Land Use and CEQA Litigation Update

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FEDERAL CASES

Yim v. City of Seattle *(9th Cir. 2023) 63 F.4th 783.*

QUICK TAKEAWAY: The Court considered a statute's total ban on inquiry regarding a potential tenant's criminal history to be overly broad, finding that more narrowly tailored regulations (such as those enacted in other jurisdictions) would serve the same ends.

Landlords and their trade association filed a state court action alleging that a city ordinance prohibiting them from inquiring about criminal history of current or potential tenants, and from taking adverse action, such as denying tenancy, against them based on that information violated their First Amendment and Substantive Due Process rights under the United States Constitution. Following removal, the United States District Court for the Western District of Washington entered summary judgment in the city's favor, and plaintiffs appealed.

The Ninth Circuit held that: (1) the city's ordinance was limited to a landlord or occupant of a unit that a prospective tenant was seeking to rent; (2) the ordinance provision prohibiting landlords from inquiring about tenants' criminal history was subject to First Amendment scrutiny; (3) the provision was not fatally under inclusive under the First Amendment; (4) the provision violated the landlords' First Amendment free speech rights as suppressing expressive activity without sufficient state interest to justify the restraint; and (5) the provision prohibiting landlords from taking adverse action based on a tenants' criminal history did not violate landlords' substantive Due Process rights.

In 2017, the City of Seattle (City) enacted the Fair Chance Housing Ordinance (Ordinance) prohibiting landlords from inquiring about the criminal history of current or potential tenants, and from taking adverse action, such as denying tenancy, based on that information. Shortly after the Ordinance was passed, Plaintiffs, several landlords who own small rental properties, and a landlord trade association that provides background screening services, filed this

action against the City, alleging violations of their federal and state rights of free speech and substantive due process. On cross-motions for summary judgment, the district court upheld the constitutionality of the Ordinance.

The Ninth Circuit held that the Ordinance's inquiry provision impinges upon the landlords' First Amendment rights as it is a regulation of speech that does not survive intermediate scrutiny. The court noted that the city's interests – in reducing barriers to housing faced by persons with criminal records and the use of criminal history as a proxy to discriminate on the basis of race – are substantial. Thus, the court was required to evaluate whether the Ordinance directly and materially advanced the government's substantial interests, and whether it is narrowly tailored to achieve them.

The Ninth Circuit held that the Ordinance was not "narrowly tailored" to achieve the city's stated goals because the inquiry provision – a complete ban on any discussion of criminal history between the landlord and prospective tenants – is not "in proportion to the interest served." The court noted that other cities have enacted similar ordinances without foreclosing all inquiries into criminal history by landlords. For instance, other cities' ordinances banned landlords from asking about arrest not leading to convictions, pending criminal charges, convictions older than two years old, the listing of a juvenile on a sex registry, and so forth. The court noted that the similar ordinances appeared to meet the city's housing goals with significantly less burdensome restrictions on speech.

However, the Ninth Circuit rejected the landlords' claim that the adverse action provision of the Ordinance violates their Substantive Due Process rights, noting that landlords do not have a fundamental right to exclude. Therefore, the Ninth Circuit held that rational basis review was the applicable standard, which the Ordinance survived because the City offered a "legitimate reason" for passing the Ordinance.

Since the Ordinance contained a severability provision, the Ninth Circuit remanded the case to the district court to determine whether the presumption in favor of severability is rebuttable.

On May 30, 2023, the Ninth Circuit denied the Appellees' and Appellants' cross-petitions for rehearing en banc. No. 21-35567, 2023 U.S. App. LEXIS 13277 (9th Cir. May 30, 2023)

SoCal Recovery, LLC v. City of Costa Mesa (9th Cir. 2023) 56 F.4th 802.

QUICK TAKEAWAY: The Court made it incrementally easier for a sober living home to state a claim that city zoning limitations constituted unlawful discrimination due to disability. The Court held that the sober living home operators could satisfy the

"actual disability" prong of the Americans with Disabilities Act and the Fair Housing Act by demonstrating that they served or intended to serve individuals with actual disabilities through admissions criteria and house rules. A showing that individual residents were disabled was not required. The Court expressed no opinion on the validity of the Costa Mesa regulations.

Sober living home operators (Appellants or Operators) brought actions alleging that the denial by the City of Costa Mesa (City) of their applications for special use permits and reasonable accommodation requests violated the U.S. Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (FHA), Americans with Disabilities Act (ADA), and California Fair Employment and Housing Act, Government Code section 12900 *et seq.* (FEHA). The United States District Court for the Central District of California, entered summary judgment in City's favor, and the Operators appealed.

The Ninth Circuit reversed and remanded, holding: (1) the Operators had standing; (2) the Operators were not required to present individualized evidence of actual disability of their residents; (3) as matter of first impression, the Operators can satisfy the "actual disability" prong of a disability discrimination claim on a collective basis; and (4) the Operators were not required to show that City subjectively believed that their residents were disabled.

In 2014, the City amended its zoning code to reduce the number and concentration of sober living homes in its residential neighborhoods. The zoning ordinances required all sober living homes to have a permit -- sober living homes do not require a license from the State of California -- and to be located more than 650 feet away from any other sober living home or treatment center. No existing homes were granted legacy status, so if two sober living homes were within 650 feet of each other, one would have to cease operations. The zoning code defined sober living homes as group homes serving those who are "recovering from a drug and/or alcohol addiction and who are considered handicapped under state or federal law," and define group homes as "facilit[ies] that [are] being used as a supportive living environment for persons who are considered handicapped under state or federal law." The Operators submitted permit applications and reasonable accommodation requests so they could continue to operate their facilities. The City denied the permits based on the 650-feet separation requirement, issued citations, and filed abatement actions in state court.

During discovery, the City requested all documents related to the "disability" status of every one of the Operators' clients. The Operators refused to produce those documents, or to have any of its employees testify about them, asserting privileges stemming from the federal Health Insurance Portability and Accountability Act (HIPPA). The City moved for summary judgment, arguing that

without individualized evidence, the Operators' statutory disability discrimination claims failed because they had not demonstrated a genuine dispute of material fact as to whether any of their residents were "disabled" or "handicapped." Granting the City's motions for summary judgment, the district court found that Operators did not establish that *individual* residents in their sober living homes were actually disabled, or that the City regarded their residents as disabled.

The Ninth Circuit held that the district court applied the wrong legal standard because the Operators can satisfy the "actual disability" prong *on a collective basis* by demonstrating that they serve or intend to serve individuals with actual disabilities; the Operators need not provide individualized evidence of the actual disability of their residents. The Ninth Circuit continued that, in determining whether the Operators can establish disability under the "regarded as disabled" prong of the disability definition, the district court erred by finding that the Operators must prove the City's "subjective belief" that their residents were disabled. The Ninth Circuit explained that, under this prong, the analysis turns on how an individual is perceived by others.

The Ninth Circuit noted that the Operators provided the district court with evidence of (1) admissions criteria and house rules, (2) employee and former resident testimony, (3) public fears and stereotypes of their residents that may have influenced the City's perception, and (4) the actual content of City ordinances, denial letters, resolutions, citations, and abatement actions that acknowledged or stated the residents in the Operators' homes were disabled.

The Ninth Circuit also noted that the City conceded at oral argument that new homes could satisfy the actual disability standard using this type of evidence, *i.e.*, evidence of policies and procedures that the group home has a zero-tolerance drug and alcohol use policy, produced through declarations of individuals related to the group home. Thus, the court held, there is no reason to hold existing homes to a higher standard.

Johnson v. City of Grants Pass (9th Cir. 2022) 50 F.4th 787.

QUICK TAKEAWAY: This case further refines the approach taken in the *Boise* case forbidding bans on outdoor sleeping by the homeless absent proof of available shelter beds, by concluding that a civil infraction process that may lead to a criminal process after a series of violations does not avoid the Eight Amendment infirmity cited in the *Boise* case. In addition, an anti-camping ordinance must at least allow an individual to take some rudimentary steps that provide protection from the elements.

