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LAND USE NEWS

GOVERNOR SIGNS INTO LAW BILLS SEEKING TO HONE AND CLARIFY "BUILDER'S REMEDY" LAW

On September 19, 2024, Governor Gavin Newsom signed Assembly Bill (AB) 1893 and AB 1886 into law causing several future reforms for Builder's Remedy projects. These new bills will come into effect on January 1, 2025, adding clarity to uncertainties regarding the Builder's Remedy.

With AB 1893 by Assembly Member Buffy Wicks, the California Legislature expressly confirms the Builder's Remedy as available to developers in the event local governments' fail to adopt sufficient housing plans. Builder's Remedy projects must now comply with more site restrictions and density caps, but AB 1893 eases certain affordability requirements and offers Builder's Remedy applicants more explicit protections.

AB 1886 by San Diego Assembly member David Alvarez also provides additional protections for builder's remedy projects by specifying that jurisdictions without state certified housing plans would be subject to the builder's remedy until those plans are passed by local officials and the California Housing and Community Development department (HCD).

Background

The current version of the Builder's Remedy is based on Cal. Gov Code Section 65589.5(d)(5), a provision within the Housing Accountability Act (HAA). The HAA defines a housing development project as a project consisting of residential units only, mixed-use developments consisting of residential and non-residential uses with at least two-thirds of the square footage designated for residential use or transitional or supportive housing.

The HAA requires that cities and counties make one of five findings to deny, or to apply conditions that make infeasible, a housing development project "for very low, low- or moderate-income households" or an emergency shelter. Among these findings were that:

> . . .the housing development project or emergency shelter is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in… substantial compliance with this article.

Therefore, developers have argued that if a local jurisdiction has not adopted a housing element in substantial compliance with state law, developers may propose affordable housing development projects that do not comply with either the zoning or the general plan. For eligible housing development projects, at least 20 precent of the dwelling units in the project must be designated as lower income or 100 precent of the units must be designated as moderate income, as defined in the HAA. Several developers have attempted to utilize the builder's remedy beginning in 2022. No builder's remedy project has yet to finish. Jurisdictions have refused to process many of these applications, arguing that the law does not apply or that they are in substantial compliance with Section 65589.5(d)(5).

AB 1893 and AB 1886

As a result of AB 1893, an updated version of the Builder's Remedy is codified in the HAA with new requirements and standards as well as additional protections for developers. Jurisdictions may now impose certain objective, quantifiable and written development standards to a project proposed on a site with a general plan designation and zoning classification that allow the density and unit type proposed by the applicant. If the local agency has no general plan designation or zoning classification that would have allowed the density and unit type proposed by the applicant, the developer may identify any standards and policies associated with a different general plan designation or zoning classification within that jurisdiction, that facilitate the project's density and unit type, and those shall apply.

AB 1893 eases the affordability requirements for Builder's Remedy projects by allowing for projects where at least 7 percent of the units are affordable to

extremely low-income households, at least 10 percent of the units are affordable to very low-income households, at least 13 percent of the units are affordable to lower-income households or 100 percent of the units are affordable to moderate-income households. In addition, builders remedy projects that propose ten units or fewer, where the project site is smaller than one acre and the project exceeds a minimum density of ten dwelling units per acre are also allowed regardless of affordability. However, bedroom and bathroom ratios comparable with market-rate units must be made part of any builder's remedy project. Although most sites are still allowed for Builder's Remedy projects, AB 1893 now excludes sites next to parcels with heavy industrial uses or uses that require a permit issued under the federal Clean Air Act.

While there was no density cap for prior builder's remedy projects, AB 1893 sets a general density cap of 65 dwelling units per acre depending on the project location. Additional dwelling units may be available if the General Plan, zoning or housing element allows for residential development on the relevant site. Density bonuses are also available for applicants under the State Density Bonus Law. AB 1893 also sets new density minimums for Builder's Remedy projects.

AB 1886 forecloses certain defenses that jurisdictions had raised in response to prior builder's remedy applications. Under AB 1886, a housing element is only "substantially compliant" for purposes of the Builder's Remedy when either HCD or a court makes that determination. This helps to counteract the argument of certain jurisdictions that their housing elements were substantially complaint following self-certification. Moreover, the date of project submittal will now be tied to the date that a Builder's Remedy Project submitted a preliminary application. This addresses the argument of jurisdictions that they are free to disapprove previously submitted Builder's Remedy projects on the basis of zoning noncompliance once their housing elements are certified by HCD.

As far as existing builder's remedy projects, some projects will be protected automatically if they already meet the requirements of AB 1893. Existing projects that do not meet these requirements may either become AB 1893 builder's remedy projects by redesigning the project for compliance with the bill or proceed under pre-existing law.

Conclusion and Implications

The new bills should add clarity to a controversial development tool currently subject to court challenges. The new version of the Builder's Remedy contains new advantages for builders including greater protections and lower affordability requirements, with the tradeoff being new standards and restrictions. Developers will no longer be able to propose or build projects with no unit restrictions due to a local jurisdictions' lack of housing element compliance. The bills have been met with some support from pro-housing groups. It remains to be seen whether the bills will be more favorable to developers or local jurisdictions. (Kathryn Casey)

THE ROOM TO ROAM ACT: EXPANDING THE SCOPE OF THE CONSERVATION ELEMENT OF GENERAL PLANS

Assembly Bill 1889, otherwise known as the Room to Roam Act, requires cities and counties to include provisions for protecting wildlife connectivity in their land use plans. The new law requires cities and counties to consider the effects of development on the movement of wildlife and habitat connectivity in the conservation element of their General Plans. While local governments are not required to comply with the amendments to Section 65302 of the Government Code until January 1, 2028, the bill represents a growing interest in accounting for wildlife connectivity as part of land use planning.

Background

A local government's General Plan includes as one of its seven required elements a section addressing conservation. The conservation element encompasses the use, development, and conservation of natural resources such as wildlife. However, previously the requirements did not include consideration of issues

related to wildlife connectivity as a result of city and county development. As the author of the bill noted:

> . . .[w]hile policies touch on wildlife connectivity, state law does not provide clear guidance on how local jurisdictions should address connectivity in their planning process.

A 2020 California Department of Fish and Wildlife study, updated in 2022, examined barriers to the movement of wildlife throughout the state. AB 2344, a bill that required the California Department of Transportation to review wildlife passage structures to support wildlife connectivity, soon followed. AB 1889 builds on this trend by extending wildlife connectivity considerations to development more broadly by requiring its incorporation into cities' and counties' land use plans.

Moreover, Section 1 of AB 1889 notes that this amendment aligns with Executive Order No. N-82-20, which includes a goal that 30 percent of California's coastal waters and lands be preserved by 2030. The bill also looks to the Public Trust Doctrine for support, highlighting its tenet that wildlife is held in trust for the people. Cities and counties, the bill asserts, have a responsibility to serve the general welfare by controlling development decision in a manner that protects wildlife connectivity. The bills seeks to support wildlife connectivity as a means of improving biodiversity by increasing access to diverse mates, food, and shelter.

Content of AB 1889

When a city or county adopts or amends their General Plan on or after January 1, 2028, they must update their conservation element to identify and analyze connectivity areas and existing or planned wildlife passage features. The bill states that these requirements are intended to ensure that planned development does not interfere with the effectiveness of these wildlife passage features. The element must also consider the impacts of development and the barriers caused by development to wildlife and habitat connectivity. Moreover, the element must, to the extent possible, avoid, minimize, or mitigate impacts and barriers to wildlife movement.

The bill also includes a provision exempting local governments that have already adopted policies that align with the requirements of AB 1889 from adopting redundant requirements. Instead, if these policies in an existing plan meet the requirements of the bill, the government may incorporate the plan by reference into the General Plan.

Also included in the bill is a section outlining what the city or county may do when preparing to update the conservation element. Specifically, it states that governments may consider incorporating feasible implementation programs or standards such as wildlife-friendly fencing and lighting, habitat connectivity overlay zones, and compact development standards. Additionally, the city or county may consider whether it is necessary to adopt an ordinance in order to implement these goals. It also suggests that the government may consult with the Department of Fish and Wildlife or any California Native American tribe, consider current scientific information on connectivity considerations, or look to the expertise of any other local, state, or federal agencies or academic institutions identified as helpful to the government.

Lastly, the bill notes that actions taken under AB 1889 are not reimbursable because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program mandated by the act.

Conclusion and Implications

AB 1889 provides for explicit consideration of wildlife connectivity issues in city and county General Plans with the goal of furthering wildlife health and statewide biodiversity. Additionally, the bill's suggestions concerning the gathering of information to support connectivity determinations provides parameters for cities and counties to follow to ensure the incorporation of feasible implementation goals into long-range development plans. The bill was signed by Governor Newsom on September 26, 2024. For more information on the bill, *see:* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB1889

(Sarah Nagle, Meagan Somogyi)

CALIFORNIA SETTLES WITH CITY OF ELK GROVE OVER VIOLATIONS OF AFFORDABLE HOUSING ACTS

California recently settled a lawsuit it brought against the City of Elk Grove (City) over alleged violations of California's fair housing laws. This settlement shows the direct approach California is taking regarding its enforcement of fair housing laws.

Background

Affordable housing has long been a concern in California. As of 2024, renters need to earn 2.8 times the state minimum wage to afford average asking rent in the state. Further, 78 percent of extremely low-income renter households are paying more than half of their income on housing costs compared to 6 percent of moderate-income renter households. Because of this, California has passed several pieces of legislation over the years in the hopes of increasing the availability of affordable housing to residents.

