Land Use and CEQA Litigation Update

Wednesday, May 8, 2024

Christine Leigh Crowl, Senior Partner, Jarvis Fay, LLP
John M. Luebberke, Of Counsel, Herum/Crabtree/Suntag

DISCLAIMER
This publication is provided for general information only and is not offered or intended as legal advice. Readers should seek the advice of an attorney when confronted with legal issues and attorneys should perform an independent evaluation of the issues raised in these materials. The League of California Cities does not review these materials for content and has no view one way or another on the analysis contained in the materials.

Copyright © 2024, League of California Cities. All rights reserved.
This paper, or parts thereof, may not be reproduced in any form without express written permission from the League of California Cities. For further information, contact the League of California Cities at 1400 K Street, 4th Floor, Sacramento, CA 95814. Telephone: (916) 658-8200.

CEQA Litigation Update

Cases Reported from August 1, 2023 through March 31, 2024

Christie Crowl
Jarvis Fay LLP
555 12th St., Suite 1630
Oakland, California 94607
510-238-1400
www.jarvisfay.com

Wednesday, May 8, 2024
Opening General Session; 1:00 pm

League of California Cities
City Attorneys Spring Conference
May 2024

TABLE OF CONTENTS

Page

I. Introduction 1

II. CEQA Exemptions 1
Historic Architecture Alliance v. City of Laguna Beach
(2023) 96 Cal.App.5th 186 1
California Construction and Industrial Materials Association v. County of Ventura
(2023) 97 Cal.App.5th 1 2
Los Angeles Waterkeeper v. State Water Resources Control Board
(2023) 92 Cal.App.5th 230 3

III. Tiering and Standards for Supplemental or Subsequent Review 4
Hilltop Group, Inc. v. County of San Diego
(2024) 99 Cal.App.5th 890 4
Save Our Access v. City of San Diego
(2023) 92 Cal.App.5th 819 5
Marina Coast Water District v. County of Monterey
(2023) 96 Cal.App.5th 46 (certified for partial publication) 6

IV. EIR Adequacy 7
Santa Rita Union School District v. City of Salinas
(2023) 94 Cal.App.5th 298 7
Tsakopoulos Investments, LLC v. County of Sacramento
(2023) 95 Cal.App.5th 280 (certified for partial publication) 9
Yerba Buena Neighborhood Consortium, LLC v. Regents of University of California
(2023) 95 Cal.App.5th 779 9
Planning and Conservation League v. Department of Water Resources
(2024) 98 Cal.App.5th 726 11
V Lions Farming, LLC v. County of Kern
(2024) 100 Cal.App.5th 412 (certified for partial publication) 12

V. CEQA Litigation and Remedies 13
Natural Resources Defense Council, Inc. v. City of Los Angeles
(2023) 98 Cal.App.5th 1176 13
Guerrero v. City of Los Angeles
(2024) 98 Cal.App.5th 1087 14
Vichy Springs Resort, Inc. v. City of Ukiah 15
(March 29, 2024) 2024 WL 1340842 (certified for partial publication) 15

I. Introduction

The landscape of CEQA litigation remains vibrant but is changing. In contrast to prior years, most of the published cases from the last year do not involve housing development projects. This likely reflects the growing number of statutory schemes which mandate ministerial approval of – or limited local agency discretion over – housing development projects[1], particularly projects which include affordable units. [2] The Legislature's housing law actions suggest that it will continue efforts to reign in local control and discretion, thereby limiting the applicability of CEQA to more categories or types of residential projects.

With respect to non-residential projects, CEQA is alive and well. This year, the judicial branch has generally upheld agency CEQA decisions and deferred to local discretion.

II. CEQA Exemptions

A. *Historic Architecture Alliance v. City of Laguna Beach* (2023) 96 Cal.App.5th 186

Holding:

- When a project relies on a Class 31 (CEQA Guidelines Section 15331) exemption for restoration and maintenance of historic resources and it complies with the Secretary of the Interior's Standards for the Treatment of Historic Properties (SOI Standards), the CEQA Guidelines Section 15300.2 exception to categorical exemptions does not apply.

Practice Tips:

- Projects involving historic resources are generally fodder for CEQA lawsuits from both actual historians and "concerned neighbors" masquerading as historians. Handle these projects with care, and diligently build a record of compliance with SOI Standards.
- Typically, when evaluating whether a project may have a significant impact on a historic resource, courts will apply the deferential "substantial evidence" standard of review to the agency's threshold determination as to whether the resource is historically significant in the first place. However, once the agency makes that determination, courts have

---

[1] See, e.g. SB 330 (Skinner, 2019), streamlining housing approvals by allowing developers to vest into General Plan and zoning standards by filing a cursory pre-application, limiting discretionary body meetings, and eliminating a city's ability to adopt or enforce new development standards unless they are objective; SB 35 (Wiener, 2017), requiring cities and counties that have not met RHNA obligations to use a streamlined, ministerial review process for qualifying multifamily residential projects; AB 2011 (Wicks, 2022), requiring streamlined, ministerial approvals for qualifying housing projects meeting specific affordability and site criteria on sites that are not even zoned for residential uses; and SB 6 (Caballero, 2022), allowing certain residential uses on commercially zoned property and providing Housing Accountability Act protections to such projects.

[2] See, e.g. the 100% affordable and ministerially-approved housing project involving 364 rental units in 3 buildings on a 2.2-acre site in Emeryville (described more fully in the attached staff report prepared for an applicant-requested study session: https://www.ci.emeryville.ca.us/DocumentCenter/View/15160/Item-92-Christie-Ave-Affordable-Housing-Study-Session).

suggested that the less deferential "fair argument" standard will apply to whether a project may have a significant impact on the resource (and thus make it ineligible for a categorical exemption). This decision is thus important in holding that such a fair argument standard cannot apply to the Class 31 exemption.

Summary:

The case involved the proposed remodeling of a historic single-family home. The City determined that the project was exempt from CEQA under Class 31 (CEQA Guidelines Section 15331) for restoration and maintenance of historic resources consistent with the Secretary of the Interior's Standards for the Treatment of Historic Properties (SOI Standards). Petitioner sued the City claiming that the City improperly relied on the Class 31 exemption because an exception to categorical exemptions applied (under CEQA Guidelines Section 15300.2) due to the project causing an adverse change to a significant historic resource.

The trial court denied the petition, finding that the City's determination was supported by substantial evidence and that Petitioner had not met its burden of demonstrating that an exception precluded reliance on the Class 31 exemption. The Court of Appeal affirmed, reiterating that the Class 31 exemption was supported by substantial evidence including various rounds of review to confirm the project's compliance with SOI Standards. The court also confirmed that these rounds of project revisions were not "mitigation measures" that would otherwise suggest additional environmental review was required. Finally, the court rejected Petitioner's argument that the historical resources exception applied – and that a fair argument test should be used to determine its application – because projects that comply with SOI Standards are considered to have less than significant impacts on historic resources pursuant to CEQA Guidelines Section 15064.5(b)(3) and the Class 31 exemption requires the same analysis. Application of a fair argument standard to the factual determination underlying the exemption would render the exemption meaningless. Thus, the substantial evidence standard applied and the City's record contained such evidence.

B. *California Construction and Industrial Materials Association v. County of Ventura* (2023) 97 Cal.App.5th 1

Holding:

- An ordinance establishing wildlife migration corridors falls within the Class 7 exemption (for the protection of natural resources) and the Class 8 exemption (for the protection of the environment).

Practice Tip:

- We see a lot of Class 7 and 8 exemptions employed erroneously by staff (e.g. for construction projects that remediate some hazardous area or that might otherwise have a beneficial impact on the environment for some reason). This case is a good example of what these exemptions are actually intended to cover – projects specifically designed to protect the environment.

