Land Use and CEQA Litigation Update

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Cases From August 10, 2021
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FEDERAL CASES

Center for Community Action and Environmental Justice v. Federal Aviation Administration (9th Cir. 2021) 18 F.4th 592.

BACKGROUND: Environmental organizations and State of California petitioned for review of decision by Federal Aviation Administration (FAA) that found no significant environmental impact stemming from construction and operation of an air cargo facility at a public airport, alleging violations of National Environmental Policy Act (NEPA).

HOLDINGS: The Court of Appeals held that: (1) FAA's use of one general study area to evaluate multiple potential environmental impacts of project was not abrogation of its responsibility under NEPA to take "hard look"; (2) FAA's use of reduced study area to analyze hazardous material issues when evaluating project was not arbitrary; (3) FAA's cumulative impacts analysis when evaluating project was not deficient; (4) findings of significant impact in environmental impact report prepared under California Environmental Quality Act did not require FAA to prepare environmental impact statement under NEPA; (5) FAA's calculations regarding truck emissions generated by project were not arbitrary or capricious; and (6) any failure by FAA to explicitly discuss project's adherence to California or federal ozone standards did not render its environmental assessment deficient. Petition denied.

KEY FACTS & ANALYSIS: Petitioners Center for Community Action and Environmental Justice, Sierra Club, Teamsters Local 1932, Shana Saters, and Martha Romero (collectively, CCA) and the State of California (collectively, Petitioners) asked the Ninth Circuit to review Respondent Federal Aviation Administration's (FAA) Record of Decision, which found no significant environmental impact stemming from the construction and operation of an air cargo facility (Project) at the San Bernardino International Airport (Airport). To comply with their duties under the National Environmental Policy Act (NEPA), the FAA issued an Environmental Assessment (EA) that evaluated the environmental effects of the Project. In an effort to prevent execution of the Project, Petitioners alleged error in the EA and the FAA's finding of no significant environmental impact. However, because Petitioners had not established the findings in the EA to be arbitrary and capricious, the Ninth Circuit denied the petition.

In relevant part for this paper, California chiefly asserted that the FAA needed to create an environmental impact statement (EIS) because a California Environmental Impact Report (EIR) prepared under the California Environmental Quality Act (CEQA) found that "[t]he proposed Project could result in significant impacts [on] ... Air Quality, Greenhouse Gas, and Noise[.]" Because CEQA review "closely approximat[ed]" review under NEPA, California argued, "NEPA require[d] the FAA to meaningfully address the substantial questions raised by the prior CEQA analysis that concluded the Project would cause significant and unavoidable environmental impacts."

California did not argue that an EA under NEPA must reach the same conclusion as the CEQA analysis. California's argument assumed, however, that if a CEQA analysis found significant environmental effects stemming from a project, a NEPA analysis was required to explain away

this significance. The Court found this to be untrue. Instead of simply relying on the conclusions in the CEQA report, California was required to identify specific findings in that report that it believed raise substantial questions about environmental impact under NEPA. But California identified only a few such findings, and none of them raised substantial questions as to whether the Project may have a significant effect on the environment for NEPA purposes.

First, although the project would violate CEQA's air quality impact requirements, the EA found that it would not result in new or additional violations of the national air quality standards. Second, California did not refute the EA's rationale for finding no significant impact on greenhouse gas emissions due to the enormity of greenhouse gases worldwide and the relative small size of the Project. Finally, the EA addressed measure to mitigated the noise findings included in the CEQA analysis, and thus was not unsupported in that regard. In sum, California failed to raise a substantial question as to whether the Project might have a significant effect on the environment so as to require an EIS.

Petitioners ("CCA") also asserted that the FAA failed to consider the Project's ability to meet California state air quality and federal ozone standards. Petitioners' arguments invoked 40 C.F.R. § 1508.27(b)(10)'s instruction that evaluating whether a project will have a "significant" environmental impact "requires consideration[ ] of ... [w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." First, the CCA argued that the EA failed to assess whether the Project met the air quality standards set by the California Clean Air Act (CCAA), but the Ninth Circuit declined to consider this argument because the CCA failed to identify a specific potential violation. *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190 (9th Cir. 1988). The Ninth Circuit also found that the EA did discuss the CCAA.

Second, the CCA argued that the EA failed to assess whether the Project met federal ozone standards. The CCA argued that the EA failed to address the Project's compliance with the 2008 and 2015 federal 8-hour ozone standard. However, the EA relied on a South Coast Air Quality Management District (SCAQMD) letter, which addressed the 2008 standard. As for the 2015 federal ozone standard, the letter also addressed how the Project could meet that standard. Because the CCA did not demonstrate a risk of a violation of federal ozone standards and rather argued only that the EA needed to determine whether a risk existed, the CCA did not refute the fact that the Project could be allocated a greater portion of the emissions budget and meet either standard. In sum, the CCA provided no reason to believe that the Project threatened a violation of the federal ozone standards.

Finally, Petitioners argued that the EA failed to assess whether the Project met California's greenhouse gas emission standards. However, the CEQA analysis recognized that the Project would not risk a violation of the California sources of law that Petitioners argued the EA needed to consider. While the CEQA analysis' discussion of the Project's compliance with state standards did not necessarily absolve the FAA of the duty to include such a discussion in the EA, it did suggest that there was no risk of such a violation. Accordingly, the Ninth Circuit found that Petitioners had failed to proffer any specific articulation of how the Project would violate California and federal law. The Ninth Circuit therefore reasoned that there was no reason to believe

that the EA is deficient for purportedly failing to explicitly discuss the Project's adherence to California and federal environmental law.

TAKE-AWAYS: Significant environmental impacts under CEQA may be insufficient to require an Environmental Assessment under NEPA. Specific findings that raise substantial questions about environmental impacts under NEPA are required to trigger an Environmental Assessment.

* * *

LA Alliance for Human Rights v. County of Los Angeles (9th Cir. 2021) 14 F.4th 947.

BACKGROUND: City and county residents experiencing homelessness and located in downtown area encampment and coalition representing business and property owners and other downtown residents brought action against city, county, and various officials, alleging that local government policies and inaction in addressing homelessness, along with various settlements and court orders in prior cases, created a dangerous environment in the downtown area. The United States District Court for the Central District of California granted preliminary injunction to require defendants to provide funding to shelter all downtown area residents experiencing homelessness. Defendants appealed.

HOLDING: The Court of Appeals held that: (1) District Court abused its discretion in relying on extra-record evidence to find facts supporting standing; (2) plaintiffs lacked standing to bring race-based claims; (3) plaintiffs lacked standing to bring due process claim under state-created danger theory; (4) plaintiffs lacked standing to bring due process claim under special relationship theory; (5) plaintiffs lacked standing to bring claim under California statute requiring local governments to provide support for indigent persons; (6) plaintiffs had standing to bring ADA claim; and (7) residents who used wheelchairs for their daily activities failed to demonstrate that law and facts clearly favored their position, in ADA claim, as required to support preliminary injunction. Vacated and remanded.

KEY FACTS & ANALYSIS: Nearly one in four unhoused people in this country live in Los Angeles County (County), and the crisis is worsening. In 2020, over 66,000 individuals were unhoused in the County, a 13% increase over the previous year. Perhaps nowhere is the emergency more apparent than on Los Angeles's Skid Row, which encompasses more than 50 blocks of downtown. Skid Row has become symbolic of the City's homelessness crisis due to its history as an area with a high concentration of unhoused individuals, its extreme density of tent encampments on public sidewalks, and its frequent incidents of violence and disease. In Skid Row and elsewhere in the County, the conditions of street living, lack of sufficient services, and lack of pathways to permanent housing have had a devastating impact on the health and safety of unhoused Angelenos and the communities in which they live. These conditions, and local governments' approach to the issue, have repeatedly been the subject of litigation.

Plaintiff LA Alliance for Human Rights and eight individual plaintiffs sued the County and City of Los Angeles (City) for harms stemming from the proliferation of encampments in the Skid Row area. They alleged that County and City policies and inaction created a dangerous environment in Skid Row, to the detriment of local businesses and residents. After extensive negotiations failed to produce a settlement, the district court issued a sweeping preliminary injunction against the

County and City of Los Angeles and ordered, among other relief: the escrow of $1 billion to address the homelessness crisis, offers of shelter or housing to all unhoused individuals in Skid Row within 180 days, and numerous audits and reports. The district court's order was premised on its finding that structural racism—in the form of discriminatory lending, real estate covenants, redlining, freeway construction, eminent domain, exclusionary zoning, and unequal access to shelter and affordable housing—is the driving force behind Los Angeles's homelessness crisis and its disproportionate impact on the Black community.

However, the Ninth Circuit found that none of Plaintiffs' claims were based on racial discrimination, and the district court's order was largely based on unpled claims and theories. Because Plaintiffs did not bring most of the claims upon which relief was granted, they failed to put forth evidence to establish standing. To fill the gap, the district court impermissibly resorted to independent research and extra-record evidence. For these reasons, the Ninth Circuit vacated the preliminary injunction and remanded for further proceedings.

On the large bulk of the bases for the district court's order, the Ninth Circuit found that the order was based on novel legal theories that the Plaintiffs did not argue, and thus that the district court abused its discretion in granting relief on issues not in the controversy before it. The claims upon which relief was granted included race-based claims, state-created danger, special relationship, equal protection, substantive due process, and deprivation of necessary medical care. Because these claims were not included in Plaintiffs' complaint, there were likewise inadequate facts alleged to show that Plaintiffs had standing to bring those claims. Because its members lacked standing, LA Alliance for Human Rights also lacked associational standing to bring its claims.

By contrast, two individual Plaintiffs using wheelchairs had standing to bring ADA claims against the City. These individuals had demonstrated that they could not traverse Skid Row due to the encampments. The Ninth Circuit found however, that the ADA claims failed to establish a right to preliminary injunction because the ADA Plaintiffs had not shown a likelihood of success on the merits. The allegations were premised on blocked sidewalks "putting everyone at risk," and not sufficient to show a likelihood of success on an ADA claim. These claims also failed to present a reasonable solution which would not require clearing city sidewalks through mass enforcement of anti-camping ordinances.

TAKE-AWAYS: Federal court rulings relying on broad social themes introduced by the court as causes for homelessness as in the *LA Alliance* case may be subject to reversal for lack of standing, and for internally inconsistent claims, such as those in this case based on accessibility barriers due to camping blocking sidewalks, the remedy for which was *enforcement* of anti-camping regulations.

* * *

Garcia v. City of Los Angeles (9th Cir. 2021) 11 F.4th 1113.

BACKGROUND: City residents experiencing homelessness and advocacy organizations brought action challenging constitutionality of provision of city ordinance allowing city to discard bulky items of personal property stored in public areas, when such items were not designed as shelters.

The United States District Court for the Central District of California granted plaintiffs' motion for preliminary injunction to enjoin enforcement of the ordinance. City appealed.

HOLDINGS: The Court of Appeals held that: (1) plaintiffs were likely to succeed on merits of Fourth Amendment challenge to ordinance, supporting preliminary injunction, and (2) bulky items provision was not severable from remainder of ordinance. Affirmed. Bennett, Circuit Judge, filed a dissenting opinion.

KEY FACTS & ANALYSIS: The case involved the City of Los Angeles (City) appealing a preliminary injunction prohibiting it from discarding homeless individuals' "Bulky Items" that were stored in public areas, as authorized by a provision of its municipal code. The Ninth Circuit agreed with the district court that the Plaintiffs were likely to succeed on their claim that the provision, on its face, violated the Fourth Amendment's protection against unreasonable seizures. The Ninth Circuit also concluded that the clauses authorizing the discarding of those items were not severable from the remainder of the provision.

Part of the City's response to the homelessness crisis was section 56.11 of its municipal code (the ordinance), which strictly limited the storage of personal property in public areas. Under most provisions of the ordinance—such as those addressing publicly stored property that was unattended; obstructing City operations; impeding passageways required by the Americans with Disabilities Act; or within ten feet of an entrance, exit, driveway, or loading dock—the City could impound that property and store it for ninety days to give its owner the opportunity to reclaim it. But the City could also, pursuant to the ordinance, discard publicly stored property without impounding it when it constituted an immediate threat to public health or safety or was evidence of a crime or contraband. Finally, the City could discard without first impounding publicly stored personal property when it was a "Bulky Item" that was not designed to be used as a shelter (the Bulky Item Provision).

Acting pursuant to the ordinance, the Los Angeles Bureau of Sanitation, with the assistance of the Los Angeles Police Department, conducted cleanups of homeless encampments. These included both "noticed cleanups, which were either noticed in advance" or "conducted on a regular schedule," and "rapid response[ ]" cleanups, which were neither noticed nor scheduled but instead triggered by resident complaints or demands by the City Council. During cleanups, City employees typically prohibited individuals from moving their Bulky Items to another location; rather, they "immediately destroy[ed]" those items by "throwing [them] in the back of a trash compactor, crushing the item[s]."

A group of homeless individuals who have had their personal property destroyed by the City, along with two organizations that advocate for the interests of homeless individuals, brought this litigation. Plaintiffs contended that the Bulky Items Provision, on its face, violated the Fourth Amendment's protection against unreasonable seizures and the Fourteenth Amendment's guarantee of procedural due process. Three Plaintiffs who had been specifically injured by the destruction of Bulky Items moved to preliminarily enjoin the City from enforcing the Bulky Items Provision.

The district court granted the requested preliminary injunction, holding that Plaintiffs were likely to succeed on both their Fourth Amendment claim and their Fourteenth Amendment claim. In discussing the Fourth Amendment's protection against unreasonable seizures, the district court reasoned that the Bulky Items Provision was likely unconstitutional under precedents holding that a warrant or a recognized exception to the warrant requirement must accompany a seizure for it to be reasonable. Turning to Plaintiffs' procedural due process claim, the court observed that the Provision lacked any notice requirement and thus "provide[d] no process at all."

The Ninth Circuit, reviewing *de novo*, affirmed. Relying on a related case, *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012), the Ninth Circuit found that the Plaintiffs would likely succeed on a claim that the Bulky Items Provision violated the Fourth Amendment on its face. The Ninth Circuit further found that the Bulky Items Provision was not severable, because the Bulky Items Provision was not functionally autonomous from the other provisions in the ordinance, and was necessary for the ordinance's operation and purpose. If severed, the ordinance would allow the City to remove property from public areas, but would not specify what the City could do with it. The Ninth Circuit found that the Bulky Items Provision was both functionally inseparable in light of the structure of the ordinance, but also in practice. The City had repeatedly insisted that it could not enforce the Bulky Items Provision without the destruction clauses the Ninth Circuit found to be unconstitutional. The provisions were "inextricably connected" to the full enforcement of the ordinance.

DISSENT: The dissent argued that the destruction portion of the Bulky Items Provision was severable, and argued that the preliminary injunction was overbroad, and would cause great harm in exacerbating the homelessness crisis in the City. The dissent argued that the decision should be reversed and remanded for further consideration on severability.

POSTSCRIPT: The League of California Cities filed an Amicus Curiae brief in support of the City and severability of the ordinance.

TAKE-AWAYS: Destruction of the property of individuals experiencing homelessness without due process is an unconstitutional violation of the Fourth Amendment. However, cities are able to impound and provide a recovery procedure for bulky items kept in public areas.

* * *

STATE CASES

Crenshaw Subway Coalition v. City of Los Angeles (2022) 75 Cal.App.5th 917.

BACKGROUND: An advocacy group filed action against city and developer to enjoin neighborhood revitalization project alleging that it violated the Federal Fair Housing Act and California's Fair Employment and Housing Act (FEHA). The Superior Court, Los Angeles County, entered judgment against advocacy group and they filed an appeal.

HOLDING: The Court of Appeal held that: (1) the California Supreme Court's depublication of *AIDS Healthcare Foundation v. City of Los Angeles*, 264 Cal.Rptr.3d 128 (*AIDS Healthcare*), did

not mean there was no basis for the trial court's ruling and that it must automatically be reversed, and (2) advocacy group's disparate impact claim based on gentrification theory was not cognizable under the Fair Housing Act. Affirmed.

Key FACTS & ANALYSIS: After the City of Los Angeles (City) approved a project aimed at "revitaliz[ing]" a neighborhood in South Los Angeles through the renovation and expansion of an existing shopping mall and the construction of additional office space, a hotel, and new apartments and condominiums, a neighborhood advocacy group (Coalition) sued to enjoin the project under the federal Fair Housing Act (42 U.S.C. § 3601 et seq.) and California's Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). The group's lawsuit rested on a "gentrification" theory—namely, that the project would lead to an "influx of new, more affluent residents"; that this influx would lead to "increased rents and increased property values that [would] put pressure" on the low-income residents who currently live near the project site; and that these higher rents will push the low-income residents out of "their neighborhoods." Because a majority of these low-income residents were Black or Latinx, the group alleged, the project had the effect of making dwellings unavailable because of race and color in violation of the disparate impact prong of the Fair Housing Act (and, thus, by extension, the FEHA).

The case involved two core issues: Did depublicatoin of *AIDS Healthcare* on which the judgment of the trial court was based warrant reversal of the judgment? And is a disparate impact claim based on this gentrification theory cognizable under the Fair Housing Act?

The Court of Appeal held in the negative on both questions.

To begin, the depublication of *AIDS Healthcare* was not dispositive of the appeal. The Court of Appeal stated that its task on appeal was to review the ruling dismissing the Coalition's claims, not its rationale. The Court of Appeal was also unable to infer disapproval from the depublication.

Second, a gentrification theory of disparate impact was not cognizable under the Fair Housing Act or the FEHA. The Court of Appeal relied significantly on the United States Supreme Court's decision in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 576 U.S. 519 (*Inclusive Communities*). The Court of Appeal observed that in no uncertain terms, *Inclusive Communities* held that the Fair Housing Act does not afford relief if such relief caused race to be used and considered in a pervasive and explicit manner in deciding whether to justify governmental or private actions. *Inclusive Communities* further held that the Fair Housing Act does not encompass disparate impact claims that coopt the act into an "instrument to force housing authorities to reorder their priorities" and thereby "displace[ ] ... valid governmental policies." *Inclusive Communities* finally held that, while the Fair Housing Act does not categorically prohibit the consideration of race "in certain circumstances and in a proper fashion," the act will not sanction disparate-impact claims that have the effect of perpetuating racial isolation and segregation.

The gentrification-based theory of liability alleged by the Coalition was not a legally cognizable disparate impact claim under the Fair Housing Act because it ran afoul of the three "cautionary standards" articulated above.

The gentrification theory necessarily injected racial considerations into the City's decision-making process. That was because this theory was premised on the allegation that the persons displaced by the gentrification were members of minority groups. Further, by requiring a developer either to dedicate every new residential unit to affordable housing and perhaps also to obligate the developer to build additional affordable housing off site in the adjoining neighborhoods, the net effect of the gentrification theory was to summon "the specter of disparate-impact litigation" in a way that would cause "private developers to no longer construct or renovate housing units for low-income individuals." *Inclusive Communities* found such a theory was not cognizable under the Fair Housing Act.

As the Coalition's allegations made clear, the evil of gentrification was that it displaced Black and Latinx residents. According to the Coalition, this concentration of Black residents and their Latinx neighbors formed the heart of "Black Los Angeles." The Court of Appeal observed that the Coalition's gentrification theory existed to protect this concentration of minority community members, and thus sought to employ the Fair Housing Act as a means of preserving the racial composition of these communities. The Court of Appeal concluded that however politically, culturally, historically, and commercially beneficial such segregation might be for those resulting communities, the Fair Housing Act was designed as a tool for moving towards a more integrated community, not a less integrated one.

The rationale from *Inclusive Communities* applied equally to the FEHA claim.

In the unpublished portion of the opinion, the Court of Appeal found that the Coalition's California Environmental Quality Act (CEQA) claims were untimely. The Coalition did not file a CEQA challenge to the project until 558 days after City's planning department approved the vesting tentative tract map and certified the final environmental impact report, the challenge was untimely. Those approvals constituted "approval" for the purposes of CEQA because it constituted a discretionary entitlement for use of the project.

TAKE-AWAY: FEHA will not support disparate impact claims attacking projects that result in gentrification of minority communities when the purpose of the gentrification allegation is to promote the maintenance of segregated communities.

* * *

Schmier v. City of Berkeley (2022) 76 Cal.App.5th 549.

BACKGROUND: In 1996, Kenneth J. Schmier converted two apartment units in Berkeley (City) into condominiums. At that time, the City's municipal code required that an owner converting an apartment to a condominium execute and record a lien on the property obliging the owner to pay an "Affordable Housing Fee". Accordingly, Schmier executed two lien agreements as a condition of approval. In 2008, the City revised the formula. In 2019, Schmier advised the City that he intended to sell the condominium. Berkeley demanded that Schmier pay an affordable housing fee of $147,202.66, as calculated under the old section. Under the new section, the fee would have been significantly less. Schmier filed suit. The trial court sustained Berkeley's demurrer and dismissed the complaint, finding Schmier's suit barred by the 90-day statute of limitations set forth

in the Subdivision Map Act, which commenced running more than 20 years earlier when Schmier signed the lien agreements.

HOLDING: Schmier's complaint was not subject to the 90-day limitations period set forth in the Subdivision Map Act. Reversed.

Key FACTS & ANALYSIS: The suit was not an "action or proceeding to attack, review, set aside, void, or annul the decision" of the City which would be subject to the 90-day limitations period. Schmier was not challenging the legality of any condition of approval, or the liens. Rather, the dispute, which could not possibly have existed at the time of the conversion approval, concerned the meaning of certain language in the lien agreements and the consequences of the City's alleged rescission of the then-operative Municipal Code provision and enactment of a new provision in its place.

Similarly, even assuming the 90-day statute applied, it could not have begun to run. The events giving rise to the dispute (the new code section) did not exist at the time the parties entered into the lien agreement. Because the challenge was to the City's interpretation of the agreements, the statute of limitations, even if applicable, would have begun to run from the time the City rejected Schmier's insistence that the lien agreement was no longer operative when the municipal code provision was rescinded. The judgment was reversed with directions to the superior court to vacate its order sustaining the demurrer without leave to amend and enter a new order overruling the demurrer.

TAKE-AWAYS: The 90-day Map Act statute of limitations may not apply to challenges to subsequent, local legislative amendments, or, alternatively, when, as in this case, the cause of the dispute was based on the city's action well after its approval under the Map Act and expiration of the then-attached 90-day statute.

* * *

Coastal Act Protectors v. City of Los Angeles (2022) 75 Cal.App.5th 526.

BACKGROUND: An advocacy group filed a petition for writ of mandate alleging that a city ordinance imposing restrictions on short-term vacation rentals was "development" under California Coastal Act for which coastal development permit (CDP) was required. The Superior Court, Los Angeles County, entered judgment in the city's favor, and the group appealed.

HOLDING: The Court of Appeal held that petition was untimely. Affirmed.

Key FACTS & ANALYSIS: On December 11, 2018, the City of Los Angeles (City) adopted the Home Sharing Ordinance No. 185,931 (Ordinance), which imposes certain restrictions on short-term vacation rentals, and provides mechanisms to enforce those restrictions. In February 2020, appellant Coastal Act Protectors (CAP) sought a writ of mandate to enjoin enforcement of the Ordinance in the Venice coastal zone until the City obtains a CDP. CAP claimed the Ordinance constituted a "development" under the Coastal Act; therefore, CAP contended, the City acted illegally in failing to obtain a CDP before implementing the Ordinance in the Venice coastal zone.

The trial court denied CAP's petition for writ of mandate on two independent grounds: (1) the petition was time-barred by the 90-day statute of limitations in Government Code section 65009, and (2) the Ordinance did not create a change in intensity of use and, therefore, is not a "development" requiring a CDP.

The Court of Appeal agreed with the trial court's holding that the 90-day statute of limitations in Government Code section 65009 subdivision (c)(1)(B) applied, and not, as CAP contended, the three-year statute of limitations in Code of Civil Procedure section 338(a). Because this conclusion was dispositive of the matter, the Court of Appeal declined to decide whether the Ordinance constituted a "development" subject to the CDP requirements of the Coastal Act.

The Court of Appeal relied on *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757 in which the California Supreme Court concluded that the 90-day statute of limitation did not apply to a preemption claim based on a statute enacted after an ordinance was adopted. Likewise, in *Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4th 1561, the Court of Appeal found that the 90-day statute of limitations did not apply to claims which contended the City of Pleasanton failed to comply with housing obligations enacted after the city had adopted its zoning ordinances. The Court of Appeal distinguished *Travis* and *Urban Habitat Program* because the Coastal Act requirements at issue predated the Ordinance. Thus, CAP's petition was an action to "attack, review, set aside, void, or annul" the City's decision to adopt a zoning ordinance applicable to the Venice coastal zone without first obtaining a CDP. Accordingly, the 90-day statute of limitations applied.

TAKE-AWAYS: An ordinance challenged based on preempting legislation in existence at the time the ordinance was adopted is subject to the 90-day statute of limitations in Government Code section 65009. An ordinance challenged based on preempting legislation enacted after an ordinance is adopted is subject to the three-year statute of limitations in Code of Civil Procedure section 338.

* * *

Pappas v. State Coastal Conservancy (2021) 73 Cal.App.5th 310, *as modified on denial of reh'g* (Jan. 25, 2022).

BACKGROUND: Ranch owners association and its owner-members brought class action against state Coastal Commission and Coastal Conservancy, disputing the public's right to recreate along gated ranch community's shoreline. After announcement of proposed settlement in which the state agencies agreed to quitclaim the state's interest in an offer to dedicate (OTD) public access easement granted to the state by a youth organization, a coastal access advocacy group intervened and filed cross-complaint and petition for writ of mandate alleging violations of the Coastal Act and the Bagley-Keene Open Meeting Act against the state agencies. The Superior Court, Santa Barbara County, overruled association's and owner-members' demurrer and granted advocacy group's motion for judgment in lieu of trial on the Coastal Act claim and dismissed the Bagley-Keene Act claim for being time-barred. The association and owner-members appealed, and advocacy group cross-appealed.

HOLDING: The Court of Appeal held that: (1) overruling association's and owner-members' demurrer was warranted; (2) pending litigation exception to the Bagley-Keene Open Meeting Act

did not excuse Coastal Conservancy from adhering to Coastal Act's public hearing requirement; (3) Conservancy's settlement agreement with association and owner-members was a transfer of ownership interest in state land sufficient to trigger Coastal Act's public hearing procedures; (4) association's and owner-members' due process rights were not violated; (5) hearsay evidence supporting advocacy group's claims against state agencies was admissible as to association and owner-members; (6) Coastal Act's public hearing requirement applied to Coastal Commission; and (7) 60-day period for advocacy group to seek writ relief did not expire before it intervened. Affirmed in part, reversed in part, and remanded.

Key FACTS & ANALYSIS: This case addressed whether a purported "public access easement" granted to a state agency four decades ago by the owner of a large coastal parcel in Hollister Ranch (the Ranch) was a property interest subject to the Coastal Act. The Court concluded that it was. The Ranch was a gated community and working cattle ranch on Santa Barbara County's Gaviota Coast. State agencies and civic activists had long quarreled with the Hollister Ranch Owners Association (HROA) and its owner-members (collectively Hollister) over the public's right to recreate along the Ranch's pristine shoreline. The California Coastal Commission and the Coastal Conservancy (collectively State Defendants) settled a contentious case with Hollister over this issue in 2016. Hollister agreed, among other things, to allow pre-approved organizations and school groups to use a small section of beach for recreation and tide pool exploration.

The self-described Gaviota Coastal Trail Alliance (Alliance) considered the settlement a capitulation to Hollister. The trial court permitted the Alliance to intervene as a defendant and to later file a cross-complaint. The Alliance alleged the State Defendants violated, among other laws, the Coastal Act and the Bagley-Keene Open Meeting Act when they settled with Hollister. The Alliance then moved for judgment. The trial court agreed the Conservancy violated Public Resources Code section 30609.5 in the Coastal Act, restricting transfers of state property interests along the coast. It declared the settlement agreements invalid and entered judgment on the cross-complaint against the Conservancy. It found the balance of the Alliance's claimed either moot or barred by the statute of limitations.