The Lawsuit

On May 1, 2023, California filed suit against the City for its denial of a 67-unit supportive housing project, Oak Rose Apartments (Project). The Project would have been located in Elk Grove's historic district and would have provided off and on-site services to assist residents in maintaining housing. The City denied the Project and, in litigation, argued that it had the right to deny the Project because it did not meet the City's zoning standards. However, the City had recently approved a similar market-rate housing project, which led some to believe that the City was trying to address the concerns of neighboring residents, instead of abiding by the zoning code. The state claimed that, in denying the Project, the City violated the Housing Accountability Act "HAA), Senate Bill 35, and nondiscrimination housing laws.

The Settlement

As part of its settlement, the City agreed to a five-year monitoring period from the Department of Housing and Community Development (HCD). As part of this monitoring process, for every affordable housing project that the City denies, the City must make factual findings, with analysis, that the disapproval is not materially inconsistent with affordable housing and nondiscrimination laws. The City must also provide HCD with a copy of any preliminary application or full project application for a housing development that includes affordable or supportive housing within 30 days of receipt of the application. The City must also pay a settlement payment of $150,000 to cover the state's costs and attorney's fees.

The Housing Accountability Act

The state alleged that the City's denial of the Project violated the HAA. The HAA is designed to "significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects." (Gov. Code, § 65589.5, subd. (a)(2)(K).) The HAA limits a jurisdiction's discretion to deny a housing development that is compliant with objective zoning and general plan standards, including projects for very low-, low-, or moderate-income households, unless specific public health and safety findings are made and supported by a preponderance of the evidence. The City denied the Project, but without making the required public health and safety findings. Thus, the state argued that the City violated the HAA.

Senate Bill 35

SB 35 is designed to streamline the approval process for housing developments in cities and counties that fail to meet their state-mandated housing production target. (Gov. Code, § 65913.4.) Under SB 35, project applicants can propose a housing development project to qualify for a streamlined ministerial process. A project applicant may take advantage of SB 35 to become eligible for a streamlined ministerial process (and be exempt from the California Environmental Quality Act), if the project meets several qualifying standards contained in the law and includes a requisite amount of affordable housing. On June 2, 2022, the City denied the Project's application by finding that the Project was not eligible for streamlined ministerial approval under SB 35 as the Project allegedly did not comply with the City's objective commercial use zoning designation. The

City found that the Project was inconsistent with the commercial use designation. The state determined that this was an improper denial because the City did not explain why the Project was inconsistent with the zoning requirements. Further, contrary to the City's findings, the Project complied with the general plan's limits on density. Thus, the City was required to treat the Project as consistent with the ground floor use restriction for SB 35 purposes, which it did not do.

Nondiscrimination Housing Laws

The City claimed that the City had violated non-discrimination zoning statutes. California's Planning and Zoning Law (Gov. Code, § 65000 *et seq.*) prohibits jurisdictions from engaging in discriminatory land use and planning activities. This means that cities cannot impose different requirements for residential use on people based on their income levels. The state pointed out that the City had previously approved a similar project in a similar location and argued that by denying the Project, the City was discriminating against lower-income households.

Among the laws violated was the Affirmatively Further Fair Housing (AFFH) law. (Gov. Code, § 8899.50.) Under the AFFH, public agencies are required to "affirmatively further fair housing" by taking actions to "that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics." The state claimed that the Project was located in a High Resource Opportunity Area per the California Tax Credit Allocation Committee, and that denying an affordable housing project would be inconsistent with the City's obligation to AFFH.

Social and Legal Implications

The lawsuit and settlement with the City demonstrates the serious enforcement approach that the state is taking against cities violating affordable housing and nondiscrimination laws. To avoid liability, cities must look closely at whether they are complying with the HAA and SB 35 (if utilized by the project sponsor) with respect to affordable housing project proposals. If a city determines that an affordable housing project does not abide by the general plan or zoning, or does not comply with SB 35's requirements, it must be able to provide substantial evidence to support its findings. Cities should also understand that the state may compare affordable housing projects that are denied to non-affordable housing projects that have been approved. If two projects are similar, but the affordable housing project is denied, the state may consider this a violation of non-discrimination laws.

Conclusion and Implications

The most recent settlement between Elk Grove and California shows the Housing and Community Development—the agency tasked with enforcement—going after alleged violations of the Housing Accountability Act violations while the state tries to tackle California's enormous affordable housing needs.

(Todd Williams, Esq., Christina Suarez, Esq., Darien Key)

RECENT FEDERAL DECISIONS

RAISING CEQA CHALLENGES IS NOT RACKETEERING—NINTH CIRCUIT FINDS CHALLENGERS WERE INSULATED FROM STATUTORY LIABILITY IN CHALLENGING PROPOSED HOTEL PROJECTS UNDER CEQA

Relevant Group, LLC v. Nourmand, 116 F.4th 917 (9th Cir. 2024).

In the published opinion *Relevant Group, LLC v. Nourmand* the Ninth Circuit of Appeals upheld a U.S. District Court decision holding that the *Noerr-Pennington* doctrine—which works to protect claims arising under the Petition Clause of the First Amendment—shielded the defendants' challenges to several of the Plaintiff's proposed hotel projects under the California Environmental Quality Act (CEQA). In doing so, the Ninth Circuit held that: (1) the District Court did not abuse its discretion in *sua sponte* reconsidering the previous judge's denial of summary judgment, and (2) the District Court was correct in its holding that the defendant's petitioning activities were protected by the *Noerr-Pennington* doctrine as they were not engaged in "sham" litigation.

Factual and Procedural Background

Relevant Group, LLC (Relevant) has spent almost a decade attempting to develop hotels in Hollywood neighborhood of Los Angeles. It is an umbrella entity managing three other LLCs overseeing proposed hotel developments in the area—each are plaintiffs in this action. These proposed hotel projects were the Thompson Hotel project, the Tommie Hotel project, and the Selma Hotel project. Relevant also held a prior ownership interest in a fourth project—the Schrader Hotel project.

Stephan "Saeed" Nourmand is the principal of Sunset Landmark Investment LLC (Sunset), which owns the Hollywood Athletic Club. Nourmand is also the founder of a real estate brokerage firm—Nourmand and Associates. Nourmand, and, consequently, his corporations, have been heavily involved in challenging many projects in the Hollywood neighborhood via the CEQA framework.

Challenges

Sunset began challenging Relevant's proposed hotel projects in 2015, objecting to the City of Los Angeles's (City) revised MND for the Thompson Hotel project in September of that year. After the City approved the Thompson project, Sunset filed a Petition for Writ of Mandate against the City challenging the project's MND and requesting that a full Environmental Impact Report (EIR) be completed. Sunset would also appeal the City's approval of the Tommie Hotel project—once again seeking a full EIR. Relevant would eventually settle both disputes with Sunset in August of 2017.

Sunset would again petition the City's approval of Relevant's Selma Hotel project in April of 2019. A California Superior Court would later hear the matter and issue an order for further proceedings and that the City provide specific findings regarding the project's baseline for air quality impacts.

The final project at issue was the Schrader Hotel project, which Relevant was not developing itself. However, it allegedly held an ownership interest in the project as a party to the purchase agreement of the property. Sunset would appeal, but later withdrew its challenge—allegedly after learning that Relevant had lost interest in the project.

At the Trial Court

In June 2019, Relevant filed a complaint in federal court claiming that Sunset was abusing the CEQA process in order to extort them in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). The case originally came before District Judge Otis Wright, who would deny both Sunset's motions to dismiss and its motion for summary judgment. The matter was then transferred to Judge

Philip Gutierrez, who *sua sponte* reconsidered Judge Wright's dismissal of summary judgment. On January 20, 2023, Judge Gutierrez ordered a supplemental briefing on the issues raised in Sunset's motion for summary judgment.

Judge Gutierrez reviewed Sunset's *Noerr-Pennington* defense. Under the *Noerr-Pennington* doctrine, petitioning parties are granted immunity from statutory liability for their petitioning conduct. The doctrine protects the rights guaranteed by the Petition Clause of the First Amendment so that petitioners are free to "petition the government for a redress of grievances." Upon reviewing the parties' supplemental briefs, Judge Gutierrez's concluded that Sunset's petition actions fell squarely under *Noerr-Pennington* and granted summary judgment in Sunset's favor. Relevant timely appealed.

The Ninth Circuit's Decision

The Ninth Circuit upheld Judge Gutierrez's summary judgment, holding that he did not abuse hiss discretion in reconsidering the prior judge's ruling. The District Court properly held that Sunset's activities were protected under the *Noerr-Pennington* doctrine.

The Ninth Circuit initially needed to determine whether Judge Gutierrez abused his discretion in reconsidering Judge Wright's summary judgment ruling. While courts are generally precluded from reconsidering issued already decided by the same court in the same case, *Delta Savings Bank v. United States*, 265 F.3d 1017, 1027 (9th Cir. 2001) held that judges are indeed permitted to review interlocutory orders by prior judges in several scenarios—including in cases where "the decision is clearly erroneous" and its enforcement would result in a "manifest injustice." The Ninth Circuit held that Judge Gutierrez did not abuse his discretion in reconsidering the denial of summary judgment because he met the *Delta Savings Bank* standard—he validly explained that Judge Wright misapplied the *Noerr-Pennington* doctrine, resulting in a "clearly erroneous" decision. Further, Judge Wright's decision would have resulted in a "manifest injustice," as Sunset would have been stripped of its core constitutional right to petition under the First Amendment.

Relevant argued that reconsideration was "highly problematic" because Sunset's *Noerr-Pennington* defense was rejected three separate times prior to Judge Gutierrez's reversal. However, the Ninth Circuit noted that two of these instances regarded motions to dismiss—and pretrial rulings such as those do not bind other District Court judges for the remainder of the case. Additionally, due to Judge Wright's clearly erroneous decision, the denial of the motion for summary judgment was also properly overturned. In conclusion, the Ninth Circuit held that any potential procedural error was harmless as Judge Gutierrez correctly granted summary judgment.

