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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

OKLAHOMA V. CASTRO-HUERTA: U.S SUPREME COURT'S RECENT EXPANSIVE INTERPRETATION OF STATES' RIGHTS TO APPLY THEIR LAWS ON INDIAN RESERVATIONS

By Roderick E. Walston

The U.S. Supreme Court's interpretation of the principles of federal Indian law, and of the states' rights to apply their laws on Indian reservations, has steadily evolved, from the Court's early view that state laws have no place on Indian reservations to its more recent view that whether state laws apply requires an accommodation of federal, state and tribal interests.

In its recent decision in *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), the Supreme Court took a particularly significant step in the evolution of federal Indian law, by significantly expanding the states' rights to apply their laws on Indian reservations. The Court held that Indian reservations are part of a state and not separate from a state, and that under the Constitution the states may apply their laws on all Indian reservations within their borders unless the state laws are preempted by federal law. And in determining whether the state laws are preempted, the Court held that the ordinary standard of preemption that applies in other contexts—that state laws are presumptively not preempted—also applies in determining whether state laws are valid as applied on Indian reservations. The default standard, the Court stated, is that state laws *apply* on Indian reservations unless specifically preempted by Congress, and not that state laws are *preempted* unless specifically authorized by Congress.

In sum, *Castro-Huerta* significantly expanded the states' authority to apply their laws on Indian reservations, by grounding their authority on the Constitution and by holding that state laws apply unless Congress clearly speaks otherwise.

The state laws that potentially apply on Indian reservations may take many different forms—such as state tax laws that apply to Indians and non-Indians on reservations; state laws that regulate property on reservations, such as state zoning, building and outdoor advertising laws; and state laws that regulate Indian activities in water, such as fishing and hunting. Although the specific rules that apply to one category of state laws may not necessarily apply to another category, some general overarching principles apply to all of these categories of state law, and this Article will focus on these general overarching principles.

The U.S. Supreme Court's Evolving Principles of Federal Indian Law

Worcester v. Georgia: State Laws Are Categorically Precluded as Applied on Indian Reservations

Under the Commerce Clause of the Constitution, Congress has power to regulate commerce among the states and with Indian tribes. U.S. Const., art. I, § 8, cl. 3. Under its commerce powers, Congress has "plenary" power to regulate Indian reservations and affairs. *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470–471 (1979). Congress has historically exercised its plenary power by entering into treaties with Indian tribes and by enacting statutes. But Congress' plenary power does not, itself, necessarily preclude the application of state laws on Indian reservations, to the extent the state laws do not conflict with Congress' treaties and statutes. The states' rights to apply their laws on Indian reservations, and to Indian conduct and activities, has undergone a checkered history, and has evolved from the nation's early history to the present.

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In *Worcester v. Georgia*, 31 U.S. 515 (1832), the U.S. Supreme Court, in a decision written by Chief Justice John Marshall, held that state laws are categorically precluded as applied on Indian reservations in the absence of Congress' or the Indian tribe's consent. Although a Georgia statute prevented white missionaries from living on the Cherokee Nation's reservation unless they obtained a permit from and swore an oath of loyalty to Georgia, the Supreme Court held that Indian reservations are separate federal enclaves in which state laws have "no force," and thus Georgia's citizens have "no right to enter" the reservation without Congress' or the Indian tribe's consent. *Worcester*, 31 U.S. at 561. President Andrew Jackson refused to enforce the *Worcester* decision, and is reputed to have said, "John Marshall has made his decision: now let him enforce it!"

The Court's Modern View: State Laws Apply on Indian Reservations Unless Preempted by Federal Law or Interfere with Tribal Self-Government, But Tradition of Tribal Sovereignty May Weigh in Favor of Preemption

As the United States expanded westward in the nineteenth century in pursuit of its Manifest Destiny, Congress adopted the policy of assimilating Indians into the rest of society rather than isolating them on their reservations. *Organized Village of Kake v. Egan* ("*Kake Village*"), 369 U.S. 60, 72 (1962). In 1871, Congress abolished its power to make treaties with Indian tribes. 25 U.S.C. § 71. In 1887, Congress enacted the General Allotment Act, 25 U.S.C. § 331, which allowed individual Indians to acquire allotments of reservation land for their agricultural and other purposes. *Mattz v. Arnett*, 412 U.S. 481, 496 (1973). But Congress abruptly halted the assimilation policy in 1934 by enacting the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, which preserved Indian reservations in their present form, authorized the Secretary of the Interior to acquire new trust lands, and ended the policy of Indian allotments, although preserving existing allotments.

Concomitantly, the Supreme Court departed from the principle established in *Worcester v. Georgia*, stating that *Worcester* has "yielded to closer analysis." *Kake Village*, 369 U.S. at 72. Under the Court's modern view, an Indian reservation is "part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law." *Id.* Therefore, the Court has held, state laws may apply on Indian reservations "unless such application would interfere with tribal self-government or impair a right granted or reserved by federal law." *Id.* at 75; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Rice v. Rehner*, 463 U.S. 713, 718 (1983); *Williams v. Lee*, 358 U.S. 217, 220 (1959). Thus, the Court's modern view is that state laws may apply on an Indian reservation but are subject to a twin barrier: the state laws are inapplicable if they are preempted by federal law or interfere with tribal self-government.

The Supreme Court has increasingly relied on federal preemption rather than tribal self-government as a bar to the application of state laws on Indian reservations. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 136, 172 (1973); *Rice*, 463 U.S. at 718. And, in determining whether state laws are preempted, the Court has held that the traditional preemption standard that applies in other contexts does not apply in determining whether state laws are preempted as applied on Indian reservations. *McClanahan*, 411 U.S. at 172; *Rice*, 463 U.S. at 718. Rather, the tradition of tribal sovereignty serves as a relevant "backdrop" in determining whether state laws are preempted, and this "backdrop" weighs in favor of preemption of state laws. *Id.* The Supreme Court has in some cases adopted a rule of statutory interpretation that ambiguities in federal law must be construed favorably to the Indians, and this rule supports preemption of state laws as applied on Indian reservations. *McClanahan*, 411 U.S. at 172; *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970).

Even so, the Supreme Court's jurisprudence has been uneven in determining under what circumstances state laws may apply on Indian reservations, and the weight accorded to tribal sovereignty in making this determination. The Court has held in some cases that state laws are preempted unless they are specifically authorized by Congress, and in others that whether the state laws are preempted depends on the balance of state, federal and tribal interests. And in making this determination, the Court has accorded greater weight to tribal sovereignty in some cases than in others.

In *McClanahan*, for example, the Supreme Court held that, in light of the tradition of tribal sovereignty, state laws "generally are not applicable to tribal Indians on an Indian reservation except where

Congress has expressly provided that State laws shall apply." *McClanahan*, 411 U.S. at 170-171. The Court, in holding that a state income tax was preempted as applied to income received by Indians from on-reservation sources, cited its decision in *United States v. Kagama*, 118 U.S. 375 (1886), which had held that Indian tribes are a "separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." *McClanahan*, 411 U.S. at 173, *citing Kagama*, 118 U.S. at 381-382. Thus, under *McClanahan*, state laws are generally preempted as applied on Indian reservations unless they are specifically authorized by Congress.

But in other cases the Supreme Court has balanced state, federal and tribal interests in determining whether state laws are preempted as applied on Indian reservations, and has held that tribal sovereignty, although accorded weight in determining the tribal interest, must yield in the face of more compelling state interests. In *Rice v. Rehner*, the Court held that the tradition of tribal sovereignty requires an "accommodation" between the interests of an Indian tribe and the federal government, on the one hand, and the state, on the other, and that the "balance of state, federal and tribal interests" may accord "less weight" to the tradition of tribal sovereignty. *Rice*, 463 U.S. at 719-720; *see also Washington v. Confederate Tribes of the Colville Indian Reservation* ("*Confederated Colville Tribes*"), 447 U.S. 134, 156 (1980); *Nevada v. Hicks*, 533 U.S. 353, 362 (2001).

In *Rice* itself, the Court balanced state, federal and tribal interests in holding that California could require a federally-licensed trader who operated a general store on an Indian reservation to obtain a state liquor license in order to sell liquor for off-premise consumption. *Rice*, 463 U.S. at 718. In *Confederated Colville Tribes*, the Court also balanced these interests in holding that Washington could impose its cigarette and sales taxes to on-reservation purchases by nontribal members. *Confederated Colville Tribes*, 447 U.S. at 156-157. There, the Court stated that the tribal interest was strongest when tax revenues are derived from value generated on the reservation by the tribal members, but weakest when, as in the instant case, the tribe seeks to market an exemption from state laws that apply elsewhere in the state. *Id.*; *see also Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976).

Similarly, in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1980), the Supreme Court balanced state, federal and tribal interests in considering whether California's anti-gambling laws applied on an Indian reservation, although the Court concluded that the balance of interests weighed in favor of preemption of the California laws. *Cabazon*, 480 U.S. at 214-222. The Court rejected *McClanahan*'s broad view that state laws are preempted unless authorized by Congress, and stated that the Court's cases "have not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of congressional consent"; rather:

> . . .[u]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances may assert jurisdiction over the on-reservation activities of tribal members. *Id.* at 214-215, *citing, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-332 (1983). (*Cabazon* led to Congress' enactment of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, which regulates gaming on Indian reservations. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014).)

The Supreme Court has made clear that state laws generally apply to conduct and activities of Indians outside the borders of their reservations. In *Ward v. Race Horse*, 163 U.S. 504 (1896), the Court held that—even when Indian fishing and hunting rights have been reserved in treaties—state laws regulating fishing and hunting generally apply to Indians outside of their reservations. *See also Kake Village*, 369 U.S. at 75 (holding that state laws generally apply to off-reservation Indian conduct, such as state criminal laws and state laws regulating fishing and hunting); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149 (1973) (holding that "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.")

In sum, under the Supreme Court's modern view, state laws may apply on Indian reservations unless they are preempted by federal law, and, while the tradition of tribal sovereignty may weigh in favor of preemption of state laws, the tradition of tribal sovereignty is accorded less weight if the balance of state,

federal and tribal interests support the state laws. The weight accorded to tribal sovereignty appears to have varied depending not simply on the facts of the case but also, in some instances, on the justice who wrote the Court's majority opinion. Justice Thurgood Marshall, for example, who wrote the majority opinion striking down state regulation in *McClanahan*, appeared to rely more on tribal sovereignty as a bar to state regulation than Justice O'Connor and then-Justice (later Chief Justice) Rehnquist, who wrote the majority opinions upholding state regulation in *Rice v. Rehner* and *Confederated Colville Tribes*, respectively.

State Laws as Applied to Non-Indians on Indian Reservations: The *Bracker* Balancing Test

In the instance of state laws as applied to *non-Indians* on an Indian reservation, the Supreme Court has in its recent history consistently that whether state laws apply to the non-Indians depends on the balance of state, federal and tribal interests. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980); *Cotton Petroleum Corps. v. New Mexico*, 490 U.S. 163, 175 (1989). This balancing test—generally referred to as the *Bracker* balancing test—may apply, for example, in determining whether state laws apply to non-Indians who lease property on Indian reservations for commercial or residential purposes, or to non-Indians who enter into tribal contracts to perform services on an Indian reservation, such as harvesting timber or building a tribal structure.

In *Cotton Petroleum Corps. v. New Mexico*, 490 U.S. 163, 175 (1989), the Supreme Court, applying *Bracker*, held that the balance of state, federal and tribal interests supported the state's right to apply its severance tax to a non-Indian lessee who produced oil and gas on an Indian reservation pursuant to a tribal contract. The Court held that—even though the state tax imposed an economic burden on the tribe—the state provided important services to the tribe and the lessee, and therefore the balance weighed in favor of the state tax. 490 U.S. at 185. As the Court stated, "[t]his is not a case in which the State has had nothing to do with the on-reservation activity, save tax it." *Id.* at 186. "Under current doctrine," the Court stated, "a State can impose a nondiscriminatory tax on private parties with whom the United States or an Indian tribe does business, even though the financial burden of the tax may fall on the United States or tribe." *Id.* at 175.

In other cases, however, the Supreme Court has held that the balance of interests under *Bracker* weighed in favor of the tribal and federal interests and against the state interest, and therefore the state laws were preempted as applied to the non-Indians. In *Bracker* itself, the Court held that the balance of interests supported preemption of a state tax as applied to a non-Indian logging company that had contracted with an Indian tribe to harvest and sell timber on the reservation. The Court stated that the economic burden of the tax fell on the Indians and the non-Indian logging company, *Bracker*, 448 U.S. at 151, and that the state had performed no regulatory functions or services that might justify the tax, *id.* at 148–149.