<u>Summary</u>:

This case involves a Ventura County ordinance creating overlay zones to protect wildlife migration corridors throughout the County. When approving the Ordinance, the County relied on the common sense exemption, as well as the Class 7 (actions by regulatory agencies for protection of natural resources) and Class 8 (actions by regulatory agencies for protection of the environment) CEQA exemptions. Two construction associations sued the County on CEQA and other grounds, claiming (ironically if not shamelessly) that the CEQA exemptions did not apply and that there was a fair argument that environmental impacts would occur so an EIR should be prepared. The court held that the project fit within the plain language of the Class 7 and Class 8 exemptions, and that there was substantial evidence supporting this conclusion. While the project's scope covers large swaths of the County, Petitioners failed to show an unusual circumstance existed under CEQA Guidelines Section 15300.2, which requires that "the project has some feature that distinguishes it from others in the exempt class, such as its size or location." The court noted that the Class 7 exemption specifically refers to even larger, statewide projects (i.e. State Department of Fish and Wildlife preservation activities with a statewide scope).

C. ***Los Angeles Waterkeeper v. State Water Resources Control Board* (2023) 92 Cal.App.5th 230**

<u>Holding</u>:

- Public Resources Code Section 21002 does not impose environmental review requirements independent of the rest of CEQA; it only has force to the extent that an entity is otherwise required to prepare an EIR.

<u>Practice Tip</u>:

- While this case reminds us that NPDES permit activities are generally exempt from CEQA pursuant to Water Code Section 13389, there is still an open question as to the true scope of that exemption. Beware reliance on Water Code Section 13389 for non-NPDES activities.

<u>Summary</u>:

Los Angeles Waterkeeper filed writ petitions against both the State Water Resources Control Board (State Board) and the Los Angeles Regional Water Quality Control Board (Regional Board) alleging that they violated the California Constitution and the State Water Code by permitting four publicly owned treatment works (POTWs) to discharge millions of gallons of treated wastewater daily into the Los Angeles River (and Pacific Ocean). Specifically, Waterkeeper alleged that they had a duty to prevent waste and unreasonable use of water, and that both the State and Regional Boards failed in that duty by issuing the permits without evaluating whether quantities discharged were reasonable or whether treated wastewater could be recycled or otherwise put to better use as required under CEQA. The trial court held that the

Regional Board did not have to comply with CEQA when issuing wastewater discharge permits to the POTWs because Water Code section 13389 exempts wastewater discharge permits from all of CEQA because it was meant to mirror a federal statute that exempts wastewater discharge permits from all of NEPA.

The Court of Appeal affirmed and explained that Pub. Res. Code Section 21002 (declaring it the policy of the state that agencies should not approve projects if there are feasible alternatives or feasible mitigation which would lessen significant environmental impacts) does not impose its own environmental review requirements. But the court declined to reach "the broader question whether Water Code section 13389 provides a complete exemption from CEQA." In short, the Court of Appeal diluted (pun intended) the trial court's conclusion about Water Code Section 13389 being a complete exemption from CEQA. The scope of that exemption for issues not related to discharge permits remains unsettled.

III. Tiering and Standards for Supplemental or Subsequent Review

A. *Hilltop Group, Inc. v. County of San Diego* (2024) 99 Cal.App.5th 890

Holding:

- The San Diego County Board of Supervisors committed a prejudicial abuse of discretion by overturning the Planning Commission's decision to rely on CEQA Guidelines section 15183 for a recycling facility project and ordering the project to prepare an EIR.

Practice Tips:

- It is rare for a court to overturn a local legislative body's determination that a project has site-specific impacts warranting further CEQA review. But if the record creates the appearance that the legislative body is reacting more to local political pressure rather relying on actual evidence, a court can and will step in.
- Be aware of the types of controversial projects for which the City Council may be influenced by politics and project opponents in its CEQA determination. Such projects often include gas stations, parking garages, and higher density residential projects that spark "NIMBY" opposition and have mere hints of environmental issues that such opponents attempt to highlight or inflate in order to use CEQA to obtain project denial. This case provides an example where courts might not give local officials the deference generally afforded to their evidentiary findings.

Summary:

The recycling facility project in this case had a lengthy processing history with the County, and in 2015 the project developer had actually prepared a draft EIR and supplemental environmental studies. However, County staff changed its mind about the required CEQA review for the project and concluded that the project was subject to review under CEQA Guidelines section 15183 because it was consistent with the County General Plan Update (GPU) and did not

contemplate significant environmental impacts that were not identified by the program EIR (PEIR) prepared for the GPU. Multiple community groups and the City of Escondido appealed the approval of the CEQA exemption to the Board of Supervisors, which heard 150 public comments expressing project opposition and then ignored the staff conclusions and voted to require preparation of an EIR. The developer then filed a petition for writ of mandate alleging that the Board had abused its discretion, and the trial court entered judgment in favor of the County.

The Court of Appeal reversed, finding that the project was eligible for streamlining under CEQA Guidelines section 15183 because it was consistent with the GPU and its related zoning designation for which a program EIR was certified. The court also rejected the County's argument that the fair argument test should apply to decisions as to whether Section 15183 *does not* apply because it is settled that the substantial evidence standard applies to decisions that it *does* apply. Further, the court found that there was insufficient evidence to support the Board of Supervisors' findings that the project would result in "project-specific peculiar impacts that were not analyzed as significant impacts in the [PEIR] related to air quality, traffic, noise, and greenhouse gas emissions." The court stated that if a project is consistent with the land use designation of a General Plan for which an EIR was certified, the lead agency must limit its environmental review to significant impacts that "(1) [a]re peculiar to the project or the parcel on which the project would be located, (2) [w]ere not analyzed as significant effects in a prior EIR on the zoning action, General Plan or community plan with which the project is consistent, (3) [a]re potentially significant off-site impacts and cumulative impacts which were not discussed in the prior EIR prepared for the General Plan, community plan or zoning action, or (4) [a]re previously identified significant effects which, as a result of substantial new information which was not known at the time the EIR was certified, are determined to have a more severe adverse effect than discussed in the prior EIR."

B. *Save Our Access v. City of San Diego* (2023) 92 Cal.App.5th 819

<u>Holding</u>:

- City improperly determined that its proposed ballot measure to remove a 30-foot height limit from a 1300-acre community plan in a coastal area was within the scope of an earlier program EIR.

<u>Practice Tip</u>:

- A city generally should not try to "tier" directly from a General Plan program EIR if it wants to make a material change from what is in its General Plan. This case might have had a different result if the City had instead prepared an addendum to its General Plan program EIR to evaluate the removal of the 30-foot height limit. The court would have then been obligated to apply the deferential substantial evidence standard to evaluate the adequacy of that addendum, rather than to apply the less deferential "fair argument" standard to evaluate the impacts of a change that was outside the scope of the prior program EIR.

Summary:

This case involves a challenge to the City of San Diego's approval of a ballot measure to remove a community plan area from a 30-foot building height limit regulating development within the City's self-described Coastal Zone (unaffiliated with the Coastal Zone as defined by the California Coastal Act). In 2018, the City approved an update to the applicable community plan, including certifying a program environmental impact report (PEIR). When two City Council members proposed a ballot measure to remove the height restriction (which eventually passed), City staff determined that the PEIR accounted for this possibility and held that no supplemental EIR would be required. Petitioner sued, arguing that the City did not adequately address the environmental impacts of removing the 30-foot height limit. The trial court agreed, holding that the City must set aside its approval of the ballot measure.

The Court of Appeal held that there was no substantial evidence in the administrative record supporting the City's argument that the PEIR had adequately evaluated the impacts of removing the height limit. In fact, the PEIR was silent on the height limit, and internal City documents demonstrated that the PEIR had analyzed development with this height limit in effect. The court thus applied the less deferential fair argument standard, and not the substantial evidence standard, in analyzing the City's decision not to prepare a subsequent EIR when the initial EIR was a PEIR. And because the administrative record supported a fair argument that removing the height limit could cause significant environmental impacts, further environmental review was required to comply with CEQA, and thus the court of appeal upheld the trial court decision.