The District Court Properly Applied the *PREI* Framework

The Ninth Circuit next inquired into whether the District Court properly applied the *Noerr-Pennington* doctrine in granting Sunset's motion to dismiss. As stated above, the doctrine generally grants immunity from statutory liability to parties for their petitioning activity. However, an exception applies to this rule—the "sham litigation exception" can arise in several instances. The first stems from the Supreme Court case *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) (*PREI*), which provides that a "sham petition" arises where a lawsuit is "objectively baseless" and the motive behind it is unlawful. The second relevant situation occurs where the defendant brings a "series" of lawsuits "without regard to the merits" for an unlawful purpose—this is the *POSCO* test from *USS–POSCO Indus. v. Contra Costa Cnty Bldg. & Constr. Trades Council*, 31 F.3d 800 (9th Cir. 1994) (*POSCO*).

Though Judge Gutierrez correctly applied the *PREI* framework to the facts of the case, Relevant claimed that this decision was erroneous and the *POSCO* framework was more applicable because Sunset's behavior constituted a "series" of lawsuits. The court looked to case law applying both tests and found that the small number of legal proceedings was not enough to be a "series."

While Sunset brought four actions challenging Relevant's hotel projects, *POSCO* itself involved twenty-nine lawsuits—a stark difference. Relevant argued on appeal that this mere "counting exercise" was improper, and that a more "holistic" analysis was required. The court should have counted the many objections and challenges Sunset raised during its CEQA challenges as individual "proceedings"—bumping its actions from four to twenty.

The Ninth Circuit rejected Relevant's "holistic" approach as it misapplied the case law it referred to

in making its argument. Citing *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1256 (9th Cir. 1982), Relevant argued that it is not the number of claims that controls when making a sham determination, "but whether the evidence shows that the claim or claims filed constitute an abuse of process." However, the court highlighted that this statement was not made to suggest a single action could constitute several actions, but merely that *Noerr-Pennington* protection can apply to cases where a plaintiff alleges more than one "sham."

The court further held that *POSCO* did not support a finding that each individual litigation action constitutes a "series" of proceedings. Though *POSCO* did use the terms "lawsuits," "actions," and "proceedings" interchangeably, these all referred to a single, concerted effort toward seeking a remedy. Many of Sunset's actions were taken in furtherance of its challenges to Relevant's hotel projects. Additionally, the court held that many of Sunset's actions, such as those during the permitting process, were non-judicial in nature. Therefore, a substantial portion of these "sham" proceedings were not even judicial proceedings at all. Finally, the court noted that this holistic counting method would result in confusion, as lower courts would struggle to draw the line between true proceedings or other actions, such as letters or motions. Therefore, the Ninth Circuit concluded that the District Court was reasonable in applying the *PREI* exception as it better fit the smaller number of potential "sham" actions Sunset had brought against Relevant's projects.

The Proceedings Were Not Shams

The Ninth Circuit explained that the *PREI* framework has two sequential prongs. First, the plaintiff must prove that the lawsuit is "objectively baseless." As the *Noerr-Pennington* doctrine is "overprotective" of petitions to prevent the chilling of First Amendment rights, this is a burdensome threshold to overcome. However, if a plaintiff is successful in meeting this element, they next must prove that the defendant's motive in bringing the claim was unlawful. The District Court held that Sunset's actions were not objectively baseless, and the Ninth Circuit upheld this ruling. An action is only objectively baseless when "no reasonable litigant could realistically expect success on the merits." Even when viewing the facts in the light most favorable to Relevant, Sunset's actions were not objectively baseless.

Regarding the Thompson and Tommie projects, Relevant settled both lawsuits with Sunset—an almost "conclusive" indicator of a lack of baselessness. Further, the terms of these settlements included terms typical of other CEQA claims rather than monetary provisions—proving Sunset had legitimate CEQA concerns. The court noted that several other petitioners had also raised Sunset's objections—including one who was successful in state court—indicating their merit. Finally, the court found that Sunset had in fact "succeeded" under CEQA as its challenges led the City to further consider the projects' impacts. Therefore, Sunset's claims regarding these two projects could not be objectively meritless, and the sham exception did not apply.

Regarding Relevant's other project—the Selma project—the court also upheld the District Court 's holding. Selma's litigation was "obviously" not meritless as the state court reviewing Sunset's petition ruled in its favor. Finally, though it could be argued that Sunset withdrew its objections to the Schrader project only after finding out that Relevant was no longer an interested party—these facts were probative of the *second* prong of the *PREI* test, improper motive. Relevant did not raise any facts first proving that Sunset's claims were objectively baseless.

As the Ninth Circuit found that Sunset's CEQA actions did not fall within the "sham exception" to the *Noerr-Pennington* doctrine, the court did not need to review Relevant's additional arguments to affirm the trial court's decision.

Conclusion and Implications

The Ninth Circuit's opinion upholds the application of the *Noerr-Pennington* doctrine to petitioning activity under CEQA. Objections and appeals under CEQA are constitutionally protected and will only lose protection when they are "shams." This is incredibly difficult to prove due to the doctrine's overprotection of petitioning activity. Where a plaintiff only alleges that a defendant has asserted few potentially improper petition actions, the *PREI* test is applicable, and the plaintiff must prove these actions are objectively meritless. If such a finding cannot be made, it does not matter whether these claims were brought unlawfully—the risk of chilling petitioner's

First Amendment rights outweighs the harm of their potentially improper motive. Therefore, Sunset did not violate the RICO Act in engaging in petitioning activity under CEQA. The Ninth Circuit's opinion is available at: https://cdn.ca9.uscourts.gov/datastore/opinions/2024/09/05/23-55574.pdf
(Adam Nir, Bridget McDonald)

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT AFFIRMS DENIAL OF WRIT CHALLENGING PROJECT UNDER CEQA FOR LACK OF DISABILITY ACCOMMODATION

Friends of the South Fork Gualala v. Department of Forestry and Fire Protection, ___Cal.App.5th___, Case No. A168163 (2nd Dist. Sept. 26, 2024).

The First District Court of Appeal in *Friends of the South Fork Gualala v. Department of Forestry and Fire Protection* affirmed the trial court's decision and found that the trial court acted within its discretion when it denied an environmental group's *seventh* request for a disability accommodation as further delays would create an undue burden and alter the expedited nature of the California Environmental Quality Act (CEQA) proceeding.

Factual Background

This case involves 267 acres of redwood forest along the South Fork of the Gualala River, located specifically in the Gualala River Watershed, which comprises 7,904 acres. Richardson Ranch LLC owns 62 percent of the watershed acreage. In December 2020, Richardson Ranch submitted a timber harvest plan to the California Department of Forestry and Fire Protection (CalFIRE). At that time, Richardson Ranch was the only entity that had performed any timber harvest in that area in the last ten years.

CalFIRE allowed for public comment and review of the plan. In April 13, 2021, CalFIRE approved the plan and published an official response which, it learned, was an incomplete version that was uploaded due to a clerical error. A corrected official response was filed on May 20, 2021 but, before the corrected version was filed, Friends of the South Fork Gualala (FSFG) filed a writ of mandate and a complaint for declaratory and injunctive relief plus attorney fees against CalFIRE and Richardson Ranch petition in Sonoma County Superior Court, challenging the approval of the plan under CEQA and the inadequacy of the official response.

The litigation between the parties continued for roughly two years, in which FSFG argued that CalFIRE's initial failure to publish a complete response to the public comments was not caused by a clerical error. Rather, FSFG argued that CalFIRE intentionally lied about the correct version ever existed when the incorrect version was filed in April 2021 and accused CalFIRE of spoliation of evidence.

FSFG sought sanctions against CalFIRE for discovery abuse and, between August 2022 and June 2023, FSFG asked the trial court for six separate continuances, extensions, and other calendar adjustments, each time citing its counsel, Garrett-Steinman's, mental health disability. Most of these extension requests were sought under California Rule of Court 1.100, at times citing Garret-Steinman's bipolar disorder specifically. Further, FSFG claimed that opposing counsel mistreated Garret-Steinman which caused him to suffer manic episodes and made it difficult for him to meet court deadlines.

At the Trial Court

The trial court granted the first six requests for extension in whole or in part. As part of the fifth request, Garret-Steinman assured the trial court that FSFG would make a good-faith effort to associate additional counsel during the gap in proceedings in order to avoid the need for further continuances. However, in April 2023, Garret-Steinman requested a sixth extension due to his mental health disability. Although the court expressed that the extensions created undue financial and administrative burdens and that Garret-Steinman did not keep his promise to avoid further continuances, the sixth request was effectively granted and the hearing was pushed to May 2023.

However, in May 2023, Garret-Steinman submitted yet another disability accommodation request. CalFIRE then filed an objection to the request. The trial court denied the seventh request for extension and asserted that, as explained after the sixth request, granting it would create undue financial and admin-

istrative burdens to the court, as the court would be required to add an additional hearing, process additional administrative documents, and would further duplicate court processing. Further, the court stated that the petitioner had not actually utilized the accommodations that were granted previously. Rather, the petitioner has instead continued to ask for additional time.

FSFG then filed a petition for writ of mandate and a request for stay as a result of the trial court's rejection of Garret-Steinman's seventh request. On June 14, 2023, the trial court denied the petition in part and granted the petition in part. Specifically, the court granted the petition for writ of mandate in regards to CalFIRE's approval of the timber harvest plan. The court cited deficiencies in the plan's analysis of the geologic, biologic, and cultural resources. The court denied the petition in part, however, as to FSFG's claim that CalFIRE's incomplete first official response rendered the approval defective.