Homeless persons (Plaintiffs) brought a putative class action against the City of Grants Pass (City) in Oregon federal court challenging the constitutionality of

the City's ordinances (Ordinance(s)) that precluded the use of a blanket, a pillow, or a cardboard box for protection from the elements while sleeping in public, and which provided for civil fines, exclusion orders, and criminal prosecution for trespass. The district court granted partial summary judgment to Plaintiffs and issued a permanent injunction prohibiting enforcement of some of the Ordinances. The City appealed.

The Ninth Circuit affirmed in part, reversed in part, and remanded. In relevant part, the Ninth Circuit found that the City Ordinance precluding the use of bedding supplies when sleeping in public violated the Cruel and Unusual Punishments Clause in the Eighth Amendment to the U.S. Constitution, as applied to individuals who were involuntarily experiencing homelessness and who had no shelter. The Ninth Circuit held that: (1) the City's alleged reduction in enforcement of the Ordinances did not render the action moot; (2) the relief sought was within the limits of Article III of the U.S. Constitution; (3) the district court acted within its discretion in finding that the commonality requirement for class certification was met; and (4) the Ordinance precluding the use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public violated the Cruel and Unusual Punishments Clause as applied to individuals who were involuntarily experiencing homelessness and who had no shelter.

The City has a population of approximately 38,000 people and as many as 600 homeless persons. The number of homeless persons outnumbers the available shelter beds. The Ordinances prohibited individuals from sleeping on or in sidewalks, streets, alleyways, and doorways. It also prohibited occupying a "campsite" on public property and defined "campsite" as any place with bedding materials, stoves, or fires, for the purpose of maintaining a temporary place to live. The Ordinances also prohibited "overnight parking" in park parking lots, including being parked for more than two (2) hours during nighttime hours. Multiple violations of the Ordinances could result in an exclusion order, and criminal trespass charges if the order was violated.

The City claimed that the lawsuit was moot because it had stopped enforcing the Ordinances in the manner challenged. The Ninth Circuit rejected the City's mootness claim, citing established case law that voluntary cessation of an enforcement practice does not deprive a court of jurisdiction.

The Ninth Circuit rejected the City's claim that the relief sought (enjoining enforcement of the Ordinances) by Plaintiffs was not within the court's grant of Article III jurisdiction because the remedy was better addressed by legislative discretion. The court cited previous history, including *Martin v. City of Boise* (9th Cir. 2019) 920 F.3d 584 (*Martin*), where courts had exercised their discretion in interpreting the constitutionality of anti-camping ordinances without overstepping its Article III jurisdiction.

The Ninth Circuit considered whether the district court erred in certifying the class of at least 600 homeless persons in the City. The appellate court found that the class was properly certified, satisfying the commonality and numerosity requirements, despite an officer's guess that enforcement had only occurred against fewer than 50 people. The Ninth Circuit also considered, *sua sponte,* whether the class could proceed when the class representative passed away while the matter was on appeal. Finding that the class could proceed, the Ninth Circuit remanded for the district court to substitute a new class representative.

On the merits, the Ninth Circuit relied heavily on its decision in *Martin*, which prohibited the imposition of criminal penalties for sleeping or lying in public when an individual had no other place to sleep. The Ninth Circuit dismissed the City's argument that its penalties were civil, explaining that the City still authorized an individual to be cited for criminal trespass if that person were found in a park after being issued an exclusion order. The Ninth Circuit also rejected the City's argument that the issue was moot because it had revised its Ordinances to permit sleeping in parks. The amended Ordinances still prohibited "campsites." The Ninth Circuit concluded that the prohibition violated the Cruel and Unusual Punishments Clause, but the Ninth Circuit remanded to the district court to narrow the injunctive relief so that it applied only to the extent necessary to protect "the most rudimentary precautions" against the elements.

The Ninth Circuit reiterated that its holding, like its holding in *Martin,* is narrow; the ruling only prohibits punishments for sleeping in public when an individual has no other option. The Ninth Circuit explained that it expanded on *Martin* by finding that class certification was not categorically impermissible in similar cases, and that "sleeping" in the context of *Martin* includes the rudimentary forms of protection from the elements.

Circuit Judge Collins stated in a dissent that *Martin* seriously misconstrued the Eighth Amendment and the U.S. Supreme Court's case law construing it, but even assuming if *Martin* were correct, the *Johnson* decision—which Judge Collins argued both misread and greatly expanded *Martin*'s holding—was egregiously wrong.

Petition for rehearing en banc denied. No. 20-35752, 20-35881, 2023 U.S. App. LEXIS 16984 (9th Cir., July 5, 2023). Judges Silver and Gould filed a joint statement regarding the denial of rehearing, writing that the other opinions on the denial of rehearing significantly exaggerate the holding in *Johnson v. Grants Pass*. Judges Silver and Gould characterized *Grants Pass* as holding only that governments cannot criminalize the act of sleeping with the use of rudimentary protections from the elements in some public places when a person has nowhere else to sleep. That is, the opinion did not establish an unrestrained right for involuntarily homeless persons to sleep anywhere they choose.

Judge O'Scannlain, joined by Judges Wallace, Callahan, Bea, Ikuta, Bennett, R. Nelson, Bade, Collins, Lee, Bress, Forrest, Bumatay, VanDyke, and M. Smith, in part, filed a statement regarding the denial of rehearing en banc. *Id.* O'Scannlain characterized Ninth Circuit jurisprudence with the addition of *Grants Pass* as now effectively guaranteeing a personal federal constitutional "right" for individuals to camp or sleep on sidewalks and in parks, playgrounds, and other public places in defiance of traditional health, safety, and welfare laws—a holding O'Scannlain calls "dubious" and "premised on a fanciful interpretation of the Eighth Amendment." *Id.*

Judge Graber, also in an opinion respecting the denial of rehearing en banc, agreed with the basic legal premise that the Eighth Amendment protects against criminal prosecution of the involuntary act of sleeping but stated that the injunctive relief in *Grants Pass* went too far; specifically, Graber took issue granting *classwide* relief as opposed to "the individualized inquiries inherent both in the Eighth Amendment context and in the context of injunctive relief." *Id.*

Judge M. Smith, joined by Judges Bennett, Bumatay, and VanDyke, and Ikuta, R. Nelson, Bade, Collins, and Bress joined in part, Judge Collins, and Judge Bress, joined by Judges Callahan, M. Smith, Ikuta, Bennett, R. Nelson, Miller, Bade, Lee, Forrest, Bumatay, and VanDyke, filed opinions dissenting from the denial of rehearing en banc. The three opinions each disagreed with *Grants Pass* and *Martin* and noted the practical consequences for local governments. *Id.* Supreme Court review of *Grants Pass* remains possible as this paper is written.

STATE CASES

Anderson v. County of Santa Barbara (2d Dist. 2023) 2023 Cal. App. LEXIS 621.

QUICK TAKEAWAY: Code enforcement activity, such as removing obstructions from a public road is not subject to injunction if the underlying activity is a crime, and CEQA cannot be used as a defense or otherwise as a tool to prevent a public official from exercising the discretion normally attendant to the enforcement of applicable public nuisance laws.

Residents had installed various obstructions in the right of way of East Mountain Drive to discourage the public from parking in front of their residences in order to access a popular hiking trail.

The County of Santa Barbara Public Works Department began the process of restoring the public parking that had been removed by these private encroachments by approving various activities under the moniker of the "Montecito Right of Way Restoration" project. The County concluded that

these activities fell under the "existing facilities" exemption contained in CEQA Guidelines section 15301(c).

The affected residents obtained an injunction from the trial court, based on a finding that (among other things) the County had failed to comply with CEQA when it approved the project under the stated exemption.

In overturning the trial court decision, the Court of Appeal noted that CEQA does not limit the "power or authority of any public agency in the enforcement or administration of any provisions of law which it is specifically required to enforce or administer…." [p. 15-16].

