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LAND USE NEWS

EXECUTIVE ORDERS BY GOVERNOR NEWSOM EXPEDITE REBUILDING EFFORTS FOLLOWING CALIFORNIA WILDFIRES BY RELAXING CEQA AND COASTAL ACT REQUIREMENTS

In response to the Southern California wildfires that have impacted Los Angeles and Ventura counties, Governor Gavin Newsom issued Executive Orders N-4-25 and N-14-25 to remove certain environmental and land use requirements to expediate the rebuilding process for affected communities. These orders suspend certain statutory and regulatory requirements to facilitate reconstruction efforts, particularly concerning the California Environmental Quality Act (CEQA) and the California Coastal Act.

Suspension of CEQA Requirements for Affected Communities

One of the most significant aspects of these executive orders is the suspension of CEQA for specific rebuilding projects. CEQA typically mandates environmental review processes that can be time-consuming and costly in the form of either a CEQA exemption, a Mitigated Negative Declaration, or an Environmental Impact Report (EIR). Under normal circumstances, projects which require any discretionary permit from a local agency must undergo an environmental impact analysis. This requirement ensures that developments do not negatively impact certain identified environmental categories such as traffic, air quality, noise, *etc*.

CEQA already has certain exemptions that would usually facilitate this type of reconstruction efforts: such as: (1) exemptions for ministerial projects which only need a building permits or demolition permits; (2) exemptions for projects to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster-stricken area in which a state of emergency has been proclaimed by the Governor are exempt from CEQA; and (3) exemptions for construction, installation, or conversion of small structures, facilities, or equipment (which typically includes single family homes and certain apartments).

However, under Executive Order N-4-25, projects to repair, restore, demolish, or replace properties substantially damaged by the fires are exempt from CEQA review. This exemption applies as long as the new structures do not exceed 110 percent of the footprint and height of the original buildings, which is slightly different than the exemptions above. By removing the CEQA requirement, the executive order eliminates procedural delays and enables property owners to begin rebuilding without undergoing extensive environmental assessments.

Permitting Exemptions under the California Coastal Act

The executive orders also suspend the requirement to obtain permits under the California Coastal Act for eligible rebuilding projects. Normally, construction or redevelopment within California's coastal zone must secure approval from the California Coastal Commission or local coastal programs. These permits are designed to regulate land use and protect coastal resources.

Executive Order N-4-25 suspends the need for these permits, allowing property owners to rebuild promptly. Executive Order N-14-25 further clarifies that statutory exemption criteria, appeal or review periods, and all submission requirements under the California Coastal Act are also suspended. This directive is intended to counter guidance issued by the California Coastal Commission in late January 2025, where the California Coastal Commission suggested that the statutory permit exemption process still applied, creating confusion among local authorities and property owners. The Governor's order in N-14-25 specifically rejected these arguments by the California Coastal Commission.

State and Local Government Involvement and Further Administrative Actions

The executive orders also direct several state agencies, including the Department of Housing and Community Development (HCD), to collaborate with local governments in streamlining the permitting

and approval processes. HCD is tasked with identifying regulatory barriers that could impede rebuilding efforts and recommending solutions such as pre-approved building plans and waivers of local permitting requirements.

Additionally, the administration is working with the California Legislature to explore statutory amendments that may provide long-term solutions to expedite future recovery efforts. These potential legislative changes may include enhancements to fire mitigation standards and incentives for incorporating fire-resistant construction materials in rebuilding efforts.

Conclusion and Implications

The suspension of certain CEQA and California Coastal Act permit requirements will likely accelerate the rebuilding of homes and businesses in wildfire-affected regions in what will likely none the less be a slow rebuilding process given the amount of damage. By allowing removing these regulatory requirements, the orders provide immediate relief to displaced individuals who may need to rebuild.

Overall, these executive orders follow traditional actions taken by the Governor for emergency regulatory relief in California, and likely are only the beginning of state-wide efforts to streamline the rebuilding process. For more more information on Executive Order N-4-25, *see:* https://www.gov.ca.gov/wp-content/uploads/2025/01/EO-N-4-25-Rebuilding-Final-signed.pdf

For more information on Executive Order N-14-25, *see:* https://www.gov.ca.gov/wp-content/uploads/2025/01/Short-Term-Housing-and-Coastal-EO-N-14-25_4-Final-GGN-Signed-.pdf
(Darien Key)

CITY OF BERKELEY OFFERS AMNESTY FOR ILLEGAL ACCESSORY DWELLING UNITS

Berkeley has instituted a four-year pilot program to address illegal accessory dwelling units (ADUs), which offers a path to legalizing such structures in hopes of increasing affordable housing options in the city.

Background

As housing prices in the San Francisco Bay Area have steadily and remarkably increased over the years, many residents have built accessory dwelling units in the form of backyard cottages, converted garages, attics, basements, and more. Many residents in the Bay Area have utilized these ADUs as properties for rent, creating a secondary stream of income. In most instances, these ADUs were not constructed legally because there were hardly any zoning areas that allowed for them. As such, building permits were hard to acquire. In fact, from 2017 to 2023, a total of 681 permits were issued for ADUs in Berkeley specifically. However, the Berkeley City Council estimated that there were as many as 4,000 non-permitted secondary units in Berkeley in 2019, and that number was considered speculative at best by 2024.

With a consistent housing shortage and housing prices through the roof, the Berkeley City Council decided there was an opportunity to make a difference.

How It Works

Berkeley city officials have offered complete anonymity to any residents that would like to learn more about the new amnesty program and how it works. If someone is interested, they are able to schedule a confidential consultation and are not required to disclose details about the parcel or who they are. Jordan Klein, Berkeley's city Planning Director, reported that eight people had scheduled consultations in just the first week or so that the program was announced.

The amnesty program is available to owners of single-family dwelling lots with an ADU or junior ADU built or converted before 2020. These structures include converted garages, attics, basements, etc. Applications will be accepted for review through the end of 2028.

Berkeley City Council wants to ensure that the additional structures are safe for habitation. As such, the pilot amnesty program has offered two separate pathways for eligible homeowners to legitimize their ADUs: (1) by ensuring that the ADUs are up to building code or (2) by ensuring that the ADUs meet

the housing code. If a homeowner elects to follow building code requirements, the ADU will earn a certificate of occupancy. Although more burdensome and expensive than the second option, complying with the building codes offers more security as a certificate of occupancy cannot be revoked. On the other hand, if a homeowner elects to have their ADU meet housing codes, they will receive a housing certificate of compliance, which can be revoked for any future violations of the housing code.

However, Klein has stated that enforcement in Berkeley is "complaint-based;" there will not be an increased enforcement against homeowners who choose not to participate in the amnesty program. Nonetheless, Berkeley City officials have urged homeowners to call for a consultation to ensure their ADUs can be inspected and deemed safe and habitable.

Conclusion and Implications

Advocates for the amnesty program believe that it will allow for Berkeley to offer more cost-effective rental spaces in a consistently high-cost housing market. Further, the amnesty program may make housing safer, although some opposing city officials fear that it rewards homeowners' bad behavior.

Although the program is only open to single-family dwelling owners, it may not be limited in the future. Berkeley City Manager, Paul Buddenhagen has stated that "[d]uplexes and multi-family buildings are not eligible for inclusion in the pilot program but will be included in future phases." However, critics of the amnesty program have also expressed concerns about these future phases. For instance, some critics have reasoned that landlords of multi-family dwellings should be required to voluntarily offer rent control protections for additional units to ensure that tenants are being respected. For more information on qualifications and technical requirements for applicants, *see:* https://berkeleyca.gov/construction-development/permits-design-parameters/permit-process/amnesty-program-unpermitted

(Mona Goodarzi)

REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION ISSUES FINAL DECISION REGARDING LONG-TERM OPERATION OF THE CENTRAL VALLEY PROJECT AND STATE WATER PROJECT

On December 20, 2024, the U.S. Bureau of Reclamation released its decision for the long-term operation of the Central Valley Project and State Water Project (the Decision). The Decision helps build the state's resilience to drought, benefiting both water users and the environment.

Background

The Bureau of Reclamation approved a new plan for the long-term operation of the Central Valley Project (CVP) and the Delta facilities of the State Water Project (SWP). The CVP and SWP play a vital role in California's water supply. Together, they deliver water to more than 30 million people, irrigate over 4 million acres of the state's agricultural lands, and generate up to 4 million surplus megawatt-hours of carbon-neutral energy annually. The Bureau and the Department of Water Resources (DWR) coordinate operations pursuant to the 1986 Coordinated Operations Agreement (COA), as amended in 2018, which provides the operational framework to guide the operations of project facilities and features to meet requirements and water management goals for the CVP and SWP. The Decision is to continue the operation of the CVP and SWP for authorized purposes while meeting the requirements under federal laws and the State of California's water rights, permits, and licenses pursuant to Section 8 of the Reclamation Act. The Decision was completed in coordination with partners from the California Department of Water Resources, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and California Department of Fish and Wildlife.