FSFG was not satisfied with the trial court's denial in part and appealed the decision, arguing that the denial of the seventh accommodation request prevented FSFG with a fair opportunity to litigate the issue.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's decision, finding that the court acted within its discretion in denying the petitioner's seventh request for accommodation.

Application of Rule 1.100

California Rule of Court 1.100 allows persons with disabilities to apply for accommodations, including reasonable modifications in policies, practices, and procedures. The purpose of Rule 1.100 is to ensure that persons with disabilities have equal and full access to the California judicial system. The Court of Appeal stated that a court may deny a request for accommodation if (1) the accommodation would create an undue financial or administrative burden on the court or (2) if the accommodation would fundamentally alter the nature of the activity and the trial court must state the reason for any denial.

Standard of Review

The Court of Appeal asserted that the applicable standard of review in this case was the abuse of discretion standard. Under this standard of review, a court is found to have abused its discretion where no reasonable basis for the denial is shown. The abuse of discretion standard is limited; the scope of this discretion depends on the applicable legal standard and, more subtly, the facts at play. The Court of Appeal recognized that trial courts are generally better positioned to resolve contests of fact than appellate courts.

The Court of Appeal ultimately found that the trial court did not abuse its discretion because the court's denial of the petitioner's accommodation request was based on a valid reason under Rule 1.100 and the trial court properly indicated to the petitioner why the request was denied. The Court of Appeal also recognized that the trial court exercised significant patience toward the petitioner for the duration of the case and, by the seventh request, the trial court had determined that by failing to retain additional counsel, FSFG was using Garret-Steinman's mental health as an excuse to indefinitely continue the case. FSFG's actions unduly burdened the trial court because it interfered with the court's ability to efficiently manage other cases on its docket. In addition, FSFG's repeated requests fundamentally altered the usually expeditious nature of CEQA proceedings.

Conclusion and Implications

This opinion by the First District Court of Appeal affirms the notion that Rule 1.100 awards a trial court a limited and structured level of discretion and implicates that, while Rule 1.100 is available and intended to assist disabled persons navigate and access the court system, it may not be abused by any party or its counsel. The Court of Appeal's published opinion is available online at: https://www.courts.ca.gov/opinions/documents/A168163.PDF
(Kathryn Casey)

SECOND DISTRICT AFFIRMS DENIAL OF CEQA CHALLENGE AGAINST CITY'S PLAN TO MODERNIZE POWER GENERATION FACILITIES—DESTRUCTION OF HISTORIC STRUCTURE RENDERED APPEAL MOOT

Glendale Residents Against Environmental Destruction v. City of Glendale et al., *Unpub.*, Case No. B331601 (2nd Dist. Sept. 30, 2024).

In an *unpublished* opinion filed on September 30, 2024, the Second District Court of Appeal found the appeal moot and dismissed the writ petition filed by Glendale Residents Against Environmental Destruction, arguing the City of Glendale, Glendale City Council, and Glendale Water and Power (collectively, the City) approved a project to modernize its power generation facilities (the Grayson Project or the Project) without first obtaining input from the City's Historic Preservation Commission (HPC) regarding the proposed destruction of a historic structure called the Boiler Building.

Factual and Procedural Background

The City's preliminary consideration of the Grayson Project began in 2015. A 2016 initial study determined that the Project would not cause any significant impacts on any historical resources, but some series of Draft EIRs and Final EIRs were circulated back and forth to explore more green and renewable energy alternatives.

In August 2021, the City circulated a Partially Recirculated Draft EIR (PR-DEIR) that evaluated additional green and renewable alternatives and included an updated cultural resources analysis. The updated cultural resources portion of the PR-DEIR treated the Boiler Building as a discretionary historical resource, added several mitigation measures related to the Boiler Building's status as such, and determined that the Boiler Building's demolition would result in a significant and unavoidable impact. The PR-DEIR was circulated for a lengthy public review period, with the City receiving numerous comments from various sources, including state, regional, and local agencies, interest groups, and individuals.

On January 20, 2022, the City released the 2022 Final EIR, and on the same day, HPC received an informational presentation about the Project from City staff and a consultant. At the presentation, one commissioner raised an objection to the lack of any opportunity for HPC to make recommendations on the planned demolition of the Boiler Building, which was raised again during the public comment portion of the City Council's noticed public hearing on February 15, 2022. In response to the comment, City staff explained that the HPC would review the demolition clearance permit, but a permit application could not be made until after the City Council had voted on to approve a project alternative from one of several described in the 2022 Final EIR. Then, the City Council voted to certify the 2022 Final EIR and adopted a resolution to move forward with one of the project alternatives, which included the demolition of the Boiler Building. The resolution also adopted a mitigation monitoring and reporting program and a statement of overriding considerations for significant and unavoidable impacts.

Petition for Writ of Mandate

In March 2022, plaintiff filed its petition for writ of mandate, but it did not make any request for any type of temporary injunctive relief to preclude demolition of the Boiler Building while the petition was pending. On July 28, 2022, HPC voted to approve the demolition clearance application for the Boiler Building, and the demolition of the Boiler Building was complete by the time of this appeal.

In July 2023, the trial court issued a written ruling, granting plaintiff's request to take judicial notice of relevant portions of the GMC, and denying the City's request that the court take judicial notice of the HPC's meeting minutes and the related presentation slides for July 28, 2022, reasoning that because the meeting took place after the City Council certified the 2022 Final EIR on February 15, 2022, it had no bearing on the question of CEQA compliance. Yet, the trial court also decided to deny plaintiff's petition on August 28, 2023.

Stay Requests and Appellate Proceedings

On September 11, 2023, plaintiff filed a petition for a writ of supersedeas in the Second District, seek-

ing an immediate stay of demolition activity and a writ of supersedeas to maintain the status quo. After first issuing an immediate stay order the next day, the court then vacated the stay and denied relief on September 20, 2023, on the grounds that plaintiff had not given any adequate explanation for its multi-month delay in seeking a stay. Plaintiff filed a second petition for writ of supersedeas in November 2023 but was denied.

In April 2024, the City sought judicial notice of the HPC's July 28, 2022 meeting minutes and presentation slides and of the fact that the demolition of the Boiler Building had been completed. HPC opposed taking judicial notice of the meeting minutes and slides, but conceded the request to judicially notice of the fact that demolition of the Boiler Building was complete. The court ultimately took judicial notice of the fact that the demolition of the Boiler Building was complete and the fact that HPC approved the demolition clearance application, but not the meeting minutes or other materials.

The Court of Appeal's Decision

The Second District Court of Appeal held that plaintiff's sole contention, that the City Council failed to obtain input from HPC before certifying the 2022 Final EIR and approving the Project, was moot because the Boiler Building was already demolished, leaving plaintiff no effective relief.

Mootness

The court first stated that an appeal should be dismissed as moot when the occurrence of events renders it impossible for the appellate court to grant appellant any effective relief, though there are three identified discretionary exceptions to mootness: (1) when the case presents an issue of broad public interest that is likely to recur; (2) when there may be a recurrence of the controversy between the parties; and (3) when a material question remains for the court's determination.

The court compared this case with *Save Tara v. City of West Hollywood* (2004) 45 Cal.4th 116 (*Save Tara*), a case plaintiff cited, and *Hixon v. County of Los Angeles* (1974) 38 Cal.App.3d 370, a case the City relied on. The California Supreme Court in *Save Tara* decided that adopting a final EIR did not render the pending appeal moot because no irreversible physical or legal change had occurred. The court in *Hixon* found the plaintiffs' writ to compel the county to prepare an EIR for a phased street improvement project futile because the trees at issue had already been removed. The Second District found the case more like *Hixon* than *Save Tara*.

The court then elaborated why it found plaintiff's contention unpersuasive, that its appeal was not moot because the City bore the risk of proceeding to demolish the Boiler Building before the court's decision was final and some mitigation measures could still be put in place. Plaintiff relied on a case called *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, where one of the developers was deemed to have assumed the risk when it proceeded to partially construct and operate their projects of two shopping malls, where the other developer's petition against the EIR and later appeal were still pending. The court pointed out that even the reviewing court there drew an important distinction between public agencies approving the project and private developers that proceeded at its own risk while litigation remained pending. The court further reasoned that, because plaintiff did not seek or obtain an injunction until later, the City, in its capacity as the public agency approving the project, was entitled to assume its approval met CEQA's requirements. Thus, the court decided that it had no reason to depart from the principle that CEQA's purpose is "not to generate meaningless paperwork," citing *Bakersfield*, as the Boiler Building has already been destroyed.

Furthermore, the court disagreed with plaintiff arguing that effective relief was still available in the form of additional mitigation measures. The court noted that the PR-DEIR and the 2022 Final EIR both included mitigation measures relevant to the Boiler Building's historic value, and plaintiff cited no legal authority for the court to order the City to take any additional mitigation measures. Therefore, the court concluded that the destruction of the Boiler Building made plaintiff's appeal moot with no effective relief to be granted.

The court examined plaintiff's next argument, relying on *Bakersfield*, that its appeal presented an issue of ongoing public concern. The court, however, reminded plaintiff that plaintiff never identified any inadequacy in the certified 2022 Final EIR but focused solely on the process of HPC not being con-

sulted before certifying the EIR. The court stated that plaintiff's failure to ask for a timely injunction could not change its reasoning that the City had the right to proceed with the approved and certified project, which resulted in destructing the Boiler Building. Thus, the court found plaintiff's appeal rendered moot, given HPC's approval of the demolition application, with no practical relief that the court could provide.