Hollister appealed the section 30609.5 ruling. The Alliance cross-appealed the statute of limitations rulings. The Court of Appeal concluded the Commission as well as the Conservancy violated section 30609.5, and otherwise affirmed the judgment.

Hollister contended the trial court erred when it: (1) permitted the Alliance to intervene; (2) overruled Hollister's demurrer to the Alliance's subsequent writ petition; (3) found the Bagley-Keene Act's pending litigation exception did not override section 30609.5's public hearing requirements; (4) found the Conservancy in fact violated section 30609.5 when it settled with Hollister; (5) deprived Hollister of due process by entering judgment before it decided the validity of the OTD; and (6) admitted certain stipulated facts as evidence against Hollister. On cross-appeal, the Alliance contended the trial court erred when it found the limitations periods had expired on certain Bagley-Keene and Coastal Act claims.

First, the Court of Appeal found that the trial court properly exercised its discretion in allowing the Alliance to intervene, citing the court's lengthy discussion, and the generally policy weighing in favor of intervention.

Second, the Court of Appeal found that the trail court properly overruled the demurrer for the same reasons as it properly allowed the Alliance to intervene.

Third, the Court of Appeal found that the pending litigation exemption to the Bagley-Keene Act did not excuse the Conservancy from Adhering to the Coastal Act's restrictions on selling or transferring state lands. The Conservancy could meet in closed session, but could then deliberate and vote in a public setting as required by law.

Fourth, the Court of Appeal found that Section 30609.5 of the Coastal Act applied to the settlement and OTD as a transfer in ownership of state land. The OTD was a "potential accessway" encompassed by the Section.

Fifth, the Court of Appeal found that the trial court did not deprive Hollister of due process by entering judgment against it without deciding the validity of the OTD. The trial court retained the right to proceed on the merits, but Hollister suffered no prejudice from it not deciding the issue at trial.

Sixth, the evidentiary rulings of the trial court were proper under Evidence Code section 1224.

Seventh, the Court of Appeal opined that the trial court erred when it found that Section 30609.5 did not apply to the Commission because the agency did not effect a transfer of state land separate from the Conservancy. The record indicated that the Commission and the Conservancy were united in seeking to effectuate the OTD's unlawful transfer. Thus, both public entities were subject to the Section.

Finally, the Court of Appeal concluded that the trial court correctly ruled that the limitations period expired on the Alliance's Bagley-Keene Act cause of action. This cause of action was subject to the 90 day limitations period contained in Government Code section 11130.3.

In conclusion, the trial court correctly invalidated the State Defendants' settlement agreements with Hollister based on the Conservancy's violation of section 30609.5 of the Coastal Act. Judgment against the Conservancy was affirmed in that respect. Judgment in favor of the Commission, however, was reversed because the record confirmed it too violated Section 30609.5.

TAKE-AWAY: Coastal access easements in favor of the public are state property interests, the transfer of which are subject to the Coastal Act public hearing requirements.

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Bankers Hill 150 v. City of San Diego (2022) 74 Cal.App.5th 755.

Background: A community association filed a petition for writ of mandate challenging city council's decision to approve a development application for a mixed-use building with total of 204 dwelling units. The superior court denied petition. The association appealed.

Holding: The Court of Appeal held that: (1) inconsistencies with development standards resulting from a project's deviation from a setback requirement as an incentive under State Density Bonus Law did not preclude project approval; (2) Density Bonus Law did not permit a city to condition approval of a project on redesign of the project to be shorter through the elimination of a courtyard; (3) sufficient evidence supported a finding that the project was consistent with a specific plan's policy of maintaining view corridors; (4) sufficient evidence supported a finding that the project was consistent with a specific plan's policies governing size of buildings in residential neighborhoods; (5) specific plan's policies governing height transitions did not apply to a parcel where the project would be developed; (6) project was consistent with the general plan's goal of complementing adjacent natural features and environment; and (7) sufficient evidence supported a finding that the project satisfied the specific plan's urban design policies for façade articulation. Affirmed.

Key Facts & Analysis: Bankers Hill 150 and Bankers Hill/Park West Community Association (collectively, the Association) appealed the judgment entered after the trial court denied their petition for writ of mandate challenging a decision by the City of San Diego (City) to approve a development application for a 20-story mixed-use building (Project). The Association challenged the approval on grounds that the building was inconsistent with the neighborhood design, the City's General Plan, and the specific plan for the area. The Court of Appeal affirmed the judgment of the trial court denying the Association's petition. The Project qualified for the benefits of the Density Bonus Law (Gov. Code, § 65915 *et seq.*), and the City was therefore obligated to waive the standards which conflicted with the Project's design.

In challenging the City's approval, the Association focused primarily on the Project's deviation from the City's setback requirements. Due to the inconsistency, the Association contended that the City abused its discretion. The Association contended that, because of the deviation from the setback requirement, the Project did not "maintain and enhance views of Balboa Park," included inadequate "façade articulation," improperly transitioned from the neighboring shorter buildings, and did not respect the scale of neighboring buildings.

The Court of Appeal found that the deviation was granted by the City as a requested incentive under the Density Bonus Law, and the City was required to grant the incentive absent certain findings, which it did not make. In fact, the City Council expressly found to the contrary, although the Court noted it was not required to do so. The grant of the incentive under the Density Bonus Law also defeated the Association's arguments of other inconsistencies with the General Plan and specific plan arising from the incentive.

The Association also argued the Project's design could have been accomplished without a courtyard, which would allow it to be built shorter and wider. The Court rejected this argument, citing precedent that the Density Bonus Law cannot be used to require an applicant to "strip the project of amenities."

The Court also rejected the Association's arguments that the City's findings were not supported by substantial evidence, and found that the specific plan's policies regarding heights of buildings in residential neighborhoods did not apply to the "community commercial" parcel on which the Project was constructed.

Finally, the Court rejected the Association's argument that the Project did not conform with the General Plan policy to be sensitive to "natural features." It found that Balboa Park, next to the Project, was not a "natural feature" warranting minimal development under the General Plan because the park modified the natural environment and was a developed urban park and constituted an urban use of the land. As such, the area around Balboa Park was not a "natural feature" warranting minimal development on adjoining parcels.

TAKE-AWAYS: In this case the court affirmed the trial court judgement upholding the City of San Diego's approval of a development application for a 20-story mixed use project. The court found that, because the project qualified for incentives under the Density Bonus law, the City was obligated to waive the development standards that conflicted with the project design, and which were the basis of the challenge to the City's project approval.

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Ocean Street Extension Neighborhood Assn. v. City of Santa Cruz (2021) 73 Cal.App.5th 985.

BACKGROUND: A neighborhood association petitioned for writ of mandamus, alleging that a city and its city council violated the California Environmental Quality Act (CEQA) and city's municipal code in approving project to build a 32-unit residential complex. The Superior Court, Santa Cruz County, issued a limited writ prohibiting the city from allowing the project to proceed unless and until it followed the municipal code regarding slope regulations and the court was satisfied with its compliance. Parties cross-appealed.

HOLDING: The Court of Appeal held that: (1) the city did not violate CEQA by placing discussion of biological resources that were determined to be less than significant with mitigation in initial study rather than in environmental impact report (EIR); (2) final EIR complied with CEQA's informational mandate; (3) substantial evidence supported city's determination that mitigation measures complied with CEQA; (4) substantial evidence supported city's conclusion that project's objectives were adequate; (5) substantial evidence supported city's conclusions that cumulative impacts analysis in EIR adequately considered impact of additional water demand in light of city-wide needs; (6) city was entitled to deference in its interpretation of an ordinance developed by the city providing a variation to slope regulations modification procedures; and (7) municipal code provision prohibiting building of new lots within 20 feet of a 30 percent slope did not apply to project to build on one lot of land. Affirmed in part, reversed in part, and remanded with instructions.

Key FACTS & ANALYSIS: In 2010, real parties in interest, Richard Moe, Ruth Moe, Craig Rowell, and Corinda Ray (real parties), applied to the City of Santa Cruz (City) for design and planned development permits and a tentative map to construct a 40-unit development with 10 four-unit buildings on a parcel of land. Following an initial mitigated negative declaration and years of litigation surrounding the impact of the nearby crematory at Santa Cruz Memorial Park, in 2016, the real parties in interest renewed their interest in moving forward with their project. As required by CEQA, the project applicant and the City prepared and circulated the initial study, the draft EIR, the partially recirculated draft EIR, and the final EIR. Following a public hearing, the city council adopted a resolution to certify the EIR and to adopt Alternative 3, a 32-unit housing project.

The Ocean Street Extension Neighborhood Association (OSENA) filed a petition for writ of mandamus, alleging the City and its city council violated CEQA and the Santa Cruz Municipal Code in approving the project.

The trial court concluded the City had complied with CEQA, but it determined the City violated the municipal code, and it issued a limited writ prohibiting the City from allowing the project to proceed unless and until it followed the municipal code and the court was satisfied with its compliance. Following entry of judgment, OSENA appealed, arguing the court erred by concluding the City complied with CEQA's requirements. OSENA contended the City violated CEQA by (1) insufficiently addressing potentially significant biological impacts and mitigation measures in the initial study rather than in the EIR directly, (2) establishing improperly narrow and unreasonable objectives so that alternative options could not be considered meaningfully, and (3) failing to address cumulative impacts adequately. The City cross-appealed, contending the court incorrectly concluded it violated the municipal code by granting a planned development permit (PDP) (Santa Cruz Mun. Code, § 24.08.700) without also requiring the project applicant to comply with the slope modifications regulations (*Id*., § 24.08.800). The Court of Appeal agreed with the City, and therefore affirmed on CEQA grounds in favor of the City, and reversed on the municipal code issue.

First, the Court of Appeal found that the City did not violate CEQA by placing its discussion of biological resources that were determined to be less than significant with mitigation in an initial study, rather than in its EIRs. Even without the discussion, the EIR complied with its purpose as an informational document. The initial study did not use information about biological resources to decide whether to prepare an EIR or a negative declaration as other environmental factors necessitated the completion of EIR, enabled the City to modify the project to mitigate adverse impacts before the EIR was prepared, helped focus the EIR on effects determined to be significant, and explained reasons potentially significant effects would not be significant. Nothing prohibited the discussion of impacts that were less than significant with mitigation in an initial study rather than in the EIR so long as the EIR complied with its purpose as an informational document.

Second, the Court of Appeal found that the EIR was sufficiently detailed to comply with CEQA's informational mandate. The final EIR provided a sufficient degree of analysis so that decision-makers could intelligently take account of environmental consequences. It focused on significant environmental effects, described feasible mitigation measures, and explained why it determined environmental effects on biological resources would be less than significant with required mitigation measures. The absence of details pertaining to the types of bird that could be impacted by construction, including the likelihood the birds would be at the project site, did not render the EIR insufficient. The EIR mitigation measures for birds applied regardless of type.

Third, the Court of Appeal found that substantial evidence supported the City's determination that its mitigation measures complied with CEQA. The measures contained concrete dates and measurements, and were therefore not vague or deferred under *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645. The requirement of a preconstruction survey did not make a mitigation measure a deferred one or one based solely on the discretion of the biologist because it specified the actions taken based on the findings of the survey.

Fourth, the Court of Appeal found that substantial evidence supported the City's conclusion that the project goals were adequate. The EIR considered each of the alternatives and evaluated the degree to which each attained the project objectives and whether the alternatives would eliminate or reduce significant impacts. It compared each of the alternatives to the original proposal and the no-project option, and it recognized that all of the alternatives would reduce the significance of environmental impacts to varying degrees. As required, the EIR provided information about each alternative that showed the major characteristics and significant environmental effects of each one.

Fifth, the Court of Appeal found that substantial evidence supported the City's conclusions that the cumulative impacts analysis in the EIR adequately considered the impact of additional water demand in light of city-wide needs. The City concluded that the water shortfall from residential housing was not cumulatively considerable. The EIR recognized the existing problem of water shortfalls, discussed citywide measures that addressed water supply because of anticipated shortfalls, considered the project's contribution to environmental conditions, and discussed the project's contribution to water consumption in context of other sources also contributing to water consumption. This was adequate under CEQA. Further, the project was required to mitigate water use by installing water conserving fixtures and landscaping, as well as curtailing use based on the severity of the drought and was required to contribute a fee towards water supply issues.

On the municipal code questions, the City was entitled to deference in interpreting its ordinance providing a variation to slope regulations modification procedures. Accordingly, the City complied with its PDP requirements in allowing a variance for development ten feet from a 30-percent or greater slope, such that city did not violate its municipal code by granting the slope modification as part of PDP. The City's interpretation was consistent with the text of ordinance and legislative intent of the PDP to allow creative and innovative design to meet the public interests more readily than through application of the conventional zoning regulations, which were more cumbersome. Moreover, the project was on a single lot of land and did not create new lots, thus, the City's municipal code provision prohibiting building of new lots within 20 feet of a 30 percent slope did not apply. Thus, the Court of Appeal affirmed on the CEQA issues, and reversed, in favor of the City, on the municipal code issues.

TAKE-AWAYS: This case holds that cities may address potentially significant environmental impacts that are reduced to less than significant levels through mitigation in an initial study, and focus the project EIR on significant impacts without violating CEQA, and that cities are entitled to deference on their reasonable interpretation of their own code provisions.

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Save Civita Because Sudberry Won't v. City of San Diego (2021) 72 Cal.App.5th 957, *review denied* (Mar. 16, 2022).

BACKGROUND: An interest group filed a combined petition for writ of mandate and complaint for declaratory and injunctive relief against a city, challenging city's certification of environmental impact report (EIR) and approval of mixed-use development and road construction project and contending that city violated the California Environmental Quality Act (CEQA), the Planning and

Zoning Law, and the public's due process and fair hearing rights. The Superior Court, San Diego County, entered judgment for the city, and the interest group appealed.

HOLDING: The Court of Appeal held that: (1) as a matter of first impression, where a recirculated EIR stated that it was replacing a prior EIR and the agency made clear the overall nature of the changes, and states that prior comments would not receive responses, the agency could be said to have complied with the CEQA Guidelines requirement that it "summarize the revisions made to the previously circulated draft EIR"; (2) any failure of the city to summarize changes to project's previously circulated programmatic draft EIR was not prejudicial; and (3) city was acting in a quasi-legislative capacity in certifying the final EIR and in approving the amendments to the community plan and the city's general plan, and thus procedural due process protections applicable to quasi-judicial hearings did not apply to those actions. Affirmed.

Key FACTS & ANALYSIS: The City of San Diego (City) certified an EIR for the "Serra Mesa Community Plan [SMCP] Amendment Roadway Connection Project" (Project) and approved an amendment to the SMCP and the City's General Plan to reflect the proposed roadway. The proposed four-lane major road—together with a median, bicycle lanes, and pedestrian pathways—would run in a north/south direction between Phyllis Place in Serra Mesa to Via Alta / Franklin Ridge Road in Mission Valley. Via Alta and Franklin Ridge Road are contained within Civita, a partially built out mixed-use development that the City approved in 2008.

Save Civita Because Sudberry Won't (Save Civita) filed a combined petition for writ of mandate and complaint for declaratory and injunctive relief (Petition / Complaint) against the City, challenging the City's certification of the EIR and approval of the Project. In its Petition / Complaint and briefing, Save Civita contended that the City violated CEQA, the Planning and Zoning Law (Gov. Code, § 65000 *et seq.*), and the public's due-process and fair-hearing rights. The trial court denied the Petition / Complaint in its entirety and entered a judgment in favor of the City.

On appeal, Save Civita raised four claims related to the City's certification of the EIR for the Project. First, Save Civita claimed that the City violated CEQA Guidelines section 15088.5, subdivision (g), in failing to summarize revisions made in the Project's recirculated draft EIR (RE-DEIR). Save Civita also claimed that the Project's final EIR (FEIR) was deficient because it failed to adequately analyze, as an alternative to the Project, a proposal to remove the planned road from that community plan. Save Civita further contended that the FEIR was deficient because it failed to adequately analyze the Project's traffic impacts. Specifically, Save Civita maintained that the FEIR failed to disclose the true margin of error associated with a traffic projection in the FEIR and "ignored obvious traffic hazards," (capitalization and boldface omitted) that the Project would create on Via Alta and Franklin Ridge Road. Save Civita also claimed that the FEIR failed to adequately discuss the Project's inconsistency with the General Plan's goal of creating pedestrian-friendly communities.

In addition to its EIR / CEQA claims, Save Civita maintained that the Project would have a deleterious effect on the pedestrian-friendly Civita community and that the City therefore violated the Planning and Zoning law in concluding that the Project was consistent with the City's General Plan. Finally, Save Civita maintained that the City acted in a quasi-adjudicatory capacity in

certifying the FEIR and approving the Project and that a City Council member violated the public's procedural due process rights by improperly advocating for the Project prior to its approval.

In a published section of the opinion the Court of Appeal concluded that the City did not violate Guidelines section 15088.5, subdivision (g), in failing to summarize revisions made to the Project's previously circulated programmatic draft EIR (PDEIR) in the RE-DEIR. In a second published section, the Court of Appeal concluded that the City Council acted in a quasi-legislative capacity in certifying the FEIR and approving the Project, and that that determination foreclosed Save Civita's procedural due process claim. In unpublished sections of the opinion, the Court of Appeal rejected the remainder of Save Civita's contentions. The Court of Appeal affirmed the trial court's judgment in favor of the City in its entirety.

Neither the RE-DEIR nor the FEIR Violated CEQA

Guidelines section 15088.5, subdivision (g) required the City to "summarize the revisions made to the previously circulated draft EIR." The Court of Appeal found that the RE-DEIR did not violate the Guidelines when it made the overall nature of changes clear, and stated that comments on the previous EIR would not receive response, as permitted by the Guidelines. However, the Court of Appeal found that even if the City had failed to comply with the Guidelines, the error was not prejudicial, and was merely procedural, the public was not deprived of the opportunity to review and comment on the RE-DEIR.

Alternatives Analysis

In an unpublished portion of the opinion, the Court of Appeal found that the City did not err in not studying amending the Mission Valley Community Plan (MVCP) as an alternative to the project. The proposed alternative would amend the MVCP to remove a proposed road connection from the planning document. The FEIR explained why the City had not selected that alternative for consideration, and had considered other alternatives which did not involve construction of a road. The Court of Appeal agreed with the trial court that this finding was based on substantial evidence. Even if, as Save Civita suggested, the Project changed from being a planning amendment to a road construction project, Save Civita had not presented a persuasive legal argument that such a change would have been improper. Given the overwhelming evidentiary support for the City's conclusion that the MVCP alternative would not have achieved the vast majority of the Project's objectives and would not have meaningfully furthered analysis of the Project, the Court of Appeal concluded that the FEIR was not defective for failing to study that alternative in detail.

Traffic Impacts Analysis

In a separate unpublished opinion, the Court of Appeal also concluded that the FEIR was not defective for failing to adequately analyze the Project's traffic impacts. Save Civita did not demonstrate that the vehicle miles travelled (VMT) calculation was clearly inadequate because it did not disclose the true margin of error associated with the projection. The FEIR explained that its VMT analysis was premised on a "White Paper" that utilized a SANDAG travel demand model. The FEIR also provided a hyperlink to the White Paper, which was contained in the administrative record. The administrative record also indicated that the SANDAG model has been used to prepare

other planning documents, including the City's Climate Action Plan. Save Civita's suggestion that the Project would actually increase VMT was not based on sufficient facts to establish the actual margin of error in the FEIR's VMT analysis. Save Civita also failed to demonstrate how any increased traffic it alleged would result in hazardous conditions it contended the FEIR failed to analyze.

Analysis of General Plan Consistency

In another unpublished opinion, the Court of Appeal found that the FEIR was not defective for failing to discuss purported inconsistencies of the Project with the City's General Plan. The FEIR exhaustively considered the inconsistencies raised by Save Civita.

Procedural Due Process

In a separate published opinion, the Court of Appeal found that the City Council acted in a quasi-legislative, rather than quasi-adjudicative capacity in certifying the FEIR and approving the project, and therefore was not subject to procedural due process requirements applicable to quasi-adjudicative proceedings. Accordingly, Save Civita was not entitled to reversal on the ground that the City violated the public's right to a fair hearing based on evidence that a City Council Member's staff solicited support for the Project.

TAKE-AWAYS: This case upheld a recirculated EIR replacing a prior EIR where the reviewing body summarized the changes from the prior EIR, and indicated comments on the prior EIR will not receive responses. The reviewing body's action in certifying the final EIR and in approving amendments to the community plan and general plan was determined to be quasi-legislative, mooting any alleged procedural due process defects.

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Mission Peak Conservancy v. State Water Resources Control Bd. (2021) 72 Cal.App.5th 873, *as modified* (Dec. 20, 2021).

BACKGROUND: A conservation group brought action against the State Water Resources Control Board (Board), alleging that it violated the California Environmental Quality Act (CEQA) by granting small domestic use registration to property owners without first conducting environmental review. The Superior Court, Alameda County, sustained the Board's demurrer without leave to amend. Conservation group appealed.

HOLDING: The Court of Appeal held that process of granting domestic use registration to property owners was ministerial. Affirmed.

Key FACTS & ANALYSIS: Mission Peak Conservancy and individual Kelly Abreau (Mission Peak) sued the Board, alleging that it violated CEQA by granting a small domestic use registration to Christopher and Teresa George without first conducting an environmental review. The trial court sustained the Board's demurrer without leave to amend, holding that the registration was exempt from CEQA as a ministerial approval. The Court of Appeal affirmed.

Mission Peak alleged that the Georges registered a small domestic use on a property in Alameda County. On its face, the form met the program requirements. Mission Peak alleged that the form contained false information, and that based on inspections, the Board knew or should have known that the project would not qualify. The petition alleged that the registration process was discretionary and not exempt from CEQA.

The Court of Appeal analyzed the process and found it to be ministerial and exempt from CEQA. The Board was only able to impose general conditions applicable to all registrations, and registration was automatically deemed complete upon receipt of the required registration. The Board had no discretionary authority. Even if the Board made an erroneous ministerial decision, the process over all was not encompassed by CEQA. The Court of Appeal upheld the trial court's decision sustaining the Board's demurrer.

TAKE-AWAY: This case is an example of the inapplicability of CEQA to ministerial approvals.

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League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer (2022) 75 Cal.App.5th 63.

BACKGROUND: Conservation groups filed separate petitions for writ of mandate and complaints alleging that a county's approval of a land use specific plan and rezoning that would permit residential and commercial development of a timberland production zone adjacent to lake basin area subject to environmental threshold carrying capacities pursuant to Clean Water Act did not comply with California Environmental Quality Act (CEQA), and that rezoning did not comply with California Timberland Productivity Act. Following consolidation, the Superior Court, Placer County, issued a writ of mandate directing the county to vacate its certification of environmental impact report (EIR) and approval of project only as they pertained to emergency evacuations for wildfires and other emergencies. Conservation groups appealed and county and land owner cross-appealed, and appeals were consolidated.

HOLDING: The Court of Appeal held that: (1) substantial evidence supported the county's reliance on air-quality data from air basin in which development was located, rather than on data from adjacent air basin; (2) the county abused its discretion by failing to describe the lake's existing water quality; (3) the county did not abuse its discretion by not utilizing regional planning agency's thresholds of significance or environmental standards when analyzing project's impact on adjacent lake basin; (4) substantial evidence supported the county's decision not to recirculate final EIR; (5) mitigation measure for greenhouse gas emissions did not comply with CEQA; (6) substantial evidence supported the county's findings required to immediately rezone from timberland production zone; and (7) the county's failure to address whether any renewable energy features could be incorporated into project violated CEQA.

KEY FACTS & ANALYSIS: These appeals concerned Placer County's (County) approval of a land use specific plan and rezoning to permit residential and commercial development and preserve forest land near Truckee and Lake Tahoe. The plaintiffs and appellants contended the County's environmental review of the project did not comply with CEQA on numerous grounds, and the rezoning did not comply with the California Timberland Productivity Act of 1982 (Gov. Code,

§ 51100 *et seq*.). (Statutory section citations that follow are to the Public Resources Code unless otherwise stated.) The trial court rejected each of plaintiffs' claims except one, a conclusion which the County and real parties in interest contested in their cross-appeal.

Sierra Watch's Appeal

Appellants Sierra Watch contended that:

(1) The EIR violated CEQA by not adequately describing the Lake Tahoe Basin's existing air and water quality, and, due to that failure and the County's decision not to utilize a vehicle-miles-traveled threshold of significance such as one adopted by the Tahoe Regional Planning Agency (TRPA), the EIR violated CEQA by not adequately analyzing the impacts that project-generated traffic may have on the Basin's air quality and Lake Tahoe's water quality; (2) The County violated CEQA by not recirculating the final EIR after it revised the draft EIR to include a new analysis of the project's impacts on climate and by mitigating the impact with an invalid mitigation measure; and (3) The County violated the Timberland Productivity Act by not making certain findings before immediately rezoning the developable portion of the site.

In their cross-appeal, the County and real parties in interest claimed the trial court erred when it found that the EIR did not adequately address the project's impacts on emergency evacuation plans and that substantial evidence did not support the EIR's conclusion that the impact would be less than significant.

Lake Tahoe Basin's Air and Water Quality

Sierra Watch argued that because the project's traffic impacts on the Tahoe Basin's air quality and Lake Tahoe's water quality were potentially significant effects on the environment and on a unique environmental resource, the EIR was obligated to, but did not (1) describe the Tahoe Basin's existing air quality and the lake's water quality as part of its description of the project's regional environmental setting, and (2) analyze the project's impacts on the Basin's air quality and water quality and determine their significance individually and cumulatively. Sierra Watch also criticized the County's decision not to utilize a threshold standard of significance established by TRPA for regulating Basin air and water quality as a method for analyzing the existing setting and evaluating the project's impacts on the Basin.

The draft EIR provided an analysis of air quality in the Tahoe-Truckee region generally. It concluded the project's impacts individually were less than significant and, when mitigated, were cumulatively less than significant. The draft EIR did not address Lake Tahoe's water quality. In the final EIR, the County recognized the TRPA threshold had been used by TRPA as an indicator of vehicle emission impacts on Basin air and water quality. It said the project's in-Basin traffic would not cause the threshold to be exceeded, but it did not utilize the threshold to determine whether the potential impact was significant. It also stated that any impacts to Lake Tahoe's water quality from project-generated traffic were accounted for in a federally-approved water pollution abatement program.

Sierra Watch claimed these analyses did not comply with CEQA's substantive and procedural requirements and were not supported by substantial evidence.

On the one hand, the Court of Appeal disagreed with the assertion that the EIR did not at all address the Basin's existing characteristics and the project's potential impacts on Basin's resources. The EIR described the regional setting, including the Tahoe Basin, in its resource chapters to the extent the County believed the project may affect that resource. The EIR explained existing Basin conditions and the project's potential impacts to those conditions with regard to the project's location, Basin land use, population, employment and housing, biological resources, cultural resources, visual resources, and transportation and circulation.

On the other hand, however, substantial evidence before the County supported a fair argument that project-generated vehicle emissions in the Lake Tahoe Basin could potentially impact the Basin's air and water quality and thus should have been addressed in the draft EIR. Before the County began preparing the EIR, League to Save Lake Tahoe and other environmental organizations responding to the notices of preparation twice stated the project's traffic would increase Basin vehicle miles travelled (VMT) and impact the Basin's air quality and the lake's water quality, and they asked the County to address those potential impacts. These assertions, based on the fact the project would increase in-Basin VMT, constituted substantial evidence that a fair argument could be made that the project would significantly impact the environment in this manner.