The Central Valley Project

The federal Central Valley Project (CVP) is a complex, multi-purpose network of dams, reservoirs, canals, hydroelectric power plants, and other facilities, spanning 400 miles. The CVP reduces flood risk for the Central Valley, supplies domestic and industrial water, and provides water to major urban centers in the Greater Sacramento and San Francisco Bay areas. Additionally, the project provides water to restore and protect fish and wildlife and enhance water quality. The CVP is operated consistent with federal Reclamation laws, rules, regulations, promulgations, and policies. Section 2 of the Rivers and Harbors Act of August 26, 1937, transferred construction of the CVP from the Secretary of War to the Secretary of the Interior. The purposes of the CVP were modified by statute several times, including by the Waterfowl Management Act of August 27, 1954. Congress directed the Bureau to operate the CVP for the following purposes: (1) river regulation and flood control; (2) irrigation and domestic uses and fish and wildlife mitigation; (3) power and fish and wildlife enhancement.

The State Water Project

The SWP is a collection of canals, pipelines, reservoirs, and hydroelectric power facilities that extend more than 705 miles throughout the state. The SWP delivers clean water to 27 million Californians, 750,000 acres of farmland, and businesses throughout the state. The SWP was constructed through the Burns-Porter Act (Water Code Sec. 12930-12944). Recognizing the need for criteria for the coordinated operation of the CVP and SWP, Reclamation and DWR entered into an initial Coordinated Operations Agreement (COA) in 1960, followed by a more comprehensive and detailed agreement in 1986, authorized by P.L. 99-546.

The Final Decision

The Decision provides a long-term action plan for the continued operation of the CVP and SWP in the state. The Bureau's Decision includes: (1) a new framework for Shasta Reservoir operations to benefit Chinook salmon; (2) plans to benefit delta smelt through revised operational criteria for Delta exports;

and (3) plans for early implementation of the Healthy Rivers and Landscapes (HRL) Program.

The Decision implements the Shasta Framework in Alternative 2, which includes actions by the Sacramento River Settlement Contractors to address the effects of multiple years of drought on water temperature management for winter-run Chinook salmon during egg incubation. The Decision also includes actions under Reclamation and DWR control within the Delta to minimize effects on delta smelt due to Delta exports. The Decision limits Delta exports in the south Delta based on flow and turbidity. Delta exports include any water diverted from the Delta for use outside the Delta, including water pumped by the State Water Project and Central Valley Project pumping plants, Contra Costa Water District, and other agencies. The Decision recognizes many stressors on delta smelt, many of which are not under Reclamation and DWR's control. The diversions are intended to better protect the habitat of the delta smelt. Incorporation of the HRL Program will increase Delta outflow, which may address ecosystem drivers on delta smelt populations.

The Decision incorporates and supports the early implementation of components of the Healthy Rivers and Landscapes Program. The HRL Program was previously called Voluntary Agreements. The HRL Program is intended to improve environmental flows and restore key habitats in California waterways. The HRL Program works to: (1) increase river flows, (2) restore aquatic habitat, and (3) use scientific data to guide decisions while encouraging collaboration from local, state, and federal agencies. The Decision includes the operation of CVP and Delta facilities of the SWP under the HRL Program, consistent with provisions included in the Memorandum of Understanding Advancing a Term Sheet.

Conclusion and Implications

The Bureau's recent Decision is to continue the operation of the CVP and SWP. This new plan provides a framework to increase the state's resilience to drought while improving environmental flows and restoring key habitats in the state's waterways. (Christina Suarez, Derek Hoffman)

CALIFORNIA'S DELTA STEWARDSHIP COUNCIL RELEASES DRAFT CLIMATE ADAPTATION PLAN FOR THE DELTA

In late 2024, the Delta Stewardship Council released for public review a draft adaptation plan for the Sacramento-San Joaquin Delta, called the Delta Adapts: Creating a Climate Resilient Future Adaptation Plan (Plan). The Plan is intended to be a comprehensive, regional approach to climate resiliency that relies on federal, state, local, and regional collaboration for the Delta and Suisun Marsh. The Plan is the second phase of a broader climate adaptation initiative started by the Council in 2018—in shorthand, Delta Adapts—and follows the Council's completion of the Climate Change Vulnerability Assessment in 2021.

Background

In 2009, the Legislature enacted the Delta Reform Act. In the Delta Reform Act, the Legislature found that the:

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

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

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

Delta." (*Id.*, §§ 85300, subd. (a), 85302, subd. (a)).

To respond to the challenge of climate adaptation, the Council developed the Delta Adapts: Creating a Climate Resilient Future (Delta Adapts). According to the Council, climate change must be considered to attain the Council's coequal goals, namely, securing a reliable water supply for California, protecting and restoring the ecosystem and wildlife it supports, and enhancing the Delta as a unique place, with its community, tribal, and agricultural heritage. Initiated in 2018 by the Council, Delta Adapts began with a Climate Change Vulnerability Assessment (CCVA) to understand how regional climate impacts will affect the Delta's ecosystems, water supply, infrastructure, agriculture, and communities, including socially vulnerable communities. The Adaptation Plan is intended to build upon the CCVA and proposes strategies to address how Delta communities, infrastructure, and ecosystems can adapt to climate change in a manner consistent with the Council's resilience goals.

The Climate Adaptation Plan

The Plan contains four categories of strategies: flood risk reduction, ecosystem, agricultural, and water supply reliability. Each category of strategy contains a description of the strategy and identifies associated implementation actions to effectuate the strategy. Strategies are also connected with existing Delta Plan policies and recommendations, and the Plan identifies the relevant policies or recommendations the strategies are connected with. Finally, the Plan also provides an intended implementation roadmap for the North, Central, and South Delta, as well as the Suisun Marsh and out-of-Delta areas.

With respect to flood risk reductions strategies, the Plan calls for: (1) the development of a comprehensive, climate-informed understanding of flood dynamics in the Delta, (2) improvements and modernization of levees based on asset importance and vulnerability, (3) restoration of climate-resilient ecosystems to act as nature-based solutions for natural flood mitigation and support biodiversity, (4) improvements to flood emergency preparedness, (5) promotion of innovative farming practices and technologies that minimize flood risks, (6) communicate flood risks, warnings, and mitigation strategies to all at-risk communities, (7) use land use and urban planning to reduce flood risks, (8) use adaptive resilience planning in high-risk flood areas with consideration for existing land uses, and (9) manage and expand upstream water storage capability.

Ecosystem Strategies

With respect to ecosystem strategies, the Plan calls for: (1) improvement of capacity of ecosystems and native species to adapt to and thrive under future conditions, (2) protect at-risk ecosystems by halting and reversing subsidence and reducing the risk of levee failures, (3) building capacity and coordination to improve ecosystem function and resilience, and (4) protecting and enhancing urban ecosystems and use nature-based solutions to increase climate resilience of urban areas in and near the Delta and Suisun Marsh.

Agricultural Strategies

With respect to agricultural strategies, the Plan calls for: (1) expanding adoption and supporting implementation of climate-smart farming practices across Delta agricultural lands, (2) building a sustainable, equitable regional food system, (3) supporting diversification of income/revenue opportunities on operating agricultural lands, and (4) cooperatively identifying strategic agricultural land retirement opportunities where land uses would be of high value (monetary or non-monetary).

Water Supply Reliability Strategies

With respect to water supply reliability strategies, the Plan calls for: (1) reducing reliance on the Delta by improving regional self-reliance through conservation and development local water supplies, (2) increasing local storage of surface and groundwater supplies north and south of the Delta, (3) improving or modifying water infrastructure in the Delta to minimize the impacts of through-Delta conveyance, (4) modifying reservoir operations to adapt to changing climate conditions, and (5) reviewing and considering modifications to water quality standards to develop climate-informed objectives for agricultural uses, fishing, recreational, tribal, and other human beneficial uses of water.

Other Strategies

The Plan ascribes various strategies and implementing actions to portions of the Delta, *i.e.* the

North, Central, and South Delta. For example, for North Delta water supply, the Plan suggests employing all five water supply reliability strategies, whereas for the Central Delta, it only recommends applying water supply reliability strategies 3-5. Accordingly, the Plan purports to tailor the various strategies to the unique regional needs of the Delta.

