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REGULATORY DEVELOPMENTS

SAN FRANCISCO BAY-DELTA POPULATION OF LONGFIN SMELT LISTED AS ENDANGERED UNDER THE FEDERAL ENDANGERED SPECIES ACT

On July 30, 2024, the U.S. Fish and Wildlife Service (USFWS) published its final rule adding the San Francisco Bay-Delta distinct population segment (DPS) of longfin smelt (*Spirinchus thaleichthys*) (hereafter, Bay-Delta longfin smelt) to the List of Endangered and Threatened Wildlife under the federal Endangered Species Act (ESA).

Background

The longfin smelt is a small fish that lives in a variety of habitats along the Pacific coast of the United States (*e.g.*, nearshore waters, estuaries, and lower portions of freshwater streams). Although longfin smelt are found in waters throughout the west coast, from California to Alaska, the specific DPS identified for ESA listing occupies California's San Francisco Estuary and Sacramento/San Joaquin Delta (Bay-Delta) as well as areas of the Pacific Ocean out to the Farallon Islands. The Bay-Delta longfin smelt's status under the ESA has long been controversial, with environmental groups advocating for protection of the fish since the 1990s. Most recently, San Francisco Baykeeper, along with other environmental organizations, filed suit against UFSWS in 2024 seeking to compel the agency to meet required deadlines for listing the Bay-Delta longfin smelt.

The Decision to List

Citing negative impacts from habitat alteration due to reduced freshwater flows and impacts associated with climate-change conditions, which include changes to hydrology associated with reduced freshwater flows, increasing water temperatures, predation, and reduced food sources, among other things, USFWS determined the Bay-Delta longfin smelt meet the definition of an endangered species (in danger of extinction throughout all or a significant portion of its range) under the ESA. Specifically, the ongoing reductions and alterations in freshwater flows into the Bay-Delta estuary greatly impact the physical and ecological processes that are critical to the Bay-Delta longfin smelt spawning and larval rearing habitat. Abundance and density of the species throughout the area have "substantially declined" such that USFWS determined, using the best scientific and commercial information available, that the DPS is in danger of extinction throughout all of its range.

Accordingly, and in conjunction with the primary purpose of the ESA—to restore listed species to a point where they are "secure, self-sustaining, and functioning components" of their ecosystems—recovery plans for the for the Bay-Delta longfin smelt will be made available on USFWS's website (https://www.fws.gov/program/endangered-species) as they are completed. Funding for recovery actions is also available from a variety of federal, state, academic and nongovernmental sources. Information on USFWS grant programs can be found at: https://www.fws.gov/service/financial-assistance.

Critical Habitat

USFWS is currently in the process of developing a proposed critical habitat designation for the Bay-Delta longfin smelt and plans to publish a proposed critical habitat rule in the near future. With the listing of the Bay-Delta longfin smelt, the ESA's many protections will extend to the species. It will be illegal for anyone to "take" the fish—*e.g.*, harm, harass, or kill—even if such take is incidental to an otherwise legal activity. Examples of activities that are considered likely to result in ESA violations are: (1) handling or collecting individual fish; (2) destruction or alteration of the Bay-Delta longfin smelt's habitat; (3) unauthorized diversion of surface flows in the Bay-Delta; (4) introduction of harmful pollutants to the Bay-Delta; and/or (5) introduction of nonnative species that compete with or prey on the fish.

Conclusion and Implications

Anyone wishing to proceed with a legal activity that may take the fish will be required to obtain an incidental take permit or authorization under Sections 7 or 10 of the federal ESA. The effective date for the final rule is August 29,

2024. For more information, see: https://www.fws.gov/press-release/2024-07/us-fish-and-wildlife-service-lists-bay-delta-longfin-smelt-endangered
The federal register listing for the longfin smelt is available here: https://www.federalregister.gov/documents/2024/07/30/2024-16380/endangered-and-threatened-wildlife-and-plants-endangered-species-status-for-the-san-francisco
(Dustin Peterson, Megan Somogyi)

STATE WATER BOARD ADOPTS WATER CONSERVATION REGULATIONS FOR URBAN RETAIL WATER SUPPLIERS

On July 3, 2024, the California State Water Resources Control Board (State Water Board) adopted water use efficiency regulations for urban retail water suppliers under the statewide *Making Conservation a California Way of Life* framework. Starting January 1, 2025, the approximately 400 suppliers that supply water to 95 percent of Californians will be subject to annual urban water use objectives and conservation goals that the State Water Board estimates will achieve a savings of 500,000 acre-feet of water per year by 2040.

Background

A 2016 executive order by former Governor Brown (E.O. B-37-16) and ensuing 2017 report by the Department of Water Resources (DWR) and State Water Board introduced the *Making Conservation a California Way of Life* regulatory framework (2017 Framework). The 2017 Framework identified legislative and regulatory actions needed to enhance water conservation in the state, centered around four primary goals: (1) use water more wisely; (2) eliminate water waste; (3) strengthen local drought resilience; and (4) improve agricultural water use efficiency and drought planning.

The California Legislature passed Assembly Bill 1668 (Friedman) and Senate Bill 606 (Hertzberg) in 2018, which directed DWR and the State Water Board to conduct water conservation studies and empowered the State Water Board to develop and implement long-term standards for the efficient use of commercial, industrial, and institutional water, consistent with the 2017 Framework. In 2022, the Legislature established residential indoor water use standards with Senate Bill 1157 (Hertzberg). The State Water Board issued a notice of proposed rulemaking for urban retail water suppliers on August 18, 2023, seeking public comment on its proposed objectives. An urban retail water supplier is:

> . . .a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annually at retail for municipal purposes. (Wat. Code, § 10608.12(af).)

While the regulations targeted urban retail water suppliers and not the residents and businesses they serve, some public commenters raised concerns over the indirect cost implications for suppliers and customers, particularly inland water suppliers and low-income communities. In January 2024, the Legislative Analyst's Office reviewed the first draft of the regulations and issued a report finding that "some of the proposed requirements are overly complicated and that some may be unrealistic for suppliers to achieve." (Legislative Analyst's Office, "Assessing Early Implementation of Urban Water Use Efficiency Requirements," at p. 33 (Jan. 4, 2024).) The report recommended that the Legislature intervene to relax the more stringent conservation goals and compliance deadlines.

From March to July of 2024, the State Water Board issued five additional notices of revised regulations and public comment periods before approving a final version of the regulations on July 3, 2024.

The Adopted Regulations

Under the adopted regulations, every urban retail water supplier will be required to calculate its urban water use objective, a supplier-specific water budget that is the sum of water use efficiency budgets for component water uses, such as residential indoor

water use, residential outdoor water use, real water loss, and commercial, industrial, and institutional (CII) landscapes with dedicated irrigation meters by January 1, 2025. (Cal. Code Regs., tit. 23, § 966 [to be codified on Jan. 1, 2025].) The efficiency standards that comprise an urban water use objective will vary for each urban retail water supplier, as different local service characteristics such as population, climate, and landscape area will factor into the total water use objective. Importantly, to comply with the regulations, urban retail water suppliers will be required to meet their overall water use objectives, not necessarily each individual water use budget. Starting January 1, 2027, urban retail water suppliers will be required to annually demonstrate compliance with their urban water use objectives. (*Id.* at subd. (g).)

Thresholds for CII Performance Measures

Section 973 of the regulations sets thresholds for CII performance measures, incorporating revisions to allow suppliers more latitude to demonstrate increased efficiency and reduced water use among CII customers. After identifying all CII water users associated with large landscapes over 0.5 acres by June 30, 2027, urban retail water suppliers will be required to install dedicated irrigation meters or employ in-lieu technologies such as advanced metering infrastructure for at least 95 percent of those water users by June 30, 2040. (*Ibid.*)

Implementation Regulations

In its adopting resolution, the State Water Board directs staff to implement the regulations in a manner that protects water resources while considering affordability and equity concerns. The final regulations provide for alternative compliance pathways and variances to make compliance more achievable for the urban retail water suppliers facing the biggest overhauls.

Conclusion and Implications

The regulations mark a significant milestone in the push toward *Making Conservation a California Way of Life*. January 1, 2025, will be the first time urban water retailers must comply with individualized water budgets rather than general statewide water reduction mandates. Implementation of the regulations will affect each urban water retailer differently, as some will have to invest in significant infrastructure changes to achieve the prescribed standards. In contrast, other suppliers that have already modernized their water use data and conservation standards may not have to make many adjustments. The final regulations and information about the *Making Conservation a California Way of Life* framework are available at: https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/regs/water_efficiency_legislation.html#reg-docs.

(Austin C. Cho, Jake R. Voorhees)

RECENT CALIFORNIA DECISIONS

SUPREME COURT REVERSES DISMISSAL OF APPEAL FILED WITHIN 60 DAYS OF NOTICE OF ENTRY OF JUDGMENT BUT MORE THAN 60 DAYS AFTER ADMINISTRATIVE WRIT ORDER

Meinhardt v. City of Sunnyvale ___Cal.5th___, Case No. S274147 (July 29, 2024).

The California Supreme Court in *Meinhardt v. City of Sunnyvale* reversed the California Court of Appeal's dismissal of an appeal of the trial court's decision in an administrative writ proceeding, because the appeal was timely filed within 60 days after notice of entry of the judgment. The Court of Appeal had held that the trial court's administrative writ order made prior to the judgment was an appealable order, the notice of which started the running of the 60-day appeal period. This decision resolves a conflict between the Courts of Appeal as to whether the writ order or the subsequent judgment constitutes the effective trigger for appeal in administrative writ proceedings.