C. ***Marina Coast Water District v. County of Monterey*** **(2023) 96 Cal.App.5th 46 (certified for partial publication)**

Holding:

- County was not required to prepare a supplemental EIR for a proposed desalination plant merely because a responsible agency (the City of Marina) later denied a subsequent permit for a component of the project as originally envisioned (specifically, coastline water wells), as that denial was not final and was subject to an administrative appeal to the Coastal Commission, and as the applicant was still pursuing the project as originally envisioned.

Practice Tip:

- Mere uncertainty over whether all necessary permits will ultimately be issued on a complex project is not a sufficient basis for triggering further environmental review. Of course, if a component of such a project is denied and the denial triggers changes in the project that are potentially environmentally significant, the agency must then evaluate whether supplemental CEQA review is necessary.

Summary:

The water district challenged Monterey County's approval of a water company's application for a permit to construct a desalination plant and associated facilities. The CPUC had previously been designated as the lead agency, and it certified an EIR for the project in 2018. The project originally anticipated that it would rely on coastline water wells within the City of Marina's jurisdiction, but the City had denied the water company's application for the requisite coastal development permit ("CDP"). The water company appealed the denial of the CDP to the Coastal Commission. Despite the uncertain status of the CDP within the City of Marina and thus the project's water supply, Monterey County acted as the responsible agency, relied upon the EIR previously certified by the CPUC, and approved the water company's permit to construct and operate the desalination plant.

Petitioner challenged the County's approval of the permit, arguing that the County violated CEQA by failing to prepare a supplemental EIR to account for the uncertainty surrounding the project's water supply source in light of the City's permit denial. Petitioner also argued that the County's statement of overriding considerations was not supported by substantial evidence and that the County violated its own General Plan in approving the project without an identified long-term water source.

The trial court granted the water district's petition in part, agreeing with its argument that the County improperly relied on the benefits of the project in the statement of overriding considerations without addressing the uncertainty surrounding the project's water supply. The Court of Appeal reversed, determining that the County was entitled to rely on the project's anticipated benefits, even though there was uncertainty about the water supply, and that the statement of overriding consideration's failure to explain these uncertainties was not prejudicial given the other relevant evidence contained in the administrative record. Additionally, the court affirmed the trial court's decision that environmental review was not required, concluding that the City's denial of the CDP did not change the project plan or the circumstances under which it had been undertaken.

IV. EIR Adequacy

A. *Santa Rita Union School District v. City of Salinas* (2023) 94 Cal.App.5th 298

Holding:

- City's EIR for large-scale specific plan was legally adequate notwithstanding school district arguments that it did not adequately address possibility that schools would not ultimately be constructed due to lack of adequate funding.

Practice Tip:

- In light of statutory limits on what development fees may be imposed to fund future school construction, school districts may continue to try to turn to CEQA litigation as leverage to obtain additional funding. Courts will likely continue to rebuff such challenges.

Summary:

The City of Salinas issued a Final EIR for the West Area Specific Plan, a project that would lead to the development of over 4,000 units of housing and contemplated five schools to accommodate the increased population. The Salinas school districts ("Districts") sued the City, contending that they would never receive sufficient funding to build these new schools and argued that they would have to accommodate this influx of new students at their current properties. The Districts argued that because the EIR did not discuss the indirect, off-site environmental impacts that would result from the current schools having to absorb these new students, it was inadequate. The City argued that the EIR had correctly analyzed the impacts of the proposed Specific Plan, that the inadequate funding argument was an economic or social issue that was too speculative and uncertain, and that the scenario that the Districts envisioned was too vague and uncertain and did not require a response.

While the trial courts ruled in favor of the Districts, the Court of Appeal reversed. The court found that the City properly assumed in the EIR that new schools would be built and that the imposed developer impact fees and other mitigation measures discussed in the EIR constituted sufficient analysis. The City was not required to analyze any potentially "off-site impacts of ill-defined, uncertain, generalized, and speculative alternative to new school construction" because these "what-if alternatives" were premised on the assumption of inadequate school funding. Without more evidence supporting the District's claims, no further environmental review or response from the City was required.

The court also ruled on several key procedural issues. The court held that the City's voluntary compliance with the writ of mandate did not moot or waive the landowners' separate right to appeal, and if the appellants prevailed, the City's certification of the EIR would be restored. Second, distinguishing *Meinhardt v. City of Sunnyvale* (2022) 76 Cal.App.5th 43 (under review by the California Supreme Court (Case No. S274147)), the court held that the trial court order did not determine the final rights of the parties by specifying what relief it would order, therefore the trial court's subsequent entry of judgment, not the earlier order, triggered the deadline to appeal. Third, the correct standard of review for the omission of information from an EIR can constitute a failure to proceed as required by CEQA, which is reviewed de novo, *only if* the analysis is clearly inadequate or unsupported by evidence. The challenger must demonstrate that the omitted information is both required by CEQA and necessary to an informed discussion of the impacts. Because the question of whether the EIR was required to discuss the "no new schools" scenario was a question of both law and fact, the court applied an independent review while affording deference to the City's factual determinations under the substantial evidence standard of review. And in applying this substantial evidence standard to the City's factual finding that the District's comments were too speculative, the court agreed and reversed the trial court judgment.

B. *Tsakopoulos Investments, LLC v. County of Sacramento* (2023) 95 Cal.App.5th 280 (certified for partial publication)

Holding:

- County properly exercised its discretion in setting significance thresholds when analyzing the greenhouse gas emissions from projects, insofar as it used fact-specific data derived from local data as opposed to statewide thresholds.

Practice Tip:

- This case provides a helpful example of a GHG analysis upheld by a court and demonstrates that courts will defer to lead agency determinations when they are supported by robust analysis and evidence in the record.

Summary:

In the published portion of this decision, the Court upheld Sacramento County's GHG analysis used in an EIR prepared for a community master plan for a project that included thousands of housing units, schools, retail and commercial space, open space, and an environmental education center. Petitioner challenged the validity of the GHG analysis, claiming it was based on methodology that the California Supreme Court and the Fourth District Court of Appeal have rejected in *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204 (*Center for Biological Diversity*) and *Golden Door Properties, LLC v. County of San Diego* (2018) 27 Cal.App.5th 892 (*Golden Door*), respectively.

The court rejected petitioners challenge and distinguished Sacramento County's GHG analysis from the two methodologies that were rejected by their respective courts. Unlike *Center for Biological Diversity,* where the EIR relied on the statewide GHG emission reduction target of 29% below business-as-usual, Sacramento County used County-specific GHG significance threshold, derived from countywide data from different sectors. And unlike *Golden Door*, the County-specific data and local thresholds for different sectors would each be applied at the project level. Thus, because Sacramento County used County data and sector-specific thresholds of significance, the EIR's analysis was distinguishable from the rejected methodologies and the court presumed that the GHG emissions analysis was adequate.

C. *Yerba Buena Neighborhood Consortium, LLC v. Regents of University of California* (2023) 95 Cal.App.5th 779

Holding:

- UC Regents' EIR for long-range planning document for its existing Parnassus Heights campus adequately complied with CEQA, and more specifically, it:
  - properly declined to consider off-campus development alternatives;
  - committed only harmless error in not directly analyzing impacts on public transit;

- was not required to consider aesthetic impacts given a statutory presumption that such impacts within transit priority areas were not significant;
- properly rejected as infeasible proposed mitigation measures to preserve historically significant buildings; and
- adequately set forth performance standards for mitigation of wind impacts.

Practice Tip:

- The court seemed to struggle with applying recent CEQA legislation and Office of Planning and Research (OPR) guidance providing that projects near transit stops should be presumed to cause a less than significant transportation impact, insofar as it found that the EIR erred in not specifically analyzing transit impacts as a category, but that the error was harmless in light of the presumption. The court's muddled analysis of this question creates confusion as to whether EIR's for projects near transit centers actually need to analyze transit impacts. When presented with a transit-adjacent project, confirm that the environmental review clearly explains the approach to transit impact analysis.