Conclusion and Implications

The Plan is intended to build on the CCVA and thus is in concept related to specific aspects of the Delta that are expected to be affected by climate change. It remains to be seen whether the strategies proposed by the Council will further the policies and recommendations of the Delta Plan as the climate continues to change. The Draft Plan available at: https://deltacouncil.ca.gov/pdf/delta-plan/2024-11-18-delta-adapts-draft-adaptation-plan.pdf
(Miles Krieger)

RECENT FEDERAL DECISIONS

FEDERAL CIRCUIT REJECTS WATER CONTRACTORS' TAKINGS CLAIMS

City of Fresno v. United States, 124 F.4th 876 (Fed. Cir. 2024).

On December 17, 2024, the United States Court of Appeals for the Federal Circuit issued an opinion in *City of Fresno v. United States* rejecting Fifth Amendment takings claims by Friant Division Central Valley Project (CVP) contractors and water users who were denied water deliveries during the 2014 drought. The opinion affirms the 2020 dismissal and grant of summary judgment by the Court of Federal Claims in favor of the government, finding the plaintiffs failed to establish they possess property rights in the water deliveries under their CVP service contract with Reclamation (Friant Contract).

Background

The CVP is a major water infrastructure system operated by the U.S. Bureau of Reclamation (Reclamation) in the Central Valley of California, consisting of reservoirs, canals, dams, hydropower stations, and other infrastructure through which Reclamation diverts, stores, and distributes Sacramento and San Joaquin River water to contractors throughout the state. The Friant Division of the CVP includes the Friant Dam, which collects San Joaquin River water, and the Friant-Kern Canals. The plaintiffs are individual growers, irrigation districts, water districts, and the City of Fresno within the Friant Division, who either contract directly with Reclamation or pay to receive water supplied under the Friant Contract.

Prior to the formation of the CVP, Reclamation entered into a Contract for the Exchange of Waters (Exchange Contract) with senior San Joaquin River water right holders, to enable Reclamation to divert San Joaquin River water for the CVP so long as it ensures the Exchange Contractors receive specified quantities of "substitute water." Deliveries under the subsequent Friant Contract are expressly subject to the terms of the Exchange Contract, though Reclamation also agreed it would not deliver San Joaquin River water to the Exchange Contractors unless and until it was required to do so. From 1962 until 2014, Reclamation was able to deliver water to the Friant Contractors, including from the San Joaquin River, while its sourced substitute water for the Exchange Contractors from the Sacramento-San Joaquin River Delta (Delta).

In 2014, at the start of a three-year drought state of emergency, Reclamation determined it would not be able to meet its combined delivery obligations for the Exchange Contractors and Friant Contractors. Reclamation notified the Exchange Contractors that for the first time, it would need to source its critical year Exchange Contract deliveries from both the Delta and the San Joaquin River. Reclamation ultimately delivered a combination of San Joaquin River and Delta water totaling 540,000 acre-feet to the Exchange Contractors in 2014, while the Friant Contractors received essentially a "zero allocation" other than the minimum amounts necessary for public health and safety.

The Friant Contract Litigation

The plaintiffs sued the United States in the Court of Federal Claims in October of 2016, alleging Reclamation's "actions in 2014, and particularly Reclamation's diversion of San Joaquin River water to the Exchange Contractors instead of to them, constituted a breach of the Friant Contract." Without water deliveries that year, the plaintiffs alleged losses of annual and permanent crops, lost groundwater reserves, and millions of dollars spent on emergency water supplies. According to the plaintiffs, Reclamation appropriated their property in 2014, which constituted an uncompensated taking in violation of the Fifth Amendment.

Joined by the Exchange Contractors, the United States argued that there was no San Joaquin River water available to the Friant Contractors due to the drought conditions that year and the plaintiffs did not have a property interest in the water they expected to receive under the Friant Contract. Further, the terms

of the Friant Contract immunized Reclamation from liability during periods of drought as long as Reclamation was not "arbitrary, capricious, or unreasonable." The trial court granted summary judgment in the government's favor on the breach claims, agreeing with its interpretation of the contracts, and dismissed the plaintiffs' takings claims for lack of standing.

The Federal Circuit's Decision

On appeal, the plaintiffs challenged the takings dismissal and argued that Reclamation breached the Friant Contract because it was not required to deliver San Joaquin River under the Exchange Contract and, even if it was, the amount delivered exceeded what was required. The Court of Appeals rejected the breach of contract claims because Reclamation's actions were not arbitrary, capricious, or unreasonable. As for standing, the Court of Appeals found that while the Court of Federal Claims had jurisdiction to hear the plaintiffs' allegations, they failed to allege a takings claim upon which relief could be granted.

The plaintiffs argued they hold appurtenant rights to CVP water delivered to their customers or their lands, but the Court of Appeals held that under California law it is Reclamation, not the plaintiffs, that holds the appropriative water rights for the Central Valley Project. (*Id.*) It distinguished Reclamation's actions to construct the diversion and storage works that make water available from the plaintiffs' end use application of the water, finding a property interest vests in the former, but not the latter. (*Id.* at 897.) As such, the plaintiffs could not allege a takings claim for failed water deliveries under their service contract.

Conclusion and Implications

While plaintiffs may seek further review by the Supreme Court, the Federal Circuit Court of Appeals' decision reinforces a prevailing interpretation of California law that there is no cognizable property interest in a contract for water service to support a takings claim under the Fifth Amendment. The Federal Circuit's opinion is available online at: https://www.cafc.uscourts.gov/opinions-orders/22-1994.OPINION.12-17-2024_2437041.pdf
(Taylor Strain, Austin Cho)

NINTH CIRCUIT RULES COSTA MESA CITY ORDINANCE WAS NOT UNLAWFULLY DISCRIMINATORY

The Ohio House, LLC v. City of Costa Mesa, et al., ___F.4th__, Case No. 22-56181 (9th Cir. 2024).

On December 4, 2024, the Ninth Circuit Court of Appeals upheld the lower court's ruling regarding sober-living-home regulations in the face of several claims.

Background

The plaintiff in this case, Ohio House, LLC, operates a sober-living housing facility in the city of Costa Mesa, California. The facility is located within a multiple-family residential zone, which caused the City of Costa Mesa to notify the plaintiff that it was required to comply with city ordinance 15-11. Ordinance 15-11 requires that group homes containing over six residents within multiple-family residential zones to obtain a conditional-use permit and to meet a separation requirement.

Specifically, the city's regulations that were applicable to Ohio House, LLC included: (1) a general restriction on group living arrangements (*i.e.* boarding homes), (2) a special allowance for group homes serving the disabled and sober-living homes that allows for (a) six or fewer residents with an administrative special use permit and (b) seven or more residents with a conditional-use permit, and (3) a requirement that group homes and sober-living facilities be 650 feet apart at the least. The 650-foot spacing requirement was enacted to prevent close grouping of sober-living homes as tight clusters have historically hindered addicts' progress and transition.

The ordinance also requires sober-living homes to provide supervision of patients 24/7. More generally, operators of the facilities may not have prior convictions for sex crimes, arson, drug-dealing, or violent felonies. Further, the ordinance requires that any facility that evicts a resident must provide resources for alternate housing options, so as not to leave recovering addicts to face homelessness.

Costa Mesa began adopting these ordinances in 2014 and, since they were first enacted, the city has been sued by roughly eight sober-living home facilities. Operators of these facilities have argued that Costa Mesa outlaws sober-living facilities. However, the city has maintained that it has worked well with the facilities that abide by the city ordinance.

Per the city's instruction, Ohio House, LLC applied for a conditional-use permit but the application was denied due to noncompliance with the separation requirement. In addition, a request for a reasonable accommodation was also denied. On September 6, 2019, Ohio House filed a lawsuit in the United States District Court for the Central District of California alleging that the city of Costa Mesa committed housing discrimination.