Factual Background

In May 2019, the City of Sunnyvale Department of Public Safety (Department) imposed a 44-hour suspension on Officer David Meinhardt (Meinhardt), and the City of Sunnyvale Personnel Board (Board) upheld the suspension. Meinhardt challenged the suspension by filing a petition for writ of administrative mandate in the Superior Court, naming the Board as a defendant and the Department as real party in interest (together: City).

On August 6, 2020, after briefing and a hearing, the court filed a document entitled "ORDER" (August 6 Order) containing factual findings and legal rulings and concluding, "the Petition for Writ of Administrative Mandamus is DENIED." The clerk of the court served the August 6 Order on the parties by mail the same day. On August 14, 2020, the City served Meinhardt with a judicial council form CIV-130 entitled "Notice of Entry of Judgment or Order," along with a file-stamped copy of the August 6 Order.

On September 4, 2020, the parties signed and submitted to the court a document entitled "JUDGMENT" that stated:

> On August 6, 2020, the Court issued an Order Denying Petitioner David Meinhardt's Petition for Writ of Administrative Mandamus . . . . For the reasons set forth in the Order, the Court hereby enters Judgment for Respondents City of Sunnyvale, et al., and against Petitioner David Meinhardt, who shall take nothing by this action. IT IS SO ORDERED, ADJUDGED AND DECREED.

The court signed this document on September 17, 2020, and Meinhardt served on the City a "Notice of Entry of Judgment" on September 22, 2020. The trial court entered the judgment on its docket on September 25, 2020 (September 25 Judgment).

On October 15, 2020, Meinhardt filed a notice of appeal from the September 25 Judgment. The Court of Appeal requested briefing on the appeal's timeliness and thereafter dismissed the appeal as untimely, concluding the August 6 Order was the "final judgment" from which Meinhardt should have appealed because it "denied" his mandate petition "in its entirety and did not contemplate any further action in the case."

In so concluding, the Court of Appeal acknowledged a split in authority on the timeliness issue but chose to follow those appellate cases which held that the time to appeal in writ proceedings starts from the filing of—or service of a file-endorsed copy of (together with a document reflecting the date of service of)—an order or ruling that is sufficiently final to constitute the judgment, not from a subsequent entry of judgment.

The California Supreme Court granted Meinhardt's petition for review, which asserted that his notice of appeal was timely filed, within 60 days of service of notice of entry of the September 25 Judgment.

The Supreme Court's Decision

Under the independent review standard applicable to statutory interpretation of appeal deadlines, the Supreme Court reversed the Court of Appeal's dismissal of the appeal, holding that the statutory time for appeal from a trial court decision in an administrative writ proceeding runs from the date of notice of entry of judgment, not from the date of notice of the trial court's administrative writ order that precedes the judgment.

Final Judgment as Statutory Basis for Appeal in Administrative Writ Proceedings

The right to appeal in California is entirely statutory and subject to complete legislative control. The Judicial Council in establishing procedural rules for appeal cannot restrict the statutory right of appeal. Reviewing courts likewise must remain true to statutes, despite the common law roots for the statutory rules on appeal. An appellate court generally lacks jurisdiction to decide an appeal from an order unless the order is one that is expressly made appealable by statute.

Code of Civil Procedure section 904.1 provides the statutory list of appealable judgments and orders. A final judgment is appealable. Certain statutorily enumerated orders are exceptions to the final judgment rule, but none of those exceptions applies to orders granting of denying a petition for writ of administrative mandate in administrative writ proceedings.

The statutory provisions for administrative writ proceedings contemplate that a judgment is contemplated as the effective trial for appeal. Code of Civil Procedure section 1094.5, subdivision (f) requires that the "court shall enter judgment" in administrative mandate proceedings "either commanding respondent to set aside the order or decision, or denying the writ." Subdivisions (g) and (h) of section 1094.5 refers to taking of appeal "from the judgment." Code of Civil Procedure sections 577 and 1064 applicable to writ proceedings both indicate that it is the judgment that is the "final determination of the rights of the parties."

The Legislature's complete control over the right to appeal, the entirely statutory nature of the right to appeal, and the plain language of section 1094.5, which requires entry of "judgment," all indicate that entry of "judgment," and not the filing of an order, minute order, ruling, statement of decision, or any other differently entitled document, signals the end of the case in administrative mandate proceedings.

Case Law Permitting Earlier Appeal from Certain Administrative Writ Proceeding Orders Does Not Require Earlier Appeal

Despite the requirement of a "judgment," the significance of the one judgment rule, and statutory limitations on what is appealable, reviewing courts, including ours, have deemed orders and other rulings to be the "judgments" under certain circumstances, such as when the ruling is sufficiently final to constitute the one judgment in the case, to promote judicial economy, to preserve a party's right to appeal, and to permit appellate review on the merits.

This practice has been common in cases involving orders that reflect the trial court's final decision but are not statutorily appealable, such as orders granting summary judgment and orders sustaining demurrers without leave to amend. Appellate courts have followed this practice in the context of administrative mandate proceedings as well.

The Court of Appeal's reliance on this practice of *permitting* an appeal by deeming a sufficiently final order or other ruling to be appealable, the Court of Appeal in this case inappropriately applied such precedent to dismiss the appeal, holding that in administrative mandate proceedings the filing of such an order is also the entry of judgment from which the time to appeal under California Rule of Court 8.104(a)(1). To so hold would require litigants to glean the required information from multiple documents or to guess at their peril, whether such documents in combination trigger the duty to file a notice of appeal. Neither parties nor appellate courts should be required to speculate about jurisdictional time limits.

It is in the context of *preserving* the right to appeal that Courts of Appeal have stated that an order or other ruling constitutes a judgment. But in no case has such an order been construed as a judgment for the purpose of *dismissing* an appeal as untimely— in administrative mandate proceedings or otherwise.

Conclusion and Implications

This opinion by the California Supreme Court reaffirms the one final judgment rule, rather than a

dispositive preliminary order, as the basis for barring an untimely appeal in administrative writ proceedings. While earlier appeal of a dispositive order may in some instances be permitted, it is not required under the statutory requirements for appeal. The Court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/S274147.PDF
(Boyd Hill)

SIXTH DISTRICT COURT REVERSES DISMISSAL OF CEQA PETITION, FINDING THAT TRIAL COURT ERRED IN DEEMING ACTION TIME-BARRED

Center for Biological Diversity v. County of San Benito, ___Cal.App.5th___,
Case Nos. H051322, H051323 (6th Dist Aug. 6, 2024).

In an opinion filed on July 24, 2024, and certified for publication on August 6, 2024, the Sixth Appellate District in *Center for Biological Diversity v. County of San* reversed the trial court's dismissal of an advocacy group's California Environmental Quality Act (CEQA) petition, finding that the group's claims were not time-barred by CEQA's statute of limitations. The court held that the County Planning Commission's initial notice of determination, which was filed before the Board of Supervisors' final decision, did not commence the CEQA limitations period.

Factual and Procedural Background

The Betabel Project

In 2021, the McDowell Trust applied to the County of San Benito for a conditional use permit (CUP) for a proposed commercial roadside attraction known as the "Betabel Project," which would include a gas station, a convenience store, a restaurant, amusement buildings with exhibits, a motel, a banquet hall, an outdoor pool, an outdoor movie screen, and an outdoor event center. The 26-acre Project site is located west of Highway 101 within the aboriginal homeland of the Mutsuh people, whose descendants now comprise the Amah Mutsun Tribal Band.

In May and June of 2022, an Integrative Cultural Resource Survey of the site uncovered artifacts and ethnobotanical resources, and also identified the likely location of numerous tribal cultural resources. The survey provided recommendations to the Trust and County with measures to avoid or reduce impacts to Indigenous cultural resources during Project construction. In August 2022, the Betabel Ethnographic Study identified new tribal cultural resources that would be adversely impacted by Project construction.

Project Review and Approval

The County released the Project's draft Environmental Impact Report (EIR) in July 2022, followed by the final EIR in September 2022. On October 12, 2022, the Planning Commission held a public hearing where it voted to certify the EIR and approve a Conditional Use Permit (CUP) for the Project. The Planning Commission publicly filed its notice of decision (NOD) on October 14, 2022.

The Center for Biological Diversity (CBD) and the Amah Mutsun Tribal Band (AMTB) each appealed the Planning Commission's decision to the County Board of Supervisors. The Board held a public hearing on November 8, 2022, during which it voted to deny the appeals, certify the EIR, and adopt an MMRP and statement of overriding considerations pursuant to CEQA. The County filed a NOD of the Board's decision on November 10, 2022.

At the Trial Court

On December 9, 2022, CBD and AMTB filed separate petitions challenging the County's approvals. CBD's petition asserted a CEQA cause of action that challenged the adequacy of the EIR, along with a Planning and Zoning Law cause of action challenging the County's general plan consistency findings. The AMTB Petition also alleged the EIR was deficient, and further claimed that the County violated AB 52 by failing to comply with CEQA's tribal consultation requirement.