The County asserted that these comments did not qualify as substantial evidence because they were interpretations of technical or scientific information that required expert evaluation. They were not. The Court of Appeal found substantial evidence that the in-Basin vehicle traffic which the project would generate might have a significant effect on the Tahoe Basin's air quality and Lake Tahoe's water quality. The issue before the Court of Appeal was whether the EIR sufficiently described the regional setting and analyzed these potential impacts in the manner required by CEQA and whether its conclusions were supported by substantial evidence.

There was no dispute that Lake Tahoe and the Lake Tahoe Basin were unique resources and were entitled to special emphasis in the EIR's description of the existing physical conditions to the extent the project could potentially affect them. (CEQA Guidelines, § 15125(c).) Because the project's in-Basin traffic could potentially impact the Basin's air quality and water quality, CEQA required the EIR to discuss the Basin's existing air and water quality so that the significance of the potential impact could be determined. The Court of Appeal found that substantial evidence supported the County's air impact analysis, but that the County abused its discretion by not describing Lake Tahoe's existing water quality.

The County claimed the EIR's air quality analysis, its discussion of the project's VMT under the TRPA threshold, and its reference to the Lake Tahoe Total Maximum Daily Load (TMDL) adequately addressed the project traffic's potential impact on Lake Tahoe's air and water quality and was supported by substantial evidence. The Court of Appeal agreed in part. The EIR concluded that the project's individual impacts on regional air quality, including emissions of nitrogen from vehicular sources, were not significant. It reached this conclusion by determining that the project's emissions would not exceed a threshold of significance approved by the Placer County Air

Pollution Control District, which includes the Lake Tahoe Air Basin as well as the Mountain Counties Air Basin.

Sierra Watch claimed the EIR's analysis was inadequate. Sierra Watch argued the County was required to utilize TRPA's VMT threshold or the science behind it to determine the significance of the project's impacts, as that was the best science available to evaluate the project's impacts on the Basin's air and water quality. Instead, the EIR did not determine whether the impacts were significant under any standard.

Sierra Watch claimed that although the final EIR addressed the VMT threshold, it did not adopt it as a standard of significance, and even if it had, it applied it incorrectly. Sierra Watch claimed the EIR did not comply with CEQA when it evaluated impacts under the thresholds of significance established by the Air Pollution Control District. It claimed those standards were not designed to protect the Basin's unique resources.

The Court of Appeal found that the County had discretion on whether to apply the TRPA standards. The County did not abuse its discretion in applying different standards. However, although the EIR satisfactorily addressed the project's impacts which emissions may have, it did not adequately address the impacts which crushed abrasives and sediment from project-generated traffic may have on the lake. To the extent the VMT analysis in the final EIR was to be used to address this water quality impact, it was inadequate for reasons raised by Sierra Watch. By not using the VMT threshold as a threshold of significance and by not providing an alternative threshold to measure this impact, the EIR did not determine the significance of the potential impact individually or cumulatively.

Revisions to the Draft EIR Climate Analysis

Sierra Watch also contended the County violated CEQA by not recirculating the draft EIR after adding new information in the final EIR about the project's impact to climate change which allegedly revealed more severe climate impacts. Sierra Watch further claimed that the County violated CEQA by not reconsidering in the final EIR the efficacy of the draft EIR's climate impact mitigation measure in light of the new information added to the final EIR, and because the revisions to that mitigation measure do not guarantee the impact will be mitigated.

The Court of Appeal concluded substantial evidence supported the County's decision not to recirculate the EIR, but also concluded the mitigation measure did not satisfy CEQA. Substantial evidence supported the decision not to recirculate the final EIR because the final EIR did not add significant new information to draft EIR; both concluded that environmental impacts from the project's greenhouse gas emissions were significant, in both short and long term, because they would far exceed air pollution control district's tier one threshold. The County could not speculate on significant future impacts without knowing emissions targets the State would adopt, and draft EIR's use of the tier two threshold, instead of the tier one threshold in the final EIR, did not change actual, quantitative impacts the project would create or that the draft EIR disclosed.

However, the County's mitigation measure did not satisfy CEQA. As written, the measure required a developer to mitigate impacts if the project conflicted with greenhouse gas targets adopted by

the state where those targets were based on "a substantiated linkage" between the project and statewide emission reduction goals. No such targets existed in the case at issue. The final EIR did not discuss how the mitigation measure would apply if no such targets were developed. As a result, the mitigation measure deferred determining the significance of the impact and establishing appropriate mitigation to an undisclosed time in the future. The measure violated CEQA because it would not trigger any mitigation despite significant emissions impacts.

Timberland Productivity Act

Sierra Watch claimed that in approving rezoning for the project, the County did not make findings required by the Timberland Productivity Act (Gov. Code, § 51100 *et seq*.). Instead, the County adopted findings that purported to justify the immediate rezoning on unrelated grounds. The Court of Appeal disagreed and found that the County adopted the required findings, and those findings were supported by substantial evidence.

County's Appeal

In their appeal, the County and applicants contended the trial court erred when it found that the EIR did not adequately address, and that substantial evidence did not support, the conclusion that the project's impacts on emergency response and evacuation plans would be less than significant. The Court of Appeal agreed with the County and applicants. Within the methodology chosen by the County, the EIR considered factors to find the impact would be less than significant. The project would not prevent an evacuation using state route 267 or other routes designated in the county evacuation plan. It would mitigate the possible impact by providing two emergency vehicle access routes, one of which could provide an alternate evacuation route. The study relied on by the County addressed route 267's capacity, and it demonstrated the project could evacuate in a reasonable time under the modeled circumstances. The project further mitigated the impact by providing funding to the first responders for equipment and personnel and by imposing strict fire prevention requirements. The Court of Appeal therefore concluded substantial evidence supported the EIR's conclusion that the project's impact on implementation of the County evacuation plan would be less than significant, and that the County adequately addressed emergency response.

On the first petition, the Court of Appeal affirmed the judgment of the trial court in part, except that the Court of Appeal held that the analysis of the project's impact on Lake Tahoe's water quality and greenhouse gas emission mitigation measure did not comply with CEQA, and the EIR's analysis of the project's impact on evacuation plans was supported by substantial evidence.

California Clean Energy Committee's Appeal

Appellant California Clean Energy Committee (the Committee) challenged the EIR's greenhouse gas emission mitigation measure. It also contended the EIR violated CEQA by: (1) Not adequately describing the environmental setting of forest resources or analyzing the project's cumulative impacts on forest resources; (2) Not addressing feasible measures to mitigate the project's impact on traffic; (3) Not disclosing the significant impacts that would occur due to the project's contribution to widening state route 267; and (4) Not discussing whether the project could increase its reliance on renewable energy sources to meet its energy demand.

Cumulative Impacts on Forest Resources

The Committee claimed the EIR's analysis of the project's cumulative impacts on forest resources did not comply with CEQA and as not supported by substantial evidence. The Committee asserted the EIR's analysis violated CEQA because (1) its description of the environmental setting did not acknowledge extensive tree mortality in the County caused by drought and bark beetle infestations; (2) the analysis did not address the project's cumulative impact; (3) the analysis did not compare the project to the physical environment; and (4) the analysis did not include the effect of tree loss due to climate change. The Court of Appeal concluded the EIR complied with CEQA and substantial evidence supported its analysis. The County's determination, that the project's cumulative impact on forest lands and timber resources would be less than significant complied despite the removal of over 37,000 trees in coniferous forest complied with CEQA. The Court agreed with the County that it could not reasonably determine the extent of tree mortality within its borders by drought or bark-beetle infestation. Therefore, the County's such reliance on historical regional projection of loss of commercial forest land due to planned developments was within the County's discretion, and the project's conversion of about 652 acres of forest land would not cause regional conversion projection to be exceeded.

Mitigation of Traffic Impacts

The County found that it did not identify any feasible mitigation measures that would reduce the project's significant and unavoidable impact to traffic congestion on state route 267 except payment of a traffic impact fee that would fund capital improvements to the highway. The Committee contended substantial evidence did not support this finding as the County, in violation of CEQA, did not review a number of suggested transportation demand management measures in the EIR that could feasibly mitigate the impact by reducing the project's future occupants' demand for automobile use. The Court of Appeal agreed with the Committee. The Committee had proposed mitigation measures, which the County did not consider. The commenters requested that the EIR discuss transportation demand management plans and measures to reduce traffic impacts in addition to reducing impacts on the transit system. The County did not claim that the suggested measures were infeasible, but the EIR did not consider them as a means to mitigate impacts on route 267. As a result, substantial evidence did not support the County's finding that no additional feasible mitigation measures were identified to mitigate the project's impact on route 267. The omission of this required analysis was prejudicial error.

Traffic Impact Fee

The Committee next claimed the EIR violated CEQA by not discussing the environmental impacts of widening state route 267, which the project's payment of the traffic impact fee would help fund. The Court of Appeal found no prejudicial error.

The final EIR stated the County had approved the widening as a matter of policy when it approved the Martis Valley Community Plan, and the community plan EIR had addressed the impacts of widening the highway at a program level. The final EIR stated that in the future, if Caltrans moved forward with a project to widen the highway, "the project would be subject to a separate

environmental study to analyze and disclose the impacts of widening the highway." The widening project had been planned for many years, the public and decision-makers had known of its likely environmental impacts to the extent they could be addressed during that time, no circumstances had changed since the County reviewed the widening's environmental impacts, the EIR referenced the prior environmental review, that information was publicly available, and the widening would undergo full CEQA review. Although it was error not to reference the EIR regarding the widening, the Court of Appeal concluded that the error was not prejudicial.

Energy Consumption

The Committee finally contended the EIR did not comply with CEQA because, in the EIR's analysis of the project's energy consumption, it "did not identify or discuss impacts on renewable energy content as an element of the energy conservation analysis." Despite being requested to address renewable energy, the County in the final EIR "did not discuss either decreasing reliance on fossil fuels or increasing reliance on renewable energy resources." The Court of Appeal agreed.

CEQA requires an EIR to analyze a project's energy consumption. Because the EIR did not address whether any renewable energy features could be incorporated into the project as part of determining whether the project's impacts on energy resources were significant, it did not comply with CEQA's procedural requirements, a prejudicial error.

On the second petition, the Court of Appeal affirmed the judgment except to hold that the greenhouse gas emission mitigation measure did not comply with CEQA, substantial evidence did not support the County's finding that no additional feasible mitigation measures existed to mitigate the project's traffic impacts on state route 267, and the EIR's discussion of the project's energy impacts did not comply with CEQA.

The matter was affirmed in part and reversed in part, and was remanded for further proceedings.

TAKE-AWAYS: In this fact-specific case, the court found the EIR defective and remanded for further proceedings. The court held that the county's EIR should have analyzed the potentially significant impact of project vehicle traffic on water quality, in part because the county failed to use the vehicle miles travelled threshold as a threshold of significance. The court also found the county deferred determining the project's greenhouse gas impacts and failed to consider mitigation measures for traffic congestion and whether renewable energy features could be incorporated into the project.

* * *

Lejins v. City of Long Beach (2021) 72 Cal.App.5th 303, *review denied* (Mar. 23, 2022).

BACKGROUND: Property owners petitioned for writ of mandate challenging a surcharge a city imposed on its water and sewer customers by embedding the surcharge in rates the water department charged its customers for service. The Superior Court, Los Angeles County, granted judgment for owners and awarded them attorney fees. The city appealed.

HOLDING: The Court of Appeal held that: (1) a voter-approved surcharge had been imposed upon parcel or upon person as an incident of property ownership within the meaning of state constitutional provision governing special taxes; (2) voters' approval of surcharge did not prevent it from violating state constitutional provision governing special taxes; and (3) a transfer or surcharge that was not in any way related to costs of providing water and sewer services was prohibited by state constitutional provision governing special taxes. Affirmed.

KEY FACTS & ANALYSIS: Diana Lejins and Angela Kimball (Plaintiffs) filed a petition for writ of mandate in the trial court, challenging a surcharge defendant City of Long Beach (City) imposed on its water and sewer customers by embedding the surcharge in the rates the Long Beach Water Department (Water Department) charged its customers for service.

The surcharge covered transfers of funds from the Water Department to the City's general fund, to be used for unrestricted general revenue purposes. The City contended the surcharge was legally imposed because it was approved by a majority of the City's voters pursuant to article XIII C of the California Constitution. Plaintiffs argued notwithstanding majority voter approval, the surcharge violated article XIII D, which prohibits a local agency from assessing a fee or charge "upon any parcel of property or upon any person as an incident of property ownership" unless the fee or charge satisfied enumerated requirements the City acknowledged were not met. (Art. XIII D, §§ 3, subd. (a) & 6, subd. (b).) The trial court entered judgment in favor of Plaintiffs, concluding the surcharge was unconstitutional and invalid under article XIII D.

The City adopted Measure M, which would amend the City Charter to authorize the Water Department to transfer to the City's general fund any funds from the Water Revenue Fund and/or the Sewer Revenue Fund that the Board of Water Commissioners (Board) determined "to be unnecessary to meet" other obligations of the Water Department, not to exceed 12 percent of the "annual gross revenues of the water works and sewer system, respectively." Measure M would permit the City to use the proceeds from these transfers for "unrestricted general revenue purposes," as the City Council may direct "by budget adoption or other appropriation." Measure M would also authorize, but not require, the Board to fix, and the City Council to approve, "water and sewer rates in an amount sufficient to recover the cost" of any transfers to the general fund that the Board may make. The purpose of Measure M was to provide financial support for general city services. Measure M was approved by the majority of the City's voters.

Following approval of Measure M, the Board passed a resolution fixing water and sewer rates, raising rates for potable and recycled water by 7.2 percent, and leaving sewer rates unchanged. In a Notice of Public Hearing, the Water Department informed customers the proposed increase in water rates was due to the following: "*In June 2018, voters in the city of Long Beach passed Measure M, reauthorizing and affirming the City's historical practice of revenue transfers from the City's utilities to the General Fund, as approved by the City Council and Board of Water Commissioners. The revenue transfer is subject to a cap of twelve percent (12%) of each utility's annual gross revenues, as shown by audited financial reports. All proceeds from utility revenue transfers to the General Fund shall be used to maintain local General Fund services, which include general City services such as police, fire and paramedic response, street repair, parks, libraries and youth/senior programs*." The City Council passed Ordinance No. ORD-18-0022, approving the rates, including the potable and recycled water rates that were increased by 7.2 percent to fund the transfers to the City's general fund authorized by Measure M.

The Measure M surcharge, which the City characterized as a general tax, was embedded in the Water Department customers' utility service charges and was not separately identified in the Water Department's bills to customers. Thus, it was not possible to discern from looking at the bills what percentage of the customers' utility charges made up the Measure M surcharge.

Plaintiffs filed a petition for writ of mandate and complaint for declaratory and injunctive relief, asserting the Measure M surcharge violated California Constitution article XIII D, section 6, subdivision (b) because the rate revenue collected through the surcharge did not benefit the water or sewer utility, was not used for the provision of water and sewer service, and was not a reimbursement of costs incurred in the General Fund for the benefit of the water and sewer utilities. Instead, such rate revenue was used for general governmental purposes. Plaintiffs further asserted, to the extent the City contended the Measure M surcharge was a general tax, article XIII D, section 3, subdivision (a) precluded local governments from imposing general taxes upon any parcel or upon any person as an incident of property ownership. In opposition to the petition for writ of mandate, the City argued article XIII D was inapplicable to a general tax imposed on the use of a property-related service (water and sewer) after approval by a majority of the City's voters pursuant to article XIII C.

The trial court found (1) the Measure M general tax was unconstitutional and invalid under article XIII D; (2) the Measure M general tax was unconstitutional and invalid under article XI, section 7, to the extent the City collected the surcharge from water and sewer utility customers who receive service at a location outside the City; (3) any transfers of the proceeds of the Measure M general tax from the City's Water Revenue Fund and Sewer Revenue Fund to its General Fund were unconstitutional and invalid under article XIII D; and (4) all City ordinances that established and/or fix water or sewer rates were unconstitutional and invalid to the extent that they embed or otherwise imposed the Measure M general tax on the City's water and sewer utility customers. The judgment enjoined the City from making any further transfers of Measure M proceeds to its general fund. The judgment also ordered the issuance of a peremptory writ of mandate.

The Court of Appeal, reviewing *de novo* agreed with the trial court. The Measure M surcharge violated article XIII D as being a surcharge upon a parcel or person incident of property ownership. The definition of "fee" under that article included Measure M. Similarly, the Measure M surcharge was required to comply with article XIII D regardless of voter approval pursuant to article XIII C. Voter approval could not convert the unconstitutional fee into a constitutional one. Finally, because the City conceded Measure M did not comply with article XIII D section 6's requirements, the Court did not analyze whether it complied. Because the Court of Appeal found that Measure M violated article XIII D, it did not consider whether it also violated article XI, section 7.

TAKE-AWAYS: Voter approval of charges for water and sewer service does not exclude them from the definition of fees or charges under the constitutional provisions governing special taxes, or from compliance with the procedural and substantive requirements of Article XIIID of the constitution. Water and sewer charges must reimburse the local government for costs associated with the water and sewer services' use of infrastructure, and may not be a fund-raising mechanism for general services. .

POSTSCRIPT: The League of California Cities filed a brief in support of the City. The League of California Cities asserted that the invalidation of the Measure M surcharge on the grounds

provided would mean the invalidation of numerous taxes imposed by local governments throughout California. The Court specified that its holding only considered the validity of Measure M.

* * *

City of Oxnard v. County of Ventura (2021) 71 Cal.App.5th 1010, *as modified on denial of reh'g* (Dec. 14, 2021), *review denied* (Mar. 9, 2022).

BACKGROUND: The City of Oxnard (City) brought action against surrounding County of Ventura (County) seeking a preliminary injunction to prevent the County from providing ambulance services within City limits pursuant to joint powers agreement. The Superior Court, Ventura County, denied the City's motion for preliminary injunction. The City appealed.

HOLDING: The Court of Appeal held that: (1) The City lacked authority under the Emergency Medical Services Systems and the Prehospital Emergency Medical Care Personnel Act to resume administration of its own ambulance services; (2) the City's authority to provide and administer ambulance services, even if police power, was subject to limits set forth in the Act; and (3) any withdrawal by the City from joint powers agreement did not provide basis for the City to resume providing ambulance services absent the County's consent. Affirmed.

Key FACTS & ANALYSIS: In 1971, the County, the City, and several other municipalities entered into a joint powers agreement (JPA) regarding ambulance services. Pursuant to the agreement, the County: (1) administered (and paid for) a countywide ambulance system, and (2) was the only party authorized to contract with ambulance service providers on behalf of the other JPA signatories. To implement the JPA, the County established seven exclusive operating areas (EOAs) in which private companies provide ambulance services. The City was located in EOA6, where Gold Coast Ambulance (GCA) was the service provider.

The JPA permitted parties to withdraw from it by providing written notice at least 180 days prior to the end of the fiscal year. Withdrawal became effective at the beginning of the next fiscal year.

In 1980, the Legislature enacted legislation to establish statewide policies for the provision of emergency medical services (EMS) in California. The EMS Act grants counties the authority to designate a local EMS agency to administer services countywide. The EMS Act also includes a "transitional" provision that allows cities that were providing EMS services on June 1, 1980, to continue to do so until they cede the provision of services to the local agency.

Pursuant to the EMS Act, the County established the Ventura County Emergency Medical Services Agency (VCEMSA) as the local EMS agency. For more than 40 years, VCEMSA administered the countywide EMS program, contracted with EMS providers, and submitted EMS plans for state approval. Each plan indicated that VCEMSA was the County's exclusive EMS agency.

In the 2010s, City officials grew dissatisfied with GCA's provision of ambulance services. In December 2020, the City notified the County of its intent to withdraw from the JPA so it could begin administering its own ambulance services effective July 1, 2021. The City requested that the County not approve a contract extension with GCA so it could instead contract with another

ambulance services provider. County officials rejected this request and approved the GCA contract extension.

The City moved for a preliminary injunction to prevent the County from providing ambulance services within City limits after June 30, 2021, claiming it retained authority under the EMS Act to provide such services because it was indirectly contracting for those services through the JPA. The trial court disagreed and denied City's motion.

The City contended the trial court erred when it concluded that the City lacked the authority to contract for its own ambulance services under the EMS Act. The Court of Appeal upheld the trial court's determination. The EMS Act permitted cities to continue to provide only those emergency services they provided on June 1, 1980, and permitted them to exercise only the administrative control that they had already exercised as of that date. Here, the City did not provide ambulance services in June 1980, because the County was providing those services under the JPA.

The City next claimed that the trial court's construction of the EMS Act violated the prohibition against contracting away police powers. Even assuming that the provision of ambulance services was a police power, the exercise of that power was subject to constitutional constraints. As relevant here, a City has the power to "make and enforce" only those "ordinances and regulations [that are] not in conflict with general laws." (Cal. Const., Art. XI, § 7.) The EMS Act was a general law. The City's authority to provide and administer ambulance services was thus subject to the limits set forth in the EMS Act.

Finally, the City claimed that because the County's authority to contract for and provide ambulance services within City limits arose from the JPA, the trial court erred when it concluded that the City could not exclude the County after the City withdrew from the JPA. But since June 1, 1980, the County's authority to provide ambulance services in City limits did not come from the JPA; it came from the EMS Act. Regardless of whether the City withdrew from the JPA, it could not resume providing ambulance services absent the County's consent.

TAKE-AWAYS: The Emergency Services Act only permits cities to continue to provide and administer those emergency services they provided on June 1, 1980. Because Oxnard's emergency services were provided by Ventura County pursuant to a joint powers agreement on June 1, 1980, Oxnard's later withdrawal from the joint powers agreement did not authorize Oxnard to commence providing emergency services it did not provide on June 1, 1980.

* * *

Friends, Artists & Neighbors of Elkhorn Slough v. California Coastal Com. (2021) 72 Cal.App.5th 666.

BACKGROUND: Objectors petitioned for a writ of administrative mandate, alleging that Coastal Commission's (Commission) approval of a coastal development permit for a subdivision development project violated California Environmental Quality Act (CEQA) and California Coastal Act. The Superior Court, Monterey County, denied the petition. Objectors appealed.

HOLDING: The Court of Appeal held that: (1) Commission's environmental review was incomplete at time it approved permit application, and (2) objectors exhausted administrative remedies under CEQA. Reversed and remanded.

KEY FACTS & ANALYSIS: Respondents Heritage/Western Communities, Ltd and Heritage Development Corporation (collectively, Heritage) sought to develop property in Monterey County. Heritage obtained the requisite government approvals, including a coastal development permit, from Monterey County.

Appellant Friends, Artists and Neighbors of Elkhorn Slough (FANS) filed an appeal with respondent Commission regarding Monterey County's approval of the coastal development permit. Commission staff prepared a report recommending denial of Heritage's coastal development permit application primarily due to the lack of adequate water supply. At a public hearing on November 8, 2017, the Commission expressed disagreement with staff's recommendation and approved Heritage's permit application. Commission staff thereafter prepared written revised findings to support the Commission's action, and those revised findings were later adopted by the Commission on September 13, 2018.

Appellants FANS and LandWatch Monterey County (LandWatch) filed a petition for writ of mandate in the trial court, contending that the Commission's approval of the coastal development permit to Heritage violated the CEQA and the California Coastal Act. The trial court denied the petition and entered judgment against FANS and LandWatch.

On appeal, FANS and LandWatch contended that the trial court erred in denying the petition for writ of mandate and the Commission's approval of Heritage's coastal development permit should have been set aside, because the Commission failed to complete the requisite environmental review before approving Heritage's permit application.

The Commission considered a 2017 staff report prior to project approval. The 2017 report acknowledged that "the proposed project would have significant adverse effects on the environment." The report also acknowledged that project modifications and design alternatives were necessary to address issues pertaining to (1) oak woodland, (2) water quality, (3) visual resources and community character, (4) agricultural areas, and (5) traffic. However, neither the 2017 staff report nor its addendum contained a complete analysis of mitigation measures or alternatives, as required by CEQA and the Commission's regulatory program. The 2017 staff report and addendum also did not analyze any specific conditions that were necessary for approval of the project. Instead, because the 2017 staff report was recommending "independently denying the project based on the lack of an adequate water supply," the 2017 staff report indicated that additional information or documentation regarding these other issues (e.g., oak woodland, water quality, visual resources and community character, agricultural areas, and traffic) was "not warranted at this time," and that any additional analysis, modification, or alternatives with respect to these other issues was rendered "moot."

After the project was approved at the November 2017 de novo hearing, Commission staff in a 2018 staff report analyzed for the first time various "components" of the project, mitigation measures, and/or conditions for the project. The 2018 staff report ultimately determined that, after

"review[ing] the relevant coastal resource issues associated with the proposed project," "the project as proposed appropriately addresses any potential adverse impacts to such coastal resources." Commission staff further found "that the proposed project avoids significant adverse effects on the environment within the meaning of CEQA. As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects that approval of the proposed project, as modified, would have on the environment within the meaning of CEQA." This new environmental analysis of various "components," mitigation measures, and/or conditions for the project that "appropriately addresse[d] any potential adverse impacts to ... coastal resources" including habitat impacts, water quality, visual resources, and traffic.

The 2018 staff report thus contained new environmental analysis regarding components, mitigation measures, and/or conditions for the project, and those revised findings (along with modifications proposed by Heritage) were adopted by the Commission at a September 2018 hearing, after project approval. The Commission was required to consider project alternatives, mitigation measures, and conditions for the project before approving the coastal development permit application at the 2017 de novo hearing.

The Court of Appeal also analyzed whether the petitioners exhausted their administrative remedies. In this case, the 2017 staff report prepared prior to the de novo hearing did not contain a complete environmental analysis of alternatives, mitigation measures, and conditions for project approval because commission staff recommended denial of Heritage's permit application. Despite the staff recommendation to deny the application, the Commission instead approved the project at the 2017 de novo hearing. Thereafter, and prior to the hearing regarding revised findings, FANS and LandWatch in a letter to the Commission dated September 7, 2018, objected to the 2018 staff report regarding revised findings.

On this record, the Court of Appeal found that FANS had preserved the dispositive issue of the appeal, that is, whether the Commission failed to complete the requisite environmental review before approving Heritage's permit application at the 2017 de novo hearing, which included the question of whether the prevailing commissioners sufficiently stated the basis for their action at the hearing to properly allow staff to prepare a report regarding revised findings.
In sum, the record reflected that the Commission did not complete an analysis of mitigation measures (including conditions for the project) or alternatives, as required under CEQA and the commission's certified regulatory program, until the 2018 staff report was prepared, which was after the project had already been approved. Under these circumstances, the Commission failed to comply with the requirements of CEQA and the commission's own regulatory program by approving Heritage's coastal development permit application without first completing an analysis of mitigation measures (including conditions for the project) and alternatives. Because the Commission did not proceed in accordance with the procedures mandated by law, the Commission abused its discretion in approving the permit application. The Court of Appeal therefore reversed and remanded for an order vacating the decision denying the petition for writ of mandate and entered new judgement granting the petition against the Commission.

TAKE-AWAYS: The environmental review for a coastal development project which was left incomplete because staff recommended denial of the project did not satisfy CEQA requirements

when the Commission chose to approve the project despite the staff recommendation. The Commission should have satisfied CEQA prior to permit approval, and the Commission analysis of project alternatives mitigations after project approval did not suffice.

* * *

People v. Venice Suites, LLC (2021) 71 Cal.App.5th 715.

BACKGROUND: Los Angeles City Attorney's Office, in the name of the People of the State of California (People), brought action against an apartment house owner and operator, alleging violations of the Los Angeles Municipal Code (LAMC), public nuisance, unfair business practices, and false advertising. The Superior Court, Los Angeles County, granted summary adjudication in part for owner and operator, and the People voluntarily dismissed remaining claims. The People appealed.