While the Department of Public Works had taken an agenda item to the Board of Supervisors for approval (presumably to obtain funding and to preempt any political efforts by the affected citizens to derail the activity), the activity to be undertaken was within the Departments existing scope of authority as per County ordinances and state law. The mere fact that the Department explained this activity as an organized effort to restore and enhance needed parking, did not place the exercise of this existing discretionary authority to enforce the law prohibiting encroachments in the public right of way within the reach of an injunction premised upon a failure to comply with CEQA.

McCann v. City of San Diego (4th Dist. Cal. Ct. App. July 19, 2023) D081185, ___ Cal. App. 5th ___, 2023 Cal. App. LEXIS 607 [ordered published Aug. 9, 2023].

QUICK TAKEAWAY: Once the city had complied with the terms of a writ, the Court could not retain jurisdiction ad infinitum to ensure city complies with CEQA should it subsequently choose to reconsider the project it has unequivocally abandoned.

In CEQA suit, the trial court issued a peremptory writ of mandate, which ordered a city to set aside approvals of projects to install underground utility wires. The city's return included a resolution rescinding the prior resolutions that had approved the projects. The trial court declined to discharge the writ.

The Court of Appeals reversed and remanded, holding the city fully complied because the writ did not direct any other remedial action beyond rescinding the approvals. The trial court exceeded its jurisdiction by not discharging the writ after the city complied because the trial court's continuing jurisdiction and equitable powers did not allow it to retain jurisdiction in perpetuity based upon the hypothetical possibility that the city might move forward with the same projects in the future, but instead ended when the writ was satisfied.

Thus, a trial court always retains continuing jurisdiction to enforce an agency's compliance with a peremptory writ that the court has issued. However, that jurisdiction ends, and the writ must be discharged, when the writ has been fully complied with, and what agency actions are required for full compliance is determined by the terms of the writ itself, interpreted as a matter of law by a

reviewing court. Here, the trial court erred to retain jurisdiction after the City filed a return demonstrating full compliance with the writ, such that nothing the writ specifically ordered the City to do remained to be done i.e., the "set aside" directive was the writ's sole remedial mandate and the City's return demonstrating it had rescinded all project approvals ordered to be set aside evidenced complete compliance with the writ. The situation could have been different had the City moved immediately to reanalyze and reapprove the project, but that was not the case.

Olen Properties Corp. v. City of Newport Beach (4th Dist. Cal. Ct. App. 2023) 93 Cal. App. 5th 270.

QUICK TAKEAWAY: When preparing an addendum to a prior EIR that used the LOS methodology in the traffic analysis, the addendum may also use that methodology. Changes to regulations alone are not "new information" that would trigger the need for a supplemental EIR, as long as the underlying environmental issue was known and addressed in the initial EIR.

In *Olen*, the court upheld the City of Newport Beach's approval of a 312-unit apartment complex challenged by a neighboring commercial development owner. To comply with CEQA, the City of Newport Beach prepared an addendum to an existing environmental impact report (EIR) prepared in 2006 as part of its general plan update. Petitioner Olen Properties challenged the addendum and argued that the City was required to prepare a subsequent EIR to analyze alleged "new conditions" not addressed in the 2006 EIR – including CEQA amendments supplanting level of service analysis of traffic impacts with vehicle miles travelled analysis. Petitioner also contended that the project was inconsistent with the City's land use policies.

The trial court denied the writ. The Court of Appeals affirmed, holding that the project was not inconsistent with the city's general plan (Gov. Code § 65300) because the city reasonably interpreted the undefined term "residential village" in one of its land use policies and, in applying another policy, did not err in finding a park was of sufficient size to qualify as a neighborhood park. Substantial evidence supported the city's determination that no new conditions required preparation of a subsequent or supplemental environmental impact report (Pub. Res. Code § 21166) because a prospective regulatory change as to measurement of traffic impacts (LOS standard used in 2006 EIR v. VMT analysis that is currently required) was not "new information", the record contained competing expert opinions about hazardous waste, covenants between private parties did not have to be considered, and neither geotechnical recommendations nor shoring recommendations substantially changed the project.

United Neighborhoods for Los Angeles v. City of Los Angeles (2nd Dist. Cal. Ct. App. June 28, 2023) __ Cal. App. 5th ___, B321050, 2023 Cal. App. LEXIS 562 [ordered published on July 25, 2023].

QUICK TAKEAWAY: When relying upon the infill exemption, general plan consistency analysis must consider all relevant policies, including housing element policies that may be affected by a non-housing project.

In *United Neighborhoods*, the court affirmed a judgment granting a writ of mandate setting aside (1) the City of Los Angeles' approval of a 10-story hotel project (with three levels of subterranean parking) on a half-acre site in the Hollywood Community Plan area, and (2) the City's determination that the hotel project was exempt under CEQA's Class 32 categorical exemption for infill projects. The project included the demolition of 40 apartments subject to the City's rent stabilization ordinance. In its approval, the city failed to consider whether the project was consistent with Housing Element policies and therefore failed to consider whether it was consistent with "all applicable general plan policies."

The Court of Appeal held that the project was not shown to qualify for the infill categorical exemption (14 CCR § 15332; Pub. Res. Code § 21084, subd. (a)) because substantial evidence did not support an implied finding that the housing element policies of the city's general plan regarding preservation of affordable housing did not apply to the project. Deference to the city's weighing of competing interests in determining consistency with the general plan was not appropriate because the record did not indicate the city weighed and balanced all applicable policies.

Lucas v. City of Pomona (2d Dist. Cal. Ct. App. 2023) 92 Cal. App. 5th 508.

QUICK TAKEAWAY: Use of CEQA exemption for projects consistent with plans of zoning ordinances themselves subject to CEQA analysis will be upheld so long as there is substantial evidence in the record to support an agency's conclusion that a project is consistent with the general plan, zoning or community plan that was the subject of a prior EIR and that there is nothing peculiar about the present project that represents a potential impact different from those studied in the prior EIR.

The City certified a Final EIR in 2014 for a General Plan Update that extended its development horizon to 2035. Subsequently, the City decided to tax and impose licensing procedures and regulations on commercial cannabis businesses. The City also determined that, prior to accepting applications for cannabis-related businesses; it would designate certain parcels in the City where those uses would be permitted. The City adopted such an ordinance, and that ordinance was the project at issue in the case.

The trial court denied a petition for writ of mandate challenging Pomona's issuance of a notice of exemption from CEQA. Pomona relied on the land use consistency exemption (14 CCR § 15183; Pub. Res. Code § 21083.3). The Court of Appeal affirmed, holding that substantial evidence supported a determination that the commercial cannabis activities to be allowed by the project were similar to or consistent with existing land uses or development density established by a prior environmental impact report and general plan update. Moreover, substantial evidence showed the project had no reasonably foreseeable project-specific changes and no impacts beyond those previously identified because cannabis-related development would remain subject to development standards set forth in the existing base zoning district and the general plan update and would occur within designated subareas for retail, commercial, and industrial cannabis uses.

Tulare Lake Canal Co. v. Stratford Public Utility Dist. (5th Dist. Cal. Ct. App. 2023) 92 Cal. App. 5th 380.

QUICK TAKEAWAY: When weighing the balance of harms in deciding whether to grant injunctive relief in a CEQA case, the Court must also consider the harm to the public interest in informed decision making when, as the case was here, the agency does not make an adequate effort at CEQA compliance.

Plaintiff filed a petition for writ of mandate alleging a public utility district failed to comply with CEQA when it granted an applicant's request for an easement to build a 48-inch water pipeline that would cross a district canal. Plaintiff applied for a preliminary injunction to halt construction and operation of the pipeline pending CEQA compliance. The trial court determined plaintiff was likely to prevail on the CEQA claim, but concluded the relative balance of harms from granting or denying injunctive relief favored denying the injunction.

The Court of Appeal reversed and remanded the matter to the trial court to reconsider the injunction. The court concluded it was a near certainty that the district failed to comply with CEQA. The construction and operation of the proposed pipeline qualified as a discretionary project. As a result, the district was required by CEQA to conduct a preliminary review before granting the easement. The trial court erred in stating there was no evidence of harm to the public generally in allowing the proposed project to go forward. The public interest in informed decision making about projects with potentially significant environmental effects was harmed when the district's board approved the easement without conducting a preliminary review and without obtaining information about the proposed pipeline's construction and operation. There was a reasonable probability the preliminary injunction would have been granted if the trial court had identified the harm to the public interest in informed decision making and included it in balancing the relative harms.