The McDowell Trust demurred to the two petitions on the ground that their CEQA claims were

time-barred because they were filed after CEQA's 30-day limitations period expired. The Trust argued that the 30-day statutory window began to run when the Planning Commission filed its NOD on October 14, 2022, and thus expired on November 14, 2022—*i.e.*, three weeks before the petitions were ultimately filed on December 9, 2022. The Trust also contended that CBD's and AMTB's appeals of the Planning Commission's decision to the Board of Supervisor did not affect when the statutory clock started to run.

CBD and AMTB opposed the demurrer, contending that the Commission's October 14 NOD did not trigger the 30-day limitations period. They instead asserted that the Commission's decision was not final due to the pendency of their appeals to the Board. Petitioners pointed to the County's local code, which explains that the Planning Commission's approval of a CUP is not final until the Board takes action to approve or deny the application. Since CBD and AMTB had timely appealed the Commission's determination to the Board, the Commission's NOD had no legal effect. Instead, the Board's November 10, 2022, NOD triggered the statute of limitations—and because CBD and AMTB had filed their petitions within 30 days, their actions were timely.

In June 2023, the trial court sustained the Trust's demurrer to the CEQA claims without leave to amend and entered judgments of dismissal on the grounds that the causes of action were time-barred. Petitioners timely appealed.

The Court of Appeal's Decision

The Parties' Arguments

The parties repeated their arguments on appeal. CBD and AMTB maintained that the petitions they filed on December 9, 2022, were within the 30-day statutory window after the Board filed its NOD on November 10, 2022. They urged that the Board's November 10th NOD was the "operative NOD" for purposes of commencing the limitations period for a CEQA action that challenges the adequacy of an EIR. For these reasons, Petitioners reiterated that the Planning Commission's decision was not a "final approval" due to their appeals of that decision to the Board. They also argued the principles of administrative law are violated if they are required to bring a CEQA action seeking judicial review of the Planning Commission's nonfinal decision without exhausting their administrative remedy of an appeal of the Planning Commission's decision to the Board of Supervisors, as the final decision-making authority, before filing suit.

The Trust responded that the petitioners were untimely because they were filed more than 30 days after the October 14th NOD. The Trust argued that the 30-day limitations period provided by Public Resources Code section 21167, subdivision (c) runs from the first notice of a project's approval, even if there is a second NOD. Under this interpretation, the Trust contended that the Planning Commission's NOD was final when it was filed within five working days of the Commission's decision, thus triggering the 30-day statutory window. The Trust maintained that Petitioners' appeals did not affect the finality of the Commission's decision because the language of the County Code does not "prohibit the decision from being final before the deadline for an appeal has expired; it simply confirms that it will forever be final after the deadline has run without an appeal."

The Court's Holding

Applying traditional principles of statutory interpretation to ascertain the meaning and intent of Public Resources Code section 21167, subdivision (c) and pertinent County Code provisions, the Sixth District concluded that the trial court erred in ruling that the writ petitions were time-barred. The court instead held that a plain language interpretation of those statutory provisions compels the conclusion that the writ petitions were timely filed within 30 days after the operative November 10th NOD that was filed following the Board's denials of CBD's and AMTB's appeals.

The court's decision rested on its interpretation and analysis of Public Resources Code sections 21167, subdivision (c), and 21152, subdivision (a). The latter section provides that the local agency must file a NOD within five working days "after the approval or determination becomes final." The timing and finality of an agency's approval, however, is governed by local rules. Here, the County Code provides that the decision of a hearing body, such as the Commission, shall be considered final unless that decision is appealed within ten days to the Board of Supervisors, which represents the final authority.

Based on the County Code's administrative scheme, the court concluded that the Planning Commission's approval of the CUP did not constitute a "final approval" since CBD and AMTB timely appealed it to the Board within ten days. Consequently, the Commission's October 14th NOD did not follow a "final approval," and was therefore not effective to commence the 30-day limitations period provided by section 21167, subdivision (c) for an action challenging the adequacy of an EIR. For these reasons, the court held that the 30-day window began to run on November 10, 2022—*i.e.*, the date that the Board filed its NOD after its final approval of the Project and denial of CBD's and AMTB's appeals. Therefore, the petitions CBD and AMTB filed on December 9, 2022, were timely.

The court also agreed with petitioners that to rule that the writ petitions were untimely filed because the 30-day limitations period provided by section 21167, subdivision (c) commenced when the Planning Commission filed an NOD after its nonfinal decision, despite the appeals of that decision to the Board of Supervisors, would violate the doctrine of exhaustion of administrative remedies. Based on both the provisions of CEQA and the County Code, the "final decision" subject to legal challenge here was that issued by the Board on November 8, 2022. The court thus held that judicial review of the Planning Commission's October 12, 2022 nonfinal decision to certify the EIR and approve the conditional use permit would constitute interference in the intermediate stages of a CEQA proceeding in violation of the doctrine of exhaustion of administrative remedies.

Conclusion and Implications

The Sixth District's opinion provides a helpful contribution to the subset of case law that concerns CEQA's short 30-day statute of limitations period. The decision reaffirms the long-standing principle that an administrative decision is not "final" until all administrative procedures have been exhausted—here, the Board of Supervisors' consideration of the Petitioners' appeals of the Planning Commission's prior decision and the Board's ultimate approval of the Project. The administrative scheme at issue here is analogous to many other jurisdictions' local appeal procedures, will therefore be helpful to practitioners who represent petitioners or agency-respondents by serving as a reminder of when CEQA's statutory clock begins to run. A copy of the Sixth District's opinion is available at: https://www.courts.ca.gov/opinions/documents/H051322.PDF
(Bridget McDonald

THIRD DISTRICT COURT AFFIRMS DENIAL OF CEQA CHALLENGE AGAINST PROSPECTIVE PURCHASER AGREEMENT AS IT WAS NOT A PROJECT

Liam Meyer v. Department of Water Resources, *Unpub.*, Case No. C097929 (3rd Dist. Jul. 30, 2024).

In an *unpublished* opinion filed on July 30, 2024, the Third District Court of Appeal affirmed the trial court's judgment to sustain the Department of Water Resources' (DWR) demurrer without leave to amend and denied appellant Meyer's motion for summary judgment against the Central Valley Flood Protection Board (Board) and DWR's enforcement action and judgment regarding Meyer's failure to take proper steps to cure erosion issues.

Factual and Procedural Background

The Notice of Violation

In mid-February 2017, the failure of the Oroville Dam spillway resulted in the sudden release of a large volume of water into the Sacramento River (hereafter the 2017 high water event). As a result, the riverbank located at the subject property in Sacramento (Property) experienced massive damage. In May 2017, MBK Engineers sent a letter on behalf of the previous owner to the Board requesting emergency authorization to conduct repairs at the Property because a significant portion of the Property fell into the adjacent Sacramento River and was exposed to continued erosion. In January 2018, Reclamation District 1000 informed the Property did not qualify for assistance, and in March 2018, the Board issued the previous owner a notice of violation (NOV) regarding several violations existing on the Property.

On May 28, 2019, appellant began discussions to purchase the Property and was provided a copy of the NOV subsequently, being informed that if he purchased the property, he would have to comply with the corrective actions in the NOV. Appellant purchased the Property in September 2019.

In October, appellant submitted to the Board a stabilization plan to address the NOV, but the Board informed appellant the stabilization plan did not comply with the corrective actions stated in the NOV, as it did not include the required design documents prepared by a California licensed civil engineer, nor a project schedule, and failed to address other violations noted in the NOV. The Board issued appellant a ceaseand desist order, which was upheld following a hearing in November 2019.

Enforcement Order and Complaint

On February 28, 2020, the Board issued an enforcement order against appellant for not remedying the violations as directed in the NOV and assessed civil penalties. The Board stayed the findings in the order to allow additional time to comply with the cease and desist order. If Meyer did not comply with the required corrective actions, the enforcement order would become effective on May 28, 2020. In August 2020, the Board obtained a civil judgment against appellant in an amount totaling $106,000.

Appellant filed a complaint in November 2020, and subsequently, appellant amended the complaint and filed a second amended complaint in pro per, alleging various causes of action against both the Board and DWR. The causes of action included: (1) request to stay enforcement of the Board's judgment under Code of Civil Procedure section 1094.5, subdivision (g); (2) request to remand the matter to an appropriate forum under section 1094.5; (3) request for a writ of mandate under section 1085 ordering DWR and the Board to cease their unlawful interpretation of the Water Code and continued enforcement action against appellant; (4) request for a writ of prohibition under sections 1102 and 1103 ordering DWR and the Board to cease their unlawful action by assessing penalties in excess of the statutory limit; (5) request for an alternative writ under sections 1087 and 1104 and order to show cause why the matter should not be stayed; (6) request for injunctive relief to restrain DWR and the Board from enforcing related actions against appellant;6 (7) claiming all actions by DWR and the Board exceed statutory authority in the Water Code; (8) inverse condemnation; and (9) a denial of due process by failing to provide a fair hearing and that he is required to comply with "infeasible" demands.

DWR demurred to the second amended complaint arguing, inter alia, that appellant's attempt to obtain writ relief was time-barred and that DWR was not the appropriate party to sue because the Board was the agency involved in the actions that appellant challenged in the lawsuit (*i.e.*, actions regarding violations, enforcement, and judgment). Appellant moved for summary judgment. The trial court first noted that injunctive relief was a remedy and not a cause of action and sustained the demurrer on the sixth cause of action. The trial court further sustained DWR's demurrer to the rest of the causes of action of the complaint without leave to amend and denied appellant's motion for summary judgment.