HOLDING: The Court of Appeal held that: (1) Court of Appeal could exercise its discretion to consider government's legal argument on uncontroverted facts, raised for first time on appeal, that short-term rentals were impliedly prohibited under permissive zoning scheme; (2) residential zone not specifying length of occupancy did not implicitly prevent apartment house from being used for short-term occupancies of 30 days or less; (3) long-term occupancy requirement for apartment house could not be inferred from definition limiting transient occupancy residential structure (TORS) to occupancies of 30 days or less; and (4) zoning code expressly authorizing use of apartment house in zone for human habitation without length of occupancy restriction could not be read in conjunction with rent stabilization ordinance (RSO) or transient occupancy tax ordinance (TOT) to require long-term occupancy. Affirmed.

Key FACTS & ANALYSIS: The People brought suit against Venice Suites, LLC and Carl Lambert (collectively, Venice Suites) for violation of the LAMC and for public nuisance, among other causes of action. Venice Suites owned and operated an "Apartment House" as defined under LAMC section 12.03. The People alleged Venice Suites illegally operated a hotel or transient occupancy residential structure (TORS), in a building only permitted to operate as an Apartment House for long-term tenants and not overnight guests or transient renters. Further, the Apartment House was located in a R3 Multiple Dwelling residential zone, which disallowed short-term occupancy. The trial court granted summary adjudication for Venice Suites on the two causes of action, finding the LAMC did not prohibit short-term occupancy of Apartment Houses in an R3 zone. The People appealed after they voluntarily dismissed the remaining claims.

First the Court of Appeal found that the LAMC did not specify the length of occupancy in an R3 zone. The People alleged that the short term rentals converted the Property into a TORS, which was not permitted in that zone. The Court of Appeal found however, that short term rentals were included in the LAMC's definition of "Apartment House" which was "[a] residential building designed or used for three or more dwelling units or a combination of three or more dwelling units and not more than five guest rooms or suites of rooms." Because the LAMC's definition did not specify occupancy duration, the Court of Appeal found that short term rentals were permitted in Apartment Houses.

Second, the Court of Appeal refused to characterize the Apartment House as a TORS, which was not allowed in the R3 zone. The Apartment House could satisfy both definitions. Moreover, the fact that the City defined TORS and limited occupancy to short term rentals therein, the Court of Appeal did not find an intent to require other dwellings, such as Apartment Houses, to only have long term rentals. While the People contended that the City operated under a permissive zoning scheme, where only expressly permitted uses were authorized, the Court declined to read that into the LAMC. Even under a permissive zoning argument, the LAMC did not provide any guidance as to the length of occupancy in an Apartment House, therefore, the People could not make an argument that the LAMC permitted one timeframe to disallow another.

Finally, the Court of Appeal disagreed with the People that the City's RSO and TOT ordinances concluded that only tenants and non-transient occupants could occupy Apartment Houses. The Court of Appeal found that the RSO only applied to monthly rentals, and that its construction was consistent with the City's TOT ordinance which included apartment houses as a possible transient use. The fact that the RSO was limited to long term use did not compel the conclusion that Apartment Houses were limited to long term occupancy.

TAKE-AWAY: The court found that the definition of apartment houses in the Los Angeles Municipal Code R3 Zone had no minimum length of occupancy requirement, and therefore did not prohibit short term occupancies in apartments in the R3 zone.

* * *

South Coast Air Quality Management District v. City of Los Angeles (2021) 71 Cal.App.5th 314.

BACKGROUND: Labor union moved to permissively intervene in an environmental dispute regarding port terminal brought by environmental group against a city. The Superior Court, Los Angeles County, denied the motion. Labor union appealed.

HOLDING: The Court of Appeal held that trial court reasonably concluded that environmental advocacy group's interest in litigating dispute without involvement of labor union outweighed union's reasons for intervening. Affirmed.

KEY FACTS & ANALYSIS: A labor union, International Longshore and Warehouse Union, Locals 13, 63, and 94 (the Union), moved to intervene in an environmental dispute about the Port of Los Angeles (the Port). The trial court denied the motion because concerns about expanding the case's scope outweighed the Union's interest. The union appealed.

Within the Port is the China Shipping Container Terminal (the Terminal). The Chinese government owned China Shipping (North America) Holding Co., Ltd. (China Shipping), which leased the Terminal long term from various city entities. The Terminal is a significant part of the Port. It and China Shipping handled 17 percent of the Port's cargo in 2019.

The City of Los Angeles, the Los Angeles City Council, the Los Angeles Harbor Department, and the Los Angeles Board of Harbor Commissioners were parties in the underlying case (the City Entities). In 2001, the City Entities issued a permit to China Shipping to build the Terminal.

This project sparked immediate controversy: in the same year, environmental and community groups filed a lawsuit to challenge whether the City Entities, in approving the Terminal project, had complied with the California Environmental Quality Act (the Act).

The parties settled that suit. Part of the settlement required the City Entities to prepare an environmental impact report for the Terminal project. They completed the report in 2008. This report—the 2008 Report—found the project "would have significant and unavoidable adverse environmental impacts to air quality, aesthetics, biological resources, geology, transportation, noise, and water quality sediments and oceanography." Accordingly, the City Entities adopted more than 50 mitigation measures and several lease measures to reduce these impacts.

The 2008 Report specified the lease with China Shipping would be amended to incorporate the mitigation measures. The lease was never amended to include them. In addition, several measures were implemented only partially, while others were ignored entirely.

In September 2015, the City Entities informed the South Coast Air District (Air District) they intended to prepare a revised environmental analysis for the Terminal to evaluate the unimplemented mitigation measures and to consider modified measures, among other items. After releasing draft reports and holding public hearings, the Board of Harbor Commissioners certified the final supplemental report in October 2019. The City Council approved it in August 2020, so we refer to this report as the 2020 Report. This approval let the Terminal operate under revised conditions.

The 2020 Report eliminated some mitigation measures from the 2008 Report. It also recognized that Terminal emissions would have significant, unavoidable, and increased impacts on air quality, and that the project would exceed a threshold for cancer risk. Again, nothing enforced the mitigation measures: the City Entities did not require a lease amendment. Further, China Shipping wrote it did not intend to implement or to pay for the new measures.

In September 2020, the Air District filed a petition for writ of mandate claiming the City Entities had not enforced the mitigation measures listed in the 2008 Report. The suit likewise challenged the decisions to certify the 2020 Report and to allow the Terminal to operate under allegedly inferior measures. The petition named each of the City Entities as respondents, as well as the following real parties in interest: China Shipping (North America) Holding Co., Ltd.; COSCO Shipping (North America), Inc.; China COSCO Shipping Corporation Limited; and West Basin Container Terminal LLC. These last four entities are collectively referred to as the "China Shipping Entities." The petition asked the court to, among other things, set aside the approvals for the Terminal project and the permit, pending compliance with the Act. It also asked for the City Entities to nullify certification of the 2020 Report and to disallow continued operation of the Terminal under that permit.

The California Attorney General, and the California Air Resources Board (Board) moved to intervene. Later, the Union also moved to intervene. The trial court denied the Union's motion, granted a limited mandatory intervention to the Board, and consolidated the action with another led by the Natural Resources Defense Council, Inc. All parties agreed to the consolidation.

The trial court ruled the Union's interest in the case was speculative and consequential—not direct and immediate, as required for permissive intervention—and the prejudice to existing parties outweighed the reasons supporting intervention. The City Entities and other real parties in interest would support the Union's interest in jobs. Moreover, the Union had no legal interest in the CEQA issue at stake and was only concerned with the consequences of terminal shutdown. The Union appealed, supported by the City Entities.

The Court of Appeal affirmed on the grounds that the Air District's interest in litigating the case without Union involvement, which would complicate the already complicated litigation, outweighed the Union's reasons for intervening. Even if the interest was direct, denying permissive intervention in such circumstances was proper. The Union's position was duplicated by the City Entities; and thus its interest in litigating directly was not as significant as the Air District's interest in reducing complexity. A union declaration stated that the income of approximately 3,075 Union members depended on operations at the Terminal, and the Terminal also "provide[d] approximately 80,000 indirect jobs in the Los Angeles region." The Court of Appeal found that the trial court reasonably could conclude that permitting Union intervention in the lawsuit would spur representatives of the other tens of thousands of jobs connected to the Terminal to enter the fray. That result would be unmanageable.

Because it was reasonable to conclude the reasons opposing Union intervention were weightier than those supporting it, the Court of Appeal concluded that denying permissive intervention by the Union was proper.

TAKE-AWAY: The court held that the union's interest in jobs of union members at the China Shipping Container Terminal – which project approval was being challenged for failure to satisfy CEQA – was not immediate and direct, as required for permissive intervention, but speculative and consequential, and that the prejudice to the parties to the CEQA litigation outweighed the reasons supporting union intervention.

* * *

Farmland Protection Alliance v. County of Yolo (2021) 71 Cal.App.5th 300.

BACKGROUND: Farmland conservation organizations filed a petition for writ of mandate and complaint for declaratory and injunctive relief, alleging that county's approval of project to develop bed and breakfast and commercial event facility violated California Environmental Quality Act (CEQA). The Superior Court, Yolo County, granted petition in part. Organizations appealed and developers cross-appealed.

HOLDINGS: The Court of Appeal held that: (1) an agency is required to prepare full environmental impact report when substantial evidence supports a fair argument that any aspect of project may have significant effect on environment, and (2) upon finding that substantial evidence supported a fair argument of significant environmental impacts to three species, the trial court was required to order the county to prepare full environmental impact report, rather than limited report.
Reversed and remanded with directions.

KEY FACTS & ANALYSIS: Defendants Yolo County and its board of supervisors (County) adopted a revised mitigated negative declaration and issued a conditional use permit (decision) to real parties in interest Field & Pond, Dahvie James, and Philip Watt (real parties in interest) to operate a bed and breakfast and commercial event facility supported by onsite crop production intended to provide visitors with an education in agricultural operations (project). Farmland Protection Alliance challenged the permit under CEQA. The trial court found substantial evidence supported a fair argument under CEQA that the project may have a significant impact on the tricolored blackbird, the valley elderberry longhorn beetle (beetle), and the golden eagle. The trial court ordered the County to prepare an environmental impact report limited to addressing only the project's impacts on the three species. The trial court further ordered that, pending the further environmental review, the project approval and related mitigation measures would remain in effect and the project could continue to operate.

Plaintiffs and appellants Farmland Protection Alliance and Yolo County Farm Bureau (plaintiffs) appealed. Plaintiffs contended the trial court violated CEQA by: (1) ordering the preparation of a limited environmental impact report, rather than a full environmental impact report, after finding substantial evidence supported a fair argument the project may have significant effects on the three species; (2) finding the fair argument test was not met as to agricultural resource impacts; and (3) allowing the project to continue to operate during the period of further environmental review. Plaintiffs also argued the trial court erred in upholding the County's determination that the project was consistent with the Yolo County Code (Code) and the Williamson Act (also known as the California Land Conservation Act of 1965; Gov. Code, § 51200 et seq.). The County and real parties in interest asserted the trial court appropriately ordered the preparation of a limited environmental impact report under Public Resources Code section 21168.9 and disagreed with the remainder of plaintiffs' arguments.

Real parties in interest cross-appealed, asserting the trial court erred in finding substantial evidence supported a fair argument the project may have significant impacts on the three species.

In the published portion of the opinion, the Court of Appeal concluded section 21168.9 does not authorize a trial court to split a project's environmental review across two types of environmental review documents (i.e., a negative declaration or mitigated negative declaration and an environmental impact report). CEQA requires an agency to prepare a full environmental impact report when substantial evidence supports a fair argument that any aspect of the project may have a significant effect on the environment. The trial court thus erred in ordering the County to prepare a limited environmental impact report after finding the fair argument test had been met as to the three species.

In the unpublished portion of the opinion, the Court of Appeal concluded the trial court did not err in: (1) upholding the County's determination that the project was consistent with the Code and the Williamson Act; and (2) finding substantial evidence supported a fair argument the project might have a significant effect on the beetle.

On the Williamson Act, plaintiffs failed to show that the County abused its discretion when it found that the project would include agricultural operations, and would not significantly impair other agricultural operations. The project was also permitted under the County's Code.

With regard to the beetle, the Court of Appeal found substantial evidence in the record supporting a fair argument that the project, a type of agricultural tourism, would increase the presence of humans in the area, and may have a significant effect on the beetle due to potential damage to elderberry bushes in which beetles live, despite the mitigation measures adopted.

In light of the Court of Appeal's conclusion in the published portion of the opinion and concluding the fair argument test was met as to the beetle, the Court of Appeal thus reversed the trial court's judgment requiring the preparation of a limited environmental impact report and remanded with directions to issue a peremptory writ of mandate directing the County to set aside its decision to adopt the revised mitigated negative declaration and to prepare a full environmental impact report for the project. Having concluded a full environmental impact report was required to be prepared, the Court of Appeal did not consider plaintiffs' and real parties in interest's remaining fair argument challenges as to agricultural resources, the tricolored blackbird, or the golden eagle.

The Court of Appeal also did not consider plaintiffs' argument that the trial court erred in allowing the project to operate while the limited environmental impact report was being prepared, because as of the time of the Court of Appeal's opinion, that issue was moot.

TAKE-AWAYS: Upon a finding that substantial evidence supports a fair argument of significant environmental impact to one aspect of the environment, a full environmental impact report is required. Courts may not allow a project's analysis to be divided where some aspects are analyzed under a mitigated negative declaration, while others are analyzed under an environmental impact report.

* * *

Save Berkeley's Neighborhoods v. Regents of the University of California (2021) 70 Cal.App.5th 705, *reh'g denied* (Nov. 17, 2021).

BACKGROUND: Environmental interest group filed a petition for writ of mandate pursuant to CEQA against public university regents and developers, seeking to vacate regents' certification of an environmental impact report (EIR) for proposed project to demolish an existing parking structure on campus and to construct a new one with residential living on top and a new academic building. The Superior Court, Alameda County, sustained developers' demurrers to the complaint without leave to amend but declined to dismiss the entire matter after concluding that developers were not indispensable parties. Developers appealed and environmental interest group cross-appealed.

HOLDING: The Court of Appeal held that: (1) trial court's order sustaining developers' demurrers did not violate the final judgment rule; (2) as a matter of first impression, amendments to CEQA clarifying the persons who must be named as a real party in interest provide a bright-line rule as to which persons must be named and served in the CEQA complaint and do not replace the equitable balancing test for evaluating whether the real party in interest is indispensable to the action with a presumption of indispensability; (3) developers were not "indispensable parties" to the action; and (4) regents' notice of determination (NOD) was adequate to start the 30-day limitations period for a challenge to the EIR. Affirmed.

KEY FACTS & ANALYSIS: The Regents of the University of California (Regents) approved a new development for additional academic space and campus housing, and certified a final supplemental environmental impact report (SEIR). On May 17, 2019, the Regents filed a NOD regarding the project, which identified American Campus Communities (ACC) and Collegiate Housing Foundation (CHF) as the parties undertaking the project.

Petitioners Save Berkley's Neighborhoods (SBN) notified the Regents it intended to challenge its adoption of the project and certification of the SEIR. On June 13, 2019, SBN filed a petition for writ of mandate seeking to vacate the certification of the SEIR on the grounds that the approval violated CEQA. The petition named the Regents, Janet Napolitano, as president of the University of California, and Carol T. Christ, as chancellor of University of California, Berkeley, as respondents. SBN then amended the petition to add ACC and CHF ad real parties in interest.

ACC and CHF filed demurrers in response to the amended petition. They asserted SBN failed to name them as parties within the applicable statute of limitations, section 21167.6.5(a) required their joinder as real parties in interest, and they were necessary and indispensable parties to the litigation. The trial court sustained the demurrers without leave to amend, but declined to dismiss the entire matter after concluding that ACC and CHF were not indispensable parties.

On appeal, the Court of Appeal found first that the order sustaining the demurrers was appealable under the final judgment rule, because it disposed of all issues between SBN, ACC, and CHF.

Second, the Court of Appeal considered the issue of first impression on whether CEQA's designation of necessary parties pursuant to Public Resources Code sections 21108 and 21167.6.5(a) overrode the general test for indispensable parties under Code of Civil Procedure section 389(b). A review of the legislative history of the CEQA sections lead the court to the conclusion that it did not. Rather, the Court found that the CEQA sections applied to determining whether a party was a real party in interest, and, after that determination, courts were required to analyze whether those parties were also indispensable parties under the Code of Civil Procedure.

Third, the Court considered whether ACC and CHF were indispensable parties required for the CEQA action. It found that the trial court did not err in concluding they were not. As developers, their interests were sufficiently aligned with Regents in having the project proceed. ACC and CHF had no economic interests that would be uniquely harmed. The trial court did not err in not dismissing the entire action for failure to join an indispensable party.

SBN cross-appealed the trial court's decision on the ground that the trial court erroneously determined the petition was subject to CEQA's 30-day statute of limitations in section 21167, subdivision (c), alleging that the NOD failed to adequately describe the project. SBN asserted that the SEIR analyzed the impact of student enrollment increase, while the NOD was silent on that analysis. However, the Court found that the project itself was not for the purpose of increasing enrollment, and student population was not a material aspect of the project. The NOD therefore was not required to consider student enrollment. Further, SBN had not demonstrated that this alleged error in the NOD was prejudicial. SBN filed its initial petition within the 30-day limitations period. Moreover, that petition specifically challenged the adequacy of the SEIR's evaluation of student enrollment increases. Thus, any alleged error in the NOD project description did not

interfere with appellants' ability to make an informed decision whether to pursue legal action or its ability to bring a timely challenge. SBN's failure to name and serve ACC and CHF was unrelated to any error in the NOD's project description. Accordingly, the 30-day statute of limitation applied.

TAKE-AWAY: Public Resources Code sections 21108 and 21167.6.5 in CEQA, clarifying who are real parties in interest, do not override Code of Civil Procedure section 389(b)'s balancing test for identifying indispensable parties to an action.

* * *

Chevron U.S.A., Inc. v. County of Monterey (2021) 70 Cal.App.5th 153.

BACKGROUND: Mineral rights holders brought action for declaratory and injunctive relief challenging the validity of county ordinances banning land uses in support of new oil and gas wells and land uses in support of wastewater injection in unincorporated areas of the county. The Superior Court, Monterey County, entered judgment striking down the ordinances. County appealed.

HOLDING: The Court of Appeal held that state law governing oil and gas operational methods and practices preempted county ordinances. Affirmed.

KEY FACTS & ANALYSIS: Appellant Protect Monterey County (PMC) appealed from the trial court's judgment striking down a County ordinance banning "land uses in support of" new oil and gas wells and "land uses in support of" wastewater injection in unincorporated areas of Monterey County. These ordinances were enacted as part of Measure Z, an initiative sponsored by PMC and passed by Monterey County voters. The trial court upheld, in part, a challenge to Measure Z by plaintiffs, numerous oil companies and other mineral rights holders in Monterey County. PMC contended that the trial court erroneously concluded that these two components of Measure Z were preempted by state and federal laws and that they constituted a facial taking of the property of some plaintiffs. PMC also contended that the trial court made prejudicially erroneous evidentiary rulings.

The Court of Appeal found that the trial court correctly concluded that those two components of Measure Z were preempted by Public Resources Code section 3106. Section 3106 explicitly provided that it was the State of California's oil and gas supervisor who had the authority to decide whether to permit an oil and gas drilling operation to drill a new well or to utilize wastewater injection in its operations. These operational aspects of oil drilling operations were committed by section 3106 to the State's discretion and therefore local regulation of these aspects would conflict with section 3106. Measure Z specifically conflicted with section 3106. Section 3106 not only permitted, but encouraged the drilling of new wells and the use of wastewater injection, but also vested the authority in the State to permit that conduct. Since Measure Z prohibited all wastewater injection and new well drilling, it was preempted.

PMC argued that Measure Z was not preempted by state law because "California oil and gas statutes and regulations expressly acknowledge and affirm local authority, precluding a finding that the state has completely occupied the field," and "state law addresses only specific, technical

aspects of oil and gas production, leaving local governments free to exercise their traditional authority over land use, health, and safety to protect communities from harm." The Court of Appeal, however, agreed with the plaintiffs that section 3106 "mandate[s] that oil and gas producers be allowed to undertake wastewater injection projects properly approved by the Oil and Gas Supervisor and also be allowed to undertake oil and gas well drilling projects properly approved by the Oil and Gas Supervisor." The Court of Appeal observed that this interpretation was consistent with the legislative history for the section.

PMC next argued that, despite the language of section 3106 lodging the authority to supervise and permit oil and gas operational "methods and practices" throughout the State, the State's statutes and regulations had "explicitly recognized and preserved local authority." Yet none of the statutes identified by PMC as preserving local authority reflected that the authority vested in the State by section 3106 to decide whether to permit oil and gas operational "methods and practices" was to be shared with local entities.

The mere fact that some aspects of oil and gas drilling was reserved to local entities did not resolve the question of whether local regulations were preempted by state law. PMC asserted that Measure Z did not regulate the technical aspects of drilling, but it on regulated where and whether drilling could occur. The Court of Appeal disagreed, finding it in direct conflict because it banned the practice section 3106 specifically encouraged and permitted. The fact that state law left room for some local regulation of oil drilling, such as zoning regulations identifying where oil drilling would be permitted in a locality, did not mean that the County had the authority to ban all new wells and all wastewater injection under Measure Z.

Because the Court of Appeal upheld the trial court's decision on the grounds of state law preemption, the Court of Appeal did not consider whether Measure Z was also preempted by federal law or constituted a facial taking of plaintiffs' property. The Court of Appeal also did not address PMC's challenge to the trial court's evidentiary rulings. The Court of Appeal affirmed the trial court's judgment.

TAKE-AWAY: The Court of Appeal emphasized that its narrow holding does not in any respect call into question the well-recognized authority of local entities to regulate the *location* of oil drilling operations, a matter not addressed by section 3106 or Measure Z, only the ability of local entities to ban it entirely.

POST-SCRIPT: The League of California Cities filed an Amicus Curiae brief in support of the County, primarily arguing that local regulation of oil and gas drilling was within the police power of local entities, and could rebut the preemption claim.

* * *

McCann v. City of San Diego (2021) 70 Cal.App.5th 51.

BACKGROUND: A property owner petitioned for writ of mandate alleging that a city's environmental review process related to its decision to approve two sets of projects to convert overhead utility wires to an underground system in several neighborhoods violated the California

Environmental Quality Act (CEQA) by failing to properly consider the environmental impact of these projects. The Superior Court, San Diego County, denied the petition and denied property owner's request for a preliminary injunction. Property owner appealed.

HOLDINGS: The Court of Appeal held that: (1) plaintiff failed to exhaust administrative remedies; (2) city's noticing requirements provided adequate notice for due process purposes; (3) city's administrative appeal process did not result in an improper bifurcation of decision process; (4) city's description for mitigated negative declaration (MND) projects was adequate under CEQA; (5) plaintiff failed to establish substantial evidence to support fair argument that MND projects would have a significant aesthetic impact on neighborhood; (6) plaintiff failed to establish a fair argument of a significant aesthetic impact; (7) city's determination that greenhouse gas emissions were not significant omitted consistency analysis; and (8) plaintiff was not entitled to a preliminary injunction barring city from cutting down or otherwise destroying and removing any pepper trees in property owner's neighborhood. Affirmed in part and reversed in part.

KEY FACTS & ANALYSIS: In 1970, the City of San Diego (City) began its decades-long effort to convert its overhead utility systems, suspended on wooden poles, to an underground system. The local effort mirrored a shift across the state arising from the California Public Utilities Commission's (PUC) decisions to require (1) new construction to install utility lines underground, and (2) utilities to allocate funds to convert existing overhead utility lines to underground. Constrained by the limits of this funding, the City established a separate "Surcharge Fund" in 2002 to provide for increased utility undergrounding.

Given the small scope of projects that could be completed in any one year due to the limited funding, the master plan and accompanying Municipal Code section developed a process to manage the selection and prioritization of undergrounding projects in any given year. The City Council each year would approve a "project allocation" to select blocks to be completed based on the available funding. Once the allocation was approved, City staff would begin its initial work, including environmental review pursuant to CEQA, for each block.

The appeal involved Petitioner McCann's challenge to the approval of two sets of undergrounding projects. Given the different circumstances arising from their different locations, one set was found to be exempt from CEQA and the other set required the preparation of a Mitigated Negative Declaration (MND).

Exempt Projects

Three days before the City Council hearing, McCann sent an e-mail to the City Council raising several issues regarding the exempt projects. In part, she contended that she had not seen the Notice of Right to Appeal, which had been posted on the City's website, and emailed to councilmember and planning email lists.

At the hearing, McCann's counsel spoke in opposition, claiming that the CEQA review was "premature" given there were no precise plans regarding tree removal and the placement of the transformer boxes. When questioned by a councilmember, staff explained that the location of the transformers would be determined during the subsequent design phase. The City Council voted unanimously to approve the creation of the undergrounding districts for the exempt projects.

In February, the City issued two "notices of exemption" for the exempt projects.

MND Projects

In November 2018, the City published a draft MND for an additional nine potential undergrounding districts. Based on earlier discussions with Native American tribes, the City learned that some of the districts included sites with cultural significance. Following further inquiry, the City determined the projects may have a significant impact on cultural resources, but the impact could be mitigated by requiring monitoring by a tribe during trenching. The final MND determined that "although the proposed project could have a significant effect on the environment, there will not be a significant effect in this case because revisions in the project have been made by or agreed to by the project proponent." As part of this process, the City also considered the aesthetic effect and greenhouse gas emissions of the projects, but found they would have no significant impact.

McCann and her attorney submitted written comments challenging the adequacy of the MND concerning the location of the transformers, the cumulative impact from greenhouse gases, and the effect on trees. Thereafter, the City filed a notice of determination providing notice of the adoption of the MND.

The trial court denied McCann's writ petition. The trial court found that McCann failed to exhaust her administrative remedies prior to seeking judicial review of the Exempt Projects. The court noted the City provided an administrative appeal to challenge a determination project was exempt from CEQA but McCann did not pursue this remedy and thus, she "may not challenge the City's approval of the categorical exemption determination." In the alternative, the court also rejected McCann's claims that the City (1) violated CEQA by not disclosing the exact location of the transformers; (2) did not provide adequate notice; and (3) improperly determined that a categorical exemption applies.

Regarding the MND Projects, the court found that McCann failed to demonstrate that substantial evidence supported a fair argument that the MND projects may have a significant impact on the environment. Thus, it concluded that no EIR was required.

The Court of Appeal agreed that McCann failed to exhaust administrative remedies with regards to the exempt projects. However, the Court of Appeal reversed the decision of the trial court in part with regard to the MND projects, finding that the City's determination that MND projects' greenhouse gas emissions would not be significant was not supported by substantial evidence, and therefore the City erred when it adopted the MND.

With regard to the exempt projects, McCann failed to file an administrative appeal as was required by CEQA. The Court of Appeal found that McCann could not avoid the exhaustion of administrative remedies doctrine through her claims that (1) posting the Notice of Right to Appeal online and sending emails to every councilmember and local planning group violated due process, (2) that the City's Notice violated CEQA, and (3) that the City improperly bifurcated the environmental determination process. The Court of Appeal found no merit in any of these claims, in part because the City's action did not impact McCann's property interests implicating a higher

due process requirement for notice, and because local agencies are expressly permitted to approve a project in one step of environmental review, and consider the application of CEQA in another.

With regard to the MND projects, the Court of Appeal agreed with the trial court that (1) the City did not violate CEQA by segmenting the MND projects rather than considering them as one citywide project because each undergrounding project was independently functional, (2) the City's description of the MND projects was adequate even though it did not indicate the locations of transformers, and (3) substantial evidence did not support a fair argument that the MND projects would have a significant aesthetic impact because the aesthetic impact of transformers fell short of imposing a "substantial" impact. However, the Court of Appeal reversed the decision of the trial court in part, finding that the City's finding that the MND projects would have no significant impact due to greenhouse gas emissions was not supported by substantial evidence.