Summary:

This case involves the adequacy of an EIR prepared in connection with UCSF Parnassus Heights Plan ("Plan"), a long-range development planning document. The EIR contemplates considerably more development than was envisioned in the university's old long-range development plan. Petitioners proffered various challenges to the EIR, all of which the trial court rejected.

The Court of Appeal affirmed. First, in discussing alternatives, the court was persuaded that they were a reasonable range of alternatives because they represented different approaches to addressing environmental harm. Petitioners had primarily argued that the EIR should have considered an off-site alternative for a portion of the project (specifically, a new hospital), but the court found that the EIR sufficiently explained how that would not accomplish the Plan's objectives.

Second, in discussing public transit, the court agreed with Petitioners that substantial evidence support an argument that the Plan might have a significant impact on public transit, and further found that the EIR had erred in concluding that such transit impacts were outside the scope of CEQA. But the court forgave this error as nonprejudicial, as it found that the EIR nonetheless provided sufficient information about transit impacts to serve the EIR's function as an informational document. The EIR described existing public transit serving the campus and analyzed the projected effects of the Plan on travel demand. The court emphasized that its decision was based on the fact that the project was located near a transit priority area and that it complied with recent OPR guidance for such development, including guidance that projects near transit stops generally "should be presumed to cause a less than significant transportation impact" (quoting CEQA Guidelines section 15064.3(b)). But the court's conclusion here begs the question as to why it found that the EIR erred in the first place.

Third, in discussing historic buildings, the court rejected Petitioners argument that it is "feasible" to avoid demolishing the buildings because the prior 2014 plan had suggested an alternative use for the building that would have preserved it. The purpose of demolishing these buildings is to make room for new structures, and the EIR adequately analyzed this issue.

Fourth, in discussing aesthetics, the court agreed with the Regents that the Plan qualifies under a CEQA provision (section 21099(d)(1)) declaring that the aesthetic impacts of certain projects are not considered significant. Specifically, the project is located on property zoned for commercial uses, and thus qualifies for the infill exception.

Fifth, in discussing wind, the court held that the EIR's requirement that wind testing of the design of any new building over 80 feet and make changes to the design as necessary was an adequate mitigation measure. This was not an improper deferral of a mitigation measure because, among other reasons, the mitigation measure identifies a specific performance criteria (26 mph in pedestrian areas).

D. *Planning and Conservation League v. Department of Water Resources* (2024) 98 Cal.App.5th 726

Holding:

- The Department of Water Resources adequately complied with CEQA in preparing a program EIR for its renewal of long-term contracts (to 2085) providing State Water Project water to 29 local government contractors, ultimately determining that such renewals would not result in any significant effects on the environment, given that the existing baseline already had the contracts in place.

Practice Tip:

- The court's holding has limited practical utility outside the unique facts of this case, which involved historic baseline conditions that pre-existed the enactment of CEQA. But the case does provide limited support for the proposition that a lead agency's re-approval of an existing activity does not need to freshly analyze impacts resulting from continued operations.

Summary:

The State Department of Water Resources (DWR) has long-term (75-year) contracts with 29 local government contractors giving each of them the right to receive a certain portion of the available water supplies under the State Water Project (SWP). The project at issue in this case involves DWR's approval of the renewals of each of these contracts until 2085, for which it prepared a program EIR concluding (arguably counter-intuitively) that the renewals would not result in any significant environmental impact. It reached this conclusion in large part in reliance on the existing baseline where all of these contracts have already been in place (and, indeed, have been in place since before the enactment of CEQA).

Following such approval (and likely anticipating litigation), DWR filed a validation action. Various conservation groups and public agencies responded seeking to challenges DWR's compliance with CEQA and other law. The trial court rejected all of the challenges, and the Court of Appeal affirmed.

Much of the litigation turned on DWR's determination as to the existing baseline already including having the contracts in place, which the court upheld. The court also rejected what was essentially a "reverse-segmentation" challenge, claiming that the DWR should have prepared separate CEQA documents for each contract, and rebuffed challenges to the EIR's project description and analysis of alternatives.

E. *V Lions Farming, LLC v. County of Kern* (2024) 100 Cal.App.5th 412 (certified for partial publication)

Holding:

- County failed to comply with CEQA by not including use of Agricultural Conservation Easements (ACEs) as compensatory mitigation to partially offset the significant and unavoidable loss of agricultural land.

Practice Tip:

- This case continues a troubling trend in which courts appear to hold that Agricultural Conservation Easements must necessarily be considered (if not actually adopted and imposed) as mitigation under CEQA to compensate for the loss of significant agricultural resources. But we believe that there are reasonable grounds for a lead agency to find such measures to be infeasible. This issue can often be a political "hot button" for agricultural interests and even the Department of Conservation. Under the current state of the case law, lead agencies analyzing projects that will result in the "significant and unavoidable" loss of agricultural resources must either impose such easements to partially mitigate the impact, or carefully develop an evidentiary record demonstrating why such mitigation is not feasible. We believe that there is still room in the law for an evidence-based determination of infeasibility here, notwithstanding the reasoning of this and other cases.

Discussion:

This case involves a second appeal by a farm company and environmental organizations against Kern County regarding the County's approval of an ordinance streamlining the permitting process for new oil and gas wells. In the first appeal, the court determined that the EIR prepared for the ordinance was defective and issued a writ requiring the County to correct the defects before reapproving the ordinance. Once the County prepared a revised supplemental EIR (SEIR) and an addendum for a slightly modified ordinance, the trial court discharged the writ but Petitioners appealed.

In the published portion of the appeal, the court determined that agricultural conservation easements (ACEs) partially mitigate a conversion of agricultural land caused by the project and that ACEs qualify as compensatory mitigation. Under CEQA Guidelines Section 15370(e), mitigation is defined to include "compensating for the impact by … providing substitute resources." The court stated that the phrase "providing substitute resources" was ambiguous, and resolved the ambiguity by adopting the interpretation that best effectuates CEQA's purpose, which would encompass preserving existing agricultural land. Thus, ACEs qualify as compensatory mitigation, even though they do not replace or otherwise offset the acres of agricultural land converted by the project and they do not ensure the project results in no net loss of agricultural land.

V. CEQA Litigation and Remedies

A. *Natural Resources Defense Council, Inc. v. City of Los Angeles* (2023) 98 Cal.App.5th 1176

Holding:

- When a court concludes that an agency violated CEQA, it may void the agency's action in whole or in part and may suspend specific project activity that may damage the environment until the agency has taken actions that are necessary to comply with CEQA.

Practice Tip:

- Mitigation Monitoring and Reporting Programs do not evaporate as they age. Devise a program to monitor (no pun intended) adopted MMRPs and confirm that your city is fulfilling any required obligations thereunder. Doing so will necessarily involve keeping an eye on existing operations. And if a project requests changes requiring new discretionary approvals, ensure that the supplemental environmental review confirms compliance with any previously-adopted mitigation.

Summary:

This case involves a challenge to the Port of Los Angeles's 2019 certification of a supplemental EIR (SEIR) for a project involving the continued operation of the China Shipping Container Terminal. The plaintiffs sued the Port, alleging a broad variety of CEQA violations with respect to the SEIR. The trial court determined that the SEIR had violated CEQA in multiple ways, including its failure to ensure that mitigation measures were actually legally enforceable. The trial court also found that the SEIR failed to adequately analyze the emissions impact of the project and had improperly modified or deleted mitigation measures that were adopted in the original 2008 EIR regarding the use of alternative marine power and implementation of an electric yard tractor pilot project. Accordingly, the trial court ordered the Port to set aside its certification of the SEIR and prepare a revised SEIR that complies with CEQA.

