval mechanisms.
(Christopher Marelich, Megan Somogyi)

## RECENT FEDERAL DECISIONS

# NINTH CIRCUIT VACATES JUDGMENT FINDING FORMER INTERIOR SECRETARY'S ORDER LIFTING COAL MORATORIUM MOOTS NEPA CLAIM BECAUSE CURRENT SECRETARY OF STATE REVOKED THE PREVIOUS ORDER

*Citizens for Clean Energy v. U.S. Department of the Interior*, *Unpub.*, Case No. 22-35789 (9th Cir. Feb. 21, 2024).

In an *unpublished* decision (not precedent except as provided by Ninth Circuit Rule 36-3) filed on February 21, 2024, the Ninth Circuit Court of Appeal reversed a trial court judgment and ordered dismissal of the case challenging a 2017 order by former Secretary of the Interior, Ryan Zinke, to rescind an Obama administration moratorium on most new federal coal leases (Zinke Order) as moot. The Ninth Circuit determined that the action, which alleged the Zinke Order failed to comply with the federal National Environmental Policy Act (NEPA) was moot because, in 2021, the current Secretary of the Interior, Deb Haaland, revoked the Zinke order. As a result, nothing about the Zinke Order could be changed through further NEPA analysis and it would be impossible for a court to grant effectual relief.

### Factual and Procedural Background

In 2016, then-Secretary of the Interior Sally Jewell ordered a moratorium on most new federal coal leases in connection with a broader review of the federal coal leasing program. The following year, then-Secretary of the Interior Ryan Zinke rescinded the Jewell Order and ordered the resumption of federal coal leasing. The Plaintiffs-Appellees consisting of several non-profit and environmental organizations, a Native American Tribe, and several states, then filed this lawsuit against the U.S. Department of the Interior, et al., alleging that Secretary Zinke's rescission of the moratorium violated NEPA.

In 2019, the U.S. District Court determined that the government violated NEPA by failing to conduct an environmental review in connection with the Zinke Order's rescission of the moratorium. The District Court reasoned that the Haaland Order's failure to reinstate the coal leasing moratorium from the Jewell Order meant that "the Zinke Order still remains in partial effect" and an appropriate analysis under NEPA review must be performed. The National Mining Association, Wyoming, and Montana intervened as defendants to appeal the 2019 decision and the District Court's subsequent 2022 decision, which found that the NEPA analysis that the government prepared in response to the District Court's earlier order was arbitrary and capricious, as well as the District Court's determination that the case was not moot. Defendants argued, among other things, that the case was moot because in April 2021, Secretary of the Interior Deb Haaland "revoked" the Zinke Order.

### The Ninth Circuit's Decision

The Ninth Circuit reviewed the District Court's mootness determination de novo and found the case moot.

The Court of Appeals noted that this lawsuit only concerned the Zinke Order's recission of the Jewell Order's moratorium on federal coal leasing. However, the Zinke Order being "revoked" in April 2021 made it legally non-existent and unable to be changed through further NEPA analysis. Under these circumstances, the court stated, "it is impossible for a court to grant any effectual relief whatever to the prevailing party."

The Ninth Circuit further disagreed with the District Court's assessment that the Zinke Order remained "in partial effect." The Ninth Circuit found that the Haaland Order definitively "revoked" the Zinke Order, and the Haaland Order not reviving the Jewell Order's moratorium did not provide a basis to conclude that the defunct Zinke Order was still in effect. Regarding the plaintiffs' alleged injury by the present lack of a moratorium on federal coal leasing, the court determined that this was actually a challenge related to the revoked Zinke Order but of the

later Haaland Order and the Bureau of Land Management's interpretations of it, matters that were not part of the lawsuit.

Lastly, the Court of Appeals noted that the voluntary cessation exception to mootness did not apply here because it found that "it [was] 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" The court emphasized again that the Haaland Order revoking the Zinke Order in its entirety was a repeal "enough to render [the] case moot and appropriate for dismissal."

### Conclusion and Implications

The decision provides some helpful guidance with regards to the mootness doctrine in federal court. When a court is unable to provide any relief regarding an action challenged in litigation, such litigation is subject to dismissal for mootness. Though it would have been challenging to amend the pleading, given that the Zinke Order was revoked when the litigation had already commenced, the case might have survived dismissal if the plaintiffs' pleading attributed the alleged continued injury to the Haaland Order by not reviving the Jewell Order's moratorium. The court's *unpublished* opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/memoranda/2024/02/21/22-35789.pdf
(David Song)

## NINTH CIRCUIT REVERSES DISMISSAL OF MOBILE HOME PARK'S PRE-ENFORCEMENT CHALLENGE TO ASSEMBLY BILL 978

*Peace Ranch, LLC v. Bonta*, 93 F.4th 482 (9th Cir. 2024).

In an opinion filed on February 13, 2024, the Ninth Circuit Court of Appeals in *Peace Ranch, LLC v. Bonta* reversed dismissal of a mobilehome park's pre-enforcement action, finding that the park adequately established the injury-in-fact prong required for standing. The court found that the park's owner sufficiently alleged that enforcement of a newly enacted mobilehome rent control statute—Assembly Bill 978—would affect a protected constitutional interest.

### Factual Background

In 2019, Peace Ranch acquired the Ranch La Paz mobilehome park, which straddles the two Orange County cities of Anaheim and Fullerton. Shortly after purchasing the park, Peace Ranch attempted to raise rents, but was met with significant tenant and political pushback. As a result, Peace Ranch and the tenants renegotiated a phased-in schedule of rent increases, though those increases were also met with considerable public controversy. In response, the cities of Anaheim and Fullerton introduced mobilehome rent control ordinances, but both were ultimately voted down.

In February 2021, following the defeat of the two rent control ordinances, a California state assemblymember for the city of Fullerton introduced a statewide mobilehome park rent control statute for "qualified mobilehome parks": AB 978. Effective as of January 2022, AB 978 prohibits qualified mobilehome parks from raising rent more than 3 percent plus the percentage cost of living or 5 percent, whichever is lower. The bill defines a "qualified mobilehome park" as one "that is located within and governed by the jurisdictions of two or more incorporated cities."

### Procedural Background

Peace Ranch filed an action challenging AB 978, alleging that the bill targets only Peach Ranch. The bill's preamble reads:

> In enacting this legislation, it is the intent of the Legislature to protect mobilehome owners in qualified mobilehome parks that have been subject to rent increases that reside in counties with populations between 2,500,000 and 3,250,000 according to the last census count.