At the Trial Court

In the initial lawsuit, Ohio House argued that that the city ordinance violated the Civil Rights Act, the Americans with Disabilities Act, and both state and federal housing laws by discriminating against individuals suffering with addiction, whom are considered to be disabled under the law. In its defense, the city successfully argued that it did not commit discrimination against Ohio House (along with the residents suffering from drug or alcohol addiction) because the city ordinance regulating the sober-living homes are in fact the only laws that are meant to *protect* the residents. On April 18, 2022, an eight-person jury unanimously decided in favor of the city of Costa Mesa after a two-week trial. In summary at the U.S. District Court: After discovery, the parties cross moved for summary judgment. The District Court granted the City's motion on Ohio House's disparate-impact claims but otherwise denied both motions. The remaining claims were then tried to a jury. Before the case was submitted to the jury, the parties each moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). The District Court orally denied these motions, except that the District Court reserved ruling on whether Ohio House's California Government Code § 65008 claim was untimely. The jury found that the City had not violated the FHA or the FEHA. Thereafter, the District Court issued findings and conclusions related to Ohio House's California Government Code § 65008 claim, concluding that this claim was untimely and that judgment in favor of Ohio House would be inconsistent with the jury's findings. Thus, the District Court entered judgment in favor of the City on all claims. Several weeks later, Ohio House renewed its motion for judgment as a matter of law and, alternatively, moved for a new trial. Ohio House also requested that the District Court take judicial notice of various documents, including letters from the California Department of Housing and Community Development, excerpts from the City's "Housing Element Update," and a notice of public hearing. The District Court denied Ohio House's motions but granted its request for judicial notice insofar as the District Court relied on the subject documents. Ohio House timely appealed

The Ninth Circuit's Decision

On appeal, the Ninth Circuit Court of Appeals affirmed the District Court's findings. The Court of Appeals held that the plaintiff failed to establish any facial disparate treatment as a matter of law as required because the ordinance facially benefits disabled individuals. Further, the court affirmed the denial of judgment as a matter of law on the plaintiff's reasonable accommodation claim. The Ninth Circuit agreed with the District Court's findings that the plaintiff's accommodation request would fundamentally alter the city's zoning scheme. Finally, the Court of Appeals upheld that the plaintiff's claim under the California Planning and Zoning Law, California Government Code Section 65008 was time-barred.

Addressing disparate treatment claim, the Ninth Circuit agreed with the parties that whether the City's zoning code facially subjects disabled to unlawful disparate treatment is a question of *law* and that Ohio House failed to establish facial disparate treatment. The Ninth Circuit found the District Court erred in submitting this issue to the jury, however, also found this error to be harmless as the jury "correctly concluded that Ohio House failed to prove the [alleged] disparate treatment.

As to the discriminatory statements claim, by enacting a facially discriminatory zoning code, the Ninth Circuit found that the claim failed:

> . . . [as] comments made by individual city employees suggesting that they had a discriminatory purpose for adopting the challenged zoning regulations [were], standing alone, insufficient to overturn the jury verdict.

As to Ohio House's claim that the City interfered with its aiding or encouraging others to exercise their rights under the Fair Housing Act, the Ninth Circuit found that Ohio House ". . failed to prove a causal link between its protected activity of providing sober-living housing. . ."

As to Ohio House's facial challenge to the City's reasonable-accommodation ordinance, the Ninth Circuit found that the ordinance "not facially inconsistent with the Fair Housing Act" and that "the jury had an evidentiary basis for finding that Ohio House's requested accommodation" ultimately, was unreasonable and because the jury ultimately "reached the correct outcome" was harmless error on the District Court's part for submitting this "purely legal issue" to the jury.

Conclusion and Implications

The decision by the Ninth Circuit Court of Appeals will surely open the door for other cities within the court's jurisdiction to implement further regulations on group and sober-living homes. These cities now have more ability to prohibit group living arrangements, while permitting disabled-related housing to operate, to impose an objective separation requirement between group and sober-living homes, and to require the use of a permit. The Ninth Circuit's opinion is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-ca9-22-56181/pdf/USCOURTS-ca9-22-56181-0.pdf
(Mona Goodarzi)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

RECENT CALIFORNIA DECISIONS

CALIFORNIA SUPREME COURT ADDRESSES WHEN THE CONVEYANCE OF LAND ACTUALLY AMOUNTS TO A SUBDIVISION

Cox v. City of Oakland, ___Cal.5th___, Case No. S280234 (Cal. Jan. 23, 2025).

The California Supreme Court's unanimous decision in *Cox v. City of Oakland* affirms that, just because a parcel appears on a parcel map which was recorded prior to 1893, it does not mean that it is a separate legal parcel for purposes the Subdivision Map Act (Government Code 66410 et.seq. and, further, for purposes of section 66412.6(a) of the Subdivision Map Act (SMA or Map Act), a conveyance does not "create[]" multiple parcels merely by referring separately to lots of the contiguous property being conveyed. Rather, a lot on an antiquated map (a subdivision map was recorded prior to 1893) achieves independent legal status as a separate legal parcel when the owner conveys that lot separately from its surrounding properties:

> Modern-day recordation of an approved map under the Map Act ordinarily creates the parcels depicted on the map…but where a subdivision map was recorded prior to 1893—the first year of statewide regulation of the subdivision of real property in California—a lot generally obtained no independent legal status based on such depiction on an antiquated map."

Background

The lot at issue was originally depicted as Lot 18 on a subdivision map entitled "[M]ap of San Antonio" (Map), recorded in 1869. The Map shows numerous "blocks," each containing many smaller units of land denominated as "lots."

Following recordation of this "antiquated map," Lot 18 was conveyed a number of times by name, along with Lot 17 and a portion of Lot 16. In 1944, Lot 18, 17 and 16 (portion of) were conveyed in a single deed by a single grantor to a husband and wife as joint tenants. There was no other conveyance prior to March 4, 1972, which is the effective date of the SMA's parcel map filing requirements for subdivisions of land with five or fewer parcels. In 2015, the plaintiff (Cox) acquired this same property (Lot 18, 17 and 16 (portion of) by a single deed.

Certificate of Compliance Application

Section 66499.35 (a) of the SMA authorizes a real property owner to request a local agency determine whether the owner's property complies with the provisions of the Map Act and local ordinances enacted pursuant to the Map Act and, if so, to issue a certificate of compliance that establishes that the parcel can be sold, leased, or financed in compliance with the act.

The plaintiff requested a certificate of compliance from the City of Oakland (City) to certify that Lot 18 was a separate legal parcel that had been legally created before March 4, 1972. The City refused to so certify, and the plaintiff filed a petition for writ of mandate, which the trial court denied. Plaintiff appealed the denial, and the Court of Appeal reversed the judgment and remanded the matter to the trial court with instructions to grant the petition, issue the writ and prompt to City to issue a certificate of compliance.

The Supreme Court's Decision

The City's position was that Lot 18 had never been created as a separate parcel under the Map Act because it was never separately conveyed from contiguous land (Lots 17 and 16 (portion of)). The plaintiff argued that Lot 18 was created through a conveyance that separately described Lot 18 as one of a group of lots conveyed. The Supreme Court agreed with the City. The Court concluded that merely referencing multiple lots in a single conveyance does not constitute a "division of land" under the SMA. Rather, in order for a parcel to be legally recognized as separate, there must have been an explicit and independent

conveyance of that parcel. Since Lot 18 had always been conveyed together with adjacent lots and never conveyed separately, it was not considered a distinct legal parcel.

The Court cited *Save Mount Diablo v. Contra Costa County*, 240 Cal.App.4th 1368, 1377 (2015) (Save Mount Diablo) extensively in its analysis of the purpose of intent of the SMA, which such analysis serves as both a helpful reminder to seasoned practitioners and an excellent primer to newer land use attorneys. The Court's opinion reiterates that, from a backward-looking perspective, the requirements of the SMA allow a property owner to legitimize a division of land (for purposes of sale, leasing or financing) that had previously occurred (by the creation of an antiquated map) by obtaining a certificate of compliance which clarifies the legal status of property that is not reflected on a recorded final or parcel map. Relative to a forward-looking perspective, the SMA requires a property owner to apply for a final or parcel map and have that map recorded so that a parcel can be subdivided for purposes of sale, leasing or financing.

Conclusion and Implications

In the end, the Supreme Court held that because Lot 18 was always conveyed together with contiguous land, it has never been separately conveyed. The mere use of multiple lot numbers in the description of property being conveyed does not amount to a "division" of land that "create[s]" parcels for each of the individual lots. (§ 66412.6(a).) Thus, the Court found that Lot 18 was never itself a parcel "created" as a result of "a division of land" during the time period specified by the statute. Accordingly, the Court reversed the Court of Appeal's ruling.

This ruling stands for the need for clear, separate conveyances to establish individual parcels, which supports the SMA's objectives of promoting orderly development and preventing the proliferation of substandard lots. The Court's opinion is available online at: https://www4.courts.ca.gov/opinions/documents/S280234.PDF

(Amara Morrison, Darien Key)

FIFTH DISTRICT COURT UPHOLDS WATER DISTRICT'S EIR PURSUANT TO CEQA FOR PROPOSED RESERVOIR ALONG THE DELTA-MENDOTA CANAL

Friant Water Supply Protection Association v. Del Puerto Water District, *Unpub.*, Case No. F085535 (5th Dist. Jan 30, 2025).