Similarly, in *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (2005), the Supreme Court, applying *Bracker*, held that a state gross receipts tax was preempted as applied to a non-Indian construction company that built tribal educational facilities on the tribe's reservation pursuant to a tribal contract. The Court held that the federal government comprehensively regulated construction and financing of Indian educational institutions, that the state tax imposed a significant burden on Indian educational opportunities, and that the state had no specific regulatory interest sufficient to justify the tax. *Ramah*, 458 U.S. at 843-846, 839-842. "Having declined to take any responsibility for the education of these Indian children," the Court stated, "the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education—a scheme which has left the State with no duties or responsibilities." *Id.* at 843.

In a separate but related line of cases, the Supreme Court has held that state laws generally apply to non-Indians who own *fee* lands on an Indian reservation, and that the Indian tribe itself has no jurisdiction over the non-Indian owned fee lands. *Montana v. United States*, 450 U.S. 544, 565-566 (1981); *Plains Commerce Bank v. Long Gamily Land & Cattle Co.*, 554 U.S. 316, 327-330 (2008); *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). (Typically, a non-Indian may acquire fee lands on an Indian reservation by purchasing an allotment of fee lands acquired by an individual Indian under the General Allotment Act of 1887.) Indeed, an Indian tribe does not have the same jurisdiction over non-tribal members on the tribe's reservation that is has over its members; as

Montana stated, the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565.

Public Law 280: Application of Certain State Laws on Indian Reservations

In 1953, Congress enacted Public Law 280, which authorizes certain states, including two continental western states, California and Oregon, to apply their criminal and civil laws on Indian reservations within their borders. Public Law 280 provides in its criminal prong that the states have jurisdiction over "offenses committed by or against Indians" in "Indian country," 18 U.S.C. § 1162, and in its civil prong that the states have jurisdiction over "civil causes of action" involving Indians within "Indian country," and that state "civil" laws that are of "general application" shall have "the same force and effect within such Indian country as they have elsewhere within the State." 28 U.S.C. § 1360.

The Supreme Court has held that Public Law 280 does not authorize the states to apply their *civil regulatory* laws on Indian reservations, such as their zoning, building and other regulatory laws. *Bryan v. Itasca County*, 426 U.S. 373, 385, 388-390 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-208 (1987). Rather, the Court has held, Public Law 280 establishes a distinction between civil regulatory laws and criminal prohibitory laws, and authorizes only the application of the latter and not the former on Indian reservations. *Cabazon*, 480 U.S. at 207-208. The Ninth Circuit has further limited the effect of Public Law 280, holding that the statute authorizes only the application of state laws—and not local laws of counties and cities—on Indian reservations. *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1390 (9th Cir. 1987); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 661 (9th Cir. 1975).

Thus, while the criminal prohibitory laws of California, Oregon and other identified states apply on Indian reservations under Public Law 280, the civil regulatory laws of the states do not.

Oklahoma v. Castro-Huerta: Supreme Court Expansion of States' Rights to Apply Their Laws On Indian Reservations

In *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022), the Supreme Court recently expansively interpreted the states' authority to apply their laws on Indian reservations. The Court, in a 5-4 decision written by Justice Kavanaugh, applied the *Bracker* balancing test in holding that Oklahoma has concurrent jurisdiction with the federal government to apply its criminal laws against non-Indians who commit crimes against Indians on an Indian reservation in Oklahoma. 597 U.S. at 650-651. The decision is significant less for its conclusion that Oklahoma had concurrent jurisdiction than for its analysis of the principles of federal Indian law that underlay the conclusion. The decision substantially expanded the states' authority to apply their laws on Indian reservations than under prior decisions, and thus represents a significant development in the evolution of federal Indian law.

First, the Court in *Castro-Huerta* held that the states' rights to apply their laws on Indian reservations is based on the Constitution itself, thus indicating that the states' authority has a constitutional source and is not based simply on Congress' consent. The Court stated that "Indian country is part of the state, not separate from the state," and "as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country." 597 U.S. at 636. In support of this conclusion, the Court cited the Tenth Amendment of the Constitution, which provides that powers not delegated to Congress are retained by the states. *Id.* The Court also cited its decision in *Pollard v. Hagan*, 44 U.S. 212, 228 (1845), which held that a state is generally "entitled to the sovereignty and jurisdiction over all the territory within her limits." *Id.* The Court stated that Chief Justice John Marshall's view in *Worcester v. Georgia*, 31 U.S. 515, 561 (1832)—that Indian reservations are separate enclaves in which state laws do not apply—has been abandoned in the Court's recent decisions, such as *Kake Village*, 369 U.S. at 72, and *Nevada v. Hicks*, 533 U.S. at 353, 361, which, among others, held that state laws may be applied on Indian reservations under some circumstances because the reservations are part of the state. 597 U.S. at 636-637. The Court concluded that "the Court's precedents establish that Indian country is part of a State's territory and thus, unless preempted, States have jurisdiction over crimes committed in Indian country." *Id.* at 637.

Second, in determining whether the state laws are preempted, the Court, citing its precedents, held

that whether state laws are preempted as applied on Indian reservations depends on the "ordinary principles of federal preemption." 597 U.S. at 638. The Court thus indicated that the traditional preemption standard that applies in other contexts also applies in determining whether state laws are preempted as applied on Indian reservations. Under the traditional preemption standard, state laws are not preempted unless Congress indicates otherwise by its "clear and manifest purpose." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). By adopting the traditional preemption standard, the Court in *Castro-Huerta* appeared to depart from the view that the tradition of tribal sovereignty serves as a "backdrop" that weighs in favor of preemption, *e.g., McClanahan,* 411 U.S. at 174, and that ambiguities in federal law must be construed favorably to Indians. *Id. Castro-Huerta* indicates that greater deference may be accorded to state laws unless they have been clearly and unambiguously preempted by Congress.

Third, the Court rejected the dissenting opinion's argument that state laws are preempted as applied on Indian reservations unless Congress specifically *authorizes* their application, and stated, just the opposite, that state laws are authorized on Indian reservations unless Congress specifically *preempts* their application. 597 U.S. at 6503. As the Court stated, "States do not need a permission slip from Congress to exercise their sovereign authority." *Id.* The Court thus resolved the disagreement among its earlier decisions in which the Court stated in some cases that state laws do not apply on Indian reservations unless they are authorized by Congress, *e.g., McClanahan*, 411 U.S. at 170-171, and in other cases that state laws may apply on Indian reservations if the balance of state, federal and tribal interests supports their application, *e.g., Rice v. Rehner*, 463 U.S. at 719-720; *Nevada v. Hicks*, 533 U.S. at 362. The Court held the latter paradigm applies and not the former.

The dissenting opinion in *Castro-Huerta*, 597 U.S. at 656-696, written by Justice Gorsuch, disagreed with all of the above aspects of the majority decision. The dissenting opinion argued that state laws do not apply on Indian reservations unless Congress has expressly authorized their application; that ambiguities in federal law involving Indians must be construed favorably to the Indians; that Indian tribes are not "private organizations within state boundaries" but are "sovereigns"; and that only the federal government or an Indian tribe can punish crimes by or against Indians on Indian reservations. 597 U.S. at 656-686. Although the Supreme Court has routinely stated that its view in *Worcester* that state laws have no place on Indian reservations has "yielded to closer analysis," *e.g., Kake Village*, 369 U.S. at 72, the dissenting opinion argued that *Worcester* is "one of this Court's finer hours." 597 U.S. at 656.

In sum, the Supreme Court's majority and dissenting opinions in *Castro-Huerta* reflect the contrasting views in the Court's long evolution of the principles of federal Indian law. The majority opinion held that the states' rights to apply their laws on Indian reservations is based on the Constitution itself; that the states may apply their laws unless they are preempted under ordinary standards of preemption; and that the default standard is that state laws apply unless specifically preempted, and not that state laws are preempted unless congressionally-authorized. The dissenting opinion argued the polar opposite, that under *Worcester* state laws do not apply on Indian reservations unless they are authorized by Congress, and that Congress presumptively does not authorize state laws on Indian reservations unless it clearly expresses its intent. *Castro-Huerta* was narrowly decided, with five justices supporting the former view and four justices supporting the latter. Whether the Court embraces or departs from the principles established in *Castro-Huerta* will likely depend on the Court's future perspectives, and perhaps its future composition.

Conclusion and Implications

The U.S. Supreme Court's jurisprudence concerning federal Indian law has evolved from the nation's early history—from the Court's early view in *Worcester* that state laws are categorically precluded as applied on Indian reservations, to its more recent view that state laws may apply on Indian reservations but are generally preempted by tribal sovereignty, and to its even more recent view that whether state laws apply on Indian reservations requires an "accommodation" and balancing of state, federal and tribal interests. The Court's decision in *Castro-Huerta* represents another significant step in this evolutionary process, by sourcing the states' rights to apply their laws on the Constitution and by holding that state laws apply unless preempted under ordinary preemp-

tion standards. Whether the Court follows or departs from the principles established in *Castro-Huerta* will likely form the next chapter in the continuing evolution of federal Indian law.

The views and opinions expressed in this article are those of the author and not necessarily those of his law firm or of his clients.

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LAWSUITS FILED OR PENDING

TRIAL COURT GRANTS PRELIMINARY INJUNCTION, PURSUANT TO CEQA, RELATED TO DELTA CONVEYANCE PROJECT GEOTECHNICAL ACTIVITIES

In June 2024, the trial court in Sacramento County assigned to ten cases challenging the Delta Conveyance Project (DCP) granted a preliminary injunction filed by a number of plaintiffs under the Delta Reform Act seeking to halt the geotechnical activities of the Department of Water Resources (DWR) related to the DCP. The preliminary injunction is effective immediately. [*Tulare Lake Basin Water Storage v. California Department of Water Resources*, Cases 24WM0000006, *et seq*., (Sac. County Super. Ct., June 20, 2024]

Background

In December of 2023, DWR certified an Environmental Impact Report (EIR) approving the Delta Conveyance Project (DCP). The DCP is a proposed project consisting of a single conveyance tunnel that would convey high flows from the Sacramento River north of the San Joaquin Delta (Delta) to a point south of the Delta, where the existing export facilities for the State Water Project are located. The DCP, as defined in the EIR, included certain geotechnical activities such as soil borings, installation of test wells, electrodes, cofferdams, survey monuments, and excavation of test trenches.

In 2009, the California Legislature enacted the Delta Reform Act (DRA). In the Delta Reform Act, the Legislature found that the:

> Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources. (Wat. Code, § 85001, subd. (a).)

Accordingly, the Legislature established the "coequal goals" of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem" as "the basic goals of the state for the Delta." (Pub. Resources Code, § 29702, subd. (a); Water Code, §§ 85001, subd. (c) [same], 85054 [defining the coequal goals].)

The DRA created the Delta Stewardship Council (Council) as an independent state agency (Wat. Code, § 85200, subd. (a)) and directed the Council to prepare a Delta Plan that furthers the coequal goals (*Ibid.*, § 85300, subd. (a)). The Delta Plan is intended to be "the comprehensive, long term management plan for the Delta" to further the coequal goals and "assist in guiding state and local agency actions related to the Delta." (*Id.*, §§ 85300, subd. (a), 85302, subd. (a)).

Legislative Intent

The Legislature declared its intent "that state and local land use actions identified as 'covered actions' pursuant to Section 85057.5 be consistent with the Delta Plan," (*Id.*, § 85022, subd. (a)), and required that any state or local agency that proposed a covered action must prepare and file a certification of consistency with the Delta Plan before it may initiate implementation. (*Id.*, § 85225). Under the Council's regulations, a certification of consistency with the Delta Plan must include detailed findings showing consistency with all applicable regulatory policies set forth in the Delta Plan and codified in the Code of Regulations. (Cal. Code Regs., tit. 23, § 5002, subd. (b)(1) ["Covered actions, in order to be consistent with the Delta Plan, must be consistent with this regulatory policy and with each of the regulatory policies contained in Article 3 [i.e., Cal. Code Regs., tit. 23, §§ 5003-5015] implicated by the covered action"].)

Covered Actions and Consistency

"Covered actions" subject to certification of consistency with the Delta Plan are actions that qualify as "projects" under the California Environmental Quality Act (CEQA) and that: (1) "will occur in whole or in part within the boundaries of the Delta or Suisun Marsh;" (2) "will be carried out, approved, or funded by a state or local agency;" (3) "is covered

by one or more provisions in the Delta Plan;" and (4) will have a significant impact on one or both of the coequal goals or the implementation of government-sponsored flood control programs." (Wat. Code, § 85057.5, subd. (a); 23 Cal. Code Regs., § 5001, subd. (j)(1) [same].)

Section 85225 of the Water Code provides that a certification of consistency for a covered action be submitted to the Delta Stewardship Council "prior to initiating the implementation" of a covered action.

