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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

U.S. SUPREME COURT HOLDS THAT LEGISLATIVE CONDITIONS ARE SUBJECT TO TAKINGS SCRUTINY UNDER THE *NOLLAN/DOLAN* TEST

By Sergio Rudin

In a unanimous decision for the plaintiff, the U.S. Supreme Court held that the Takings Clause of the U.S. Constitution does not distinguish between legislative and administrative land-use permit conditions. As a result, all land use conditions and fees will be subject to review under the unconstitutional conditions doctrine. Under *Nollan v. California Coastal Commission*, 483 U. S. 825 (1987) and *Dolan v. City of Tigard*, 512 U. S. 374 (1994), this requires that the government imposing the condition or fee demonstrate that the condition has an "essential nexus" to the government's regulatory interest and "rough proportionality" between the development's impact and that interest. The Court overturned the decisions of California courts which had assumed that the unconditional conditions doctrine, and *Nollan* and *Dolan*, did not apply to conditions imposed by legislation. However, the Court left open the important question of whether a legislature imposing a permit condition a class of properties must tailor that condition with the same degree of specificity as a permit condition that targets a particular development. As a result, the decision is likely to spawn more litigation over legislatively imposed land use conditions, impacting local government agencies throughout California. [*Sheetz v. County of El Dorado*, 601 .U.S.___, Case No. 22-1074, 601 (2024).]

Background

In 2016, plaintiff George Sheetz applied for a building permit to build a 1,854 square foot manufactured home on his land in unincorporated El Dorado County, California. The County's Board of Supervisors had adopted a general plan, which included a requirement that developers pay a traffic impact fee as a condition of receiving a building permit. The traffic impact fee was determined by a rate schedule that considered the type of development and the location within the County. As a condition of receiving a building permit, Sheetz paid the traffic impact fee in amount of $23,420 under protest, and then sought a refund from the County, which did not respond.

In 2017, Sheetz then filed suit in state court, challenging the legality of the traffic impact fee under both state law and federal law: first, under the Mitigation Fee Act (specifically, California Government Code section 66001) as well as under the Takings Clause of the U.S. Constitution. He did so by filing a petition for writ of mandate, and six other causes of action for declaratory and injunctive relief.

Sheetz asserted that the fee violated the Mitigation Fee Act because there is no "reasonable relationship" between the amount of the fee and the cost of the road improvements specifically attributable to his development project, nor was there a "reasonable relationship" between the traffic impacts caused by his project and the need for road improvements within the County. Sheetz further asserted that the fee violated the Mitigation Fee Act because it included costs attributable to existing deficiencies in the County's "traffic infrastructure." As for his federal claim, Sheetz asserted that the fee violated the takings clause of the United States Constitution as the County failed to make an individualized determination that an "essential nexus" and "rough proportionality" existed between the traffic impacts caused by his project and

The opinions expressed in attributed articles in *California Land Use Law & Policy Reporter* belong solely to the contributors, do not necessarily represent the opinions of Argent Communications Group or the editors of *California Land Use Law & Policy Reporter,* and are not intended as legal advice.

the need for improvements to roads, as required by *Nollan* and *Dolan*. The County demurred, and the trial court upheld the demurrer as to all of causes of action for injunctive and declaratory relief (including the federal claim) on the basis that they were time-barred, and that the sole remedy for "as applied" challenges was administrative mandamus, not declaratory relief. The trial court overruled the demurrer on the writ of mandate cause of action, on the basis that it stated a cognizable claim under the Mitigation Fee Act.

After full briefing, the trial court denied the petition for writ of mandate on the merits, finding that the County had met its burden under the Mitigation Fee Act to produce evidence demonstrating that the County had used a valid method for imposing the fee, had established a reasonable relationship between the free charged and the burden posed by Sheetz's development project, and that there was no evidence that the fee was arbitrary, entirely lacking in evidentiary support, or otherwise invalid. As for the federal claim, the trial court rejected Sheetz's constitutional challenge, concluding that the fee was not subject to the requirements of *Nollan* and *Dolan* because it is a legislatively prescribed development fee that is generally applicable to a broad class of property owners.

On appeal, the California Court of Appeal noted that the purpose of the fee was to require new development pay the full cost of constructing new roads and widening existing roads, but that:

> . . .[i]n assessing the fee, the County does not make any 'individualized determinations' as to the nature and extent of the traffic impacts caused by a particular project on state and local roads. 84 Cal. App. 5th 394, 402 (2022).

The Court of Appeal affirmed on the state law claims, finding no error in the denial of the petition for writ of mandate. As for the federal Takings Clause claim, the Court of Appeal found that as a matter of law, generally applicable development fees were not subject to the *Nollan/Dolan* test, and thus the trial court properly dismissed the federal claim. The California Supreme Court denied review.

The Supreme Court's Decision

The opinion of the Court, authored by Justice Barrett, noted that *certiorari* was granted because various state courts had reached different conclusions on whether the Takings Clause recognized a distinction between legislative and administrate conditions on land use permits. As a starting point, the decision recognized that the compensation requirements under the Takings Clause coexist with the police powers reserved to states to regulate land use, and that a right to compensation will not be automatically triggered if conditions are imposed to further a legitimate police power purpose. The *per curiam* opinion summarized briefly the requirements of the *Nollan* and *Dolan*, including the requirement that all permit conditions have an "essential nexus" to the government's land-use interest and that conditions have a "rough proportionality" to the development's impact on the land-use interest, meaning that conditions will not require a landowner "to give up more than is necessary to mitigate harms resulting from new development."

Fifth Amendment—No Exception to Ordinary Takings Analysis for Legislatively Enacted Development Fees

The Supreme Court then determined that the California Court of Appeal's determination that legislatively prescribed monetary fees were exempt from Takings Clause analysis was error, and that such a distinction "finds no support in constitutional text, history, or precedent."

The Court began its analysis with the text for the Fifth Amendment, stating the text did not single out legislative acts from other official acts. The Court also stated that at the time the Takings Clause was written, the power of eminent domain was frequently exercised by legislation, making legislation the "prime target for scrutiny under the Takings Clause." Lastly, the Court noted that prior physical takings and regulatory takings cases required just compensation when a takings was found, regardless of whether the official act causing the takings was legislative or administrative. As a result, the Court found that there was no exception to ordinary takings rules for legislatively enacted development fees. In concluding, the Court stated it was not deciding whether a:

> . . .condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development.

Concurring Opinions

Justice Sonia Sotomayor authored a concurring opinion, joined by Justice Ketanji Brown Jackson, positing that *Nollan/Dolan* scrutiny should only apply where the condition at issue would be considered a compensable taking if imposed outside the permitting process, and pointing out that neither the Supreme Court nor the California Court of Appeal addressed the issue with respect to the County's traffic impact fee.

Justice Neil Gorsuch also authored a concurring opinion to argue that the *Nollan/Dolan* test should not be considered by courts to operate differently when an alleged taking affects a large class of properties, rather than a specific property.

Justice Brett Kavanaugh authored the final concurring opinion, joined in by Justices Kagan and Jackson joined, clarifying that the Court had not previously ever considered—and was not deciding—the validity of impact fees or other permit conditions that are imposed on applicants based on reasonable formulas or schedules that assess the impact of various classes of development.

Conclusion and Implications

In the *per curiam* opinion, all nine justices puzzlingly declined to address any of the parties' arguments regarding the validity of the traffic impact fee, and even remarked that:

> . . .[w]hether the parties' other arguments are preserved and how they bear on Sheetz's legal challenge are for the state courts to consider in the first instance.

Furthermore, the Court failed wholly to address any of the factual findings made by the trial court below on the state law claims, which appear dispositive of the issues raised by Sheetz's federal takings claim as well. Importantly, the Court does not address that the "reasonable relationship" test under California's Mitigation Fee Act is essentially co-extensive with the requirements "essential nexus" and "rough proportionality" under *Nollan* and *Dolan*. The Mitigation Fee Act arose through a series of legislative enactments in the 1980s, rewritten by AB 1600 in 1987 to reflect the requirements of the recently decided *Nollan*. The California Supreme Court, in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996), subsequently interpreted the statutory framework to also encompass *Dolan*, stating that:

> . . .in order to avoid substantial questions concerning the constitutional sufficiency of the legislative standard embodied in the [Mitigation Fee Act], the tests formulated by the high court in its Dolan and Nollan opinions for determining when a regulatory taking has occurred apply here to the [A]ct's requirement that the local regulatory authority demonstrate a 'reasonable relationship' between the monetary exaction and the public impact of the development. *Ehrlich*, supra, 12 Cal. 4th at 860.

The Supreme Court's own decision in *Dolan* even recognized that the "reasonable relationship" test in many state laws was intended to be analogous to the federal standard. (See *Dolan*, supra, 512 U.S. 374, 391 ["We think the 'reasonable relationship' test adopted by a majority of the state courts is closer to the federal constitutional norm. But we do not adopt it as such, partly because the term . . . seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause . . ."])

As a result, while the Supreme Court remanded the case to the state courts for further proceedings, it is unclear what if anything is left to be decided with respect to Mr. Sheetz, or the validity of the County's traffic impact fee. Arguably, nothing in the Supreme Court's decision appears to affect the validity of the judgment already entered in the case.

However, since the Supreme Court specifically did not decide what degree of specificity a legislatively adopted fee must be tailored to in order to meet the "rough proportionality" requirement, extensive litigation on this issue will likely occur. As a result of this decision, inclusionary housing, commercial linkage fees, and other in-lieu fees are likely to be impacted by how *Sheetz* is applied by lower courts in the future, and depending on how such fees were adopted, they may be invalidated.

Of course, nothing in the *Sheetz* decision specifically requires that impact fees or other permit conditions that are imposed on applicants based on reasonable formulas should automatically be invalid, and only Gorsuch's concurring opinion, in which nobody

else joined, even hints that this should be rule. Furthermore, even in *Dolan*, the Court stated that "no precise mathematical calculation is required, but the city must make some effort to quantify its findings." *Dolan v. City of Tigard*, supra, 512 US at 396. Thus, most nexus studies that have been historically undertaken by jurisdictions to substantiate impact fees (and which are now required under Government Code section 66016.5 for all new impact fees) should already be more than sufficient to meet the rough proportionality standards set forth under *Dolan*. After all, many practitioners developing nexus fee studies had already assumed that the "reasonable relationship" requirement in the Mitigation Fee Act required local impact fees to meet something functionally akin to the nexus and rough proportionality standards under *Nollan* and *Dolan*. This was primarily because even though California court decisions had previously refused to directly apply *Nollan* and *Dolan* to legislatively enacted fees, court decisions had still stated that impact fees still had to be reasonable and that arbitrary or extortionate fees would not pass constitutional muster, even if legislatively adopted.