Based on this, Peace Ranch argued that Orange County's population is just under 3.2 million, and no other California county's population falls within that range.

Similarly, Peace Ranch noted that it is the only mobilehome park "located within and governed by the jurisdictions of two or more incorporated counties." For these reasons, Peace Ranch maintained that the authors of AB 978 drafted the bill in the hopes of ensuring that only Peace Ranch would be subject to the law.

### At the U.S. District Court for the Eastern District of California

Peace Ranch brought an action against the Attorney General (AG) and Governor for the State of California. The complaint sought declaratory and injunctive relief for violations of the constitutional prohibition on Bills of Attainder, the Contracts Clause, the Equal Protection Clause, the Due Process Clause, and the Takings Clause. The AG moved to dismiss the action for lack of standing and failure to state a claim for relief.

The court granted the AG's motion, reasoning that AB 978 did not apply to Peace Ranch because, accepting the complaint's allegations as true, Peace Ranch did not own a "qualified mobilehome park." As such, the court concluded that there was "no realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement."

Peace Ranch amended its complaint to emphasize that its injury stemmed from the AG's position that AB 978 did, in fact, apply to Peace Ranch. The district court nevertheless rejected this argument and granted the AG's renewed motion to dismiss with prejudice. In doing so, the court reiterated:

> Because Plaintiff continues to allege Rancho La Paz is 'actually two separate parks ...,' it does not meet the criteria of a 'qualified mobilehome park.' Plaintiff's choice to comply with AB 978 is irrelevant. Voluntary compliance with a law that does not apply does not constitute an injury-in-fact.

Peace Ranch appealed.

### The Ninth Circuit's Decision

On appeal, Peace Ranch argued that it adequately established pre-enforcement standing, noting that if the park raises mobilehome rents more than AB 978 allows, the AG will enforce AB 978 against Peace Ranch and seek sanctions. In the alternative, Peace Ranch alleged that AB 978 does not apply to Peace Ranch at all. The AG seized upon the latter allegation, arguing that Peace Ranch could not state a pre-enforcement injury if it also alleged that the statute was inapplicable.

Based on the parties' arguments, the issue on appeal for the Ninth Circuit to consider was: Is a pre-enforcement injury the threat of enforcement or the threat of *successful* enforcement? The Court of Appeals concluded that the substantial threat of enforcement, not the likelihood that any such enforcement action would ultimately lead to sanctions, would drive the court's analysis. The court observed that Peace Ranch had a choice: raise rents and face a costly enforcement action or forego a rent increase and conform to a law that may not apply. The court opined: "Peace Ranch is indeed stuck in between a rock and a hard place—the precise dilemma that supports pre-enforcement standing." For these reasons, the court reversed the district court's dismissal.

### Pre-Enforcement Standing

To adequately establish pre-enforcement standing, a plaintiff must first allege an intention to engage in a course of conduct arguably affected with a constitutional interest. The intended future conduct must be arguably proscribed by the challenged statute, and the threat of future enforcement must be substantial.

Under the first prong of the pre-enforcement standing test, the Ninth Circuit agreed that Peace Ranch adequately established that it intended to engage in a course of conduct arguably affected with a constitutional interest. More specifically, Peace Ranch specifically pled its intent to raise rents, which it corroborated with past practice. Before AB 978 was enacted, Peace Ranch had raised rents on its mobilehome plots by more than 5 percent. Peace Ranch alleged that after AB 978 went into effect, to avoid injury in the form of an action seeking to enforce AB 978 and associated penalties based on the AG's belief that Rancho La Paz operated as a single park, Peace Ranch had been forced to conform its conduct to the mandates of the bill. For these reasons, the court agreed that Peace Ranch adequately alleged an "intention to engage in a course of conduct." So too was this conduct "arguably affected with a constitutional interest." The court agreed that "the ability to raise rents arguably affects a constitutional interest," and

therefore concluded that Peace Ranch had satisfied this requisite prong for establishing pre-enforcement standing.

### Conduct Arguably Proscribed by the Statute

The second prong for pre-enforcement standing required Peace Ranch to establish that its intended future conduct was "arguably proscribed by the statute" it sought to challenge (*i.e.*, AB 978). The Ninth Circuit opined that the parties' arguments presented a "unique quirk" to this analysis.

In particular, the court observed that, in an effort to preserve future arguments, both parties "danced around" whether Rancho La Paz is a single mobilehome park straddling two cities, or two mobilehome parks with one in each city. While Peace Ranch maintained that Rancho La Paz straddles two cities, it also alleged that the park functioned as two separate parks in separate cities. Nevertheless, Peace Ranch made clear that it wanted to preserve its alternative argument that Rancho La Paz could function as a single park and would thus be subject to AB 978.

The court reiterated that Peace Ranch, as the "would-be sanctioned party," needed to argue that the law *did* apply, while the AG, as the "would-be enforcing party," could defeat standing by conceding that the law did *not* apply. But the court declined to consider the merits of this "pickle," instead clarifying that the purpose of pre-enforcement standing is "to ensure that no law is practically unchallengeable," because the risk of being sued by the state would deer many plaintiffs from "testing their luck." As such, the court concluded that Peace Ranch plausibly alleged that it refrained from raising rents because of the AG's interpretation of AB 978, thus satisfying this second prong.

### Substantial Threat of Enforcement

Under the third and final prong, Peace Ranch needed to demonstrate a "substantial threat" of enforcement of AB 978. To do so, Peace Ranch needed to establish that the AG refused to disavow enforcement—or, in other words, show that the AG intended to enforce the law, such that Peace Ranch faced a credible threat.

The court found that the AG not only refused to disavow its intent to enforce the law, but it also admitted that the law targets Peace Ranch. Though the AG's briefing stopped short of its intention to enforce AB 978 against Peace Ranch, counsel during oral argument conceded that it was not able to commit that the State would *not* enforce the law against Peace Ranch if the park raised rents by more than 5 percent. And, by the AG's own admission, the Legislature had Peace Ranch "in mind" when it enacted AB 978. For these reasons, the court concluded that it could not "ignore the Legislature's clear targeting of Peace Ranch and the AG's answer at oral argument." This was enough to substantiate the threat, and thus satisfy the third requisite prong of pre-enforcement standing.