Appellant filed a notice of appeal.

The Court of Appeal's Decision

The Third District Court of Appeal granted the Board's motion to dismiss the appeal against them, pursuant to *Angell v. Superior Court*, 73 Cal.App.4th 691, 698 (1999).

Because orders denying a motion for summary judgment are not appealable under Code of Civil Procedure section 904.1, the court limited its discussion to whether the trial court properly granted DWR's demurrer.

Statutory Overview

The court first visited relevant statutes to this case. Under the California Water Code, the Board has the authority to issue NOVs for encroachments into rivers and boundaries. (Wat. Code, §§ 8532, 8701.) When a party fails to respond to a NOV, the Board has the authority to issue a cease and desist order. (Wat. Code, § 8701.2.) When a person has failed to correct a violation as outlined in a cease and desist order, the Board must hold an enforcement hearing to consider the issuance of an enforcement order. (Wat. Code, § 8701.4.) If the Board issues an enforcement order against a person, that person may seek judicial review pursuant to Water Code section 8579, which provides that such review shall be by writ of mandate in accordance with Code of Civil Procedure section

1094.5, within 30 days after the decision or action becomes final. (Wat. Code, §§ 8701.4, subd. (e), 8579.)

In addition, upon an enforcement hearing and issuance of an enforcement order pursuant to Water Code section 8701.4, the Board may impose administrative penalties. (Wat. Code, § 8704.1, subd. (a).) Then, after the time for judicial review pursuant to Water Code section 8579 has passed, the board may apply to the clerk of the appropriate court in the county in which the administrative penalties were imposed for a judgment to collect the penalties assessed. (Wat. Code, § 8704.1, subd. (e).) The statutory provisions regarding the Board's remedies also provide that the:

> . . .remedies provided by this article are not exclusive of, but shall be concurrent with and in addition to, any other remedy, penalty, or sanction that may exist by law, civil or criminal... The action or proceeding may be commenced and maintained by the board in the name of the state. (Wat. Code, § 8704.4.)

Timeliness

The court then focused on whether appellant timely filed its writ relief sought under section 1094.5 and found that not to be the case. Pursuant to the statutory scheme described above, the relevant date for calculating the timeliness of writ relief under section 1094.5 was February 28, 2020, the date the enforcement order was adopted by the Board, thus making the Board's decision final. Appellant then had until March 29, 2020, 30 days after finalizing the enforcement order, to seek judicial review of that order. However, appellant did not initiate the instant suit until November 2020, over seven months beyond the statutory deadline.

The court noted that even if it construed the final date of the enforcement order to be May 28, 2020, the effective date of the enforcement order if appellant failed to comply, appellant still did not initiate judicial review within 30 days as required by Water Code section 8579. As a result, appellant's challenges to the validity of the enforcement order through section 1094.5 were time-barred.

The court rejected appellant's argument that the time limits in Water Code section 8579 did not apply but rather set by *Knick v. Township of Scott,* 588 U.S. 180 (2019).

DWR Not the Responsible Agent

The court tackled the appellant's first five causes of action relating to writs, where each statute stated within required that the entity against whom the writ relief was sought was the one responsible for an administrative duty impacting the petitioner. The court decided that appellant's writ of mandate, whether it be under section 1094.5, section 1085, or section 1087, against DWR for the allegedly improper enforcement process was misplaced because DWR was not the responsible agency. Citing *Paterno v. State of California,* 113 Cal.App.4th 998 (2003), appellant argued that because the state, and DWR in particular, had a ministerial duty to maintain the Oroville Dam and the flood control system, the failure of the dam leading to the 2017 high water event placed the blame for the soil erosion squarely at their feet and any attempt to hold him responsible for those damages was subject to judicial intervention. However, the court found that *Paterno*, at best, could be helpful to appellant's inverse condemnation case but did not provide for the ability to pursue writ relief challenging subsequent enforcement actions initiated by a different agency.

The court found that it was undisputed that the agency involved in the NOV, cease and desist and enforcement orders, and the judgment against appellant was the Board. Because the Water Code assigned the enforcement responsibilities to the Board in the name of the state, the statutory obligation to conduct enforcement procedures belonged to the Board. Appellant could not factually establish that DWR made an administrative decision impacting appellant or otherwise had a legal obligation or ministerial duty to him subject to judicial review through the writ process.

For similar reasons, the court also concluded that the demurrer was properly sustained as to Meyer's seventh and ninth causes of action, where the causes of action alleged wrongdoing on both the Board and DWR. Since the Board was already dismissed and appellant could not state any basis for holding DWR responsible for the Board's actions, the court found these causes of action properly demurred and could not be cured of these defects in these causes of action by amendment with any reasonable possibility.

Inverse Condemnation

In the eighth cause of action, appellant alleged that DWR, responsible for maintaining the Oroville Dam and nearby levees, was liable for the damage caused by the 2017 high water event, resulting in "specifically preventing the best use of the land" and constituting a compensable taking under the theory of inverse condemnation. He also alleged that the subsequent judgment lien entered against him constitutes a compensable taking. DWR contended that appellant had no interest in the Property when it was damaged and, thus, had no right to recover in inverse condemnation. DWR also contended that even if he could recover under that theory, he filed the lawsuit after the expiration of the statute of limitations. The court agreed with DWR.

First, the court noted that to state an inverse condemnation cause of action, the property owner must show there was an invasion or appropriation (a 'taking' or 'damaging') of some valuable property right that the property owner possesses by a public entity and the invasion or appropriation directly and specially affected the property owner to his injury. However, appellant did not allege that he had an interest in the Property at the time it was damaged back in 2017. For this reason, the court noted that appellant could not show he could cure this defect by amendment. As a result, even *if* DWR could be held liable for the damage sustained from the 2017 high water event as appellant alleged pursuant to *Paterno*, appellant failed to state a cause of action regarding his entitlement to compensation.

To the extent appellant claimed that the enforcement action and judgment against him constituted a different form of inverse condemnation, the court decided that he failed to support this claim with a coherent, reasoned argument and thus forfeited it.

Lastly, appellant claimed that a previous lawsuit he filed the day before the enforcement order was issued effectively rendered the enforcement order void or tolled the statute of limitations for the inverse condemnation claim because that deprived the administrative court of jurisdiction to enter the enforcement order. The court found this claim unsupported by any legal authority and, thus, forfeited.

Conclusion and Implications

In sum, the court concluded that appellant did not state a cause of action for inverse condemnation or identify any reasonable possibility this defect could be cured by amendment, affirming the trial court's order sustaining DWR's demurrer.

Aside from the lesson that one should always be careful when buying properties to not get involved in unnecessary, additional costs, this case highlights the fundamentals, that one cannot be too late filing its claim and cannot simply raise issues against an agency that had seemingly no direct involvement in one's alleged damages. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/C097929.PDF
(David Song)

FIRST DISTRICT COURT UPHOLDS CLASS 32 INFILL CEQA EXEMPTION FOR CONDOMINIUM DEVELOPMENT PROJECT

Nassiri v. City of Lafayette, 103 Cal.App.5th 910 (1st Dist. 2024).

In an opinion filed on June 27, 2024, and later published on July 18, 2024, the First Appellate District in *Nassiri v. City of* denied an office building owner's challenge under the California Environmental Quality Act (CEQA), to an adjacent condominium project. The court rejected the neighbor's claims that the project did not meet the criteria for the "Class 32" infill exemption by finding that substantial evidence failed to establish the site provided habitat for "rare" bird species or that emissions from project construction would result in significant air quality effects.

Factual and Procedural Background

City's Review and Approval of the Project

In May 2018, developer 3721 Land LLC applied to the City of Lafayette for a permit to demolish a vacant building and construct a new, 4-story, 13-

unit condominium complex. The relatively flat 0.3 site is largely consumed by the vacant building and features a creek that runs along the southern property line. The site is in an urban corridor on Mt. Diablo Boulevard and flanked on either side by commercial buildings.

By April 2020, the Project had been modified in several respects, including eliminating one of the fourth-floor units. At a public hearing that month, the Planning Commission found the now-12-unit project exempt from CEQA as an urban infill development pursuant to the "Class 32" categorical exemption under CEQA Guidelines section 15332.

On June 22, 2020, the City Council considered the Planning Commission's recommendation to approve the Project subject to conditions. The Council also considered written comments and consultant reports submitted by Nahid Nassiri, a neighbor who owns an office building next door to the Project site. In a legal memorandum prepared for the City Council, the City Attorney's Office concluded that Nassiri had not provided substantial evidence to support her claim that the project was not categorically exempt, and further found substantial evidence supported the City's application of the Class 32 exemption to the Project. The Council agreed with the opinion, and therefore resolved to conditionally approve the Project and find it categorically exempt from CEQA.

At the Trial Court

Nassiri filed a petition for writ of mandate in June 2021, arguing the City's approval of the Project violated CEQA. The trial court granted Nassiri's CEQA claim that substantial evidence did not support the City's determination that the Project site had no value as habitat for endangered, rare, or threatened species.

The developer and the City subsequently filed a motion for new trial based on the Second District's recently published opinion in *Protect Tustin Ranch v. City of Tustin,* 70 Cal.App.5th 951 (2021) (*Tustin Ranch*), which addressed the meaning of "project site" as it is used in Guidelines section 15332. Based on the *Tustin Ranch* decision, the developer and City argued that the "Project site" at issue here should be properly understood as including only part of the 0.3 acre on which the Project would be located. Given this, the developer argued that the only potential habitat for rare birds on the subject parcel was in an area that was not part of the "project site" because no demolition or construction activities would occur there.