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Sergio sits on the Editorial Board of the *California Land Use Law & Policy Reporter*.

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF WATER RESOURCES RELEASES WATER PLAN UPDATE LOOKING TO THE FUTURE OF WATER RESOURCE MANAGEMENT

On April 3, 2024, the California Department of Water Resources released the 2023 Update to the California Water Plan. The statewide plan provides local communities, water districts, tribes, cities, counties and the public guidance with respect to the statewide objectives for the use and development of California's water resources.

Background

The California Water Plan is updated every five years and the 2023 Update focuses on promoting climate resilience by providing a vision for the entire state, establishes clear goals, and provides planning frameworks and toolkits to support the Plan's objectives. The updated Water Plan also includes resource management strategies, regional planning and performance tracking tools, and looks to a future where changes to the climate are invariably impacting resource management.

Development of the 2023 State Water Plan Update

In preparing the 2023 Update, the Department of Water Resources engaged with California's tribal communities, other state agencies, industry representatives, non-governmental organizations, water suppliers and local government. Committees and teams were established as well as numerous public meetings and workshops were conducted gathering the concerns, priorities and ideas, which were integrated into the final plan.

Key Elements of the 2023 Update

The primary objective of the 2023 Update is to continue to build California's water supplies to be climate resilient and equitable into the future. The 2023 Update integrates the Water Plan with existing water policies, laws and regulations that have been implemented in recent years. This includes financial investments, prioritizing vulnerable and disadvantaged communities, accounting for ecosystem needs and the importance of water resource management in California's economy. Integrating three primary themes, the 2023 Update addresses climate urgency, strengthening watershed resilience, and steps to achieve equity with the overarching goal of assuring California has climate resilient water systems that equitably benefit all Californians.

The 2023 Update identifies seven objectives that provide a roadmap toward resilience in meeting the challenges facing California. These include: (1) Supporting water resilience planning and implementation; (2) Improved resiliency of "backbone" state, federal, and regional water infrastructure; (3) Improved resiliency of natural "backbone" infrastructure; (4) Advancing equitable outcomes in water resource management; (5) Support and learn from tribal water resource management practices; (6) Support and increase flexibility of regulatory systems; and, (7) Provide guidance and support continued resources for implementation of actions toward water resilience.

Climate Urgency

Focusing on water resource planning while expanding on existing knowledge and experiences. The 2023 Update examines the challenges facing California's water systems and builds on the lessons learned—both positive and negative—to improve water supply management, improve water quality and food security while seeking to protect communities from the adverse impacts of the changing climate, including drought, flooding, sea level rise, and excessive heat. In achieving these objectives, the 2023 Update addresses strategies to continue to enhance and protect infrastructure within watersheds and regions.

Resilient Watersheds

As watersheds, including surface and groundwater systems, are on the frontline of impacts from climate change, the 2023 Update focuses on encouraging

climate vulnerability analyses and adaptation plans for California's watersheds. These evaluations and plans will then support the development of solutions and programs that will allow for communities to implement solutions to face climate and resource uncertainties.

Equity

Building on California's legislative recognition that every human has the right to safe, clean, affordable, and accessible water, the 2023 update focuses on implementing strategies to achieve water equity for all Californian's regardless of social, economic, and health disadvantages. This includes addressing inequities in access to domestic water supplies as well as inequities in water quality. The 2023 Update also addresses challenges to disadvantaged communities in responding to the impacts of climate change, including drought and floods.

Conclusion and Implications

The 2023 Update to the California Water Plan continues California's efforts to be proactive in addressing the challenges in managing the state's water resources. By building on lessons that have been learned over prior years and developing strategies to meet the goals and needs of the State, the 2023 Update continues to reflect California's priorities of understanding the challenges facing the state though developing proactive strategies to meet those challenges while improving equity and economic opportunities for all Californians.
(Micheline Nadeau Fairbank, Derek Hoffman)

CALIFORNIA PUBLIC UTILITIES COMMISSION PROPOSES TO IMPLEMENT FIXED INCOME-BASED ELECTRICITY CHARGES TO PAY FOR INFRASTRUCTURE AND OPERATIONAL COSTS

In July 2022, the California Legislature passed Assembly Bill 205 (AB 205), which, among other things, directed the California Public Utilities Commission (CPUC) to authorize utility companies to change the way customers are billed for the costs of providing electrical transmission and distribution service and the costs of utility operations, including wildfire mitigation measures (Fixed Costs).

Under the current billing framework, California investor-owned public utilities recoup nearly all of the costs of providing electricity service through the volumetric (cost per unit) portion of each residential customer's bill that is tied to usage rates—*i.e.*, bills are based on how much electricity the customer uses. According to the Legislature, this volumetric billing scheme has led to a situation in which rates must rise to recover sufficient revenue to support Fixed Costs, which in turn can cause year-to-year rate increase volatility. This is especially true considering that electricity sales may decline due to greater adoption of distributed energy resources (*e.g.*, rooftop solar), whereas a utility's Fixed Costs are likely to continue to climb. Because only a portion of a utility's operating costs vary based on electricity consumption, whereas Fixed Costs do not, AB 205 declared that this disparity can contribute to inequities among customers. To address these issues, AB 205 directed the CPUC to establish reasonable fixed charges based on income for residential customers in order to: (1) stabilize rates; (2) equitably allocate and recover costs among customers; and (3) reduce the cost of electricity so as to encourage customers to adopt electric vehicles and replace gas appliances with electric appliances, as these will become less expensive to charge.

Public Workshops

After a public workshop and multiple rounds of interpretive briefing by a variety of stakeholders regarding how best to implement the requirements of AB 205, the CPUC issued its proposed decision on March 27, 2024 (Proposed Decision). If approved, the Proposed Decision would authorize all investor-owned utilities to change the structure of residential customer bills by shifting the recovery of a portion of Fixed Costs from volumetric rates to a separate, fixed amount without changing the total costs that utilities may recover. This, according to the Proposed Decision, will reduce "the volumetric price of electricity (in cents per kilowatt hour) for all residential custom-

ers of investor-owned utilities," thereby incentivizing increased electrical vehicle and appliance usage, in line with the state's climate change goals.

The Proposed Decision

Taking an incremental approach to implementing AB 205's requirements, the Proposed Decision adopts a tiered billing structure based on income that utilizes the existing income-verification processes already in place for the utilities' California Alternate Rate for Energy (CARE) and Family Electric Rate Assistance (FERA) programs, which provide lower billing rates for low-income customers. If approved, Southern California Edison Company (SCE) and San Diego Gas & Electric Company (SDG&E) will begin implementing these bill changes in the fourth quarter of 2025, with Pacific Gas and Electric Company (PG&E) and other smaller utilities following suit in the beginning of 2026.

Fixed Charges and Income Verification for Large Utilities

After considering various proposals regarding the best procedure for implementing income-graduated fixed charges in light of AB 205's statutory requirements, the Proposed Decision determined that the most efficient and equitable way to verify customers' income levels was through the existing CARE and FERA income verification processes, which verify customers' income based on self-attestation and spot checks. Accordingly, the Proposed Decision adopted the following tiering structure and income tier assignments for SCE, SDG&E, and PG&E customers (collectively, Large Utilities):

Tier 1 will be assigned to customers with incomes from 0 to 200 percent of the Federal Poverty Guideline levels applicable to that household under the CARE program. All customers enrolled in CARE will automatically be enrolled in Tier 1.

Tier 2 will be assigned to: (1) customers with incomes above 200 percent and below 250 percent of the Federal Poverty Guideline levels applicable to that household through the FERA program, or (2) to customers who live in an affordable home that is restricted by federal or state law to residents with incomes at or below 80 percent of Area Median Income. All customers enrolled in the FERA program will automatically be assigned to Tier 2, with all customers who live in qualifying affordable homes based on the statewide database maintained by the California Housing Partnership also being placed in Tier 2. Neither group will be required to take any action to verify income levels to qualify for Tier 2.

All customers who do not qualify for the first or second tier are automatically assigned to Tier 3.

In considering what fixed costs, and at what dollar levels per tier, the Large Utilities could charge, the Proposed Decision used a dataset that included aggregated residential customer bill data from the Large Utilities. The Proposed Decision also considered existing residential fixed charges that had already been successfully implemented, such as the one used by the Sacramento Municipal Utility District (SMUD). Despite the Large Utilities' assertion that their Fixed Costs were different than those of the smaller SMUD, the Proposed Decision found that it was reasonable to use SMUD's fixed charge rates as a benchmark for the Large Utilities and applied the following fixed charges for each tier:

- The Tier 1 fixed charge was set at $6, provided that the charge would be reduced if CARE-eligible customers did not average monthly bill savings in all baseline territories;

- The Tier 2 fixed charge was set to $12.08; and

- The Tier 3 fixed charge was set to $24.15, provided that this charge would be reduced if it is more than 100 percent of authorized Fixed Cost categories.

Fixed Charges and Income Verification for Small Utilities

For other utilities that have a smaller customer base and lower Fixed Costs— Bear Valley Electric Service, Inc., PacifiCorp, and Liberty Utilities (collectively, Small Utilities)—the Proposed Decision set a different tiering structure, income tier assignments, and fixed charges from those imposed on the Large Utilities, due to the fundamental differences between the Large and Small Utilities' customer bases and operating costs. The Small Utilities' rates and tiering structure were proposed in a settlement agreement between the Small Utilities and other stakeholder groups. The settlement agreement did not propose a middle tier based on FERA eligibility because the Small Utilities do not administer FERA programs.

The Proposed Decision found that the settlement agreement's income tier and income verification proposal was reasonable and set the following tiering structure and income tier assignments:

- Tier 1 will be assigned to customers with incomes of 0 to 100 percent of the Federal Poverty Guideline levels as applicable to that household under the CARE program. Eligibility for Tier 1 will be based on those customers who attest to having eligible incomes through the CARE application process.

- Tier 2 is assigned to customers with incomes above 100 percent and at or below 200 percent of the Federal Poverty Guideline levels applicable to that household under the FERA program.

All CARE program customers who do not attest to having eligible incomes for Tier 1 are automatically enrolled in Tier 2 without needing to take any action.

All customers who are not enrolled in the CARE program are assigned to Tier 3.