Petitioners appealed the trial court's decision, alleging that the trial court erred in concluding that certain other mitigation measures constituted feasible mitigation and that the trial court erred in determining that the only available remedy was to set aside the 2019 SEIR. The Court of Appeal agreed and determined that the trial court did not understand its authority under the CEQA statute when it stated that the only available remedy was to set aside the SEIR while allowing operations at the Port to continue as those operations were occurring prior to the certification of the SEIR (without certain adopted mitigation measures being made enforceable and being implemented). Public Resources Code section 21168.9, subdivision (c) makes clear that a court retains all of its traditional equitable powers to remedy violations of CEQA, such as an order directing an agency to take specific action as may be necessary to bring its determination in compliance with CEQA. Further, the trial court misapprehended the scope of authority under Section 21168.9, subdivision (a)(2) and (a)(3), which allows a court to suspend a specific project activity that may damage the environment until the agency complies with CEQA. The court concluded that the trial court's remedy – ordering the Port to set aside the SEIR while still allowing the Port to continue operations without any of the purportedly-adopted mitigation being enforced during preparation of a new SEIR – would permit the Port to violate CEQA without any real consequence. The case has been remanded to the trial court with orders to exercise its discretion to fashion an appropriate remedy, such as setting a timeline for SEIR adoption or suspension of certain shipping activities unless specific mitigation measures from the 2008 EIR or the SEIR are implemented.

B. ***Guerrero v. City of Los Angeles*** **(2024) 98 Cal.App.5th 1087**

Holding:

- Any CEQA action challenging the adequacy of a facially valid NOD must be filed within 30 days.

Practice Tip:

- File a Notice of Determination after the first of any discretionary approvals in a project with multiple approvals. Like voting, employ NODs early and often.

Summary:

This case involves a 42-lot residential single-family home subdivision in northeast Los Angeles. The City prepared a 2016 MND and an updated 2017 MND after the project was redesigned several times. The project required a number of discretionary approvals in addition to the subdivision map, including a rezoning and retaining wall approvals. On March 3, 2020, the City's Planning Department conditionally approved a vesting tentative tract map and adopted the MND and a mitigation monitoring program. On March 25, 2020, the City filed a NOD pursuant to CEQA. On May 25, 2020, the East Los Angeles Area Planning Commission also adopted the previously prepared MND, approved various zoning determinations and adjustments to the project's retaining walls, and recommended to the City Council to adopt the necessary zone change. The City filed a second NOD on February 4, 2021.

The City Council thereafter adopted the previously prepared MND and approved the recommended rezoning on June 8, 2021, and followed it with a third NOD on June 18, 2021. Petitioners filed a writ action challenging the project approvals under CEQA on July 16, 2021, within 30 days of the filing of the City's *third* NOD for the project. The trial court overruled the City's demurrer regarding the CEQA claim, finding that the petition was timely filed. At trial, the trial court rejected the CEQA statute of limitations claim again, and also found that the MND was inadequate and an EIR was required. The City and developers filed consolidated appeals, and the Court of Appeal reversed. The court directed the trial court to dismiss the petition as time-barred under CEQA because any challenge must be filed within 30 days after the filing of a valid NOD. Since CEQA review must occur at the earliest meaningful opportunity, the first approval triggers the statute of limitations.

C. ***Vichy Springs Resort, Inc. v. City of Ukiah*** **(March 29, 2024) 2024 WL 1340842 (certified for partial publication)**

Holding:

- A CEQA challenge is not moot just because the project is completed if there are specific, feasible, and operational-based mitigation measures available to mitigate significant environmental impacts.

Practice Tip:

- City Attorneys should conform that the City's standard conditions of approval contain adequate project indemnity and defense provisions because even project construction – to completion! – may not moot a timely CEQA lawsuit.

Summary:

The Ukiah Rifle and Pistol Club ("Club") operates a shooting range on unincorporated land it leases from the City of Ukiah ("City") in Mendocino County ("County"). Half a mile away from the shooting range is the Vichy Spring Resort ("Vichy"). When the Club planned to demolish the existing shooting range and construct a brand new shooting range (the "Project"), Vichy sued both the City and the County (because Vichy was uncertain which entity had regulatory authority over the Club's actions), alleging that the new project would have significant environmental effects, such as lead contamination and increased noise and traffic. Vichy did not ask the court to enjoin construction of the shooting range, so while the case was pending in the trial court, the project was completed and the City and County entered into a Joint Powers Agreement to resolve the uncertainty regarding their respective regulatory authority over the project. After multiple rounds of motions, the trial court entered judgment in favor of the City and County.

The Court of Appeal reversed the trial court's judgment with respect to some of the CEQA claims. In a partially published opinion, the court rejected the Club and City's argument that the CEQA claim is moot because there is no effective relief that the Court can order now that the

Project is complete. The court reasoned that the claim is not moot because Vichy has adequately alleged that mitigation measures could still be imposed to reduce or avoid the significant environmental impacts alleged in the Petition (such as using lead-free ammunition, engaging in a proactive lead removal program, and implementing a pollution prevention plan to prevent pollution of lead to Sulfur Creek and the Russian River). The City could revoke and hold in abeyance the building permit and certificate of occupancy while the County completes its review. The court also rejected the Club's argument that because Vichy did not seek a preliminary injunction, the claim is moot because the court concluded that there is no legal basis for such an argument.

Additionally, the court concluded that the County's position, which was that the City's ownership of the property rendered the Club's activity immune from the County's regulatory authority, was incorrect. Rather, Vichy's allegation that the County's local ordinances required a discretionary use permit for a project which had reasonably foreseeable environmental impacts, thus requiring CEQA review, was sufficient to survive demurrer. The court rejected the County's argument that CEQA does not apply to governmental inaction because the Petition alleges, with supporting documentation, that the County determined the Project was not subject to CEQA. CEQA's definition of a project does not require a permit to be issued, but rather that the proposed activity "involve[] the issuance to a person of a … permit." (Pub. Res. Code § 21065.)

John M. Luebberke
jluebberke@herumcrabtree.com

Land Use Litigation Update, Spring 2024

John M. Luebberke,

Of Counsel

FEDERAL CASES

Sackett v. EPA (2023) 598 US 651

QUICK TAKEAWAY: The Supreme Court narrowed federal jurisdiction over "waters of the United States." However because state jurisdiction remains broad, it remains to be seen what practical changes (if any) the ruling will have in California.

In *Sackett*, the Supreme Court significantly narrowed the scope of the wetlands and other waters subject to the reach of the Clean Water Act ("CWA").

Sackett limits waters of the United States ("WOTUS") to "relatively permanent" water bodies such as streams, oceans, rivers and lakes, and to wetlands with a "continuous surface connection" to those water bodies.

This ruling removes a variety of wetlands from the CWA's permitting requirements, likely eliminates jurisdiction for many ephemeral and intermittent streams, and will require the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency to reconsider its recent rulemaking regarding the definition of WOTUS for CWA purposes.

The case involves a challenge to the EPA's assertion that wetlands on a

residential lot near Priest Lake, Idaho, were subject to CWA jurisdiction.

In a prior case involving the same property, the Supreme Court ruled on a procedural matter, holding that property owners were entitled to immediate judicial review of EPA compliance orders on the question of CWA jurisdiction, rather being forced to wait until the agency bought a judicial enforcement action.

When that case was remanded, the EPA asserted jurisdiction over certain wetlands because they were "adjacent" to a creek and had a "significant nexus" through the creek to the lake, a traditional navigable water.

The EPA's opinion was upheld at the district court and the Ninth Circuit Court of Appeals. The Supreme Court reversed, unanimously rejecting the "significant nexus" test as a basis for CWA jurisdiction. The majority also rejected the EPA's broad interpretation of "adjacent" as including not just wetlands that were physically touching a traditional navigable water, but also those neighboring or near such waters.

The court held that WOTUS means: (i) relatively permanent, standing or continuously flowing bodies of water forming geographic features described in ordinary parlance as streams, oceans, rivers and lakes; and (ii) adjacent wetlands with a continuous surface connection to such waters, so that the wetlands are "as a practical matter indistinguishable from" the water bodies.