### Conclusion and Implications

The Ninth Circuit's opinion in *Peace Ranch v. Bonta* builds upon existing precedent surrounding "pre-enforcement standing"—a prerequisite that plaintiffs must establish to challenge a law before it either goes into effect or is enforced on the complaining party. The contested statute here, AB 978, presented a unique factual scenario given the Attorney General's admission that the law targeted the plaintiff, Peace Ranch. Though both parties presented alternatively competing arguments, the Ninth Circuit considered the issues more broadly, finding that, as evidenced by the three-prong test for establishing standing, enforcement of AB 978 would leave Peace Ranch "between a rock and a hard place." Now that the merits of the case will proceed to litigation, it remains to be seen whether Assembly Bill 978 will remain on the books. The Ninth Circuit's opinion is available at: https://cdn.ca9.uscourts.gov/datastore/opinions/2024/02/13/22-16063.pdf.
(Bridget McDonald)

## RECENT CALIFORNIA DECISIONS

# SECOND DISTRICT COURT DETERMINES 'MOST' ATTACHED ADU PROJECTS ARE NOT SUBJECT TO CDP REQUIREMENTS UNDER THE COASTAL ACT OR LOCAL COASTAL PROGRAM

*Riddick, et al. v. City of Malibu, et al.*, ___Cal.5th___,
Case No. No. B323731 (2nd Dist. Feb. 1, 2024, as *modified* Feb. 22, 2024).

The case deals with the interplay between state accessory dwelling unit (ADU) requirements under Government Code section 65852.2 and the state Coastal Act. The plaintiffs applied to the City of Malibu (City) to build a new 414 square foot ADU, attached to the existing residence, and addition to the existing residence for a new primary bathroom. The City's planning commission denied the permit application, finding that the project required a coastal development permit (CDP) under the Coastal Act (Public Resources Code section 30000 *et seq.*) and refused to approve a CDP as the project on the basis that the project violated the setback requirements, impervious lot coverage, and maximum allowed development footage in the City's adopted Local Coastal Plan.

### Background

Public Resources Code section 30610 of the Coastal Act includes an exemption from the CDP requirement for all "improvements to existing single-family residences," except those developments that may have adverse environmental effect as determined by Coastal Commission regulation. Section 13250 of Title 14 of the California Code of Regulations implements this portion of the Coastal Act by requiring a CDP for projects on different kinds of environmentally sensitive sites, such as beaches and wetlands. The regulation also defines "improvements to existing single-family residences" to include all fixtures and structures directly attached to the residence, as well as a structures on the property normally associated with a single-family residence but excluding guest houses and self-contained residential units.

The City's adopted Local Coastal Program, as certified by the Coastal Commission, includes an exemption from CDP requirements for improvements to existing single-family residences that appears based on Section 13250 of Title 14 of the California Code of Regulations. The City's Local Coastal Program stated exemption from improvements to existing single-family residences:

> . . .includes all fixtures and structures directly attached to the residence and those structures normally associated with a single-family residence, such as garages, swimming pools, fences, storage sheds and landscaping but specifically not including guest houses or accessory self-contained residential units.

The City's language is nearly identical to the Coastal Commission's regulation.

### At the Trial Court

Plaintiffs sued seeking a writ of administrative mandate under Code of Civil Procedure section 1094.5, traditional writ of mandate under Code of Civil Procedure section 1085, and declaratory relief, and further alleged violation of the Housing Accountability Act (Government Code section 65589.5). The City argued that because Government Code section 65852.2 included language that it did not "alter or lessen" requirements under the Coastal Act, the City did not have a ministerial duty to process the plaintiffs' permit application and traditional mandate was not appropriate. The City also argued it was entitled to deference in the interpretation of its own exemptions under its adopted Local Coastal Program. The trial court issued an order granting the traditional writ of mandate and directing the City to process the permit as exempt from CDP requirements but denied all other causes of action. Notably, the trial court also refused to grant deference to the Coastal

Commission in its interpretations of the exemption in Public Resources Code 30610 or to the City in its analogous exemption in the Local Coastal Program, noting that neither agency had long-standing opinions on how the exemptions should be interpreted.

### The Court of Appeal's Decision

On appeal, the City argued that the trial court misinterpreted the CDP requirements under the Coastal Commission's regulation as well as the City's Local Coastal Program, and that neither attached nor detached ADUs were exempt from CDP requirements. Plaintiffs cross-appealed and argued that their attached ADU should be exempt as an "improvement to an existing single-family residence, and that they had a right under the state ADU law to a permit, the trial court should have directed the issuance of the permit under their request for a traditional writ of mandate. The Court of Appeal upheld the trial court order in its entirety.

The Court of Appeal indicated that the issue of interpreting the City's Local Coastal Program was subject to *de novo* review, and that the City was not entitled to any deference with respect to the language of its Local Coastal Program.

The court found that he the meaning of the exemption was sufficiently clear from the plain language and required that the City process the ADU project without requiring a CDP permit. The court noted that the language of the City's exemption was modeled on the Coastal Commission's regulation, and both used "directly attached" in referring to exempt improvements but excepted from permitting "self-contained residential units" which were not "directly attached" but still on the property.

Accordingly, the court found the plain language of the exemption supported a conclusion that detached guest houses and self-contained residential units required a CDP, but that attached ADU projects did not. The court also noted that this reading was consistent with the Coastal Commission's regulation, and it rejected the City's position that it intended a different meaning, stating it did not believe that the City "harbored an unexpressed intent to alter materially the meaning and effect of the [Coastal Commission] r egulation upon which it is based." The court also rejected a number of arguments by the City that this would create inconsistencies with other provisions of the City's Local Coastal Program.

The court also rejected plaintiffs' arguments that they were entitled to an order granting their ADU application, finding that the issues raised by plaintiffs related to enforcement of the judgment and were not properly before the court.

### Conclusion and Implications

In addition to clarifying permit requirements under Malibu's Local Coastal Program, the decision clarifies permit requirements for ADU projects under the Coastal Act. Since most attached ADU projects will not be subject to permitting under the Coastal Act as long as they are not located in specified environmentally sensitive areas, the decision will likely result in more attached ADU projects in coastal zones, as compared to detached ADU projects which may face more regulatory hurdles. A copy of the decision may be found here: https://www.courts.ca.gov/opinions/documents/B323731M.PDF
(Sergio Rudin)

# SECOND DISTRICT COURT FINDS THE COASTAL COMMISSION HAD JURISDICTION AND DID NOT ABUSE ITS DISCRETION IN FINDING A PROJECT INCONSISTENT WITH A LOCAL COASTAL PLAN

*Shear Development Co., LLC v. California Coastal Commission, Unpub.*,
Case No. B319895 (2nd Dist. Feb. 21, 2024).

