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FEATURE ARTICLE

SECOND DISTRICT COURT OF APPEAL AFFIRMS TRIAL COURT'S DENIAL OF MOTION TO RECOVER LITIGATION EXPENSES IN EMINENT DOMAIN CASE

By David Song

In an *unpublished* opinion filed on October 30, 2024, the Second District Court of Appeal affirmed the trial court's denial of the appellants' motion to recover their litigation expenses in an eminent domain proceeding pursuant to Code of Civil Procedure section 1250.410, subdivision (b) because the respondent's offer was reasonable and out of good faith. [*County of Los Angeles v. 8400 S. Vermont Avenue, L.P., et al.*, *Unpub.*, Case No. B326965 (2nd Dist. Oct. 30, 2024).] Though unpublished, the decision is highly instructive on eminent domain lawsuits.

Background

Eminent Domain Complaint and Negotiation

On December 8, 2017, the County of Los Angeles (County) filed a complaint in eminent domain seeking to acquire the fee simple title in 16 adjacent assessor's parcels owned by appellants, located on the 8400 and 8500 blocks of South Vermont Avenue (Property), for construction and operation of the Vermont and Manchester Transit Priority Joint Development Project. The Property covers approximately 4.203 acres.

On December 13, 2017, pursuant to section 1255.010, the County deposited $15.7 million with the State Treasurer, representing its estimate of just compensation for the Property based on its expert opinion. In April 2018, pursuant to section 1255.460, the trial court issued an order authorizing the County to take prejudgment possession of the Property. In October 2019, the parties exchanged appraisal reports prepared by their respective experts. Another one of the County's experts appraised the fair market value of the Property at $17.98 million, and the County deposited an additional $2,279,400 with the State Treasurer to account for the difference between the amount the County had previously deposited. Appellants' expert appraised the fair market value of the Property at $65.8 million.

In January 2020, the County made a final offer under section 1250.410 in the amount of 26.6 million. The offer included "all compensation, damages, interest, costs, fees, causes of action, and claims, except for [appellants'] claim for severance damages." On the same day, appellants made a final demand under section 1250.410 in the amount of $42.5 million. The demand excluded "statutory interest and costs as provided by law." Neither the offer nor the demand was accepted.

At the Trial Court

In August 2022, the case proceeded to trial on the sole issue of the value of the Property. During his testimony, the appellants' expert revised his opinion of the Property's value to be $60.145 million. As in his earlier report, the County's expert also testified and valued the Property at $17.98 million. The jury rendered its verdict, determining that the fair market value of the Property was $39 million. The trial court subsequently entered judgment.

Appellants' Motion to Recover Litigation Expenses

In October 2022, appellants filed a motion to recover roughly $4.95 million in litigation expenses under section 1250.410. They argued that, while their final pretrial demand was reasonable, the County's

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final pretrial offer was unreasonable considering the $39 million jury verdict. According to appellants, if interest and costs were excluded from the County's offer, the offer "constitute[d] only 64 percent of the verdict," which was "almost per se unreasonable."

The County opposed the motion. It argued that its offer was reasonable, it had "used good faith, care, and accuracy in" making it, and it had not "rigidly adhere[d] to" its expert's valuation of the Property.

On December 6, 2022, the trial court issued an order denying appellants' motion to recover litigation expenses. The court found that the County's final offer had been reasonable, given the evidence introduced at trial and the compensation awarded. The court further found that the County had acted with sufficient good faith, care, and accuracy. The court noted that, even though the expert's estimate was supported by evidence including comparable sales, analysis of highest and best use, rental data, and housing projects, the County did not stubbornly adhere to its own estimate by offering a nominal amount above its expert's appraisal and offered more than $8 million above its expert's estimate, which was "hardly a token amount." The court also noted that the appellants' expert had even testified that he had found no fault with the report or methodology of the County's expert, although they had ultimately formed different opinions.

Thus, the trial court rejected the appellants' arguments that (1) the County's offer improperly included costs and fees and (2) the County's offer was unreasonable because it only constituted 64 percent of the jury verdict. Appellants timely appealed.

The Court of Appeal's Decision

Regarding the question of reasonableness, the Second District Court of Appeal examined if substantial evidence supported the trial court's decision, and regarding interpreting section 1250.410, reviewed de novo.

Applicable Law

The court first reviewed section 1250.410, which governs the award of litigation expenses in eminent domain proceedings. For section 1250.410, "litigation expenses" means the party's reasonable attorney's fees and costs, including reasonable expert witness and appraiser fees, per subdivision (e). The court noted that before the trial court can award litigation expenses to the property owner, section 1250.410 requires that it find both that the property owner's demand was reasonable and that the County's offer was unreasonable.

As general guidelines, courts examine several factors for determining the reasonableness or unreasonableness of offers, such as: (1) the amount of the difference between the offer and the compensation awarded, (2) the percentage of the difference between the offer and award, and (3) the good faith, care, and accuracy in how the amount of offer and the amount of demand, respectively, were determined. Thus, the mathematical relation between the condemner's highest offer and the award is only one factor that should enter into the trial court's determination.

The Trial Court Did Not Err

Applying these legal principles, the court concluded that the trial court did not err and that substantial evidence supported its finding that the County's final offer of compensation to appellants was reasonable.

The court found that the County's expert, in appraising the fair market value of the Property at $17.98 million, was qualified to render his opinion and the methodology he used to arrive at his valuation. At over 80 pages, the appraisal report provided a detailed analysis of the Property, and the sales comparison approach used to value it. And appellants' expert testified that he knew the County's expert professionally and respected him. From this evidence, the court concluded that the trial court could find that it was reasonable for the County to rely on its expert's appraisal, that the County exercised care and accuracy when formulating the offer, and that the County was not compelled to radically inflate its offer based on the much higher appraisal of appellants' expert.

Furthermore, the court emphasized that the County's final offer greatly exceeded its expert's appraisal by $8.62 million, even considering that this offer included costs, fees, and interest. From the court's view, even with the value adjustment to accommodate these expenses, the County's offer was more than $3.12 million more than its expert. Thus, the court found that, as the trial court reasonably concluded, the County's offer was "a significant departure" from its expert's appraisal of the Property, upon which the County could already reasonably rely. The court concluded this was substantial evidence of the County's good faith.

Finally, the court noted that the jury ultimately determined the fair market value of the Property to be $39 million, which essentially averaged the valuations of the parties' experts, which then suggests that it found both experts persuasive to an extent. Additionally, the evidence admitted at trial and the jury's award demonstrated that the Property was unique, so the valuations of rational actors could vary significantly. The court found nothing unreasonable as a matter of law about the County finding its expert more persuasive than appellants' expert and anchoring its offer to its expert's lower appraisal value.

County's Offer Was Not Invalid

Next, the court addressed the appellants' contentions. First, appellants argued that the County's offer was invalid because it included "damages, fees, causes of action, and claims" instead of simply compensation for the Property, interest, and costs. However, the court noted that nothing in the text of section 1250.410 prohibits a party from offering the type of broad, global settlement made by the County, nor does it require a party who offers or demands a lump sum to parse out its valuations of the condemned property and other categories such as costs and fees. It only requires a party to state whether the offer or demand includes interest and costs.

The court also rejected the appellants' plea to examine similar cases involving section 998 offers. First, section 998, subdivision (g)(1) makes it expressly inapplicable to an offer made by a plaintiff in an eminent domain action. Second, the court noted the section 998 offers in the cases cited by appellants were found invalid for reasons not present here and were, thus, factually distinguishable. Thus, the court rejected appellants' argument that the County's offer was invalid as a matter of law.