The Court's Ruling

The preliminary injunction is based on Section 85225 of the Delta Reform Act. Generally speaking, a preliminary injunction is an "order that is sought by a plaintiff prior to a full adjudication of the merits of its claim." (*Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1260.):

> Trial courts evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued. (*Amgen Inc. v. California Correctional Health Care Services* (2020) 47 Cal. App.5th 716, 731.). . . The potential merit and interim harm are described as *interrelated* factors because the greater the plaintiff's showing on one, the less must be shown on the other to obtain an injunction." (*Tulare Lake Canal Company v. Stratford Public Utility District* (2023) 92 Cal.App.5th 380, 396-397.)

Submission Prior to Initiating Implementation

In their motion for preliminary injunction, plaintiffs argued that DWR's plan to undertake geotechnical activities prior to submitting a certification of consistency for the DCP violated the requirement that such certification be submitted "prior to initiating implementation" of a covered action. The trial court found that DWR defined the DCP to include the geotechnical work at issue under the California Environmental Quality Act. Specifically, the trial court observed that the final EIR analyzed the geotechnical work as part of the DCP CEQA project, and that DWR's notice of determination under CEQA described the geotechnical work as a key component of the project. The trial court concluded that because the geotechnical work was part of the DCP as a defined CEQA project, it was "necessarily" a covered action within the meaning of Water Code § 85225.

Statutory Interpretation

In its ruling, the trial court determined that the question before it—whether the geotechnical work included in the DCP CEQA project was a covered action for purposes of the Delta Reform Act's prohibition on initiating implementation of a covered action before a certification of consistency has been submitted—was a matter of statutory interpretation, which involves determining the Legislature's intent in enacting the statute. The court agreed with plaintiff's interpretation of the statute, namely, that the DCP is a covered action under the Delta Reform Act, and because the geotechnical work was a component of the DCP CEQA project, section 85225 required DWR to prepare a certification of consistency prior to initiating implementation of the DCP, including its geotechnical component.

The court further found that the geotechnical work would likely cause a physical change in the Delta environment and "significantly impact the Delta's ecology or California's water supply," and thus such activities fell within the purview of the Legislature's intent in requiring a certification of consistency prior to implementing those activities. In other words, the trial court interpreted section 85225 to evince a Legislative intent to require certifications of consistency for activities that would significantly impact the Delta ecology or California's water supply, and that the geotechnical activities at issue had such significant impacts.

The trial court rejected DWR's interpretation of section 85225, namely, that the geotechnical activities were only preliminary activities intended to inform the final design of the DCP for which DWR would submit a certification of consistency.

Implementation and Covered Actions

The court found that "implementation" relates to a "covered action," which consisted of the DCP CEQA project that in turn included geotechnical activities. The court also rejected DWR's reliance on admin-

istrative materials and Delta Stewardship Council regulations and programs. Accordingly, the trial court determined that because plaintiffs had demonstrated a strong likelihood of success on the merits of their claims, the degree of harm they needed to show was relatively lower and they met that burden by alleging procedural, tribal, and physical harm (to real property). The court so found even though DWR would be responsible for paying $160,000 in contract penalties, higher project costs from delay due to inflation and overhead costs, and higher risks of harm to the state's water supply from a natural disaster.

Conclusion and Implications

It remains to be seen whether DWR will appeal the trial court's granting of the motions for preliminary injunction. For now, however, the geotechnical activities related to DCP are halted. The court's ruling available at https://www.courthousenews.com/wp-content/uploads/2024/06/delta-preliminary-injuction-granted.pdf
(Miles Krieger)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT HOLDS FOREST SERVICE CANNOT COMBINE NEPA CATEGORICAL EXCLUSIONS

Friends of the Inyo v. United States Forest Service, 103 F.4th 545 (9th Cir. 2024).

The Ninth Circuit Court of Appeals, on May 24, 2024, in *Friends of the Inyo v. United States Forest Service* held the Forest Service's regulations do not allow the agency to combine National Environmental Policy Act (NEPA) categorical exclusions to cover a single project.

Background

The Forest Service combined two NEPA categorical exclusions to approve a mineral exploration project on Forest Service-managed land within the Inyo National Forest. The mineral exploration project would proceed in two phases. First, KORE, the project proponent, would construct 12 temporary drilling pads, which would be used for one year or less. Then, for up to three years after drilling, experts would monitor and tend to the project area to ensure successful environmental rehabilitation. The Forest Service applied CE-8 to the first phase, which allows certain short-term mineral, energy, or geophysical investigations and their incidental support activities, and CE-6 to the second phase, which allows timber stand or wildlife habitat improvement activities that do not use herbicides or require more than 1 mile of low standard road construction.

With its approval, the Forest Service also found that any impacts to the sage grouse, a ground nesting bird recognized by the Forest Service as a Species of Conservation Concern, would be minor and temporary. The Forest Service concluded the project would "not result in any impacts to the species that would affect their viability within the Project area or the Inyo National Forest." The Forest Service further found the project was unlikely to impact surface water or groundwater quality.

At the U.S. District Court

Environmental groups sued the Forest Service after it approved the project, alleging that the Forest Service violated by NEPA by approving the project using a combination of two categorical exclusions where neither alone could cover the entire project. Both sides moved for summary judgment and the District Court ruled in favor of the Forest Service. The Ninth Circuit, with a two-judge majority, revered the District Court and found that the agency violated NEPA.

The Ninth Circuit's Decision

The first issue the majority opinion tackled was whether the project was a single proposed action. The court held the proposed project was a single proposed action subject to NEPA because the agency's regulations do not allow bifurcation of mineral exploration activities and reclamation activities. Further, the agency and project proponent treated the proposed project as a single proposed action even though it was phased.

The Categorical Exclusions and Combining Them for a Single Proposed Action

The Ninth Circuit then considered whether either categorical exclusion alone could cover the proposed action. All parties to the litigation agreed that *neither* categorical exclusion could cover the whole project alone. CE-8 would not cover the entire project because reclamation efforts would exceed one year. And CE-6 would not cover the project because phase one included drilling and exploratory activities that were not remedial in nature.

Next, the court addressed the central issue: whether the Forest Service's regulations allow combining categorical exclusions for a single proposed action. The court found the regulations prohibit the Forest Service from combining categorical exclusions where no single categorical exclusion could cover the proposed action alone. The court looked mainly to the plain language of the statute to support this

interpretation, but also found support in the history, structure, and purpose of the regulations.
The court observed the plain text of 36 C.F.R. § 220.6 uses singular nouns: "*a* proposed action" may be categorically if "*the* proposed action" is "within *a* category." This indicates that a single "proposed action" must fall within a single "category." The usage of singular language is also consistent with Section 220.6's requirement that the agency pick one exclusion and provide a rationale for its choice when more than one could have been used.

Harmless Error Inquiry

Lastly, the court considered whether the agency's error was harmless:

> The harmless-error analysis asks whether the failure to consult materially impeded NEPA's goals—that is, whether the error caused the agency not to be fully aware of the environmental consequences of the proposed action, thereby precluding informed decisionmaking and public participation, or otherwise materially affected the substance of the agency's decision. [*Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1104 (9th Cir. 2026).

The court found the error was not harmless because the Forest Service did not undertake the required environmental analysis in either an EA or EIS. Any conclusions about environmental impacts of the project were just speculation.

> Where, as here, the agency completely fails to undertake the required environmental analysis, conclusions about the environmental impact of the under-evaluated project are speculation. . .while the dissent quips that "zero plus zero is zero," this circular math assumes that because the agency found each category of risk acceptable, their impact will not change when combined. . . The dissent's back-of-the-envelope math thus cannot replace the "hard look" NEPA requires.

The Dissent's Position

U.S. Circuit Judge Patrick J. Bumatay prepared a dissenting opinion. The dissent disagreed with the majority's statutory interpretation, but argued the textual debate was not necessary to resolve because any error was harmless. The dissent reasoned the project would disturb less than an acre of land and no one identified any significant impact on the environment. Given that each phase would have no significant environmental impact individually or cumulatively, analyzing the project as one would not yield any greater environmental impact. Put another way, "zero plus zero is zero." The majority responded as follows:

> Where, as here, the agency completely fails to undertake the required environmental analysis, conclusions about the environmental impact of the under-evaluated project are speculation. . .while the dissent quips that "zero plus zero is zero," this circular math assumes that because the agency found each category of risk acceptable, their impact will not change when combined. . . The dissent's back-of-the-envelope math thus cannot replace the "hard look" NEPA requires.

Conclusion and Implications

This case sets a significant precedent on the impropriety of combining two or more categorical exclusions to a single project. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2024/05/21/23-15492.pdf
(Breana Inoshita, Megan Somogyi)

FIRST CIRCUIT AFFIRMS DISMISSAL OF MARINE MAMMAL PROTECTION ACT CHALLENGE TO MASSACHUSETTS OFFSHORE WIND PROJECT

Melone v. Coit, 100 F.4th 21 (1st Cir. 2024).

On April 25, 2024, the U.S. Court of Appeals for the First Circuit decided *Melone v. Coit*, one of the two appeals challenging the Vineyard Wind 1 offshore project, upholding the National Marine Fisheries Service's (NMFS) issuance of an Incidental Harassment Authorization (IHA) under the Marine Mammal Protection Act (MMPA) to an offshore wind project.

Background

Vineyard Wind 1, LLC (Vineyard Wind) proposed an 806-megawatt offshore wind project (Project) to be constructed off the Massachusetts coast, south of Martha's Vineyard and Nantucket. The Project, as proposed, would generate enough energy to power 400,000 Massachusetts homes.

Thomas Melone—a part-time resident of Martha's Vineyard and owner of solar companies—sued the NMFS and other federal agencies, arguing that the project approvals violated various federal statutes, including the MMPA. Vineyard Wind moved to intervene as a defendant in the U.S. District Court. Melone opposed the request, but the District Court granted Vineyard Wind's motion. Reaching the merits, the District Court ruled for NMFS and Melone appealed.

The First Circuit's Decision

Intervention

The First Circuit first considered whether the District Court had properly granted Vineyard Wind leave to intervene. Melone made several arguments that the District Court had abused its discretion in permitting the intervention. However, the First Circuit rejected all arguments because Vineyard Wind had significant interest in the litigation given its multi-million dollar investment in the Project, and found that Melone also failed to argue, let alone demonstrate, that the intervention prejudiced his substantial rights. As such, it found no error in the District Court's ruling.

Magnitude of Impacts

On the merits, Melone first argued that NMFS had misapplied the standard governing the magnitude of impacts allowed with an IHA. The MMPA allows NMFS to issue an IHA if it finds that the activity would harass a "small number" of individuals and would have a negligible impact on the species as a whole. The Project was estimated to affect 20 individuals, of the approximately 368 endangered North Atlantic right whales in existence as of 2019. NMFS determined that this 5.4 percent of right whales was a "relatively small percentage" that qualified as a small number under the MMPA.

In the District Court, NMFS had also relied on an unrelated final rule stating that a take of up to one-third of a species was a small number under the MMPA. Melone argued that the agency had erroneously "rubberstamped" the IHA in reliance on the rule. But on appeal, NMFS maintained that it had not relied on the on-third rule, and the Court of Appeals agreed, finding it had only cited it as a post hoc rationalization in litigation. The court then found no basis for overturning the agency's actual finding that harassment of 5.4 percent of the population would only affect a small number and noted that other courts had upheld similar determinations. It also noted that the legislative history of the provision showed that Congress recognized the imprecision of the term.

Cumulative Impacts

Melone also argued that NMFS had been required to evaluate the cumulative impact of the Project and all others engaging in similar activities contemporaneously when evaluating the "specified activity" that might result in a take. The Court rejected Melone's arguments, noting that the IHA process "is plainly applicant-driven," and did not require evaluation of all activities proposed by all citizens undertaking similar activities. It also cited the legislative history, showing that Congress intended "specified activity" be narrowly identified so that the anticipated effects

would be substantially similar. Further, NMFS had evaluated cumulative effects in its "negligible impact" analysis.

Limitation of Geographic Scope

Finally, Melone argued that NMFS improperly limited the geographic scope of where it considered covered activities to occur. Melone urged that the analysis should have encapsulated the right whales broader habitat along the eastern shoreline. Once more, the Court disagreed and cited legislative history supporting its interpretation. Further, NMFS once more pointed out that overall cumulative impacts to the right whale population were evaluated in the "negligible impact" analysis.

Conclusion and Implications

Just one day before this opinion was released, the First Circuit ruled in favor of NMFS in a related case brought by local residents over the issuance of a Biological Opinion for the Project. As such, the court's rejection of all Melone's arguments marks the Project's second legal victory in as many days. These consolidated First Circuit decisions mark the first appellate decisions affirming the federal government's approval of the Project, setting a strong precedent for future challenges in litigation against other offshore wind projects. The court's ruling is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-ca1-23-01736/pdf/USCOURTS-ca1-23-01736-0.pdf
(Samuel Bacal-Graves, Hina Gupta)

RECENT CALIFORNIA DECISIONS

CALIFORNIA SUPREME COURT UPHOLDS AB 1307'S CEQA AMENDMENT—RULING THAT UC BERKELEY'S LRDP PROGRAM EIR NEED NOT CONSIDER IMPACTS OF 'SOCIAL NOISE'

Make UC a Good Neighbor v. The Regents of the University of California, ___Cal.5th___, 321 Cal.Rptr.3d 409, Case No S279242 (Cal.2024).