Conclusion and Implications

This case highlighted, if anything, two common principles as old as time: the deference a public agency enjoys compared to a private player and the importance of strategic, timely requests for an injunction of any sort early on in bringing a case to the court. It is possible the petitioner somehow believed HCP would not approve the demolition clearance application, but asking the court to enjoin any further activity with the Project related to the Boiler Building could have created a different outcome. At least, the Second District Court of Appeal, in the interests of justice, ordered each party to bear its own costs on appeal. The court's unpublished opinion is available at: https://casetext.com/case/glendale-residents-against-envtl-destruction-v-city-of-glendale
(David Song)

SIXTH DISTRICT COURT FINDS WATER MANAGEMENT DISTRICT'S WATER SUPPLY CHARGE DID NOT CONSTITUTE A "SPECIAL ASSESSMENT" UNDER PROPOSITION 218

Monterey Peninsula Taxpayers' Association, Inc. v. Monterey Peninsula Water Management District, *Unpub.*, Case No. H051128 (6th Dist. Oct. 2, 2024).

The case between the Monterey Peninsula Taxpayers Association Inc. and the Monterey Peninsula Water Management District (District) centers on the legality of water supply charges imposed by the District on whether certain fees had sunset and whether the fees were "special assessments" under Proposition 218.

Background

The Monterey Peninsula Water Management District manages and regulates water in the region and has historically worked alongside California American Water (Cal-Am), a private utility, to supply water to property owners within its jurisdiction.

The case arose because of two charges imposed by the District: a "user fee" collected through Cal-Am bills until 2009, and a later "water supply charge," introduced in 2012 once Cal-Am had been ordered to not collect the "user fee" by its regulatory agency the Public Utilities Commission (PUC). The PUC eventually changed course on the collection of the user fee collection by Cal-Am and authorized the resumption of the user fee collection in 2017. The plaintiffs, Monterey Peninsula Taxpayers Association Inc. argued that the water supply charge should have been reduced or eliminated in line with a "sunset" clause in Ordinance 152, which the District adopted in 2012 to replace the user fee.

Ordinance 152 and Sunset Provision

The District enacted Ordinance 152 in 2012 to generate revenue for water supply projects through the water supply charge after the PUC halted Cal-Am's collection of the user fee. This ordinance imposed the water supply charge as a line item on property tax bills. At the time, the ordinance included a "sunset" provision to end the charge if alternative funding became available, including the reinstatement of the user fee.

In 2017, when the PUC allowed Cal-Am to resume collecting the user fee, the plaintiffs contended that the water supply charge should no longer be collected, or at least reduced, as required by the sunset provision. The sunset clause clearly stated that the District would stop collecting the water supply charge "to the extent alternative funds are available via a charge collected on the [Cal-Am] bill."

The Legal Arguments

The core of the dispute lies in whether the District's continued imposition of the water supply

charge after 2017 violated the terms of Ordinance 152. The plaintiffs argue that once the user fee collection resumed, the water supply charge should have been reduced proportionally or eliminated, as the alternative funding condition had been met.

In response, the District claimed that the petition to eliminate the charge was untimely, asserting that the water supply charge was a "special assessment" under Prop 218, a state constitutional provision that governs certain "special assessments."

At the Trial Court

The trial court found in favor of the Monterey Peninsula Taxpayers Association. It concluded that the plain language of Ordinance 152 required the reduction of the water supply charge by the amount collected through the user fee. The court rejected the District's argument that the user fee revenues were unavailable for water supply purposes, stating that the funds were "present and accessible," and the sunset provision in the ordinance required a proportional reduction in the water supply charge.

The court ordered the District to reduce the water supply charge accordingly, citing the language of the ordinance. Specifically, the court interpreted the term "to the extent" in the sunset provision as requiring a dollar-for-dollar reduction in the water supply charge for every dollar collected via the user fee.

Lastly, the trial court ruled that the validation statue for special assessments did not apply to the water supply charge because it was not a special assessment under Prop 218.

The Court of Appeal's Decision

The District appealed the trial court's ruling, reiterating its argument that the water supply charge should be classified as a special assessment, which would make the petition to eliminate the charge untimely under Prop 218. They further contended that the user fee revenues were earmarked for different projects than those funded by the water supply charge, and thus were not "available" under the terms of Ordinance 152 to trigger the sunset provision.

The District's appeal also argued that the PUC's decision and subsequent authorization of the user fee required the funds to be directed to mitigation and conservation projects, and not water supply projects. As such, the District claimed it was entitled to continue collecting the water supply charge to fund its water supply-related expenditures.

In reviewing the case, the Court of Appeal upheld the trial court's ruling. It found that the District's water supply charge did not constitute a "special assessment" under Prop 218 and was instead a fee subject to different legal requirements. The court found that that the water supply charge is not a special assessment because the impacted properties do not receive an advantage or privilege that other properties in the District do not also receive.

The court also agreed with the lower court's interpretation of the sunset provision, finding that the user fee revenues, once reinstated, were sufficient to trigger the required reduction in the water supply charge.

Lastly, court rejected the District's argument that the PUC decision limited the use of user fee revenues to certain projects, noting that no such restrictions were explicitly imposed. As a result, the court concluded that the user fee revenues were available for use in water supply projects, and thus the water supply charge should have been reduced as required by the ordinance.

Conclusion and Implications

The decision in *Monterey Peninsula Taxpayers Association Inc. v. Monterey Peninsula Water Management District, while unpublished,* underscores the importance of adhering to the clear language of municipal ordinances and the conditions they impose on local agencies. Additionally, the court's interpretation of "special assessment" is not surprising given the current case law under Prop 218, but the case does demonstrate the importance of establishing potentially in a rate study each advantage or privilege certain parcels receive when trying to create special assessments. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/H051128M.PDF

(Darien Key, Derek Hoffman)

THIRD DISTRICT AFFIRMS REJECTION OF CEQA CHALLENGE AS SENATE BILL NO. 174 EXEMPTS THE PROJECT PROPOSING MAJOR CHANGES TO THE CALIFORNIA STATE CAPITOL

Save Our Capitol! v. Department of General Services,
___Cal.App.5th___, Case No. C101151 (3rd Dist. Oct. 7, 2024).

In a published opinion filed on October 7, 2024, the Third District Court of Appeal affirmed the trial court's decision to reject appellant's challenge under the California Environmental Quality Act (CEQA) against the revised Environmental Impact Report (EIR), prepared by the Department of General Services and the Joint Committee on Rules (together, DGS), for a project that proposes major changes to the California State Capitol, as the legislative body passed Senate Bill 174, making the project exempt from CEQA.

Factual and Procedural Background

The Capitol building and the surrounding area—the State Capitol Complex—has four general components: the Historic Capitol or West Wing (the oldest part of the Capitol building that includes the Capitol dome), Capitol Park (a park covering 40 acres), the Insectary (a small building initially designed to house insect-related experiments), and most relevant here, the Capitol Annex Building or East Wing (the Annex). The Annex—which connects to the Historic Capitol—includes offices for the Governor, legislators, and others.

The Legislature found the Annex deficient and, through the State Capitol Building Annex Act of 2016 (the Annex Act) (Gov. Code, § 9112 et seq.), authorized:

> . . .the Joint Rules Committee [to] pursue the construction of a state capitol building annex or the restoration, rehabilitation, renovation, or reconstruction of the State Capitol Building Annex.

Two years later, the Legislature expanded the scope of the Joint Rules Committee's authority, allowing it also to construct "a visitor center, a relocated and expanded underground parking facility, and any related or necessary deconstruction and infrastructure work."

Following these authorizations, the Joint Rules Committee, working with the Department of General Services and the Department of Finance, proposed the Capitol Annex Project (the Project). The Project included three primary components: (1) demolishing the 325,000-square-foot existing Annex attached to the east side of the Historic Capitol and constructing a new attached Annex; (2) constructing a new underground visitor/welcome center (visitor center) on the west side of the Historic Capitol between the Historic Capitol and 10th Street; and (3) constructing a new underground parking garage.

DGS prepared and certified an EIR and approved the Project. Then, two entities—Save Our Capitol! (Save Our Capitol) and Save the Capitol, Save the Trees (Save the Trees)—each filed a petition for writ of mandate challenging the EIR. These challenges ultimately led to two prior published decisions in the Third District.

Previous CEQA Challenges

The Third District's first decision followed after the trial court rejected the challenges to the EIR. On appeal, the Third District reversed in part after finding certain aspects of the EIR flawed, then remanded the matter to the trial court and directed it to issue a peremptory writ. The trial court issued the peremptory writ, DGS revised its EIR and reapproved the project (though now without the visitor center), and the trial court then discharged the writ. On appeal, Save the Trees contended the trial court prematurely discharged the writ, reasoning that the court needed to find the revised EIR consistent with our prior decision before discharging the writ; the Third District agreed and reversed.

The third appeal involved DGS's revised EIR. After DGS certified its revised EIR, both Save Our Capitol and Save the Trees challenged it, though through different means. Save the Trees challenged it in the existing litigation, arguing that the trial court could not discharge the writ unless DGS showed (and the trial court found) that the revised EIR was

consistent with the Third District's decision. Save Our Capitol, however, filed a new petition for writ of mandate alleging that the revised EIR failed to comply with CEQA. It argued that in the revised EIR, DGS wrongly stated the project complied with the Secretary of the Interior's Standards for the Treatment of Historic Properties and improperly omitted information concerning these standards. The trial court rejected these claims, and this appeal followed.

The Court of Appeal's Decision

The Third District Court of Appeal rejected Save Our Capitol's arguments that DGS's revised EIR violated CEQA based on recent legislation exempting the Project from CEQA's requirements.

Senate Bill No. 174 and CEQA Exemption

The court first took judicial notice of the newly passed Senate Bill No. 174 (SB 174), which amended the Annex Act to provide that "all work performed pursuant to this [act] shall be exempt from" CEQA's requirements and would take effect immediately. While most bills cannot take effect immediately under the California Constitution, SB 174 could because apart from providing this CEQA exemption, it also "provid[ed] for appropriations related to the budget bill" and was "identified as related to the budget in the budget bill passed by the Legislature."