The trial court granted the motion for new trial based on its finding that there was substantial evidence in the record that the "project site," as properly understood, did not include the portion of the parcel where rare birds were located. The court thus re-entered judgment denying Nassiri's petition. Nassiri timely appealed.

The Court of Appeal's Decision

On appeal, Nassiri argued that the Project did not qualify for the infill development exemption because the Project site had value as habitat for rare species and because Project approval would result in significant effects related to air quality. Nassiri also argued, for the first time, that the "unusual circumstances" under Guidelines section 153002, subdivision (c) precluded application of the exemption.

The First District Court disagreed with Nassiri's biological and air quality arguments, and finding no error in the trial court's decision, affirmed denial of Nassiri's petition. The court also declined to reach Nassiri's "unusual circumstances" argument because she failed to raise it at the trial court.

Project Site's Value as "Rare" Habitat

The Class 32 exemption requires that the Project site possess "no value as habitat for endangered, rare, or threatened species." Under CEQA, a species is considered "rare" if it is: (a) not presently threatened with extinction, but exists in such small numbers throughout all or a portion of its range that it may become endangered if its habitat worsens; or, (b) likely to become endangered within the foreseeable future throughout all or a significant portion of its range and may be considered "threatened" under the federal Endangered Species Act. A species is "endangered" under CEQA when its survival and reproduction in the wild are in immediate jeopardy.

Based on these definitions, the issue before the First District was whether substantial evidence supported the City's finding that the oak titmouse and Nuttall's woodpecker were not "rare" because they did not meet the above criteria. The court considered a report submitted by Nassiri's biological expert, who

had observed both birds and regarded them as "special-status species" because they were listed as "Bird Species of Conservation Concern" by the U.S. Fish and Wildlife Service. The developer's expert submitted a written response that acknowledged the birds' presence but clarified that neither species was "rare" under CEQA's definition; therefore, the Project site did not have value for species listed under federal or state Endangered Species Acts or have habitat value that is "rare" or unique to the region.

The court agreed with the City and found that substantial evidence supported its conclusion that the Project site was not known to have any value as habitat for rare species. The court explained that while the two bird species were observed near the Project site and listed by U.S. Fish & Wildlife Service (USFWS) as "Bird Species of Conservation Concern," neither Nassiri nor her expert biologist provided any authority or legal analysis to support their claim that those species met CEQA's definition of "rare" species. Instead, the biologist opined only that the Project site provided habitat value for "special-status species," without connecting this opinion to a conclusion that these species were therefore "rare." The court concluded that the City, on the other hand, provided substantial evidence in the form of expert reports explaining that the bird species were not "rare" based on the criteria listed under CEQA. Moreover, the court noted that even if Nassiri's expert had provided an opinion that the two bird species were "rare" under CEQA's standards, such a conclusion would only serve as evidence that the court could weigh against evidence to the contrary.

Because the court concluded that substantial evidence supported the City's determination, it declined to consider the City's argument that the "creek area" where the birds were observed was not part of the "Project site" based on the *Tustin Ranch* decision. Nevertheless, the court briefly clarified that *Tustin Ranch* was distinguishable because it held that an agency can properly consider a "project site" to be part of an existing parcel so long as development and construction activities are confined to that part of the parcel and no other part of the parcel will be altered by the project. Here, however, there was nothing to suggest that the City considered the Project site to be just part of the parcel or that it excluded the "creek area."

Significant Air Quality Effects

Nassiri also argued that the City lacked substantial evidence to conclude the Project would not have significant impacts to air quality. Instead, Nassiri contended that a health risk assessment (HRA) prepared by her air quality expert constituted evidence of significant impacts from diesel particulate matter. Because no other expert rebutted this assessment, Nassiri argued that the City could not conclude that the Project satisfied the requirements for the Class 32 exemption.

The court disagreed with Nassiri, instead finding that the record contained substantial evidence to support the City's conclusion that Project approval would not result in any significant air quality effects. In particular, the court pointed to a report prepared by the developer's expert, which analyzed emissions based on Project-specific data to conclude that the Project's construction emissions would not result in any significant air quality impacts.

The court questioned Nassiri's characterization of her expert's HRA as constituting evidence that the Project "would result" in significant effects. Instead, by its own terms, the report conclude only that the Project "may" result in impacts to the surrounding environment and that the Project "could" result in a potentially significant impact. The court emphasizes that these semantical differences were important because the infill exemption does not depend on whether a project *may* have a significant effect, but instead depends on if it *will* have a significant impact.

The court also partially agreed with the City's argument that the HRA did not accurately reflect the scope of anticipated Project construction and therefore did not constitute substantial evidence of the effect of approving the Project. In particular, the HRA overestimated the rate of construction emissions by assuming they would occur 24-hours a day throughout the 171-day construction period. The developer's expert clarified that the highest level of emissions would occur only during a five-day phase of construction, not the entire period. Based on this, the court agreed that there was no evidence that Nassiri's HRA provided an accurate representation of the effect of emissions from the Project, and thus, on-the-whole, did not constitute substantial evidence that approving the Project will have a significant effect relating to air quality.

Conclusion and Implications

The First District's opinion is a welcome addition to CEQA case law, particularly as more and more developers rely on CEQA's Class 32 categorical exemption to streamline infill housing projects. The First District's opinion sheds light on a less-litigated aspect of the exemption—*i.e.*, whether the project site constitutes habitat value for "rare" species. Here, the court weighed competing expert evidence submitted by both parties, but ultimately resolved any conflicts in the City's favor. The opinion's analysis of expert evidence, however, provides a cautionary message for project proponents and opponents: to ensure their reports rise to the level of "substantial evidence," any retained experts should confirm their analyses directly address the underlying legal standards (here, CEQA's definition of "rare") and project-specific facts (here, the Project's construction schedule) at issue. A copy of the court's opinion is available at: https://www.courts.ca.gov/opinions/documents/A165324.PDF (Bridget McDonald)

PROPOSITION 5 DECISION BY THE THIRD DISTRICT COURT FINDS BALLOT MEASURE CHANGING HOUSING BOND VOTER APPROVAL TO 55 PERCENT IS NOT MISLEADING

Rob Bonta v. Superior Court of Sacramento County, et al., Case No. C101764 (3rd Dist. Aug. 13, 2024).

In a significant turn of events in the ongoing legal battle concerning California's Proposition 5, the Howard Jarvis Taxpayers Association (HJTA) has seen both victory and defeat in the span of a week. The case centers on the ballot label for Proposition 5, specifically the language used to describe the measure's impact on voter approval requirements for certain tax measures.

Proposition 5 is a measure proposing to lower the voter approval threshold for certain local taxes from the historically stringent two-thirds majority to a simple 55 percent majority. The crux of the HJTA's argument is that the ballot label, as initially drafted, did not adequately inform voters of this significant change, thereby misleading the electorate and undermining the transparency essential to the initiative process.

Background

The Lawsuit

The HJTA, known for its staunch advocacy of taxpayer rights and limited government, filed a lawsuit arguing that the ballot label was incomplete and failed to clearly state that Proposition 5 would reduce the voter approval requirement for specific tax measures. The association contended that this omission was not merely an oversight but a fundamental flaw that deprived voters of critical information needed to make an informed decision at the polls.

According to the HJTA voters would be misled by not noting that current bonds of this type must have a two-thirds voter approval and that this proposition lowers it to 55 percent. The association argued that any measure seeking to lower this threshold must be clearly and explicitly communicated to voters, particularly in the ballot label, which is often the primary source of information for many voters.

At the Sacramento County Superior Court

A Sacramento County judge ruled in favor of the association, finding that the ballot label for Proposition 5 indeed lacked the necessary information. The judge ordered that the ballot label be rewritten to explicitly state that the measure would lower the voter approval requirement from two-thirds to 55 percent. The ruling was based on the premise that voters have the right to be fully informed about the implications of the measures they are voting on and that the original ballot label failed to meet this standard.

This decision was hailed by the HJTA as a triumph for taxpayer rights and government transparency.

The Court of Appeal's Decision

However, the victory for the HJTA was short-lived. Merely a week after the trial court ruling, the Third District Court of Appeal reversed the lower court's ruling, effectively reinstating the original bal-

lot label. The appellate court found that the language of the ballot label, while perhaps not as explicit as the HJTA desired, was not legally deficient. The judge noted that ballot labels, by their nature, are limited in length and cannot include every detail of a measure. The court held that as long as the label provided a fair and impartial summary of the measure, it met the legal requirements. Additionally, because the ballot summary contained the information that HJTA advocated for voters would not be misled by the ballot label alone.

Conclusion and Implications

The decision underscores the deference appellate courts may give to election officials in drafting ballot labels, as well as the challenges faced by those who seek to challenge the wording of such labels in court.