In an *unpublished* decision filed on January 30, 2025, the Fifth District Court of Appeal in *Friant Water Supply Protection Association v. Del Puerto Water District* denied a challenge under the California Environmental Quality Act (CEQA) against the Del Puerto Water District's Environmental Impact Report (EIR) for a proposed dam and water storage reservoir that would store allotments from the federal Central Valley Project. The court held that the EIR was not fatally flawed for failing to analyze what would occur if the Bureau of Reclamation decided in the future to alter pumping operations in the Bay-Delta.

Factual and Procedural Background

Water Conveyance Infrastructure and Geography

The Central Valley Project (CVP) is a collection of water conveyance infrastructure projects that generally transfer water from northern California to southern California to hundreds of water contractors pursuant to various delivery contracts. Two portions of the CVP are relevant here: the Friant Division and the Delta-Mendota Canal, which are hydrologically connected via the San Joaquin River.

The Friant Division impounds the waters of the San Joaquin River at Friant Dam and delivers water to several water agencies, including ten of Friant Water Supply Protection Association's (plaintiff) member agencies, through the Madera Canal to the north and the Friant-Kern Canal to the south. The remaining water continues west along the San Joaquin River and intersects with the endpoint of the Delta-Mendota Canal (DMC) at the Mendota Pool. The DMC pumps water south from the Bay-Delta through the San Luis Reservoir, and finally to the Mendota Pool. The remaining DMC waters are delivered to the San Joaquin River, replacing water delivered to Plaintiffs and other water agencies at the upstream Friant Division.

In the 1930's, the United States Bureau of Reclamation (Reclamation) purchased the water rights necessary to operate the Friant Division. To execute this transfer, Reclamation entered into a Purchase Contract and an Exchange Contract with the water rights holders. Under the Purchase Contract, the water rights holders sold all their water rights to Reclamation, except for "reserved water." Under the Exchange Contract, the water rights holders promised not to exercise their rights to the "reserved water," provided that the water rights holders received substitute waters from the federal DMC. Today, the water rights described in those contracts are held by Reclamation and the San Joaquin River Exchange Contractors Water Authority (collectively: Exchange Contractors).

The State Water Project (SWP) is a system of water conveyance and storage infrastructure projects operated by the California Department of Water Resources (DWR). DWR and Reclamation entered into an operating agreement in 1986 which governs the interplay between the CVP and the SWP.

The Del Puerto Water District (DPWD) has existing contractual rights directly with Reclamation to divert from the DMC 840,000 acre-feet of water during wet years and 650,000 acre-feet of water during dry years. DPWD and the Exchange Contractors seek to build a reservoir just west of the City of Patterson to impound and store up to 85,000 acre-feet of their pre-existing share of DMC water received during wet years for use during subsequent dry years (Project).

Procedural History

Respondent DPWD issued an NOP for the Project in June 2019 and received comments from DWR and the State Water Resources Control Board (SWRCB). Collectively, DWR and SWRCB requested information regarding the underlying water rights for the Project and a thorough environmental analysis of the effects of diverting the water to support the Project. Defendants confirmed that all water diverted from the DMC for purposes of the Project would be diverted pursuant to existing contractual entitlements with Reclamation.

Defendants circulated a Draft EIR (DEIR) in December 2019. The SWRCB commented, again requesting a thorough environmental analysis of the effects of the Project. The SWRCB again commented on the Project, inquiring what would happen if CVP deliveries are stored in the proposed Project's reservoir instead of the San Luis Reservoir. As a result, the SWRCB suggested that Reclamation may export additional water at times when lack of storage space and real time demand would limit water exports. According to the SWRCB, the EIR should therefore analyze what effect these potential export modifications might have on the Delta's hydrological and biological conditions. Defendants addressed this comment in the Final EIR (FEIR) by asserting that the Project could provide Reclamation with additional flexibility to increase pumping if it so chose, because of increased storage capacity and increased flexibility to alter when water would be pumped to Project Partners. The FEIR also noted that "any such modification of Delta pumping *by Reclamation* would be evaluated *by Reclamation* in a separate National Environmental Policy Act (NEPA) document if such pumping is determined to be outside existing certified environmental documentation and/or operating agreements."

In October 2020, DPWD certified the FEIR and approved the Project. Shortly thereafter, plaintiff filed a petition for writ of mandate in the Stanislaus Superior Court ordering DPWD to decertify the FEIR and set aside the Project approvals. The trial court denied the petition, and plaintiff appealed.

The Court of Appeal's Decision

The Fifth District Court of Appeal reviewed the lower court's ruling for abuse of discretion. Generally, the appellate court reviewed de novo the DPWD's procedural choices while according greater deference to the DPWD's factual determinations. The Fifth District ultimately upheld the EIR, finding that the EIR: (1) sufficiently discussed Reclamation's hypothetical ability to increase Bay-Delta pumping, (2) adequately described the relevant water rights and the Project's infrastructure, and (3) effectively notified SWRCB regarding Reclamation's water rights amendments and otherwise adequately responded to SWRCB's comments.

EIR Did Not Need to Address Hypothetical, Future Excess Pumping from the Bay-Delta

Appellants argued that the FEIR failed to analyze impacts related to using existing CVP supplies for storage at a new location and storage at different

times. Citing the SWRCB's comment letters, appellants claimed that increased capacity at the San Luis Reservoir might give Reclamation the hypothetical ability to increase the amount of water pumped from the Bay-Delta, and those increased outflows could have environmental impacts. The Fifth District ruled that this impact was too speculative to be evaluated in the EIR because Reclamation's potential increase in Delta pumping was not the underlying project at issue. Additionally, that impact would only materialize after Reclamation, a third-party agency, made a future, hypothetical decision to increase pumping from the Bay-Delta. While CEQA does require analysis of both direct and indirect impacts flowing from a project, Reclamation's decision to increase pumping from the Bay-Delta is too speculative to constitute a direct impact.

Additionally, the court noted that if Reclamation increased the amount of pumping from the Bay-Delta, that decision would either be permitted by existing approvals that have satisfied their own environmental reviews or be subject to additional environmental analysis at the federal and/or state level—two points that the EIR had previously explained. Finally, the court affirmed that while the SWRCB is the final arbiter when it comes to issuing water rights permits, their status as a responsible agency for purposes of this Project does not render their comments requesting certain analyses mandatory.

Piecemealing

Appellants also argued that the FEIR improperly piecemealed the Project. Appellants urged the court to treat the proposed construction and operation of the Project's reservoir and Reclamation's hypothetical future increase in Bay-Delta outflows as a single project disguised as two. The court declined to do so, finding appellants failed to demonstrate that this was the case. The court explained that the Project does not "presume" or "practically compel" Reclamation's future decision to increase pumping from the Bay-Delta; it merely allows that decision to be made. Moreover, Appellants did not point to anything about the Project that would result in its demands exceeding the Project Partners' water allotments, which would in turn trigger additional review.

EIR Sufficiently Described the Project Partners' Water Rights and Adequately Analyzed the Project's Proposed Infrastructure

Appellants argued that the EIR failed to account for the need to amend the Exchange Contract to permit: (1) water deliveries through a new turnout connecting the DMC to the Project, (2) the storage of DMC waters for later use, and (3) the storage of DMC waters at the Project site. The appellate court did not decide whether those future contractual amendments may be necessary to effectuate the Project. Instead, the appellate court simply noted that the EIR sufficiently analyzed the Project as it would physically exist if those contractual amendments occurred, or if Reclamation approved those actions.

Appellants also argued that the court must "evaluate the accuracy of a project proponent's claim of existing water entitlements" as is required by *Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, 106 Cal.App.4th 715, 722 (2003) (*Santa Clarita*). There, the court found an EIR to be insufficient for failure to distinguish between the amount of water described in an "entitlement" to SWP waters and the amount of water that could actually be delivered. Here, though, if defendants do not receive a delivery of either 840,000 or 650,000 acre-feet of water in wet or dry years, respectively, they can take water directly from the San Joaquin River to make up the difference. Additionally, the EIR clearly and accurately distinguished between defendants' contractual rights to receive water deliveries from Reclamation, and Reclamation's potential modification of its own water rights to shift some storage criteria across various CVP projects. For these reasons, the court held that the EIR accurately described defendants' "water rights" and correctly concluded that the Project Partners would not need to seek separate water right permits themselves.

EIR Put SWRCB on Notice Regarding Reclamation's Water Right Amendments and Adequately Addressed SWRCB's Comments

Appellants argued that the FEIR failed to list the SWRCB as a responsible agency and failed to note SWRCB's need to approve changes to Reclamation's existing water rights. However, the court noted that the SWRCB was listed in the EIR as a responsible agency, but, even if it was not, such an error was

merely technical and not prejudicial. The court noted that "everyone was aware of the potential need for the Water Board to approve an alteration to Reclamation's CVP water rights..." Although these proposed modifications to Reclamation's existing water rights permits should have been noted in the EIR for "maximal clarity and convenience," its absence did not render the EIR fatal or prejudicially preclude dissemination of relevant information.