Thus, the court found that SB 174 dictated the result and decided that it simply had to reject Save Our Capitol's claims that DGS violated CEQA. Per Senate Bill 174, DGS's work performed on the Capitol Annex Project pursuant to the Annex Act was expressly exempt from CEQA's requirements, so the court found that Save Our Capitol could not prevail on its claims that DGS violated CEQA's requirements.

While the court's disposition based on SB 174 was clear, it disagreed with DGS's and Save Our Capitol's application of SB 174 to this case.

DSG's Mootness Argument

First, the court disagreed with DGS's mootness argument, that SB 174 made it impossible for Save Our Capitol to receive effective relief and rendered the appeal moot. The court stated that the mootness doctrine did not apply because SB 174 did not make it impossible for a court to provide Save Our Capitol relief if it were to decide the case in Save Our Capitol's favor. In other words, from the court's view, the recent legislation did not moot the case but instead determines who prevails on the merits, requiring the court to reject Save Our Capitol's claims that DGS violated CEQA, rather than finding it moot.

Save Our Capitol's Constitutional Argument

The court then turned to Save Our Capitol's argument. Save Our Capitol argued that Senate Bill 174 was unconstitutional under Article IV, section 28 of the California Constitution, which limits the Legislature's ability to make alterations to certain parts of the Historic Capitol, including by barring the Legislature from authorizing or appropriating funds for such work through a statute that would become effective immediately as an urgency statute. It states, in relevant part:

> [N]o bill shall take effect as an urgency statute if it authorizes or contains an appropriation for ... the alteration or modification of the color, detail, design, structure or fixtures of the historically restored areas of the first, second, and third floors and the exterior of the west wing of the State Capitol from that existing upon the completion of the project of restoration or rehabilitation of the building conducted pursuant to Section 9124 of the Government Code as such section read upon the effective date of this section. Art. IV, § 28, subd. (a).

Save Our Capitol made two general points. First, it asserted that SB 174 appropriates funds for altering the Historic Capitol's exterior, based on the revised EIR that depicted an entry into the visitor center through the exterior wall of the historic Capitol, which would require breaking a hole through that exterior." However, while the revised EIR discussed a visitor center, DGS ultimately approved the project without the visitor center, so the court did not consider this angle any further. Second, Save Our Capitol asserted that the public never had a meaningful opportunity to scrutinize Senate Bill 174, having been signed into law to take effect immediately only 10 days after its language was first proposed. Save Our Capitol contended that, for these two reasons, SB 174 undermined Proposition 3's purpose—which was meant to give citizens notice in advance of any

proposal to alter or modify the Capitol and an opportunity to express themselves before changes are made to it.

DGS had five counterarguments. First, article IV, section 28 purports to cover only "urgency statute[s]" and SB 174 was not an urgency statute. Second, SB 174 was phrased to avoid any conflict with Article IV, section 28, specifying that the appropriated funds:

> . . .shall not be used to alter or modify the color, detail, design, structure or fixtures of the historically restored areas […] unless the Legislature expressly appropriates those moneys for that purpose in accordance with subdivision (b) of Section 28 of Article IV of the California Constitution.

Third, any modifications to the Historic Capitol were funded through appropriations outside of SB 174. Fourth, SB 174 does not even appropriate funds for the Project; it instead provides a timeline for distributing funds already appropriated. Lastly, Save Our Capitol's argument is premised on speculation about the potential construction of a visitor center in the future.

Article IV Section 28 and Proposition 3 & 25

The court found Save Our Capitol's arguments unpersuasive and navigated Article IV, section 28, history and scope. While the California Constitution describes several types of bills that can become effective immediately, article IV, section 28 purports to cover only one type: urgency statutes. At the time voters approved Proposition 3, a bill like SB 174 would have been passed as an urgency statute to take effect immediately because SB 174 is a so-called "trailer bill" that accompanied and implemented the budget bill, and in 1980, these types of bills could take effect immediately only as urgency statutes, which required passage with a two-thirds vote.

The law, however, has changed since 1980, when Proposition 25 amended the California Constitution to allow the Legislature to pass, with a simple majority vote "the budget bill and other bills providing for appropriations related to the budget bill ... to take effect immediately...." Thus, trailer bills could now take effect immediately as "bills providing for appropriations related to the budget bill" passed with a majority vote. The court noted that SB 174 was a product of Proposition 25 and became effective immediately as a bill "providing for appropriations related to the budget bill," not as an urgency statute.

The court then acknowledged that this could lead to a reasonable dispute among the parties about Article IV, section 28's scope and whether a literal reading of Article IV, section 28 would render Proposition 25 effectively overturning Proposition 3

However, the court found no need to resolve such question because it still found Article IV, section 28 inapplicable because, as DGS noted, SB 174 explicitly barred funds from being used inconsistent with Article IV, section 28, and Save Our Capitol ultimately acknowledged that as well. The court did not find Save Our Capitol's argument persuasive, that DGS could not be trusted to comply with SB 174's restrictions on using these funds. The court found that Save Our Capitol's concern ultimately was that DGS might violate Senate Bill 174, not that Senate Bill 174 itself violates Article IV, section 28. Even though DGS might approve a visitor center under the Annex Act in the future, which might alter the Historic Capitol's exterior, this hypothetical future scenario was not before the court.

Thus, focusing on SB 174's language, the court rejected Save Our Capitol's claim that the bill itself violated Article IV, section 28.

Conclusion and Implications

This case involved a unique scenario involving a revised EIR approval for the Capitol Building, which had the State Legislature's blessing to be fully exempt from CEQA review. Nonetheless, this decision could be used to defend that preemptively litigating wrongdoing that never happened yet should be rejected at the EIR approval stage. The court's opinion is available at: https://www.courts.ca.gov/opinions/documents/C101151.PDF
(David Song)

FOURTH DISTRICT COURT FINDS ADMINISTRATIVE RECORD CONTAINED SUBSTANTIAL EVIDENCE TO SUPPORT CITY'S USE OF SELECTED GREENHOUSE GAS EMISSION THRESHOLDS IN CEQA CHALLENGE

Upland Community First v. City of Upland, ___Cal.App.5th___, Case No. E078241 (4th Dist. 2024).

The California Fourth District Court of Appeal considered the matter of *Upland Community First v. City of Upland,* which arose from a challenge to the approval of a 201,096-square-foot warehouse and parcel delivery service building in Upland, California. The case primarily focused on whether the City of Upland (City) complied with the California Environmental Quality Act (CEQA) in its review and approval process of the project. Upland Community First (UCF), a local citizens group, argued that the City improperly approved the project without conducting a full Environmental Impact Report (EIR), claiming the project would result in significant unavoidable impacts on greenhouse gas (GHG) emissions, traffic, and air quality. The City, however, adopted a Mitigated Negative Declaration (MND) after concluding the project would not result in any significant environmental impacts, with implementation of identified mitigation measures.

Background

The proposed development site spans 50.25 acres near the Cable Airport in Upland and is currently used for a rock and gravel crushing operation. The new warehouse project, spearheaded by Bridge Development Partners, LLC (Bridge), initially included development of three warehouse buildings totaling 977,246-square-feet. Subsequently, Bridge scaled down the proposed project to one single-story, 201,096-square-foot building due to environmental concerns and feedback from the public and opposition groups. The final proposal includes 16 truck docks, eight van loading doors, and over 1,400 vehicle parking spaces, with sustainability features like rooftop solar panels and electric vehicle (EV) charging stations added to reduce the project's environmental footprint.

The Dispute Over Greenhouse Gas Emissions

A central issue in the case was the City's determination of whether the project's GHG emissions would significantly contribute to climate change. Under CEQA, public agencies are required to determine whether a project might have significant environmental impacts, and if so, they must prepare an EIR. If, however, mitigation measures can reduce impacts to a less than significant level, the agency may adopt a Mitigated Negative Declaration (MND).

UCF argued that the City had violated CEQA by failing to prepare an EIR, as a "fair argument" could be made that the project would result in a significant impact to climate change from GHG emissions. The City's original analysis used a threshold of 10,000 metric tons of CO2 equivalents per year (MTCO2e/yr.), which UCF argued was too lenient for this type of project. In response to public comments on the MND, Bridge further refined the project to include additional sustainability features including solar panels, electric vehicle charging stations and additional landscaping. The City also revised the threshold to 3,000 MTCO2e/yr., a lower standard that could be more suited to mixed-use commercial and industrial developments. The City thereafter prepared a supplemental GHG analysis showing with a revised environmental baseline and the added sustainability features, the project's GHG emissions would be less than the 3,000 MTCO2e/yr threshold. UCF contended that even the revised GHG threshold was not supported by substantial evidence in the administrative record.

At the Trial Court

The trial court found that there was insufficient evidence to support the City's chosen threshold of significance for GHG emissions. Particularly, the trial court concluded that use of the 3,000 MTCO2e/yr threshold was not supported by substantial evidence in part because that threshold had not been formally adopted by the local air quality district (SCAQMD) and no scientific or factual basis is provided for its use. As a result, the trial court ordered the City to set aside its approvals of the MND and revisit the

sufficiency of its evidence regarding GHG thresholds. However, the court did not rule that an EIR was necessarily required, leaving open the possibility that the City could justify its threshold and proceed with the MND.