The legal battle over Proposition 5's ballot label highlights the ongoing tensions between voter transparency and the practical limitations of ballot language. While the HJTA succeeded in convincing a lower court that the label needed to be rewritten, the appellate court's reversal suggests that the threshold for challenging ballot language is high. For now, the original wording will stand, and voters will cast their ballots on Proposition 5 without the explicit mention of the lowered voter approval requirement for taxes on the ballot label. As the HJTA contemplates its next steps, the case serves as a reminder of the complexities involved in ensuring that voters are fully informed while navigating the constraints of ballot language. The court's *partially* certified for publication opinion is available online at: https://www.courts.ca.gov/opinions/documents/C101764.PDF
(Darien Key)

FIRST DISTRICT COURT AFFIRMS DENIAL OF WRIT FOLLOWING DISMISSAL OF ADMINISTRATIVE COMPLAINT REGARDING THE CITY'S ZONING ORDINANCES

San Pablo Avenue Golden Gate Improvement Association, Inc. v. City Council of City of Oakland, 103 Cal.App.5th 233 (1st Dist. 2024).

In an opinion filed on June 28, 2024, the First District Court of Appeal held that chapter 17.152 of Oakland's (City) Municipal Code (OMC) governing enforcement of zoning regulations, the provision relied upon by organizations, did not provide a legal basis to challenge the city planning department's interpretations and determinations of zoning regulations, including use classifications and zoning clearances.

Factual and Procedural Background

CloudKitchens's Use Classified as Light Manufacturing

In September 2020, CloudKitchens applied to the City's Planning Department for a zoning clearance to convert a wood shop into a commercial kitchen for take-out services only, measuring roughly 14,000 square feet. CloudKitchens's facility was in a "Housing and Business Mix-1 Commercial Zone" (HBX-1 zone), which permits by right certain industrial activities classified as "Light Manufacturing." (§ 17.65.030.) One such light manufacturing use enumerated in the OMC is the production or assembly of beverages (including alcoholic) and food with more than ten thousand (10,000) square feet of floor area. (§ 17.10.560, subd. (D).) Later that month, the Planning Department issued CloudKitchens a zoning clearance. The following March, the Planning Department issued CloudKitchens a building permit allowing renovations.

Neighbors' Request for Revocation Review Process

In April 2021, the appellant neighbors (Neighbors) learned of CloudKitchens's plans and, two months later, sent a letter to the City Administrator requesting that the City reconsider its approval of CloudKitchens as qualifying for HBX-1 classification. The City's Zoning Manager responded, maintaining that the decision was proper.

In July, Neighbors filed a formal complaint requesting the Planning Department initiate a revocation review process under chapter 17.152, known as the Enforcement Regulations (§ 17.152.010). They al-

leged that CloudKitchens would become a nuisance due to increased traffic, air pollution, and noise and that the commercialized kitchen was essentially a fast-food restaurant not permitted in an HBX-1 zone. Given the alleged impermissible use and anticipated nuisance, Neighbors contended that the zoning clearance contravened zoning regulations.

The Planning Department denied the request. The Zoning Manager responded that CloudKitchens's proposed use was "considered a Light Manufacturing Industrial Activity since it involves the manufacturing of food in a facility that exceeds 10,000 square feet" and thus was permitted by right in the HBX-1 Zone. It expounded that this determination was consistent with similar kitchen uses, including another CloudKitchens located in the City.

The Planning Department further stated it was beyond the scope of OMC chapter 17.152 to revisit the zoning determination because it enforces against violative uses and existing nuisances, not zoning decisions. The Planning Department refused to reconsider its zoning determination, but it addressed the merits of Neighbors' complaint that CloudKitchens's activities constituted a nuisance. Despite sending staff several times to the site to observe any violations, the Planning Department averred there was no substantial evidence to initiate revocation proceedings.

Hearing Officer's Decision

Neighbors appealed to an independent hearing officer pursuant to section 17.152.080. They expressly limited the appeal to two issues: (1) whether chapter 17.152 provides a legal basis to revoke the prior City approvals, and (2) whether CloudKitchens's proposed use was correctly classified as Light Manufacturing Industrial. The hearing officer affirmed the decision. He first noted that chapter 17.152 is designed to address "public complaints regarding existing violations" and not previous errors by City staff in making zoning determinations. He found the Planning Department could not revisit the initial zoning approval and was correct in denying the revocation request to the extent the City addressed only the present allegations regarding CloudKitchens's existing or intended use. Nonetheless, the hearing officer found sufficient evidence to support the light manufacturing use classification. Despite conceding that CloudKitchens's business model shared some characteristics of a fast-food restaurant, he concluded the Planning Department's classification was persuasive and found the City should be afforded deference in interpreting its own zoning classifications.

Neighbors then petitioned for a writ of mandate in the trial court. Following a hearing, the trial court affirmed, holding that chapter 17.152 does not create a legal basis to challenge a prior zoning determination made by the City. Because Neighbors limited their administrative appeal to the Planning Department's use classification and zoning clearance, the trial court held that the hearing officer lacked jurisdiction to reach the complaint's merits and that remand would be futile. Neighbors appealed.

The Court of Appeal's Decision

The First District Court reviewed the trial court's denial of the writ of mandate *de novo* and for abuse of discretion.

Chapter 17.152 vs. 17.132

The court disagreed with the Neighbor's argument that chapter 17.152 authorizes review of use classifications and resultant zoning clearances because chapter 17.132 was the more appropriate procedure to address its issue with CloudKitchens's new commercial kitchen.

The court first noted that section 17.10.090, entitled "Classification of unlisted uses," specifies chapter 17.132 as the appropriate chapter for appealing use classification determinations, which provides that if there is:

> . . .uncertainty as to the classification of use, the Director of City Planning shall classify said use, subject to the right of appeal from such determination pursuant to the administrative appeal procedure in [c]hapter 17.132.

Alleged Ambiguity

The court found this section to show that there was no ambiguity that chapter 17.152 was an improper legal basis to challenge a use classification.

Even if section 17.10.090 did not specify that chapter 17.132 governs appeals of uncertain or novel use classifications, the plain meaning of chapter 17.132 establishes that it covers Neighbors' complaint. The express purpose of chapter 17.132 is to

"prescribe the procedure" for appealing "any determination or interpretation made by the Director of City Planning under the zoning regulations." (§ 17.132.010, italics added.) The court found this broad language facially applied to use classifications and zoning clearances and was fatal to Neighbors' claim because they filed it after the statute of limitations. (§ 17.132.020 [requiring an appeal to be brought within ten calendar days of a Planning Department decision].)

Adherence to Zoning Classification Rules

The court noted that Neighbors failed to substantiate their contention that the Planning Department did not adhere to classification rules outlined in chapter 17.10 and that Neighbors forfeited any argument that the Planning Director was required to issue a "formal" use classification determination by failing to raise this argument during the administrative process. Neighbors did not cite any ordinance or case law supporting their contention that a zoning clearance issued by Planning Department staff does not constitute a determination under chapter 17.10. The court also found it unpersuasive that a zoning clearance does not constitute a "determination" by the Planning Department merely because it was also required for certain business permits under chapter 5 of the OMC because the application form expressly states that a zoning clearance is required "to verify that the type of business [being proposed] is permitted by the City's Zoning Regulations at that location," and because the Neighbors' request for judicial notice and initial letter to the Planning Department state that a clearance letter is the Zoning Department's interpretation that the activity is allowed.

Timeliness for Appeal

Next, regarding timeliness under chapter 17.132, the court acknowledged that the ten-day window to appeal might be too brief and effectively foreclose facial challenges to zoning determinations by any interested third parties, especially when there were no publications about it and the determination was not widely known publicly, but found this issue best addressed by the legislative body. In any case, the court rejected Neighbors' contention that chapter 17.152 controlled because it empowered any public member to file a complaint regarding "violations of the zoning regulations." (§ 17.152.080.) The court found this argument ignored the dictate that the Enforcement Regulations "shall not be deemed exclusive" in ensuring compliance with the zoning regulations. Moreover, where a specific statute covers a particular subject, chapter 17.132, in this case, the specific statute controls and takes priority over a general statute encompassing the same subject. Thus, even if "violations of zoning regulations" under the Enforcement Regulations include erroneous zoning interpretations and determinations by the Planning Department, the court concluded that chapter 17.132 was the more specific ordinance controlled.

Additionally, in the footnotes, the court discussed briefly how the term "violation" might not even apply in this case. Combined with the fact that Neighbors did not bring an appeal under the correct chapter of the OMC, the court concluded that Neighbors' authority for the proposition that staff approvals inconsistent with the applicable zoning scheme are *ultra vires* was unavailing.

No Legal Basis for Challenge

Lastly, because the court found that chapter 17.152 did not provide a legal basis for challenging the Planning Department's classification determination, it did not address Neighbors' other arguments regarding the merits of the use classification or nuisance and ended with that the Enforcement Regulations still permit Neighbors to seek a revocation hearing for any nonconforming uses (or nuisances) if they arise.

Conclusion and Implications

It seems possible that Neighbors knew chapter 17.132 was the more on-point procedure, but because they realized they were outside of the timeliness window, they had to create a new theory to bring their claim, hence relying on chapter 17.152 instead. One can only speculate, but had Neighbors brought up the challenge under chapter 17.132, the court might have elaborated its footnote point about the 10-day window being too brief, delving into the fairness of timely appeal under chapter 17.132. Still, this opinion by the First District Court of Appeal illustrates that the correct and more specific statute would usually have priority in controlling the case. The court's opinion as modified on July 29, 2024 is available online at: https://www.courts.ca.gov/opinions/documents/A168039M.PDF
(David Song)

SECOND DISTRICT COURT FINDS SUBSTANTIAL EVIDENCE SUPPORTED CITY'S APPROVAL OF ELDERCARE FACILITY WITH ZONING CODE DEVIATIONS

Westwood Neighbors for Sensible Growth v. City of Los Angeles, Unpub., Case No. B329768 (July 19, 2024).