Finally, appellants argued that the SWRCB was not allowed to fully participate because the FEIR failed to include or perform certain analyses that the agency had requested be performed. The court initially responded by contending that, just because a responsible agency requests that a certain type of analysis be performed does not necessarily mean that it must be included in the EIR. Here, while the SWRCB will be the final arbiter on future changes to the water rights licenses it issues, it is not the ultimate authority on what must be included in the Project Partners' EIR. To this end, the SWRCB essentially asked for an analysis of environmental impacts that would occur *if* Reclamation decided to alter its pumping operations in response to the increased storage capacity occasioned by the Project's construction. As the court had previously noted, the EIR was not required to analyze the speculative possibility that Reclamation might alter its behavior in response to the Project. Therefore, under CEQA, the EIR did not need to address these uncertain future actions.

Conclusion and Implications

The Fifth Circuit Court of Appeals upheld Del Puerto Water District's EIR despite its failure to analyze Reclamation's hypothetical ability to pump more water from the Bay-Delta due to the increased storage capacity provided by the Project along the DMC. Ultimately, the court affirmed that an EIR need not analyze hypothetical, future, third-party actions. A copy of the Fifth District's unpublished opinion is available at: https://www4.courts.ca.gov/opinions/nonpub/F085535.PDF

(Blaine R. Dyas, Bridget K. McDonald)

Note: The author's firm represents the respondent in this matter.

REAFFIRMING TAXPAYER PROTECTIONS: FOURTH DISTRICT COURT FINDS WATER DISTRICT'S RATE STRUCTURE RAN AFOUL OF THE CALIFORNIA CONSTITUTION

Howard Jarvis Taxpayers Association v. Coachella Valley Water District, ___*Cal.App.5th*___, Case No. E080870 (4th Dist. Jan. 31, 2025).

In January of this year, the California Court of Appeal for the Fourth District affirmed the trial court's decision in *Howard Jarvis Taxpayers Association v. Coachella Valley Water District* holding that the Coachella Valley Water District's (Water District) rate structure was an improper tax under Article XIII C of the California Constitution. The Court of Appeal upheld a refund of at least $17 million to affected customers.

Background

The case is centered around canal water from the Coachella Canal (Canal) that is being provided to consumers through the Coachella Valley Water District. The Canal branches off from the All-American Canal in Imperial County and carries water (Canal Water) for about 120 miles to the Coachella Valley in Riverside County. The Canal's water is mainly used for agriculture, golf courses, and groundwater replenishment. In the past seven years, approximately 75 percent of Canal Water has been used for agriculture and 18 percent for groundwater replenishment. Domestic customers indirectly pay for Canal Water through the Water District's interfund transfers.

Propositions 218 and 26

The main issue in the Howard that the court addressed was whether a charge imposed by the local agency a tax. To understand how the court answers this question, we must first understand the mechanics of Propositions 218 and 26. Propositions 218 and 26 expand on the definitions of and procedures for

enacting taxes under the Constitution. Proposition 26 added a new definition of "tax" to the California Constitution. Under Proposition 26, all levies, charges, or exactions of any kind imposed by a local government are taxes unless they meet one of seven exceptions. Under Proposition 218, if a levy, charge, or exaction imposed by a local government does not fall under any of the exceptions, it is a tax and requires voter approval by a majority (or two-thirds majority for a special tax.) Proposition 218 defines Combined, Propositions 218 and 26 restrict local governments from levying taxes without voter approval.

Procedural Posture

The Howard case officially began in 2019, when plaintiff Randall Roberts (Roberts), who was later substituted by plaintiff Howard Jarvis (Jarvis), filed a combined petition and putative class action complaint against the Water District for the rates for Canal Water. Robert's claims were regarding the Water District's two-tiered rate system for Canal Water. The Water District classified customers as Class 1 or Class 2.

Class 1 customers were those Canal Water for commercial agricultural activities. Class 2 customers were non-agricultural users. Roberts defined the putative class as domestic water customers of Water District who have paid and/or are paying Class 2 Canal Water rates. Roberts alleged that the Water District was charging Class 1 customers $34.32 per acre-foot, while charging Class 2 customers $102.12 per acre-foot of Canal Water. Roberts (and later Jarvis) was suing on behalf of domestic water customers of the Water District who were paying Class 2 Canal Water rates.

According to Roberts, Class 2 customers were subsidizing the water rates of Class 1 customers by paying a much higher rate for the same product. The Water District imposed the Class 2 rate without prior voter approval. Thus, according to Roberts, the Water District violated the California Constitution, including Propositions 218 and 26. In November 2021, the trial court held that the Water District Canal Water rates violated Proposition 218.7 and the California Constitution. In March 2023, the trial court entered judgment awarding the Class 2 customers approximately $17.5 million for invalid charges by the Water District. The Water District appealed the decision.

The Court of Appeal's Decision

The Water District contended that the trial court erred in both its liability and remedies rulings. The Water District argued that it qualified under one of the exceptions for tax under Proposition 26. If the Class 2 rate qualified under one of the seven exceptions, then the Water District did not need voter approval to impose the Class 2 rate. Thus, the Water District argued that the rate was not invalid under the California Constitution. Specifically, the Water District argued that the Class 2 rate qualified under two potentially applicable exceptions: (1) Article XIII C, section 1, subdivision (e)(7) (Property Fee Exception), which excludes "[p]roperty-related fees imposed in accordance with the provisions of Article XIII D,"; and (2) subdivision (e)(2) of the same section (Charges for Specific Government Services or Products Not Exceeding Reasonable Costs Exception) , which excludes:

> . . .charge[s] imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.

The Court of Appeal held that neither exception applied to the Class 2 rates.

For the Property Fee Exception to apply, the Water District attempted to show that the Class 2 rate does not exceed the proportional cost of providing Class 2 customers with Canal Water. This argument would rest on whether Class 2 customers paid for the Canal and irrigation distribution system. However, the court held that this argument was invalid because Class 2 customers did contribute significantly to the Canal and irrigation distribution system. Thus, the Class 2 customers were not paying a proportional rate, and the Class 2 rate did not fall under the Property Fee Exception.

For the Charges for Specific Government Services or Products Not Exceeding Reasonable Costs Exception to apply, the court found that the Water District must prove, government must also prove that:

> . . .the manner in which those costs are allocated to a payor bear a fair or reasonable rela-

tionship to the payor's burdens on, or benefits received from, the governmental activity.

The court held that this exception did not apply for the same reasons that the Property Fee Exception did not apply.

Thus, the Court of Appeal affirmed the trial court's decision and upheld the judgment awarding approximately $17 million to affected Class 2 customers.

Conclusion and Implications

If a local government, such as a city or local agency, wishes to impose a charge or rate for a service, the government must ensure that they are applying the rate fairly and in compliance with the processes outlined by the California Constitution. If the local government wishes to impose a charge without needed to obtain voter approval, then the government must ensure that the charge falls squarely within one of the exceptions in Proposition 26. Charges that do not fall into one of the exceptions and that are not approved by voters are invalid. Charges that are imposed disproportionately between different classes of users disproportionately and without valid reason likely do not fall under one of the Proposition 218 exceptions, as shown in the case.

The results of the Howard case reinforce the tax protections afforded to customers and citizens by the California Constitution. Local governments such as the Water District must take great care to ensure that they comply with the requirements of the California Constitution when imposing charges. The court's opinion is available online at: https://www4.courts.ca.gov/opinions/documents/E080870.PDF
(Christina Suarez, Darien Key, Derek Hoffman)

FIRST DISTRICT COURT DENIES ATTORNEY'S FEES MOTION FOR CROSS-CLAIM CHALLENGING UC BERKELEY'S PROPOSED VOLLEYBALL FACILITY PROJECT

Phillip Bokovoy v. Regents of the University of California, Unpub., Case No. A168346 (1st Dist. Feb. 3, 2025).

In an *unpublished* decision filed on February 3, 2025, the First District Court of Appeal in *Phillip Bokovoy v. Regents of the University of California* upheld the trial court's discretionary denial of landowner-plaintiffs' attorney's fees motion because they were not a "successful" party under the private attorney general doctrine under Code of Civil Procedure § 1021.5.

Background

In 1982, the Regents of the University of California (Regents) acquired a 50-acre lot in Berkeley, California, and recorded covenants against the property for the benefit of adjacent landowners, which included plaintiffs. The covenants prohibit the University from developing any new building on the property, except for replacement structures. The covenants also prohibit the addition of any facility for hosting "major spectator events." Among other things, the covenants prohibited the Regents from constructing any facility to host a "major spectator event."