In a highly anticipated opinion published on June 6, 2024, the California Supreme Court in *Make UC a Good Neighbor v. The Regents of the University of California* reversed the First District Court of Appeals' decision that UC Berkeley's program Environmental Impact Report (EIR) for the university's long-range development plan was deficient for not examining social noise and considering alternative locations for the proposed People's Park housing project. The Court ruled that, based on the recent enactment of AB 1307, social noise from residential projects and alternative locations do not need to be considered in a plan-level EIR under the California Environmental Quality Act (CEQA).

Factual and Procedural History

UC Berkeley's Long-Range Development Plan and People's Park Project

Pursuant to the Education Code, UC Berkeley and all other UC campuses periodically develop a Long-Range Development Plan (LRDP)—a forward-looking planning document that guides the physical development, land use designations, building locations, and infrastructure systems for future campus development. In July 2021, the Regents approved UC Berkeley's LRDP, which estimates future population levels at the university to identify the university's campus space, housing, and parking needs, while also describing the land use, open space, mobility, and infrastructure systems needed to support campus development. The LRDP, however, does not mandate or commit UC Berkeley to any specific level of student enrolment or overall growth.

Compared to all other UC campuses, UC Berkeley provides the lowest percentage of housing to its students. Therefore, one of the 2021 LRDP's goals is to improve the university's existing housing stock and construct new student beds and faculty housing units by calling for the development of 11,730 new student beds to be incrementally implemented. One of those projects includes a new student housing development proposed at People's Park—a 1,113 student-bed development featuring 1.7 acres of open landscape and 125 affordable and supportive beds for qualifying students and formerly homeless individuals.

In the summer of 2021, the university certified an EIR that analyzed the environmental impacts of UC Berkeley's LRDP at a programmatic-level, along with the environmental impacts of the People's Park Housing Project at a project-level.

At the Trial Court

In October 2021, Make UC a Good Neighbor filed a petition for writ of mandate contending that UC Berkeley's EIR failed to evaluate and mitigate potential noise pollution from the People's Park project—such as noise caused by student partying and late-night wandering—and failed to identify alternative locations for the Project.

The trial court denied the petition, finding that, with respect to the "social noise" claim, comment letters from Good Neighbor's noise expert were unpersuasive because they were based on speculation. The court also found that the UC's failure to consider off-site alternatives did not violate CEQA, as off-site development would not satisfy the Project's objectives or substantially lessen its significant impacts. Good Neighbor appealed.

At the Court of Appeal

The First District Court of Appeal agreed with Good Neighbor's argument that UC Berkeley failed to analyze the People's Park Project's effect on noise pollution and consider reasonable alternatives. Good Neighbor relied on a noise expert and the history of

noise complaints faced by UC Berkeley students as evidence of potential noise pollution that could occur from the People's Park housing development.

The court disagreed with the Regents' argument that the alleged noise implications were speculative and lacked substantial evidence. The court noted that CEQA includes noise as part of the "environment," and emphasized the California Legislature's previous declarations that it is the state's policy to take all necessary action necessary to provide Californians with freedom from excessive noise. Thus, CEQA applies to the type of noise at issue here—i.e., crowds of people talking, laughing, shouting, and playing music that disturbs neighboring residents. As such, the court rejected the Regents' arguments that Good Neighbor's noise impact claim was based on opinions and unfounded stereotypes. The court pointed to past nuisance complaints from student parties as evidence that there is a reasonable possibility that an increase in the student population could worsen noise concerns in the area.

The court also dismissed UC Berkeley's contention that the university was not required to analyze infeasible off-site alternative locations for the People Park's Project, finding that the EIR failed to consider and analyze a reasonable range of alternatives. The court explained that, although UC Berkeley did not necessarily have to study alternative Project sites, the EIR's failure to explain or consider alternative locations was unreasonable.

The Regents filed a petition for review with the California Supreme Court, which the Court ultimately granted.

AB 1307

While the Regents' appeal was pending before the California Supreme Court, the State Legislature urgently passed AB 1307 in response to the appellate court's decision. AB 1307 added Sections 21085 and 21085.2 to the Public Resources Code, which provided that: (1) "for residential projects, the effects of noise generated by project occupants and their guests on human beings is not a significant effect on the environment" for purposes of CEQA; and, (2) institutions of public higher education in an EIR for a residential or mixed-use housing project are not required to consider alternative locations if certain requirements are met.

Based on AB 1307, Good Neighbor conceded that UC Berkeley's project EIR did not need to examine "social noise" or alternative locations to People's Park. However, Good Neighbor argued that the new law did not apply to the LRDP's program EIR as it only exempted residential projects from CEQA analysis, which the development plan was not.

The California Supreme Court's Decision

The Court was tasked with considering the legislative meaning and intent behind sections 21085 and 21085.2 and their limitations on CEQA. Specifically, the Court considered whether AB 1307's use of the term "residential projects" in sections 21085 and 21085.2 included the LRDP's housing scheme that was analyzed in the Regents' plan-level EIR.

The Court stated that although section 21085 did not specifically define the term "residential project," CEQA elsewhere defined the term "project" under section 21065. And because CEQA mandates that section 21065's definition of "project" govern the broader construction of CEQA, the Court ruled that the Legislature intended to have the same definition assigned to section 21065's use of the term "project." Similarly, although CEQA did not statutorily define the term "residential," the Court assumed that the Legislature intended for it to have an "ordinary meaning." Thus, considering both terms collectively, the Legislature intended for the statute to apply to public agency activities that relate to residences that may have a significant effect on the environment.

The Court explained:

> A broader interpretation of 'residential projects'—one that encompasses land use planning to the extent it concerns residential development—appears to better correspond with the Legislature's intent to specify the type of noise that does not constitute a significant effect on the environment, namely that emanating from 'project occupants of their guests.' In addition, by referring to 'residential projects' rather than LRDPs in section 21085, the Legislature appears to have left open the possibility that certain noise impacts from a nonresidential project (e.g., a stadium, entertainment venue, or commercial center) planned for in an LRDP might constitute a significant effect on the environment.

Given this, the Court concluded that the statute's use of the term "residential projects" was ambiguous because it could either refer narrowly to plans to add residential units to a specific location or more broadly to land use planning to the extent it concerns residential development. Nevertheless, the Court found it unnecessary to conclusively define the scope of the term "residential projects" because, even assuming UC Berkeley's 2021 LRDP was not a plan to add residential units to a specific location, the legislative history of the statute's purpose revealed that it should be interpreted broadly enough to encompass those portions of the 2021 LRDP.

The Court reasoned that the Legislature explicitly passed the bill in response to the appellate court's decision, which elucidated the Legislature's desire to reject the appellate court's underlying conclusion that social noise from residential users may constitute a significant effect on the environment. One of the bill's stated purposes was to "remove the potential for litigants to challenge residential development based on the speculation that the new residents will create unwanted noises," concluding instead:

> . . .that minor and intermittent noise nuisances, such as from unamplified human voices, be addressed through local noise ordinances and not via CEQA.

For these reasons, the clear legislative intent to abrogate the appellate court's interpretation of CEQA strongly supported the conclusion that the Legislature intended for section 21085 to apply to the 2021 EIR's evaluation of the residential aspects contemplated in the 2021 LRDP.

Consideration of Social Noise Impacts under CEQA for Projects Designed to Add Residential Housing Units

The Court further found it:

> . . .untenable that the Legislature would preclude the consideration of social noise impacts under CEQA only for projects designed to add residential units to a specific location (such as the [People' Park Project]) while potentially requiring the same analysis of social noise when an agency makes broader land use planning decisions (such as the 2021 LRDP) that encompass the specific projects. If anything, an agency's broader land use planning decisions have less direct connection to the production of social noise than an agency's specific project adding residential units to a specific location.

Accordingly, the Court found Good Neighbor's argument that AB 1307 "implicitly affirmed" the appellate court's ruling by failing to specify its potential application to the 2021 LRDP as "unsound."

Finally, the Court rejected Good Neighbor's request that it decide how section 21085.2 will apply to future housing projects, finding it unripe and not a proper request of an advisory opinion.

Conclusion and Implications

The long-awaited Supreme Court decision affirms the Legislature's quick response (AB 1307) to the First District's highly publicized but highly controversial opinion in *Make UC a Good Neighbor v. Regents of University of California* that found CEQA required an analysis of "social noise" impacts. The Court's broad interpretation of "residential project" as used in AB 1307 means that individual housing projects along with the residential components of long-term planning documents are exempt from analyzing "social noise" under CEQA. The Court's decision should help streamline the analysis and implementation of LRDPs and other similar planning documents promulgated by institutions of higher education, particularly in their effort to address student housing shortages. The Supreme Court's opinion is available at: https://www.courts.ca.gov/opinions/documents/S279242.PDF

(Julissa De Haro, Bridget McDonald)

SECOND DISTRICT COURT AFFIRMS DISMISSAL OF DECLARATORY RELIEF ACTION TO DETERMINE TIMING OF CONSTRUCTION WHILE CONSTRUCTION PERMIT PROCEEDINGS ARE PENDING

Casa Blanca Beach Estates Owners' Association v. County of Santa Barbara, *Unpub.*, Case No. B314102 (2nd Dist. May 30, 2024).

The Second District Court of Appeal in an *unpublished* opinion in *Casa Blanca Beach Estates Owners' Association v. County of Santa Barbara* affirmed the trial court's decision to dismiss a declaratory relief action regarding the timing of plaintiff's obligation to construct a beach access walkway pursuant to an offer to dedicate recorded in 1990 because plaintiff failed to exhaust its administrative remedy of obtaining a permit to construct.

Factual Background

More than 30 years ago, the County of Santa Barbara Planning Commission approved the development of a 12-lot oceanfront subdivision in Carpinteria. Casa Blanca is the nonprofit homeowner's association formed by the developer to manage the development. Casa Blanca has owned the common area within the development since the 1990s.

The development's approval was subject to a condition that required the developer to provide an irrevocable offer to dedicate a lateral access easement five feet in width for public beach access and to construct a concrete walkway along the entire easement length within 180 days after acceptance of the offer to dedicate.

The developer recorded an offer to dedicate, which required the developer to construct a concrete walkway within 180 days after the last to occur of: (i) recordation of County notice of acceptance of the offer to dedicate, or (ii) issuance of any required land use permit or other governmental approval needed to permit construction of the accessway, including approval by the State Lands Commission, if required.

The County accepted the offer to dedicate in 2011. In 2017, the County and Commission sent Casa Blanca a notice of violation alleging the deadline to construct the walkway had passed. In response, Casa Blanca submitted walkway construction plans to the County, but was told it must obtain a coastal development permit from the Commission. It applied to the Commission for the permit, but the Commission deemed the application incomplete.

Over the next few years, Casa Blanca and the Commission unsuccessfully worked together to complete the permit application. In September 2018, Casa Blanca filed a complaint for declaratory relief against the County and Commission and petitioned for writ of mandate against the County, alleging it had exhausted all administrative remedies and had no plain, speedy, or adequate remedy at law.

In May 2019, as litigation proceeded, Casa Blanca appealed the Commission staff's determination that its application was incomplete but then withdrew the appeal at the Commission's request, stating it would examine the feasibility of two alternative construction options. It subsequently determined further study of the alternatives was not worthwhile and declined to submit the requested analysis to the Commission.

At the Trial Court

In November 2019, the court heard cross motions for summary judgment and/or adjudication from the County and Casa Blanca. The trial court granted the County's motion on all causes of action and denied Casa Blanca's.

The court found the offer to dedicate had been timely accepted by the County, disposing of the first and third causes of action. As to the second cause of action seeking a determination regarding the deadline for Casa Blanca to meet any obligation to construct a walkway within the land described in the Offer to Dedicate, the court found it had no jurisdiction because Casa Blanca had failed to exhaust administrative remedies.

One month later, the Commission, acting alone, issued a "Notice of Intent to Record Notices of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Administrative Civil Penalty Action Proceedings" (notice of intent). Ten months after that, Casa Blanca filed a Statement of Defense and Objections to Recordation of Notices of Violation.

After the State Lands Commission issued a preliminary determination showing portions of the promised walkway encroached on tidal lands, the Commission rescinded the portion of its notice of intent regarding its intent to record the notice of violation.

In December 2019, the court stayed litigation to provide Casa Blanca an opportunity to exhaust administrative remedies. The stay was lifted in November 2020.

In February 2021, Casa Blanca filed a second amended complaint adding allegations against the Commission. The Commission demurred on grounds Casa Blanca failed to exhaust administrative remedies. The trial court sustained the demurrer without leave to amend and entered judgment in favor of the County and Commission

The Court of Appeal's Decision

Under the *de novo* standard of review applicable to summary judgments and demurrers, the Court of Appeal affirmed the trial court determination that it lacked jurisdiction because of Casa Blanca's failure to exhaust administrative remedies.