In order to establish jurisdiction over a wetland an agency must now show that the adjacent body of water is a "relatively permanent body of water connected to interstate navigable waters"; and that the wetland has a "continuous surface connection" with that water body.

This change is similar to the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2007). However, this case directly rejects the "significant nexus" test that was also discussed in *Rapanos*. That more lenient test has been relied on by the Army Corps and EPA to impose jurisdiction over non-contiguous wetlands as well as many ephemeral and intermittent tributaries that are not themselves navigable. This decision greatly reduces the scope of Army Corp and EPA jurisdiction.

While this case involved only a challenge to federal jurisdiction under the CWA Section 404 permitting program, it should also have an effect on the scope

of other water quality programs under the CWA, including the National Pollutant Discharge Elimination System, which regulates wastewater, stormwater, and other types of discharges to WOTUS. That being said, the scope of state jurisdiction remains unchanged. Therefore, this decision may result in some discharges being subjected to waste discharge requirements issued under state law rather than receiving state approval through water quality certification issued under a Clean Water Act Section 401 permit.

Further clarification will come as the affected agencies work through the regulatory changes required to comply with this decision.

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 articulated 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 federal district court in Oregon, 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 court held that the City Ordinance prohibiting the use of bedding supplies when sleeping in public violated the Cruel and Unusual Punishments Clause of the Eighth Amendment to the U.S. Constitution, as applied to individuals who were involuntarily experiencing homelessness and who had no shelter. The court further 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; and (3) the district court acted within its discretion in finding that Plaintiffs met the commonality requirement for class

certification.

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 court 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 court also rejected the City's argument 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, citing, inter alia, *Martin v. City of Boise* (9th Cir. 2019) 920 F.3d 584 (*Martin*).

The court affirmed the certification of a class of at least 600 homeless persons in the City. The court found that the class satisfied the commonality and numerosity requirements, despite an officer's guess that enforcement had only occurred against fewer than 50 people. The court 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: it prohibits only 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.

Judge Collins dissented, arguing *Martin* seriously misconstrued the Eighth Amendment and U.S. Supreme Court case law, and, even assuming *Martin* were correct, the *Johnson* decision—which Judge Collins argued both misread and greatly expanded *Martin*'s holding—was egregiously wrong.

The Ninth Circuit denied the City's petition for rehearing en banc. No. 20-35752, 20-35881, 2023 U.S. App. LEXIS 16984 (9th Cir., July 5, 2023). Judges Silver and Gould, O'Scannlain, Graber, and Smith filed statements on the denial of rehearing. Judges Silver and Gould argued the other opinions on the denial of rehearing significantly exaggerated 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 in part by 14 others, characterized Ninth Circuit jurisprudence with the addition of *Grants Pass* as 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."

Judge Graber 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."

The Supreme Court has granted cert, with oral argument scheduled for April 22, 2024.

STATE CASES

Anderson v. County of Santa Barbara (2d Dist. 2023) 94 Cal. App. 5th 554

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. In addition, 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.

<u>Discovery Builders, Inc. v. City of Oakland (1st Dist. 2023) 92 Cal. App. 5th 799</u>

QUICK TAKEAWAY: Absent a valid Development Agreement, it still may be possible to impose new development impact fees regardless of lesser agreements to the contrary.

In *Discovery Builders*, the Court held that an agreement (this was not a Development Agreement) between a developer and the City of Oakland was not a barrier to the city imposing new impact fees in the future because terms in the relevant agreement to the contrary amounted to an impermissible contracting away of the city's police power.

In 2004 and 2005, the city had approved a vesting tentative map and final tract maps for a 400-unit housing project. The city and the developer also entered into an agreement with regard to mitigation requirements. The agreement provided that the fees paid by the Developer under the agreement "satisfy all the Developer's obligations for fees to the city for the Project."

Subsequently, in 2016, the city enacted three new impact fees. When the developer applied for its final round of building permits for the project, the city assessed all three new fees against permits.

In the litigation that followed, the developer prevailed in the trial court. However, the appellate court reversed. The appellate court determined that the *Avco Community Developers Inc. v. South Coast Regional Committee* (1976) 178 Cal.3d 785, was applicable and that cities cannot therefore contract away their police power in the future. This ruling invalidated the terms of the 2005 agreement on which the developer had relied.

The court held that since the city had rightfully exercised its police power by enacting the 2016 fees, any contrary term of the 2005 agreement was invalid.

This case does not address Development Agreements, and had there been one here, the parties would have locked in for the course of the project the applicable laws, regulations, and fees in existence at the time of approval of that

agreement.

<u>Snowball West Investments L.P. v. City of Los Angeles (2d Dist. 2023) 96 Cal. App. 5th 1054</u>

QUICK TAKEAWAY: In applying Government Code § 65589.5(j)(4), a city's exercise of discretion in defining what zoning designations are "consistent" with the density expectations presented in the General Plan will be respected, even when the result is development only being permitted at a density far below the maximum provided for in the General Plan.

In *Snowball West*, the Court rejected a developer's challenge to the city's denial of its requested upzoning of its project site. Following the city's denial, for the first time the developer contended that the existing zoning was too restrictive and thereby inconsistent with the applicable Community Plan (General Plan), and on this basis pursuant to Government Cade § 65589.5(j)(4) the project must be approved without requiring a zone change. The court upheld the city's determination that the existing zoning was consistent with the General Plan, and that section 65589.5(j)(4) was therefore inapplicable.

The facts are unusual, because of the convoluted history of the city's efforts to efficiently achieve alignment between its General Plan and zoning requirements in the early 1990's. In brief, the city used a short cut (Footnote 23) that in effect allowed areas designated in the existing zoning code as low density to remain "consistent" with the General Plan even when the General Plan later designated those areas as being ones where a higher density is permitted. In effect, under the city's interpretation Footnote 23 allowed areas zoned low density to continue to be developed as low density, even when (as was the case here) the General Plan called for higher density on the site.

The developer proposed to build 215 homes, and requested the site be rezoned to allow for this density. The Community Plan for the site called for development at Low Residential and Low Medium I densities. The Community Plan listed various zoning designations as applicable to this density, but it did not list the existing zoning designations for the site: Agricultural and Estate zones.

The city denied the rezoning application. Following that denial, for the first time the developer requested that the city accept and process the project's approved Vesting Tentative Tract Map and ignore the rezoning condition

required for Final Map approval, arguing that under the Housing Accountability Act at section 65589.5(j)(4), no rezoning could be required. The city refused, and the developer filed a petition for writ of mandate and claims for damages.

The city prevailed, with the Court finding that the city acted within its discretion in concluding that Footnote 23 meant the existing zoning was consistent. It rejected the developer's argument that the city violated the spirit of the HAA by relying on low-density zoning to deny this housing project, finding that the city had presented adequate findings (primarily related to wildfire risks) to support its decision.

Yes In My Back Yard v. City of Culver City (2d Dist. 2023) 96 Cal. App. 5th 1103

QUICK TAKEAWAY: The Housing Crisis Act of 2019 [Gov't Code § 66300, et seq. (the "Act")] will be interpreted broadly and in accord with its stated terms such that new regulations that have the effect of reducing a city's "housing capacity" below that which was possible on January 1, 2018 will not be permissible.

In *Yes In My Back Yard*, the Court of Appeal held that the Act, which generally prohibits cities from reducing the intensity of land use on a parcel where housing is allowed below 2018 levels specifically prohibits reductions in floor area ratio. Floor area ratio measures the ratio of total square footage of the building to the total area of the parcel.

Yes in My Back Yard filed its writ petition after the city adopted an ordinance that had the effect of reducing the allowable floor area ratio in R-1 zones from 0.60 to 0.45. This anti "mansionization" provision was enacted, for among other reasons, to preserve the character of existing neighborhoods.

In response to the suit the city argued the Legislature intended the Act to address only reductions in density, meaning reductions in the allowable number of housing units per acre. The court disagreed, noting that the Act itself defines "reducing the intensity of land use" to include reductions in floor area ratio.