In *Riddick v. City of Malibu* the California Coastal Commission (Commission) considered an appeal from a decision by the San Luis Obispo County (County) to grant a Coastal Development Permit (CDP). The County granted a development permit allowing appellant Shear Development Co. (Shear) to build three single family homes. The Commission appealed that decision to itself and denied the development permit. Shear filed a writ petition to reverse the Commission's denial. The Superior Court denied the writ. On appeal before the Court of Appeal Shear challenged the Commission's jurisdiction to hear the appeal and abused its discretion denying the permit. The Court of Appeal found that the Commission "properly exercised appellate jurisdiction based on the project's location in a Sensitive Coastal Resource Area (SCRA). The Court of Appeal also held that the Commission did not abuse its discretion because "factual findings relating to water and wastewater access" was supported by substantial evidence. The court's opinion was *unpublished*.

## Factual Background

In 2003, Shear Development Co, LLC acquired eight lots in Los Osos. The lots are located near properties developed with single family homes and there are also some undeveloped vacant lots nearby. The lots are zoned for single family homes. Shear performed grading work and installed improvements, including landscaping, retaining walls, roads, sidewalks, storm drainage and underground utilities. The utilities include water and sewer mains and sewer laterals.

In 2004, San Luis Obispo County approved a CDP to eventually allow the development of eight single family houses on the lots. The project was to proceed in two phases. Phase I authorized the construction of four single family houses on four of the lots. Phase II contemplated construction of single-family houses on the remaining lots.

The CDP obtained for Phase I of the Shear development specified that the houses included in Phase II are required to be served by the new community sewer system. The County placed a scenic easement on the Phase II lots to assure that these residences could not be developed until after sewer completion. The California Coastal Commission also required Shear to submit final plans for Phase I that included a notation indicating that future development of the Phase II lots is subject to a separate CDP.

In 2010, following County approval, the Commission granted a CDP authorizing construction of the Los Osos Wastewater Project (LOWWP). As a condition of issuing the LOWWP CDP, the County agreed to Special Condition No. 6 which provides:

> Wastewater service to undeveloped properties within the service area shall be prohibited unless and until the Estero Area Plan is amended to identify appropriate and sustainable buildout limits, and any appropriate mechanisms to stay within such limits, based on conclusive evidence indicating that adequate water is available to support development of such properties without adverse impacts to ground and surface waters, including wetlands and all related habitats.

Shear built the four houses authorized for Phase I. When the LOWWP was completed in 2016, those houses were connected to the community sewer. Shear then applied to the County for a CDP to construct Phase II, the remaining four houses. It later modified the proposed development by reducing the number of houses to three.

The County granted a CDP for Phase II in 2019. The Commission appealed that decision to itself and eventually denied the CDP. It found the CDP application was appealable because the project is located in a SCRA and because the proposed project is not "the principal permitted use" for the applicable zoning category.

The Commission denied the permit because it found the project was inconsistent with development standards for environmentally sensitive habitat areas (ESHA) and because the project site does not have adequate access to water and wastewater services.

Shear filed a petition for writ of mandate to overturn the Commission's decision and reinstate the CDP. The Superior Court denied the writ after concluding the project was located in a sensitive coastal resource area (SRA) and lacked access to water and wastewater services.

### The Court of Appeal's Decision

Under the standard of independent review as to questions of law, the Court of Appeal held that the Commission had jurisdiction to hear the appeal. Under the substantial evidence standard of review, the Court of Appeal held that the Commission did not abuse its discretion in denying the second CDP.

### Coastal Commission Jurisdiction

Both the Coastal Act (Act) and the County's Coastal Zone Land Use Ordinance (CZLUO) provide that a CDP approved for a development located in a Sensitive Coastal Resource Area (SRA) is appealable to the Commission. (Public Res. Code, § 30603, subd. (a)(3); County Code, § 23.01.043, subd. (c)(3).)

Both the Act and CZLUO define a SRA as identifiable and geographically bounded land and water areas within the coastal zone of vital interest and sensitivity. (Public Res. Code, § 30116; County Code, § 23.11.)

Appealable permits under the County Codc include those for projects that are located in a SRA, which includes: (i) Special marine and land habitat areas, wetlands, lagoons, and estuaries mapped and designated as Environmentally Sensitive Habitats (ESHA) in the Local Coastal Plan.

The Estero Area Plan (EAP) contains policies, programs and standards applicable to the community of Los Osos and the site of appellant's proposed development. Chapter 6 of the EAP identifies special features of the environment, discusses relevant issues, sets policies, and recommends programs to implement the relevant goals and policies of the EAP.

"Combining designations" included in Chapter 6 identify sensitive, scenic and other special features of the environment. Areas that fall within these combining designations require more detailed project review to avoid adverse environmental impacts. One of the combining designations is for a SRA, defined as:

> . . .ecologically important areas, such as wetlands, marshes, sand dunes, natural plant communities, habitat for rare and endangered plants and animals, and sensitive watershed.

### Applicability of Coastal Commission Jurisdiction to CDP

Chapter 6 of the EAP identifies the Los Osos Dune Sands Habitat as an SRA. Portions of the same area are also identified as an environmentally sensitive habitat. Figure 6-3 of the EAP is a map of the Los Osos Dune Sands.

The Shear project site is located within the Dune Sands area depicted on that map. This constitutes substantial evidence supporting the Commission's findings that the project is located in an SRA and that the development permit is therefore appealable to the Commission.

The Coastal Act does not limit the Commission's appellate jurisdiction to projects located in mapped ESHA, but extends it to all projects located in an SRA. The EAP describes the entire Los Osos Dune Sands habitat as having soil characteristics that support globally rare habitat in a unique composition of biological communities. These communities support a diversity of native plant species and a number of rare, endangered or threatened species of plants and animals some of which are found nowhere else in the world.

Nothing in the EAP indicates that these globally rare and unique features are limited to one side or another of the Los Osos urban reserve line. Instead, the description of the dune sands meets the definition of an SRA under both the County CZLUO and the Coastal Act without regard to the urban reserve line. Because the project is located in an SRA, the Commission had jurisdiction over the appeal from the second Shear CDP.