Although the settlement agreement set different fixed charge levels for each of the three tiers depending on the costs of each individual utility involved—ranging from $5 to $7.21 for Tier 1; $10 to $15.64 for Tier 2; and $23.40 to $33.98 for Tier 3—the Proposed Decision determined that the record of proceeding was not sufficient to determine which portion of the Small Utilities' base revenues were Fixed Costs that were eligible for recovery through a fixed charge. Accordingly, the Proposed Order requested the Small Utilities to submit further information for the CPUC to determine if the Small Utilities' fixed charge levels are reasonable.

Conclusion and Implications

The Proposed Decision has no legal effect until it is approved by the CPUC. The earliest day that the Proposed Decision may be heard is during its May 9, 2024, public voting meeting but the Proposed Decision can be held for multiple consecutive voting meetings if the CPUC staff or Commissioners require more time to consider it. Although there has been talk among lawmakers announcing efforts to roll back some of the provisions in AB 205, saying that the provisions need more time for review, it is still unclear at this point whether these roll-back efforts are being actively pursued in the Legislature or if any proposed cleanup legislation will be successful. (Dustin Peterson, Megan Somogyi)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT UPHOLDS SENATE BILL 10 GRANTING MUNICIPALITIES DISCRETION TO SUPERSEDE LOCAL HOUSING DENSITY CAPS

Aids Healthcare Foundation v. Bonta, ___Cal.App.5th___, Case No. B321875 (2nd Dist. Mar. 29, 2024).

The Second District Court of Appeal has upheld Senate Bill 10 (SB 10), which grants cities and counties the discretion to supersede local housing density caps, as constitutionally valid on its face.

Factual and Procedural History

Signed into law on September 16, 2021, the Legislature enacted SB 10 in response to the "severe shortage of housing at all income levels in [California]." SB 10 grants local legislative bodies discretion to superseded local housing density caps on a parcel-by-parcel basis, including those caps that were enacted via the voter initiative process. Specifically, SB 10 authorizes cities and counties to adopt an ordinance allowing an individual parcel to be upzoned to a residential density of ten units per parcel for qualifying parcels meeting specific requirements. To qualify, a parcel must be located in a "transit-rich area" or an "urban infill site" and cannot be in a "very high fire hazard severity zone." Further, any increase in residential density pursuant to SB 10 must be for the purpose of furthering fair housing. If these requirements are met, the local legislative body may supersede housing density caps by a simple majority vote for those caps enacted by local ordinance. A supermajority vote, however, is required to superseded a residential density cap enacted by voter initiative.

Petitioners filed a lawsuit facially challenging the constitutionality of SB 10 on the grounds that it violated the initiative power of the California Constitution. The trial court disagreed ruling against petitioners and finding that SB 10 was a constitutionally valid exercise of the Legislature's power, *i*.e., it did not unconstitutionally invade the voter-initiative power. This appeal followed.

The Court of Appeal's Decision

The appellate court initially set forth the step-by-step framework it intended to use to ensure that all parties' arguments were fully addressed.

Legislative Authority

The Court of Appeal first considered when it is appropriate for the Legislature to supersede local zoning and land use laws, particularly those of charter cities. It explained that, in general, state law supersedes local ordinances where the two are shown to conflict. In the context of charter cities, however, the state law must not only conflict with the local ordinance, but must also involve a statewide or regional concern, which is ultimately a question of law for the courts. The court held that SB 10, which is intended to address the state's housing crisis, involved a matter of statewide concern finding that affordable housing has been a statewide issue for nearly 60 years—and throughout that time, the Legislature has enacted numerous laws to address the issue. As the court noted, this is because due to the vulnerability of local governments to succumb to "not in my backyard" (NIMBY) pressure, state intervention is often necessary to address a housing shortage. The court agreed with petitioners that the Legislature's express declaration that SB 10 involved a statewide concern was not dispositive. It is, however, entitled to great weight and the court noted that it had independently examined the reasons behind the Legislature's finding before concluding it was supported. The court also rejected petitioners' argument that the Legislature's evidentiary record failed to support a finding that there was a shortage of *all* housing and not just affordable housing finding that the fact that housing prices rose for all levels of housing supported a finding that there is a shortage of housing at all of those levels.

State Preemption

Next, the court considered whether SB 10 preempts local housing density caps. The court articu-

lated that there are two ways in which a local law can conflict with a state statute—(1) when the local law says you cannot do X, but the state law says you must do X; and (2) where the local law says doing X is prohibited and the state law provides the option of doing X, Y, or Z. The court went on to hold that SB 10 preempts local housing density caps because SB 10 permits what the local housing density caps prohibit. Petitioners argued a lack of conflict between SB 10 and local housing density caps because SB 10 only gives local legislative bodies the discretion to supersede local density caps but does not expressly require them to do so. The court disagreed finding that petitioners' argument ignored the second type of preemption, where the state law provides an option of doing what is otherwise prohibited by local law. Petitioners also argued that a conflict could be avoided by asking the voters to supersede an initiative-based housing density cap. In response, the court reiterated that the NIMBY-ism associated with letting the voters decide exacerbates (rather than alleviates) the housing crisis, which is precisely why the Legislature found it necessary to enact SB 10.

Heightened Standard for Preemption

The court then addressed whether SB 10 satisfied the heightened standard for preempting local voter initiatives. The court explained that while the Legislature can only preempt a local voter initiative where there is a "clear showing" or "definite indication" of legislative intent to do so. Here, the court found that the Legislature had made the required showing to preempt because SB 10 expressly granted local legislative bodies the ability to upzone a parcel notwithstanding, in part, "restrictions enacted by local initiative." As further evidence of legislative intent to supersede local voter initiatives, the court emphasized SB 10's heightened standard requiring a two-thirds vote in order to achieve initiative-based density caps. The court rejected petitioners' argument that voter initiative power could never be preempted relying on article II, section 11 of the California Constitution specifically states that the Legislature could do so if the law was of statewide importance. The court similarly rejected petitioners' claim that "exclusive delegation" doctrine, which provides that the Legislature can exclusively delegate authority to a local legislative body, so long as the legislation addresses a matter of statewide concern, did not apply to SB 10 because the statute does not delegate local legislative bodies the exclusive power over housing density caps. Petitioners further claimed that as the "power" of the voter initiative is inherently preexisting, it could not be taken away and redelegated to local legislative bodies. The court observed that SB 10 does not take away the power of voters to adopt initiatives regulating housing density, rather SB 10 grants exclusive power to supersede all local housing density caps whether enacted by ordinance or by voter initiative.

A Parcel-By-Parcel Approach

The court was then faced with considering whether the Legislature's approach in allowing local housing density caps to be superseded on a parcel-by-parcel basis rather than outright nullifying local density caps was constitutionally problematic. The court held that it was not. First, it reasoned that the Legislature's actions were supported by case law holding that in matters of statewide concern, the Legislature has the ability to grant local legislative bodies with discretion on how to act and supersede conflicting or interfering voter initiatives. Second, the court concluded that the Legislature's discretionary approach provides greater weight to the local initiative process than a statewide approach because voters can still approve new housing density caps, and SB 10 offers only limited discretion to override them.

Voter Initiatives and Preemption

Finally, the court answered the question of whether voter initiatives enacted prior to SB 10 can be superseded. Petitioners argued that an already-existing initiative imposing housing density caps operates as a preemptive decision to not supersede the imposed density caps. The court rejected petitioners' interpretation. First, the court reasoned that the plain language of SB 10 made no exception for these already-existing initiatives. Second, it found that petitioners' approach would significantly frustrate the Legislature's goal in enacting SB 10 by narrowing a local legislative body's ability to use their discretion to supersede housing density caps.

Conclusion and Implications

The Second District Court of Appeal affirmed the trial court decision upholding SB 10 against petitioners' facial attack. This case highlights the extent of

authority the Legislature has in addressing matters of statewide concern and provides a thorough explanation of the interaction between state law and local law created by voter initiative. In upholding SB 10, it is also worth noting that the court independently determined that California's housing shortage was an issue of statewide concern. This case could pave the way for additional legislative action aimed at addressing the housing shortage. The court's opinion is available online at: https://oag.ca.gov/system/files/attachments/press-docs/Court%20Decision.pdf (Christina Berglund, Bridget McDonald)

FOURTH DISTRICT COURT FINDS TRIBE IS NEITHER A NECESSARY NOR INDISPENSABLE PARTY IN CEQA ACTION CHALLENGING PROPOSED WIND FARM

Backcountry Against Dumps v. San Diego County Board of Supervisors, Unpub., Case No. D081530 (4th Dist. Mar. 13, 2024).

The Fourth District Court of Appeal in *Backcountry Against Dumps v. San Diego County Board of Supervisors*, in an *unpublished* opinion, reversed the trial court's decision dismissing the lawsuit brought under the California Environmental Quality Act (CEQA) for failure to name the Campo Band of Diegueno Mission Indians (Campo) as an indispensable party, because of Campo's sovereign immunity.

Factual Background

This case concerns a challenge by Backcountry Against Dumps (BAD) to the Final Environmental Impact Report (FEIR) for the Boulder Brush Project approved by the Board of Supervisors (Board) of San Diego County (County).

The Boulder Brush Project consists of a 3.5 mile long, 230-kilovolt overhead gen-tie transmission line, a high-voltage substation, a 500-kilovolt switchyard, and various other improvements to a 320-acre corridor of private land owned by real party in interest Boulder Brush, LLC. The Boulder Brush Project will connect two newly planned windmill farms to San Diego Gas & Electric's existing transmission lines. The larger of the two windmill installations will consist of approximately 60 windmills that will be constructed entirely within the Campo reservation.

The Boulder Brush transmission line would carry wind energy from a separate proposed wind energy project (Campo Wind Project) on the Campo Indian Reservation (Reservation) to the existing Sunrise Powerlink. The portion of the line on private land would be approximately 3.5 miles in length and would include 32 steel poles at a maximum height of 150 feet.

While the majority of the Campo Wind Project is not within San Diego County's jurisdiction and is not subject to the County's land use regulations, the County FEIR for the Boulder Brush Project approval considered the overall project to be all facilities required for the development of the Campo Wind Project, including the Campo Wind Facilities.

The Campo Wind Facilities would be located on land leased from Campo within the 16,000-acre Reservation Boundary. The Boulder Brush Facilities would be located on adjacent land leased from a private landowner within the Boulder Brush Boundary. The FEIR uses the term "On-Reservation" to refer to portions within the reservation boundary and "Off-Reservation" to refer to the portion outside the reservation boundary, or, on private land.