Analysis of Traffic and Air Quality Impacts

UCF also raised concerns about the project's traffic and air quality impacts, particularly the number of vehicle trips the project would generate. The City's traffic analysis, which formed part of the MND, was based on trip generation estimates for a "High-Cube Parcel Hub Warehouse" land use classification. UCF argued that the City underestimated the number of trips and vehicle miles traveled (VMT), leading to an underestimation of the project's impacts on traffic and air quality. UCF believed that a more detailed analysis using a Vehicle Miles Traveled (VMT) metric, recently introduced in CEQA for assessing transportation impacts, should have been conducted.

However, the City countered that its analysis accounted for traffic impacts based on conservative estimates, including the potential for a larger warehouse and a higher number of vehicle trips than the project was likely to generate. Additionally, the City argued that the project's sustainability features, such as EV chargers and rooftop solar panels, would help mitigate the overall environmental impacts, including traffic-related emissions.

The Court of Appeal's Decision

The Court Denied the Writ in its Entirety

The Court of Appeal's ruling reversed the trial court and found in favor of Bridge and the City on all allegations. The Court of Appeal concluded the administrative record contained substantial evidence supporting the use of the selected GHG emission thresholds, particularly the 3,000 MTCO2e/yr. threshold. The court noted that comment letters submitted on the project advocated for the use of the "more stringent" 3,000 MTCO2e/yr threshold. The Court of Appeal also noted that the record included minutes of a SCAQMD meeting where the agency presented lead agencies with the option of using the 3,000 MTCO2e/yr threshold for industrial projects. Together, this information was sufficient to support the lead agency's decision. Additionally, the court ruled the traffic analysis was adequate, concluding that the City's use of established traffic analysis methods, i.e., its reliance on the ITE Trip Generation values for Parcel Hub Warehouses, was appropriate and that the City did perform a VMT analysis contrary to UCF's assertations. As such the MND's GHG, Air Quality, and Traffic analysis all were supported by substantial evidence.

Conclusion and Implications

The *Upland Community First v. City of Upland* case underscores the complexity of CEQA compliance, particularly when it comes to evaluating the environmental impacts of large-scale developments and their impacts on GHG, air quality, and traffic. The case reinforces that lead agencies have significant discretion in determining thresholds of significance and such decisions will be upheld on legal challenge as long as there is substantial evidence in the record.

This case is also important for validating the use of the 3,000 MTCO2e/yr threshold for GHG emissions. This threshold was not formally adopted through ordinance or regulation by SCAQMD or the City of Upland. Nevertheless, the Court of Appeal concluded that there was substantial evidence in the record supporting its application.

For developers and cities, the case serves as a reminder that careful documentation of environmental impacts is crucial in avoiding litigation and ensuring that projects meet CEQA requirements. The court's opinion, as modified and approved for publication is available online at: https://www.courts.ca.gov/opinions/documents/E078241.PDF
(Donovan Collier, Darien Key)

THIRD DISTRICT COURT UPHOLDS AWARD OF COST FOR PREPARATION OF THE ADMINISTRATIVE RECORD IN CEQA CHALLENGE

Yolo Land and Water Defense et al. v. County of Yolo et al., ___Cal.App.5th___, Case No. CV2022-277 (3rd Dist. Sept 13, 2024, *published* Oct. 3, 2024).

In an opinion filed on September 13, 2024, and later *partially published* on October 3, 2024, the Third Appellate District in *Yolo Land and Water Defense et al. v. County of Yolo et al.* affirmed the trial court's denial of advocacy groups' petition under the California Environmental Quality Act (CEQA) and upheld the County's memorandum of costs.

In the *unpublished* portion of the decision, the Court of Appeal rejected the Sierra Club and Yolo Land and Water Defense's (Appellants) CEQA claims that the Environmental Impact Report (EIR) improperly calculated the baseline, inadequately analyzed significant impacts of methylmercury in a reclaimed lake, and lacked substantial evidence to support a mitigation measure to reclaim 113 acres of prime farmland.

The published portion of the opinion addresses awarding costs to the County for preparation of the administrative record.

Factual and Procedural Background

Teichert, Inc. (Teichert) sought permission from the County of Yolo to mine sand and gravel at a 319.3-acre site for the Teichert Shifler Mining and Reclamation Project (Project). Following mining activities, approximately 113 acres of the Project site will be reclaimed to agricultural use with another portion reclaimed to a lake, grassland, and riparian woodland. The Project included a proposal to transfer specified tonnage allocations from two of Teichert's existing mining operations to the Shifler location upon their completion, which are anticipated to cease either on January 1, 2028, or when the maximum amount of permitted removal is reached.

The County released the Project's draft EIR in July 2019, followed by the final EIR. The Board issued findings of fact and a statement of overriding considerations, concluding that the benefits of the project overrode the significant and unavoidable environmental impacts. It certified the final EIR and approved a mining permit for the Teichert Shifler operation, which included the transfer of tonnage from Teichert's other operations.

Appellants challenged the County's approval of the Project and filed a notice electing to prepare the administrative record under Public Resources Code section 21176.6, subdivision (b)(2). The trial court denied Appellants' writ petition and awarded the County $3,813.45 in costs for preparation of the record.

The Court of Appeal's Decision

The Court of Appeal upheld the trial court's denial of the writ on the merits. In the published portion of the decision, the court denied Appellants' appeal of the lower court's award of costs to the County for record preparation.

Appellants contended that because they elected to prepare the record, Respondents could not recover those costs. The court held that section 21167, subdivision (b)(2) does not preclude an award of costs to the prevailing party. Despite Appellants' election to prepare the record, the County incurred costs in producing the documents that comprised the record and the agency is required certify the record's accuracy under subdivision (b)(1).

The court held that generally, under Civil Code of Procedure (CCP) section 1032 a prevailing party is entitled to recover costs unless otherwise provided by statute. Further, CCP 1094.5, subdivision (a) requires petitioner to bear the cost of preparing the record unless otherwise specified by statute. Nothing in section 21167.6 bars a prevailing public agency from recovering those costs.

The court rejected Appellants' contention that the Public Records Act prohibits recovery of staff and consultant time associated with production of documents under existing caselaw. Appellants failed to show the County's account of staff time and hourly rates were unreasonable and the court upheld the County's account of costs.

Conclusion and Implications

The opinion indicates the court may award reasonable administrative record preparation costs to a prevailing lead agency, even where the petitioner elects to prepare the record and makes a request under the PRA. The Third District's opinion is available at: https://www.courts.ca.gov/opinions/documents/C099086.PDF.
(Natasha Roland, Bridget McDonald)

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): (Gov. Code § 65589.5, as amended by Stats. 2024 ch. 265; Gov. Code §§ 65589.5.1, 65589.5.2, added by Stats. 2024 ch. 265). This bill was signed by the Governor on September 19, 2024 and revises provisions of the Housing Accountability Act (HAA) added by Assembly member 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 moves the provisions added by AB 1633 to new statutes—Government Code Sections 65589.5.1 and 65589.5.2. It also requires agencies to publish these notices, and prohibits the agency from making a decision on the notice for 60 days, providing an opportunity for public comment. It also contains provisions that harmonize AB 1413 with AB 1893, which has also now been signed into law.

AB 1893 (Wicks): (Gov. Code § 65589.5, as amended by Stats. 2024 ch. 268). This bill was signed by the Governor on September 19, 2024. This bill primarily addresses 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 gives 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 also broadens 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 also expands 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 also expands 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 allows 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): (Gov. Code § 65943.1, added by Stats. 2024 ch. 358; Gov. Code § 65940.1, as amended by Stats. 2024 ch. 358; Gov. Code § 65941.1 as amended by Stats. 2024 ch. 358). This bill was signed by the Governor on September 22, 2024 and provides 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 allows a developer submitting a preliminary application pursuant to SB 330 to also request a preliminary fee and exaction estimate. The local agency will 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 requires 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 ap-

plication to be complete. The bill also authorizes 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): (Gov. Code §§ 65852.24, 65912.101, 65912.111, 65912.112, 65912.113, 65912.114, 65912.121, 65912.122, 65912.123, and 65912.124, as amended by Stats. 2024 ch. 272; Gov. Code § 65912.106, added by Stats. 2024 ch. 272). This bill was signed by the Governor on September 19, 2024 and makes various changes to the Affordable Housing and High Road Jobs Act of 2022 (AB 2011), which 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 makes 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 prohibits 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 (Juan Carrillo): (Gov. Code § 66332, as amended by Stats. 2024 ch. 834). This bill was signed by the Governor on September 28, 2024 and prohibits 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 also requires 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. 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): (Gov. Code § 66005.1, as amended by Stats. 2024 ch. 275; Pub. Resources Code § 21064.3 as amended by Stats. 2024 ch. 275). This bill was signed by the Governor on September 19, 2024 and amends 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 amends 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 also incorporates 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 3122 (Kalra): (Gov Code § 65913.4, as amended by Stats. 2024 ch.754). This bill was signed by the Governor on September 27, 2024 and allows a local government to apply objective planning standards to projects approved under SB 35, which provides a streamlined, ministerial process for housing developments that are in compliance with local planning standards. More specifically, 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 allows 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.

SB 450 (Atkins): (Gov. Code §§ 65852.21 and 66411.7, as amended by Stats. 2024 ch. 286). This bill was signed by the Governor on September 19, 2024 and makes several changes to SB 9, the 2021 bill that required ministerial approval of urban lot splits in residential zones. SB 450 prohibits local agencies from imposing new development standards on SB 9 projects not applicable on other projects in the zone, puts a timeline on SB 9 application processing, and prevents denial of such projects on perceived environmental grounds.