When the City analyzed the greenhouse gas impacts, it followed its Climate Action Plan (CAP) Checklist, designed to determine compliance with the City's CAP. However, application of the Checklist to the MND project resulted in City staff only analyzing whether the MND projects were consistent with existing land use and zoning designations. The Court of Appeal found that the City erred because it used an inapplicable checklist for the projects. The checklist expressly stated that it did not apply to projects if no certificate of occupancy was required. Therefore, the Court of Appeal found that the City had never analyzed whether the MND projects were consistent with the CAP, which was required for its CEQA review under Section 15183.5 of the CEQA Guidelines.

The Court of Appeal reversed the decision of the trial court with regard to the MND projects, and required the City to perform the requisite CAP analysis.

Finally, the Court of Appeal upheld the trial court's denial of McCann's request for a preliminary injunction with regard to trees that would be cut down on her street as part of the exempt projects, because she failed to establish a likelihood of success on the merits.

TAKE-AWAYS: An individual's due process rights with regard to a CEQA decision are not violated if notice is adequate, regardless of whether they received actual notice. There is a higher notice requirement for decisions impacting property rights.

* * *

Protect Tustin Ranch v. City of Tustin (2021) 70 Cal.App.5th 951, *review denied* (Feb. 9, 2022).

BACKGROUND: Citizen group petitioned for writ of mandate to set aside city's approval of a proposed project after concluding that it was exempt from the California Environmental Quality Act (CEQA) under the categorical exemption for in-fill development. The Superior Court, Orange County, denied the petition. Citizen group appealed.

HOLDINGS: The Court of Appeal held that: (1) substantial evidence supported city's determination that the size of the project fell within the five-acre limit for the in-fill development exemption from CEQA; (2) citizen group failed to establish that the planned project presented circumstances that were unusual for projects falling in the in-fill development exemption; and (3) substantial evidence supported the city's conclusion that the unusual circumstance exception did not apply. Affirmed.

KEY FACTS & ANALYSIS: The City of Tustin (City) reviewed a gas station project adjacent to a Costco and concluded the project was exempt from CEQA under the categorical exemption for "in-fill development" (Cal. Code Regs., tit. 14, § 15332; infill exemption). After the City approved the project and filed a notice of exemption, appellant Protect Tustin Ranch (Protect) sought a writ of mandate to set aside the City's approvals due to what it claimed was an erroneous finding by the City that the project was exempt from CEQA. The trial court denied Protect's petition. Protect contended that the project site was too large for the project to qualify for the in-fill exemption and there were "unusual circumstances" which precluded the City from relying on the exemption.

The project had two components: (1) construction of a 16-pump (32-fuel position) gas station with a canopy, related equipment and landscaping; and (2) demolition of an existing Goodyear Tire Center and adjacent surface parking, all to be replaced with 56 new surface parking stalls. The gas station portion of the project would replace a portion of an existing surface parking lot. Costco's conditional use permit (CUP) application stated that the site size was 11.97 acres. With City staff believing the project was exempt from review under CEQA, the City planning commission held a public hearing concerning the CUP and considered adopting a notice of exemption for the project. Regarding CEQA, the City staff report stated the following: "This project is Categorically Exempt from further environmental review pursuant to the CEQA Class 32, 'In-Fill Development Projects' in that the project is consistent with the City's General Plan and [the Specific Plan] and occurs within city limits on a project site of no more than five (5) acres substantially surrounded by urban uses. The project site has no value as habitat for endangered, rare, or threatened species. The project can be adequately served by all required utilities and public services. Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality." It thereafter included a paragraph addressing each of the latter subjects.

The planning commission's analysis stated, in relevant part: "The project site (consisting of the area where the fueling station and landscape screening will be constructed and the area where the existing Goodyear Tire Center building will be demolished and restriped with surface parking) has a total area of approximately 2.38 acres."

Ultimately, the planning commission approved the project, adopting a resolution which found the project categorically exempt from environmental review under CEQA pursuant to CEQA Guidelines section 15332 (Class 32, In-Fill Development Projects) (infill exemption). After receiving public comments, the city council adopted a resolution finding the project categorically exempt from CEQA review under the in-fill exemption, with no applicable exceptions, and granting the requested approvals. The City filed a notice of exemption.

In its petition, Protect argued one of the criteria for the claimed in-fill exemption—that the project site be no more than five acres in size—was not met because documents described the project site as occupying nearly 12 acres. It also asserted the City erroneously relied on the exemption because the project fell within the scope of the "unusual circumstances" exception set forth in CEQA Guidelines section 15300.2, subdivision (c).

With regard to the Class 32 in-fill exemption, the Court of Appeal found substantial evidence in the record indicating that the project was less than five acres in size, contrary to Protect's contentions. Multiple documents confirmed that the area of work was 2.38 acres despite some

documents stating that the "site size" was almost 12 acres. There was therefore no abuse of discretion.

With regard to the unusual circumstances exception, the Court of Appeal agreed with the City that Protect had not met its burden of showing that the exception applied. Protect did not argue that there was evidence the project would have a significant effect on the environment, and therefore the two-prong test from *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086 applied to the City's determination that the exception did not apply.

Protect claimed that unusual circumstances applied due to the former operations of the Goodyear Service Center, the large configuration of the gas station, and the planned use of retractable bollards and additional Costco employees to re-route traffic during peak usage. However, Protect did not explain how those features would distinguish the project from others that would qualify for the in-fill exemption, nor did it cite any evidence from the record demonstrating a distinction. As the party challenging the City's reliance on the in-fill exemption, Protect bore the burden of producing evidence to support the claimed exception.

Moreover, even assuming Protect had articulated and supported an argument of unusual circumstances, substantial evidence supported the City's conclusion the project was not unusual in relation to other in-fill development which would qualify for the exemption. As for the size of the project, although the proposed gas station would have 16 pumps (32 fuel positions), evidence in the record showed that size was not remarkably different than other Costco gas stations in California. The court also considered that project's synchronicity with the surrounding area. The project was within an existing and expansive retail center, and substantial evidence showed that the gas station would be in line with the surrounding setting.

TAKE-AWAY: Courts may look to conditions in the immediate vicinity of a proposed project to determine whether a circumstance is unusual, for purposes of the unusual circumstances exception to a categorical exemption from CEQA.

* * *

Schreiber v. City of Los Angeles (2021) 69 Cal.App.5th 549.

BACKGROUND: Neighbors filed a petition for writ of administrative mandamus to challenge city planning commission's approval of a mixed-use development project that included density bonus incentives and waivers. The Superior Court, Los Angeles County, denied the petition, and the neighbors appealed.

HOLDING: The Court of Appeal held that: (1) developer was not required to show that the incentives granted under the density bonus law would actually result in cost reductions; (2) city ordinance requiring documentation to show that the waiver or modification of any development standards were needed in order to make restricted affordable units economically feasible was therefore preempted by state law; and (3) financial feasibility study was sufficient to support any required finding by city planning commission under the density bonus law that incentives would result in cost reductions. Affirmed.

KEY FACTS & ANALYSIS: The density bonus law (Gov. Code, § 65915 *et seq.*) requires that cities and counties allow increased building density, and grant concessions and waivers of permit requirements, in exchange for an applicant's agreement to dedicate a specified number of dwelling units to low income or very low income households. In this case, the Court of Appeal held that neither the statute nor the Los Angeles City ordinance implementing it requires the applicant to provide financial documentation to prove that the requested concessions will render the development "economically feasible."

Appellants appealed the denial of a petition for writ of administrative mandamus challenging the City of Los Angeles's (City) approval of a development project. Appellants contended: (1) the City abused its discretion when it approved incentives and waivers without obtaining the required financial documentation, and (2) the City's approval of the project was not supported by substantial evidence. The Court of Appeal affirmed.

Appellants contended that Government Code section 65915 required that applicants submit certain financial information to support a request for incentives and waivers under the density bonus law. The City's ordinance also required an applicant to submit information to show the incentives were needed to make the project "economically feasible," however, the City did not apply this ordinance to the project at issue.

The Court of Appeal found that the City could not require proof that incentives were needed to make a project economically feasible. A city or county is not prohibited from requesting or considering information relevant to cost reductions pursuant to subdivisions (a)(2) and (j)(1) of the density bonus law. However, a showing that an incentive was needed to make the project "economically feasible" related to the overall economic viability of the project and was not the same as showing the incentive would result in "cost reductions." The City could not require that an incentive be necessary to make the project "economically feasible" because that information does not "establish eligibility for the concession or incentive or ... demonstrate that the incentive or concession meets the definition set forth in subdivision (k)." (§ 65915, subd. (j)(1).) The City's ordinance conflicted with state law to the extent it required an applicant to demonstrate that an incentive was needed to make a project economically feasible. This requirement was deleted from the state law in 2008. Thus the City's ordinance, although it was not applied, was preempted and could not form a basis to deny the project.

The Court of Appeal also found that the City's approval of the project was supported by substantial evidence. The City did not make a finding that the incentives would not result in cost reductions, and was not required to substantiate this negative finding with evidence. But even if substantial evidence regarding cost reductions was required, a financial feasibility analysis included in the project application was sufficient for this purpose. Although the petitioners challenged portions of the analysis, it was not the Court's role to reweigh that evidence. The Court reiterated that the density bonus law required the City to grant the incentives *unless* it made a finding that they did not result in cost reductions. The City did not make such a finding. The City was not required to make an affirmative finding that the incentives would result in cost reductions, or to cite evidence to establish a fact presumed to be true.

TAKE-AWAYS: The density bonus law does not require a showing that incentives would result in a project cost savings, and a city's ordinance may conflict with state law if it requires that an incentive is necessary to make the project economically feasible.

* * *

Muskan Food & Fuel, Inc. v. City of Fresno (2021) 69 Cal.App.5th 372.

BACKGROUND: Owner of a gas station and convenience store petitioned for writ of mandate seeking to set aside city's approval of a conditional use permit for the development of a neighborhood shopping center across the street from his store. The Superior Court, Fresno County, denied the petition, concluding substantial evidence supported city's zoning decision. Owner appealed, and real parties in interest filed cautionary cross appeals.

HOLDING: The Court of Appeal held that: (1) word "petition," as used in municipal code describing the procedures for appealing city's approval of a conditional use permit, was vague; but (2) meaning of "petition" encompassed both oral and written requests; (3) informal dinner with city council member was not a "petition" to the council member to appeal city planning commission's decision approving a conditional use permit; and (4) e-mail sent to mayor from the president of city's chapter of convenience store association was not a "petition" to appeal city planning commission's decision approving a conditional use permit. Affirmed.

KEY FACTS & ANALYSIS: Appellant Muskan Food & Fuel, Inc. (Muskan Food) filed a petition for writ of mandate to challenge the City of Fresno's (City) approval of a conditional use permit for the development of a neighborhood shopping center across the street from Muskan Food's gas station and convenience store. The proposed development included a specialty grocery store with a license to sell beer, wine and distilled spirits for consumption off the premises. The area had a high concentration of businesses selling alcohol and Muskan Food contended the City misapplied the municipal ordinance restricting permits for new establishments selling alcohol in such areas. The superior court denied the petition, concluding the City did not misinterpret the ordinance and substantial evidence supported the City's decision to approve the conditional use permit.

On appeal, Muskan Food challenged both of these determinations. Real parties in interest filed a cautionary cross-appeal to assure they could challenge the superior court's conclusion that Muskan Food properly exhausted its administrative remedies. Real parties in interest and the City contended the superior court properly decided the case on its merits and, alternatively, the denial of the writ petition should have been upheld because Muskan Food did not exhaust its administrative remedies. The Court of Appeal concluded Muskan Food did not exhaust the administrative appeal process set forth in City's municipal code and this failure barred its lawsuit.

On appeal, the Court of Appeal focused on the administrative exhaustion issue. The City's development code required decisions to be appealed in accordance with the code. The relevant portion of the text read: "Failure by any interested person to petition a Councilmember or the Mayor for an appeal shall constitute a failure to exhaust administrative remedies." Decisions of the director could be appealed to the planning commission by filing a written appeal with the director. Appeals of planning commission decisions could be made to the City Council through a Councilmember.

First the Court found that the word "petition" in the code was vague, and thus construed it as including both written and oral petitions. The Court then turned to the issue of whether Muskan Food had petitioned the Mayor or a Councilmember. The Court found that neither an informal dinner in which the planning commission's decision was discussed with a councilmember, nor emails to the Mayor raising concerns about the development, requesting the mayor "look into" concerns, were "petitions" for the purpose of the code. Having failed to "petition" as required by the code, the Court of Appeal found that Muskan food failed to exhaust administrative remedies, which was sufficient to affirm the judgment of the trial court without reaching the issue raised in Muskan Food's appeal.

TAKE-AWAYS: Although the court affirmed the trial court's finding that the appellants failed to exhaust their administrative remedies in this case, the appellate court's analysis of the city's appeal procedures found them vague, and that petitions could be made verbally as well as in writing. In view of this holding, cities may wish to ensure their appeal requirements are clear to avoid arguments that appellants may lodge appeal petitions informally.

* * *

Department of Water Resources Cases (2021) 69 Cal.App.5th 265.

BACKGROUND: County brought action against State Department of Water Resources (DWR) seeking injunctive relief arising from DWR's alleged violation of county's well-drilling ordinance by failing to obtain county permits before conducting geotechnical exploration activities for a state water infrastructure project. The Superior Court, San Joaquin County, granted summary judgment for DWR. County appealed.

HOLDINGS: The Court of Appeal held that: (1) mootness exception for recurring issues applied to allow review of issue of whether DWR needed county permits, and (2) Legislature waived DWR's immunity only with respect to activities defined in water code chapter governing water wells and cathodic protection wells. Affirmed.

KEY FACTS & ANALYSIS: Plaintiff and appellant County of Sacramento (County) appealed from the trial court's grant of summary judgment in favor of defendant and respondent DWR.

In 2019, the County filed a complaint for injunctive relief alleging that DWR failed to obtain county permits before conducting geotechnical exploration activities related to a state water infrastructure project in the Delta region of Sacramento County. The County noted that its ordinance required all persons, including the state, to obtain county permits before conducting activities including drilling exploratory holes and borings. The County contended that it adopted its ordinance pursuant to division 7, chapter 10 of the Water Code (chapter 10), and the Legislature had expressly waived the state's sovereign immunity with respect to the chapter's provisions.

DWR moved for summary judgment. It asserted that, as a state agency acting within its governmental capacity, it was immune from local regulations except where the Legislature expressly waived that immunity. DWR further contended that its activities did not fall within the scope of chapter 10, which was a limited statute governing "wells," "water wells," "cathodic protection wells," and "geothermal heat exchange wells" as those terms are defined in the chapter. The trial court granted the motion, concluding DWR's exploration activities did not fall within the

scope of chapter 10, and the County was not authorized to expand its regulatory authority over the state beyond that which was expressly authorized by the Legislature.

The County challenged the trial court's ruling. It contended the scope of the Legislature's waiver of sovereign immunity extended beyond activities expressly defined in chapter 10 to include activities governed by an administrative bulletin establishing drilling and boring standards that the Legislature referenced in chapter 10. Alternatively, the County argued that various statements made by DWR created a triable issue of fact as to whether DWR's exploration activities fell within the scope of activities expressly defined by chapter 10. Finally, the County challenged multiple evidentiary rulings made by the trial court.

Published Opinion

The Court of Appeal first addressed the issue of whether the County's appeal was moot because DWR had already completed the activities the County complained of. The Court of Appeal found that the issue was not moot as it was likely to be repeated.

Next, the Court of Appeal concluded that the scope of the Legislature's waiver of the state's immunity extended only to the activities expressly defined in chapter 10, governing water wells and cathodic protection wells. The Court of Appeal concluded that the Legislature's waiver of sovereign immunity of DWR did not extend beyond those activities to include drilling and boring standards contained in a bulletin that the Legislature referenced elsewhere in the chapter, where the Legislature did not incorporate the bulletin's definitions to establish the scope of the chapter. The Court of Appeal found no suggestion in chapter 10 that the definitions in the bulletin superseded those in the statute and therefore concluded it did not encompass the drilling and boring standards.

Unpublished Opinion

In the unpublished portion of the opinion, the Court of Appeal agreed with DWR that the County failed to establish a genuine dispute of material fact as to whether DWR's exploration activities fell within the scope of chapter 10. The County failed to provide any evidence to contradict DWR's express statement that it did not and would not conduct activities within the scope of chapter 10 on the affected parcels. The County had not pointed to any evidence suggesting that DWR obtained groundwater samples on the affected parcels, or that its borings fell within the definition of a "water well" or "monitoring well" in chapter 10. Similarly, while the County pointed to various statements about what might have been necessary to complete DWR's project, it indicated no statements of DWR's intent with respect to the affected parcels that contradicted its declaration.

Finally, the Court of Appeal concluded that the County failed to demonstrate prejudice from the trial court's evidentiary rulings, even assuming error. None of the evidence the County claimed to have been improperly excluded gave rise to a genuine dispute of material fact as to whether DWR's geotechnical activities on the affected parcels constituted an activity within the scope of chapter 10. Accordingly, the Court of Appeal affirmed the judgment.

TAKE-AWAY: Provisions in Chapter 10 of Division 7 of the Water Code waiving sovereign immunity of the Department of Water Resources are limited in scope and only apply to activities expressly described Chapter 10.

* * *

Central Delta Water Agency v. Department of Water Resources (2021) 69 Cal.App.5th 170 *as modified on denial of reh'g* (Oct. 21, 2021), *review denied* (Jan. 5, 2022).

BACKGROUND: In one action, regional water agency filed complaint against Department of Water Resources (DWR) under CEQA, seeking writ of mandate, reverse validation, and declaratory and injunctive relief based on challenge to validity of DWR's revised environmental impact report (EIR) that analyzed impact of amendments to state water project (SWP) regarding allocation of water resources to urban and agricultural SWP contractors and conveyance of land to county entities for development of groundwater bank. In two additional actions, nonprofit environmental filed complaints asserting similar challenges. The Superior Court, Sacramento County, issued a limited writ of mandate ordering DWR to decertify the revised EIR only as necessary to address groundwater bank development and denied a motion for attorney fees. Plaintiffs appealed, and appeals were consolidated.

HOLDING: On denial of rehearing, the Court of Appeal held that: (1) DWR did not abuse its discretion in describing in its EIR "proposed" water project for allocation of water resources as "continuing to operate" under prior amendment to SWP contracts; (2) EIR adequately provided for informed decision-making and public participation; (3) water agency's reverse validation action was time-barred; (4) trial court did not abuse its discretion when it issued writ of mandate directing DWR to revise EIR and make new determination whether to continue use and operation of groundwater bank but otherwise left prior approvals of SWP contracts in place; (5) doctrine of *res judicata* did not apply to bar water agency's action challenging revised EIR after original EIR was invalidated in prior action; (6) water agency was not collaterally estopped from challenging validity of revised EIR; (7) motion for attorney fees under attorney general fees statute was governed by 30-day deadline for appeal from judgment in reverse validation case; (8) environmental advocate's case was not subject to automatic stay; and (9) substantial evidence supported DWR's conclusion in revised EIR that conveyance of land to county authority for development of groundwater bank did not effect a substantial adverse change in environment due to crop conversion. Judgments affirmed.

KEY FACTS & ANALYSIS: Three consolidated appeals at issue against DWR involved litigation related to changes in long-term water supply contracts brought about by a water allocation agreement and amendment entitled the "Monterey Agreement" and the "Monterey Amendment".

The SWP is one of the largest water projects in the world, consisting of dams, reservoirs, storage tanks, pumping plants, aqueducts, pipelines, and canals designed to capture, store, and deliver water throughout the state. Each year, the SWP delivers water to about 25 million residents from Napa Valley to San Diego and irrigates about 750,000 acres of farmland. DWR is charged with operating and managing the SWP. During the 1960s, DWR entered into long-term contracts with local and regional water contractors, known as the State Water Project contractors (SWP contractors).

Under the contracts, the SWP contractors received entitlements to an amount of SWP water. Each The SWP contractors agreed to make a proportional payment regardless of the amount of available water. The Kern Water Bank is an approximately 20,000-acre groundwater reserve in Kern

County. In 1988, DWR acquired the Kern Fan Element as part of a plan to develop the Kern Water Bank. DWR ultimately determined it could not develop a state water bank and, in 1993, ceased work on the project.

In 1994, DWR and SWP contractor representatives engaged in mediated negotiations in an effort to settle allocation disputes under the long-term water supply contracts. In December 1994, in Monterey, the parties reached a comprehensive agreement known as the Monterey Agreement. The Monterey Agreement established 14 principles designed to resolve water allocation disputes and operational issues of the SWP. To implement the Monterey Agreement, the parties drafted an amendment to the long-term water supply contracts. This standard amendment and separate amendments to the long-term contracts became known as the Monterey Amendment.

The Monterey Amendment altered water allocation procedures in times of shortage by eliminating the urban preference and mandating that deliveries to both agricultural and urban SWP contractors would, with exceptions, be reduced proportionately. The amendment also authorized permanent sales of water among contractors and implemented various other changes in administration of the SWP. In addition, the Monterey Amendment transferred the 20,000 acres of farmland, the Kern Fan Element, previously considered as the location of the Kern Water Bank, to local Kern County entities so that they could develop the groundwater bank. The parties in the Monterey Amendment and Agreement also rewrote parts of the SWP. A joint powers agency composed of two SWP contractors prepared an environmental impact report on the agreement (the Monterey Agreement EIR), which DWR, as responsible agency, certified in 1995.

In December 1995, a group of plaintiffs, including the Planning and Conservation League (PCL), filed suit challenging the sufficiency of the Monterey Agreement EIR. Among many objections, the PCL plaintiffs argued the Monterey Agreement EIR violated CEQA and the contracts were an invalid transfer in violation of the Water Code. They also alleged DWR, not the two SWP contractors, should have served as the lead agency for purposes of preparing the EIR.

In 1996, the trial court entered an order granting DWR's motion for summary adjudication on the reverse validation cause of action, finding the plaintiffs failed to join Kern County Water Agency as an indispensable party. The court dismissed the reverse validation action. The court subsequently entered a final judgment denying the plaintiffs' application for a writ of mandate to set aside the Monterey Agreement EIR. The court concluded the two SWP contractors were not the proper lead agency under CEQA, but upheld the adequacy of the EIR.

In 2000, the court of appeal reversed the trial court's judgment. It found the Monterey Agreement EIR invalid because it was prepared by the wrong lead agency and because it failed to discuss implementation of the SWP provision as a "no project" alternative. In addition, the court of appeal held the trial court erred in dismissing the reverse validation challenge to the execution of the Monterey Agreement and the Kern Fan Element transfer agreement for failure to name and serve indispensable parties.

The parties engaged in extensive mediated settlement discussions, which led to a comprehensive settlement agreement. Among other things, the settlement agreement provided that the Kern Water Bank Authority, the public entity created to operate the Kern Water Bank, would retain title to the

Kern Water Bank and DWR would study its impacts through a Monterey Plus EIR. The parties also agreed that DWR would act as the lead agency in preparing a Monterey Plus EIR.

In addition, the parties agreed that the Monterey Plus EIR would include analysis of (1) the environmental effects of the pre-Monterey Amendment long-term water supply contracts as part of the no project alternative, (2) the potential environmental impacts of changes in SWP operations and deliveries relating to the implementation of the Monterey Plus project, and (3) an analysis and determination regarding the transfer of development of the Kern Water Bank.

In 2007, DWR released the draft Monterey Plus EIR.

On June 4, 2010, Central Delta Water Agency (Central Delta) filed a first amended petition for writ of mandate and complaint for declaratory and injunctive relief challenging the Monterey Plus EIR under CEQA. Two other districts also filed suit alleging CEQA violations.

The trial court granted DWR's motion to set a special trial on several claims, and found them to be time-barred.

Subsequently, the court tried the CEQA claims. The court found no merit in them, save for one. The trial court questioned the adequacy of DWR's analysis of the Kern Water Bank's potential future impact on groundwater and water quality. The trial court concluded that the Monterey Plus EIR should have further analyzed the impacts associated with the Kern Water Bank, and issued a limited writ of mandate in 2014 ordering a revision to address that issue.

The court also considered whether an attorneys' fees motion was timely.

DWR prepared the "Revised EIR" in compliance with the 2014 Writ. In September 2016, DWR filed its return to the 2014 Writ. The Central Delta plaintiffs did not object to the discharge of the 2014 Writ, but stated their intent, along with other parties, including "Food Safety" to file a new suit challenging the Revised EIR. Subsequently, other parties filed a petition for writ of mandate.

The parties in all cases stipulated the trial court would conduct a single hearing as to whether to discharge the 2014 Writ and on the petition challenging the Revised EIR. Following a hearing, in October 2017 the court issued an order discharging the 2014 Writ and denying the petition challenging the Revised EIR.

The appeal consolidated three separate appeals: (1) the "Central Delta Appeal", (2) the "Biological Diversity Appeal", and (3) the "Food Safety Appeal."

The Central Delta Appeal

On appeal from the 2014 Writ, Central Delta contended: (1) DWR violated CEQA by failing to make a proper project decision; (2) the Monterey Plus EIR failed to analyze one article of the SWP in the no project alternatives; (3) Central Delta's validation claims were not time-barred; and (4) the trial court was required to order DWR to void its project approvals relating to the Kern Water Bank.

Kern Water Bank Authority, et al. cross-appealed, arguing Central Delta's challenge to the 2010 Monterey Plus EIR was barred by res judicata and Central Delta lacked standing to bring suit. The court affirmed the judgment but denied the cross complaint.

First, because DWR was operating pursuant to the Monterey Amendment while preparing the Monterey Plus EIR, the report accurately described the practical result of carrying out the proposed SWP as "continuing." The Monterey Plus EIR also accurately described the no project alternatives as returning to operation of the SWP in accordance with the pre-Monterey Amendment long-term water supply contracts. As a result DWR did not err in determining it could carry out the SWP "simply by deciding to continue operating under the Monterey Amendment."

Second, even without considering the impact of every article of the SWP, the Court of Appeal found that the analysis of the "no project alternative" to operate under the SWP was sufficient for CEQA purposes. The analysis explained the objective of the SWP and the Monterey Agreement and Amendment. The description provided enough information to the public of the effects of operating under the "no project" alternative.

Third, Central Delta's reverse validation claims were time-barred under Code of Civil Procedure section 860 *et seq*. While the settlement agreement required DWR to set aside its Monterey EIR, it was not required to set aside the Monterey Agreement and Amendment. The new EIR did not restart the statute of limitations as to the underlying agreements.

Fourth, the trial court did not err by issuing a limited writ of mandate on the Revised EIR. Because the errors in the Monterey Plus EIR were limited, the limited writ of mandate was appropriate, and not an abuse of discretion under CEQA.

Finally, the Court denied the cross-appeal. *Res Judicata* did not bar the claims of a previous group of petitioners who challenged an earlier EIR. The underlying cause of action was different than an earlier proceeding which involved the validity of a previous EIR. The challenges to the Monterey Plus EIR which did not exist at the time of the original case were distinct from those in the earlier action. Moreover, collateral estoppel did not bar the claims, because there was no privity between the petitioners in the current and former case, because the litigants in the former case stated explicitly that they disavowed any intent to act on behalf of others.

<u>The Biological Diversity Appeal</u>

The Biological Diversity Appeal involved an action for attorney's fees. The motion was untimely because the 30-day deadline applicable to the appellant's reverse validation claims applied, even when the appellants made CEQA claims as well, and argued CEQA's 60-day limit should apply.

<u>The Food Safety Appeal</u>

The Food Safety Appeal argued that Code of Civil Procedure section 916 automatically stayed the trial court's consideration of its challenge to the Revised EIR, because prior litigation on the

Monterey Plus EIR sought some of the same remedies. The trial court denied the stay. The court acknowledged that the issue was moot due to the consolidated cases, and turned to the merits.