### No Abuse of Discretion

The LOWWP CDP prohibited extension of wastewater service to undeveloped properties within its

service area until and unless the EAP was amended to identify appropriate and sustainable buildout limited and appropriate mechanisms to stay within such evidence, based on conclusive evidence of adequate water available to support development of such properties. Because that had not occurred, the Commission did not abuse its discretion in denying the second Shear CDP, despite Shear's development of the project site with water meters, sewer mains and laterals constructed in connection with Phase I of the project and use of those facilities for landscaping.

### Conclusion and Implications

This opinion by the Second District Court of Appeal demonstrates how under the Coastal Act a lack of determination of adequate water supply and how impacts on groundwater supply can prevent development approval, even though adequate facilities may exist and may appear to vest the right to development. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/B319895.PDF
(Boyd Hill)

## SIXTH DISTRICT COURT UPHOLDS DECISION TO DISMISS CEQA ACTION FOR FAILURE TO TIMELY FILE A REQUEST FOR HEARING PURSUANT TO PUBLIC RESOURCES CODE SECTION 21167.4

*Steinbruner v. Soquel Creek Water District et al.*, *Unpub.*, Case No. H050093 (6th Dist. Feb. 5, 2024).

In an *unpublished* decision filed on February 5, 2024, the Sixth District Court of Appeal upheld the trial court's judgment to dismiss the plaintiff's writ of mandate under the California Environmental Quality Act (CEQA) for untimely filing of a request for a hearing pursuant to Public Resources Code section 21167.4. The plaintiff sought relief based on excusable neglect under Code of Civil Procedure section 473, subdivision (b), but the trial court concluded that the plaintiff's excuses were unpersuasive and granted defendant's motion to dismiss. The appellate court, while acknowledging another trial court could have reasonably reached a different conclusion, found that the plaintiff did not demonstrate the trial court's decision was so at odds with the relevant facts or law as to constitute an abuse of discretion.

### Factual and Procedural Background

The Pro Per plaintiff petitioned for a writ of mandate under CEQA to challenge an addendum of a previously certified Environmental Impact Report (EIR). However, the plaintiff filed a request for a hearing 96 calendar days after the petition was filed when Public Resources Code section 21167.4, subdivision (a) required the request to be filed within 90 days.

Defendants moved to dismiss the petition based on the plaintiff's untimely request. The plaintiff filed opposition to the motion to dismiss, requesting relief under Code of Civil Procedure section 473, subdivision (b) due to excusable neglect. Some of the hardship plaintiff described in its first declaration were as follows: being the primary caregiver of her old mother-in-law, the suicide of a close friend, responding to defendant serving plaintiff's husband with an order of examination relating to a different case, quarantining due to COVID-19, *etc*.

The trial court issued a tentative ruling granting the motion to dismiss. In her second declaration filed the day of the hearing on the motion to dismiss, plaintiff added that she had forgotten to note the deadline to file the request for hearing in her paper calendar due to hardships laid above, attaching a copy of her calendar as an exhibit. Still, the trial court was not persuaded and granted the motion to dismiss.

### The Court of Appeal's Decision

The Sixth District Court upheld the trial court's judgment.

The court first noted that the sole issue on appeal was whether the trial court abused its discretion in denying plaintiff's request for discretionary relief under the Code of Civil Procedure section 473, subdivision (b) from dismissal after the untimely request for a hearing. Although a trial court order denying relief

under Code of Civil Procedure section 473 is "scrutinized more carefully than an order permitting trial on the merits," the court stated they were limited to reviewing the decision for abuse of discretion, that the plaintiff had to demonstrate that the trial court's decision was so at odds with the relevant facts or law as to constitute an abuse of discretion on this record.

Plaintiff relied on a case called *Comunidad en Accion v. Los Angeles City Council,* 219 Cal.App.4th 1116 (2013), another case involving a late filing for request of hearing and relief under Code of Civil Procedure section 473. The Court of Appeal noted the *Comunidad* court balanced between two public policies —the strong preference for a trial on the merits and the policy favoring expeditious review of CEQA challenges. There, the petitioner's counsel stated in its declaration that he forgot to put the request for hearing deadline in his personal calendar system due to taking care of a family illness. Additionally, the court noticed that one of the *Comunidad* court's reasons the respondents would not suffer prejudice from the short delay was that "they themselves had sought extensions to prepare the administrative record."

The court found that, among the various hardships laid out as excuses in plaintiff's opposition to the motion to dismiss and first supporting declaration, forgetting to note the deadline in plaintiff's personal calendar was not one of them. Pointing out it was only on the day of hearing the motion to dismiss that plaintiff filed a second declaration describing the calendar issue, the court found that the trial court could reasonably conclude that plaintiff would have raised the calendar issue in her initial opposition papers had that been the primary reason she failed to file the request for hearing timely.

Lastly, plaintiff took issue with the trial court's reliance on an unpublished opinion in related litigation. The Court of Appeal acknowledged that the trial court's consideration of the unpublished was improper, but this did not amount to an abuse of discretion.

### Conclusion and Implications

The *Steinbruner* decision, while *unpublished*, highlights the crucial importance of meeting filing deadlines. Although the Code of Civil Procedure section 473 was intended to protect petitioners from genuine mistakes or excuses, the seemingly arbitrary distinction made in this case between failure to mark the deadline on one's calendar and the actual hardships highlights the unpredictable and "discretionary" nature of this relief. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/H050093.PDF
(David Song)

## THIRD DISTRICT COURT FINDS CITY COMPLIED WITH ITS OWN CANNABIS ORDINANCE IN CHALLENGE OVER SELECTION PROCESS BY APPLICANT

*TMG Placerville LLC v. City of Placerville*, *Unpub.*, Case No. C095605 (3rd Dist. Feb. 16, 2024).

TMG Placerville LLC (TMG) applied for a permit to operate a cannabis store in the City of Placerville (City). As part of a multi-round review process, the City awarded permits to other applicants, including Conscious Consulting and Yoga, Inc. (Chuck's) and JSCR Management LLC (Reserve House), along with three alternates. The City limited the number of permits for cannabis businesses to three, and create a selection process that involved four phases: (1) submission of a complete application, (2) initial review and scoring by the City's consultant, HdL Companies (HdL), where applicants had to obtain at least 80 percent of possible points, (3) review and interviews by a City selection committee, where applicants had to obtain at least 80 percent of the cumulatively possible points, and (4) review and issuance of permits by the City Manager.