The California Court of Appeal in an *unpublished* opinion in *Westwood Neighbors for Sensible Growth v. City of Los Angeles* affirmed the trial court's denial of an administrative writ, holding that substantial evidence of practical difficulties and unnecessary hardships justified not strictly applying the City of Los Angele's (City) land use regulations to an eldercare facility.

Factual Background

Westwood Presbyterian Church (Church) owns a 1.62-acre property in the Westwood Corridor containing a church, administrative office, fellowship hall, preschool, and parking lot. The improvements cover 95 percent of the site.

Belmont Village, LP (Belmont) intends to preserve the church, demolish the other improvements, and build at the north end of the site a 12-story eldercare facility with 53 independent living units; 77 assisted living rooms; 46 Alzheimer or dementia care rooms; and amenities for residents (Project). Belmont will have a 99-year lease from the Church. The eldercare facility will have a fellowship hall fronting Wilshire for Church's use.

At the south end of the site, near single family dwellings, Church plans to construct a two-story building with a preschool; administrative space; and multipurpose area. Preschool enrollment will increase from its current 80 children to a maximum of 105. There will be surface and subterranean parking, and 70 spaces for bicycles.

The irregularly-shaped Project site is zoned R-5 (high density with a six-story height limit) and R-1 (single family dwelling). Belmont and Church (RPIs) submitted applications to City in 2018, seeking zoning deviations. Deviations include reduced yard setbacks; increased building height and floor space limits; construction of a preschool, and more than 50 dwelling units; and parking that varies from the City's specific plan. RPI's applied for environmental approval under the California Environmental Quality Act (CEQA).

Church told City that the Project will endow its work, which includes programs to assist unhoused persons. Other developers wanted to build luxury condominiums on the site. Church chose Belmont because it has a presence in the community, serves seniors, and will have the least impact on traffic. Project opponent Westwood Neighbors for Sensible Growth (WNSG) admits that the Church property is underutilized.

Over WNSG's opposition, City's zoning office allowed the Project's deviations from zoning laws and approved permits for the Project in July 2021—an Eldercare Permit and a Conditional Use Permit for the preschool. WNSG appealed to the City Planning Commission (PC). PC recommended denial of the appeal in November 2021 and issued letters of determination in December 2021.

The permits allow zoning deviations that increase maximum building height from six to 12 stories and width from 75 feet to 100 feet for the eldercare facility; increase building height from 28 to 33 feet for the childcare facility; reduce parking requirements; reduce yard setbacks to zero; and increase interior common open space. PC wrote that City "has historically facilitated the construction of numerous residential high-rise buildings of twenty stories or more along this portion of the Wilshire corridor," including the 24-story "Californian" condominium tower next to the Project site.

WNSG appealed to the City Council. The City Council adopted the PC recommendation. In approving the Project, City found a significant need for an aging-in-place facility, given increasing demand for senior housing. City found that the Project falls within the scope of its eldercare ordinance, which facilitates applications for all types of senior housing—independent living, assisted living, skilled nursing, and dementia care.

No Environmental Impact Report (EIR) was prepared for the Project. Instead, City found that the Project qualifies as a "transit priority project" (TPP). Under state law, if a project is a TPP, an agency may

prepare a Sustainable Communities Environmental Assessment (SCEA) in lieu of an EIR.

WNSG asked the trial court to set aside City's approval of the Project, challenging the deviations from zoning and environmental laws. WNSG alleged that RPI's did not present evidence of hardship or difficulty if they comply with land use regulations; or that the Project will not cause an adverse impact on street access or circulation in the neighborhood; or that the Project's location, size, height, and operations are compatible with adjacent properties, the neighborhood, or public health, safety and welfare. WNSG claimed that City's findings are unsupported by substantial evidence, violate state and local law, and that City's approval of the Project was arbitrary and capricious.

The trial court found that City's detailed findings support its determination that strict application of land use regulations on the Project would result in practical difficulties and unnecessary hardships. The court also rejected WNSG's CEQA claim. It denied WNSG's petition and entered judgment for City and RPIs.

The Court of Appeal's Decision

Under the abuse of discretion standard applicable to administrative determinations, the Court of Appeal held that the City's findings were supported by substantial evidence that financial hardship and site-specific characteristics would prevent construction of an eldercare facility, thereby justifying the deviations from the City's land use regulations.

City's Code Allows Deviations from Standards for Eldercare Facilities Where Evidence of Hardship

City streamlined development of senior housing in 2006, to create a single process for approvals and facilitate the processing of applications for eldercare facilities. These facilities provide much needed services and housing for the growing senior population of the City. The ordinance allows City to approve eldercare facilities that do not meet the use, area, or height provisions of a particular zone.

City cannot approve an eldercare facility with such deviations unless the zoning administrator finds that the strict application of the land use regulations on the subject property would result in practical difficulties or unnecessary hardships inconsistent with the general purpose and intent of the zoning regulations.

The zoning administrator must find that the project provides services to the elderly such as housing, medical services, social services, or long-term care to meet citywide demand; does not have an adverse impact on neighboring properties, street access and circulation; is compatible with the scale and character of adjacent properties; and substantially conforms with the purposes, intent and provisions of City's general plan.

There Was Substantial Evidence of Hardship

City found that the local senior population is increasing by more than 1,000 people per year, and that there is a shortage of senior housing, with very few new senior units being added.

The City found substantial evidence of hardship, relying upon several expert reports, including a Financial Feasibility Analysis (FFA), a market feasibility analysis from RCLCO Real Estate Advisors and a landscape architect's report.

> With respect to financial hardship, the FFA states, Without the requested building height and zoning deviations, the project could not be built. Therefore, the requests are not designed merely to increase profitability or enhance returns — but instead are essential to enable the construction and viability of an eldercare facility.

For residents who cannot live alone or travel into town, the facility provides lodging and amenities: dining areas, kitchens, recreation rooms, an indoor pool, a movie room, lounges, a salon, and laundry and housekeeping services. Out of 176 units, 123 of them (70 percent) are dependent on food service. Staff is required for resident care and activities, food service, housekeeping, transport, and administration.

As City found:

> Without providing these centralized services, which increase the non-rentable floor area of the Eldercare Facility, a hardship would occur as . . . many of the facility's residents require assistance with normal living activities and cannot live independently.

The court concluded:

> [W]ithout the proposed residential density . . . the facility cannot operate, nor achieve financial stability when considering staff, medical care, equipment, food, and other costs. Eldercare projects require substantial support services and common areas to provide a healthy environment for a senior population to age in place with dignity.

The evidence supporting this conclusion was deemed legally sufficient.

City also determined that Project site features create a hardship: It is irregular—180 feet wide in its northern section and 88 feet wide farther south. Its odd shape and Gothic Revival church hamper development. The site has split zoning: The northern section is zoned for a six-story eldercare facility "by right," but the southern portion only allows homes. The record shows that Belmont must build alongside Church's sanctuary, which covers a large part of the R-5 lot, and construct parking for Church and the eldercare facility on land zoned R-1.

Given the constraints, City found that the site's "unique lot arrangement . . . is not common among other parcels subject to the same Specific Plan regulations." This "makes strict compliance with building height and width, setbacks, open space, and location, utilization, and access between accessory and main buildings and uses practically difficult or unnecessarily hard." City's findings are not arbitrary, capricious, or unreasonable.

Conclusion and Implications

This opinion by the Court of Appeal demonstrates how a local jurisdiction may make and support findings of hardship using expert reports (which suffice even if there is contrary evidence) to satisfy zoning code exceptions designed to provide for California's significantly expanding senior housing needs. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/B329768.PDF (Boyd Hill)

LEGISLATIVE UPDATE

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

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

Affordable and Other Housing Laws

AB 1413 (Ting)—This bill was repurposed in June 2024 to serve its current objectives. Since that time it has passed through the Housing and Local Government committees, and currently sits in the Appropriations Committee, where it has been amended and heard several times. This bill would revise provisions of the Housing Accountability Act (HAA) added by Assemblymember Ting's AB 1633 in 2023. The prior bill sought to prevent CEQA stall by local municipalities, by making unwarranted agency delays in the CEQA process violations of the HAA. A developer invoking AB 1633 must notify the agency that the law has been violated prior to filing a lawsuit. This bill would move the provisions added by AB 1633 to new statutes—Government Code Sections 65589.5.1 and 65589.5.2. It would also require agencies to publish these notices, and prohibit the agency from making a decision on the notice for 60 days, providing an opportunity for public comment.

AB 1893 (Wicks)—This bill was ordered to a third reading in the Senate on August 26, 2024. This bill would primarily address the "builder's remedy" feature of the 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. The bill would also expand the classes of projects that can make use of the HAA. Currently, mixed-use projects that are at least two-thirds residential qualify for the law's benefits. This law would allow 50% residential projects to qualify as well, though it places limits on the projects containing a smaller percentage of residential uses, including that they must include at least 500 units.