The Claremont Canyon Conservancy v. Regents of University of California (1st Dist. Cal. Ct. App. 2023) 92 Cal. App. 5th 474.

QUICK TAKEAWAY: The requirement of a legally adequate project description can be satisfied in various ways, largely dependent on the type of project proposed, and if appropriate may account for potentially changing site conditions through the application of established standards and other criteria that are explained in the EIR.

The dispute arose from UC Berkeley's intention to remove vegetation from its Hill Campus, spanning 800 acres in the East Bay Hills. The Campus is historically prone to wildfires, prompting UC to clear it regularly over the past 100 years. Plaintiffs filed writ petitions challenging the adequacy of the EIR's descriptions of four projects and its environmental analysis. The trial court concluded the EIR did not comply with CEQA because the project descriptions were insufficiently "concrete" and issued a peremptory writ of mandate directing vacation of the projects' certification.

The Court of Appeal reversed, holding the EIR's project description contained the information required by CEQA Guidelines § 15124(a)-(d) and thus provided sufficient information to understand the projects' environmental impacts. The project descriptions were sufficient without identifying each tree that would be removed because detailed criteria for removal provided flexibility in responding to changing conditions and the projects' basic characteristics were accurate, stable, and finite. The evidence amply supported a conclusion that it was not reasonably feasible to prepare a tree inventory because the steep, rugged terrain of the project areas created a practical impediment and preparing a tree inventory would be costly; moreover, judicial deference was appropriate with regard to factual determination that it would be impractical to identify a set tree density and infeasible to specify the exact number of trees that would be removed.

Coalition for Historical Integrity v. City of Buenaventura (2d Dist. Cal. Ct. App. 2023) 92 Cal. App. 5th 430.

QUICK TAKEAWAY: Despite a statutory presumption of historical significance, an agency may make a finding to the contrary regarding a particular resource so long as the agency bases its decision on substantial evidence.

In 1936, a concrete statue of Father Junipero Serra was erected in front of the Ventura County Courthouse, which later became City Hall. The City designated that statue a historic landmark in 1974; styling it "Landmark No. 3". The concrete statue deteriorated over the years, and was replaced in 1989 with a bronze replica, also marked by a plaque reading "Landmark No. 3". The City

subsequently placed the bronze statue on a list of historic landmarks. The County Recorder recorded the minute order from 1974 designating the original concrete statue a historic landmark. In 2020, the City hired a consultant to analyze whether the bronze statue was indeed of historical value. After concluding that the replica was not a historic landmark, the City decided to relocate the statute to the local mission, finding its decision exempt from CEQA under the "common sense" exemption.

Plaintiff sued. The trial court denied a writ of mandate challenging the City's decision to remove what Plaintiff alleged was a historic landmark (Pub. Res. Code § 5020.1, subd. (k)).

The Court of Appeal affirmed, holding that the decision did not require CEQA review because the City's finding that the bronze statue was never culturally or historically significant rebutted any presumption of historical value (Pub. Res. Code §§ 21060.5, 21084.1), and the CEQA commonsense exemption (14 CCR § 15061, subd. (b)(3)) therefore was properly applied. Removing the bronze statute did not violate either a specific plan or the municipal code because there were no prohibitions on removing property lacking historical value.

Preservation Action Council of San Jose v. City of San Jose (6th Dist. Cal. Ct. App. 2023) 91 Cal. App. 5th 517.

QUICK TAKEAWAY: Compensatory mitigation for demolition of historic resources should be considered, but if required should be limited to efforts that are proportional to the project impacts and will preserve substantially similar resources.

In *Preservation Action Council*, the Court of Appeal upheld the City of San Jose's certification of a final Supplemental EIR for development of three high-rise office buildings on an eight-acre downtown site containing several historic structures that the Project would demolish. In affirming the trial court's judgment denying the plaintiff's petition for writ of mandate, the Court rejected Appellant's arguments that the EIR failed to adequately analyze and provide compensatory mitigation for historic buildings and failed to adequately respond to comments on those issues.

The petition alleged the project would demolish significant historical resources despite feasible mitigation measures and alternatives that could accomplish project objectives. Of particular concern was the proposed demolition of a bank building. The petition claimed the City failed to justify its rejection of suggested mitigation measures, which included delays to some of the demolition and the payment of fees intended to compensate for the removal of historic resources. Once the trial court denied the petition, the bank building was immediately demolished. This mooted consideration of certain project alternatives and limited the issues to the claimed CEQA violation of certifying the

EIR despite an inadequate analysis and identification of mitigation loss of historic resources.

The Court of Appeal affirmed, holding that the city did not abuse its discretion because compensatory mitigation would have done little to lessen the significant unavoidable impact, given unchallenged EIR findings that the resources were unique and irreplaceable. The opinion establishes that such mitigation is theoretically available. However, any proposed compensatory mitigation must involve preservation of properties sufficiently similar to those that are being removed to represent proportional mitigation that actually lessens the project's specific impacts.

Shenson v. County of Contra Costa *(Cal. Ct. App., Mar. 30, 2023, No. A164045) 2023 WL 2706499.*

QUICK TAKEAWAY: To establish liability for inverse condemnation due to flooding, a public improvement must be the cause of the damage. Approving a subdivision map, requiring the construction of drainage improvements, and requiring an offer of dedication will not convert the required improvements into a public work unless the dedication is accepted or the claimant otherwise proves that the agency has dominion and control over the improvements.

Plaintiffs purchased residential properties that are adjacent to a creek in neighboring subdivisions within Contra Costa County (County). The Owners sued the County and a flood control district for inverse condemnation and parallel tort causes of action after drainage improvements that were constructed more than 40 years earlier by the subdivision developers failed, seriously damaging Owners' properties. Owners appealed from the judgment the superior court entered after granting summary judgment against them on their complaint.

The undisputed facts failed to demonstrate that the Defendants owned or exercised actual control over the waterway or drainage improvements, thereby precluding the improvements from being rendered public works for which either entity is responsible.

The creek that runs along the properties is a natural watercourse that is the main conveyance for storm water runoff from the watershed above the Owners' properties, and is the only reasonable means of collecting and conveying that runoff. Pursuant to the Subdivision Map Act, the County required the developers to make drainage improvements and to offer to dedicate drainage easements to the County. When it approved the subdivision maps, however, the County did not accept the offers of dedication for the drainage improvements, which remained in the ownership of the developers and later the homeowners who purchased the properties.

Owners claimed the County assumed ownership and responsibility for the drainage improvements by requiring the developers to construct them and to offer to dedicate easements to the County. The County contended that it did not accept the offers to dedicate the easements and did not otherwise assume responsibility for maintaining the improvements.

The Court of Appeal noted that a public entity may be liable as a property owner when alterations or improvements to its own upstream property result in the discharge of an increased volume of or velocity of surface water in a natural watercourse causing damage to the property of a downstream owner. However, a government entity is only liable if its conduct was unreasonable and the lower property owner acted reasonably. Further, a government entity may be liable in inverse condemnation where the damage is caused by increased volume or velocity of surface waters from public works or improvements, such as a storm drainage system, on publicly owned land. On the other hand, inverse condemnation liability will not lie if the damage is caused by a private development approved or authorized by the public entity when the entity's sole affirmative action was the issuance of a permit and approval of the subdivision map.

Owners failed to cite any authority supporting the proposition that a county's imposition of conditions of approval through the Subdivision Map Act, including drainage and easement requirements, standing alone converts the improvements into a public work. The court also rejected Owners' claim that requiring drainage facilities and conveying water across properties, over which it might not have flowed when the area was undeveloped, converted the improvements into public works.

Reviewed denied by S279857, 2023 Cal. LEXIS 4061 (Cal. July 12, 2023).