Following issuance of permits, TMG, which had placed ninth out of 11 applicants that completed the whole multi-round process, contested the results of the process to the City Council, arguing the process was unfair and violated the city's cannabis ordinance. TMG claimed Chuck's and Reserve House should have been disqualified for submitting incomplete ap-

plications at the first phase and shouldn't have been allowed to challenge their second phase scores via appeals to the City Manager or City Council, because such appeals were not authorized by ordinance. While the City Council found errors in the scoring process but deemed them not fundamental enough to prejudice other applicants. In particular, the Council determined that the City selection committee did not know of HdL's scoring, and that both HdL and the City selection committee had recommended the same three applicants, and the third phase of the process had cured any deficiencies arising out of the second phase.

### At the Trial Court

TMG filed suit, seeking a writ of mandate under Code of Civil Procedure § 1085, administrative mandate under Code of Civil Procedure section 1094.5, and declaratory and injunctive relief. The petition sought revocation of the permits awarded. However, TMG's opening brief included no mention that it was seeking mandate under § 1085, and prior to argument the trial court issued a tentative ruling indicating that TMG had waived any claim for relief under section 1085. The tentative ruling also indicated that the City did not abuse its discretion by accepting incomplete applications from Chuck's and Reserve House in the initial phase, and that the City Council's determinations regarding the mid-process appeals was supported by substantial evidence. Following argument, the trial court adopted its tentative ruling as the final judgment.

### The Court of Appeal's Decision

TMG appealed, primarily focusing on seeking administrative relief under § 1094.5, without addressing why the trial court had found they had waived their claim for traditional mandamus under § 1085. The Court of Appeal highlighted that TMG's failure to challenge the waiver ruling on appeal constituted forfeiture of any claim for relief under section 1085. The court further noted that had the court exercised its discretion to consider TMG's claims for relief under § 1085 on the merits, those claims would be rejected. After reviewing the city ordinance and the application procedures, the court of appeal found that neither expressly required the City to reject incomplete applications, and therefore there was no clear failure to perform a ministerial or mandatory duty that could trigger relief under § 1085.

TMG also argued that the City abused its discretion by allowing mid-process appeals, asserting that it resulted in unfair advantages to Chuck's and Reserve House. The court of appeal affirmed the trial court's judgment, emphasizing that TMG had failed to demonstrate any resulting prejudice from the mid-process appeals, and that the trial court had found that substantial evidence supported the City's position that the third round of the selection process had cured deficiencies. The Court of Appeal noted that TMG's arguments supported conclusions that there may have been conflicts in the evidence but did not undermine the trial court's conclusions that the City's position was adequately supported by substantial evidence.

### Conclusions and Implications

The decision highlights the challenges that petitioners will face challenging a public agency decision that is subject to review for substantial evidence under Code of Civil Procedure § 1094.5. In particular, the decision does highlight some of the benefits of having multi-round review procedures, which create opportunities for public agencies to correct errors.
A copy of the *unpublished* decision is available here: https://www.courts.ca.gov/opinions/nonpub/C095605.PDF
(Sergio Rudin)

# 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.

## Affordable Housing

**AB 1893 (Wicks)—**This bill was introduced on January 23, 2024 and would address the "builder's remedy" feature of the Housing Accountability Act. The builder's remedy can allow a residential development project to bypass zoning and general plan development standards. The provision only applies in jurisdictions that lack a legally compliant housing element, but affords such a jurisdiction limited ability to deny a project meeting applicable criteria, even if the proposal would normally be barred by applicable land use plans. This bill would give jurisdictions potentially subject to the builder's remedy additional abilities to deny otherwise-qualifying projects, including projects that exceed certain extreme density standards or fall below the minimum allowed density.

**AB 1820 (Schiavo)—**This bill was introduced on January 11, 2024 and amended on February 20, 2024. The bill would provide more transparency for housing developers by requiring local agencies to provide robust information about fees and exactions applicable to housing projects earlier in the entitlement process than is currently required. First, it would allow a developer submitting a preliminary application pursuant to SB 330 to also request a preliminary fee and exaction estimate. The local agency would be required to provide a "good faith estimate" covering of applicable fees and exactions within ten days of submittal of a complete preliminary application making such a request. Second, the bill would require local agencies to provide the applicant with an itemized list and total sum amount of all fees applicable to a housing development project at the time they determine the development application to be complete. The bill would also authorize the agency to request that the developer provide the total amount of fees owed under the agency's fee programs, but specifies that the developer is under no obligation to respond to the request.

**AB 2243 (Wicks)—**This bill was introduced on February 8, 2024 and would make various changes to the Affordable Housing and High Road Jobs Act of 2022 (AB 2011). The Affordable Housing and High Road Jobs Act of 2022 provides for streamlined ministerial approval of qualifying mixed-income and affordable housing development projects along commercial corridors in zoning districts where office, retail, or parking uses are principally permitted. AB 2243 would make various changes to the objective standards, affordability, and site criteria applicable to an affordable housing development or mixed-income housing development subject to the streamlined, ministerial review process under the Act. Among other changes to those objective standards, the bill would prohibit an affordable housing development subject to the Act from demolishing a historic structure that was placed on a national, state, or local historic register.

**AB 2584 (Lee)—**This bill was introduced on February 14, 2024 and would prevent business entities with an interest in more than 1,000 single-family residential properties from acquiring an interest in another single-family residential property to subsequently lease the property. The Attorney General is authorized to bring a civil action against a business entity that violates the provisions of the bill. Each violation carries a civil penalty of $100,000, reasonable attorney's fees, and the business entity must sell the property to an independent third party within a year of the judgement.

**AB 2881 (Lee)—**This bill was introduced on February 15, 2024 and proposes the creation of the

California Housing Authority, an independent state body, with a mission to ensure that the production and acquisition of social housing developments eliminate the gap between housing production and regional housing needs assessment targets, and preserve affordable housing. Social housing developments include the housing owned by the authority and other entities, as specified, provided that all social housing developed or authorized by the authority would be owned by the authority. The bill outlines the board composition for governing the authority, and outlines the authority's powers and duties, emphasizing revenue neutrality and cost recuperation over the life of its properties to maximize housing accessibility without rent burden. The bill prioritizes developing specific properties, promotes a mix of household incomes in social housing, and ensures resident participation in management. It also introduces two leasing models, including a 99-year lease under the ownership model, and establishes eligibility criteria for the social housing project residents. Additionally, the bill creates a Social Housing Revolving Loan Fund to finance the authority's activities, including zero-interest loans for constructing housing, through bonds, and mandating regular audits and reporting to the Legislature.