Trial Court Did Not Rely on Incorrect Figures

The court then disagreed with the appellants' argument that the trial court should have deducted the interest, costs, fees, and other items from the County's offer to truly compare the correct figures of the offer and the verdict. The court noted that the trial court understood what the County's offer included and excluded and that the appellants informed the trial court that the County's final offer would amount to $21 million after deducting those items. The trial court did not miscalculate or use any actual erroneous figures. Thus, the court found that the trial court was well aware of what appellants considered to be an "apples to apples" comparison of compensation and still concluded that the County's total $26.6 million offer was reasonable.

Trial Court Did Not Fail to Address Mathematical Factors

Regarding mathematical factors of the reasonableness test, the court corrected the appellants' view that these, just with the assessment of the good faith, care, and accuracy with which the demand or offer was calculated, were not required but only "general guidelines" to determine the reasonableness of an offer. Thus, it follows that a court does not necessarily commit a reversible error if it fails to analyze one of the factors.

Even then, the court found that the trial court was aware of these factors, as well as the California Supreme Court's express "disapproval of any pronouncement purporting to find unreasonableness as a matter of law based purely on mathematical disparity[.]" The trial court's order noted the County's offer and the compensation awarded. The order also discussed appellants' own calculation that the County's offer was 64 percent of the award, dividing $25.12 million (the $26.6 million offer minus appellants' estimate of interest and costs, only) by $39 million (the award). The court found nothing about these numbers compelled a finding of unreasonableness. The court further found that even appellants' alternative calculation of the percentage of the difference between the offer and the award, 52 percent (dividing $20.22 million (the $26.6 million offer minus one of appellants' estimates of interest, costs, and fees) by $39 million (the award)), would not be per se evidence of unreasonableness.

Trial Court Did Not Misapply the Good Faith Factor

Finally, the court rejected appellants' challenge of the trial court's finding that the County acted with good faith, care, and accuracy because it was not the appellate court's role to reweigh the evidence and find that it did not reflect good faith, care, and accuracy. Having already identified substantial evidence to support the trial court's finding, the court concluded that

it was irrelevant what the appellate court thought about the evidence that might have reached a contrary conclusion.

Thus, the court decided that the trial court did not err in finding the County's offer reasonable and rejecting the appellants' motion for litigation expenses.

Conclusion and Implications

The appellants' and the County's final valuation at trial were equally off by roughly $20 million compared to the final verdict of $39 million. From a layman's perspective, though the appellant was also deemed to have overestimated its property value, one could certainly feel and argue that the public entity's undervaluation of $20 million was not fair or coming from good faith. However, the court's decision demonstrates that it would consider both the actual difference in value and other various factors and circumstances to determine whether there was substantial evidence to show the trial court denied litigation expenses to the moving party. Theoretically, there could be a case where the difference in the absolute value of the public entity's valuation to the final verdict is so off that a court would find such valuation not in good faith, even if the overestimation was also proportionally off on the other side. However, as this case shows, if the expert on the other side cannot disqualify the other expert, it is likely wise to accept the wins where you can and move on strategically. The court's *unpublished* opinion is available online at: https://www4.courts.ca.gov/opinions/nonpub/B326965M.PDF

David Song is an Associate at Miller Starr Regalia, Walnut Creek, where he is a member of the firm's Litigation and Land Use Departments where he guides clients through California's complicated development permitting and California Environmental Quality Act (CEQA) compliance process at every level of government, facilitating and expediting project entitlements and related environmental review. In addition, David works with clients in connection with land use due diligence, entitlement strategy, project coordination and negotiation, and all aspects of project implementation.

REGULATORY DEVELOPMENTS

WESTERN BURROWING OWL NAMED CALIFORNIA ENDANGERED SPECIES ACT CANDIDATE SPECIES

On October 15, 2024, the California Department of Fish and Wildlife (CDFW) announced that the California Fish and Game Commission (Commission)—the group charged with, among other things, setting regulations that CDFW is charged to enforce—unanimously approved naming the western burrowing owl (Athene cunicularia hypugaea) as a candidate for potential listing as a protected species under the California Endangered Species Act (CESA).

Background

These small birds, the only owl species who nests and roosts in underground burrows, are widespread from the southern Canadian prairies throughout the western United States and into the deserts of Mexico; however, its numbers have been in steady decline for years in California. The owls typically burrow in flat grassland, shrublands, and deserts, and often live in holes created by squirrels and gophers, but the species also persists in some landscapes that are highly altered by human activities such as roadsides, water conveyance infrastructure, golf courses, and other areas where short vegetation and sparse shrubs exist. Its steady decline has been attributed to loss of suitable habitat from, among other things, greenfield development of housing and large solar energy farms, and one environmental group has estimated that the owls are nearing localized extinction in the San Francisco Bay Area, where there are reportedly fewer than 25 breeding pairs remaining. Another factor leading to the owl's decline is attributed to the widespread eradication of ground squirrels, resulting in a loss of suitable burrows, which the owls use for shelter, nesting, and protection from predators.

The Path to Listing

In March 2024, various environmental organizations petitioned the Commission seeking to list the western burrowing owl as a threatened or endangered species under CESA. Subsequently, the Commission unanimously determined that threats from direct mortality and permanent habitat loss caused by urbanization and reduction in ground squirrels warranted the species' candidacy. As a candidate species, the owl will enjoy the same CESA protections in place for state-listed threatened and endangered species while the Commission takes the next 12-18 months to make its final determination on listing.

Because the burrowing owl is afforded the same protections as listed species under CESA, this means that any "take" of the species (defined in Fish and Game Code section 86 as "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill") may subject potential offenders to both criminal and civil liability. Notably, CDFW has identified a host of construction-related activities, from grading and disking to earthmoving and heavy equipment compacting, that may potentially result in a take of the owl or its burrows. Because of the intense demand in California for development on open, flat land—the same type of land that the owl typically inhabits—the Commission's decision to list the owl will likely have immediate and widespread effects on ongoing and future development projects in many parts of California.

Conclusion and Implications

Accordingly, anyone wishing to proceed with a legal activity that may take the owl will be required to obtain an incidental take permit or other similar authorization from CDFW, which may also include requirements for relocation, avoidance, and/or the provision of compensatory off-site habitat through the purchase of, among other things, conservation easements or credits. CDFW is currently seeking data and public comments on the petition to list the western burrowing owl under CESA, and pertinent listing petition, CDFW evaluation, and updates are available on the Commission's website at: https://fgc.ca.gov/CESA

(Dustin Peterson, Meagan Somogyi)

LAWSUITS FILED OR PENDING

LAWSUIT FILED BY CALIFORNIA ATTORNEY GENERAL TAKES AIM AT DEFIANT CITY AND ALLEGED NON-COMPLIANCE WITH "HOUSING ELEMENT" LAW

The lawsuit, *California v. City of Norwalk*, filed by California Attorney General Rob Bonta and the California Department of Housing and Community Development (HCD) on November 4, 2024, highlights the ongoing struggle over new housing laws and their interplay with traditional local authority in Norwalk, California. The City of Norwalk recently implemented a moratorium on the development of supportive housing for vulnerable populations back in August 2024. Norwalk's urgency ordinance prohibits the approval of housing developments aimed at aiding the homeless and low-income individuals, citing concerns about public safety. However, the state argues that this moratorium violates multiple state housing laws designed to address California's housing crisis, ensure fair housing, and prevent discrimination.