The proponents were awarded their attorneys' fees under CCP § 1021.5.

Riddick v. City of Malibu (2d Dist. 2024) 99 Cal.App.5th 956

QUICK TAKEAWAY: When a city's interpretation of a provision of its code is contrary to the applicable unambiguous plain language, a court need not defer to the city's interpretation.

In *Riddick*, the Court found a city ordinance that exempted certain improvements to existing single-family residences from the requirement to obtain a coastal development permit required the city to administratively process a homeowner's permit for an attached accessory dwelling unit ("ADU"). The Court overruled the city's interpretation of its own local coastal program

Under the Coastal Act, a coastal development permit ("CDP") is generally required for all development activity. In this case, the city contended that the application for an attached ADU required a CDP, despite there being an exception in the state regulations [14 CCR 13250(a)] and identical provisions in the city's code for "directly attached" improvements to single family homes.

The applicant prevailed in the trial court, and the Court of Appeal affirmed holding that the plain meaning of the regulations describes two categories of exempt structures: (1) an unqualified exemption for all fixtures and structures directly attached to the house; and (2) structures (presumably unattached) normally associated with a single-family residence but not including guest houses or self-contained residential units.

In rejecting the city's interpretation of its own ordinance, under which the phrase excluding guest houses and accessory units would be read to modify the first category as well as the second, the Court noted that the city had not established that this interpretation was either carefully considered or longstanding, and with it also being at odds with the plain language of the ordinance, this interpretation was not entitled to "great deference." The court acknowledged that it must give consideration to an agency's interpretation, but not to the exclusion of other tools of statutory construction. In this case the language and legislative history of the relevant ordinance were clear, so there was no need to defer to the city's interpretation.

Sheetz v. County of El Dorado (3rd Dist. 2022) 84 Cal. App. 5th 394, cert granted 144 S.Ct. 477

QUICK TAKEAWAY: The California rule that exactions approved legislatively (generally applicable impact fees) are not subject to the rigorous Nollan and Dolan standard is under Supreme Court review: Review was granted on "The question … whether a permit exaction is exempt from the unconstitutional conditions doctrine as applied in Nollan and Dolan simply because it is authorized by legislation."

George Sheetz owns a parcel of land upon which he has planned to erect an 1800-square-foot manufactured home. The land is in a rural area of unincorporated El Dorado County near Placerville.

When he applied for the necessary permits, the county imposed its Traffic Impact Mitigation Fee (the "Fee"). The Fee is intended to offset traffic impacts attributable to new development. The amount charged was $23,420.

The Fee was adopted by the county in 2004, in accord with its traffic and circulation plan. The Fee is a one-time traffic impact fee designed to offset the traffic impacts of new development on the county's road network. The amount of the Fee is set by a fee schedule adopted by the county and varies depending on the type and extent of the development. The Fee is not tied to the cost of any particular planned road improvements, and is not designed to ensure construction of any specific improvements tied to the impacts of the development being charged. Instead, it is purported to represent payment for a projects proportionate share of countywide road improvements that the county has concluded is reasonably attributable to new development in the relevant fee zone.

Mr. Sheetz sued, challenging the Fee as an unconstitutional taking. Both the trial court and the court of appeal found no constitutional error, because the Fee was enacted by the county's legislative body and therefore not subject to the stricter Nollan and Dolan standard. The California Supreme Court denied review and the United States Supreme Court granted certiorari on September 29, 2023.

This case juxtaposes the relative benefits of certainty and bureaucratic convenience against an impact fee on a very modest project that on its face appears to be disproportionately burdensome. That together with the sympathetic circumstances of the owner's plight, brings to mind circumstances of the Dolan case. A decision is expected in June of 2024.

Planning and Conservation League v. Department of Water Resources (3rd Dist. 2024) 98 Cal. App. 5th 726. [Non-CEQA aspects of the case]

QUICK TAKEAWAY: The Court of Appeal rejected the petitioners' claims that amendments extending certain State Water Project contracts to 2085 violated the Delta Reform Act or the Public Trust Doctrine.

The Department of Water Resources ("DWR") and 29 local government contractors entered into long-term (75-year) contracts in the 1960's that granted the contractors rights to a portion of water from the State Water Project ("SWP"). The contracts each specify a maximum annual water allocation, although there is no guarantee of full delivery in any given year.

The contracts include an "evergreen clause", which allows the contractors to continue service beyond the contract's nominal expiration date by giving advanced notice to DWR. After several contractors exercised this option, the parties began negotiations aimed at securing long-term extensions of the contracts.

Several conservation groups and public agencies brought legal challenges to the approval and the associated validation action. The trial court ruled in favor of DWR and this appeal followed.

<u>Delta Reform Act:</u>

Under the Delta Reform Act, any state or affected local agency planning to undertake a "covered action" must first certify in writing that the action is consistent with the Delta Plan. [Water Code § 85225]. This certification and detailed supporting findings, must be submitted to the Delta Stewardship Council before the covered action is implemented. Water Code section 85057.5 defines a "covered action" generally as a non-exempt plan, program, or project that occurs within the Delta boundaries, has some public agency involvement and has the potential to effect the implementation of Delta-related state policy objectives.

DWR did not prepare a certification of consistency when it approved the contract amendments. The petitioners argued that the amendments constituted a covered action. The Court, in siding with DWR concluded that the SWP is essentially exempt from the Covered Action procedures. This is the case because the SWP is an ongoing state operation (not a new project), the actions involved in the contracting process did not generally take place within the legal Delta, the contracting process itself did not impact the state's water supply or the Delta ecosystem and in any event "routine maintenance and operation" of the SWP is exempt.

<u>Public Trust Doctrine:</u>

The petitioners, relying on *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419 (*National Audubon*), argued that DWR had an affirmative duty to take the public trust into account when considering approval of the contract amendments. In finding to the contrary, the Court found the obligations stated in *National Audubon* most particularly apply to water diversions. These contract amendments did not address or approve water diversions, since that process is carried out by the State Water Resources Control Board.

The Court also found that, given the water rights at issue were granted in 1967, the amendments do not impact a public trust resource. The contracts specifically allow the contractors to extend their interests indefinitely, so it was reasonable for DWR to reach this conclusion with regard to the extension of those contracts to 2085.

Cave Landing LLC v. California Coastal Commission (2nd Dist. 2023) 94 Cal. App. 5th 654

QUICK TAKEAWAY: The court upheld the authority of the California Coastal Commission to decide "de novo", appeals of coastal development permits.

The McCarthy family owned a parcel of land located in San Luis Obispo County. The property was located in the coastal zone and was subject to an easement in favor of the county for a hiking trail. While the easement had a set location, it was subject by its terms to being moved with the reasonable consent of both parties

San Luis Obispo County had an approved local coastal program. Therefore, actions implementing the program were delegated and could be decided by the County, subject to appeal to the Commission.

In 2013 the McCarthy's blocked access to the hiking trail by installing fences and gates, without a coastal development permit. Subsequently, the Commission issued a cease-and-desist order prohibiting blocking of the trail or other similar actions. That order was not challenged.

Later, in 2016, the McCarthys applied for a coastal development permit to move the trail over to a neighboring parcel. The proposal would have the trail constructed and dedicated to the county once the county quitclaimed the existing easement. The county approved a coastal development permit for the project, which was appealed to the Commission.

The Commission granted the appeal, denying the permit. In so doing the Commission found that the project would interfere with public views, the new trail would be located within an archaeologically sensitive area, the project would involve substantial soil disturbance in a geologically unstable area and the project was generally out of character with the rural and scenic state of the location.

The McCarthys sued. The appellate court confirmed that the Commission has de novo review authority under Public Resources Code sections 30621(a) and 30625(a), and on that basis upheld the denial of the writ.

The appellate court noted that the Commission was effectively a party to the easement, since the Commission has ultimate authority regarding compliance with the Coastal Act. The court also noted that while the county was free to implement its local coastal program, and the county did so by approving the project, the Commission retained jurisdiction to exercise de novo development review authority over matters brought before it on appeal.