### California Environmental Quality Act

**SB 1159 (Dodd)—**This bill was introduced on February 14, 2024. The Office of Planning and Research and the Secretary of the Natural Resources agency are responsible for developing the list of categorical CEQA exemptions for classes of projects they have determined to generally not have significant environmental impacts. This bill would direct the agencies to evaluate roadside wildfire risk reduction projects and consider including them as a new categorical exemption class.

**SB 1227 (Wiener)—**This bill was introduced on February 15, 2024 and would exempt projects in downtown San Francisco from CEQA, so long as they meet specified environmental, labor, and tenant protection standards. The bill would also expand the welfare exemption from property tax for affordable housing projects in the same area.

**SB 1259 (Wiener)—**This bill was introduced on February 15, 2024 and seeks to address several practices commonly associated with allegations of CEQA abuse. First, it would seek to address the complaint that CEQA suits can be anonymously funded. The bill would authorize a motion to compel a CEQA petitioner to divulge the identify of every person or entity that contributed in excess of $10,000 to the lawsuit, with dismissal of the suit being a potential consequence of failure to comply. However, the law would prohibit those disclosures from being admissible into evidence for any purpose. Second, the bill would prohibit settlements in CEQA cases that include nonenvironmental provisions. Third, the bill would seek to expedite CEQA lawsuits brought to challenge a commercial, housing, or public works project that results in at least $25 million in investment. It would require courts to resolve such lawsuits within a year of when the administrative record is filed, to the extent feasible. Finally, the bill would prohibit courts from enjoining proposed projects unless they find that continued construction or operation would present an imminent threat to public health and safety or that the project location contains historical, tribal, archaeological, or ecological resources that would be adversely affected.

**AB 1835 (Muratsuchi)—**This bill was introduced on January 16, 2024 and would exempt from environmental review under CEQA housing development projects on real property owned by local educational agencies of at least ten housing units where all of the units are rented by local educational agency employees, local public employees, and general members of the public pursuant to specified procedures. Such housing development projects would be deemed an allowable use and not subject to requirements for a conditional use permit, planned unit permit, or other local discretionary action that would be considered a "project" under CEQA.

**AB 1951 (Fong)—**This bill was introduced on January 29, 2024 and last amended on March 21, 2024. This bill would create a statutory exemption from the requirements of CEQA for wildfire prevention projects, such as removal of trees and brush, conducted within 50 feet of either side of a roadway.

**AB 2087 (Alanis)—**This bill was introduced on February 5, 2024. The bill would require that, in all actions or proceedings brought under CEQA, the fil-

ing party would be required to disclose their identity and interests. This would include individuals, corporations, unions, parties' attorneys, and any others. If the filing party is filing a subsequent action regarding the same project, then the court may request more information as needed, such as financial information or testimony.

**AB 2091 (Grayson)—**This bill was introduced on February 5, 2024 and last amended on March 21, 2024. The bill would create a new statutory exemption from the requirements of CEQA for approval of a change in use to allow public access, as long as exclusively for nonmotorized recreation, and in areas acquired or managed by the public agency for open space or park activities. The bill would define the term "public access" by limiting it to (1) visitors that are in the agency-managed park or open space in a manner consistent with the park's own or conservational purposes; and (2) whose presence is not likely to result in significant impacts to endangered, threatened, rare, and special status species, or to tribal cultural resources. The bill would sunset on January 1, 2030.

**AB 2190 (Mathis)—**This bill was introduced on February 7, 2024 and would extend existing CEQA streamlining benefits for certain energy infrastructure projects enacted under SB 149 (2023) to projects using hydrogen as a fuel. One such benefit is that judicial actions, including any potential appeals, challenging the approval must be resolved within 270 days after filing of the certified record of proceedings.

**AB 2503 (Lee)—**This bill was introduced on February 13, 2024 and would provide a statutory exemption for railroad electrification and railroad siding projects from environmental review under CEQA.

**AB 2940 (Muratsuchi)—**This bill was introduced on February 15, 2024. The bill proposes to add transmission projects that bring new renewable energy generation onto the grid to be defined as environmental leadership development projects under CEQA to qualify them for certain streamlining benefits related to CEQA, including concurrent preparation of the record of proceedings along with the administrative process.

## Density Bonus

**AB 2560 (Wiener)—**This bill was introduced on February 14, 2024. Existing density bonus law allows, among other things, for development concessions and incentives for affordable housing projects. Under the existing law, any concessions or incentives under the law are not allowed to supersede specific development requirements under the California Coastal Act. This bill would allow for density bonuses, concessions and other incentives to apply to qualifying housing developments regardless of the specific planning requirements applicable to the development in the Coastal Act.

## General Plans

**AB 1889 (Friedman)—**This bill, also known as the Room to Roam Act, was introduced on January 22, 2024 and would require a city or a county general plan to either include a wildlife connectivity element, or integrate related goals, policies, and objectives into other elements of the general plan to consider the effect of development within the jurisdiction on fish, wildlife, and habitat connectivity. The bill would require the wildlife connectivity element to identify and analyze connectivity areas, permeability, and natural landscape areas within the jurisdiction, and incorporate and analyze specified guidelines and standards, relevant information from specified sources, and relevant best available science. The bill would require a city or county to adopt or review the wildlife connectivity element or integrate related goals, policies, and objectives into other elements, upon the adoption or next revision of one or more elements of the general plan on or after January 1, 2025.

## Housing Element Law

**SB 951 (Wiener)—**This bill was introduced on January 18, 2024 and would amend Housing Element law that requires a jurisdiction lacking adequate sites to accommodate its regional housing needs allocation (RHNA) for all income levels by engaging in a rezoning program to provide adequate sites. This bill would specify that such a rezoning program may include adopting any necessary local coastal program updates under the Coastal Act for jurisdictions in the coastal zone. The bill was amended on March 19, 2024 to no longer remove areas of San Francisco from the coastal zone.

**AB 1886 (Alvarez)**—This bill was introduced on January 22, 2024 and would amend Housing Element law to clarify when a local housing element shall be considered to be in substantial compliance with the State law. Under existing law, if a city or county submits its draft housing element to the Department of Housing and Community Development (HCD), and HCD finds it does not substantially comply, then the legislative body of the city or county should either: (A) change the draft element or amendment to substantially comply with the Housing Element law or (B) adopt the draft housing element or amendment without changes and make specified findings as to why the draft element or amendment substantially complies with the Housing Element law despite the HCD's findings. Under the proposed amendments, if the planning agency makes the above-described findings, then the city or the county shall submit those findings to HCD, and HCD would be required to review these findings as part of its review of an adopted housing element or amendment. The bill would create a rebuttable presumption of validity for HCD's findings regarding a housing element or an amendment that substantially complies with the Housing Element Law.