Background

The "Housing Element Law" in California mandates that local jurisdictions, like Norwalk, plan and periodically update housing strategies to accommodate all community members, particularly low-income residents. Under this law, each city is required to submit a "housing element" for state certification, demonstrating their commitment to meeting state-assigned housing goals. Norwalk's certified housing element outlines a plan to develop affordable housing for various income levels. Yet, despite these commitments, Norwalk has approved only a small fraction of the required housing units.

In August 2024, Norwalk's City Council enacted Urgency Ordinance 24-1752U, placing a moratorium on new supportive housing and other businesses. The city argued this decision was necessary for public safety, allowing time to study the potential impacts of such developments. Critics have long argued such actions hinder affordable housing and shelter construction. California alleges that Norwalk has disregarded its certified housing element and this obstructs the state's mission to alleviate California's housing crisis.

The State's Challenge Alleges Violations under Multiple Housing Laws

The State of California bases its case on several legislative violations allegedly committed by Norwalk, which are central to the housing dispute, summarized as follows.

Urgency Ordinance Statute

California law requires any urgency ordinance to be grounded in a demonstrable threat to public health and safety. California alleges Norwalk's moratorium, which halts supportive housing without concrete evidence of an imminent health threat, lacks evidentiary support as required under this statute.

Housing Crisis Act of 2019

This act prohibits local jurisdictions from restricting or halting housing projects unless an immediate health threat is present. The state claims that Norwalk's moratorium on supportive housing violates the act, as the City did not submit the ordinance to HCD for required approval, nor provided evidence of an imminent health threat to justify the ban.

Anti-Discrimination in Land Use Law

This law prevents local governments from creating zoning restrictions that discriminate against certain groups, particularly based on income level or use of government subsidies. The state argues that Norwalk's moratorium targets low-income individuals and those experiencing homelessness, which constitutes discrimination and runs contrary to anti-discrimination laws.

Affirmatively Furthering Fair Housing (AFFH) Law

The AFFH law mandates that local governments actively foster inclusive communities and eliminate segregation. By restricting supportive housing, the

state argues that Norwalk impedes the AFFH mandate to create diverse, accessible neighborhoods for all residents, regardless of income or background.

By-Right Housing Laws

California's "by-right" laws stipulate that supportive and emergency housing should be permitted without discretionary local approval in certain zones. The lawsuit contends that Norwalk's moratorium directly contradicts these statutes by restricting supportive housing that, under state law, should be permissible by right in multifamily or mixed-use zones.

Norwalk's Justification for the Moratorium

Norwalk's urgency ordinance, passed unanimously, claims that allowing supportive housing could negatively impact the community. The City Council cited public safety concerns as the reason for needing time to study these housing developments. According to city officials, housing developments for the homeless and low-income residents could strain resources, increase public safety calls, and disrupt the community's aesthetics and traffic. However, the state argues that these concerns are not substantiated by evidence, as the ordinance offers no factual basis for labeling supportive housing as a public safety threat.

Norwalk's resistance to state housing mandates has persisted even after receiving a notice of violation from HCD in September 2024. The notice warned Norwalk that its housing element certification could be revoked if the moratorium was not repealed. On October 1, 2024, the City Council discussed repealing the moratorium but ultimately decided to continue enforcing it while attempting to negotiate with HCD.

Revocation of Norwalk's Housing Element Certification

In response to Norwalk's actions, HCD formally revoked the City's housing element certification in early October 2024. This decertification has significant implications. Without a compliant housing element, Norwalk is vulnerable to lawsuits under the "Builder's Remedy," which allows developers to bypass local zoning laws if a city fails to meet state housing obligations. Decertification also suspends Norwalk's authority to approve certain non-residential permits, effectively placing city planning under additional scrutiny.

The state contends that Norwalk's moratorium not only violates state housing laws but undermines the broader goal of addressing homelessness and housing shortages across California. Despite meetings between HCD and Norwalk officials, the City has refused to repeal the moratorium, leading to the state's pursuit of a writ of mandate to overturn the ordinance.

Conclusion and Implications

The case of *California v. City of Norwalk* underscores the tension between local autonomy and state mandates in addressing the housing crisis. With California facing a severe shortage of affordable housing and high homelessness rates, the state has enacted laws to prevent local governments from imposing unreasonable restrictions on housing development. Norwalk's moratorium raises critical questions about cities' rights to self-governance and the state's power to enforce housing policies that prioritize vulnerable populations.

Should the court rule in favor of the state, Norwalk would likely be required to repeal the moratorium and comply with state housing laws, potentially setting a precedent for other cities resistant to state-imposed housing regulations. This case could also influence future interpretations of the AFFH Law and the Housing Crisis Act, signaling to cities statewide that restrictions on supportive housing must align with state policies and evidence-based public safety concerns.

Ultimately, the case highlights California's commitment to ensuring housing accessibility and fairness for all residents, particularly low-income and at-risk populations. The outcome could reinforce the state's authority in housing policy, pushing local governments to prioritize inclusive housing strategies over localized control of land-use decisions. For more information from the Governor's Office, *see:* https://www.gov.ca.gov/2024/11/04/governor-newsom-sues-norwalk-for-unlawful-homeless-shelter-ban/
(Darien Key)

RECENT FEDERAL DECISIONS

D.C. CIRCUIT FINDS COUNCIL ON ENVIRONMENTAL QUALITY LACKS AUTHORITY TO ISSUE REGULATIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT

Marin Audubon Society v. Federal Aviation Administration, ___F.4th___, Case No. 23-1067 (D.C. Cir. Nov. 12, 2024).

In a decision published on November 12, 2024, the U.S. Court of Appeals for the D.C. Circuit held that the Council on Environmental Quality's (CEQ's) regulations implementing the National Environmental Policy Act (NEPA) were *ultra vires* and thus invalid. The court held that CEQ lacked authority to issue such regulations because its rulemaking authority was tied not to Congress but to an Executive Order of the President.

Factual and Procedural Background

The National Parks Air Tour Management Act of 2000 (Act) requires the Federal Aviation Administration (FAA)—housed within the Department of Transportation—and the National Park Service (NPS)—housed within the Department of the Interior—to develop plans regulating tour flights over national parks throughout the United States.

Pursuant to the Act, the Agencies issued an Air Tour Management Plan governing tourist flights over four Bay Area, California national parks: the Golden Gate National Recreation Area, Muir Woods National Monument, San Francisco Maritime National Historical Park, and Point Reyes National Seashore. The Agencies determined that they did not need to prepare an environmental analysis of the Plan under the National Environmental Policy Act upon finding that the Plan, as compared to what currently existed, would cause little to no additional environmental impacts.

Several environmental organizations and one area resident petitioned for review of the Plan, arguing that the Agencies violated NEPA and the regulations that implement NEPA promulgated by the Council of Environmental Quality, an entity within the Executive Office of the President of the United States.

The D.C. Circuit's Decision

At issue on appeal was whether the Agencies complied with CEQ's NEPA regulations. Petitioners argued that the Agencies violated CEQ regulations by foregoing an environmental assessment; the Agencies denied the claim and defended their action by invoking the same regulations. Upon review, the D.C. Circuit declined to address the merits of these arguments and instead independently held that the CEQ's regulations, which purport to govern how all federal agencies must comply with NEPA, are *ultra vires* and thus invalid.

Historical Legal Background

The court began by detailing the background of NEPA and the CEQ. The CEQ traces its rulemaking authority not to a legislative act, but instead to an Executive Order (EO) of the President. Because a presidential EO is not legally binding or have the force of law, CEQ's authority to issue regulations on such a basis raises a separation of powers issue.