Hamilton and High, LLC v. City of Palo Alto *(Cal. Ct. App., Mar. 20, 2023, No. H049425) 2023 WL 2570589.*

QUICK TAKEAWAY: Strict compliance with the requirements and deadlines of the Mitigation Fee Act (AB 1600) is essential. The required five-year findings must be made on a timely basis for all development fees that fall within the Act. This includes both mandatory fees and fees paid electively in lieu of complying with a development standard or condition of approval. The required findings must be made within 180 days of the end of the applicable fiscal year and must cover <u>all</u> unexpended fees in the fund. Cities that do not adopt timely and adequate findings are at risk of claims for refund of the entire balance of the relevant fee account. The decision also creates uncertainty as to the one-year statute of limitations for refund claims applied in *County of El Dorado v. Superior Court* (2019)

42 Cal.App.5th 620 ("*El Dorado*"), opening the possibility of a three- or four-year statute.

Developers brought a petition and complaint for mandamus, declaratory, and injunctive relief against the City of Palo Alto (City), alleging that the City's retention of unexpended "in-lieu parking fees" after failing to make certain public reports and findings violated the Mitigation Fee Act. The Superior Court entered judgment in favor of the City. Developers appealed.

The Court of Appeal reversed and remanded, holding: (1) the City's in-lieu parking fee was a "fee" within meaning of Mitigation Fee Act; (2) the mandamus claim accrued when the City denied developers' request for a refund (stating no deadline for the developer to request that refund); (3) the Mitigation Fee Act required the City to make five-year findings regarding the entirety of the fund, including fees deposited within last five years; (4) the Mitigation Fee Act mandated that the City return unexpended fees upon its failure to make timely five-year findings; and (5) the general standard for holding invalid or setting aside zoning or planning actions due to procedural errors did not apply to the mandatory refund remedy.

Petitioners contended the City failed to make certain five-year findings statutorily required by section 66001, subdivision (d), of the Act and was therefore required to refund their unexpended in-lieu fees.

The City countered that the in-lieu parking fee, charged when a developer elected not to provide parking directly, was not a "fee" subject to the Act because it was paid voluntarily and not "imposed." Consequently, the City contended that the five-year finding and refund provisions did not apply, and the City had no obligation under the Act to return the fees.

In addition to this principal claim, the City maintained that, even if the Act did apply, the claim for relief was time barred and lacks a statutory basis. The City also contended that it complied with the Act's requirements by belatedly adopting five-year findings.

The Court of Appeal found that the in-lieu parking fee met the Act's definition of "fees." By its plain terms, the Act applies when "a monetary exaction" imposed in connection with an applicant's development project for the purpose of defraying the cost of public facilities related to the development project is charged by a local agency as a condition of approval for a development project by a local agency. The provision of parking or alternative fee payment was a condition of approval for the project, with the purpose of defraying the cost of facilities related to the project. The requirement was expressly written in the City's municipal code. When a party elects to pay the in-lieu fee, the fee becomes a condition of approval. Accordingly, the Court of Appeal found that the Act

applied to the in-lieu fee.

The Court of Appeal rejected the City's argument that the challenge was barred by Code of Civil Procedure section 340's one-year statute of limitations applicable to claims based on penalty or forfeiture as *El Dorado* had concluded. The Court of Appeal concluded that, at the earliest, the cause of action accrued when the City denied the refund request for unexpended in-lieu fees. This timing complied with all three possible statutes of limitations in the Code of Civil Procedure – Sections 340, 338, and 343. But the Court set no deadline for when a developer might claim a refund – here, it was years after the fees were paid. Thus, the decision opens the possibility for a nearly endless exposure to refund.

The Court of Appeal also found that the City was obligated to issue five-year findings for the in-lieu fees, the City failed to make those findings, and the City's belated findings did not satisfy the Act.

On April 17, the court of appeals denied review after modifying its opinion. No. H049425, 2023 Cal. App. LEXIS 299 (6th Dist. Apr. 17, 2023).

The California Supreme Court denied review. S279718, 2023 Cal. LEXIS 4171 (Cal. July 19, 2023). A legislative response is possible.

Committee to Relocate Marilyn v. City of Palm Springs (2023) 88 Cal.App.5th 607.

QUICK TAKEAWAY: When substantial changes are made to a project after the filing of a notice of exemption, the normal 35-day statute of limitations is replaced by a 180-day statute of limitations that begins to run when petitioner knew or reasonably should have known of the changes to the project.

Committee to Relocate Marilyn filed a petition for writ of administrative mandate, challenging the City of Palm Springs' closure of downtown to all vehicular traffic for a period of three years to allow a tourism organization to install and display a large statue of Marilyn Monroe in the middle of the street. The Superior Court sustained the City's demurrer without leave to amend, and Petitioner appealed.

The Court of Appeal reversed and remanded on the grounds that: (1) the City exceeded its statutory authority to "temporarily" close portions of streets when it closed the downtown street for three years, and (2) the City's "temporary" closure of street for three years was a material change to the project, made by the City after it filed its notice of exemption citing Class 1 (existing facilities), and thus, the applicable statute of limitations under CEQA to challenge the project was 180 days from the date of notice of the change.

The City closed off one of its downtown streets to traffic for three years to

allow a tourism marketing organization to install and display a large statue of Marilyn Monroe in the middle of the street. Petitioner filed a petition for writ of administrative mandate challenging the street closure.

The Court of Appeal first concluded that the most reasonable construction of Vehicle Code section 21101 was that a temporary closure was only for a relatively short period of time, in order to safeguard persons during an event listed in the statute such as a parade or special event. The Court of Appeal concluded that the statute did not permit cities to close streets for whatever longer time it desired. Accordingly, the Court of Appeal found that Petitioner had sufficiently alleged that the City exceeded its statutory authority to close the street to survive the City's demurrer.

The Court of Appeal found that the trial court erred in sustaining the City's demurrer to the CEQA cause of action. The trial court found that the CEQA cause of action was time-barred by the 35-day statute of limitations following the City's filing of a notice of exemption for the project. The Court of Appeal, however, found that the notice of exemption did not trigger the shorter statute of limitations because the description of the project, citing the Class 1 existing facilities (CEQA Guidelines, § 15301) categorical exemption, included the City permanently ending vehicular access rights on the public street. The City, however, temporarily limited public access per Vehicle Code section 21101, subdivision (e). The Court of Appeal found that this was a material change after the notice of exemption was filed, and accordingly, the 180-day statute of limitations applied from the date Petitioner knew or reasonably should have known that the project substantially differed from the project in the notice of exemption. Thus, the CEQA claim was timely.

Spencer v. City of Palos Verdes Estates (2023) 88 Cal.App.5th 849.

QUICK TAKEAWAY: City may face liability for violations of the Coastal Act by tolerating, and in some instances assisting or being complicit in private actions, over decades that enforced a "locals only" policy on beach access. Extension of this "conspiracy" concept to access restrictions on other public property, such as parks or recreation facilities, may be possible.

Non-local surfers, who encountered alleged harassment from a local surf group when trying to use a premier surf spot at a City of Palos Verdes Estates (City) beach, and a non-profit organization dedicated to preserving coastal access (collectively, Plaintiffs) brought an action against the local surf group, some of its members, and the City alleging conspiracy to deny access under California Coastal Act (Act or Coastal Act). The Superior Court granted the City's motion for judgment on the pleadings. Plaintiffs appealed.

Lunada Bay is a premier surf spot located of a beach owned by the City. The Lunada Bay Boys (Bay Boys) are a group of young and middle-aged men, residents of the City, who consider themselves the self-appointed guardians of Lunada Bay. One of their tenets is to keep outsiders away. They accomplish this allegedly through threats and violence. The Plaintiffs sued the Bay Boys, the City, and some individual members of the Bay Boys under the Act.