This bill further provides that, for the Housing Accountability Act (HAA) findings to disapprove or conditionally approve an affordable housing development project, a housing element or amendment is considered substantially compliant with the Housing Element law only when the local agency has adopted a housing element or amendment and HCD or a court of competent jurisdiction determines the adopted housing element or amendment is in substantial compliance with the Housing Element law. This determination of substantial compliance continues until HCD or the court determines otherwise or the end of the applicable housing element cycle. For purposes of the HAA, a housing element or amendment is considered in substantial compliance with the Housing Element law only if the substantial compliance findings determination was made when a preliminary application or complete application was submitted. The bill's HAA provisions are limited to local agencies that have adopted housing elements that HCD or a court have determined are substantially compliant with the Housing Element law.

**AB 2023 (Quirk-Silva)**—This bill was introduced on January 31, 2024 and last amended on March 21, 2024. This bill would amend provisions of the Housing Element Law to provide that, for the seventh and subsequent revisions of the housing element, local governments must complete the rezoning of sites within one year of the statutory deadline for the adoption of the housing element or the earlier of three years after the date the housing element is adopted or 90 days after receipt of comments from HCD, if the local government satisfies certain requirements, including submitting a draft element or draft amendment to HCD for review within specified timeframes and adopting a draft element or draft amendment that HCD finds to be insubstantial compliance with the Housing Element Law. Further, existing housing element law requires local governments to identify adequate sites for housing and make adequate provision for the current and future needs of all community household income levels. This bill would provide that, when the identified inventory of sites is inadequate to meet housing needs, the local government must establish and adhere to a program for rezoning to make the inventory adequate. This bill would further provide that nonvacant sites in a prior housing element and vacant sites not approved for development in at least two planning periods, would not be considered adequate sites, unless they are residentially zoned at a particular density and the site is subject to a program requiring rezoning by the applicable deadline. Finally, under existing law related to actions challenging the validity of a housing element, where HCD finds that the housing element substantially complies with the Housing Element Law, there is a rebuttable presumption of validity. This bill provides that for the same actions, if HCD finds that the housing element does not substantially comply with the law, there is a rebuttable presumption of invalidity.

## Planning and Zoning

**SB 968 (Seyarto)**—This bill was introduced on January 24, 2024 and would add new considerations to the Regional Housing Needs Allocation (RHNA) process. California governments utilize the RHNA process to plan for housing needs in each region of the State. This process starts with the State determining how much housing at a variety of affordability

levels is needed for each region in the State, and then regional governments develop a methodology to allocate that housing need to local governments. This bill would allow regional governments to consider a local government's overproduction of housing units from the previous RHNA cycle in a particular income category, which may count as a credit toward the need allocation of that same income category in the next cycle. The Senate Housing Committee considered the bill on March 19, 2024, and it did not receive enough votes to pass. If reconsideration is not granted within 15 legislative days, it will be returned to the Secretary of the Senate and may not be considered further during the session.

**SB 937 (Wiener)—**This bill was introduced on January 17, 2024 and seeks to extend the expiration date of land use entitlements issued to housing development projects by 18 months. As drafted, the extension would only apply to those entitlements issued and in effect prior to 2024 and expiring before the end of 2025. The bill would also enact several modifications to how impact fees are assessed for housing projects under the Mitigation Fee Act. It would prohibit assessment of such fees until certificates of occupancy are issued, at the earliest. It would also subject parkland dedication fees (sometimes known as Quimby fees) to the law, removing an exemption for such fees. Finally, the bill would specify that water and sanitation districts are subject to the Mitigation Fee Act as local agencies, and that sewer and water connection fees assessed by a local agency are subject to provisions of the law.

**SB 1037 (Wiener)—**This bill was introduced on February 6, 2024 and proposes to impose civil penalties ranging from $10,000 to $50,000 per month on cities, counties, or local agencies where the Attorney General has brought an action against the local jurisdiction for failure to comply with housing element revisions or for enforcing state housing laws mandating ministerial approval of housing development projects. The penalties collected would be deposited into the Building Homes and Jobs Trust Fund to support affordable housing in the affected jurisdiction. If a jurisdiction fails to pay the penalties, the court would be authorized to direct the State Controller to intercept state and local funds and allocate them to the Trust Fund to address the non-payment.

**AB 2085 (Bauer-Kahan)—**This bill was introduced on February 5, 2024. The bill would provide that development of a community clinic licensed under Section 1204 of the Health and Safety Code shall subject only to ministerial approval, and therefore not subject to CEQA, if the development is located in an area that is principally permitted for use for offices, retail, health care, or parking. If the agency determines the project does not meet these standards, then the agency must provide written documentation supporting its determination. The agency has 90 days to either approve or provide documentation to the development.

**AB 2117 (Patterson)—**This bill was introduced on February 5, 2024 and would extend the expiration date of local development permits and project approvals to not include the time during which the permit or approval is challenged. Under the bill, an action or proceeding involving the permit or project approval would essentially toll the expiration date of the permit until the action or proceeding is resolved.

**AB 2314 (Lee)—**This bill was introduced on February 12, 2024 and amended on March 19, 2024 to allow certain tribal housing developments to be permitted as a use by right. Planning and Zoning Law currently allows developers to submit applications through a ministerial approval process if certain conditions, such as meeting objective planning standards and affordable housing requirements, are met. This bill would allow tribal housing developments that meet specific requirements, such as being on an infill lot that is not environmentally sensitive, to be permitted under this ministerial process regardless of the site's zoning designation.

### Public Records Act

**SB 908 (Cortese)—**This bill was introduced on January 8, 2024 and would prohibit public officials, legislators, and staff from creating or sending public records using nonofficial electronic messaging systems, like personal e-mail or text message, unless they send a copy of the public record to an official electronic messaging system within 20 days of the original creation or sending of the public record. The California Public Records Act and the Legislative Open Records Act require that certain public and legislative records be made available for public inspection. The

bill notes that public employees and officials often communicate about public business using private electronic devices. The California Supreme Court has held that the mere use of a private electronic device does not transform what would otherwise be a public record into a private record. SB 908 aims to ensure that public records on private devices are accessible to the public.
(Amy Higuera)

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