NEPA, on the other hand, is a legislative act that Congress adopted in 1969. NEPA requires each federal agency to issue a detailed statement addressing the environmental impact of any proposed major federal action that significantly affects the quality of the human environment. All federal agencies must develop procedures that implement NEPA. NEPA also created the CEQ within the Executive Office of the President, to be run by three presidentially appointed Commissioners who are confirmed by the Senate. CEQ's job was to "review and appraise" agencies' compliance with NEPA, make recommendations to the President with respect thereto, and to develop and recommend to the President national policies to foster and promote the improvement of environmental quality.

In 1970, President Nixon issued an EO instructing CEQ to issue guidelines to federal agencies for preparing the detailed environmental statements NEPA required. In response, CEQ published a memorandum containing guidelines for federal agencies to consider when considering or preparing environmental impact statements.

At the time, several courts regarded CEQ's role as "merely advisory" because it lacked authority to prescribe regulation governing compliance with NEPA. CEQ, however, held a different view, and considered its guidelines to be mandatory, non-discretionary standards by which federal agencies must comply.

The D.C. Circuit in *Sierra Club v. Morton,* 514 F.2d 856 (1975), agreed with CEQ's treatment of its NEPA guidelines as the equivalent of legally binding rules that were entitled to great respect and heightened deference.

In 1977, President Carder issued an EO that empowered CEQ to issue "regulations," as opposed to "guidelines," which would govern federal agencies and their implementation of NEPA. The EO required all federal agencies to comply with CEQ's regulations unless doing so would violate federal law. In compliance with this EO, CEQ issued a large body of new law comprised of 92 new regulations that set forth uniform standards applicable throughout the federal government, which was binding on all federal agencies, federal courts, and non-federal litigants in NEPA cases. As authority for its regulations, CEQ invoked President Carter's EO and "the President's Constitutional and statutory authority."

The CEQ's NEPA regulations erected a framework that largely remains effect to this day. The regulations described the "detailed statement" for proposed agency actions that may significantly affect the quality of the human environment. In particular, a federal agency must begin by determining whether the proposed action would have a significant environmental effect and then document its findings in an Environmental Assessment. If the agency finds the action would be significant, it must prepare an Environmental Impact Statement (EIS); if it does not so find, the agency must issue a Finding of No Significant Impact (FONSI) documenting its conclusion.

CEQ's NEPA Regulations are Ultra Vires

With this contextual background in mind, the D.C. Circuit explained that executive agencies, such as the FAA and the NPS, are creatures of statute and therefore have no power to act except to the extent authorized by Congress. Thus, for CEQ's regulations to be legally binding on those agencies, as well as on courts and the public, a nexus must be established between the regulations and some delegation of the requisite legislative authority by Congress. In other words, the court must determine whether CEQ as an executive or independent agency has statutory authority from Congress to issue its NEPA regulations.

Although CEQ publishes its NEPA regulations in the Code of Federal Regulations, such publication is no measure of the agency's authority to issue rules that appear there. Here, NEPA's provisions provide no support for CEQ's authority to issue binding regulations. No statutory language states or suggests that Congress empower CEQ to issue rules binding on other agencies—that is, to act as a regulatory rather than advisory agency. The court reiterated:

> NEPA contains nothing close to the sort of language Congress typically uses to confer rulemaking authority.

The court also noted that "[n]o statute confers rulemaking authority on CEQ." By way of example, the court cited the Environmental Quality Improvement Act of 1970, which established the Office of Environmental Quality that is headed by the CEQ's chairman. Even as the director of that office, CEQ's chairman only has the authority to "assist" other federal agencies and may only "promulgate regulations" related to the Office's funding for research studies and projects.

The court qualified that the Supreme Court's prior pronouncements on CEQ's regulations could not rescue them. Although the Court once wrote that those regulations were "entitled to substantial deference," the statement did not result from the Court's examination of CEQ's authority to issue judicially enforceable regulations, nor did other analogous stray remarks in similar opinions.

CEQ Regulations Are Not a Mere Delegation of the President's Authority

The court further concluded that the CEQ regulations were not a mere delegation of the President's authority under the "Take Care Clause" of the Constitution. While EOs are focused solely on the

internal management of the Executive Branch and thus create no private rights and are not judicially reviewable, NEPA imposes statutory obligations that agencies must execute and in turn affect private parties who make seek judicial review of those agencies' actions. The court reasoned:

> If all federal agencies are bound by the CEQ regulations and must follow them in carrying out their obligations under NEPA, and if the regulations are enforceable by courts, then those regulations cannot be justified solely as an exercise in a President's oversight of his Administration.

To this end, the Supreme Court has previously held that the Take Care Clause cannot be used to bypass agencies' limited status as "creates of statute" because the Constitution does not permit the President to seize Congress' lawmaking power by issuing an order that, like a statute, authorized a government official to promulgate rules and regulations.

Based on these foregoing reasons, the court held that CEQ had no lawful authority to promulgate NEPA regulations.

Conclusion and Implications

The D.C. Circuit's landmark decision marks another cataclysmic turn in the rapidly evolving federal judicial landscape. The decision comes on the heels of the Supreme Court's blockbuster opinion in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), which overturned the long-standing *Chevron* doctrine that previously afforded significant deference to federal agencies' rulemaking authority. CEQ's regulations are a cornerstone to NEPA practice and how federal agencies conduct environmental review of major actions, approvals, and funding decisions. While the effects of the D.C. Circuit's opinion have yet to be felt, it will nevertheless certainly impact practitioners on both sides of the aisle. Though the opinion does not offer much guidance on how agencies should move forward in light of the court's holding, it does note that federal agencies may adopt their own NEPA regulations that either incorporate or closely mirror those promulgated by CEQ. However, doing so will be subject to the notice and comment rulemaking proceedings under the Administrative Procedure Act before they can go into effect. Accordingly, it remains to be seen how agencies and practitioners will respond, and how this decision will affect any pending projects or approvals that are currently undergoing NEPA review.

A copy of the D.C. Circuit's opinion is available online at: https://media.cadc.uscourts.gov/opinions/docs/2024/11/23-1067-2084381.pdf.
(Bridget McDonald)

U.S. DISTRICT COURT ENJOINS GROUNDWATER ORDINANCE DUE TO POTENTIAL DISCRIMINATION

Ger Chong Ze Chang, et al, v. County of Siskiyou, ___F.Supp.4th___, Case No. 2:22-cv-01378-KJM-AC (E.D. Cal. Oct. 25, 2024).

In October, a U.S District Court granted in part a preliminary injunction against the County of Siskiyou (County) for employing county zoning ordinances in a racially discriminatory way against Asian American customers. The County's ordinance was designed to combat contamination to water supplies resulting from illegal marijuana growing operations.

Background

Siskiyou County is a large, mostly rural and undeveloped county on California's northern border. It has banned commercial cannabis cultivation for many years and has contended with the effects of illegal cannabis grow operations within its territory. Pesticides found in remote illegal marijuana grow sites contain suspected carcinogens that can pollute groundwater, are highly toxic to fish and aquatic invertebrates, and that have been reported to cause nausea, vomiting, eye and throat irritation, shortness of breath, redness of the face, severe eye irritation, skin rash, blistering, and itching. Authorities have found flammable, corrosive, and combustible liquids at illicit grow sites, which can increase the risk

of wildfires; pits filled with trash, debris, hazardous waste, and pools or containers of unknown liquids, illegal burn pits, human waste and sewage dumped from trailers directly into the ground; and illegally diverted water.