The FEIR addresses the project as a whole but acknowledges the County's land use jurisdiction is limited to the private lease lands within the Boulder Brush Boundary (Boulder Brush Facilities). The FEIR clarifies that the Bureau of Indian Affairs (BIA) has jurisdiction over the portion of the Project within the Reservation Boundary (Campo Wind Facilities) and has prepared an Environmental Impact Statement (EIS) to evaluate the impacts of the Project under the National Environmental Policy Act (NEPA). The BIA is the Lead Agency for the Project under NEPA, and the County is a cooperating agency for the EIS. The EIR adopts and incorporates by reference the EIS.

The FEIR breaks the project into separate components, beginning with the Boulder Brush Facilities. The FEIR considers several different impacts of the project for both the On- and Off-Reservation portions. It concludes that the Off-Reservation Boulder Brush Facility, specifically, would have potentially significant impacts to the community character aesthetics, habitats of the federally protected Quino checkerspot butterfly and other special-status plant and wildlife species, jurisdictional aquatic resources, and wildfire hazards.

The FEIR presents four potential alternatives to the proposed Boulder Brush Project: (1) a no project alternative; (2) a no Boulder Brush Facilities on private lands alternative; (3) an alternative gen-tie route within the existing Boulder Brush boundary; and (4) an underground gen-tie within the Boulder Brush Boundary.

The second alternative assumes that the Boulder Brush Facilities would not be developed and the existing conditions on lands within the County's land use jurisdiction would remain.

Instead, the connection of power generated on the Reservation by the 60 wind turbines to the grid via the Sunrise Powerlink, via a gen-tie route that extends across the Manzanita Band of Diegueño Mission Indians' (Manzanita) Reservation and U.S. Bureau of Land Management (BLM) managed lands, connecting to a substation on a portion of the Sunrise Powerlink on BLM managed lands.

The FEIR concludes that it is not possible to determine whether this alternative is feasible because the County does not have any authority over the Manzanita or BLM lands.

The third alternative, an alternate orientation of the gen-tie route, would increase the overall length of the gen-tie line by 0.2 miles, but would decrease the total disturbance in the area by eight to ten acres. The FEIR concludes that the third alternative, the alternate route for the gen-tie line, would be the "environmentally superior" alternative.

The County Board of Supervisors (Board) approved the FEIR and Boulder Brush Project, and BAD timely filed a petition for writ of mandate challenging the approvals, the Board's statement of overriding considerations, its analysis of impacts to golden eagles, bats, local groundwater resources, and wildfires, and its compliance with the County General Plan and zoning ordinances.

Before the petition could be briefed, Campo filed a motion to intervene for the limited purpose of dismissing the petition on sovereign immunity grounds. Campo defined the project as the construction and operation of a $400 million renewable energy project, argued that it had a material interest in the project that would not be adequately represented by any other party in its absence., and asserted that if BAD succeeded, tens of millions of dollars of tribal revenue, tribal jobs and Campo's sovereign right to control tribal resources on its property would be lost.

The trial court granted Campo's motion to intervene and its motion to dismiss on sovereign immunity grounds.

The Court of Appeal's Decision

Under the abuse of discretion standard applicable to determinations of whether a party is necessary or indispensable, the Court of Appeal reversed the trial court judgment of dismissal.

Necessary and Indispensable Parties

Code of Civil Procedure section 387 provides for mandatory intervention if the person seeking intervention claims an interest relating to the property or transaction that is the subject of the action and that person is so situated that the disposition of the action may impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by one or more of the existing parties.

Code of Civil Procedure section 389(a) requires joinder of a person as necessary when: (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If a person who is a necessary party is also an indispensable party to the action, but cannot be joined, then under Code of Civil Procedure Section 389(b) the court must determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed.

To make the indispensable determination, the court considers the following four factors: (1) to what

extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Of relevance to the dismissal, because of sovereign immunity of federally recognized Indian tribes under federal law, California state courts have limited jurisdiction over tribes and must dismiss if a non-joined tribe is an indispensable party.

Determination that Campo Is Not Necessary or Indispensable

The Court of Appeal determined that Campo was not a necessary party because in its absence relief can be afforded. The other joined parties—Boulder Brush and the Board—have essentially the same interest in the litigation—upholding the approvals—and can therefore adequately represent Campo's interests in the litigation.

The ability of the Campo to go forward with the Campo Wind Project is not closely tied to the FEIR challenge. The FEIR itself sets fourth four alternatives, only one of which is a no Boulder Brush Facility project alternative. Notably, the second option expressly contemplates completing the Campo Wind Project without the use or development of any land over which the County has jurisdiction. Even if appellants prevail in the present litigation, it would not necessarily be a death knell for the On-Reservation portion of the Campo Wind Project.

The Court of Appeal also determined that Campo was not an indispensable party justifying dismissal for those same reasons, because existing parties adequately represent the absent party's interest in defending the challenged approvals. The interest the public has in obtaining some level of review of the actions of the Board in approving the Off-Reservation portion of the project under County land use jurisdiction is sufficiently important to preclude dismissal.

Because the approval at issue is limited to the Boulder Brush Project, which is entirely Off-Reservation and on private land under the jurisdiction of the County, the impact to Campo is already limited by the scope of the Board and County's jurisdiction. The presence or absence of the Tribe would not appear to have any direct impact on resolution of the legal issues themselves.

If the petition is dismissed based solely on the inability to join the Tribe, there would be no avenue for BAD, or any other interested party, to seek environmental review of the construction of a significant substation and associated gen-tie line and facilities on private, non-tribal land.

Conclusion and Implications

This opinion by the Fourth District Court of Appeal demonstrates how tribal sovereign immunity cannot be asserted in a vacuum to prevent environmental review of non-tribal aspects of a project that is not carried out on tribal land under the rubric of indispensable party merely because a tribe is nominally involved. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/D081530.PDF
(Boyd Hill)

FIRST DISTRICT COURT REVERSES DENIAL OF WRIT PETITION TO REQUIRE PROCESSING OF A REFERENDUM CHALLENGING A HOUSING DEVELOPMENT AGREEMENT

Move Eden Housing v. City of Livermore ___Cal.App.5th___, Case No. A167346 (1st Dist. Mar. 6, 2024).

The First District Court of Appeal in *Move Eden Housing v. City of Livermore* reversed the trial court's denial of a writ petition to process, pursuant to the Elections Code, a referendum petition challenging a City Council resolution approving a development agreement for development of housing in downtown Livermore. (City).

Factual Background

This case involves a proposed residential development and new public park in downtown Livermore (Project). In 2008, the City's former Redevelopment Agency acquired the Property using the City's inclusionary housing funds, and, in 2009, a portion of the purchase price was refinanced using "Residential Development Loan Program" funds from the State of California. The funds were awarded to the City for site acquisition and pre-development expenses in the City's downtown.

The City loaned the funds to the former Redevelopment Agency, and a deed restriction was recorded requiring any development of the Property to include at least 28 units of low-income housing and 56 units of moderate-income housing. The restriction was a condition of accepting the Program funds from the state.

When the State of California dissolved the Redevelopment Agency, the Property was included in a long range property management plan (Long Range Plan), which the State approved. The Long Range Plan identified the Property as a housing asset to be transferred to the City as the successor to the former redevelopment agency; it specified that the "goal" is to develop the Property as a high density residential project with an affordable component and to repay the $5,000,000 state redevelopment loan.

In 2018, the City and Eden Housing entered into a Disposition and Development and Loan Agreement for development of the Property and other nearby downtown parcels (2018 Agreement). The 2018 Agreement recited that, in January, the City Council approved the development of the Livermore Village Site (including the Property) to include a public park, up to 130 units of workforce housing, a science center, a black box theater, and retail space."

The City selected Eden Housing to develop housing at the Property, and the 2018 Agreement states a portion of the Property will be dedicated to the City for a park. The City agreed to sell the Property to Eden Housing, after satisfaction of various conditions, for the Property's fair market value at the time of sale and to make a future acquisition loan to Eden Housing in the amount of the Purchase Price of the Property. The term of the loan would be 55 years, at either 3 percent annual simple interest or:

> . . .the long-term applicable federal rate for annual compounding published by the Internal Revenue Service, with the City and Eden Housing agreeing upon the Site Acquisition Loan's applicable interest prior to Site acquisition, based on the Project's overall financial feasibility and Investor requirements.

The 2018 Agreement also required Eden Housing and City to enter into an indemnity agreement to apportion any potential liability related to Hazardous Materials after the date of the close of escrow between the parties.

In December 2020, the City reviewed "Conceptual Plans" and instructed staff to move forward (capitalization omitted) with the Project. In May 2021, the City approved land use entitlements for the Project, subject to conditions. That same month, the City approved an amended development agreement (2021 Agreement) to clarify the definition of the Property subject to transfer by City for development of the Project, define development and financial obligations for Veteran's Park, allow for reimbursement by City to Developer for certain emergency vehicle access road improvements adjacent to the Project, and to update the entitlement, financing and development timeline in the Schedule of Development.

With respect to the park, the 2021 Agreement stated that at City's option, City and Developer may negotiate a future construction and reimbursement

agreement with Developer to coordinate the construction of the Veteran's Park Improvements. These improvements would be exclusive of any development loan provided by the City for development of the Project.

On May 24, 2022, the City adopted Resolution No. 2022-085 (Resolution). The Resolution authorized the execution of an Amended and Restated Disposition, Development and Loan Agreement for the Project (2022 Agreement). The 2022 Agreement requires the City to make a loan to Eden Housing for the purchase price of the Property ($7.8 million), at an interest rate of 3 percent and payable over 55 years. The 2022 Agreement also reflects the City's decision to spend $5.5 million on constructing and improving Veteran's Park as part of the Project. To address historic subsurface contamination of the Property, the 2022 Agreement requires the City and Eden Housing to enter into an indemnity agreement to apportion costs and potential liability related to Hazardous Materials at the Project site, with the City's obligation not to exceed $4.3 million.

Plaintiff Move Eden then submitted a referendum petition which obtained more than the minimum number of signatures required to qualify for the ballot. However, rather than accepting the petition for filing and determining the validity of the signatures pursuant to statutory requirements, the City Clerk sent a letter stating that, based on the advice from the City Attorney and special counsel, the City determined that the Resolution was an administrative act, not a legislative act, and not subject to referendum and not eligible for filing, taking no further action on the referendum petition.