Exhaustion of Administrative Remedies and Ripeness

The exhaustion of administrative remedies doctrine applies when there is an administrative remedy to questionable government action. It assures certain prerequisites are met before legal action is taken. Where an administrative remedy is provided by statute, relief must first be sought from the administrative body. This is a fundamental rule of procedure followed under the doctrine of stare decisis, and binding upon all courts. A court's intervention before an administrative agency has resolved the claim constitutes jurisdictional interference. Courts have no discretion to relax the exhaustion doctrine.

A concept distinct from but similar to the exhaustion requirement is that there be a ripe controversy. Ripeness looks at whether a controversy is definite and concrete. The ripeness doctrine prevents courts from entangling themselves in abstract disagreements over administrative policies and protects administrative agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. An administrative decision is final, i.e., ripe, when the agency has exhausted its jurisdiction and possesses no further power to reconsider or rehear the claim. Until a public agency makes a final decision, the matter is not ripe for judicial review.

Procedures for Challenge to Return and Revised Project

Casa Blanca contended the controversy is ripe because Commission staff threatens millions of dollars in fines and penalties for an alleged delay in construction of a walkway. But threats are not formalized or final decisions. Neither the Commission nor the County has made a final decision whether to impose any fines or penalties or even whether they agree with Casa Blanca that the obligation to construct the walkway is subject to conditions precedent.

Casa Blanca alleged it was excused from obtaining a final administrative decision because the process has been unreasonably delayed or halted by Commission staff's refusal to set a hearing on the permit application. However, the Commission is not obligated to schedule a hearing on the application until Casa Blanca completes it. (Cal. Code Regs., tit. 14, § 13062). Casa Blanca did not but could (as it did previously) appeal the determination its application was incomplete and a hearing would then be required.

Conclusion and Implications

This opinion by the Second District Court of Appeal reaffirms the doctrines of exhaustion of administrative remedies and ripeness apply to a challenge to whether an administrative application is determined to be complete. That challenge must be made in the administrative proceedings and cannot be made by way of separate declaratory relief court proceedings. The court's *unpublished* opinion is available online at https://www.courts.ca.gov/opinions/nonpub/B314102.PDF (Boyd Hill)

SECOND DISTRICT COURT FINDS ABUSE OF DISCRETION IN ORDERS TO STRIKE PORTIONS OF WRIT REQUIRING COUNTY NEPA COMPLIANCE AND WITH SPECIFIC INSTRUCTIONS FOR CEQA COMPLIANCE

Duca v. County of Santa Barbara, *Unpub.*, Case No. 2D CIV. B325999 (2nd Dist. May. 15, 2024).

In an *unpublished* opinion filed on May 15, 2024, the Second District Court of Appeal affirmed the trial court's finding that the writ petition was timely but ordered to strike portions from the writ, mainly mandating the County to comply with NEPA and follow specific instructions to comply with CEQA, because it exceeded the trial court's authority.

Factual and Procedural Background

The Live Oak Trail Project Notice of Exemption

The Live Oak Trail, located in the Cachuma Lake Recreation Area managed by Santa Barbara County (County) under a management contract with the United States Bureau of Reclamation, has been reserved for the exclusive use of equestrians since the late 1980s. In 2011, the Bureau of Reclamation adopted a resource management plan that would allow hikers and mountain bikers to use the trail. In January 2021, the County announced the Live Oak Trail multi-use program, opening the trail to hikers and mountain bikers.

The County's notices under the California Environmental Quality Act (CEQA) are handled by the office of the Clerk of the Board of Supervisors (CBS). Because of COVID-19, at the time, CBS's website stated that its public counter was closed and that the public could submit claims, assessment appeals, and other documents electronically, via regular mail, or through a physical drop box in the lobby of the County Administration Building.

During the pandemic, CBS's Notices of Exemption (NOEs) were posted on a bulletin board in the clerk's office and on a clipboard (labeled "Notice of Exemptions") kept on a table labeled "Clerk of the Board" in front of the main sliding glass doors of the county administration building's first-floor lobby. NOEs were removed from the clipboard after 30 days. NOEs were available upon request from the clerk's office. Members of the public could call or email the clerk's office to request a document. However, the County did not post CEQA notices on any public-facing website during the pandemic. It did not post signs on the sliding glass doors indicating that CEQA notices were available for review upon entry to the building. None of the County's websites informed members of the public that CEQA notices were available for review upon entry to the administration building.

At a public meeting on January 11, 2021, the County Parks Department announced that the Live Oak Trail would be opened to hikers and mountain bikers. On January 12, 2021, the County posted a NOE for the program on the clipboard in the lobby of the county administration building. On January 15, 2021, the deputy clerk emailed a copy of the NOE to the Santa Ynez Valley Riders, which sent a lengthy written objection to the project to the County's community services department on January 31, 2021. In July 2021, petitioners filed their petition for writ of mandate.

At Trial Court

After a hearing, the trial court issued its statement of decision concluding the petition was timely because the County did not make the NOE available for public inspection. It further concluded that the project to open the Live Oak Trail to hikers and bikers was not categorically exempt from CEQA review because there was a fair argument that it could have a significant impact on the environment. The trial court issued a writ of mandate directing the County to set aside its approval of the project and suspend all activity on the trail other than horseback riding until the County has taken all actions necessary to bring the Project's environmental review, decisions, and determinations into full compliance with CEQA, the CEQA Guidelines, the National Environmental Policy Act (NEPA) and the court's Statement of Decision. The trial court further mandated that the County restore any and all measures used to control access to Live Oak Trail that were removed or

modified to support the Project in lieu of the former equestrian-only usage.

As to the declaratory and injunctive relief causes of action in the respondents' first amended petition for writ of mandate, seeking a declaration that the County had no right to change the use of the trail until it complied with CEQA, NEPA, and other applicable laws, the trial court found in favor of the County.

The County's appeal raised two issues: (1) the trial court erred when it concluded the petition was timely filed because CEQA's 180-day statute of limitations applied rather than the statute's alternate 35-day statute of limitations, and (2) the trial court abused its discretion when it mandated compliance with NEPA, required the County to suspend activities that are not part of the project, and when it retained jurisdiction if the County reapproves the project.

The Court of Appeal's Decision

The Second District Court reviewed the trial court's finding of the petition's timeliness and scope of writ of mandate *de novo* and for abuse of discretion.

Statute of Limitations

The court first examined the statute of limitations to commence a CEQA action. If a local public agency determines that a project that may cause a direct or reasonably foreseeable indirect physical change in the environment is exempt, it may file an NOE documenting that determination. In such cases, an action or proceeding alleging that the public agency has improperly determined that a project is exempt from CEQA review shall be commenced within 35 days from the date of the filing by the public agency of the NOE. If the public agency does not file a NOE, the action or proceeding shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project.

Like the trial court, the court concluded that the 180-day statute of limitations applied because the County did not make the NOE available for public inspection. The court reasoned that posting an NOE in an office that was closed to the public, or in a location unknown to the public was not sufficient to make the NOE available for public inspection within the meaning of the statute.

The court noted that the County or CBS took no action to inform the public that County-generated documents, such as CEQA NOEs, could be accessed and reviewed in the lobby of the county administration building, even though the office where those notices were usually posted was closed to the public. This information was not placed on the Clerk's website, or on any public-facing County website, and there were no signs containing this information were posted on the entry doors to the administration building. Under these circumstances, the court concluded that members of the public had no reason to believe they could access the county administration building or review NOEs in the lobby of that building. The court did not find the County's argument persuasive when it contended that notices were publicly accessible because staff was available during business hours to open the doors to the administration building and direct members of the public to the table that held the NOE clipboard.

Moreover, even though the County contended that the shorter limitations period should apply because interested members of the public had actual knowledge of the NOE and the County's approval of the project via email, the court, citing another case, stated "that the adequacy of a notice to trigger commencement of the short 35-day statute of limitations should not turn on whether a party had actual knowledge of the board's action."

The court further rejected the argument that CEQA itself requires only that an NOE be filed with the county clerk to trigger the statute of limitations, stating the CEQA Guidelines require NOEs to be posted and available for public inspection to the statutory filing requirement.

Scope of Writ and Abuse of Discretion

The Court of Appeal first explored the relevant statute, Public Resources Code section 21168.9(a), requiring a trial court to include in its order only one or more of three specified mandates necessary to achieve compliance with CEQA. Regardless of which mandates the trial court includes in its order, per subdivisions (b) and (c), it may not direct any public agency to exercise its discretion in any particular way, and it may only include the mandates necessary to achieve compliance with CEQA.

For the trial court's first mandate, ordering the County to set aside its decision making a determination of exemption and to vacate all approvals,

actions, and activities adopted and implemented to change the use of Live Oak Trail from equestrian-only to mixed hiking and mountain biking, the court found this falls squarely within the trial court's discretion because it requires the County to set aside the determination that the trial court found to be in violation of CEQA.

The second mandate requires the County to suspend all recreational activity on the trail other than horseback riding until the County has taken all actions necessary to bring the Project's environmental review, decisions, and determinations into full compliance with CEQA, the CEQA Guidelines, NEPA, and the Court's Statement of Decision. To the extent this mandate required the County to comply with NEPA, the court concluded it exceeds the trial court's authority under section 21168.9, subdivision (a) because it says nothing whatsoever about mandating compliance with other statutes. Moreover, the Court of Appeal noted that the record indicated that the parties did not litigate the question of whether the County's actions violated the federal statute, and the trial court's statement of decision includes no specific findings to that effect. Thus, the court found that the trial court abused its discretion when it included a mandate to comply with NEPA.

Lastly, Paragraph 3 of the writ required the County to take a series of very specific actions to restore any and all measures used to control access to Live Oak Trail that were removed or modified to support the Project in lieu of the former equestrian-only usage. The Court of Appeal concluded this mandate was an abuse of discretion because it purports to direct the County to comply with CEQA in particular ways, per section 21168.9, subdivision (c). For example, the trial court ordered the County not simply to void its approval of the multi-use plan but to restore equestrian-only access to the trail. Further, the trial court's order mandated that the County achieve that result by installing or restoring particular gates, a specific type of lock on those gates, a specific means of accessing the combination to those locks, and the precise location where day-use permits and lock combinations may be distributed. The trial court also mandated that the County exercise its police powers in a specific way by patrolling a parking lot "daily and ticketing any vehicle not displaying the user pass. Restating that section 21168.9 does not authorize the trial court to mandate specific actions the County must undertake or precise regulations it must adopt to achieve that compliance, the court found this paragraph 3 of the writ exceeding the trial court's authority under section 21168.9 subdivision (c).

Conclusion and Implications

This opinion by the Second District Court of Appeal illustrates that Notices of Exemption must be reasonably accessible for members of the public to be displayed even during state of emergency situations like COVID-19. Considering that the County of Santa Barbara used the clipboard NOE practice for a good portion of the pandemic, one could expect more decisions finding these NOE inadequate within the County and other counties that adopted a similar, overly simplified way of displaying NOEs. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/B325999.PDF

(David Song)

SECOND DISTRICT COURT REJECTS CHALLENGE TO PROJECT APPROVED UNDER TRANSIT-ORIENTED COMMUNITIES GUIDELINES FOR FAILING TO COMPLY WITH GOVERNMENT CODE SECTION 65009'S STATUE OF LIMITATIONS

Fix the City v. City of Los Angeles, Unpub., Case No. B321899 (2nd Dist. May 22, 2024).

In an *unpublished* opinion filed on May 22, 2024, the Second District Court of Appeal in *Fix the City v. City of Los Angeles* held that "as-applied" challenges to the validity of conditions imposed by a local ordinance are subject to the 90-day statute of limitations in Government Code section 65009, which begins to run from the date of the ordinance's passage. The court explained that allowing a third party that otherwise lacks a property interest to make a facial challenge to the adoption of a local ordinance any time the respondent city approves a project pursuant to that ordinance undermines Government Code section 65009.

Factual and Procedural Background

Measure JJJ and the TOC Guidelines

In 2016, Los Angeles City voters approved Measure JJJ—the "Build Better LA Initiative"—to create an affordable housing incentive program near major transit stops while also implementing local hiring and labor standards. To implement the measure's "Transit Oriented Communities (TOC) Affordable Housing Incentive Program," the Department of City Planning and Planning Commission promulgated and approved TOC Guidelines in 2017 and 2018, which established a tier-based incentive system to permit greater density and building intensity at varying levels based on proximity to transit and transit type. The Guidelines also identified base incentives for density, floor area ration (FAR), and parking for qualifying housing developments, while also incorporating additional state and local density bonus incentives and concessions.