Most commercial cannabis growers in Siskiyou County use water trucks filled with pumped groundwater to supply their crops. In 2020, the County passed an ordinance banning the use of groundwater for illegal cannabis cultivation. The county also began investigating and enforcing its zoning ordinances against suspected water suppliers—landowners who were pumping water from the ground and selling the pumped water to illicit cannabis cultivation operations. Despite the County's new ordinance and zoning enforcement efforts, water trucks still appeared to be transporting groundwater to illicit cannabis operations within the County. The County thus passed two more ordinances requiring landowners to obtain a permit in all instances in which groundwater is extracted and transported off the parcel from which it was extracted and imposing permit requirements on water truck drivers.

As part of the County's enforcement efforts, the County began investigating water extraction and hauling activities occurring on the properties of Asian American residents. According to a prior lawsuit and as alleged in the instant case, the County's ordinances had effectively shut off the supply of water certain Asian American residents relied on to meet their basic needs, from drinking and cooking to raising animals and growing gardens. Other Asian American residents, who are plaintiffs in the instant case, allowed water hauling trucks on their properties to provide water to elderly family and other clan members who relied on that water supply, but the County ordinances made doing so unaffordable due to escalating fines. Moreover, plaintiffs alleged that they were unable to change their zoning designations to allow for water hauling, forcing those clan members who relied on the water to drill wells that they could not afford. Other of the plaintiffs alleged that they needed groundwater delivered by truck for drinking, cooking, bathing, washing clothes, caring for pets, growing food, raising livestock, and fighting fires.

The District Court's Decision

Plaintiffs alleged that the County's recent enforcement efforts were arbitrary, extreme, nonsensical and discriminatory in violation of their Due Process rights under the federal Constitution. To obtain a preliminary injunction, plaintiffs must establish four things by a clear showing: they are likely to succeed on the merits, they are likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in their favor, and an injunction is in the public interest. *City & County of San Francisco v. U.S. Citizenship & 19 Immigr. Servs.*, 944 F.3d 773, 788–89 (9th Cir. 2019). Alternatively, serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest. District courts within the Ninth Circuit must consider whether plaintiffs are likely to succeed on the merits of any constitutional claims they assert.

The District Court ruled that plaintiffs were likely to succeed on their Due Process claim. According to the court, the Fourteenth Amendment Due Process Clause prohibits state government bodies from depriving any person of life, liberty, or property, without due process of law. U.S. Const. 7 amend. XIV, § 1. As the court explained, this language demands fair procedures by its own terms, but it also bars some government actions outright, regardless of the fairness of the procedures used to implement them, and prevents government power from being used for purposes of oppression.

While the substantive protection does not generally impose an affirmative duty on governments to protect their citizens' lives, liberty, and property from all harms, several federal courts of appeals have held government actors violate the Fourteenth Amendment if, through deliberate indifference, they take affirmative actions exposing a person to a danger that person would not otherwise have faced. This is commonly known as the state-created-danger doctrine, which is applied using a two-part test: (1) plaintiffs must allege and ultimately prove affirmative conduct on the part of the state that exposed them to an actual, particularized danger they would not otherwise have faced, and (2) plaintiffs must allege and ultimately prove the defendants acted with deliberate indifference to the danger. The court found that plaintiffs were likely to pass the test because (1) the county took affirmative action by enforcing its zoning ordinances against well owners who have sold or do-

nated pumped well water to people on other properties and those people were in a worse position as a result of the County's actions and (2) the danger was obvious and foreseeable to the County, and perhaps even the result they specifically intended. Accordingly, the court fashioned a preliminary injunction to prevent the County from enforcing its ordinances as to residents' properties that lacked a residential well or municipal water source, subject to certain future water supply conditions that, if shown by the County, would lift the injunction.

Conclusion and Implications

It remains to be seen whether plaintiffs will ultimately prevail on their Constitutional claims. However, the District Court ruling suggests that strict water extraction requirements that prevent minimal health and safety needs from being met might be subject to Constitutional constraints, although such constraints may be narrowly fashioned to protect only those affected while maintaining important enforcement tools held by public agencies. The court's ruling is available here: https://www.courthousenews.com/wp-content/uploads/2024/10/siskiyou-water-injunction.pdf
(Miles Krieger)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT AFFIRMS COUNTY RIGHT-OF-WAY TO RELATED TO LEVEE PROJECT ACCESS AREA TO DETERMINE SUBSTANTIAL IMPAIRMENT

Campagna, et al., v. Delta Farms Reclamation District No. 2029, Unpub.,
Case No. C097628 (3rd Dist. Nov. 4, 2024).

In an *unpublished* opinion filed on November 4, 2024, the Third District Court of Appeal affirmed the trial court's finding that, though the marina parcels were not physically abutted to the county right-of-way at the time of ownership transfer, the parcels were considered abutted the county right-of-way and that the levee lift project substantially impaired a right of access to the levee road because the parcels were abutted at the time the road deed was conveyed.

Background

The Marina Parcels

Empire Tract is an island in the San Joaquin Delta that was created when various sloughs were cut along the San Joaquin River between the 1860s and 1918. Eight Mile Road transverses the island and dead ends at Empire Tract Road/Correia Road, a county road running along the crown of a levee that protects the island from flooding (the levee road). The underwater parcels in question (the marina parcels) are located along the levee road, to the north and south of Eight Mile Road, along the western edge of the island. The eastern edges of those parcels are underwater, at the base of the levee that protects Empire Tract.

After some change of hands, in 2014, an entity holding a second deed of trust secured by the marina parcels conveyed the deed of trust to John Campagna, who formed Empire Tract Property, LLC (Empire Tract Property, collectively Campagna), and conveyed the deed of trust to that entity. In 2018, Empire Tract Property purchased the parcels.

The District's Levee Lift Project

Delta Farms Reclamation District No. 2029 (District) owns the land next to the marina parcels, including the levee and levee road. In 1946, the previous owner of the land abutting the marina parcels, who also owned the marina parcels at that point in time, conveyed a road easement 40 feet in width to San Joaquin County (County). That road easement was measured off the center line of the levee. After a 1955 levee breach, a 150-foot strip of land was transferred to the State of California and later owned by the District for levee maintenance. In 1998, the District leased portions of its property to marina owners until 2014.

Meanwhile, in 2013, the District agreed with the California Department of Water Resources (DWR) to fund District's action of lifting the levee adjacent to the marina (the levee lift project), which required widening the levee crown to 24 feet where a county road existed and 18 feet elsewhere to reduce costs. The District proposed the County abandon part of the levee road due to insufficient funds for reconstruction to County standards, but this was not approved as the District only provided non-permanent easements instead of permanent road access deeds.

In 2017, the District obtained a design exception to construct a non-standard county road along the levee by the marina parcels, as widening the roadbed to county standards would have cost over $1 million.

The levee lift project, completed in January 2018, raised the crown by almost three feet and narrowed it from up to 45 feet to about 18 feet along the marina parcels. Parts of the crown now measure as narrow as 16 1/2 feet, with none wider than 20 feet. A non-standard county road was paved on the crown, eliminating parking and complicating boat launches due to the steep slope. Witnesses noted increased difficulty accessing pedestrian gangways, some of which became separated from the roadway, posing a risk of falls.

At the Trial Court

In May 2018, Campagna sued the District, asserting causes of action including inverse condemnation.

Following a court trial on the question of liability, the trial court ruled that the marina parcels abutted the county right-of-way for the levee road, and that the levee lift project substantially impaired access to the road, resulting in a taking or damaging of private property for public use within the meaning of article 1, section 19 of the California Constitution. Thereafter, a jury determined that the damages attributable to the impaired access was $300,000.

This appeal involves only the trial court's liability determination. Relevant parts of the trial court's statement of decision will be set forth in the discussion portion of this opinion.