Move Eden filed a writ of mandate and an undertaking with the Superior Court. In January 2023, the Superior Court denied the Petition on the merits, concluding the Resolution was not subject to challenge by referendum because it was an administrative act.

The Court of Appeal's Decision

Under the independent review standard applicable to legal determinations in a traditional mandate proceeding, the Court of Appeal reversed the trial court judgment that the Resolution was an administrative act under the Elections Code not subject to referendum.

Mandatory Duty to Accept Petition for Filing

The California Constitution places the legislative power in the California Legislature, but reserves to the people the powers of initiative and referendum. The referendum power allows voters to weigh in on laws that have already been passed by their elected representatives. Any voter or group of voters that gathers enough signatures can place a legislative enactment on the ballot for an up or down vote. A referendum suspends operation of the law until it is approved by a majority of voters.

Local governments are not empowered to exercise discretion in determining whether a duly certified referendum is placed on the ballot. If the local government believes an initiative or referendum is unlawful and should not be presented to voters, it should file a petition for a writ of mandate seeking to remove it from the ballot. In certifying a referendum petition, a clerk's duty is limited to the ministerial function of determining whether the procedural requirements have been met.

Given the minimum number of signatures, the City Clerk had a mandatory ministerial duty to accept the referendum petition for filing.

Defense of Administrative Act Is Not Applicable

The power of referendum applies only to acts that are legislative in character; executive or administrative acts are not within the scope of that remedy. Legislative acts generally are those which declare a public purpose and make provisions for the ways and means of its accomplishment. Administrative acts, on the other hand, are those which are necessary to carry out the legislative policies and purposes already declared by the legislative body. Alternatively stated, the power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.

The 2022 Agreement, for the first time, authorizes the construction of and improvements to Veteran's Park. Thus, the record demonstrates that the Resolution approving the 2022 Agreement was the initial relevant policy determination regarding the park's construction and improvements. Thus, the Resolution at issue here involves a public policy determina-

tion to construct and improve Veteran's Park at the public's expense.

The Court of Appeal rejected Move Eden's argument that the Resolution was part of the City's administrative actions in implementing State required redevelopment agency Dissolution Law. While the Long Range Plan specifies use of the Property as high density housing with an affordable component, in deciding to construct and improve Veteran's Park, the City made discretionary policy determinations that were not dictated by the Long Range Plan or any provision of the redevelopment agency Dissolution Law.

Conclusion and Implications

This opinion by the First District Court of Appeal demonstrates that local agency discretionary actions cannot be shielded from initiatives and referenda simply because they involve a component of prior redevelopment agency property or loans. (https://www.courts.ca.gov/opinions/documents/A167346.PDF
(Boyd Hill)

FOURTH DISTRICT COURT AFFIRMS REJECTION OF BROWN ACT CLAIM FOR SALE OF ANGEL STADIUM BUT REVERSES ON ISSUE FINDING CITY IMPROPERLY RESTRICTED PUBLIC COMMENTS

Peoples Homeless Task Force Orange County v. City of Anaheim, *Unpub.*,
Case No. G061422 (4th Dist. Mar. 6, 2024).

In an *unpublished* decision filed on March 6, 2024, the Fourth District Court of Appeal affirmed the trial court's judgment to reject the plaintiff's first four contentions that the City of Anaheim (Anaheim or City) violated the Brown Act when selling Stadium Site to the Angel Baseball Club. Regarding the plaintiff's last contention, the Court of Appeal agreed with the plaintiff and found that Anaheim violated the Brown Act when it restricted public input to e-mail only, reversing the trial court's decision.

Factual and Procedural Background

After decades of leasing, in November 2019, the Angels Baseball Club (the Angels) proposed that Anaheim purchase the stadium site. In December 2019, Anaheim published notice of meeting regarding the sale, and later that month, the City Council voted to approve the proposal to sell the Stadium Site. The plaintiff filed its first petition for a writ of mandate seeking declaratory relief and nullifying the approval under the Brown Act.

The Public Meetings

The City Council held two other public meetings in September and October 2020 to consider (and ultimately approve) a restated purchase proposal (which expressly superseded the first agreement) and related development agreement. Anaheim held the meeting by teleconference, accessible to the public electronically and on cable television, in reliance on Governor Newsom's Covid-19 related Executive Order No. N-29-20, but the public was permitted to submit comments to the City Council via e-mail only with no speaking opportunities. Following the approval of the restated agreement, the plaintiff filed a second petition for a writ of mandate with five main contentions because the restated agreement mooted any objection to the approval of the original agreement.

At the Trial Court

While much of the evidence was undisputed, a key conflict arose in the testimony between the City Manager and Councilmember and the City Attorney. The former two testified that the City Council discussed whether to sell or continue to lease the Stadium Site during the closed session meeting in August 2019. The latter testified that no such discussion occurred and that the central issue was the appraisal of the Stadium site.

The trial court ultimately concluded that Anaheim had not violated the Brown Act and denied the plaintiff's petition. The court found that the City Attorney's testimony was more credible and, even if the other two's testimonies were more credible, the sale versus lease discussion was allowable in the closed session setting. The trial court also rejected

the plaintiff's remaining contentions, including that Anaheim improperly restricted public comment to e-mails at the public meetings in September 2020 and October 2020.

The Court of Appeal's Decision

The Fourth District Court of Appeal upheld the trial court's judgment mostly except for the public comments by e-mail issue.

Sale Versus Lease Discussion

The plaintiff's first contention was that the evidence established that Anaheim violated the Brown Act by holding discussions in closed session regarding whether to sell versus lease the Stadium Site. The trial court concluded that no such discussions had occurred, but they would not have violated the Brown Act even if they had. Reviewing the former factual finding for substantial evidence, the Court of Appeal found that substantial evidence supported the trial court's conclusion that no discussions of sell versus lease took place in closed sessions and did not reach the issue of whether such talks would have been permissible.

The Court of Appeal noted that the issue, in this case, is whether the City Council decided in closed session to sell, rather than lease, the Stadium Site, and, if so, whether that decision exceeded the discussion of "price and terms of payment" permitted in closed sessions by Section 54956.8 of the Brown Act. The Court of Appeal found the former issue was a factual one, requiring a separate heading or subheading dedicated to a substantial evidence argument. However, the plaintiff's opening brief barely touched on the substantial evidence issue. It was mainly dedicated to whether the alleged discussion exceeded the limited scope of "price and terms of payment." The Court of Appeal found this to be reserving arguments, raising questions about gamesmanship and prejudice on Anaheim's ability to respond. The Court of Appeal concluded that the plaintiff forfeited any substantial evidence challenge to the trial court's conclusion.

Additionally, the Court of Appeal found that there was nothing incredible about the City Attorney's testimony and that the trial court could find substantial evidence from the contradiction in the Councilmember's testimony that the sell versus lease discussion did not occur in closed session.

Negotiating Team Formation

Plaintiff's second contention was that Anaheim formed a negotiating team that itself constituted a public body subject to the Brown Act Section 54952 and that violated the Brown Act by operating behind closed doors. The City Council discussed several times to form a "negotiating team" for the sale of the Stadium Site but took no action. At a later meeting, the City Council appointed the mayor to take a representative role in negotiations. The Court of Appeal found that, because there was only an individual appointment of the mayor to be a negotiations representative for the City, there was no creating of a "commission, committee, board, or other body" and agreed with the trial court's conclusion.

Improper Serial Communications

Plaintiff's third contention was that the City Council violated Section 54952.2(b)(1), which generally requires the public's business to be conducted in public and prohibits private individual conversations to deliberate. The City Manager declared, which the trial court already found not credible, that the staff offered several briefings to the Councilmembers. The trial court found these meetings to fall within the exception for individual briefings under Section 54952.2(b)(2). The plaintiff pointed to evidence in the record of the City Council discussing certain deal points that allegedly never took place in either open or closed session, inferring these were series of private conversations to deliberate. The Court of Appeal, while finding this question interesting, concluded that this was not enough to meet the substantial evidence standard.

Agenda Descriptions for Closed Sessions

Plaintiff's fourth contention was that the agendas for closed sessions held on August 13, September 24, November 19, and December 3, 2019, contained inadequate and inaccurate information, violating Sections 54954.2 and 54954.5. Mainly, the plaintiff contended that the agendas did not identify the "negotiating team" and that the agendas listed as negotiating parties the Angels Baseball, LP, rather than SRB, the special purpose entity the Angels created for this transaction.

On the first contention, the Court of Appeal reminded that the trial court's finding of no formation

of a negotiating team was supported by substantial evidence, neglecting it entirely. On the plaintiff's second contention, the Court of Appeal noted that SRB was not even formed until after three of the closed session meetings passed, leaving only the December 2019 meeting relevant. The Court of Appeal additionally found that, even if SRB was going to be the technical legal rights holder, SRB was, in fact, Angels Baseball, LP, a name the public was more familiar with, and ""[t]he law disregards trifles." (Civ. Code § 3533.)" Thus, the Court of Appeal found that the City fully complied with its duties under Section 54954.5.

E-mail Public Input Restriction

Plaintiff's fifth and final contention was that the City improperly restricted public comment to e-mails at the public meetings on September 29 and October 6, 2020, which the Court of Appeal agreed to.

Section 54954.3(a) of the Brown Act provides that, at public meetings, a legislative body must:

> . . .provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public ... that is within the subject matter jurisdiction of the legislative body. . . . (Italics in original).

At the beginning of the COVID-19 pandemic, on March 17, 2020, Governor Gavin Newsom issued Executive Order No. N-29-20 (Executive Order), authorizing legislative bodies "to hold public meetings via teleconferencing and to make public meetings accessible telephonically or otherwise electronically to all members of the public seeking to observe and to address the" body and waived:

> . . .[a]ll requirements in ... the Brown Act expressly or impliedly requiring the physical presence of members, the clerk or other personnel of the body, or of the public as a condition of participation in or quorum for a public meeting....

In response to the Executive Order, Anaheim held teleconferenced public meetings on September 29 and October 6, 2020, making the meetings accessible to the public via cable television or the Internet. Regarding the public's ability to directly address the City Council, Anaheim set up an e-mail address where the public could submit written comments, and the comments were forwarded to the entire City Council by e-mail; the record revealed that these comments were not read aloud during the meeting. Anaheim viewed that the e-mail option satisfied the Executive Order's "otherwise electronically" prong.