On the merits, the Food Safety Appeal contended that DWR failed to adequately address the impacts caused by the transfer of the Kern Water Bank, in terms of both (1) the relationship between the transfer and an increase in the planting of permanent crops and (2) the impact of this crop conversion on water supply and reliability. According to the appellant, the Revised EIR's conclusion that the Kern Water Bank transfer did not cause crop conversion in the water bank service area was not supported by substantial evidence, nor was the report's analysis of the impacts to regional and statewide water supplies caused by crop conversion.

The trial court reviewed the record and found the Revised EIR adequately addressed the reality of crop conversion, its causes, and potential impact on the environment. The Revised EIR concluded the Kern Water Bank was not the primary cause of crop conversion, a conclusion the trial court determined was supported by substantial evidence. The evidence before the trial court revealed the primary forces behind crop conversion were the higher commodity price of permanent crops as compared to annual crops, making them more valuable to growers, and the need for growers to plant more valuable crops to cover the costs of implementing more efficient irrigation systems. This trend toward permanent crops was not new nor unique to the area served by the Kern Water Bank. The Court of Appeal analyzed the evidence reviewed by the trial court which involved multiple sources supporting the finding that although the Kern Water Bank increased the water supply reliability in the area it serviced, the environmental impact of the Kern Water Bank on crop conversion was less than significant, because SWP contractors would have requested same amount of water with or without the bank, and evidence showed that, in decades prior to the Revised EIR, the SWP had been supply-limited, not demand-limited, and therefore, there was no reason to expect that SWP contractors would have requested less water without the Kern Water Bank.

TAKE-AWAYS: In this fact-specific, complex, and protracted case involving environmental analysis of amendments to the massive State Water Project for capture, storage and delivery of water throughout the state, the court made a number of related holdings, including: that the Project EIR accurately described the Project as continuing under prior amendments to the Project; that the trial court did not abuse its discretion in ordering the Department of Water Resources to revise the Project EIR and make a new determination about whether to continue use of a groundwater bank; and that conveyance of land to a county authority for development of a groundwater bank did not result in substantial, adverse environmental change due to crop conversion.

* * *

California Renters Legal Advocacy & Education Fund v. City of San Mateo (2021) 68 Cal.App.5th 820.

BACKGROUND: Renters advocacy organization petitioned for writ of administrative mandamus seeking to compel a city to approve an application to build a four-story, ten-unit apartment building, and claiming that city's denial of the application for failure to satisfy city's design guidelines for multifamily homes violated the Housing Accountability Act (Gov. Code, § 65589.5 (HAA)), restricting a local government's ability to deny applications to build housing that complied with the general plan, zoning, and design review standards that were objective, if

substantial evidence would allow reasonable person to conclude that a project complied with those standards. Following bench trial, the Superior Court, San Mateo County, denied the petition and, subsequently, denied organization's motion for new trial. Organization appealed.

HOLDING: The Court of Appeal held that: (1) HAA applied to height standards in city's multi-family design guidelines; (2) height guidelines violated HAA by not providing objective standards; (3) HAA did not violate city's constitutional right to home rule; (4) HAA was not unconstitutional delegation of municipal functions; and (5) HAA did not violate procedural due process rights of project opponents. Reversed.

KEY FACTS & ANALYSIS: After the City of San Mateo (City) denied an application to build a ten-unit apartment building, petitioners California Renters Legal Advocacy and Education Fund, Victoria Fierce, and John Moon (CARLA) sought a writ of administrative mandamus seeking to compel the project's approval. The trial court denied the petition, ruling that the project did not satisfy the City's design guidelines for multifamily homes and that, to the extent the HAA required the City to ignore its own guidelines, it was an unconstitutional infringement on the City's right to home rule and an unconstitutional delegation of municipal powers. The Court of Appeal reversed.

Relevant here, the City's guidelines for housing provided as follows: "Most multi[-]family neighborhoods in San Mateo are 1 to 4 stories in height. When the changes in height are gradual, the scale is compatible and visually interesting. If height varies by more than 1 story between buildings, a transition or step in height is necessary. Any portion of a building constructed taller than surrounding structures should have the taller section built to a width that acknowledges the traditional building width pattern of the City—generally 30 to 50 feet in width." Importantly, the HAA only allows a city to deny a project for inconsistency with design standards which would reduce density. when those standards are objective. (*See* Gov. Code, § 65589.5(j)(1).) The City denied the project due to inconsistency with its height standards, particularly stating that the project was "too tall" compared to the surrounding buildings.

The Court observed that two separate standards of review applied to its analysis. Whether the standards were objective was a question of law, to be reviewed *de novo*. Whether the building project complied with those standards was a question of fact, to be reviewed for substantial evidence.

On the first issue, the guidelines were not objective standards. The court focused on the definition of "objective" in the HAA, which defines it as "involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official." (Gov. Code, § 65589.5(h)(8).) In this case, the City's guidelines for height were not objective because the applicable portion provided "a transition or step in height is necessary." This invariably left discretion into what could be an adequate transition other than a step in height, such as a tree line beside the property. Because the Court found that the guidelines were not objective, there was no need to analyze whether the project complied with them.

The second major issue analyzed by the Court was the constitutionality of the HAA.

First, the Court found that the HAA was not an unconstitutional infringement on the City's "home rule" as a charter city. Although building standards were an area of municipal concern, the housing crisis was an area of statewide concern, and the HAA was reasonably related to resolving the California housing crisis and narrowly tailored to avoid interfering with local government by allowing them to impose objective standards. The Court highlighted the "escape valves" in the HAA, such as for standards which would not reduce density, or the ability of a city to deny a project which would result in an unavoidable impact on health and safety.

Second, the HAA was not an unconstitutional delegation of municipal functions because the HAA did not divest the City of its final decision making authority to approve, conditionally approve, or deny a project. The governing body retained authority to exercise decision-making authority: to determine whether there was substantial evidence from which a reasonable person could conclude the project was consistent with the city's applicable objective requirements; to deny or reduce the density of a project that did not meet such standards or that causes an unavoidable adverse impact on public health or safety; and to impose conditions of approval that did not reduce the project's density where applicable objective standards are met. (Gov. Code, § 65589.5(f)(4) & (j).)

Third, the HAA did not violate due process rights of neighboring landowners by depriving them of a meaningful opportunity to be heard before a housing development is approved. The HAA still allowed opponents to seek to demonstrate that a project did not comply with the City's objective standards. Nor did the statute prevent neighbors from presenting, or the agency from considering, evidence that conditions of approval that did not reduce density could mitigate undesirable effects on neighbors, or that the project would have an unavoidable "specific, adverse impact upon the public health or safety" if approved at the proposed density.

Accordingly, the Court of Appeal reversed the decision of the trial court, and ordered the trial court to issue a writ of mandate directing the City to vacate its action upholding the City's denial of the project, and reconsider the challenge to the City's decision in accordance with the opinion.

TAKE-AWAYS: Local governments should carefully draft zoning and development standards which are statutorily required to be "objective". This holding represents a case where a court has taken a rigid position on what qualifies as objective under the HAA.

* * *

City of Escondido v. Pacific Harmony Grove Development, LLC (2021) 68 Cal.App.5th 213.

BACKGROUND: City brought an eminent domain action against land owners, which sought to acquire a strip of the owners' land by condemnation. Following bench trial on bifurcated issue of valuation of land, the Superior Court, San Diego County, entered judgment in favor of the city. Owners appealed.

HOLDING: The Court of Appeal held that: (1) dedication requirement was constitutional; (2) it was reasonably probable that city would impose dedication requirement in exchange for permit to further develop land; (3) dedication requirement arose four years prior to date of probable inclusion; and (4) condemnation action was not unreasonably delayed for purpose of precondemnation damages. Affirmed.

Key FACTS & ANALYSIS: The City of Escondido (City) sought to acquire by condemnation from Pacific Harmony Grove Development, LLC and Mission Valley Corporate Center, Ltd. (Owners) a 72-foot-wide strip of land (the strip) across a mostly undeveloped 17.72-acre parcel (the Property) to join two disconnected segments of Citracado Parkway, a major road that runs through portions of the City's industrial areas on either side of the Property.

The City argued below that the strip should be valued under the *Porterville* doctrine (*City of Porterville v. Young* (1987) 195 Cal.App.3d 1260 (*Porterville*)), which values condemned property at its undeveloped state (here, about $50,000) when the condemning agency can establish that (1) it would have conditioned development of the remainder of the property on dedication of the condemned portion, and (2) such a dedication requirement would be constitutional under *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*), which require that a dedication requirement have an essential nexus and be roughly proportional to the public interest that would be served by denying development approval.

Owners argued the *Porterville* doctrine did not apply, and that the court should instead apply the "project effect rule," which disregards for valuation purposes a condemner's belated imposition of a dedication requirement as a means to drive down the price of property the condemner is likely to condemn. Owners maintained the City violated this rule by imposing dedication requirements on the Property long after it became probable that the City would condemn the strip to complete the Citracado Parkway extension project. Thus, Owners maintained the strip should be valued based on its highest and best use, without regard for the dedication requirement (about $960,176).

Owners also argued they were entitled to precondemnation damages caused by the City's unreasonable delay in pursuing condemnation proceedings and other unreasonable conduct. The City countered that it did not engage in unreasonable delay or conduct because it commenced condemnation proceedings shortly after it annexed the Property from county jurisdiction in 2015.

After a four-day bench trial, the court issued a comprehensive statement of decision ruling in the City's favor on all issues. The parties then stipulated to a judgment, which the court entered. Owners appealed, contending the trial court erred by finding the *Porterville* doctrine applied, the project effect rule did not, and the City was not liable for precondemnation damages. The Court of Appeal affirmed the judgment of the trial court.

On the issue of whether to apply the *Porterville* doctrine or the project effect rule, the Court of Appeal found that the dedication requirement satisfied both the *Nollan* and *Dolan* tests. Under *Nollan*, the dedication for a roadway was related to the public interest in mitigating traffic impacts. Under *Dolan*, the burdens of the dedication did not exceed the overall impacts of developing the property. It would cost $2.38 million to build such a road entirely within the Property, and $4.6 million to build such a road that connected to the existing northern segment of Citracado Parkway. Under both the City's and Owners' valuation, the benefits versus burden weighed towards the constitutionality of the dedication. Likewise, under the second portion of the *Porterville* analysis, it was reasonably probable that the City would impose the dedication requirement as a condition of development of the Property, were Owners to apply for such development.

The Court of Appeal agreed with the trial court that the project effect rule did not apply. The dedication requirement arose in 2002 when the City fixed the location of Citracado Parkway across the Property in its general plan and circulation element. Under the circumstances, applying the project effect rule to require that Owners be compensated for an industrial use of the strip that they should never reasonably have expected to make would have resulted in the type of windfall the *Porterville* doctrine sought to avoid.

Finally, the Court of Appeal disagreed with Owners' argument that the City was required to pay precondemnation damages because it did not seek to condemn the property until 10 years after an agreement for hospital construction which the owners contended irrevocably committed the City to constructing Citracado Parkway through the Property. The Court of Appeal agreed with the trial court that this delay was reasonable. First, the timeframe was reasonable considering the size of the project and the time it would take to gather the necessary funding. Second, the City could not have approved any development of the Property until 2015 when it annexed the Property from the County. Moreover, until the annexation, the Property was zoned for low-density residential use. The City's up-zoning of the property to industrial use during the annexation undoubtedly benefited, rather than harmed, Owners. Third, Owners had never sought City approval to develop the Property. The Court could not see how the City's delay unreasonably restrained Owners' development of the Property when Owners never sought to develop it.

The Court of Appeal opined that at its core, Owners' precondemnation damages claim was based not so much on the City's failure to condemn the strip sooner, but rather, on the notion that the City might condemn it at all.

TAKE-AWAYS: In this case the court upheld Escondido's dedication requirement and denied the property owners' claim for precondemnation damages. The case includes discussion of the *Porterville* analysis and project effect rules for property valuation in condemnation cases.

* * *

Sierra Watch v. County of Placer (2021) 69 Cal.App.5th 86.

BACKGROUND: Environmental organization filed petition for writ of mandate and complaint alleging that county's environmental review of proposed resort development near Lake Tahoe was inadequate under CEQA, including with respect to discussion of environmental setting and construction noise mitigation measures. The Superior Court, Placer County, rejected organization's claims. Organization appealed.

HOLDING: The Court of Appeal held that: (1) discussion of lake's water quality in environmental setting section of environmental impact report (EIR) was inadequate; (2) discussion of air quality for lake basin in EIR's environmental setting section was adequate; (3) EIR's discussion of development's traffic impacts on lake's water quality and lake basin's air quality was inadequate; (4) county's failure to disclose duration of construction noise at any specific location within development did not render EIR inadequate; (5) county's failure to consider noise impact occurring further than 50 feet from expected construction activity rendered EIR inadequate; (6) EIR's discussion of impact of construction noise on residents was adequate; and (7) county's inclusion

of additional mitigation measures for construction noise to benefit school, but not other nearby buildings, was not arbitrary. Reversed.

KEY FACTS & ANALYSIS: In 2016, Placer County (County) approved a project to develop a resort on about 94 acres in Olympic Valley — the site of the 1960 Winter Olympics. Petitioner Sierra Watch afterward challenged the County's approval under CEQA. In Sierra Watch's view, the County's analysis fell short. In particular, Sierra Watch maintained, the County (1) failed to sufficiently consider Lake Tahoe in its analysis, (2) insufficiently evaluated the project's impacts on fire evacuation plans for the region, (3) inadequately evaluated and mitigated the project's noise impacts, (4) failed to allow for sufficient public review of the project's climate change impacts, (5) failed to consider appropriate mitigation for the project's climate change impacts, (6) overlooked feasible mitigation options for the project's traffic impacts, and (7) wrongly relied on deferred mitigation to address the project's impacts on regional transit. The trial court rejected all Sierra Watch's arguments.

The Court of Appeal considered each argument.

On the first Argument, the County's EIR never meaningfully discussed Lake Tahoe in its description of the environmental setting. In its discussion of the environmental setting for "Hydrology and Water Quality," the draft EIR offered only one parenthetical reference to Lake Tahoe, stating: "The plan area is located within the low elevation portion of the approximately eight square mile Squaw Creek watershed, a tributary to the middle reach of the Truckee River (downstream of Lake Tahoe)." Nowhere in this sentence, or elsewhere, did the draft EIR discuss the importance of Lake Tahoe, its characteristics, or its current condition. Due to the significance of Lake Tahoe, the EIR inadequately addressed it. However, the Court of Appeal agreed with the trail court that the EIR adequately assessed air pollutants originating from traffic when it mentioned the types of pollutants in the area, and that vehicle traffic was one source. The Court of Appeal also found that the EIR failed to meaningfully assess the impact of the project's traffic impact on Lake Tahoe air quality. The EIR provided mixed messages on the project's potential impacts to Lake Tahoe and the basin from increased traffic. On the one hand, it said the project would not result in an exceedance of Tahoe Regional Planning Agency (TRPA's) cumulative vehicle miles travelled (VMT) threshold for the Lake Tahoe Basin. But on the other hand, it showed the project would likely exceed TRPA's project-level threshold of significance for traffic in the basin.

Rather than follow one of TRPA's approaches, however, the EIR simply declared that TRPA's thresholds were inapplicable because the project was not located in the basin. But if TRPA standards were inapplicable, what standards did apply? The EIR never answered the question. Nor did it supply any meaningful information to evaluate the significance of a daily addition of 23,842 VMT on Lake Tahoe's water quality and the basin's air quality. Nor did it even offer any clear conclusion on whether this additional traffic would significantly impact Lake Tahoe and the basin. It instead simply supplied some discussion about TRPA's thresholds of significance and then said "the TRPA thresholds are not used as standards of significance in this EIR." The Court found this to be inadequate under CEQA.

On the second argument, the Court of Appeal determined that the EIR fatally underestimated the impact of the project on fire evacuation times because it wrongly assumed emergency responders would provide traffic control at key intersections. The EIR's misleading estimation of evacuation times rendered it inadequate.

On the third claim, the County's failure to disclose duration of construction noise at any specific location in EIR did not render the EIR inadequate. The EIR did disclose the duration of construction and the noise for at least one part of project, and the EIR sufficiently demonstrated why specific detail about duration of construction noise at each specific location within development was not possible, including that development would be constructed over 25 years, that building location within development was flexible, and that there was no specific construction schedule. The EIR listed noise level ranges, explained the significance, and specifically acknowledged that construction would annoy residents. Additionally, the Court opined that the County's inclusion of mitigation measures for construction noise near schools, but not other buildings, was not arbitrary and capricious, due to the sensitivity of schools to noise and the infeasibility of imposing measures on all nearby buildings.

The remaining portions of the opinion are unreported.

On the fourth claim, the Court of Appeal found that the County was not required to recirculate its EIR when it changed its climate change analysis between the draft and final EIR pursuant to changing law. While the draft and final EIRs applied different standards to the climate change analysis, the impacts disclosed in the final EIR were also revealed in the draft EIR. There was therefore no new significant information not included in the draft EIR which would require recirculation to the public under Public Resources Code section 21092.1.

On the fifth claim, the Court of Appeal rejected Sierra Watch's claim that the EIR failed to reconsider the draft EIR's climate mitigation analysis. The Court found that the County had adequately considered climate mitigation. The County was not required to consider impacts that had no possibility of occurring. The Court also declined to hear two additional arguments it considered to be "undeveloped."

On the sixth claim, the County had adequately considered mitigation measures for traffic impacts including public transportations and shuttles. Although the County declined to adopt them due to "limited benefit."

Finally, on the seventh claim, the Court of Appeal agreed with Sierra Watch that the EIR improperly relied on deferred mitigation to address traffic impacts. The draft EIR said the project would increase demand on the existing public transit system (known as Tahoe Area Regional Transit or TART) and would, as a result, have a potentially significant impact on transit. But it said that the developer's commitment either to provide "fair share funding" to TART or to form a "Community Service Area (CSA) or a Community Facilities District (CFD) to fund the costs of increased transit services" would mitigate this impact to a less-than-significant level. It then noted how transit services could potentially be increased, stating that "[i]ncreased service may consist of more frequent headways, longer hours of operations, and/or different routes." The final EIR added little new, though it did include some detail on how the "fair share funding" would be calculated:

"The fair share would be based on an engineer's report and would establish the project's financial contribution to additional transit services." The EIR's mitigation measure for transit impacts included no performance standard at all. Nor did it provide any analysis supporting its conclusion that the project's impacts on transit would be rendered less than significant. Rather than supply this analysis, the EIR simply required the developer to provide an unspecified amount of funding to increase transit service by an unspecified amount in the future, and then, without any analysis, concluded that this vague offer to increase transit service would reduce impacts to a less-than-significant level..

TAKE-AWAYS: This fact-specific case provides an example of analysis of vehicle miles traveled and evacuation time impacts in relation to a proposed development project near Lake Tahoe, and of how deferred mitigation of transportation impacts fails to satisfy CEQA requirements.

* * *

Sierra Watch v. Placer County (2021) 69 Cal.App.5th 1.

BACKGROUND: Environmental organization filed petition for writ of mandate and complaint for injunctive and declarative relief alleging that approval of resort development project by county board of supervisors violated the Ralph M. Brown Act based on county's failure to make memorandum explaining change to proposed development agreement available for public inspection at time it was sent to board less than 72 hours before open meeting. Following bench trial, the Superior Court, Placer County, denied petition. Environmental organization appealed.

HOLDING: The Court of Appeal held that county violated Ralph M. Brown Act by placing copy of memorandum in county clerk's office after hours. Affirmed in part and reversed in part.

Key FACTS & ANALYSIS: In 2016, Placer County (the County) approved a project to develop a resort on about 94 acres near Lake Tahoe. Sierra Watch afterward challenged the County's approval in two lawsuits, both of which are briefed in this paper.

This appeal concerns Sierra Watch's Brown Act allegations and involved two of the act's requirements. The first claim concerned section 54957.5 of the Brown Act. Under that statute, in the event a county distributes to its board of supervisors any writing pertinent to an upcoming board meeting less than 72 hours before that meeting, the county must make that writing "available for public inspection" at a county office "at the time the writing is distributed" to the board. The case involved two competing interpretations of this statute.

The Court of Appeal considered the issue of whether the writing had to be placed in the county office, or whether it had to actually be available for public inspection in that office to satisfy the public distribution requirement. In this case, the County placed the writing in a county office at a time the office was closed to the public (5:40 PM). The Court of Appeal found that the writing was not actually available for public inspection until the office reopens to the public, and so was not available at the time required under section 54957.5 because the writing was distributed to the Board of Supervisors (Board) at 5:40 PM, but was not available for public inspection until the county office opened the next day.

Sierra Watch's second claim concerned section 54954.2 of the Brown Act. Under that statute, counties must post an agenda before each board meeting "containing a brief general description of each item of business to be transacted or discussed at the meeting." The County here, in its agenda, informed the public that its board would consider approving a development agreement that its planning commission had recommended. But in the end, the County's board never considered that particular agreement. It instead considered and then approved a materially revised development agreement that County staff, in consultation with the project applicant and another party, had prepared the night before the meeting. In other words, the Board only considered a version of the agreement that the Planning Commission had never considered, even though the agenda indicated that the Board would consider the agreement that the commission had actually considered. This issue was whether the board's consideration of this revised agreement, rather than the one referenced on the County's agenda, rendered its agenda misleading. The Court of Appeal found that it did in an unpublished portion of the opinion.

The Court of Appeal therefore reversed in part, finding the County's conduct violated the Brown Act. However, the Court of Appeal also rejected Sierra Watch's request to vacate the County approvals because it found that the Sierra watch had failed to show prejudice from the violation. Since the agreement considered was only finalized the night prior, even if the County had complied with the Brown Act, it would not have been able to review the agreement before the meeting. Because Sierra Watch failed to show that the County's violation deprived it of a fair opportunity to participate at the County's meeting, the Court of Appeal declined to find that nullification of the County's approval was warranted.

TAKE-AWAYS: Under Section 54957.5 of the Brown Act, which requires that materials pertaining to an agenda item that are provided to a majority of the legislative body less than 72 hours prior to the public meeting must be made available to the public at the same time, the materials must actually be available to the public. However, the Brown Act violation in this case did not support invalidation of the County's approval of a resort project.

* * *

Brown v. Montage at Mission Hills, Inc. (2021) 68 Cal.App.5th 124, *review denied* (Nov. 17, 2021).

BACKGROUND: Owner of a condominium unit brought an action against owner's association seeking, among other claims, declaratory judgment that she was exempt from the association's amendment to their governing documents which prohibited the renting of properties in the association for less than 30 days. The Superior Court, Riverside County, granted association's motion for summary judgment and denied owner's motion for summary adjudication. Owner appealed.

HOLDING: The Court of Appeal held that: (1) owner of condominium unit was exempt from restriction on short term rentals; (2) owner's association failed to preserve for consideration on appeal argument that short term rentals were limited licenses rendering such guests of owners licensees rather than tenants; and (3) owner of condominium unit was exempt from prohibition against "business or commercial activities" to extent that it prohibited her right to rent her property. Reversed with directions.

Key FACTS & ANALYSIS: Sixteen years after a condominium owner bought a unit, her home owners' association (HOA) prohibited short term rentals. She sought declaratory relief that she was exempt from that requirement pursuant to Civil Code section 4740.

Section 4740, subdivision (a) states that an owner of a property in a common interest development shall not be subject to a provision in its regulations "that prohibits the rental or leasing of any of the separate interests in that common interest development" unless that provision "was effective prior to the date the owner acquired title to their separate interest." The sole issue on appeal was whether section 4740 exempted the owner from the restriction on rentals added to the governing documents after the owner had acquired title to her condominium. The Court concluded that it did. The statute did not differentiate between short term and long term rentals, and short term rentals constituted a "rental" for the purposes of section 4740. Moreover, the history of the Davis-Stirling Act applicable to common interest developments indicated that Civil Code section 4740 would apply to both rental prohibitions and restrictions. Finally, the court found that the defendant HOA had failed to preserve its argument that because short term rentals were limited licenses to use property, renters were not "tenants" for the purposes of the Davis-Stirling Act (Civ. Code, § 4000 *et seq.*).

TAKE-AWAYS: In this case the court held that Civil Code Section 4740, which provides that rental restrictions on owners in common interest developments do not apply to owners that acquired their interest before the imposition of the restriction, excused the appellant common interest holder from complying with the restriction.

* * *

Save Our Access-San Gabriel Mountains v. Watershed Conservation Authority (2021) 68 Cal.App.5th 8, *review denied* (Dec. 15, 2021).

BACKGROUND: Advocacy group petitioned for writ of mandate ordering conservation authority to set aside its approval of proposed project to improve national forest under California Environmental Quality Act (CEQA), alleging various deficiencies in environmental impact report (EIR) that was certified by authority. The Superior Court, Los Angeles County, granted petition in part and issued writ of mandate ordering authority to articulate and substantiate parking baseline, and subsequently awarded group $154,000 in attorney fees. Group and authority appealed, and appeals were consolidated.

HOLDING: The Court of Appeal held that: (1) EIR did not "gloss over" project's parking reduction, and thus did not violate CEQA on such basis; (2) EIR was only required to address parking reduction to extent reduction had secondary impact on environment; (3) EIR sufficiently evaluated alternative proposals; and (4) project did not conflict with land management plan or presidential proclamation pertaining to forest. Reversed.

Key FACTS & ANALYSIS: This case concerned environmental review of an improvement project in the Angeles National Forest. Defendant Watershed Conservation Authority (WCA or defendant) certified the EIR for the project under CEQA. Plaintiff Save Our Access–San Gabriel Mountains challenged defendant's certification of the EIR. The EIR addressed the usual extensive range of potential impacts on the environment, on biological resources, cultural resources, water quality, air quality, and more. The trial court rejected plaintiff's claims that CEQA required the defendant

to consider additional project alternatives, and that the project was inconsistent with applicable land use plans, but issued a writ of mandate requiring defendant to "articulat[e] and substantiat[e] an adequate parking baseline" for the project, and to "reassess[ ] the significance of the impacts resulting from the ... project's parking reduction." The court found those two issues were severable and the rest of the defendant's project activities did not violate CEQA.
Both parties appealed from the judgment.

The appeal addressed only three points: a reduction in available parking; the fact the EIR did not analyze multiple alternatives to the project, instead analyzing a single "no project" alternative; and alleged conflicts with land management plans.

The Angeles National Forest is a designated National Monument. The project site was within the monument. It encompassed "the riverbed, public roads ..., and all existing recreational facilities within the project site." It was among the most popular recreation areas for weekend use, and "heavy use combined with the lack of facilities had resulted in the degradation of the area," including damage to vegetation, soil compaction and erosion, stream alteration, high levels of litter deposition, and water quality impairment due to excessive trash. The project was proposed "to better manage the heavy recreation use while balancing the need for long-term resource protection."

The plaintiff contended that the centerpiece of the project was a reduction of parking. The plaintiff alleged the EIR glossed over the reduction. However, the Court of Appeal found that the draft EIR clearly listed the reduction of parking. The Court of Appeal likewise rejected the remaining alleged CEQA violations and found sufficient discussion in the draft EIR. The Court of Appeal noted that reducing parking would actually have a positive impact on the environment. The Court of Appeal cited to *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, and stated that a reduction of parking availability was not an environmental impact. Under the circumstances, it was reasonable to determine that individuals who could not find parking would recreate elsewhere.