The Plaintiffs alleged that the City conspired with the Bay Boys essentially to privatize Lunada Bay, depriving nonlocals of access, in at least two ways: (1) by allowing the Bay Boys to build on the City's beach a masonry and wood structure, known as the Rock Fort, which the Bay Boys used as their hangout; and (2) being complicit in the Bay Boys' harassing activities and tacitly approving them. The trial court granted the City judgment on the pleadings, on the joint bases that: (1) merely allowing the Rock Fort to be built was not actionable against the City, in the absence of allegations that the City itself performed its construction or agreed that it be built; and (2) condoning the Bay Boys' acts of harassment is not a Coastal Act violation as neither harassment itself, nor standing by while it occurs, is conduct reached by the Act. The Court of Appeal reversed.

The Court of Appeal found that the fort qualified as "development" under the Act, which therefore required a permit under the Act. The Court of Appeal cited *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, and *Lent v. California Coastal Com.* (2021) 62 Cal.App.5th 812, 832 (*Lent*), to find that a landowner could be liable for Coastal Act violations on their land, and, that by maintaining an unpermitted structure on their property, a landowner "undertakes activity" under the Act. Accordingly, the City could be liable under the Act for Rock Fort, even though it did not build it.

The Court of Appeal first found that harassment *may* qualify as "development" under the Act. The Court of Appeal compared the Bay Boys' alleged activities of running people off and engaging in fights to a locked gate with a security guard, which had previously been found to constitute "development" under the Act. The Court of Appeal also found that the Plaintiffs sufficiently alleged that the City could be liable for conspiracy to commit the unpermitted development under the Act. The Plaintiffs alleged that City residents and the city council did not want outsiders in the city and city officials had previously stated a desire to keep outsiders away. They also alleged that the City was aware of the Bay Boys and had not stopped their activities, and had actually instituted their own acts to keep outsiders away by issuing traffic and parking citations.

The California Supreme Court denied review. S279465, 2023 Cal. LEXIS 3016 (Cal. May 31, 2023)

Arcadians for Environmental Preservation v. City of Arcadia (2023) 88 Cal.App.5th 418.

QUICK TAKEAWAY: General objections to a project that is the subject of a categorical exemption are not sufficient to exhaust administrative remedies. The opponent must articulate during the approval process why the project does not qualify for the stated exemption.

Arcadians for Environmental Preservation (AEP), founded by the neighbor of a home-remodel project, filed a petition for writ of administrative mandamus challenging the approval by the City of Arcadia (City) of a homeowner's application to expand the first story of her single-family home and to add a second story. AEP contended that the project was not categorically exempt from CEQA as a minor alteration to an existing private structure. The Superior Court denied petition, finding AEP failed to exhaust administrative remedies. AEP appealed.

Following the City planning commission's vote to conditionally approve the project, the applicant's neighbor appealed the approval to the city council, contesting the project's design. The notice of public hearing for the appeal stated that the city council would consider "Categorical Exemption per Section 15301 from the California Environmental Quality Act (CEQA) for an addition to an existing structure" as well as the approval of the project. The city council ultimately upheld the project approval and found that the CEQA exemption applied. The neighbor formed AEP and petitioned for writ of administrative mandamus contending that the City erred in finding that the exemption applied.

The Court of Appeal first found that AEP failed to exhaust its administrative remedies. No member of AEP objected to the project at the administrative proceedings. While the neighbor's administrative appeal referenced environmental impacts of the project, it did not mention any indication to the applicability of the private-structures exemption. Relying on previous case law, the Court of Appeal found that a request for an environmental impact report for a project alone is not sufficient to preserve a challenge to the application of a specific CEQA exemption.

The Court of Appeal found that AEP had not demonstrated that the City failed to proceed as required by law when it impliedly found no exception to the exemption applied. In finding the exemption applied, the City did not expressly state whether an exception to the exemption removed the project from its scope. Specifically, AEP contended that the cumulative impacts exception or the unusual circumstances exception applied. The Court of Appeal cited case law finding that a city impliedly finds that no exception-to-the-exemption applies when it finds that an exemption *does* apply. While cities may not ignore evidence in the record that an exception would apply, it does not have to affirmatively

make a finding.

The California Supreme Court denied review. S279279, 2023 Cal. LEXIS 2631 (Cal. May 17, 2023)

Save Our Capitol! v. Department of General Services (2023) 87 Cal.App.5th 655.

QUICK TAKEAWAY: In this complex and instructive opinion, the Court imposed a new substantive requirement when it held an EIR must contain a particular visual simulation to ensure the public meaningfully understood the issues raised.

Organizations filed petitions for writ of mandate, challenging the environmental impact report (EIR) prepared by the Department of General Services and Joint Committee on Rules of the California State Senate and Assembly (collectively DGS), regarding the proposed demolition and construction of the annex and other facilities at the State Capitol. The Superior Court denied the petitions, and the organizations appealed.

DGS prepared an EIR for a project to extensively remodel the California State Capitol Building (Historic Capitol). DGS would demolish the 1960's State Capitol Building Annex (the existing Annex) and replace it with a larger new annex (the new Annex), construct an underground visitor center attached to the Historic Capitol's west side, and construct an underground parking garage east of the new Annex. It is notable that these facilities are across 10th Street from the 3rd District Courthouse, which is adjacent to the west frontage of the capitol complex. It is also notable that the exiting annex had been vacated and the Legislature and its staff relocated to temporary facilities while the environmental review was underway.

The trial court denied the CEQA writ, rejecting. Plaintiffs' contentions: (1) the EIR lacked a stable project description; (2) the EIR did not adequately analyze and mitigate the project's impacts on cultural resources, biological resources, aesthetics, traffic, and utilities; (3) the EIR's analysis of alternatives was legally deficient; and (4) DGS violated CEQA by not recirculating the EIR a second time.

<u>Project Description</u>

On the first claim, Petitioners argued the project's description was not stable because it did not disclose the project's glass exterior, failed to disclose temporary construction areas, and did not substantiate that a significant increase in the annex's size would not increase the number of employees working on site.

The Court of Appeal found that a change to a glass exterior in the final EIR foreclosed public comment, and this rendered the project description between the draft and final EIR insufficiently stable, accurate, and finite A.

Cultural Resources

DGS concluded the project's impacts on historical resources was significant and unavoidable. It adopted findings and a statement of overriding considerations describing why it nonetheless approved the project. The Court of Appeal found that the analysis was deficient because it did not account for public comment on the new Annex's exterior glass design.

Biological Resources

Petitioners challenged the impacts analysis for trees and birds. On trees, the EIR disclosed the number to be affected and acknowledged construction would impact trees. The EIR adequately described the trees affected, and imposed mitigation measures to protect remaining trees. The fact that the annex was enlarged in the final EIR such that the project may impact both city- (i.e., street) and state-owned trees did not require different impacts analysis or different mitigation because the trees would be impacted in the same way and the same mitigation measures would apply. The Court of Appeal also determined that DGS could rely enforcing regulations and a tree protection plan as mitigation measures.

Aesthetics, Lights, and Glare

Petitioners contended substantial evidence did not support the EIR's conclusion that the visitor center would not significantly impair the scenic vista of the Historic Capitol from the Capitol Mall. They claimed the finding was not supported because the visitor center would result in a large hole in the ground which would impact lower plaza elevations, and because no elevations, view simulations, or other means of evaluating the visual impact were provided in the EIR.

On the first claim, the Court of Appeal found that, while CEQA does not expressly require visual simulations, an EIR must contain enough detail for people to understand meaningfully the issues raised. Due to the importance of the project site, the Court of Appeal concluded that CEQA required the EIR to render or represent the view of the west side of the project from the Capitol Mall.

The Court of Appeal agreed with Petitioners that the EIR did not meaningfully analyze impacts on light and glare due to the change to a glass exterior after circulation. Although the final EIR stated the project would meet CALgreen standards on light and glare, the EIR failed to analyze whether the impacts on light and glare would still be significant despite that compliance.

Recirculation

Other than the impacts already discussed above (project description, aesthetics, cultural resources), the Court of Appeal rejected Petitioners'

arguments that the EIR should have been recirculated based on changes increasing the number of impacted trees and an extension of the project boundary. DGS reasonably concluded that these changes were not "significant new information" and would not exacerbate existing impacts.