The Project

On January 17, 2019, the City Planning Commission approved a residential housing project proposed by Real Parties in Interest Elliot Nayssan, Robhana Inc., and NHD Terrace under the new TOC Guidelines. The Project would construct a 97,011-square foot, seven-story, 120-unit market-rate residential building with 12 units set aside for extremely low-income households at 10400 Santa Monica Boulevard. The Project site is located on five vacant lots in a State-designated active fault zone under the Alquist-Priolo Act (AP Act), less than 750 feet from bus and transit lines and within 2,640 feet from a future rail station. By setting aside 12 units for affordable housing, the Project qualified for increased density and incentives at a "Tier 3" level under the TOC Guidelines. Based on this tier level, the Project received an increased density bonus to increase the number of units, FAR, and maximum height, and to reduce the number of parking spaces and square footage of side yard and open space.

Geologic Testing

In December 2016, Real Parties submitted a geologic report prepared pursuant to the AP Act to the City's Department of Building and Safety (DBS) for the Project site. The report confined its investigation solely to the subject property, admittedly failing to investigate fault lines extending up to 50 feet from the property in every direction due to difficulty in physically accessing beyond the property's boundaries. A supplemental report submitted in January 2017 further concluded that, due to its inability to confirm or deny the presence of a faultline in the immediate vicinity, one should be presumed. DBS' Bulletin 2017-129 implements the AP Act and allows for reduced setbacks based on data from adjacent sites. Based on this, DBS issued an initial approval but required Real Party to submit an addendum. Real Party complied by submitting a second report in April 2017, which again omitted exploration extending up to 50 feet to the north and south of the Project site, but reiterated that the Project utilize a mat foundation due to potential off-site faults in the unexplored area.

In June 2019, the City Planning Commission approved the Project, finding that the potential for fault rupture had been tested for and analyzed in conformance with regulatory requirements.

At the Trial Court

Fix the City, Inc., a nonprofit public benefit corporation whose "mission is to improve neighborhoods and advocate for sufficient critical infrastructure and public services throughout the City of Los Angeles," filed a petition for writ of mandate in August 2019 alleging the Project violated Measure JJJ and the AP Act. Fix the City sought revocation of all approvals and a judicial declaration that the TOC Guidelines unlawfully exceeded the scope of Measure JJJ. The trial court found the Project failed to comply with the AP Act and DBS Bulletin 2017-129, but denied all other claims, finding that they amounted to facial challenges barred by the 90-day statute of limitations in Government Code section 65009.

The trial court remanded the issue of compliance with the AP Act and Bulletin 2017-129 back to the City; but, after a hearing, the court subsequently issued an interlocutory order remanding due to the City's failure to implement mandatory setback requirements or alternatively rely on data from adjacent sites.

The court thus issued a second writ of mandate requiring the City to set aside and vacate all approvals, ultimately preventing the City from taking further action until the Project complied with Bulletin 2017-129. Fix the City appealed, challenging the scope of the writ for failing to vacate the Project's entitlements and for failing to find the Project violated the AP Act.

The Court of Appeal's Decision

The Second District Court of Appeal upheld the trial court's application of Government Code section 65009, disagreeing with Fix the City's characterization of its claim as an "as-applied" challenge to Measure JJJ.

Analysis under the *Travis* Decision

In particular, the court rejected Fix the City's argument that, because it brought its action within 90 days of the City applying the TOC Guidelines to its approval of the Project, the holding in *Travis v. County of Santa Cruz,* 33 Cal.4th 757 (2004) applied. *Travis* explained that, if a property owner challenges conditions attached to a conditional use permit, the 90-day limitations period under Government Code section 65009 runs from the date of final administrative action on the permit. Fix the City argued that it filed the underlying action within 90 days of the City's approval of the Project—therefore, this action functions as an "as-applied" challenge to this particular Project, which necessarily includes a challenge to the legality of components of the underlying administrative document (*i.e.*, the TOC Guidelines) upon which the approval was based.

Unpersuaded, the Court of Appeal emphasized that the facial attack in *Travis* was raised in connection with a challenge to the "enforcement or application of the legislation against the plaintiff's property." Here, because Fix the City did not assert a taking or establish any other protected property interest implicated by the City's decision, permitting a facial challenge to the TOC Guidelines years after they were passed would undermine the purpose of Government Code section 65009.

Analysis under the *County of Sonoma* Decision

The court also pointed to the holding in *County of Sonoma v. Superior Court,* 190 Cal.App.4th 1312 (2010), explaining that, to determine when the statute of limitations begins to run, one must look at the nature of the claims, what governmental acts are being challenged, the allegations in the pleadings, and the relief requested. In examining Fix the City's Project-related claims here, the court noted that the causes of action essentially harkened back to complaints about a fundamental unfairness in how the City applied the TOC Guidelines as unlawfully exceeding the scope of authority under Measure JJJ. Similarly, the relief Fix the City requested focused on invalidating and prohibiting the City's future reliance upon the TOC Guidelines. Yet, Fix the City failed to identify the harm it suffered that was specifically caused by this Project that could be differentiated from the effects that would occur from any other project approved under the TOC Guidelines. In other words, Fix the City did not claim a taking of property by this specific Project approval; therefore, there was no reason Fix the City could not have challenged the City's adoption of the TOC Guidelines in 2017.

The court also rejected Fix the City's claim that the lower court erred in issuing a writ that would allow the Project's approvals to be reinstated upon the City's compliance with Bulletin 2017-129. The court found the claim was largely speculative and that the order was within the trial court's discretion.

Conclusion and Implications

The Second District's opinion upholds the distinction between facial and "as-applied" challenges to local ordinances and when the statute of limitations begins to run under Government Code section 65009. An "as-applied" challenge must focus on the specific application and effects of the ordinance to the circumstances being challenged. Where the challenger is a third party without a property interest in the matter, it is more likely the court will characterize the challenge as a "facial attack" on the offending ordinance, unless that party can properly show and plead specific and direct harm to a protected property interest. The Second District Court of Appeal's opinion is available at:

https://www.courts.ca.gov/opinions/nonpub/B321899.PDF

(Natasha Roland, Bridget McDonald)

SECOND DISTRICT COURT AFFIRMS DISMISSAL OF CHALLENGE TO HISTORIC PRESERVATION DETERMINATION OF HOME DUE TO STATUTE OF LIMITATIONS

Haselhoff v. City of Santa Monica, Unpub., Case No. B322168 (2nd Dist. May 7, 2024).

The Second District Court of Appeal in *Haselhoff v. City of Santa Monica* affirmed, in an *unpublished* opinion, that the trial court's decision to dismiss a challenge to the City of Santa Monica's (City) historic preservation determination of a home due to expiration of the short 90-day Government Code section 65009 statute of limitation applicable to the challenged land use decision.

Factual Background

The City's General Plan historic preservation element states the City is strongly committed to historic preservation as reflected in the City's Landmarks and Historic Districts Ordinance (Ordinance). The Ordinance allows a property may be nominated for designation by any person. Following nomination, a public hearing is scheduled within 100 days of determination that the application is complete.

The Ordinance requires notice of the public hearing to be given in a daily newspaper of general circulation, mailed to the applicant, the owner of the improvement, all owners and residential and commercial tenants of all real property within 300 feet of the exterior boundaries of the lot or lots on which a proposed Landmark is situated, and to residential and commercial tenants of the subject property, using for this purpose the names and addresses of such owners as are shown on the records of the Los Angeles County Assessor.

Significantly for this case, the Ordinance provides that failure to send notice by mail to any such real property owner where the address of such owner is not a matter of public record shall not invalidate any proceedings in connection with the proposed designation.

At the public hearing, the Landmarks Commission receives and evaluates the evidence submitted, including public comment, and then issues a final decision. The decision is final and in full force and effect from and after the date of the rendering of such decision by the Landmarks Commission.

The property at issue was the former home of actress and singer Kathryn Grayson. Shortly after she passed away, while the property was owned by the Grayson Trust, the City received a letter from the purported owner of the property inquiring about a historic landmark designation. The property was listed on the City's Historic Inventory.

The property owner representative indicated that the property was up for sale and that the potential purchaser intended to alter the building façade, but that the potential purchaser was aware of the property's inclusion on the Historic Inventory and was not opposed to the landmark designation.

Title to the property was transferred to Greg Briles on July 9, 2010, but not recorded until October 2010. Meanwhile, the City gave notice of the public hearing on the landmark designation to the Grayson Trust, unaware of the title transfer as it was not a matter of public record.

Subsequently, Briles and Elaine Culotti entered into a partnership (Briles-Culotti) to hold the property title. Over several years, the Briles-Culotti partnership completed an expansive multi-million-dollar

renovation of the property. Significant alterations to a landmarked property require a certificate of appropriateness from the Landmarks Commission or City staff before building permits are issued. From 2011 through 2012, the Briles-Culotti partnership applied for and received several certificates of appropriateness. Also, during this time Culotti attended multiple public certificate of appropriateness hearings before the Landmarks Commission. Also, the Briles-Culotti partnership applied and was granted after public hearing a Mills Act special tax treatment for the property.

Eventually the Briles-Culotti partnership had a falling out, but during ensuing litigation, the partners acknowledged the landmark designation of the property, with Briles eventually holding title for the partnership.

In 2018, Briles transferred title to Haselhoff. In 2019, Haselhoff filed the present writ of mandate against the City, alleging that various irregularities in the landmark designation process rendered the application invalid. Haselhoff further alleged that the City failed to give proper notice of the landmarking hearing to Briles, the owner of the property at the relevant time.

The City demurred and brought a motion to strike, presenting by way of judicial notice public documents showing the acceptance over the years by Briles-Culoti of the landmark designation, and arguing that the 90-day local land use decision statute of limitations of Government Code Section 65009 bars challenge to the landmark designation brought more than 9 years following the City's landmark designation decision.

The trial court sustained the demurrer and motion to strike without leave to amend on the writ and related causes of action. The parties settled another cause of action and stipulated to dismissal of the remainder of the petition/complaint.

The Court of Appeal's Decision

Under the *de novo* standard of review applicable to demurrers, the Court of Appeal affirmed the trial court's dismissal for failure to state a cause of action due to the applicable 90-day statute of limitations under Government Code 65009.

The Land Use Decision 90 Day Statute of Limitations

Section 65009, subdivision (c)(1) establishes a 90-day statute of limitations to file and serve a writ challenge to any decision on land use matters. Section 65009 falls within the State Planning and Zoning Law. The Planning and Zoning Law authorizes local government entities to regulate the use of land. That includes the adoption of a comprehensive, long-term General Plan for the physical development of the county or city with development policies. That also includes zoning laws, which regulate the geographic allocation and allowed uses of land.

To provide certainty for property owners and local governments regarding decisions by local agencies made pursuant to the planning and zoning law, the Legislature enacted a short, 90-day statute of limitations, applicable to both the filing and service of challenges to a broad range of local zoning and planning decisions. Courts have interpreted section 65009 as applying to challenges to a broad range of local zoning and planning decisions, including those that regulate the use of buildings, structures, and land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes.

The Landmark Designation is a Zoning Decision

The City's General Plan historic preservation element provides that the City is strongly committed to historic preservation as reflected in the programs and policies of the City including a Landmarks and Historic Districts Ordinance. The City's landmark ordinance located in its Zoning Code thus constitutes a zoning-related land use regulation that advances the City's General Plan. Thus, the time limitations set forth in section 65009, subdivision (c)(1), appy.

The challenged Landmarks Commission decision was made on November 8, 2010, and officially approved on February 14, 2011. Because Haselhoff did not file this action within 90 days of either of those dates, all of his claims are untimely. Accordingly, the petition/complaint was properly dismissed.

Haselhoff contended that Briles had no specific notice of the landmarking application, hearing, or decision, thus excusing Haselhoff from the application of the statute of limitations. The problem with Haselhoff's contention is that there is no requirement that Briles should have been given notice. He was not the property owner. Rather, pursuant to exhibits of which the trial court properly took judicial notice,

at all relevant times, either the Grayson Trust or the Briles-Culotti partnership owned the property. And there is no contention that either of those two entities did not have notice.

Conclusion and Implications

This opinion by the Second District Court of Appeal reaffirms the application of the short 90-day land use and zoning decision statute of limitations, regardless of lack of actual notice due to an unrecorded transfer of title at the time of the local agency final determination, especially under the circumstances of this case where notice was repeatedly subsequently acknowledged by the property owner over a period of several years thereafter. The court's *unpublished* opinion is available online at https://www.courts.ca.gov/opinions/nonpub/B322168.PDF
(Boyd Hill)

FIRST DISTRICT COURT AFFIRMS DENIAL OF CEQA CHALLENGE AGAINST PROSPECTIVE PURCHASER AGREEMENT— FINDS THE AGREEMENT WAS NOT A PROJECT

Mothers Against Toxic Housing v. California Department of Toxic Substances Control, *Unpub.*, Case No. A166861 (1st Dist. May. 16, 2024).