The plaintiff next contended that the EIR's analysis of alternatives violated CEQA, and in addition that the EIR failed to analyze the project's alleged conflicts with certain land use policies. The draft EIR only analyzed a no project alternative, and the project itself, and stated that as a result of planning workshops, those were the only alternatives suitable to reasonably achieve the purpose of the project. The EIR also described "alternatives considered but eliminated from full analysis." This consisted of a "forest closure alternative" suggested by the California Department of Fish and Wildlife. This alternative would have closed "all or a portion of the project site to adequately protect biological resources during the breeding season of the Santa Ana sucker (March 1 through August 1)." The draft EIR described the reasons for eliminating this alternative from full analysis, including that recreation use would be restricted during the time of year when most use currently occurs. The Court of Appeal observed that analyzing only the no project alternative was not *de facto* a violation of CEQA. The plaintiff failed to show that it was manifestly unreasonable for the agency to determine that other suggested alternatives were not feasible and adequate. The Court of Appeal also agreed with the trial court that the project was not inconsistent with the applicable land management plan or the proclamation that the forest was a national monument.

Finding no violation of CEQA, the Court of Appeal reversed the judgement of the trial court, with directions to enter a new judgment denying petition for writ of mandate in its entirety.

TAKE-AWAY: This fact-specific case holds that reducing parking availability in the Angeles National Forest, based on the circumstances and objectives to be achieved, resulted in environmental benefits and was not an environmental impact subject to CEQA.

* * *

Los Angeles Dept. of Water & Power v. County of Inyo (2021) 67 Cal.App.5th 1018, *review denied* (Nov. 17, 2021).

BACKGROUND: City department of water and power filed petition for writ of mandate, alleging that county, which sought to acquire city department's landfill sites in county by eminent domain, failed to properly identify the true nature and scope of its "project" under the California Environmental Quality Act (CEQA). Following transfer, the Superior Court, Kern County, entered judgment and issued writ, and county appealed.

HOLDING: The Court of Appeal held that: (1) county did not provide adequate notice that CEQA exemptions would be considered at public meeting, and (2) categorical CEQA exemption for existing "facilities" does not include unlined landfills. Affirmed.

Key FACTS & ANALYSIS: The County of Inyo (County) appealed from a judgment and issuance of a peremptory writ of mandate in a proceeding under CEQA. The trial court issued the writ of mandate after determining (1) County's description of the activity constituting its project was too narrow and, thus, did not comply with CEQA and (2) the project, when properly defined, was not exempt from CEQA's requirements.

The project included County's use of condemnation proceedings to acquire fee simple title to three sites it leases and uses for landfills and County's continued operation of the landfills. In arguing that the project was exempt from CEQA, County relied on the commonsense exemption and the existing facilities exemption. (See Guidelines, §§ 15061, subd. (b)(3) [commonsense exemption], 15301, subd. (a) [existing facilities exemption].)

In the published portions of the opinion, the Court of Appeal addressed exhaustion of administrative remedies and the interpretation of the existing facilities exemption. The Court of Appeal concluded that the issue exhaustion requirement does not apply to challenges to the exemptions because County did not provide adequate notice that CEQA exemptions would be considered at the public hearing held by its Board of Supervisors. The agenda request form the hearing of County's Board of Supervisors did not mention CEQA or any exemption, and nothing in the administrative record showed the public was notified before the hearing of County's possible reliance on CEQA exemptions. As a result of the lack of notice, County did not provide an "opportunity for members of the public to raise ... objections" to its reliance on those exemptions. (§ 21177, subd. (e).) Therefore, the issue exhaustion requirement did not apply to objections to County's reliance on the exemptions.

The Court of Appeal found that the word "facilities" was ambiguous—that is, reasonably susceptible to more than one interpretation—because it could be interpreted to include or exclude unlined landfills. The Court of Appeal resolved the ambiguity by interpreting "facilities" to exclude unlined landfills. Therefore, County misinterpreted the Guidelines and violated CEQA when it concluded the existing facilities exemption applied to the project.

In the unpublished portion of the opinion, the Court of Appeal concluded County committed two other CEQA violations. First, it improperly described the project as constituting only the proposed condemnation proceedings and a mere change in ownership of the landfill sites, the County did not include the nature and extent of the project, the development of new groundwater rights, the import of waste, and the remaining operational life of the landfills. Second, the unduly narrow project description caused County to erroneously conclude the commonsense exemption under CEQA applied.

The CEQA violations justified the trial court's issuance of a writ of mandate vacating County's approval of condemnation proceedings for each of the three landfills.

TAKE-AWAYS: The holding in this case serves as a reminder of the importance of including actions under CEQA in legislative body agenda descriptions to avoid challenges based on inadequate opportunity for the public to raise objections under CEQA. In this case the court held that the existing facilities exemption did not apply to the unlined landfills at issue.

* * *

Pacific Merchant Shipping Association v. Newsom (2021) 67 Cal.App.5th 711.

BACKGROUND: Plaintiffs filed an action against the Governor of the State of California and professional baseball team, alleging that the Governor's authority to certify a baseball park development project for streamlined environmental review had expired. The Superior Court, Alameda County, granted Governor's and baseball team's motions for judgment on the pleadings and upheld the Governor's ongoing certification authority. Plaintiffs appealed.

HOLDING: The Court of Appeal held that special statute providing fast-track judicial review of challenges to baseball park development project did not impose a deadline for Governor to certify the project for streamlined environmental review. Affirmed.

Key FACTS & ANALYSIS: This appeal concerns special legislation enacted to facilitate the construction of a new baseball park and mixed-use development project at the Howard Terminal site in the City of Oakland (Howard Terminal Project). Under section 21168.6.7 of the Public Resources Code, the Howard Terminal Project was eligible to qualify for expedited administrative and judicial review under the California Environmental Quality Act (CEQA) if the Governor of the State of California certified that the project met an enumerated set of job-creation, environmental protection, sustainable housing, and transit and transportation infrastructure conditions.

In March 2020, Pacific Merchant Shipping Association, Harbor Trucking Association, California Trucking Association, and Schnitzer Steel Industries, Inc. (collectively, petitioners) filed the

instant action challenging the authority of Governor Gavin Newsom to certify the project for streamlined environmental review. Specifically, petitioners claimed that, under section 21168.6.7, the Governor's authority to certify the project had expired on January 1, 2020. The Governor, the City of Oakland, and real party in interest Oakland Athletics Investment Group, LLC (Real Party and collectively, respondents) filed motions for judgment on the pleadings, arguing that section 21168.6 contained no deadline for certification by the Governor. The trial court sided with respondents' reading of the statute and upheld the Governor's ongoing certification authority. On February 11, 2021, the Governor certified the Howard Terminal Project for expedited CEQA review.

Assembly Bill 734 was special legislation applicable solely to the Howard Terminal Project. According to the Legislature, a special statute was necessary "because of the unique need for the development of a sports and mixed-use project in the City of Oakland in an expeditious manner."

In parallel with the Legislature's consideration of Assembly Bill 734, the Legislature concurrently enacted Assembly Bill 987, special legislation providing the same type of streamlined CEQA review for the "Inglewood Project," for the Los Angeles Clippers' basketball arena. Assembly Bill 987 adopted similar requirements with respect to Leadership in Energy and Environmental Design (LEED) certification, trip reduction, job creation, greenhouse gas neutrality, recycling, enforcement of environmental and mitigation measures, and allocation of costs. The legislation also required certification by the Governor and incorporated the Guidelines from Assembly Bill 900 (Guidelines) "to the extent the guidelines are applicable and do not conflict with specific requirements" of the special statute.

Assembly Bill 900 established fast-track administrative and judicial review procedures for an "environmental leadership development project" that met certain conditions, including the creation of high-wage, high-skilled jobs, no net additional emission of greenhouse gases, and the payment of certain costs by the project applicant. Under this legislation, the Governor was required to certify that the project met these statutory criteria to qualify for fast-track status. Once certified, Assembly Bill 900 established that certain CEQA court challenges must "be resolved, to the extent feasible, within 270 days." As originally enacted, Assembly Bill 900 contained no deadline for the Governor's certification of a leadership project. The relevant version of Assembly Bill 900 required the Governor to certify a leadership project by January 1, 2020 and the lead agency to approve the project by the sunset date, January 1, 2021.

Assembly Bill 987 differed from Assembly Bill 734 in two notable respects. First, Assembly Bill 987 stated that an EIR must be certified by the lead agency prior to January 1, 2025, or the statute would be repealed as of that date. Conversely, Assembly Bill 734 contained no express deadlines for certification by the Governor or project approval by a lead agency. Second, Assembly Bill 987 encouraged the California Air Quality Board (CARB) "to make its determination no later than 120 calendar days after receiving an application for review of the methodology and calculations of the [Inglewood Project's] greenhouse gas emissions," while no such expedited review or encouragement of CARB appears in Assembly Bill 734.

On November 20, 2018, shortly after the Governor signed Assembly Bill 734 into law, the City of Oakland issued a notice of preparation of a draft EIR for the Howard Terminal Project. In January

2019, the Governor updated the Guidelines to state that they applied to projects requesting streamlined judicial review under Assembly Bills 734 and 987 "to the extent the Guidelines are applicable and do not conflict with the language contained within those statutes." In March 2019, Real Party submitted an application to the Governor for certification of the project under Assembly Bill 734. However, unlike the Inglewood Project, which was certified by the Governor prior to January 1, 2020, the Howard Terminal Project was still in the certification process during 2020. In particular, CARB was still evaluating whether the Howard Terminal Project would meet its greenhouse gas reduction targets under Assembly Bill 734. It was not until August 25, 2020, over 16 months after Real Party submitted its application, that CARB finally issued its determination that the Howard Terminal Project "will meet the [greenhouse gas] requirements provided by AB 734."

The sole question on appeal was whether the Governor's power to certify the Howard Terminal Project for expedited CEQA review expired on January 1, 2020, because subdivision (e)(2) of section 21168.6.7 incorporated the certification deadline from the Guidelines into Assembly Bill 734. The Court of Appeal found that a fair reading of this legislative history supported respondents' position that the Assembly Bill 900 deadlines were not meant to be imported into Assembly Bill 734. The initial analysis of the bill by the Senate Committee on Environmental Quality focused on the ways in which Assembly Bill 734 was substantively weaker than Assembly Bill 900 with respect to environmental protections and the scope of judicial review. Both that committee and the Senate Judiciary Committee questioned whether the Howard Terminal Project should proceed as standalone legislation or be subject to the Assembly Bill 900 process. Enforcement of a one-year certification deadline prior to the expiration of Assembly Bill 900 was never mentioned. Furthermore, the author expressly acknowledged that the project could not be accomplished under the existing Assembly Bill 900 expiration date without further extension of the deadlines.

The Court of Appeal found that the legislative purpose of Assembly Bill 734 also supported the above interpretation. Considering the size of the project, a one-year deadline for certification would undermine the purpose of the legislation to allow the project to proceed. The Court of Appeal found that the more reasonable interpretation of Subdivision (e)(2) of Assembly Bill 734 was that the Guidelines were not incorporated. The Court of Appeal therefore concluded that the Governor was authorized to certify the project when he did.

TAKE-AWAY: This fact-specific case upheld the applicability of special legislation permitting fast-tracking of environmental review for the Howard Terminal ballpark and mixed-use development project.

* * *

UNREPORTED STATE COURT OF APPEAL CASES

East Meadow Action Committee v. Regents of the University of California (Cal. Ct. App., Feb. 4, 2022, No. H048695) 2022 WL 334036 [unreported].

BACKGROUND: This case arises from the proposal of the University of California, Santa Cruz (UC Santa Cruz), to build new student housing in accordance with the 2005 long range development

plan (LRDP) for the campus. The 2005 LRDP was accompanied by the 2005 program environmental impact report (EIR) that was prepared pursuant to the California Environmental Quality Act (CEQA) to evaluate the environmental effects of the campus growth anticipated in the 2005 LRDP. In 2019, respondents the Regents of the University of California (Regents) approved the Student Housing West [SHW] project, which included building family student housing on a portion of the UC Santa Cruz campus known as the East Meadow. The project-level EIR for the SHW project was tiered from the 2005 LRDP program EIR.

East Meadow Action Committee, "an unincorporated association of current and former [UC Santa Cruz] staff, students, and alumni, as well as residents and taxpayers of and within the City of Santa Cruz and the County of Santa Cruz," challenged the Regents' approval of the SHW project by filing a petition for writ of mandamus alleging violations of CEQA's requirements for environmental review.

The trial court granted the petition for writ of mandamus to the extent it asserted that the Regents' findings regarding the infeasibility of the SHW project alternatives did not comply with CEQA, and denied the petition as to all other claims of CEQA violations. The court ordered that a peremptory writ of mandate issue directing the Regents to correct the CEQA error regarding the infeasibility of the project alternatives, and staying all SHW project activities until the error was corrected.

In its appeal, East Meadow Action Committee contended that the trial court erred because : (1) tiering the SHW project EIR from the 2005 LRDP program EIR was improper; (2) the SHW project EIR failed to analyze cumulative impacts; and (3) the trial court improperly limited the scope of the peremptory writ of mandate.

HOLDING: The Court of Appeal, affirmed, finding no error.

Key FACTS & ANALYSIS: Regarding the claim that the SHW project EIR was improperly tiered from the 2005 LRDP program EIR, the trial court found that the SHW project EIR could be tiered because the amendment to the 2005 LRDP redesignated the site and the statutory scheme allowed tiering from a broad program EIR where a site-specific analysis was conducted for the portions of a project not adequately addressed in the program EIR. Under Public Resources Code section 21094, subdivision (b) tiering "applies only to a later project which the lead agency determines (1) is consistent with the program, plan, policy, or ordinance for which an environmental impact report has been prepared and certified, (2) is consistent with applicable local land use plans and zoning of the city ... in which the later project would be located, and (3) is not subject to Section 21166 [EIR required when substantial changes in the project require major revisions of a previously-prepared EIR]."

The Court of Appeal observed that one of the purposes of the 2005 LRDP was to plan for the development of the UC Santa Cruz campus to accommodate growth in campus enrollment through 2020. The campus development anticipated in the 2005 LRDP expressly included developing additional student housing for undergraduates, graduate students, and students with families. The 2005 LRDP specifically stated that the development plan included replacement of existing family student housing and the development of additional family student housing in other locations on

campus. Therefore, development of family student housing on the site, as analyzed in the SHW project EIR, was consistent with the 2005 LRDP as it pertained to family student housing. The change in land use designation to the site at issue was also expressly contemplated in the 2005 LRDP. The Court of Appeal accordingly affirmed that tiering was properly used from the 2005 LRDP.

With regard to analysis of cumulative impacts, East Meadow Action Committee argued that the Respondents could not tier the SHW Project EIR from the 2005 LRDP EIR due to alleged conflicts between the documents, and inconsistencies with the program and policy adopted in 2005. However, because the Court of Appeal found that the SHW project was consistent with the 2005 LRDP within the meaning of Public Resources Code section 21094(b), the Court of Appeal found no merit in the contentions. East Meadow Action Committee failed to meet its burden to show that the SHW project EIR's discussion of cumulative impacts with respect to the site was inadequate under CEQA.

With regard to the trial court's limited writ of mandate, the trial court ruled that the Regents had violated CEQA by improperly rejecting the alternatives to the SHW project as economically infeasible on the basis of a non-public cost analysis that was delegated to a three-member committee. The trial court therefore ordered that a peremptory writ issue directing the Board of Regents as a whole to correct the CEQA error by reconsidering the Regents' approvals of the SHW project and the feasibility of the project alternatives, and stayed all SHW project activities until the Regents complied with the peremptory writ. The merits of that ruling were not at issue on appeal. East Meadow Action Committee failed to meet its burden to show that the trial court abused its discretion in limiting the scope of the peremptory writ to a correction of the sole CEQA error found by the court and staying SHW project activities until the error was corrected. The trial court had the discretion under CEQA to leave the project approval in place.

* * *

Save Our Rural Town v. County of Los Angeles (Cal. Ct. App., Jan. 26, 2022, No. B309992) 2022 WL 224163 [unreported].

BACKGROUND: Save Our Rural Town (SORT) appealed from the trial court judgment denying its writ petition. The trial court found that the OurCounty environmental strategy plan (OurCounty) adopted by Los Angeles County was not a project under the California Environmental Quality Act (CEQA) and therefore did not yet require a formal environmental review.

HOLDING: The Court of Appeal affirmed, concluding that that OurCounty was merely aspirational and insufficiently concrete to amount to a project under CEQA.

Key FACTS & ANALYSIS: In 2016, the Los Angeles County Board of Supervisors established a Chief Sustainability Office (CSO) "to create a vision for making our communities healthier, more equitable, economically stronger, more resilient, and more sustainable." The CSO also was "tasked with developing, implementing, and updating a new Countywide Sustainability Plan." Its formal efforts to create such a plan, including stakeholder workshops, presentations to "business, civic, and community organizations across the region," "expos" in each of the county's supervisorial

regions, and circulation of a "discussion draft," began in late 2017 and continued through mid-2019.

OurCounty contained 12 "broad, aspirational, and cross-cutting goals." The goals, defined by the plan as "[b]road, aspirational statement[s] of what we want to achieve," were supported by 37 "strategies," defined as "[l]ong-range approach or approaches that we take to achieve a goal," and 159 "actions," defined as "[s]pecific policy, program[s], or tool[s] we use to support a strategy." The plan identified certain targets for particular jurisdictions. OurCounty expressly provided that, "[a]s a strategic plan," it "does not supersede land use plans that have been adopted by the Regional Planning Commission and Board of Supervisors, including the County's General Plan and various community, neighborhood, and area plans." The CSO also advised commenters that "the plan will not be legally enforceable," and "was not intended to be a new policy document with enforceability that acted as an ordinance, general plan or have land use and zoning designation/regulation authority."

SORT filed a verified petition for writ of mandate and complaint for declaratory and injunctive relief in January 2020. It alleged the County violated CEQA by failing to prepare an environmental impact report (EIR) or consider the environmental factors of OurCounty.

The Court of Appeal agreed with the trial court that the County's commitment to moving ahead with an aspirational plan did not somehow make it tangible enough to constitute a project under CEQA requiring environmental review. Unlike precedential cases relied upon by SORT, OurCounty only contained high-level strategy, and did not require or commit to any concrete development. For example, a goal to increase renewable energy could be accomplished with a variety of methods, and in a variety of locations. Without specification on how the plan would be implemented, it was not sufficiently concrete to be a project under CEQA.

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Citizens' Committee To Complete the Refuge v. City of Newark (Cal. Ct. App., Dec. 29, 2021, No. A162045) 2021 WL 6694579 [unreported].

BACKGROUND: Citizens' Committee to Complete the Refuge (CCCR) and Center for Biological Diversity appealed from the denial of their petition for writ of mandate under the California Environmental Quality Act (CEQA). Plaintiffs argued the City of Newark (City) violated CEQA when it approved a housing development project by relying on the environmental impact report (EIR) from its approval of a specific plan without conducting further environmental review.

HOLDING: The Court of Appeal concluded the City's project was exempt from further CEQA review under Government Code section 65457 because it implemented and was consistent with the specific plan, and substantial evidence supported the City's conclusion that no project changes, changed circumstances, or new information required additional analysis. The Court of Appeal also determined that the City's deferral of analysis of potential flood control projects to address sea level rise in the latter half of this century was proper. The judgment of the trial court was affirmed.

Key FACTS & ANALYSIS: In 2010, the City certified an EIR on the specific plan for particular areas "Areas 3 and 4", approved the specific plan for Areas 3 and 4, and entered into a development

agreement for the specific plan. The specific plan allowed development of up to 1,260 residential units as well as a golf course and related facilities. One subarea could contain only recreational uses such as the golf course.

The City's revised EIR's (REIR) analysis of environmental impacts was "based on the potential environmental impacts of the maximum development permitted by the Specific Plan."

The REIR further stated that the City would proceed under CEQA Guidelines section 15168. But the REIR also quoted the statement in CEQA Guidelines section 15168, subdivision (c)(5) that, with an adequately detailed analysis in a program EIR, "many subsequent activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required."

In 2019, applicants submitted a proposed subdivision map for approval of residential lots below what was authorized by the specific plan. To determine whether the REIR sufficiently addressed the environmental impacts of the proposed subdivision map, the City prepared a checklist comparing the REIR's analysis of the impacts of the specific plan with the impacts of the subdivision map. The checklist included supporting materials. The checklist concluded the construction would be consistent with the specific plan, and there were no changed circumstances or new information that might trigger the need for additional environmental review. The City posted the checklist for public comment and responded to those comments. The City then approved the subdivision map based on the analysis in the checklist.

Plaintiffs challenged the map and checklist via a petition for writ of mandate and complaint for injunctive relief. The trial court denied appellants' writ petition, concluding the administrative record contained substantial evidence to support the City's determination that further environmental review after the REIR was not necessary.

The Court of Appeal agreed.

First, regarding escape habitat for a "harvest mouse", the specific plan REIR already addressed the loss of upland escape habitat, so the subdivision map's impact on such habitat was not new. The subdivision map's change of developing less of the habitat did not require a new EIR.

Second, the applicants removed plans for the golf course. The petitioners argued this removed another escape habitat and constituted a substantial change. However, the REIR's finding of no significant impact from the development did not depend on the golf course continuing to provide a habitat. Moreover, the abandonment of the golf course resulted in less development than planned for in the specific plan. Even if development could occur there in the future, the City could not be faulted for not considered development that was not currently proposed.

Third, the REIR disclosed indirect impacts to the harvest mouse due to development. Because the subdivision map would develop fewer acres than the specific plan, in total the impacts on the harvest mouse would be reduced.

The only aspect of the subdivision map that appellants identified which the REIR did not already address is the fact that the western sides of the raised and filled developed areas would be armored with riprap. However, this information was not "of substantial importance."

Finally, the plaintiffs' arguments that rising sea level required a new EIR were misplaced. The REIR noted that the rate of sea level rise was uncertain. Sea level rise was not an impact caused by the project, so neither the REIR nor the City's CEQA checklist was required to discuss the effects of sea level rise on the project at all.

* * *

Gulli v. San Joaquin Area Flood Control Agency (Cal. Ct. App., Dec. 3, 2021, No. C088010) 2021 WL 5754312, *reh'g denied* (Jan. 3, 2022), *review filed* (Jan. 12, 2022) [unreported].

BACKGROUND: Plaintiff Dominick Gulli's company, Green Mountain Engineering, was one of two companies to submit proposals to build a flood gate to address potential flooding in Stockton. Gulli's proposal, which claimed a flood gate was unnecessary, was not selected by defendant San Joaquin Area Flood Control Agency (Agency). After the Agency certified a final Environmental Impact Report (EIR) and approved the selected project, Gulli petitioned for a writ of mandate, seeking, among other things, to vacate the EIR, suspend all activity, and require the Agency to contract with him. The trial court ultimately denied Gulli's petition.

HOLDING: The Court of Appeal affirmed.

Key FACTS & ANALYSIS: On appeal, Gulli contended: (1) the administrative record did not conform to Public Resources Code section 21167.62; (2) the selected project was not needed for flood protection; and (3) the EIR failed to inform the public and elected officials of various environmental consequences. Many contentions were grounded on the belief that Gulli's solution was superior, as well as expert disagreement with the Agency's determinations. Gulli argued on appeal that the flood control issue could be best addressed "by simply buying diesel pumps and piping such that if a 100-year storm rains in Stockton and the power goes out the pumps can evacuate the water into the river." The Court based its opinion on the grounds that the law is clear that disagreement amongst experts does not make an EIR inadequate.

In 2008, the Federal Emergency Management Agency (FEMA), revoked accreditation of levees surrounding the Smith Canal in Stockton. The surrounding area became a "special flood hazard area," an area expected to be inundated by a 100-year flood. To address the flood risk and reacquire FEMA accreditation, the Agency evaluated several options, ultimately concluding the most cost-effective alternative was constructing a fixed flood wall and gate structure at the mouth of the Smith Canal.

In July 2013, with the Agency's authorization, proposals to build the Smith Canal Gate were sought from engineering firms. Two firms responded with proposals; one was Gulli's company, Green Mountain Engineering. In the proposal, Gulli suggested an alternative to a gate. The other firm was unanimously selected, and the Agency entered into a consultant contract with it.

After commenting on the draft EIR and EIR , Gulli, acting in pro per, petitioned for a writ of mandate. In his petition, he argued the selected gate proposal would damage the environment more than other possible solutions. He sought to, inter alia, vacate the EIR, suspend all activity, require the Agency to "thoroughly and completely review alternatives to rehabilitate the levees," and require that the Agency contract with him. After a series of successful demurrers to certain causes of action, Gulli filed his third amended petition. In it, Gulli requested more circumscribed relief, limiting his causes of actions to CEQA claims.

First, the Court of Appeal declined to consider additional evidence under Code of Civil Procedure section 909. The Court of Appeal found no exceptional circumstances to justify considering additional evidence under that section, particularly because Gulli failed to specify which additional evidence he wanted the court to consider.

Second, Gulli contended the record failed to comply with section 21167.6, subdivision (e) and argued that counsel for the Agency determined the contents of the record; the record failed to include prejudicial information; the record was burdensome, duplicative and unorganized; documents in the record were illegally redacted; and he was not allowed to correct, supplement, or augment the record. The Court of Appeal found no error. None of the arguments raised demonstrated an error on the part of the trial court regarding the scope of the record. None were more than perfunctory claims. The Court of Appeal therefore concluded that substantial evidence supported the finding that the record complied with section 21167.6.

Third, Gulli contended that the project was not needed for flood protection. The Court of Appeal declined to hear the argument that the Agency withheld information from the EIR and failed to recirculate it, because Gulli did not appropriately plead it, referring instead to trial court briefs. The Court of Appeal did consider the argument that the selected firm's project was not appropriate, the Court indicated that the argument was a dispute among experts, which was not sufficient to render an EIR insufficient. Third, the Court of Appeal declined to consider the allegations that the "map revision" was obtained through filing a false federal document. The Court of Appeal found that it was not clear which document the allegation was referring to.

Fourth, Gulli argued the EIR failed to address two particular public comments. The Court found to the contrary—the one had been directly addressed, and that while the EIR did not respond specifically to the second, its examination on the same topic indicated that no prejudice resulted. The Court rejected the remaining claims. Gulli could not rely on a difference of opinion to show noncompliance with CEQA. Contentions not raised before the trial court could not be considered. Issues not raised during the CEQA process were barred under exhaustion of administrative remedies, and the remaining argument held no merit.

* * *

Chinatown Community for Equitable Development v. City of Los Angeles (Cal. Ct. App., Dec. 2, 2021, No. B307157) 2021 WL 5709507, *review filed* (Jan. 11, 2022) [unreported].

BACKGROUND: Chinatown Community for Equitable Development (CCED) appealed from a trial court judgment denying its petition for writ of mandate and complaint for declaratory relief (petition). CCED filed the petition following the decision by respondents City of Los Angeles, Los

Angeles City Council, and Los Angeles Department of City Planning (city) to approve a 725-unit, mixed-use development (project) proposed by real party in interest and respondent Atlas Capital Group, LLC (Atlas).

CCED claimed that the trial court misinterpreted the law in rendering its decision that Measure JJJ, a voter-approved initiative, did not apply to the project because Atlas's map application was deemed complete six months prior to Measure JJJ's effective date.

CCED further challenged the trial court's determination that substantial evidence supported respondents' compliance with the California Environmental Quality Act (CEQA). Specifically, CCED claimed that substantial evidence did not support the conclusion contained in the environmental impact report (EIR) that no significant hazards existed. CCED claimed that evidence of project site remediation and cleanup of soil contamination on the site occurring prior to 2003 did not support the conclusion of no significant hazards due to certain modifications of the project since it was initially proposed.

Finally, CCED claimed the city was required to recirculate the EIR based on significant new information and revisions in the final EIR, including revisions to the methane mitigation plan and removal of the project's designation as a project required to comply with footnote 12 of the Central City North Community Plan (Footnote 12).