The Fourth District Court found that this was a violation of the Brown Act because the Executive Order suspended the physical presence requirement but not the public's opportunity to address it to the City Council directly. Rather, the term "telephonically," in the context of the Brown Act, indicates that the public had to be permitted to call in or use other electronic means that would allow direct addressing and participation in the meeting to offer public comment. Therefore, the Court of Appeal found that the City's option to enable e-mail comments before the public meeting without a chance to provide direct comment violated the Brown Act and reversed the trial court's judgment.

Conclusion and Implications

The Fourth District Court's decision, though unpublished, provides some helpful guidance regarding the technical requirements of the Brown Act; the City of Anaheim's seemingly perfect compliance was not enough. While it is unlikely that the sale would fall apart due to this decision, providing ample means for the public to "directly address the legislative body" could be quite cost-efficient in the future. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/G061422.PDF (David Song)

FIRST DISTRICT COURT FINDS CEQA CHALLENGE ON CITY-OWNED LAND WAS NOT MOOTED BY CONSTRUCTION COMPLETION DURING TRIAL COURT PROCEEDINGS

Vichy Springs Resort, Inc. v. City of Ukiah, et al., ___Cal.App.5th___,
Case No. A165345, A167000 (1st Dist. Mar. 29, 2024).

In a *partially* published opinion filed on March 29, 2024, the First District Court of Appeal partially reversed the trial court's judgment that erred in granting the motion to strike, where the petition sufficiently alleged that both the City and the County violated the California Environmental Quality Act (CEQA), and the County abused its discretion in determining it had no regulatory authority over the question-at-hand project. This article will focus on the published portion of the opinion.

Factual and Procedural Background

Real Party in Interest Ukiah Rifle and Pistol Club, Inc. (Club) operates a shooting range on land owned and leased by the City of Ukiah (City) but located in an unincorporated area of Mendocino County (County). The Club planned to demolish its existing main shooting range to replace it with a newer one (Project). A nearby resort and spa, Vichy Springs Resort, Inc. (Vichy), was concerned that the Project would have significant environmental impacts, including lead contamination and increased noise and traffic from increased usage. Because it was uncertain which entity regulated the Club's land use activities, Vichy sued both the City and the County under CEQA for alleged General Plan and local ordinance violations.

Vichy did not ask the trial court to enjoin the project, which was later completed while the case was pending in the trial court. The City and County entered into a Joint Powers Agreement (JPA) concerning the Club's activities. Also, during the proceedings, the Attorney General issued Opinion 14-403, 80 Ops. Cal. Atty. Gen. 88 (2018), clarifying that a city's private lessee is exempt from a county's land use regulatory authority, pursuant to statutorily provided intergovernmental immunity under Government Code section 53090, if the lessee's use primarily serves the city's public purposes, but not if the lessee's use primarily serves its private interests. The Opinion did not decide whether the Club's use of the City's land, in this case, was primarily for a public or private purpose.

Ultimately, the trial court entered judgment in favor of the City and the County on Vichy's second amended petition for writ of mandate (Petition). The trial court then denied Vichy's motion for attorneys' fees, rejecting Vichy's argument that the lawsuit was the "catalyst" for establishing the JPA. On appeal, Vichy contended that the trial court erred by: (1) sustaining without leave to amend demurrers to the causes of action alleging that the City and the County failed to comply with CEQA and the respective General Plans and local ordinances; (2) granting the Club's motion to strike allegations related to its lease with the City; and (3) granting the City's and the County's motion for judgment on the pleadings on Vichy's claim for declaratory relief on the ground that it was mooted by the JPA. Vichy also contended the court erred in denying its motion for attorneys' fees.

The Court of Appeal's Decision

The First District Court affirmed the trial court's dismissal of local law claims against the City for building permit issuance and judgment that the JPA mooted a declaratory relief claim but reversed the judgment where the trial court found the CEQA claim moot. The court reviewed de novo trial court orders sustaining demurrers and justiciability issues such as mootness. The court also noted, however, that the abuse of discretion standard arguably applies to review a trial court's rejection of the public interest exception to mootness.

CEQA Claims In re the Club and City

After observing that CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws (citing CEQA Guidelines, § 15040), the court reviewed in relevant part CEQA's definition of a "project." Section 21065 provides, in relevant part, that a project is:

> . . .an activity which may cause a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is … [a]n activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies" or "an activity directly undertaken by any public agency.

The "project" must also implicate "discretionary," not "ministerial," approval authority of the public agency for CEQA to apply, under Section 21080(b)(1).

The court disagreed with the Club's and City's arguments that the completion of the Project precluded the grant of any effective relief, making the CEQA claim moot. Instead, even completed and in-operation projects can be subjected to additional mitigation measures, modification, reconfiguration, or even removal as a result of an agency's further required CEQA compliance.

The court noted that the Petition alleged that the Project would increase the use of the shooting range, resulting in contamination of the water flowing offsite and increased noise and traffic. The Petition also alleged that the County could require the Club to engage in several mitigation measures to reduce or avoid the significant environmental impact, such as a proactive lead removal program, implementing a pollution prevention plan, employing lead-free ammunition, and limiting hours and uses of the main range. The court reasoned that:

> . . .while the Project may be complete, mitigation measures could still be imposed to reduce or avoid the significant environmental impacts alleged in the Petition. The [building] permit and certificate of occupancy issued by the City could be revoked and held in abeyance while the County completes its [CEQA] review.

The court distinguished both *Parkford Owners for a Better Community v. County of Placer,* 54 Cal.App.5th 714 (2020), and *Santa Monica Baykeeper v. City of Malibu,* 193 Cal.App.4th 1538 (2011), where the CEQA challenger either made only generalized and unelaborated arguments or unpursued and abandoned arguments that completed projects could be modified or removed to mitigate impacts; Vichy's Petition included specific allegations about available post-completion mitigation measures.

The court rejected finding Vichy's claims moot because it failed to seek a preliminary injunction to stay in construction during the trial court proceeding. The court recognized that Vichy asking for temporary injunctive relief could have prevented any impact on or exhaustion of feasible mitigation measures. The court also acknowledged that it could not fault the Club for proceeding with construction given Vichy's inaction. However, the court could not see any legal basis for concluding that a petitioner's earlier failure to seek injunctive relief required a court to find a CEQA claim moot in a situation where effective relief remained available.

The court again distinguished this case with *Wilson & Wilson v. City Council of Redwood City,* 191 Cal. App.4th 1559 (2011), which involved a non-CEQA, reverse validation action where the court did not consider any argument that the trial court could or should have ordered mitigation measures notwithstanding the completion of construction.

Lastly, the court mentioned that the Club's argument that the alleged mitigation measures were irrelevant to the harm caused by the Project ignored the factual allegations in the Petition, such as the increased use of the shooting range potentially increasing bullet usage.

CEQA Claims In re the County

The First District Court agreed with Vichy that the Petition sufficiently alleged to state a cause of action for the County's violation of CEQA, mainly that: (1) the County's local ordinances required a discretionary use permit for a Project which had reasonably foreseeable environmental impacts, thus requiring CEQA review, (2) Vichy's two complaints to the County about the Project were closed without enforcement based on the County's determination that the Project is within the sole jurisdiction of the City, and (3) the County failed to exercise its regulatory authority based on its mistaken belief that the Club was immune from regulation under Government Code sections 53090 and 53091.

The court, while acknowledging that the alleged County's determination above was not directly about a CEQA provision, explained that a narrow reading of Public Resources Code section 21168.5 would be overly formalistic to exclude the petitioner's ac-

tion because the petition ultimately complained the County's resulting failure to follow any of CEQA's requirements.

The court rejected the County's argument that the Project was not a CEQA "project" because the County issued no permit. Public Resources Code § 21065's definition of "project" does not require that a permit be issued, only that the proposed activity "involve[] the issuance to a person of a … permit." If, as Vichy alleged, the activity was subject to the County's authority requiring a permit, the Petition then sufficiently alleged that the Club's construction would be a "project" within CEQA's definition.

The court also rejected the County's argument that CEQA only applies to project approvals, not governmental inaction. However, with document support, the Petition alleged that the County determined the Project was not subject to CEQA because it had no authority to regulate the Club's activities. The court, only for the purposes of its analysis on demurrer, assumed that the County possessed regulatory authority over the Project, based on the Petition's uncontested allegation. Further, unlike a prior decision holding a CEQA challenge was unripe because there was no project for the local agency's consideration, the Petition here alleged the existence of a Project that the County determined was not subject to regulate, an "unusual circumstance" where:

> . . .the County's determination meant that the Project was allowed to proceed without environmental review, which directly conflicts with the stated purpose of CEQA.

Finally, for that reason, the court rejected the County's argument that it could not have violated CEQA through inaction, based on *Lake Norconian Club Foundation v. Department of Corrections & Rehabilitation*, 39 Cal.App.5th 1044 (2019). That case held a public agency's failure to repair a historic building was not a CEQA project because:

> . . .the failure to act is not itself an activity, even if, as may commonly be true, there are consequences, possibly including environmental consequences, resulting from the inactivity.

The court stated, unlike in *Lake Norconian*, the project here was not the County's inaction but rather the club's demolition and construction of the main shooting range. Because the County did not dispute that the Project would have been subject to its environmental review if the County had regulatory authority, the court concluded that the Petition properly alleged a CEQA violation, where the County erroneously concluded it had no responsibility for issuing a discretionary permit that would have otherwise triggered its review obligations.

Conclusion and Implications

As the Court of Appeal put it, this was an unusual CEQA case, with a project on city-owned land in the county's unincorporated area, but no actual discretionary approval was issued to trigger a CEQA compliance obligation. One thing to note was that the court recognized that, at least in some cases, project proponents with all necessary approvals (as of their knowledge) could not be faulted for proceeding to construct their authorized projects and completing them unless enjoined by a court order. Most importantly, CEQA petitioners and its counsel who strategically do not or cannot seek a preliminary injunction, despite the risk of project construction completion during the trial proceedings, should make sure to allege specific, feasible, and effective mitigation measures in their petition to avoid having their action becoming moot. The court's *partially* published opinion is available here: https://www.courts.ca.gov/opinions/documents/A165345.PDF
(David Song)

LOS ANGELES COUNTY SUPERIOR COURT FINDS CITY VIOLATED THE HOUSING ACCOUNTABILITY ACT BY FAILING TO PROCESS A BUILDER'S REMEDY APPLICATION

600 Foothill Owner L.P. v. City of La Cañada, Case No. 23STCP02614, March 4, 2024 (L.A. Super Ct.).

In an order filed on March 4, 2024, Judge Beckloff of the Los Angeles County Superior Court in *600 Foothill Owner L.P. v. City of La Cañada* granted a housing developer's petition against the City of La Cañada (City), finding that the City's failure to process the developer's "Builder's Remedy" application for a mixed-use housing project violated the state's Housing Accountability Act (HAA). The Superior Court concluded that the City's refusal to process the application based on its purported "incompleteness" was tantamount to a statutory "denial" within the meaning of the HAA.