In an *unpublished* opinion filed on May 16, 2024, the First District Court of Appeal held the trial court's judgment to reject plaintiffs' challenge under the California Environmental Quality Act (CEQA) involving an 86-acre site in Richmond that has been under the responsibility of the California Department of Toxic Substances Control (DTSC) since 2005.

Factual and Procedural Background

The Administrative Phase

A site, referred to as the Zeneca site, devoted to chemical manufacturing sits on 86 acres in Richmond. Commercial activity ceased in 1997, and the site was badly contaminated. The California Department of Toxic Substances Control (Department or DTSC) took over regulatory responsibility for the site in 2005.

An Environmental Impact Report (EIR) was prepared and adopted as Final EIR by the City Council in 2016. In November 2019, the Department approved a Feasibility Study & Remedial Action Plan (FS/RAP) covering a large portion of the site. The FS/RAP described at length the history of the Zeneca Property, the prior remediation performed at the Site, the testing and pilot studies undertaken to evaluate the contamination at the Site and the efficacy of certain remediation measures, and multiple alternative forms of remediation considered by the Department to clean up the Zeneca Property. Because the FS/RAP further determined the remedial efforts would not have a significant environmental impact, the Department adopted a negative declaration and determined that operations encompassed by the FS/RAP would not present significant environmental consequences. In 2020, the City Council adopted an addendum to the Final EIR about the specifics of remediation, including a Mitigation Monitoring and Reporting Program (MMRP).

In July 2021, DTSC approved a Prospective Purchaser Agreement (PPA) with HRP Campus Bay Property, LLC (Campus), which intends to develop a large mixed-use project on the Zeneca Site, including up to 4,000 residential units. In return for the PPA's protection, Campus committed to complete portions of the cleanup activity at the site previously approved under the FS/RAP and to satisfy certain financial obligations relating to local community organizations and remedial alternatives. At the time it approved the PPA, DTSC found with certainty that there was no possibility that the activities in question would result in a significant environmental effect.

The Judicial Phase

In August 2021, a group of seven nonprofit and unincorporated associations (plaintiffs or petitioners) commenced this CEQA action against the Department and Campus, the latter being designated as the real party in interest. Previously, some of the same plaintiffs in this action, with the same attorneys, raised a judicial challenge to the City Council's action against the same defendants. The challenge was

also heard by the same judge, who rejected the challenge with a detailed order.

The petition here brought a single cause of action, and the supporting allegations made it clear that, although the PPA was the ostensible target, the petition was tied to the FS/RAP. Three issues were tried: (1) whether the PPA qualified as a "project" as defined by CEQA; (2) assuming it was a project, whether any of the CEQA exemptions applied; and (3) whether the PPA may have a significant effect on the environment, as shown by new information demonstrating changed circumstances, thus triggering a subsequent environmental review despite a previous review, mainly, the Department's adoption of a negative declaration when it approved the FS/RAP. All three issues were decided against plaintiffs.

Specifically, one of the plaintiffs' issues was that the City violated CEQA by not reopening an environmental review of the PPA and failing to adequately address new information about the updated "sea level rise (SLR) projections from a May 2020 report issued by the California Coastal Commission, with an estimated SLR amount higher than that considered by the negative determination in the FS/RAP.

The trial court concluded that the claim that the issuance of FS/RAP constitutes changed circumstances that require subsequent environmental review was forfeited because it had not been raised during the administrative proceedings. The trial court also found that the new information and plaintiffs' arguments focused on the potential effect of SLR on the Zeneca Property but not the effect of the Project on the environment. Moreover, the updated SLR information was not previously unknown or new information because it was addressed in the final EIR. Lastly, the trial court rejected the argument that the Department's adoption of a remediation option was a changed circumstance because the addendum specifically addressed the Department's remediation plan and its interplay with the Project as approved.

The Court of Appeal's Decision

The First District Court of Appeals adopted almost entirely the trial court's findings and position and concluded that PPA did not require a subsequent environmental review.

PPA Was Not a Project under CEQA

The court first disagreed that the PPA was a CEQA project because the future use of the site and its significant environmental impacts had been extensively examined, and the measures to remediate those impacts, including the MMRP had been approved. The court found that the PPA neither added nor subtracted anything from the decisions already made or the remediation measures already approved. The court pointed out that a project cannot mean every governmental action or decision that may have a tangential connection to a project, and agreed with the trial court that the Department was justified in concluding with certainty that there was no possibility that the PPA would result in a significant environmental effect.

Because the court did not find the PPA a CEQA project, it also found that there was no need to determine whether the PPA was exempt from CEQA review.

Updated SLR Information Was Not New Information or Changed Circumstances

The Court of Appeal concluded that the updated SLR did not constitute new information that required a supplemental environmental review because both parties were aware of the SLR risks, which were even mentioned in the final EIR and the negative declaration.

The court also did not find the updated SLR as "changed circumstances" that presented a substantial increase in the severity of previously identified significant effects that were not discussed in the previous EIR or negative declaration.

The court stated that DTSC's adoption of a negative declaration when it approved the FS/RAP was entitled to a presumption of finality and that the Department's approval of the PPA encompassed an implicit finding that plaintiffs failed to carry that burden. The court emphasized that by the time the PPA came to be considered, the final EIR had already been certified by the City, and a negative declaration had been adopted by the Department. Accordingly, the court found that it was more than reasonable for the Department to conclude that the negative declaration retained relevance when considering the PPA, with its *de minimis* environmental impact.

The Court of Appeal found the plaintiffs' failure to address the trial court's legal conclusions that: (1) approving the PPA did not cause any environmental impacts, and (2) plaintiffs were relying on informa-

tion about environmental impacts of what might happen to the Zeneca Site, not by the project, as plaintiffs' failure to meet its burden to show the absence of substantial evidence to support the Department's finding. The trial court pointed out that one of the precedents plaintiffs cited, *Citizens' Committee to Save the Refuge v. City of Newark* (2021) 74 Cal.App.5th 460, 478, stated that SLR did not have an impact on the environment caused by the project, but the plaintiffs' opening brief did not address this. In short, the court found this action as a second bite attempt of the apple in using the same information to try to derail the project.

Changed VOC Measurement Guidelines Were Not New Information or Changed Circumstances

Lastly, the Court of Appeal reviewed the plaintiffs' argument that the Department introducing supposedly more accurate draft guidelines for volatile organic compound (VOC) measurement, different from the guidelines used for the FS/RAP, constituted either new information or changed circumstances. The court noted that the trial court found the draft guidelines were based almost entirely on existing materials and did not qualify as being "new" within the meaning of CEQA Guideline § 15162. The court also added that, because courts lack institutional expertise in the technical aspects of the issues covered by CEQA, they do not demand technical perfection or scientific certainty.

The court further agreed with Campus's argument, citing *Concerned Dublin Citizens v. City of Dublin*, 214 Cal.App.4th 1301 (2013) and *Fort Mojave Indian Tribe v. Department of Health Services*, 38 Cal.App.4th 1574 (1995), that newly adopted regulations or guidelines do not constitute new information if the information about the underlying issue was known or should have been known at the time the original environmental document was certified or adopted. Lastly, the court stated that the adequacy of programs like the MMRP in the FS/RAP and the EIR Addendum are only required to be "reasonably feasible," not technical perfection. Thus, the court concluded that the Department's decision to continue to treat the negative declaration as retaining relevance and not to re-open an environmental review was supported with substantial evidence.

Conclusion and Implications

The First District Court of Appeal made clear that an agreement that only has a tangential connection and no real modification to an existing project with a series of environmental reviews, like the PPA here, will not be labeled as a separate CEQA project. The court also emphasized that, when challenging an agency's environmental determination, there is a distinction between new, unknown information versus merely updated information, that the new information must not have been raised and absent from the discussion in the series of environmental reviews. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/A166861.PDF
(David Song)

FOURTH DISTRICT COURT OVERTURNS, ON RIPENESS GROUNDS, JUDGMENT THAT HISTORIC DESIGNATION CONSTITUTES A REGULATORY TAKING

Young v. City of Coronado, *Unpub.*, Case No. D081111 (4th Dist. May. 9, 2024).

The Fourth District Court of Appeal, in an *unpublished* decision, refused to rule on the issue of whether a historic preservation designation can constitute a regulatory taking due to ripeness issue.

Facts and Background

This case arises out of the City of Coronado (City) designating the plaintiffs' 1924, single story bungalow cottage as a historic resource under the City's municipal code. Plaintiffs sought to develop the property, and in 2013, found a group of investors to assist in the financing and construction. Upon approaching the City's planning department in 2013, the plaintiffs were told that they had to obtain a demolition permit and have the City's Historic Resource Commission (Commission) review the project. In 2014, the Commission determined the property was a historic resource, over plaintiffs' objections. Plaintiffs filed a notice of intent to demolish with the City and appealed the Commission's decision to the City Council. The City Council upheld the Commission's decision, and plaintiffs filed a writ action to overturn the administrative decision. Following three years of state court litigation, the administrative decision was upheld by the Court of Appeal. As a result, plaintiffs filed a separate inverse condemnation action in January 2018 alleging that the designation and the City's application of its municipal code to deny a demolition permit resulted in a regulatory taking.

In November 2019, plaintiffs applied for a historic alteration permit for the first time, seeking demolition of the property, and the trial court stayed the inverse condemnation action. After being informed by the City's planning department that demolition would require preparation of an EIR, plaintiffs withdrew the application in order to move forward with another plan involving modification of the property rather than demolition, in hopes of relying on a CEQA exemption. Ultimately, the new application was deemed incomplete by the City, and plaintiffs also received comments from City staff that the Secretary of Interior's Standards for Treatment of Historic Properties would require them to limit the size of any addition to no more than the existing structure, and effectively prohibit any second story addition. Plaintiffs made no further attempt to seek alteration, and the application was never considered by the City's Historic Resources Commission. Notably, the City's municipal code authorized approval of a demolition permit if there was no alternative for preservation that would not result in a "considerable financial hardship," and a permit could be issued if denial would result in "an immediate and substantial hardship on the applicant" based on the conditions of the property, owner, or historic resource.

At the Trial Court

During trial, City staff testified that the City had only received three applications to demolish historic properties, and all had been withdrawn. While City staff admitted that they had determined that an addition more than twice the size of the existing structure would violate the Secretary of Interior's standards, staff also testified that the Commission made such determinations and that both the Commission and the Council had in the past not followed staff recommendations.

Following a bifurcated trial, the trial court judge found that the action was ripe, was not barred by collateral estoppel, and that the City had effectively taken property without providing just compensation. Subsequently, a jury awarded $800,000, based on the difference between the property's fair market value with and without the historic designation.

The City appealed the judgment and raised several arguments. First, the City argued that a diminution in the value of property due to a valid exercise of police powers does not constitute a taking as a matter of law. The City also argued the action was unripe, as City had not made a final determination regarding the extent of permitted development on the property, which was a prerequisite for an inverse condemnation claim based on a regulatory taking. The City also argued that it had been successful defending the administrative decision, thus making it immune from collateral attack.

The Court of Appeal's Decision

The Court of Appeal reversed the judgment, after determining that the City's arguments on ripeness had merit. The City argued that while the trial court had determined that any further development applications would be futile, the trial court's analysis was:

> . . .based upon pure speculation related to potential development of the property because no final determination regarding the proposed development has ever been made.

After an overview of both ripeness and inverse condemnation case law, the Court of Appeal noted that a claim of regulatory taking is not ripe until after the government entity has reached a final decision about the application of the subject regulations to the property at issue. This requirement is due to the need to make a determination of whether the regulation has actually deprived the landowner of all economically beneficial use or defeated reasonable investment-backed expectations. While the Court of Appeal acknowledged that there is an exception to the requirement that the government reach a final decision, if waiting to reach such decision would be futile, the court indicated that this futility exception generally requires that the applicant show that it is clear no project would be approved and that the exception is "extremely narrow."

Finding the record undisputed that plaintiffs had never submitted a complete historic alteration permit, the Court of Appeal held that plaintiffs had not met their burden to demonstrate the futility, and that the stipulation by both sides that the Historic Resources Commission had never approved a request to demolish a historic structure was not sufficient to demonstrate futility, as all applicants had previously withdrawn their applications. The Court of Appeal refused to consider the City's other arguments.

Conclusion and Implications

In sum, the Court of Appeal's decision highlights the importance to developers of exhausting available administrative processes prior to filing litigation. However, in this particular instance, the Court of Appeal's refusal to rule on the issue of whether a historic preservation designation can constitute a regulatory taking leaves open the possibility of subsequent litigation on this ground. A copy of the opinion is available here: https://www.courts.ca.gov/opinions/nonpub/D081111M.PDF
(Sergio Rudin)

LEGISLATIVE UPDATE

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

We strive to be current, but deadlines require us to complete our legislative review several weeks before publication. Therefore, bills covered can be substantively amended or conclusively acted upon by the date of publication.