AB 1820 (Schiavo)—After passing both the Assembly and Senate, this bill was sent to engrossing and enrolling on August 27, 2024. The bill would provide more transparency for housing developers by requiring local agencies to provide robust information about fees and exactions applicable to housing projects earlier in the entitlement process than is currently required. First, it would allow a developer submitting a preliminary application pursuant to SB 330 to also request a preliminary fee and exaction estimate. The local agency would be required to provide a "good faith estimate" covering of applicable fees and exactions within ten days of submittal of a complete preliminary application making such a request. Second, the bill would require local agencies to provide the applicant with an itemized list and total sum amount of all fees applicable to a housing development project at the time they determine the development application to be complete. The bill would also authorize the 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 returned to the Senate Floor for consideration on August 29, 2024. This bill would make various changes to the Affordable Housing and High Road Jobs Act of 2022 (AB 2011). The Affordable Housing and High Road Jobs Act of 2022 provides for streamlined ministerial approval of qualifying mixed-income and affordable housing development projects along commercial corridors in zoning districts where office, retail, or parking uses are principally permitted. AB 2243 would make various changes to the objective standards, affordability, and site criteria applicable to an affordable housing development or mixed-income housing development subject to the streamlined, ministerial review process under the Act. Among other changes to those objective standards, the bill would prohibit an affordable housing development subject to the Act from demolishing a historic structure that was placed on a national, state, or local historic register.

AB 2533 (Carrillo)—After passing both the Assembly and Senate, this bill was sent to engrossing and enrolling on August 27, 2024. The bill would prohibit local agencies from denying a permit for an unpermitted accessory dwelling 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 enrolled and presented to the Governor on August 28, 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 had its first hearing in the Senate canceled at the request of the bill's author on July 2, 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)—After passing both the Assembly and Senate, this bill was sent to engrossing and enrolling on August 28, 2024. 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)—After passing both the Senate and Assembly, this bill was sent to engrossing and enrolling on August 29, 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)—After passing both the Senate and Assembly, this bill was sent to engrossing and enrolling on August 27, 2024. 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 held in committee and placed under submission on August 15, 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 1272 (Laird)—This bill was gutted and amended in the Assembly on August 27, 2024. As amended, the bill would allow the California Energy Commission (CEC) to prepare a program EIR (PEIR) evaluating a class or classes of clean energy facilities. The definition of "facility" used in the bill includes large terrestrial wind, solar photovoltaic, and thermal power plants, manufacturing facilities for clean energy facilities, and some transmission facilities. If a project is within a class of projects evaluated in a CEC PEIR then it will be able to tier from the prior environmental review as already provided for in CEQA

SB 1361 (Blakespear)—This bill was approved by the Governor and filed with the Secretary of State on August 19, 2024. The bill provides a CEQA exemption for actions taken by local agencies to approve contracts for providing services for people experiencing homelessness, including services related to case management, resource navigation, security services, residential services, and counseling. This bill also exempts actions taken by the Department of Housing and Community Development, among others, to provide financial assistance and insurance to low-income housing projects from CEQA.

AB 2091 (Grayson)—After passing both the Assembly and Senate, this bill was sent to engrossing and enrolling on August 29, 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 enrolled and presented to the Governor on August 28, 2024. 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 enrolled and presented to the Governor on August 28, 2024. This bill would provide a statutory exemption from environmental review under CEQA for a public project for the institution of bus rapid transit, bus, or light rail service, including construction or rehabilitation of stations and other existing facilities, which will be used by low- or zero-emission vehicles on existing rights-of-way.

AB 3057 (Wilson)—This bill was approved by the Governor and chaptered by the Secretary of State on August 27, 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 held under submission in the Senate Standing Committee on Appropriations on August 15, 2024. 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. A previous version of this bill would have exempted 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. However, the bill was amended to remove that provision. This bill would still designate the California Public Utilities Commission as the lead agency for purposes of CEQA for electrical infrastructure projects. The bill, as amended, would also give the Commission a shortened 270-day timeline to complete environmental review and limit the alternatives that can be considered in the alternatives analysis under CEQA

Density Bonus

AB 2560 (Alvarez)—This bill was held under submission on August 15, 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 requires any local government in the coastal zone to submit an amendment to the local government's local coastal program that harmonizes the Density Bonus Law and the California Coastal Act. Any entitlements permitted under the Density Bonus Law must not result in significant adverse impacts to coastal resources or public coastal access.

AB 3116 (Garcia)—After passing both the Assembly and Senate, this bill was sent to engrossing and enrolling on August 28, 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)—After passing both the Assembly and Senate, this bill was sent to engrossing and enrolling on August 28, 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.

SB 721 (Becker)—This bill was held in committee and under submission on August 15, 2024. Existing planning and zoning law requires a city or county to adopt a General Plan for land use development that includes a housing element, which the city or county required to incorporate into an annual report detailing existing and projected housing needs. This bill would require a city or county to include suite-style student housing quarters subject to specified requirements in its annual housing report.

Housing Element Law

SB 951 (Wiener)—After passing both the Senate and Assembly, this bill was sent to engrossing and enrolling on August 29, 2024. This bill would 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 passed by the Senate but re-referred to the Committee on Appropriation on August 29, 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. 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)—After passing both the Assembly and Senate, this bill was sent to engrossing and enrolling on August 28, 2024. This bill would amend provisions of the Housing Element Law to provide that, for the seventh and subsequent revisions of the housing element, local governments must complete the rezoning of sites within one year of the statutory deadline for the adoption of the housing element or the earlier of 3 years after the date the housing element is adopted or 90 days after receipt of comments from HCD, if the local government satisfies certain requirements, including submitting a draft element or draft amendment to HCD for review within specified timeframes and adopting a draft element or draft amendment that HCD finds to be insubstantial compliance with the Housing Element Law. Further, existing housing element law requires local governments to identify adequate sites for housing and make adequate provision for the current and future needs of all community household income levels. This bill would provide that, when the identified inventory of sites is inadequate to meet housing needs, the local government must establish and adhere to a program for rezoning to make the inventory adequate. This bill would further provide that nonvacant sites in a prior housing element and vacant sites not approved for development in at least two planning periods, would not be considered adequate sites, unless they are residentially zoned at a particular density and the site is subject to a program requiring rezoning by the applicable deadline. Finally, under existing law related to actions challenging the validity of a housing element, where HCD finds that the housing element substantially complies with the Housing Element Law, there is a rebuttable 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.

AB 2580 (Wicks/Quirk-Silva)—This bill passed the Senate and was ordered back to the Assembly on August 29, 2024. Existing law requires cities and counties to prepare annual reports on their progress meeting housing goals, and constraints hindering the

development of housing. This bill would require the annual reports to include additional specificity about affordable units approved and disapproved by the jurisdiction. It would also require the jurisdiction to provide information about properties with existing or proposed historic designations, which can impede development of housing projects.

AB 3093 (Ward)—After passing both the Assembly and Senate, this bill was sent to engrossing and enrolling on August 29, 2024. The bill is the only housing bill of the 2024 session to be sponsored by Governor Gavin Newsom. Existing law requires the Department of Housing and Community Development and regional councils of governments to determine regional housing needs and allocate those needs to jurisdictions in a Regional Housing Needs Allocation (RHNA). While RHNA already includes several tiers of affordability, this bill alters the tier definitions and adds an allocation for extremely low income housing . It has also absorbed two provisions previously incorporated into other bills. First, it incorporates AB 2580's former provision requiring each jurisdiction's housing element to include a discussion of how historic preservation practices and policies may constrain the jurisdiction's ability to provide housing. Second, it incorporates SB 951's former provision requiring local coastal program updates required as part of housing element rezoning programs to be completed within a three-year period.

Planning and Zoning

SB 937 (Wiener/Grayson)—After passing both the Senate and Assembly, this bill was sent to engrossing and enrolling on August 28, 2024. This bill would enact several modifications to how impact fees are assessed for housing projects under the Mitigation Fee Act. Among other things, it would prohibit assessment of such fees until certificates of occupancy are issued, at the earliest, or unless specified conditions are met. Certain residential development by nonprofit housing developers will be exempted from the act if 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 ordered to a third reading in the Assembly on August 23, 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 or HCD 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.

SB 1123 (Caballero)—After passing both the Senate and Assembly, this bill was sent to engrossing and enrolling on August 29, 2024. This bill would expand SB 684, which required local governments to ministerially approve a parcel map or tentative and final map of 10 or fewer units on sites zoned multifamily, no larger than five acres, and substantially surrounded by qualified urban uses. SB 684 also required ministerial approval of housing developments using the subdivision process. This bill would add vacant, single family sites to the ministerial subdivision process and the approval process for housing developments on subdivided sites, with a few differences. For example, for sites zoned single-family, a local government could cap the height of units at the height for the applicable height in the zone. This would prevent development of projects that are not consistent in height with surrounding single-family homes. Also, the minimum lot size must be no less than 1,200 square feet, rather than no less than 600 feet on multi-family sites.

AB 2085 (Bauer-Kahan)—After passing both the Assembly and Senate, this bill was sent to engrossing and enrolling on August 29, 2024. This bill would provide that development of a community clinic licensed under Section 1204 of the Health and Safety Code that provides reproductive health services shall be subject only to ministerial approval, and therefore

not subject to CEQA, if among other things, 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 enrolled and presented to the Governor on August 23, 2024. The bill would extend the expiration date of local development permits and project approvals to not include the time during which the permit or approval is challenged. Under the bill, an action or proceeding involving the permit or project approval would essentially toll the expiration date of the permit until the action or proceeding is resolved.
(Amy Higuera)

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