In 2019, UC Berkeley approved the construction of a new volleyball facility (Project) on the 50-acre lot of the Clark Kerr Campus, finding that it was exempt from further environmental review under the California Environmental Quality Act (CEQA). The new facility could accommodate up to 400 spectators and would feature four sand volleyball courts with lighting and a scoreboard, a lawn area, and a building for locker rooms, storage, and office space for coaches.

At the Trial Court

Plaintiffs challenged the University's approval of the Project for failing to comply with CEQA and for breaching the Covenants. The Alameda County Superior Court bifurcated the CEQA and Covenant claims into two litigation phases.

In the first litigation phase, plaintiffs successfully alleged that the Project was improperly approved under a CEQA exemption and secured an interlocutory peremptory writ of mandate requiring the Regents to rescind their prior approval of the Project pending adequate CEQA analysis. Plaintiffs then sought attorney's fees as the "successful" party under Code of Civil Procedure § 1021.5's private attorney general doctrine. The trial court granted the motion and

awarded plaintiffs more than $260,000 in attorney's fees and costs for their successful CEQA challenge.

In the second litigation phase, the Regents filed an amended cross-complaint against plaintiffs that sought a declaration that the Project complied with the covenants or, alternatively, for reformation of the covenants to permit the Project to proceed. In particular, the Regents argued that the Project was permitted under the covenants despite a prohibition against the development of facilities that host "major spectator events." Alternatively, the Regents argued that certain circumstances had changed between 1982 and 2019 to warrant judicial reformation of the covenants to allow the Project to move forward.

Plaintiffs filed their own cross-complaint, arguing that the Regents breached the covenants by historically exceeding student population limits for the Clark Kerr Campus and failing to provide sufficient parking. The trial court denied plaintiffs' cross-claims, finding them summarily barred by the statute of limitations and the doctrine of laches.

The trial court also denied the Regents' cross-claims. As to whether the covenants authorized the Project, the court held that "it's not a close issue …"—the volleyball games hosted on the Project site would constitute "major spectator event(s)" in clear violation of the covenants. The court also concluded that there had been no "change of circumstances between 1982 and today" that would justify modifying the covenants' use restrictions. The court thus held judgment on the Regents cross-complaint in favor of plaintiffs, and judgment on plaintiffs' cross-complaint in favor of the Regents. The court's order later awarded costs of suit to plaintiffs but clarified that "neither side shall be a prevailing party in the actions litigated in the two competing cross complaints."

Plaintiffs first filed a memorandum of costs, which the Regents sought to tax. Thereafter, plaintiffs moved for an award of attorney's fees in excess of $1 million, arguing they were "successful" in their defense against the Regents' cross-complaint.

The trial court denied plaintiffs' motion for attorney fees, finding that they were not the "successful party" and their cross-complaint "did not confer a significant benefit on the general public or on a large class of persons; and the litigation did not enforce an important right affecting the public interest." Plaintiffs timely appealed.

The Court of Appeal's Decision

On appeal, the First District Court of Appeal upheld the trial court's order, finding that it was consistent with substantive law and fell within the confines of its discretion.

First, the court reiterated the applicable framework under which plaintiffs sought to recover their attorney's fees. The private attorney general doctrine under Code of Civil Procedure § 1021.5 allows a "successful" party to recover fees if:

> (1) the litigation enforced an important right affecting the public interest; (2) the litigation conferred a significant benefit on the general public or a large class of persons; and (3) the necessity and financial burden of private enforcement were such as to make the award appropriate.

Whether a party is considered "successful" rests not on the court's final judgement but instead on the impact of the action overall. Accordingly, a trial court has broad discretion in determining a party's "success," and an appellate court must defer to the trial court's determination unless it lacks any reasonable basis.

The First District considered whether plaintiffs met section 1021.5's definition of a 'successful party' in defending against Regents' cross-claims, such that they were entitled to recover their attorney's fees. In doing so, the court evaluated not whether plaintiffs' action resulted in a favorable final judgment, but instead on the impact of their litigation and whether their 'success' achieved some material benefit.

The First District noted that the trial court's judgement was clear: neither party "successfully" litigated their cross-claims during the second litigation phase. The court further observed that the ruling obtained by plaintiffs at the trial court during phase two of the litigation—*i.e.*, that the Volleyball Project was prohibited by the Covenants—was somehow more significant than the trial court's ruling on the University's cross-complaint. Plaintiffs conceded that their explicit goal in bringing their lawsuit was to halt the Project, which they ultimately accomplished by prevailing on their CEQA claims during the first litigation phase, and for which they had already been awarded attorney's fees under section 1021.5. Because

plaintiffs already halted the Project in its entirety during the first phase of litigation, the trial court could have reasonably found that no additional fees should be awarded regarding the litigation that ensued during phase tow. For these reasons, and in the absence of a convincing showing that this determination was clearly wrong, the appellate court declined to disturb the trial court's decision that no party was successful and thus upheld the denial of Plaintiff's request for the attorney's fees they expended during the second litigation phase.

The Court of Appeal also held that the trial court had discretion to tax plaintiffs' memorandum of costs. As with their attorney's fees motion, the court reiterated that, to recover litigation costs as a matter of right, they must be the "prevailing party" in the underlying action. Here, the trial court employed Code of Civil Procedure section 1032's definition of a "prevailing party," which allows the court to determine, under certain circumstances, who the prevailing party is and whether they are entitled to costs. During the second litigation phase, the trial court similarly disallowed plaintiffs' requests for costs because they were not the "prevailing party" under section 1032. Based on the trial court's rationale for justifying denial of plaintiffs' attorney's fees motion during phase two, the appellate court agreed.

As to the first phase of litigation, however, the Court of Appeal agreed with plaintiffs that the trial court erred by failing to include in its order $682.72 in costs that plaintiffs incurred to reproduce for the court a set of trial binders relating to their CEQA claim, which was required under the local rules. Although the trial court ruled that the trial binders predated the court's interlocutory judgment on the CEQA claims, it still neglected to include those costs in its order. Because the Regents made no attempt to dispute this, the appellate court reversed the trial court's order to tax costs and remanded the matter for a limited order awarding plaintiffs the amount of costs owed for producing the CEQA trial binders.

Conclusion and Implications

The Court of Appeal's decision affirms the discretionary role of the trial court in determining whether a party is "successful" for purposes of awarding attorney fees under Code of Civil Procedure section 1021.5's private attorney general doctrine. Additionally, the decision makes clear that a court may determine the "success" of a party by comparing the effect of the litigation from both parties' perspectives, rather than relying solely on the outcome obtained in the final judgment. Finally, the opinion serves as a cautionary tale for attorneys seeking to leverage that doctrine. Here, plaintiffs tried to claim they prevailed on claims that the court denied on procedural grounds. But, even if the court had entertained the merits of those claims, plaintiffs nevertheless achieved their desired outcome in halting the project and thus could not be deemed the 'successful party' for purposes of recovering their attorney's fees.

A copy of the First District's *unpublished* opinion is available online at: https://www4.courts.ca.gov/opinions/nonpub/A168346.PDF.
(Blaine R. Dyas, Bridget K. McDonald)

LEGISLATIVE UPDATE

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

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

California Environmental Quality Act

AB 35 (Alvarez)—This bill would streamline California Environmental Quality Act (CEQA) review for qualifying clean hydrogen transportation projects. Qualifying projects would undergo a specialized clean hydrogen environmental assessment to accelerate permitting and approval, unless the project applicant elects otherwise. A clean hydrogen environmental assessment would not be required to analyze project alternatives. The bill also provides a mandatory approval timeline and expedited judicial review for qualifying projects.

AB 295 (Macedo)—This bill would extend application of The Jobs and Economic Improvement Through Environmental Leadership Act of 2021 to water storage projects, water conveyance projects, and groundwater recharge projects that provide public benefits and drought preparedness. The Act authorizes the Governor, until January 1, 2032, to certify environmental leadership development projects that meet specified requirements for certain CEQA streamlining benefits.

AB 314 (Arambula)—CEQA exempts certain types of residential projects on infill sites that are near "major transit stops." These major transit stops include, among other locations, the intersection of 2 or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods. This bill would additionally define "major transit stop" to include a planned or existing high-speed rail station.

AB 404 (Sanchez)—Existing law temporarily exempts certain prescribed fire and fuel reduction projects on federal lands to reduce the risk of high-severity wildfire from environmental review under CEQA, if the project has already undergone environmental review under the National Environmental Policy Act (NEPA). This bill would extend the exemption, and the requirements for notification of particular agencies under this exemption, indefinitely.