Affordable and Other Housing Laws

AB 1893 (Wicks)—This bill was passed out of the Assembly and ordered to the Senate on May 21, 2024, and has been amended several times in the Senate. This bill would address the "builder's remedy" feature of the Housing Accountability Act (HAA). 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. However, as amended, it would also broaden the scope of projects that can make use of the bill by, among other things, lowering the affordability requirements and eliminating those requirements for certain small housing projects. The bill would also expand the HAA's broad limitations on when municipalities can deny housing projects, by defining disapproval to include a course of conduct of sustained inaction or imposition of burdensome processing requirements.

AB 1820 (Schiavo)—This bill was passed out of the Assembly and ordered to the Senate on May 21, 2024, and has been amended several times in the Senate. 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 developer to request that the agency provide the total amount of fees owed under the agency's fee programs but specifies that the estimate is not binding.

AB 2243 (Wicks)—This bill was passed out of the Assembly and ordered to the Senate on May 16, 2024, where it has been amended several times. 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 2533 (Carrillo)—The bill was amended and read for the second time in the Senate on May 30, 2024, passed the Committee on Housing and re-referred to Committee on Local Government on June 19, 2024. The bill would prohibit local agencies from denying a permit for an unpermitted accessory dwell-

ing unit or junior accessory dwelling unit constructed before January 1, 2020, unless necessary to correct violations that would otherwise deem the building substandard. The bill would also require local agencies to inform the public about these provisions, provide a checklist of substandard conditions, and allow homeowners to obtain a third-party code inspection before applying for a permit. Low- or moderate-income households may be exempt from paying certain fees to obtain permits, and local agencies must inspect units for health and safety compliance and assist with necessary permits without penalizing the homeowner for the unpermitted unit.

AB 2553 (Friedman)—This bill was passed out of the Assembly and ordered to the Senate on May 2, 2024, and amended by the Senate Committee on Housing on June 12, 2024. The bill would amend definitions in both CEQA and the Mitigation Fee Act (MFA) that govern whether a project is considered to be sufficiently close to transit services for certain benefits to apply. Specifically, the bill would amend CEQA's definition of "major transit stop" to include stops with bus service every 20 minutes during peak commute periods, whereas the current requirement is service every 15 minutes. It would also incorporate the definition by reference into the MFA's provision generally requiring lower transportation impact fees for housing projects near transit services, and include planned stops in the MFA provision.

AB 2584 (Lee)—This bill was passed out of the Assembly and ordered to the Senate on May 21, 2024, and has been amended and re-referred to the Judiciary Committee on June 20, 2024. The bill would prevent a business entity, as defined, with an interest in more than 1,000 single-family residential properties from acquiring an ownership interest in another single-family residential property and subsequently leasing the property. The amended bill clarifies that sellers of real property will not be held liable for any violations of this provision. The bill also states that the Attorney General will be authorized to bring a civil action against a business entity that violates the provisions of the bill. Each violation would carry 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 3122 (Kalra)—This bill was passed out of the Assembly and ordered to the Senate on May 16, 2024, and on June 19, 2024, the bill was amended and re-referred to the Committee on Local Government. The bill would allow a local government to apply objective planning standards to projects approved under SB 35, which provides a streamlined, ministerial process for approving housing developments that are in compliance with local planning standards. The bill authorizes local governments to apply objective planning standards to a project when a developer seeks to increase or decrease the total square footage of a development by 15 percent or more. Alternatively, the bill would allow local governments to impose objective planning standards if developers seek to increase or decrease the total square footage of the development by 5 percent or more, provided that a local government finds it necessary to apply new standards that were not in place when the development was initially proposed. The bill further stipulates that project applications submitted before January 1, 2019 proposing a minimum of 500 housing units must designate 20 percent of its units as affordable housing. Among those units, at least 9 percent must be affordable to very-low income households, with the rest designated as affordable for lower-income households.

California Environmental Quality Act

AB 174 (Committee on Budget) / SB 174 (Committee on Budget and Fiscal Review)—Each of these bills were originally introduced as legislation related to the Budget Act of 2023, but have been repurposed to exempt from the requirements of CEQA work to be performed under the Capitol Building Annex Act of 2016. Both bills were introduced to address ongoing CEQA litigation challenging the environmental review prepared for the Annex project. SB 174 was enrolled and presented to the Governor on June 27, 2024, while AB 174 was ordered to a third reading in the Senate on June 26, 2024. The bills would also appropriate a total of $700 million to fund the acquisition, design, construction, and equipping of projects authorized by the Annex Act and require the amount appropriated for each fiscal year to be transferred to the State Project Infrastructure Fund. These bills also propose a five-year extension for CEQA exemptions related to climate and biodiversity projects, extending the sunset date from January 1, 2025, to January 1, 2030.

SB 312 (Wiener/Allen)—This bill was passed out of the Senate on January 15, 2024, and most recently amended in the Assembly on June 10, 2024. This bill would extend the CEQA exemption for certain qualifying university housing developments from January 1, 2030 to January 1, 2032, and removes and extends certain Leadership in Energy and Environmental Design (LEED) certification filing requirements.

SB 768 (Caballero)—This bill was passed out of the Senate on January 29, 2024 and has been amended twice while in the Assembly. The bill would require the Transportation Agency to conduct a study on CEQA's shift to analyzing vehicle miles traveled (VMT) as a measure of transportation impacts. The study would include how VMT targets, analyses, and mitigation are being developed by agencies undertaking CEQA review.

SB 1159 (Dodd)—This bill was passed out of the Senate and ordered to the Assembly on May 23, 2024, and non-substantively amended by the Assembly Committee on Appropriations on June 24, 2024. The Office of Planning and Research and the Secretary of the Natural Resources agency are responsible for developing the list of categorical CEQA exemptions for classes of projects they have determined to generally not have significant environmental impacts. This bill would direct the agencies, in consultation with other state agencies, to evaluate roadside wildfire risk reduction projects and consider including them as a new categorical exemption class.

SB 1361 (Blakespear)—This bill was passed out of the Senate and ordered to the Assembly on April 25, 2024, where it was read in the Committees on Natural Resources and Housing and Community Development and ordered to the consent calendar on June 27, 2024. The bill provides a CEQA exemption for actions taken by local agencies to approve a contract for providing services for people experiencing homelessness, including services related to case management, resource navigation, security services, residential services, and counseling.

AB 2091 (Grayson)—This bill was passed out of the Assembly and ordered to the Senate on May 9, 2024 and referred to the Committees on Environmental Quality and Natural Resources and Water on May 22, 2024. The bill would create a new statutory exemption from the requirements of CEQA for approval of a change in use to allow public access, as long as exclusively for nonmotorized recreation, and in areas acquired or managed by the public agency for open space or park activities. The bill would define the term "public access" by limiting it to: (1) visitors that are in the agency-managed park or open space in a manner consistent with the park's own or conservational purposes; and (2) whose presence is not likely to result in significant impacts to endangered, threatened, rare, and special status species, or to tribal cultural resources. The bill would sunset on January 1, 2030.

AB 2199 (Berman)—This bill was passed out of the Assembly and ordered to the Senate on May 9, 2024 and referred to the Committee on Housing. This bill would extend the sunset date for CEQA exemptions that apply to qualifying multi-family residential and mixed-use housing projects on infill sites by an additional seven years. AB 2199 would also make the exemption inapplicable to projects that may cause substantial adverse impacts to tribal cultural resources.

AB 2503 (Lee)—This bill was passed out of the Assembly and ordered to the Senate on May 2, 2024 and was amended most recently on June 10, 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 3057 (Wilson)—This bill was considered by the Senate Committee on Environmental Quality and re-referred to the Committee on Housing on June 5, 2024. This bill creates a new CEQA exemption for a city or county's adoption of an ordinance that allows creation of junior accessory dwelling units in areas zoned to for single-family residential use.

AB 3238 (Garcia)—This bill was passed out of the Assembly and ordered to the Senate on May 22, 2024, and referred to the Environmental Quality Committee and Committee on Energy, Utilities, and Communications. The state will need to significantly expand its transmission capacity to meet its clean energy goals. This bill proposes several reforms to

streamline the permitting and environmental review process for electric transmission projects. Notably, this bill would exempt projects that expand existing public rights-of-way across State-owned land to accommodate the construction, expansion, modification, or update of electrical infrastructure from CEQA requirements until January 1, 2035. This bill would also designate the California Public Utilities Commission as the lead agency for purposes of CEQA for electrical infrastructure projects.

Density Bonus

AB 2560 (Alvarez)—This bill was passed out of the Assembly and ordered to the Senate on May 20, 2024 and amended and re-referred to the Committee on Appropriations on June 27, 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 if the development is not located on certain specified areas in the coastal zone.

AB 3116 (Garcia)—This bill was passed out of the Assembly and ordered to the Senate on May 21, 2024 and was ordered to the consent calendar on June 19, 2024. This bill would revise and enhance existing density bonus laws for student housing developments. The bill would also prevent developers from restricting lower-income students from sharing a room or unit with non-lower-income students. The bill would allow developers to establish a system for confirming its renters' status as students and would prohibit a student housing project with a density bonus exceeding 35 percent from being located on sites that would necessitate the replacement of existing units.

General Plans

AB 1889 (Friedman)—This bill was passed out of the Assembly and ordered to the Senate on May 20, 2024, and following minor amendments from the Committee of Natural Resources and Wildlife, was referred to the Committee on Appropriation on June 26, 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 relevant best available science. The bill would require a city or county to adopt or review the wildlife connectivity element or integrate related goals, policies, and objectives into other elements, upon the adoption or next revision of one or more elements of the General Plan on or after January 1, 2025.

Housing Element Law

SB 951 (Wiener)—This bill was passed out of the Senate and most recently amended by the Assembly on June 19, 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 would also allow for actions taken by a local government that is both a city and county on qualifying coastal development permit applications to be exempt from requirements for appeal to the Coastal Commission.

AB 1886 (Alvarez)—This bill was amended and read for the second time by the Senate Committee on Housing on June 11, 2024 and referred to the Committee on Appropriation on June 19, 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, HCD or a court determines that the adopted housing element or amendment is in substantial compliance with the Housing Element Law, and HCD's compliance findings have not been superseded by subsequent contrary findings by HCD or by a decision of a court of competent jurisdiction, or the court's decision has not been overturned or superseded by a subsequent court decision or by statute. The bill would further specify that these provisions do not alter the interpretation of the terms "substantially complies" or "substantial compliance" under existing law. This bill further provides that, for purposes of the HAA, a housing element or amendment is considered in substantial compliance with the Housing Element Law only if the substantial compliance findings determination was made when a preliminary application or complete application was submitted.

AB 2023 (Quirk-Silva)—This bill was passed out of the Assembly and ordered to the Senate on May 20, 2024, where it was referred to the Committee on Housing and the Judiciary Committee on May 29, 2024. This bill would amend provisions of the Housing Element Law to provide that, for the seventh and subsequent revisions of the housing element, local governments must complete the rezoning of sites within one year of the statutory deadline for the adoption of the housing element or the earlier of three years after the date the housing element is adopted or 90 days after receipt of comments from HCD, if the local government satisfies certain requirements, including submitting a draft element or draft amendment to HCD for review within specified timeframes and adopting a draft element or draft amendment that HCD finds to be insubstantial compliance with the Housing Element Law. Further, existing housing element law requires local governments to identify adequate sites for housing and make adequate provision for the current and future needs of all community household income levels. This bill would provide that, when the identified inventory of sites is inadequate to meet housing needs, the local government must establish and adhere to a program for rezoning to make the inventory adequate. This bill would further provide that nonvacant sites in a prior housing element and vacant sites not approved for development in at least two planning periods, would not be considered adequate sites, unless they are residentially zoned at a particular density and the site is subject to a program requiring rezoning by the applicable deadline. Finally, under existing law related to actions challenging the validity of a housing element, where HCD finds that the housing element substantially complies with the Housing Element Law, there is a rebuttable presumption of validity. This bill provides that for the same actions, if HCD finds that the housing element does not substantially comply with the law, there is a rebuttable presumption of invalidity.

Planning and Zoning

SB 937 (Wiener/Grayson)—This bill was passed out of the Senate and most recently amended in the Assembly on June 17, 2024. The bill 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 in the Assembly on June 13, 2024, approved by the Judiciary Committee, and then referred the Committee on Appropriation on June 18, 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 the agency's acts or omissions are arbitrary, capricious, or entirely 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. The bill specifics that the remedies available to the Attorney General under its provisions would not limit or affect the remedies available to any other party seeking to enforce the laws enumerated in Government Code section 65585 subsection (j).

AB 2085 (Bauer-Kahan)—This bill was passed out of the Assembly and has been amended several times in the Senate. As amended, 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 60 days to either approve or provide documentation to the development.

AB 2117 (Patterson)—This bill was passed out of the Assembly and ordered to the Senate on May 16, 2024, and referred to the Local Government and Housing Committees. 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.
(Amy Higuera)

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