The opinion described here is that which issued after the Court of Appeal granted rehearing and vacated its original decision. The State thereafter acquiesced in the ruling, seeking no further rehearing nor review in the Supreme Court likely because such review would further delay the project.

Ventura29 LLC v. City of San Buenaventura (2023) 87 Cal.App.5th 1028.

QUICK TAKEAWAY: This case demonstrates the unforgiving character of the administrative exhaustion requirement. The court rejected each of a developer's arguments its failure to exhaust was excusable, including time-sensitive construction, allegedly unlawful modification of a permit, a lack of knowledge of its appeal rights, and the City's failure to inform the developer of those rights.

A developer brought this action against the City of San Buenaventura (City), for inverse condemnation, private nuisance, trespass, and negligence, arising from the City engineer's modification of an approved grading plan to require developer to remove uncertified fill, which the City had dumped on the property 38 years before the developer acquired it. The Superior Court sustained the City's demurrer without leave to amend, and the developer appealed.

The Court of Appeal first rejected the developer's argument that exhausting administrative remedies would halt construction. The developer would still have been required to remove the fill even without the City engineer's modification, and could have done so while the appeal was pending. The Court of Appeal also stated "[p]ermitting a developer to bring an action for damages without exhausting its administrative remedies would have a chilling effect on governmental regulation of new construction."

The developer next contended that the City engineer's oral modification of the grading plan violated the municipal code's requirements that modifications be in writing. Even if true, the absence of a writing did not excuse the failure to exhaust administrative remedies.

The Court of Appeal found that the developer's lack of knowledge of the exhaustion requirement did not excuse its failure, even if the City failed to inform the developer the decision was appealable. The Court of Appeal referenced the sophistication of real estate developers in particular.

The Court of Appeal also found that the City was not equitably estopped from asserting a forfeiture by failing to inform the developer of a right to appeal.

The developer cited no authority imposing a duty on the City to inform a real estate developer of the right to appeal the City engineer's decision. Accordingly, the developer could not argue that the City was estopped from contending the developer forfeited its claims by failing to exhaust administrative remedies.

Finally, the Court of Appeal found that the remaining causes of action for private nuisance, trespass, and negligence were barred by statutes of limitation. The "discovery rule" could not save them because the developer had conceded that a prior owner of the property might have known the City had dumped the fill on the property. The complaint failed to show that prior owners would have been unable, despite reasonable diligence, to have discovered 80 million pounds of uncertified fill.

Save Livermore Downtown v. City of Livermore (2022) 87 Cal.App.5th 1116.

QUICK TAKEAWAY: Whether reviewed under CEQA or the Housing Accountability Act, the standard of review of a City's general plan consistency finding is essentially the same. In this case, the City had provided substantial evidence on the record to support its findings that the project was exempt from CEQA because it was consistent with the general plan and the applicable specific plan, for which the City had previously certified an EIR.

Save Livermore Downtown (Petitioner) challenged an affordable housing project, alleging it violated planning and zoning laws and CEQA. The Superior Court denied the petition, and Petitioner appealed. The Developer also moved for a bond, which the Superior Court granted.

The City approved an affordable housing project in a downtown area subject to a specific plan. The specific plan was adopted pursuant to an environmental impact report (EIR), supplemental environmental impact report (SEIR), and several addenda. One of the addenda contemplated the affordable housing project.

The City found that the project conformed to the general and specific plans, and that no changes triggered the need to revise an EIR, SEIR, or any addenda. The City found that the project was exempt from CEQA because it was consistent with a certified EIR, and separately as infill development.

Petitioner challenged the project on the ground that it violated zoning and planning laws and that it was inconsistent with the specific plan, and not exempt from CEQA. The developer moved for a bond pursuant to Code of Civil Procedure section 529.2. The Superior Court denied the petition and granted the motion for a bond.

The Court of Appeal found that Petitioner failed to show any standard was

violated by, and substantial evidence supported, the City's plan consistency determination. As to the specific plan, Petitioner only cited inconsistencies between the project's details and the specific plan; however, the City found, with supporting evidence, that the project was consistent with the "objectives, policies, general land uses, and programs" of the specific plan; moreover, the Housing Accountability Act (Gov. Code, § 65589.5) had a role in the consistency determinations Petitioner did not show that the project was inconsistent with the overarching policies, and, when evaluating the claimed inconsistencies, the Court of Appeal found that the matters were subjective, and the record supported the City's conclusions:

"[I]t is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be 'in harmony' with the policies stated in the plan. [Citation.] It is, emphatically, not the role of the courts to micromanage these development decisions." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719, 29 Cal.Rptr.2d 182 (*Sequoyah Hills*).)

Also, under the Housing Accountability Act (Gov. Code, § 65589.5) (HAA), a local agency may not disapprove a housing development project for very low-, low-, or moderate-income households, nor condition approval in a manner that renders the project infeasible, unless it makes one of several specific findings, among them that the project would have a specific, adverse impact on public health and safety or that the project is inconsistent with both the zoning ordinance and land use designation at the time the application was deemed complete. (Gov. Code, § 65589.5, subd. (d)(2) & (5).) And for any housing development, without regard to income-level, a local agency may not disapprove a project that complies with "applicable, *objective* ... standards and criteria, including design review standards," in effect when the application was deemed complete, unless the project would have a specific, adverse impact on public health or safety that cannot feasibly be mitigated or avoided. (Gov. Code, § 65589.5, subd. (j)(1), italics added.) An objective standard is one that can be applied without "personal interpretation or subjective judgment." (*California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 840, 283 Cal.Rptr.3d 877 (*California Renters*).)

Under *California Renters*, in reviewing a decision denying an application to build new housing, explained that instead of asking, "as is common in administrative mandamus actions, 'whether the City's findings are supported by substantial evidence' [citation], we inquire whether there is 'substantial evidence that would allow a reasonable person to conclude that the housing development project' complies with pertinent standards." (*California Renters, supra,* 68 Cal.App.5th at p. 837, 283 Cal.Rptr.3d 877; Gov. Code, § 65589.5, subd. (f)(4).) But

the court in *Bankers Hill* [*v. City of San Diego*] recognized that this "stringent, independent review" may be unnecessary where, as here, the agency approves a project. (*Bankers Hill 150, supra,* 74 Cal.App.5th at p. 777, 289 Cal.Rptr.3d 268.) In fact, there seems to be no practical difference in the two standards when an agency finds a project consistent with its general plan, as even under the ordinary standard that finding "'can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion.'" (*The Highway 68 Coalition v. County of Monterey* (2017) 14 Cal.App.5th 883, 896, 222 Cal.Rptr.3d 423 [applying deferential standard to consistency determination not involving the HAA].) Using either lens to review the project's consistency with the specific plan—asking whether there is substantial evidence from which a reasonable person could find the project consistent, or whether there is substantial evidence supporting the City's finding of consistency—leads to the same conclusion.

Petitioners made no effort to show the project would not promote the overarching policies of providing housing, including affordable housing, and revitalizing the Downtown area. Rather, its challenges were limited to asserted inconsistencies between details of the project and standards in the Downtown Specific Plan. Consequently the Court rejected each of Petitioner's specific complaints.

The California Supreme Court denied review. S278955, 2023 Cal. LEXIS 2167 (Cal. Apr. 19, 2023)

AIDS Healthcare Foundation v. City of Los Angeles (2022) 86 Cal.App.5th 322.

QUICK TAKEAWAY: The Court of Appeal held the 90-day statute of limitations of Government Code section 65009 barred plaintiffs' claims in an action challenging, under the Political Reform Act, land use decisions made by the City of Los Angeles's planning and land use management committee while allegedly engaged in a bribery scheme. This ruling drastically limits the window in which Political Reform Act claims might be brought to challenge discretionary land use actions.

Plaintiff Aids Healthcare Foundation sued to enjoin an alleged violation of the Political Reform Act (Gov. Code, § 81000 *et seq*.) and asserted a claim under the taxpayer waste Statute (Code of Civil Procedure section 526a), challenging land-use decisions that the City of Los Angeles' (City's) planning and land-use management committee made while two of its members allegedly were the beneficiaries of an extensive, ongoing bribery scheme directed at committee projects. (The Councilmembers had been indicted for corruption.) The Superior Court sustained the City's demurrer without leave to amend, and dismissed. Plaintiff appealed.