<u>Martinez v. City of Clovis (5th Dist. 2023) 90 Cal. App. 5th 193</u>

QUICK TAKEAWAY: 1) HCD determinations are generally given deference, but not when the determinations are unexplained and are not supported by evidence in the record; 2) Violations of the duty to affirmatively further fair housing are enforceable by ordinary writ of mandate procedures.

In the relevant housing element revision, the City of Clovis was required to accommodate a new RHNA allocation of 6,328 units, as well as 4,425 unbuilt units that were allocated in the previous cycle ("carryover").

The city had obtained approval of its prior housing element, but subsequently had failed to follow through on certain specific commitments to "provide adequate zoning … to cover the unaccommodated need" left over from the previous cycle. This resulted in revocation of the prior approval.

In response to this, the city amended its general plan and zoning ordinance to include an overlay zone, which added another layer of permissible use that would permit high density development of sites otherwise zoned for low density housing development. The sites so designated were still capable of being developed with lower densities. After this action was taken, HCD recertified the amended housing element.

In the litigation that followed the petitioner alleged (among other things) that the new housing element failed to adequately accommodate the carryover RHNA obligation and the city's actions violated its duty to "affirmatively further fair housing" under Government Code § 8899.50.

Of particular import here, the court noted that state law provides more stringent requirements for carryover housing obligations. In such cases cities must: a) permit multifamily residential development by right where at least 20 percent of the units are affordable, and b) provide for certain minimum densities on identified sites.

The problem identified by the court was that, while the overlay parcels could be developed at high densities, they were nonetheless not regulated to a minimum density of at least 20 units per acre. Despite the prior HCD approval, the court, agreeing with the petitioner, did not agree with the unsupported reasoning of HCD and instead relied upon the mandatory nature of the statutory language: carryover sites "shall be zoned with minimum density …." This holding applies only to carryover sites, and should not be assumed to apply to circumstances where no shortfall is being addressed.

The decision also addressed the city's obligation under the requirement to "affirmatively further fair housing" ("AFFH"), a requirement enacted in 2018 as Government Code section 8899.50. This decision is the first to address this obligation at the appellate level.

Section 8899.50(a) requires all public agencies in the state to "affirmatively further fair housing" by "taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics." This section provides that the "duty to affirmatively further fair housing extends to all of a public agency's activities and programs relating to housing and community development."

In addressing the scope of the city's AFFH obligation, the court held that the statute creates affirmative obligations. Specifically, the city must do more than merely prohibit discrimination. The city must also administer its programs "in a manner to affirmatively further fair housing."

Of note as well the court held that the city's violations of the Housing Element Law related to carryover housing also constituted, as a matter of law,

violations of its AFFH obligations. This holding means that in essence, any housing element requirement that affects the availability of affordable housing implicates AFFH duties. The court did not rule on whether violations of a different nature could also be considered AFFH violations.

Noting that the AFFH statute did not directly address the mechanism of its enforcement, the court ruled that it is a proper subject of ordinary mandate because it represents a mandatory duty placed on public agencies.

John M. Luebberke
jluebberke@herumcrabtree.com

Land Use Litigation Update, Spring 2024

John M. Luebberke,

Of Counsel

SUPPLEMENT

Sheetz v. County of El Dorado (April 12, 2024) 2024 U.S. LEXIS 1574; 2024 WL 1588707.

QUICK TAKEAWAY: The Court held that exactions approved legislatively (generally applicable impact fees) are subject to the rigorous Nollan and Dolan standard.

George Sheetz owns a parcel of land upon which he has planned to erect an 1800-square-foot manufactured home. The land is in a rural area of unincorporated El Dorado County near Placerville.

When he applied for the necessary permits, the county imposed its Traffic Impact Mitigation Fee (the "Fee"). The Fee is intended to offset traffic impacts attributable to new development. The amount charged was $23,420.

The Fee was adopted by the county in 2004, in accord with its traffic and circulation plan. The Fee is a one-time traffic impact fee designed to offset the traffic impacts of new development on the county's road network. The amount of the Fee is set by a fee schedule adopted by the county and varies depending on the type and extent of the development. The Fee is not tied to the cost of any

particular planned road improvements, and is not designed to ensure construction of any specific improvements tied to the impacts of the development being charged. Instead, it is purported to represent payment for a projects proportionate share of countywide road improvements that the county has concluded is reasonably attributable to new development in the relevant fee zone.

Mr. Sheetz sued, challenging the Fee as an unconstitutional taking. Both the trial court and the court of appeal found no constitutional error, because the Fee was enacted by the county's legislative body and therefore not subject to the stricter Nollan and Dolan standard. The California Supreme Court denied review and the United States Supreme Court granted certiorari on September 29, 2023.

This case juxtaposes the relative benefits of certainty and bureaucratic convenience against an impact fee on a very modest project that on its face appears to be disproportionately burdensome. That together with the sympathetic circumstances of the owner's plight, brings to mind circumstances of the Dolan case.

A decision has now been issued. In this narrow decision, the Court found that the same Nollan/Dolan standards apply to exactions imposed on a development project regardless of what governmental actor has imposed them. The Court did not address the question of exactly what differences (if any) there may be in the tests to be applied to project-specific v. generalized (categorical) development fees. In this case the county had imposed a uniform fee that was applicable to all single family homes built within a particular geographic zone. Whether this coarse level of analysis will be sufficient to support such fees going forward is for subsequent cases to determine.

HERUM \ CRABTREE \ SUNTAG
ATTORNEYS

John M. Luebberke
jluebberke@herumcrabtree.com

Land Use Litigation Update, Spring 2024

John M. Luebberke,

Of Counsel

SUPPLEMENT

Sheetz v. County of El Dorado (April 12, 2024) 2024 U.S. LEXIS 1574; 2024 WL 1588707.

QUICK TAKEAWAY: The Court held that exactions approved legislatively (generally applicable impact fees) are subject to the rigorous Nollan and Dolan standard.

George Sheetz owns a parcel of land upon which he has planned to erect an 1800-square-foot manufactured home. The land is in a rural area of unincorporated El Dorado County near Placerville.

When he applied for the necessary permits, the county imposed its Traffic Impact Mitigation Fee (the "Fee"). The Fee is intended to offset traffic impacts attributable to new development. The amount charged was $23,420.

The Fee was adopted by the county in 2004, in accord with its traffic and circulation plan. The Fee is a one-time traffic impact fee designed to offset the traffic impacts of new development on the county's road network. The amount of the Fee is set by a fee schedule adopted by the county and varies depending on the type and extent of the development. The Fee is not tied to the cost of any

particular planned road improvements, and is not designed to ensure construction of any specific improvements tied to the impacts of the development being charged. Instead, it is purported to represent payment for a projects proportionate share of countywide road improvements that the county has concluded is reasonably attributable to new development in the relevant fee zone.

Mr. Sheetz sued, challenging the Fee as an unconstitutional taking. Both the trial court and the court of appeal found no constitutional error, because the Fee was enacted by the county's legislative body and therefore not subject to the stricter Nollan and Dolan standard. The California Supreme Court denied review and the United States Supreme Court granted certiorari on September 29, 2023.

This case juxtaposes the relative benefits of certainty and bureaucratic convenience against an impact fee on a very modest project that on its face appears to be disproportionately burdensome. That together with the sympathetic circumstances of the owner's plight, brings to mind circumstances of the Dolan case.

A decision has now been issued. In this narrow decision, the Court found that the same Nollan/Dolan standards apply to exactions imposed on a development project regardless of what governmental actor has imposed them. The Court did not address the question of exactly what differences (if any) there may be in the tests to be applied to project-specific v. generalized (categorical) development fees. In this case the county had imposed a uniform fee that was applicable to all single family homes built within a particular geographic zone. Whether this coarse level of analysis will be sufficient to support such fees going forward is for subsequent cases to determine.