Factual and Procedural Background

La Cañada's Sixth Cycle Housing Element

Under State Housing Element law, the City of La Cañada—a small suburb of Los Angeles County—was required to adopt a statutorily compliant 6th Cycle (2021–2029) Housing Element by October 15, 2021. The City submitted its draft housing element to the State Department of Housing and Community Development (HCD) that same day. On December 3, 2021, HCD informed the City that significant revisions were required before the draft Housing Element could be deemed compliant with State law.

Ten months later, on October 4, 2022, the City adopted its 6th Cycle Housing Element (October 2022 HE). The City thereafter submitted the adopted Element to HCD for review. On December 6, 2022, HCD informed the City that the adopted Housing Element met most statutory requirements described in HCD's prior review, but outstanding revisions still needed to be made before the Element complied with State law.

The City later conceded it needed to update the October 2022 HE to conform to State Housing Element Law. Thus, on February 21, 2023, the City Council adopted a third revised Housing Element (February 2023 HE), which addressed the deficiencies identified by HCD. Though the Council stated that it "certified that the Housing Element was in substantial compliance with State Housing Element Law as of October 4, 2022," it recognized that "self-certification" was not necessarily a pathway to complying with State law.

600 Foothill's Preliminary Application

On November 10, 2022, petitioner and developer, 600 Foothill Owner L.P. (600 Foothill) submitted to the City a Preliminary Application (Pre-App) under the HAA for construction of a mixed-use housing development project. The Project would be developed on a site currently occupied by two vacant church buildings and a surface parking lot and would feature 80 apartments, 16 (or 20 percent) of which would be reserved for low-income households. Because the City's Housing Element was out of compliance with state law on the date the Pre-App was submitted, 600 Foothill proposed the Project as a "Builder's Remedy" project under the HAA, meaning that the Project would not be required to account for the City's zoning or general plan land use designations that governed the site.

On February 10, 2023, the City issued an "incompleteness determination" regarding 600 Foothill's Pre-App (First Incompleteness Determination) and requested certain missing information. 600 Foothill supplemented its application with the requested materials on April 28, 2023. However, before receiving 600 Foothill's supplemental materials, the City issued a second incompleteness determination on March 1, 2023 (Second Incompleteness Determination), which advised 600 Foothill that the Project was ineligible for the Builder's Remedy because it failed to comply with the City's zoning and residential density limitations.

600 Foothill appealed the Second Incompleteness Determination, which the City Council denied, stating that it would not process 600 Foothill's application "as a Builder's Remedy project," but would instead subject the application to the City's discretionary approval process.

HCD's Notice of Violation

On June 8, 2023, HCD sent the City a Notice of Violation advising the City that it had violated the HAA and Housing Element Law by denying 600 Foothill's appeal. HCD informed the City that it could not "backdate" its Housing Element compliance date to an earlier date to avoid approving a Builder's Remedy application. Thus, because the City's October 2022 HE was non-compliant, the City could not analyze the Project's consistency against it or use it to deny 600 Foothill's application.

Writ Proceedings

600 Foothill filed a petition for writ of mandate on July 21, 2023, which was later joined by Petitioners and Intervenors California Housing Defense Fund (CHDF), the Attorney General, and HCD. Petitioners sought a writ directing the City to set aside its decision disapproving 600 Foothill's preliminary application and compelling the City to either approve or process it in accordance with the HAA and Builder's Remedy.

The Superior Court's Decision

At trial, the Los Angeles County Superior Court considered whether the City violated the HAA when it denied 600 Foothill's appeal and subjected it to discretionary review. The court was therefore tasked with determining whether the City proceeded in the manner required by law and supported its findings with evidence. In turn, the City bore the burden of proof that its decision conformed to all conditions specified in the HAA.

The court ultimately held that the City abused its discretion when, in upholding the Second Incompleteness Determination, it found that the Builder's Remedy did not apply to the Project. At the time the City rendered this decision, it lacked a compliant Housing Element and failed to produce one of the five written findings to support denial, as statutorily required by the HAA. For these reasons, the Pre-App was "vested" as a Builder's Remedy Project on the date it was submitted.

The City 'Disapproved' the Project under the HAA

The court first considered whether the City "disapproved" the Project within the meaning of the HAA when it determined, via a vote of its City Council, that the Project did not qualify for the Builder's Remedy. Under this lens, the court looked to the text of the HAA, which provides that "disapproval" of a housing project includes:

> . . .any instance in which a local agency votes on a proposed housing development project application and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit. (Gov. Code, § 65589.5(h)(6)(A).)

In order to lawfully "disapprove" a project, the reviewing agency must make written findings based upon a preponderance of the evidence in the record as to one of five enumerated criteria. (Gov. Code, § 65589.5(d).)

The court concluded that the City's actions met this broad definition of "disapprove." In particular, the City Council "voted" on the Project when it denied 600 Foothill's appeal of the Second Incompleteness Determination and indicated its intent to process the application under traditional discretionary review. The Council also made clear that any required land use approvals or entitlements would not be issued for the Project as a Builder's Remedy project. The court explained that, while the Council may not have voted to deny related entitlements, such as the conditional use permit or tentative tract map, the Council's vote determined the Project could not proceed as proposed under the Builder's Remedy. As such, the City was required but failed to produce written findings to support its determination that the Builder's Remedy "did not apply" to the proposed project. Therefore, the Council's vote on 600 Foothill's application fell within the

HAA's Definition of a 'Disapproval'

In so holding, the court rejected the City's defenses that it could not "approve" or "disapprove" a project, including one proposed under the Builder's Remedy, before it conducts environmental review under CEQA. The court observed that the City can disapprove a project without undertaking CEQA review—neither CEQA nor the HAA require that environmental review be performed before the agency disapproves a project. Similarly, nothing suggests disapproval under the HAA can occur only after CEQA

review. The court cautioned that the City's interpretation of the HAA, under which a disapproval cannot occur before CEQA review, would run afoul of the HAA by hindering the approval and provision of housing.

600 Foothill's Preliminary Application Vested Upon Submittal

The court also considered whether 600 Foothill's Pre-App was "deemed complete" on the day it was submitted, such that it acquired a vested right to develop based on the standards in place on that date. The City argued that the filing of a preliminary application does not "vest" the Builder's Remedy because it considers the status of its Housing Element as of the date the completeness finding is made. Therefore, because the City regarded its October 2022 HE as "substantially compliant," it concluded 600 Foothill's November

2022 Pre-App Could Not Be Processed under The Builder's Remedy

The court disagreed and instead concluded that a Builder's Remedy "vests" if the local agency does not have a substantially compliant housing element at the time a complete preliminary application is submitted and "deemed complete." Here, because the City's October 2022 HE did not substantially comply with the law at the time 600 Foothill submitted its Pre-App, the Builder's Remedy "vested" on the date it submitted its application in November 2022. The court reiterated that the HAA precludes the City from retroactively applying a Housing Element to a Builder's Remedy project that "vested" before that element was certified. (Gov. Code, § 65589.5(o)(1).)

The court concluded by cautioning that adopting the City's position would be:

> . . .inconsistent with the HAA's policy of promoting housing. . .(because). . . no housing developer would ever submit a Builder's Remedy application because of the uncertainty about whether the project would remain eligible long enough to be approved.

Conclusion and Implications

Though the City has since appealed the decision summarized above, the superior court's holding nonetheless serves as an important development in the growing area of housing jurisprudence. The court's holding provides several key takeaways for housing developers and reviewing agencies. First, a Builder's Remedy "vests" if the local agency does not have a substantially compliant housing element at the time a complete preliminary application was submitted and "deemed complete." Second, if the agency refuses to process a housing development project under the Builder's Remedy because the agency believes that the Builder's Remedy "does not apply," then the agency's refusal equates to a "disapproval" within the meaning of the HAA, and, in turn, must be accompanied by one of the five written findings set forth in Government Code § 65589.5(d). Failure to produce these written findings equates to a violation of the Housing Accountability Act and can result in a court order directing the agency to process the application under the Builder's Remedy. Third, and finally, Government Code § 65589.5(o)(1) precludes a reviewing agency from retroactively applying (or "back-dating") a formerly new-but-not-yet-certified housing element to a Builder's Remedy project that "vested" before certification of a now-compliant housing element.

A copy of the trial court's order granting the petition is available on the City's website at: https://cityoflcf.org/wp-content/uploads/2024/03/2024-03-04-Order-Granting-Petitions-1750-6-1.pdf.
(Bridget McDonald)

SACRAMENTO COUNTY SUPERIOR COURT RULES IN FAVOR OF THE STATE WATER BOARD'S SUBSTITUTE ENVIRONMENTAL DOCUMENT FOR PHASE I OF THE SAN FRANCISCO BAY-DELTA PLAN

State Water Board Case Judicial Council Coordinated Proceedings, Case No. 5013 (Sac Super. Ct, Mar. 15, 2024).

On March 15, 2024, a Sacramento Superior Court judge upheld the State Water Resources Control Board's (State Water Board) Substitute Environmental Document (SED) for the Phase I update to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). The SED adopts more stringent flow objectives for native and migratory fish in the lower San Joaquin River and its three major tributaries, the Merced, Stanislaus, and Tuolumne rivers, while partially relaxing salinity standards for South Delta crops. In a comprehensive 160-page ruling, the court considered all 116 claims filed by various petitioners and found the State Water Board did not violate the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), the California Environmental Quality Act (CEQA), the public trust doctrine, or article X, section 2 of the California Constitution. (Super. Ct. Sacramento County, 2024, No. JCCP5013 (Ruling).)