AB 442 (Hardwick)—This bill would add a CEQA exemption for prescribed fire, thinning, or fuel reduction projects undertaken within a community with a single ingress and egress evacuation route.

SB 71 (Weiner)—This bill would expand on prior bills that exempt various projects related to public transportation, as well as bike and pedestrian infrastructure. It would expand an existing CEQA exemption for transportation plans to include additional projects, such as transit route readjustments or plans that readjust transit routes. The bill would also eliminate the exemption's sunset date, extending it indefinitely. The bill would also expand a CEQA exemption for projects related to zero emission modes of public transportation to include a larger class of projects, and would eliminate that exemption's sunset date as well.

SB 73 (Cervantes)—This bill would expand several existing CEQA exemptions and streamlining applicable to projects in transit priority areas to also cover projects in low vehicle travel areas. This bill would also modify and slightly broaden requirements applicable to CEQA exemptions for agricultural employee housing projects and infill housing projects near transit.

SB 231 (Seyarto)—This bill would require that, on or before July 1, 2027, the Office of Land Use and Climate Innovation (formerly the Governor's Office of Planning and Research) prepare and develop guidelines to incorporate into Appendix O of the CEQA Guidelines to establish best practices for determining whether a proposed project may have a sig-

nificant effect on the environment. The best practices would consider and identify thresholds of significance based on: (1) the California Global Warming Solutions Act of 2006 for greenhouse gas emissions; (2) the federal Clean Air Act for vehicle miles traveled; and (3) the California Noise Control Act of 1973 for noise pollution.

SB 232 (Seyarto)—This bill would require that the Office of Land Use and Climate Innovation conduct a study to evaluate how "locked in guidelines" could provide regulatory certainty for developers and lead agencies. The study would assess how those guidelines could affect the efficiency of the environmental review process pursuant to CEQA and evaluate whether the guidelines impact the quality and thoroughness of environmental reviews or create unintended environmental risks. As defined, "locked in guidelines" refers to guidelines adopted pursuant to Section 21083 of the Public Resources Code that are in effect at the time of the first issuance of the notice of preparation for a project. Those guidelines would then apply to the project throughout the course of the environmental review process, regardless of any later changes to the guidelines.

SB 252 (Valladares)—This bill would exempt projects to underground powerlines from the requirements of CEQA.

SB 607 (Wiener)—This bill would make several changes aimed at improving the clarity and efficiency of the CEQA process. For projects that do not meet all eligibility for a categorical or statutory exemption, this bill would focus the scope of environmental review to the project aspect or impact that resulted in inapplicability of the exemption. The bill would also align the standard of judicial review for a lead agency's determination to adopt a Negative Declaration or a Mitigated Negative Declaration to the existing substantial evidence standard of review for an Environmental Impact Reports, with exceptions for distribution centers and oil and gas infrastructure projects. This bill would also would also exclude from the administrative record required for CEQA litigation any communications of persons tangential or far removed from project decision-making, with specified exemptions. The bill would also aim to reduce delays on housing and other urban infill projects by clarifying the existing Class 32 urban infill exemption and exempting from CEQA review rezones that are consistent with an already approved housing element.

California Coastal Act

AB 10 (Essayli)—This bill would clear the way for SpaceX to increase its Falcon 9 launch activities at the Vandenberg Space Force Base from 36 to 50 launches per year. In October 2024, the Coastal Commission declined to concur with the Department of Air Force's consistency determination regarding increased SpaceX launches at the base under the Coastal Zone Management Act. This bill would declare that the Coastal Commission's objection to the consistency determination is null and void and find increase SpaceX launches consistent with the Coastal Act, effectively granting the necessary approval for the launch expansion. The bill emphasizes the importance of proposed launches for national security and the aerospace sector in California.

AB 357 (Alvarez)—This bill would exclude student housing projects and faculty and staff housing projects, as defined, from needing to obtain a permit from the California Coastal Commission for development in a coastal zone.

Density Bonus Law

AB 87 (Boerner)—This bill declares legislative intent to enact legislation that would ensure the Density Bonus Law only applies to residential projects, with no portion being used for visitor serving purposes or uses.

SB 92 (Blakespear)—Under existing law, a city or county is required to provide a density bonus and other incentives to housing developments of five or more residential housing units, including mixed-use developments, that meet certain affordability standards. SB 92 would revise existing law to define "housing development" to mean a project with at least five residential housing units, including mixed-use development, but only if at least two thirds of the square footage of the mixed-use development is designated for residential use.

General Plans

AB 39 (Zbur)—This bill would require cities, counties, or cities and counties with populations over

75,000 residents to develop or integrate an electrification plan into their general plans by January 1, 2030. This plan must include locally-based goals, policies, and implementation measures to promote electric vehicle (EV) charging, building electrification, and clean energy generation, with a particular focus on supporting disadvantaged communities, low-income households, and small businesses.

Housing Elements

AB 36 (Soria)—This bill aims to refine the process by which local jurisdictions are designated as "prohousing" by the Department of Housing and Community Development (HCD). This designation gives local governments priority for state funding related to housing and infrastructure. Existing law requires HCD to designate jurisdictions as prohousing pursuant to emergency regulations adopted by HCD, as prescribed, and to report those designations to the Office of Land Use and Climate Innovation. The bill would require HCD to adopt permanent regulations to determine which jurisdictions qualify as prohousing. Beginning with the 7th housing element cycle, the bill would require HCD to use materials from a jurisdiction's housing element submission when determining whether the jurisdiction qualifies as prohousing. This bill would also prohibit HCD from requiring jurisdictions with populations of less than 100,000 to renew their prohousing designation before the next housing element cycle.

SB 233 (Seyarto)—This bill would amend the Planning and Zoning Law's requirement that HCD meet and consult with each council of governments (council) to determine the existing and projected needs for housing in each region by a specified deadline. Specifically, for the seventh revision of the housing element, this bill would require HCD to meet and consult with each council at least 38 months prior to the scheduled revision and for the eighth and subsequent revisions of the housing element, the bill would require all meetings to occur at least 38 months prior to the scheduled revision. Under existing law, these meetings need occur only 26 months prior to the scheduled revision for the fourth and subsequent revisions of the housing element.

SB 262 (Wahab)—Existing law, section 65589.9 of the Government Code, creates incentives for jurisdictions that are compliant with housing element requirements and have enacted prohousing local policies. This bill would expand the definition of "prohousing policies" under the Planning and Zoning Law to include residential rent stabilization ordinances, safe parking and safe camping programs, and funding legal services for eviction defense and eviction prevention.

Planning and Zoning

AB 301 (Schiavo)—Existing planning and zoning law requires local agencies to compile a list of information needed to approve or deny a post-entitlement phase permit. Existing law also requires the agency to provide the public with exemplars of approved applications, and sets timelines for completing review of these applications. This law would apply the same rules to post-entitlement permitting conducted by a state department.

SB 9 (Arreguín)—Existing Planning and Zoning Law provides for the creation of an accessory dwelling unit by local ordinance, or, if a local agency has not adopted an ordinance, by ministerial approval, in accordance with specified standards. This bill would prohibit local agencies from imposing owner-occupancy requirements on accessory dwelling units.

SB 79 (Weiner)—This bill declares legislative intent to enact legislation that makes housing more affordable, reduces greenhouse gas emissions, and enhances public transportation by, among other things, upzoning land near transit.

Public Records Act

AB-343 (Pacheco)—The California Public Records Act exempts from disclosure specified information relating to elected or appointed officials, and makes specified disclosures of information relating to elected or appointed officials a crime. This bill would include certain types of retired judges to be included in the term "elected or appointed official."

AB 370 (Carrillo)—Under existing law, the California Public Records Act requires agencies to promptly determine whether a request seeks copies of disclosable public records in possession of the agency and then to notify the requester of the determina-

tion. However, if there are "unusual circumstances," as defined, an agency may delay this notification by 14 days. This bill defines "unusual circumstances" to allow for agencies experiencing a cyberattack to delay notification until the agency regains its ability to access its electronic servers and documents. This bill would also only allow unusual circumstances to apply during a state of emergency if the emergency directly affects the agency's ability to timely respond to requests.

Surplus Land Act

AB 76 (Alvarez)—This bill would amend how local agencies calculate affordable housing obligations when disposing of surplus land that includes housing for students, faculty, and staff. The bill revises two key provisions governing exempt surplus land in sectional planning areas. First, it specifies that the requirement to dedicate 25 percent of units to lower-income households applies only to units not designated for academic institution members. Second, it clarifies that the minimum density requirement of ten units per acre must account for all residential units in the planning area, including those designated for academic institution occupants.
(Amy Higuera)

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