This appeal placed the anti-corruption objectives of the PRA against the desire for certainty in land use that justifies the 90-day statute of limitations of Government Code sections 65009 and 66499.37. Plaintiff challenged land use decisions by the Los Angeles City Council Planning and Land Use Management (PLUM) Committee, made while two of its members allegedly were the beneficiaries of an extensive and ongoing bribery scheme. Plaintiff contended the three-year catch-all statute of limitations in Code of Civil Procedure section 338, subdivision (a), applied. The City asserted that the more specific 90-day statutes of limitations in Government Code sections 65009 and 66499.37 applied.

The Court of Appeal agreed with the trial court that Government Code section 65009 controlled. The land use gravamen of the case implicated the 90-day statute of limitations. The Court of Appeal referenced the broad language of Government Code section 65009 as to its reach. The Court of Appeal also concluded that application of the statute of limitations did not unconstitutionally amend the PRA (an initiative statute), which did not specify a statute of limitation for all claims under it. Finally, the Court of Appeal rejected Plaintiff's argument that policy considerations overrode the short statute for challenges to land use decisions.

Review denied. S278269, 2023 Cal. LEXIS 1575 (Cal March 22, 2023).

Save Lafayette v. City of Lafayette (2022) 85 Cal.App.5th 842.

QUICK TAKEAWAY: A project application deemed complete in 2011 (and never denied) was not subject to standards subsequently approved in 2020. Under the Housing Accountability Act, the standards in place when the application was deemed complete applied.

City of Lafayette residents petitioned for writ of mandate alleging that an apartment development approved by the City of Lafayette (City) conflicted with the City's general plan and zoning, that the environmental impact report (EIR) was inadequate, and that a supplemental EIR was required. The Superior Court denied the petition. Residents appealed.

In the published portion of the opinion, the Court of Appeal affirmed and as a matter of first impression and held that, under the Housing Accountability Act, Government Code section 65589.5 (HAA), the City's general plan and zoning standards in effect when the original application was deemed complete applied.

The City notified the developer in 2011 that its application was complete, and certified an EIR in 2013. Before the project was approved, the developer and City suspended processing while the developer pursued a smaller proposal. In 2018, the parties revised the original proposal, which the City approved in 2020

after an addendum to the EIR.

The project was consistent with the 2011 standards, but inconsistent with standards in effect in 2018. The issue on appeal was whether the 2011 standards applied to the project, or whether the time limits in the Permit Streamlining Act, Government Code section 65920 *et seq.* (PSA), required the City to treat the project as a new application in 2018. The PSA contains no provision for "suspension" of a project, but also did not contain any provision requiring an application to be deemed withdrawn or disapproved if an agency fails to act promptly. The Court of Appeal also found that no resubmittal was required under the PSA. The PSA also specifically addresses disapproval, and excluded an agency's failure to act from the listed bases for disapproval. Finally, The PSA's relationship to the HAA favored a finding that would further housing development, and thus a statutory construction that deeming the application complete "froze" the applicable standards in 2011.

Review denied (Mar. 15, 2023).

Save North Petaluma River and Wetlands v. City of Petaluma (2022) 86 Cal.App.5th 207.

QUICK TAKEAWAY: The EIR was not deficient because it used a special status species survey dated three years before the Notice of Preparation, because in addition the City used site visits and other more timely information to determine existing physical conditions. It is appropriate to use relevant information gathered both before and after the NOP.

Save North Petaluma River and Wetlands (Petitioner) challenged a 180-unit apartment complex and its environmental impact report (EIR). The Superior Court denied the petition. Petitioner appealed.

Petitioner challenged the EIR's analysis of special status plant and animal species because (1) the City never investigated the project's baseline conditions as of 2007 when the notice of preparation was published, and the record contained no evidence of studies at that time, (2) substantial evidence did not support the EIR's discussion of baseline conditions for special status species, and (3) absent complete, accurate information, the EIR could not adequately analyze or mitigate impacts.

The Court of Appeal rejected this argument, finding that a 2004 Wetlands Research Associates, Inc. (WRA) Special Status Species Report was a sufficient basis for evaluating the project's impacts on special species. It was not invalidated simply because it preceded the notice of preparation. The EIR also indicated its analysis updated database reviews from several more recent years. The Court of Appeal found that the City was not required to conduct a new study

at the time of the notice of preparation.

Hobbs v. City of Pacific Grove (2022) 85 Cal.App.5th 311.

QUICK TAKEAWAY: The City did not violate the due process rights of short-term rental owners when it refused to renew 51 one-year short-term rental permits to meet citywide and neighborhood density caps imposed by ordinance.

Property owners (Plaintiffs) who held licenses for short-term rentals (STRs) sued the City of Pacific Grove (City), seeking declaratory and injunctive relief, alleging the City violated their due process rights by adopting an ordinance that arbitrarily limited the number of homes which could be offered as short-term rentals and subjecting them to a lottery to determine who could renew their permits. The Superior Court granted summary adjudication in favor of the City. Plaintiffs appealed.

After permitting STRs as of 2010, the City, a costal tourist destination adjacent to Monterey, took several actions to limit the number of STRs, including imposing a City-wide cap, a density cap per block, and a distance limitation between licensed properties to respond to residents' concern that the residential character of neighborhoods was threatened by too many tourist-serving properties. As of 2017, the City's municipal code stated that licenses could not be automatically renewed and that renewals could be denied for any reason. By early 2018, the City had exceeded the City-wide cap and enacted an ordinance imposing a "lottery system" to reduce the number of licenses by picking 51 that would sunset the following year, 22 in the Coastal Zone. The City's voters also approved Measure M, which contemplated an 18-month phase-out of all STR permits except those in the Coastal Zone. Plaintiffs, homeowners whose license was selected for non-renewal under the lottery system, sued the City for a violation of their substantive and procedural due process rights.

The Court of Appeal first found that the City did not violate the owners' due process rights because the owners had no vested right to continued renewal of their one-year STR licenses, which were expressly limited by the City's municipal code. In addition, the Court found that the random selection process was a legislative and not adjudicative act, which could implicate procedural due process principles.

The Court of Appeal then addressed the owners' substantive due process claims that the City violated their right to allow guests in their homes. The court denied the owners' argument that the ordinance implicated their associational freedom, and found that rational basis review, rather than strict scrutiny review, was warranted. The court found that the ordinance had a rational relation to the

City's goal of protecting its residential character, and left owners with other economic uses of their homes, including long term rentals.

County of San Bernardino v. Mancini (2022) 83 Cal.App.5th 1095

QUICK TAKEAWAY: The County did not violate the religious rights of a church, whose adherents consumed cannabis as sacrament, when it brought an enforcement action seeking a permanent injunction prohibiting the church from selling or dispensing cannabis for use outside of religious services.

San Bernardino County (County) sued a putative church, whose adherents consumed cannabis as sacrament, and the church owner, alleging a violation of a County zoning ordinance prohibiting commercial cannabis activity. The Superior Court determined that the church was operating an illegal cannabis dispensary, issued a permanent injunction, and denied the defendants' motion to set aside judgment. The church and owner appealed.

The Court found that state law did not preempt the County ordinance. While California law permitted the use of cannabis, it did not mandate that local governments allow dispensaries.

The church failed to show that the County ordinance imposed a substantial burden on their religious exercise within RLUIPA. The church members could still use and possess "blessed" cannabis. The County ordinance only impacted the church's ability to sell, dispense, or deliver cannabis for use elsewhere, which was not a religious activity. The trial court's injunction was also limited to prohibiting "commercial cannabis activity," and still permitted the church to dispense free cannabis for immediate use in religious ceremonies.

The Court of also concluded the tax deductibility of donations to the church did not render the ordinance unenforceable. The ordinance still applied to the church even if the church's collection of contributions was not in pursuit of profit.

Review denied (Dec. 21, 2022).