Background

The Porter-Cologne Act authorizes the State Water Board and its regional boards to adopt, implement, and update plans that protect water quality in California's rivers and waterways for fish, agriculture, and other beneficial uses of water. Under CEQA, a lead agency must analyze the environmental impacts of a proposed project and inform the public in an Environmental Impact Report (EIR). Here, a program-level SED was prepared in place of an EIR, but like an EIR, an SED must identify and analyze the potential impacts, alternatives, and feasible mitigation measures of a proposed plan or program. In addition to the statutory frameworks that govern the adoption of a new Bay-Delta Plan, the State Water Board is subject to the common law public trust doctrine and article X, section 2 of the California Constitution. The public trust doctrine vests a duty in the State, as sovereign, to act as trustee for the benefit of the people by taking the public trust into account when managing and allocating public resources, and to protect public trust uses whenever feasible. Article X, section 2 of the California Constitution establishes a rule that all water use in the state must be reasonable and beneficial.

At the confluence of the Sacramento and San Joaquin rivers, the Delta is the largest estuary on the West Coast and a significant source of the state's water supply. The State Water Board adopted the first Bay-Delta Plan in 1978, shortly after the enactment of the Porter-Cologne Act. The Bay-Delta Plan was updated in 1991, 1995, and 2006, though flow standards have remained largely unchanged since 1995. For the current Bay-Delta Plan update, the State Water Board has divided the process into two phases: Phase I to address flow and salinity objectives for the San Joaquin River watershed, and Phase II to address flow and cold-water management standards in the Sacramento River and the Delta.

The Supplemental Environmental Document

The SED revises the San Joaquin portion of the Bay-Delta Plan by adding a numeric objective to maintain 40 percent unimpaired flow—with an allowed adaptive range of 30 to 50 percent—to support and maintain the viability of fish populations in the San Joaquin River watershed. Unimpaired flow is the amount of natural flow in a river, unaffected by upstream diversions, storage, or other manipulation. Requiring 40 precent unimpaired flow will likely prohibit water right holders from diverting the full amount allowed under their water rights in certain conditions. To justify its new flow requirements, the SED relies on a 2012 technical report that found:

> . . .increased unimpaired flows are needed in February through June when juvenile fall-run Chinook are in the critical freshwater-rearing phase of their life cycle and migrating from the [San Joaquin River] basin through the Delta and out to the ocean. (*Ruling*, at p. 16.)

The SED also lowers the summer salinity threshold for agriculture that was originally developed in the 1978 Bay-Delta Plan to avoid salt stress and damage to crops on roughly 100,000 acres of irrigated farm-

land in the southern Delta. Under the 2006 Bay-Delta Plan, the salinity objective was 0.7 deciSiemens per meter (dS/m) from April through August, and 1.0 dS/m from September through March. Citing a 2010 report on salt tolerance that found South Delta crops could handle a salinity range of 0.9 to 1.1 dS/m, the SED revises the salinity standard to 1.0 dS/m, year-round.

The Superior Court's Decision

In establishing a water quality control plan, the State Water Board must ensure the reasonable protection of beneficial uses. (Wat. Code, § 13241.) One of the factors that must be considered under the Porter-Cologne Act is "[p]ast, present, and probable future beneficial uses of water." (*Id.* at subd. (a).) Numerous parties challenged the SED, arguing that the State Water Board did not consider the impacts to other beneficial uses, such as municipal, industrial, and agricultural uses, when it set the unimpaired flow objective.

CEQA Claims

However, the court found the administrative record demonstrates the State Water Board did consider the water supply impacts and did not abuse its discretion, despite foreseeable impacts to competing beneficial uses. *The court reasoned that since* other flow alternatives would result in more harm to native fish populations, the mere fact that reasonable minds could disagree over the State Water Board's ultimate decision does not indicate the decision was arbitrary or capricious. The court deferred to the State Water Board's conclusions regarding water supply impacts, finding substantial evidence to support the use of the hydrologic modeling and analysis employed. The other primary CEQA claim was that the State Water Board did not adequately analyze the impact of the complete Bay-Delta Plan because it "improperly segmented" the project by not considering the Phase II update to the Bay-Delta Plan. The court rejected the argument that the SED needed to consider the impacts of Phase II because:

> . . .the [Lower San Joaquin River] flow and southern Delta salinity objectives operate independently of any future amendments in the Sacramento River or Delta watersheds and can be implemented separately.

The court held that the interconnected ecosystems of the Delta do not require the State Water Board to formulate revisions to the Bay-Delta Plan in a single environmental review process:

> . . .because the phases pertain to separate rivers and watersheds in hydrologically distinct geographic areas with native fish that have different viability needs.

Public Trust Doctrine and Article X Claims

In considering challenges under the common law public trust doctrine, the court held that the State Water Board satisfied its affirmative duty to take the public trust into account by satisfying its responsibilities under the Porter-Cologne Act. Similarly, the court held that the State Water Board did not act in an arbitrary or capricious manner that would amount to a violation of its authority to balance competing beneficial uses of water under article X, section 2 of the California Constitution.

Salinity Standards

Lastly, the court rejected claims that the revised salinity standards for crops in the South Delta relied on faulty analysis or were otherwise arbitrary or capricious. Finding no significant discrepancy between the State Water Board's 2010 report and petitioners' conflicting expert analysis, the court deferred to the administrative findings under the substantial evidence standard. Moreover, the court agreed with the State Water Board's conclusion that the additional unimpaired flows would provide an added benefit of higher water quality. For any remaining claims that were not specifically addressed in the Ruling, the court considered them, but did not find them persuasive.

Conclusion and Implications

The court's ruling represents a significant victory for the State Water Board, which may be emboldened as it moves forward with the implementation of Phase I and considers the draft SED for the Phase II update to flow objectives in the Sacramento River and Delta watershed.

A copy of the Ruling is available at: https://qhj126.p3cdn2.secureserver.net/wp-content/uploads/2024/03/2024-03-15-State-Water-Board-cases-decision.pdf

(Jake R. Voorhees, Austin C. Cho)

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.

Affordable Housing

AB 1893 (Wicks)—This bill was amended on April 29, 2024 and re-referred to the Appropriations Committee. This bill 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 amended on April 29, 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 amended on April 18, 2024, and re-referred to the Appropriations Committee on April 25, 2024. This bill 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 referred to the suspense file on April 24, 2024. The bill would have prevented 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 would be authorized to bring a civil action against a business entity that violates the provisions of the bill. Each violation would have carried a civil penalty of $100,000, reasonable attorney's fees, and the business entity would be required to sell the property to an independent third party within a year of the judgement.

AB 2881 (Lee)—This bill was passed by the Housing and Community Development Committee

and re-referred to the Appropriations Committee on April 24, 2024. This bill 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 read a second time and amended on April 24, 2024, and re-referred to the Appropriations Committee on that same date. 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, in consultation with other state agencies, to evaluate roadside wildfire risk reduction projects and consider including them as a new categorical exemption class.

SB 1227 (Wiener)—This bill was amended on April 18, 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 (Niello)—This bill failed passage in committee on April 3, 2024. This bill sought to address several practices commonly associated with allegations of CEQA abuse. First, it sought 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 sought to prohibit settlements in CEQA cases that include nonenvironmental provisions. Third, the bill sought 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 amended and re-referred to the Committee on Housing and Community Development on April 8, 2024. As amended, the bill would no longer 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. Instead, the amended bill would require that all such units be affordable to lower-income households, rather than lower- or moderate-income households, as required under existing law. The bill would also deem units subject to its provisions and rented to specified public employees to satisfy any affordability requirement of any local inclusionary housing ordinance.

AB 1951 (Fong)—This bill was re-referred to the Committee on Natural Resources on April 1, 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 referred to the Judiciary Committee and the Committee on Natural Resources on February 26, 2024. The bill would require that, in all actions or proceedings brought under CEQA, the filing 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 re-referred to the Appropriations Committee on April 23, 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 will sunset on January 1, 2030.

AB 2190 (Mathis)—This bill was referred to the Natural Resources Committee and the Judiciary Committee on February 26, 2024, but has not yet been heard. The bill 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 read a second time and ordered to consent calendar on April 25, 2024. This bill would provide a statutory exemption from environmental review under CEQA for a public project for the institution of passenger rail service, including construction or rehabilitation of stations and other existing facilities, which will be used by zero-emission trains in urbanized areas.

AB 2940 (Muratsuchi)—This bill was referred to the Committee on Natural Resources and the Judiciary Committee on March 18, 2024. The bill proposes to add transmission projects that bring new renewable energy generation onto the grid to the definition of environmental leadership development projects under CEQA, which would qualify them for certain streamlining benefits, including concurrent preparation of the record of proceedings along with the administrative process.

Density Bonus

AB 2560 (Wiener)—This bill was amended on April 24, 2024, and ordered to third reading on April 25, 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 was amended and re-referred to the Appropriations Committee on April 15, 2024. This bill, also known as the Room to Roam Act, 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, implementation programs, relevant information from specified sources, and rel-

evant 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 placed on suspense file on April 29, 2024. This bill 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 amended on April 15, 2024, and re-referred to the Appropriations Committee on April 25, 2024. This bill 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.

As a declaration of existing law, the bill would provide that a housing element or amendment is considered substantially compliant with the Housing Element Law when the local agency has adopted a housing element or amendment and HCD or a court determines that the adopted housing element or amendment is in substantial compliance. This determination would continue until HCD or a court determines otherwise or the end of the applicable housing element cycle. This bill further provides that, for purposes of the Housing Accountability Act (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.

AB 2023 (Quirk-Silva)—This bill was re-referred to the Appropriations Committee on April 25, 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 3 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 presump-

tion 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 re-referred to the Appropriations Committee on April 25, 2024. This bill 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.

SB 937 (Wiener)—This bill was ordered to second reading on April 29, 2024, and seeks to extend the expiration date of land use entitlements issued to "priority residential development projects," as defined, by 24 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, or unless specified conditions are met. If a fee is not fully paid prior to issuance of a building permit, this bill would allow the local agency to require the property owner to execute a contract to pay the fee as a condition of issuance of building permits.

SB 1037 (Wiener)—This bill was amended and re-referred to the Appropriations Committee on April 25, 2024. The bill 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. However, the penalties set forth in this bill shall only apply when local land use decisions or actions are arbitrary, capricious, lacking in evidentiary support, contrary to established public policy, unlawful, or procedurally unfair. 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 re-referred to the Appropriations Committee on April 23, 2024. The bill would provide that development of a community clinic licensed under Section 1204 of the Health and Safety Code shall be 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 re-referred to the Appropriations Committee on April 25, 2024. The bill 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 re-referred to the Housing and Community Development Committee on April 8, 2024. 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 have prohibited 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. On March 20, 2024, the bill was amended in the Senate and no longer relates to the Public Records Act. SB 908 now addresses issues related to fentanyl-related deaths of children.
(Amy Higuera)

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