The Court of Appeal's Decision

The Third District Court of Appeal rejected the District's argument that there is insufficient evidence (1) that the marina parcels abutted the county right-of-way such that a right of access to the levee road was substantially damaged, and (2) that the marina parcels were singled out for harm from the levee lift project.

District's First Contention

After reviewing applicable law related to inverse condemnation, the court addressed the District's contention that there was insufficient evidence that the marina parcels abut the county right-of-way. The court noted that the trial court found the following evidence. In 1946, the owner who conveyed the road deed to the County, J.O. Hayes, Jr., owned both the property on which the levee sits and the abutting marina parcels. The road deed granted a 40-foot-wide easement from the levee's crown. Hayes operated a marina at that point in time, which had access to this road. Later, ownership of the marina parcels and District properties transferred from Hayes. The trial court determined that the road easement's western boundary likely abutted the marina in 1946, though the levee's crown has since shifted landward due to elevation changes. Despite this, the marina-maintained access to the levee road until the levee lift project. Testimonies also confirmed that the marina owners need a perpetual easement for the County to abandon the road, as the marina parcels still currently abut it. The court found this was sufficient to establish that the marina parcels have a right of access to the levee road.

However, the District argued that the parcels needed to have physically abutted the right-of-way, not in 1946, but rather in 2011 or 2014, when Campagna and Empire Tract Property obtained their respective interests in the marina parcels, citing *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385 (*Ricards*). The court found the District was conflating the *Ricards* court's point, which was about the *ownership* of the property at the time of the taking, with the physical *abutment* of the marina parcels to the levee road at the time ownership was obtained. The court noted these two were separate things, which the *Ricards* court did not deal with.

Instead, citing another Supreme Court case, *Bacich v. Board of Control of California* (1943) 23 Cal.2d 343 (*Bacich*), the court explained that, so long as the marina parcels abutted the county right-of-way at the time the road deed was conveyed, those parcels had a right to access the road "in the nature of an easement in the [road] which is appurtenant to [the] abutting property." Thus, the court declined to hold as a matter of law that the marina parcels were not abutting the right-of-way, even if the District was correct that they no longer physically touched each other because in 1946 and for decades afterward, the marina parcels abutted the county right-of-way along their entire eastern boundary. Additionally, the court noted again that there were testimonies from the County's Deputy Director of Engineering for the Department of Public Works that the marina parcels currently abut the road.

District's Second Contention

The court also did not find the District's second argument persuasive, that even if there was a right of access, the evidence did not support a necessary finding that the marina parcels were singled out for harm from the levee lift project.

The court analyzed two cases the District cited and distinguished that those dealt with property non-abutting properties. Another case the District relied on was about abutting property, but the court there found that the right of access was not substantially impaired by increased traffic on the street. The court found *Bacich* was more analogous, where a public entity altered the grade of an abutting road and the court found that to have substantially impaired the abutting property's access to that road.

Thus, the court affirmed the trial court's findings and judgment that the levee lift project substantially impaired the marina parcels that abut the county right-of-way.

Conclusion and Implications

This case is educational in showing that, for inverse condemnation cases, courts make a clear distinction between ownership of the property at the time of the taking and abutment of that property to the levee road at the time ownership was obtained when determining there was substantial impairment on the property affected. The court's *unpublished* opinion is available online at: https://www4.courts.ca.gov/opinions/nonpub/C097628.PDF
(David Song)

FIRST DISTRICT COURT AFFIRMS TRIAL COURT'S DENIAL OF SEVENTH REQUEST FOR EXTENSION BY ATTORNEY IN CEQA CASE

Friends of the South Fork Gualala v. Department of Forestry and Fire Protection, ___Cal.App.5th___, Case No. A168163 (1st Dist. Nov. 22, 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. On 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.

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 administrative 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 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's opinion is available online at: https://www4.courts.ca.gov/opinions/documents/A168163A.PDF
(Mona Goodarzi, Kathryn Casey)

FIRST DISTRICT COURT UPHOLDS USE OF CEQA CATEGORICAL EXEMPTION FOR CONVERSION OF OIL WELL TO INJECTION WELL

Sunflower Alliance v. California Department of Conservation, ___Cal.App.5th___, Case No. A167698 (1st Dist. Sept. 6, 2024).

In *Sunflower Alliance v. California Department of Conservation*, the First District Court of Appeal found that substantial evidence supported the California Department of Conservation's Division of Geologic Energy Management's (CalGEM's) determination that converting a former oil well into an injection well constituted a negligible expansion of use and therefore fit within CEQA's Class 1 categorical exemption. The Court of Appeal held that a project is not automatically disqualified from the categorical exemption by any new use but instead depends on whether the change in use, and the environmental risks of the change, are negligible.

Factual and Procedural Background

In 2020, Reabold California LLC filed an application with the Department of Conservation's Division of Geologic Energy Management (CalGEM) to convert a former oil well in Contra Costa County into a Class II injection well. The well was drilled in 1963 and operated for over 20 years before it was plugged. Reabold operates two nearby oil wells that produce about 300 barrels of water per day. Currently, the produced water is transported to a disposal site 32 miles away, which requires ten truck trips per week. Reabold intends to use the proposed injection well to eliminate those trips.

The application proposed minor changes to the existing injection site, including removal of the well plug, installation of injection equipment inside the well, and use of the existing well pad and access road. The application was reviewed by CalGEM, the State Water Resources Control Board, and the Regional Water Quality Control Board. Reabold submitted a technical report from an engineer, a geologist, and a hydrologist, which concluded that the injected water would be confined to the aquifer by a barrier of about 1,000 vertical feet of shale. The agencies ultimately approved the application.

Regarding the California Environmental Quality Act (CEQA), CalGEM found that the project fit within the Class 1 categorical exemption (CEQA Guidelines, § 15301) as a "minor alteration" of an existing facility involving "negligible or no expansion" of a well's former use. CalGEM had previously promulgated a regulation determining that minor well conversions and injections may fall within the Class 1 exemption, based on a case-by-case and fact-intensive inquiry. In this case, CalGEM noted that the injection equipment would be installed within the existing well boring and would require no significant surface equipment or new drilling. In addition, the project would eliminate the need for routine trucking of produced water from Reabold's active wells.

At the Trial Court

Sunflower Alliance filed a petition for writ of mandate challenging CalGEM's use of the categorical exemption. The trial court held that, despite the fact that the physical modifications to the well would be minor and fit within the exemption, the exemption did not apply because injection, rather than extraction, is a "significantly different use." The court entered judgment in favor of Sunflower Alliance and issued a peremptory writ of mandate directing CalGEM to set aside its approval of the project. CalGEM complied with the writ, and Reabold appealed.

The Court of Appeal's Decision

The First District Court of Appeal reversed, holding that well conversion projects are not inherently outside of the Class 1 exemption's scope. In reviewing CalGEM's decision to apply the exemption, the court considered whether the agency abused its discretion in determining that the exemption applied to this project, and whether substantial evidence in the record supported the decision.

First, the court considered whether well conversion projects, as a group, are beyond the exemption's scope. Sunflower Alliance argued that any new use of a modified well is an impermissible expansion. On the other hand, Reabold argued that the applicability of the exemption instead depends on the degree of change; here, since the change essentially just revers-

es the process, the degree of change is insignificant.

The court did not fully agree with either approach. To determine the applicable rule, the court looked to CEQA's plain language to conclude that the exemption does not inherently bar any new use. Instead, the court interpreted the exemption to allow changes or expansions in use that are inconsequential, and to exclude changes in use that threaten environmental harm. In other words, a "change in use is unimportant, as far as CEQA goes, if the risk of environmental harm from the new use is negligible." The court supported this interpretation of the Guidelines by considering the fundamental purpose of categorical exemptions, which is to exclude from CEQA review certain classes of projects that have been determined to not have significant environmental impacts.