SB 1211 (Skinner): (Gov. Code §§ 66313, 66314, and 66323, as amended by Stats. 2024 ch. 296). This bill was signed by the Governor on September 19, 2024 and makes several changes to the state law governing accessory dwelling units (ADUs). It requires local agencies to ministerially permit multiple ADUs on lots with existing or proposed multifamily units. It will also prohibit local agencies from requiring replacement of parking that may be lost from ADU development

California Environmental Quality Act

SB 312 (Wiener): (Pub. Resources Code § 21080.58, as amended by Stats. 2024 ch. 284). This bill was signed by the Governor on September 19, 2024 and extends the CEQA exemption for certain qualifying university housing developments from January 1, 2030 to January 1, 2032. The bill also removes and extends certain Leadership in Energy and Environmental Design (LEED) certification filing requirements for reliance on the exemption.

SB 440 (Skinner): (Gov. Code § 62500, et seq., as added by Stats. 2024 ch. 767). This bill was signed by the Governor on September 27, 2024 and authorizes the creation of regional housing finance authorities to oversee funding and provide technical assistance at a regional level for affordable housing development. The bill also exempts from CEQA actions taken by an authority concerning funding for affordable housing preservation, new affordable housing production, or providing technical assistance consistent with the authority's purpose.

SB 768 (Caballero): (Pub. Resources Code § 21099.5, added by Stats. 2024 ch. 773). This bill was signed by the Governor on September 27, 2024 and requires the Department of Housing and Community Development to conduct a study on CEQA's shift to analyzing vehicle miles traveled (VMT) as a measure of transportation impacts. The study will include how VMT targets, analyses, and mitigation are being developed by agencies undertaking CEQA review.

SB 1342 (Atkins): (Pub. Resources Code § 21189.81.1, as added by Stats. 2024 ch. 794). This bill was signed by the Governor on September 27, 2024. Existing law authorizes the Governor to certify projects meeting certain requirements as infrastructure projects and provides those projects with streamlining benefits. This bill provides the streamlining benefits to two specific projects: the San Vicente Energy Storage Facility project proposed by the San Diego County Water Authority and a project concerning the South Bay Sewage Treatment Plant in the County of San Diego.

SB 1361 (Blakespear): (Pub. Resources Code § 21080.10, as amended by Stats. 2024, ch. 188). This bill was signed by the Governor on August 19, 2024 and 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, to provide financial assistance and insurance to low-income housing projects from CEQA.

SB 1395: (Gov. Code §§ 8698.4 and 65660, as amended by Stats. 2024 ch. 297; Pub. Resources Code § 21080.27.5, as added by Stats. 2024 ch. 297; Welf. & Inst. Code § 8255, as amended by Stats. 2024, ch. 297). This bill was signed by the Governor on September 19, 2024 and expands the provisions of a CEQA exemption for low barrier navigation centers for the homeless. The bill revises the definition of "low barrier navigation center" by noting that the exemption can apply to non-congregate and relocatable facilities. The bill extends the sunset date of the provisions to January 1, 2036.

SB 1420: (Pub. Resources Code §§ 21189.81 and 25545, as amended by Stats. 2024 ch. 608). This bill was signed by the Governor on September 25, 2024 and excludes eligible renewable energy resources under the California Renewables Portfolio Standard Program that combust, rather than use, biomass fuels from the definition of "energy infrastructure project" for the purpose of streamlining benefits related to CEQA for energy infrastructure projects.

AB 1801: (Gov. Code §§ 65650 and 65651, as amended by Stats. 2024 ch. 683). This bill was signed by the Governor on September 27, 2024 and expands the "by right" ministerial approval exemption for supportive housing projects. The bill al-

lows the supportive housing development to include administrative office space in its nonresidential floor area and amends the floor space requirements for supportive services at the development.

AB 2091 (Grayson): (Pub. Resources Code § 21080.28.5, as added by Stats. 2024 ch. 377). This bill was signed by the Governor on September 22, 2024 and creates 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 defines 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 statutory exemption also applies to specified "rails to trails" projects approved by the Great Redwood Trail Agency. The bill will sunset on January 1, 2030.

AB 2199 (Berman): (Pub. Resources Code § 21159.25, as amended by Stats. 2024 ch. 271). This bill was signed by the Governor on September 19, 2024 and extends 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 also makes the exemption inapplicable to projects that may cause substantial adverse impacts to tribal cultural resources.

AB 2387 (Pellerin): (Gov. Code § 65852.8, as added by Stats. 2024 ch. 396). This bill was signed by the Governor on September 22, 2024 and allows an owner of an existing mobile home park to apply to add lots to the park without the need for a conditional use permit, zoning variance, or other zoning approval in order to add lots to a mobile home park. The bill also exempts these projects from CEQA by requiring a city or county to ministerially approve a project to add the mobile home park lots.

AB 2503 (Lee): (Pub. Resources Code § 21080.25, as amended by Stats. 2024 ch. 718). This bill was signed by the Governor on September 27, 2024 and provides a statutory exemption from environmental review under CEQA for a public project for the institution or increase of bus rapid transit, bus, or light rail service, including construction or rehabilitation of stations and other existing facilities that will be used by low- or zero-emission vehicles on existing rights-of-way.

AB 3057 (Wilson): (Pub. Resources Code § 21080.17, as amended by Stats. 2024 ch. 210). This bill was signed by the Governor on August 27, 2024 and 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 for single-family residential use.

AB 3227 (Alvarez): (Pub. Resources Code § 21080.61, as added by Stats. 2024, ch. 761). This bill was signed by the Governor on September 27, 2024. If certain conditions are met, the bill exempts from CEQA the routine maintenance of public stormwater facilities that are fully concrete or that have a conveyance capacity of less than a 100-year storm event. The bill also prohibits the appeal of determinations by nonelected decision making bodies concerning the exemption to the agency's elected decision making body when the determination arises for a city with a population of at least 1,000,000. The provisions will sunset on January 1, 2030.

AB 3265 (Bryan): (Pub. Resources Code § 21168.6.6, as added by Stats. 2024, ch. 255). This bill was signed by the Governor on September 14, 2024 and establishes streamlined procedures, under certain conditions, for the administrative and judicial review of the environmental review and approvals granted for an environmental leadership media campus project. The bill defines the project as construction/renovation on a film and television media campus in the County of Los Angeles.

Density Bonus

AB 3116 (Garcia): (Gov. Code § 65915, as amended by Stats. 2024 ch. 432). This bill was signed by the Governor on September 22, 2024 and revises and enhances existing density bonus laws for student housing developments. The bill also prevents developers from restricting lower-income students from sharing a room or unit with non-lower-income students. The bill allows developers to establish a

system for confirming its renters' status as students and prohibits 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): (Gov. Code § 65302, as amended by Stats. 2024 ch. 686). This bill was signed by the Governor on September 27, 2024. The bill, also known as the Room to Roam Act, requires 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 requires 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 also requires a city or county to adopt or review the wildlife connectivity element or integrate related goals, policies, and objectives into other elements, upon the adoption or next revision of one or more elements of the General Plan on or after January 1, 2025.

Housing Element Law

SB 951 (Wiener): (Pub. Resources Code § 30603, as amended by Stats. 2024 ch. 775). This bill was signed by the Governor on September 27, 2024 and allows 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): (Gov. Code §§ 65585.03 and 65589.55, added by Stats. 2024 ch. 267). This bill was signed by the Governor on September 19, 2024 and amends 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 provides 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 further specifies 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): (Gov. Code §§ 65583, 65583.2, 65585, 65588, and 65589.3, as amended by Stats. 2024 ch. 269). This bill was signed by the Governor on September 19, 2024 and amends provisions of the Housing Element Law to provide that, for the seventh and subsequent revisions of the housing element, local governments must complete the rezoning of sites within one year of the statutory deadline for the adoption of the housing element or the earlier of three years after the date the housing element is adopted or 90 days after receipt of comments from HCD, if the local government satisfies certain requirements, including submitting a draft element or draft amendment to HCD for review within specified timeframes and adopting a draft element or draft amendment that HCD finds to be insubstantial compliance with the Housing Element Law. Further, existing housing element law requires local governments to identify adequate sites for housing and make adequate provision for the current and future needs of all community household income levels. This bill provides 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 further provides 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): (Gov. Code § 65400, as amended by Stats. 2024 ch. 723). This bill was signed by the Governor on September 27, 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 requires the annual reports to include additional specificity about affordable units approved and disapproved by the jurisdiction. It also requires the jurisdiction to provide information about properties with existing or proposed historic designations, which can impede development of housing projects.

AB 3093 (Ward): (Gov. Code §§ 65400, 65582, 65583, 65583.1, 65583.2, 65584, 65584.01, 65584.04, and 65584.07, as amended by Stats. 2024 ch. 282; Gov. Code § 65583.05, added by Stats. 2024 ch. 282). This bill was signed by the Governor on September 19, 2024 and is the only housing bill of the 2024 session to have been 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): (Gov. Code § 66007, as amended by Stats. 2024 ch. 290). This bill was signed by the Governor on September 19, 2024 and enacts several modifications to how impact fees are assessed for housing projects under the Mitigation Fee Act. Among other things, it prohibits 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 are 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 allows 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): (Gov. Code § 65009.1, added by Stats. 2024 ch. 293). This bill was signed by the Governor on September 19, 2024 and imposes 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 will 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 is 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): (Gov. Code § 65852.28 and 66499.41, as amended by Stats. 2024 ch. 294). This bill was signed by the Governor on September 19, 2024 and expands SB 684 of 2021, which required local governments to ministerially approve a parcel map or tentative and final map of ten 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 adds 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 will 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): (Gov. Code § 65914.900, added by Stats. 2024 ch. 820). This bill was signed by the Governor on September 28, 2024 and provides 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. The bill further authorizes the project proponent or California Attorney General to bring an action to enforce the bill's provisions.

AB 2117 (Patterson): (Gov. Code § 65009, as amended by Stats. 2024 ch. 270). This bill was signed by the Governor on September 19, 2024 and extends the expiration date of local development permits and project approvals to not include any 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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