Based on this interpretation, the court found that the project fit within the Class 1 categorical exemption because it only included "minor alterations" to "existing equipment." The court reiterated that conversion to an injection well requires minor alterations to the existing well, and no significant changes to existing roads, the well pad, or surrounding vegetation. Further, the court found that the change in the well's use was negligible, since the well formerly pumped oil and water from an exempt aquifer, and it would simply inject water into the same aquifer. Part of CalGem's regulatory determination in approving the site as a Class II well is ensuring that the injected water cannot escape the aquifer and harm people, property, or the environment. Based on this determination, the court concluded that the environmental risks of the conversion are negligible.

The Court of Appeal then rejected Sunflower Alliance's argument that substantial evidence did not support CalGEM's decision to apply the categorical exemption to the project. The court pointed out that Sunflower Alliance did not dispute any particular findings or argue that the agency made a mistake, but instead "briefly raised concerns that there 'may' be significant adverse impacts although it is 'unclear.'" The court first rejected Sunflower Alliance's concern about the injected water's impact on the aquifer's water quality, finding no evidence in the record of negative effects on the already poor-quality water in the aquifer. The court then found that Sunflower Alliance had no basis to question the agencies' technical conclusions in determining that the injected fluids would not escape from the aquifer. Therefore, the court concluded that substantial evidence supported CalGEM's determination that the project fit within the Class 1 exemption.

Lastly, the court rejected Sunflower Alliance's argument that CalGEM improperly imposed mitigation measures to eliminate the project's alleged environmental impacts. CalGEM adopted several conditions in approving the well, which Sunflower Alliance asserted were mitigation measures used to mitigate the project into the categorical exemption. The court stated that the conditions and regulations that Sunflower Alliance pointed to were imposed in response to CalGEM's standard that it usually required for permit issuance. Compliance with these standards is a legally mandated element of the project, not a CEQA measure to lessen the project's environmental impact in order to fit within a categorical exemption.

Conclusion and Implications

The First District Court of Appeal's opinion clarifies its approach to analyzing whether and how a proposed project qualifies for CEQA's Class 1 categorical exemption. The court emphasized relying on the plain language of Guidelines section 15301 and adhering to the exemption's underlying purpose in interpreting its requirements. Ultimately, the court found that the relevant inquiry is whether a proposed change and the environmental impacts of that change are negligible, and it rejected the contention that the Class 1 categorical exemption inherently does not apply to any new proposed use. The First District Court of Appeal's opinion is available at: https://www.courts.ca.gov/opinions/documents/A167698.PDF.

(Hannah Rider, Bridget McDonald)

SIXTH DISTRICT COURT UPHOLDS CITY'S DETERMINATION THAT GROCERY OUTLET QUALIFIED FOR CEQA'S CLASS 32 URBAN INFILL CATEGORICAL EXEMPTION

Working Families of Monterey County v. King City Planning Commission, ___Cal.App.5th___, Case No. H051232 (6th Dist. Nov. 18, 2024).

In an opinion issued on October 21, 2024, and certified for publication on November 18, 2024, the Sixth Appellate District in *Working Families of Monterey County v. King City Planning Commission* upheld King City's determination that a proposed Grocery Outlet store qualified for the "urban infill" categorical exemption from the California Environmental Quality Act (CEQA). The court held that the exemption's use of the terms "infill development" and "substantially surrounded by urban uses" was limited to CEQA's statutory definitions of analogous terms.

Factual and Procedural Background

Factual Background

In April 2021, Real Party in Interest Best Development Group, LLC filed applications with the King City Community Development Department for various permits and entitlements for a proposed Grocery Outlet store to be located in King City. The store would be located on a 1.6-acre former car sales lot adjacent to Highway 101 and would feature a 18,187-square foot building with 72 parking spaces and 13,908 square feet of landscaping. The surrounding vicinity includes commercial buildings, parking lots, a cemetery, vacant land, and the Monterey County Sheriffs' Department.

As part of its planning application, Best Development submitted an environmental assessment that concluded the Project would not result in significant environmental impacts to traffic, noise, air quality, water quality, or other factors. Based on this, the assessment concluded that the Project qualified for the "Class 32" "urban infill development" categorical exemption from CEQA. (CEQA Guidelines, § 15332.)

The Planning Commission held a public hearing where it resolved to approve the Project and categorically exempt it from CEQA. Efrain Aguilera and United Food and Commercial Workers Local 5 appealed the Planning Commission's decision to the City Council, arguing that the Project did not qualify for the Class 32 exemption and instead required full environmental review. The City Council held a public hearing during which it denied the appeal, upheld the Project approvals, and concluded the Project was categorically exempt from CEQA.

At the Trial Court

Aguilera and Working Families of Monterey County filed a writ petition challenging the Council's approval of the Project, contending that the class 32 exemption did not apply. In particular, petitioners argued that the Project's location in King City did not meet CEQA's definition of an "urbanized area" as defined under either Public Resources Code section 21071(a) or CEQA Guidelines section 15387. Petitioners further argued that the Project site did not meet CEQA's definition of an "infill site" under Public Resources Code section 21061.3 because the site was not previously developed for "qualified urban uses." For these reasons, Petitioners maintained that the City was required to perform full environmental review to study the cumulative impacts of the project, including the potential presence of hazardous materials resulting from the site's former operation as a car sales lot.

The Monterey Superior Court denied the petition. The court ruled that the Class 32 exemption does not require a qualifying project to be located on an "infill site" in an "urbanized area" as those terms are defined in CEQA (Pub. Resources Code, §§ 21061.3, 21071.) The court further held that substantial evidence supported the City's determination that the Project met the requirements of the Class 32 exemption and that petitioners failed to show otherwise.

In so holding, based on the rules of statutory interpretation, the court declined to read the statutory terms "infill site" and "urbanized area" into CEQA Guidelines section 15332. Moreover, the court concluded that substantial evidence supported the City's application of the exemption to the project because

aerial photographs showed the Project site was substantially surrounded by urban uses.

The Court of Appeal's Decision

On appeal, petitioners repeated their claims that the Class 32 exemption could not be applied to the Project because: (1) the exemption, as provided by CEQA Guidelines section 15332, must be construed to require an exempt project to be located in an "infill site" in an "urbanized area" surrounded by "qualified urban uses" as those terms are defined un Public Resources Code sections 21061.3, 21071, and 21072, respectively, and in CEQA Guidelines section 15387; (2) substantial evidence did not support the City's application of the Class 32 exemption because the Project site is located in a rural area and therefore does not qualify as an infill site in an urbanized area surrounded by qualified urban uses; and (3) the City failed to adequately analyze air qualify impacts based on the Project's proximity to Highway 101.

Interpretation of the Class 32 "Urban Infill" Categorical Exemption

Petitioners' first claim challenged the interpretation of Guidelines section 15332, subdivision (b), which provides that a project may qualify for the underlying infill exemption if the "proposed development occurs within city limits on a project site of no more than five acres *substantially surrounded by urban uses*."

The parties disagreed with each other's respective interpretations of the exemption's use of the terms "infill development" and "substantially surrounded by urban uses." In particular petitioners maintained that, because Guidelines section 15332 does not define either term, those terms must be interpreted by using CEQA's statutory definitions of "infill site," "urbanized area," and "qualified urban uses." And, based on those terms' respective definitions, the Project did not qualify for the Class 32 exemption because King City is not located in an "urbanized area" and the Project site is not an "infill site."

The City and Real Party responded that there is no authority for the proposition that CEQA's statutory definitions should be used in interpreting the categorical exemptions provided by the CEQA Guidelines because the rules of statutory interpretation would improperly compel a contrary result.

The court agreed with the City and Real Party. The court noted that CEQA categorical exemptions must be construed narrowly and therefore should not be expanded or broadened beyond the reasonable scope of their statutory language. As such, the court turned to the intent of the Natural Resources Agency when it issued Guidelines section 15332. In its initial statement of reasons for promulgating the exemption, the Agency noted that exempting infill development would help reduce widely dispersed development and historic urban sprawl that now stood to degrade the quality of life of the state's residents. To curb these effects, the Agency found that projects that met specific requirements in already-developed areas would not pose a significant effect on the environment. Later, the Governor's Office of Planning and Research defined "infill development" as:

> . . .building within unused and underutilized lands within existing development patterns, typically but not exclusively in urban areas. Infill development is critical to accommodating growth and redesigning our cities to be environmentally- and socially-sustainable.

Based on these statements of regulatory intent, the court concluded that they showed no indication that the state's regulators intended to limit Guideline section 15332's categorical exemption to infill projects that meet the criteria set forth in the CEQA definitions of "infill site," "urbanized area," and "qualified urban uses." Not only are those terms absent from the plain language of Guidelines section 15332, but the stated regulatory intent lacks any indication that the population requirements prescribed by the definition of "urbanized area" was intended to limit the types of "cities" where exempted infill projects could be developed. To the contrary, the regulators expressly intended to reduce sprawl by exempting from CEQA developments in unused or underutilized areas that were already in developed areas, which were typically, but not exclusively, urban areas.

The court similarly found that the rules of statutory interpretation barred petitioners' interpretation of Guidelines section 15332. Notably, based on the Guideline's omission of specific terms such as "infill site," "urbanized area," and "qualified urban uses," the court was prohibited from broadening or narrowing the scope of the Guideline by reading into it language

that otherwise did not appear. For example, Guideline section 15387's definition of "urbanized area" was specifically tailored to certain contiguous cities with minimum population numbers. The term, however, is not used in Guidelines section 15332. Therefore, the court could not equivocate section 15332, subdivision (b)'s phrase "surrounded by urban uses" to be the same as an "urbanized area" defined by section 15387.

Finally, the court emphasized the Legislature's express directive that courts not interpret the CEQA statute *or* Guidelines "in a manner which imposes procedural or substantive requirements beyond those" explicitly stated in either body of law. To adopt Petitioners' interpretation of Guidelines section 15332 would require:

> ... environmental review of projects that one could argue *may* have a significant environmental effect, but that the Governor's Office of Planning and Research and the Secretary of the Natural Resources Agency, exercising the authority of the Legislature has by statute delegated to them and required them to exercise, *have already determined do not, in fact,* have a significant effect on the environment.

For these reasons, the court found no merit to petitioners' contention that CEQA Guidelines section 15332 should be interpreted by applying CEQA's statutory definitions of "infill site," "urbanized area." and "qualified urban uses." Accordingly, the court further held that the City did not err in determining that the Grocery Outlet Project came within the Class 32 categorical exemption for infill development.

Conclusion and Implications

The Sixth District's opinion is a welcome addition to the growing body of case law interpreting the meaning and effect of the Class 32 categorical exemption for "urban infill" projects under CEQA Guidelines section 15332. The court's opinion builds upon prior opinions that have dissected the language of subdivision (b), which requires qualifying developments be "substantially surrounded by urban uses." The court's straightforward analysis applies well-established rules of statutory interpretation to decline reading superfluous words into the exemption that the Legislature otherwise omitted. As the court reiterated, had it attached CEQA's definitions of "infill site," "urbanized area," and "qualified urban uses" to subdivision (b), various infill developments that would have otherwise been eligible would suddenly be disqualified from relying on the Class 32 exemption—a result that would contravene the Legislature's intent of discouraging the urban sprawl that has historically exacerbated the State's environmental concerns. A copy of the Sixth District's opinion is available online at: https://www4.courts.ca.gov/opinions/documents/H051232.PDF.
(Bridget McDonald)

Editors' Note: Attorneys from the author's law firm represented Real Party in Interest Best Development Group, LLC in the litigation summarized in this article.

LEGISLATIVE UPDATE

2024 LEGISLATIVE YEAR END WRAP UP

The 2023-2024 Legislative Session has come to a close and a number of bills related to land use have been signed by the Governor. The following bill summaries reflect bills that were enacted during the second year of the two-year Legislative Session. Unless otherwise noted, all bills signed by the Governor will go into effect on January 1, 2025.

The Legislature continued its efforts to address the housing crisis, with the Governor signing bills that, among other things, refine the Housing Accountability Act to expand its protections, and State Density Bonus Law to extend its provisions. Several CEQA bills were also enacted that expand or extend the sunset date of existing exemptions and also broaden the types of projects eligible for streamlined judicial review in the event of CEQA litigation.

Affordable and Related 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 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. The bill 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 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 percent 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 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 10 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 application 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 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 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 3122 (Kalra) (Gov Code § 65913.4, as amended by Stats. 2024 ch.754). This bill 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 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 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 also prohibits local agencies from requiring replacement of parking that may be lost from ADU development.

California Environmental Quality Act

SB 174 (Committee on Budget and Fiscal Review) (Gov. Code §§ 9112, 9112.5, 9125, and 14692, as amended by Stats. 2024 ch. 74; Pub. Resources Code § 21080.56, as amended by Stats. 2024 ch. 74). This bill exempts the Capitol annex project from CEQA and also extends existing exemptions by

five years for projects that conserve, restore, protect, enhance, or assist in the recovery of California native fish and wildlife and their habitats.

SB 312 (Wiener) (Pub. Resources Code § 21080.58, as amended by Stats. 2024 ch. 284). This bill 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 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 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). 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 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 (Becker) (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 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 (Caballero) (Pub. Resources Code §§ 21189.81 and 25545, as amended by Stats. 2024 ch. 608). This bill 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(Jackson) (Gov. Code §§ 65650 and 65651, as amended by Stats. 2024 ch. 683). This bill expands the "by right" ministerial approval exemption for supportive housing projects. The bill allows 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 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 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 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 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 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 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 3057 (Wilson) (Pub. Resources Code § 21080.17, as amended by Stats. 2024 ch. 210). This bill creates a new CEQA exemption for a city or county's adoption of an ordinance that allows creation of junior accessory dwelling units in areas zoned for single-family residential use.

AB 3227 (Alvarez) (Pub. Resources Code § 21080.61, as added by Stats. 2024, ch. 761). This 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 if certain conditions are met. 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 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 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, also known as the Room to Roam Act, requires a city or a county general plan to either include a wildlife con-

nectivity 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 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 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 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 3 years after the date the housing element is adopted or 90 days after receipt of comments from HCD, if the local government satisfies certain requirements, including submitting a draft element or draft amendment to HCD for review within specified timeframes and adopting a draft element or draft amendment that HCD finds to be insubstantial compliance with the Housing Element Law. Further, existing housing element law requires local governments to identify adequate sites for housing and make adequate provision for the current and future needs of all community household income levels. This bill 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). 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 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 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 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 expands SB 684 of 2021, which required local governments to ministerially approve a parcel map or tentative and final map of 10 or fewer units on sites zoned multifamily, no larger than five acres, and substantially surrounded by qualified urban uses. SB 684 also required ministerial approval of housing developments using the subdivision process. This bill 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 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 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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