HOLDING: The Court of Appeal found that under the applicable Government Code sections governing the approval process and the vesting of a developer's rights, Measure JJJ was not applicable to the project. The Court of Appeal further found that CCED failed to meet its burden of showing that there was insufficient evidence to support the less than significant hazards finding and the decision not to recirculate the EIR. Therefore, the Court of Appeal affirmed the judgment.

KEY FACTS & ANALYSIS:

Measure JJJ

Measure JJJ was a voter-initiative which imposed certain affordability and labor requirements on new developments such as the project.

The Court of Appeal found that Measure JJJ did not apply to the project, because Measure JJJ became effective approximately 6 months after the project was deemed complete by operation of law pursuant to the Subdivision Map Act. (Gov. Code, § 65943, subd. (a).) CCED claimed that the trial court erred in construing the city's approval of the project's vesting tentative tract map to grant a vested right to proceed with the project because the project was conditioned on the city council ultimately approving the project's general plan amendment and zoning and height district changes. However, CCED failed to cite any authority to support a claim that the vesting under the Subdivision Map Act did not apply when an applicant was also seeking a zone change or general plan amendment. CCED further argued that Measure JJJ was not a general plan, specific plan, zoning, or subdivision ordinance. CCED claimed that Atlas did not have a vested right to approval of its requests and the city's voters were free to impose additional conditions such as Measure JJJ's affordability and labor standards as part of its approval of those conditions through a voter initiative such as Measure JJJ. The Court of Appeal found no reason to categorize Measure JJJ and the subsequent amendments to the municipal code as anything other than changes in standards that

the Subdivision Map Act intended to cover. Contrary to CCED's argument Measure JJJ was proposed as an ordinance from its inception. Regardless of its origin once Measure JJJ, as a voter initiative, was enacted by the city in December 2016 through ordinance No. 184745, it became a generally applicable land use ordinance. In short, the city and the trial court properly concluded that Measure JJJ was inapplicable to the project.

Finding of No Significant Hazards

The EIR concluded that the project would result in a less than significant impact—that it would not expose persons to substantial risk—from reasonably foreseeable conditions involving the release of hazardous materials in the environment. CCED contended that substantial evidence did not support this conclusion. Specifically, CCED contended that the groundwater and soil contamination could have significant impacts on outdoor workers and construction workers because the project departed from proposed uses initially assumed by a 2003 "No Further Action" determination letter issued by the Los Angeles Regional Water Quality Control Board (LARWQCB). The No Further Action letter prohibited residential use of the ground floor. It also noted that at that time the project included no underground structures, green areas, or unpaved areas. CCED claimed that the project departed from the proposed use of the land at the time of the 2003 determination, therefore the EIR could no longer rely on the 2003 No Further Action letter. Because there was no recent sampling or investigation, CCED contended that the EIR's reliance on the No Further Action letter was insufficient. However, the EIR had documented what had occurred since the No Further Action letter and had discussed the investigation and of the soil contamination at the site. It further discussed the lack of ground-level residential uses, and the impact of construction activities. The Court of Appeal found that substantial evidence supported the conclusion of less than significant hazards regarding soil contamination. The Court of Appeal further found that CCED failed to show a significant enough departure from the proposed use of the land in the 2003 letter that would render the letter insufficient support for the city's conclusion. The No Further Action letter did not suggest that design changes such as those challenged would present obstacles or change the conclusion of the No Further Action letter that "the health risks associated with residual contamination left in soils at the Site would not exceed—and most likely [would] be less than—those estimated for the protection of human health." Further, there was evidence in the record that the city provided written notice to the water board that the project had been revised to include underground parking. The city received written reassurance in response that "unless additional contamination is encountered during future activities at the site (such as during the excavation work for the subterranean parking structure), no further review [was] needed from the [LARWQCB]."

Finally, CCED failed to show that the city was required to recirculate the EIR. CCED argued that the city was required to recirculate the EIR for two reasons: first, because the city revised the final EIR to include a methane mitigation plan to mitigate methane hazards from the project; and second, because the city revised the EIR to remove the project's Footnote 12 designation and the associated general plan amendment. On the first claim, several public comments on the draft EIR (DEIR) concerned its failure to describe in detail the project's methane mitigation system. The city provided comprehensive responses to these comments. The city explained that the DEIR acknowledged that the project site is located in a city-designated methane zone, which means that methane was a condition of the existing setting, not an impact of the project. As such the methane did not need to be mitigated by the project. Instead, this condition, which existed in the setting,

had to be addressed through regulatory compliance. The additional information in the final EIR with regard to the methane mitigation plan merely clarified and amplified this information. In response to public requests the city provided details regarding the methane mitigation plan required by the Methane Code, as well as available testing results. The Court of Appeal found that this amplified or clarified the DEIR, and therefore the city was not required to recirculate the EIR. On the second claim, the city was not required to recirculate the EIR when it deleted reference to Footnote 12, from which Atlas sought deviation. The removal of the Footnote 12 designation did not deprive the public of a meaningful opportunity to comment on a substantial adverse environmental effect of the project or a feasible project alternative or mitigation measure that would clearly reduce such an effect. Rather, the Court of Appeal opined that the removed text related to an affordable housing proposal that was never formally adopted. Removing a request to deviate from an inapplicable legal requirement regarding affordable housing did not concern an environmental effect and therefore was not " 'significant new information' " requiring recirculation of an EIR under the applicable law.

* * *

Citizens for a Safe and Sewage-Free McKinley Park v. City of Sacramento (Cal. Ct. App., Nov. 24, 2021, No. C090760) 2021 WL 5504230 [unreported].

BACKGROUND: The City of Sacramento (City) operated a combined sewer and storm water system that serves over 200,000 residents in downtown Sacramento and surrounding areas, including the McKinley Park area in East Sacramento. This case involved a challenge under the California Environmental Quality Act (CEQA) to the McKinley Water Vault Project (the project), designed to reduce flooding and the outflow of wastewater from the combined sewer system during large storm events by providing additional storage capacity for the system via a below-ground storage facility (the vault). Plaintiff Citizens For a Safe and Sewage-Free McKinley Park (Citizens) appealed from the denial of its mandamus petition seeking to set aside the City's certification of an environmental impact report (EIR) and approval of the project.

On appeal, Citizens contended the EIR violated CEQA by failing to adequately analyze various environmental impacts of the project and failing to analyze a reasonable range of project alternatives. Citizens added that recirculation of the EIR was required under CEQA due to the addition of significant new information following the public review period.

HOLDING: The Court of Appeal disagreed with each of the claims of error and affirmed.

KEY FACTS & ANALYSIS: Citizens contended the EIR violated CEQA by failing to adequately analyze various environmental impacts of the project.

First, Citizens contended the EIR was deficient because it contained virtually no analysis of how construction activities may damage or destroy dozens of trees at the project site. According to Citizens, the EIR was inadequate because it failed to: (1) consider how construction activities may adversely impact all trees at the project site, not just the trees to be removed; (2) evaluate the impacts to trees caused by construction vehicles entering and leaving the project site, including the impact from construction vehicles compacting soil above the roots of trees; and (3) analyze the impacts to trees caused by placing or storing construction equipment or material at the project site.

The draft EIR explained that approximately 129 trees were surveyed within the proposed project area, that those trees are generally located on the periphery of the work area and along access paths, and that the project was designed to avoid the removal and/or pruning of trees in accordance with Sacramento City Code 12.56 (Tree Ordinance), with the assistance of a report from an arborist. The draft EIR stated, "Figure 2.4-2 illustrates the trees surveyed and their identified driplines [or protection zones] to be avoided to the extent feasible." Unlike the case cited by Citizens the project did not involve excavation of structural root zones. The Court of Appeal thus found that the analysis of trees was adequate.

Second, Citizens contended the City violated CEQA because it failed to analyze the impacts of the project on McKinley Park as an historic resource until the release of the final EIR, which deprived the public and responsible agencies of a meaningful opportunity to comment on this issue. Citizens further contended that, even if it were proper for the City to analyze the project's impacts on an historic resource for the first time in the final EIR, substantial evidence did not support the final EIR's conclusion that the project would be consistent with the Secretary of Interior's Standards for Rehabilitation. The Court of Appeal disagreed on both points.

Initially, the Court of Appeal disagreed that the draft EIR was required to analyze the project's impacts on McKinley Park as an historic resource. At the time the draft EIR was published, McKinley Park had not been listed on a federal, state, or local register of historic landmarks or places. Further, the record reflected that the public and responsible agencies were not deprived of a meaningful opportunity to comment on this issue, and substantial evidence supported the EIR's conclusion that the project's impacts on an historical resource would be less than significant.

Third, Citizens contended the EIR's analysis of air quality impacts on sensitive receptors was deficient because it was based on fundamentally flawed assumptions, and failed to account for: (1) two-way hauling trips, with idling time on each end; (2) the use of a single access point to the project as opposed to two access points; and (3) the larger project area identified in the final EIR. The Court of Appeal disagreed.

The draft EIR explained that construction of the project would cause a temporary increase in traffic volumes on streets near the project site, resulting in an increase in carbon dioxide emissions during construction. The draft EIR further explained: "The proposed Project would generate approximately 4,722 total hauling trips throughout Project construction. Although hauling and construction worker vehicle trips would cause a temporary increase in traffic during Project construction, these additional trips would not result in a significant increase to congestion on local roadways since construction traffic would be intermittent and staggered in timing from residential and other local traffic in the area. Therefore, the proposed Project would not have the potential to expose sensitive receptors to substantial concentrations of localized [carbon dioxide]."

In response to comments about the air quality analysis in the draft EIR, the final EIR provided the an explanation regarding construction-related hauling trips. The Court found that Citizens failed to carry its burden showing the analysis was inadequate.

The Court of Appeal also rejected Citizens' contention that the draft EIR's analysis of air quality impacts was deficient due to the subsequent reduction from two to one project access point. The draft EIR identified two proposed alternative access routes stated that access routes would be

established during site preparation, and contemplated limiting access routes "when feasible" to mitigate impacts to trees. While the final EIR identified only one access route to the project site, Citizens had not carried its burden to demonstrate that the EIR's air quality analysis was inadequate because it was based on the "false assumption" that construction traffic would be divided between the two proposed access points.

The Court of Appeal rejected Citizens' contention that the draft EIR's analysis of air quality impacts was deficient because the final EIR showed a larger project work area than analyzed in the draft EIR, with no updated analysis of the air quality impacts. Citizens did not cite any portion of the final EIR to support its vague contention that the final EIR showed a "far larger" project work area.

Fourth, the draft EIR described the regulatory and environmental setting for transportation and traffic, and explained the methodology used to determine whether the project's impacts on traffic and transportation near the project site would be significant, including use of the CEQA Guidelines Appendix G checklist and the Level of Service (LOS) method. The Court of Appeal found no merit in Citizens' contention that the EIR's transportation and traffic impact analysis was deficient. The record disclosed substantial evidence supporting the EIR's conclusion that the project's impacts on traffic would be less than significant with mitigation. The draft EIR identified two proposed alternative access routes. Equally without merit was Citizens' conclusory contention that the draft EIR was inadequate for failing to "evaluate the impacts that may be caused by residents of Park Way and 33rd Street being forced to use the intersection at 33rd Street and H Street for both ingress and egress to their homes." The draft EIR stated, "Park Way and 33rd Street may experience temporary partial closures from installation of Project features within the roadway, parking restrictions, or construction site access; however, residential access would be maintained throughout construction for all road closures as required by [implementation of a traffic and pedestrian control plan]." Thus, the record reflected that the draft EIR considered the traffic impacts from temporary partial road closures in determining that the project would have less than a significant impact on traffic with mitigation.

Fifth, Citizens contended the EIR was deficient because it failed to adequately analyze noise and vibration impacts with respect to children at the nearby daycare. Citizens additionally contended the EIR was deficient because it failed to adequately analyze the noise and vibration impacts with respect to residences, including older or historic residences. The Court of Appeal disagreed. The record disclosed substantial evidence supporting the EIR's conclusion that the project would have less than significant impacts regarding noise and vibration. Contrary to Citizens' contention, the EIR considered and analyzed the project's noise and vibration impacts on sensitive receptors near the project site, including impacts to children attending the daycare, as well as the vibration impacts on historic homes.

Sixth, Citizens contended the EIR was deficient because: (1) its conclusion that the project would cause no significant "liquefaction" impacts was not supported by substantial evidence; (2) its conclusions about landslide hazards were not supported by substantial evidence; and (3) the EIR did not include any mitigation measures to ensure that landslide risks were minimized. Although Citizens initially complained that the EIR was deficient because the draft EIR did not include a site-specific geotechnical report, it acknowledged that such a report was attached to the final EIR. Citizens failed to show how the EIR was deficient with the inclusion of this report. Citizens also

faulted the EIR for discussing soil conditions at a regional level rather than a site-specific level. However, the final EIR explained that site-specific information of the soils in the project area was gathered via soil borings, as discussed in the geotechnical report. The Court of Appeal was not persuaded by the remaining arguments raised by Citizens as to the adequacy of the EIR's analysis regarding geology and soils, which were conclusory in nature and did not show that the EIR was deficient.

Seventh, the Court of Appeal rejected Citizens' initial contention that the EIR was deficient because it failed to evaluate the risks associated with storing sewage material beneath McKinley Park, including analyzing the impacts from a leak or overflow after a large storm event. Citizens failed to carry its burden to show that the EIR's hazardous materials analysis was inadequate. The EIR addressed these concerns and described a temporary and well-maintained storage facility that, even if overwhelmed by the weather, would serve to reduce flooding and sewage overflows. Citizens failed to demonstrate that the EIR was deficient for failing to consider the impacts from a leak in the vault or the inlet and outlet pipelines.

Eighth, Citizens contended the EIR violated CEQA by failing to identify and consider a reasonable range of project alternatives. The Court of Appeal disagreed. The draft EIR analyzed three project alternatives and one no project alternative. The draft EIR discussed the ability of the three alternatives to meet the objectives of the project and the environmental impacts of the alternatives. In rejecting the three alternatives and concluding that the proposed project is the environmentally superior alternative, the draft EIR found that none of the alternatives would cause impacts less severe that the proposed project, each of the alternatives would cause environmental impacts more severe than the proposed project, and the alternatives would not or only partially achieve the proposed project objectives as compared to the proposed project. Equally without merit was Citizens' cursory contention that the EIR's alternatives analysis was deficient because it failed to account for the fact that McKinley Park was a unique site compared to the alternative locations due to its historic nature and listing in the National Register of Historic Places. The EIR considered the historic nature of McKinley Park and determined that the proposed project would not cause a substantial adverse change to the historical significance or integrity of the park, since the park would maintain its existing uses once construction is finished and the historical context would be maintained.

Finally, Citizens contended the City violated CEQA by failing to recirculate the EIR. According to Citizens, recirculation was required due to the addition of significant new information to the EIR following the public review period. The Court of Appeal disagreed, rejecting Citizens' initial argument that recirculation of the EIR was required because the final EIR expanded the project work area by approximately 159,000 square feet and failed to analyze the environmental impacts that might be caused by such an expansion. In support of its position, Citizens did not cite any portion of the draft EIR or final EIR showing an expansion of the project by 159,000 square feet, instead it relied on a letter. The City conceded that the drawings included in the final EIR showed a "modestly larger" construction staging area than the proposed staging area depicted in the draft EIR, but argued that Citizens failed to meet its burden to demonstrate that this amounted to significant new information requiring recirculation of the EIR. The Court of Appeal agreed. Citizens' argument failed to show that the expansion of the construction staging area qualified as

significant new information requiring an opportunity for further public comment and additional analysis by the City.

The Court of Appeal further rejected Citizens' contention that the EIR should have been recirculated because the final EIR identified a single access point to the project site whereas the draft EIR contemplated that the project would have two access points to the site. Citizens failed to show that the City's selection of one of the proposed access routes in the draft EIR constituted significant new information triggering the need to recirculate the EIR. The public was not deprived of a meaningful opportunity to comment on this issue. The draft EIR contemplated limiting access routes to the project site "when feasible" to minimize impacts to trees.

Finally, the Court of Appeal rejected Citizens' contention that recirculation of the EIR was required because the draft EIR contained virtually no analysis of the project's impacts on McKinley Park as an historical resource, and the final EIR included seven pages of new analysis on this issue.

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510pacificave v. Piana (Cal. Ct. App., Nov. 22, 2021, No. B304189) 2021 WL 5445999 [unreported].

BACKGROUND: An apartment lease agreement provided that the renter would be the apartment's sole occupant, and would pay an added $200 "per occupant" if she allowed someone else to occupy the apartment. Rather than occupy the apartment herself, the renter sublet it to 1,090 Airbnb guests on a day-rate basis. The landlord sued for breach of contract and moved for summary adjudication of that sole cause of action. Finding no triable issue as to whether the renter breached the lease agreement, the trial court granted summary adjudication, and at a later hearing the court determined the undisputed damages were $200 per Airbnb guest, amounting to $218,000. The court entered judgment for that amount. The renter contended the $200 charge per Airbnb guest constituted a rent "increase" that violated the Rent Stabilization Ordinance of the City of Los Angeles.

HOLDING: The Court of Appeal affirmed the judgment of the trial court, finding that the charge did not constitute a rent "increase."

KEY FACTS & ANALYSIS: The City of Los Angeles regulated various aspects of the landlord/tenant relationship, including rent "increases." (LAMC, § 151.01.) A rent increase was defined as "[a]n increase in rent or any reduction in housing services where there is not a corresponding reduction in the amount of rent received." (LAMC, § 151.02.)

The City's Rent Stabilization Ordinance provided that "[f]or a rental unit which has an additional tenant joining the occupants of the rental unit thereby resulting in an increase in the number of tenants existing at the inception of the tenancy ... [¶] ... The landlord may increase the maximum rent or maximum adjusted rent by an amount not to exceed 10% for each additional tenant that joins the occupants of the rental unit." (LAMC, § 151.06, subd. (G)(a).) "The rental unit shall not be eligible for a rent increase until the additional tenant has maintained residence in the rental unit for a minimum of thirty consecutive days." (LAMC, § 151.06, subd. (G)(b).)

The Rent Stabilization Ordinance did not regulate initial rents. (Civ. Code, § 1954.52, subd. (a) ["Notwithstanding any other provision of law, an owner of residential real property may establish the initial and all subsequent rental rates for a dwelling or a unit"]; see also *Bullard v. San Francisco Residential Rent Stabilization Bd.* (2003) 106 Cal.App.4th 488, 489 [landlords are permitted to "set the initial rent for vacant units"].)

The Court of Appeal opined that the $200 surcharge per occupant was a contingent part of the initial rent for the apartment, not an "increase" for purposes of the Rent Stabilization Ordinance. It was set forth in the lease agreement and never changed. That the contingency was realized and the surcharge therefore invoked did not constitute a rent "increase" for purposes of the Rent Stabilization Ordinance.

For this, and other reasons related to the specific provisions of the lease at issue, the Court of Appeal affirmed the judgment of the trial court.

TAKE-AWAYS: Courts may construe a surcharge in a lease for occupants as part of initial rent, which landlord may impose outside of a City's rent stabilization ordinance.

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AIDS Healthcare Foundation v. City of Los Angeles (Cal. Ct. App., Nov. 1, 2021, No. B313529) 2021 WL 5048628, *review denied* (Jan. 19, 2022) [unreported].

BACKGROUND: The City of Los Angeles (City) certified an environmental impact report (EIR) and adopted findings concerning a redevelopment project proposed by real party in interest Riley Realty LP (Riley). AIDS Healthcare Foundation (AHF) filed a petition for writ of mandate in the superior court challenging the City's certification of the EIR and other project-related entitlements on the ground, among others, that the EIR failed to comply with the California Environmental Quality Act (CEQA). The court denied the petition and entered judgment for the City and Riley. AHF contended that the EIR was inadequate by failing to consider and analyze the possibility of scheduling construction of the Project and other nearby construction projects so as to mitigate the cumulative construction noise of the projects.

HOLDING: The Court of Appeal agreed with the City and Riley that AHF did not raise the cumulative construction noise argument during the administrative proceedings below and thus failed to exhaust its administrative remedies. The Court of Appeal therefore affirmed the judgment.

Key FACTS & ANALYSIS: Riley was the proponent of a project to redevelop approximately 1.16 acres (the Project). There was one single family residence, one duplex, a detached garage below a studio apartment, and three two-story apartment buildings on the site. As initially proposed, the Project would replace the buildings with two buildings. One of the new buildings would be 20 stories tall and include commercial, hotel, and residential uses. The second building would provide three floors of residential units. The Draft EIR (DEIR) for the Project concluded that construction noise impacts would be less than significant and that no mitigation measures were required. The DEIR included a list of past, present, and probable future projects producing related or cumulative impacts. According to the DEIR, if these nearby projects were constructed concurrently with construction of the Project, "significant and unavoidable cumulative construction noise impacts

could result." The proposed noise mitigation measures included: the construction of 15-foot tall construction noise barriers between the Project site and adjacent properties; the use of "state-of-the-art noise minimization strategies when using mechanized construction equipment"; not operating heavy construction equipment within 15 feet of the nearby single family residence; and employing personnel and equipment to monitor ground vibrations. Even with the mitigation measures, the DEIR concluded, "construction noise impacts would remain significant and unavoidable."

AHF submitted comments with respect to the DEIR's analysis of, among other matters, the Project's noise impacts. The comments included the following: (1) "[T]he analysis of existing ambient noise levels at locations of noise-sensitive receptors [was] incomplete"; (2) Baseline noise levels, or "significance thresholds," used in the DEIR "d[id] not adequately capture noise impacts that [were] potentially significant"; (3) Specified locations of noise measuring equipment "[did] not allow adequate assessment of noise levels at residential uses adjacent to the Project site"; (4) the DEIR underestimate[d] the number of times per hour that the entrance to a parking structure would be used; (5) the analysis of impacts from the use of an emergency generator [was] flawed; and (6) the DEIR underestimate[d] the "composite noise level impacts" of the Project. Regarding the discussion of mitigation measures for "construction-related noise impacts—including cumulative impacts," AHF asserted that the DEIR "d[id] not adequately discuss the feasibility of additional mitigation measures beyond those proposed, and [did] not provide information regarding the incremental benefits of increasing mitigation beyond that in the identified mitigation measures."

Following the administrative process, AHF contended in its petition for writ of mandate that the City could reduce the cumulative noise by requiring staggering of the multiple projects. The Court of Appeal agreed with the trial court that AHF failed to exhaust its administrative remedies. AHF never asserted at any point in the CEQA process that the City should have considered staggered construction schedules as a mitigation measure for cumulative noise impacts or that the EIR was flawed for failing to address that possibility. In its comments to the DEIR, the closest AHF came to raising this issue is its statement that "although the DEIR identifies some construction-related noise impacts—including cumulative impacts—as significant and unavoidable, the DEIR does not adequately discuss the feasibility of additional mitigation measures beyond those proposed."

AHF contended that the issue was preserved for judicial review because "the City itself" raised the issue when the City's Deputy Advisory Agency stated that the City did not have "any control over the timing or extent of the construction of any of the related projects." The Court of Appeal disagreed. Even if the DAA's comment implied that mitigation of cumulative noise impacts by staggering construction schedules was beyond the City's control, neither AHF nor any other person (including the City) ever alleged the failure to consider or analyze such a mitigation measure as a "ground[ ] for noncompliance with [CEQA]." (§ 21177, subd. (a); see *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197 [evidence in the administrative record that would support an argument that proceedings violated CEQA does not preserve issue for judicial review if no one made the argument].)

AHF further argued that the exhaustion requirement should not apply because raising the possibility of staggering construction schedules during the administrative process would have been

futile. The Court of Appeal disagreed. Raising the argument at an earlier stage would have allowed evidence that the City could have staggered schedules to be presented during the administrative proceedings.

Lastly, AHF argued that the Court of Appeal should have reached the merits of its argument to allow the public to participate meaningfully in the decision. However, this position would have eviscerated the exhaustion of administrative remedies requirement.

Finding that AHF failed to exhaust its administrative remedies, the Court of Appeal affirmed.

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North Coast Rivers Alliance v. Department of Food and Agriculture (Cal. Ct. App., Oct. 15, 2021, No. C086957) 2021 WL 4809691, *as modified on denial of reh'g* (Nov. 15, 2021) [unreported].

BACKGROUND: The California Department of Food and Agriculture (Department) is tasked with preventing the introduction and spread of injurious plant pests and its pest prevention and management activities are covered by pest-specific California Environmental Quality Act (CEQA) documents. In 2014, when the Department implemented a Statewide Plant Pest Prevention and Management Program (Program), it certified an environmental impact report (EIR) that provided a consolidated set of management practices and mitigation measures.

Two groups of petitioners sought writs of mandate challenging the program EIR: (1) North Coast Rivers Alliance, Pesticide Free Zone, Inc., Health and Habitat, Inc., Californians for Alternatives to Toxics and Gayle McLaughlin (the NCRA petitioners), and (2) Environmental Working Group, City of Berkeley, Center for Food Safety, Pesticide Action Network North America, Beyond Pesticides, California Environmental Health Initiative, Environmental Action Committee of West Marin, Safe Alternatives for Our Forest Environments, Center for Biological Diversity, Center for Environmental Health, Californians for Pesticide Reform and Moms Advocating Sustainability (the EWG petitioners). Certain NCRA petitioners also sought writs of mandate challenging addenda to the program EIR. The petitions were asserted against the Department and its Secretary (the Department Appellants).

The trial court granted the writ petitions in part, ordering the Department to set aside its certification of the program EIR and approval of the Program and addenda. The trial court enjoined further activities under the Program until the Department certified an EIR correcting the CEQA violations identified in the trial court's ruling. The Department appealed.

HOLDING: The Court of Appeal concluded (1) the trial court correctly determined that the program EIR's tiering strategy and checklist violated CEQA; (2) Public Resources Code section 211081 required the Department to file a notice of determination when it approved or decided to carry out an activity under the Program and when the Department concluded no new environmental document was required under CEQA; (3) while the Court of Appeal rejected most of the NCRA and EWG petitioners' contentions regarding the program EIR's baseline, the Court of Appeal agreed the baseline was inaccurate because it significantly understated existing pesticide use; (4) BIO-CHEM-2 did not improperly defer formulating mitigation for impacts on special-status wildlife species, WQ-CUM-1 was not a mitigation measure, and the program EIR failed to provide

mitigation for potential significant impacts when there were discharges to impaired waterbodies; (5) the program EIR was adequate in discussing the organic-pesticide and no-pesticide alternatives to the Program; (6) with regard to the addenda to the program EIR, the Court of Appeal adopted its conclusions in (4) above; (7) the Department Appellants forfeited their claim that the trial court failed to make certain findings in its injunction order; (8) the program EIR failed to (a) provide mitigation measures for potential significant impacts on pollinators, (b) state facts supporting the conclusion that the Program's contribution to the cumulatively significant impact on impaired waterbodies would not be considerable, and (c) adequately analyze cumulative impacts, but the Court of Appeal rejected the other claims by the Department Appellants and EWG petitioners regarding the program EIR's discussion of potential significant environmental impacts; (9) the EWG petitioners failed to show that any mischaracterization of mitigation measures as Program features hindered the Department or the public's ability to understand the Program's significant environmental impacts and measures to mitigate those impacts; and (10) because the NCRA petitioners did not file an appeal or cross-appeal, their challenge to the judgment was forfeited.

The Court of Appeal disagreed with the trial court's conclusions that the program EIR failed to do the following: identify which of the Department's ongoing activities were included in the baseline, describe the amount of pesticides associated with ongoing Department activities, disclose figures for unreported pesticide use and adequately discuss the no-pesticide and organic-pesticide alternatives. The Court of Appeal also disagreed with the trial court's conclusions that the Department had a demonstrated ability to estimate unreported pesticide use based on sales data, that the Department erred in not considering impacts on non-special status pollinators, and that mitigation measure BIO-CHEM-2 improperly deferred the formulation of mitigation measures.

KEY FACTS & ANALYSIS: The Program included reasonably foreseeable pest prevention, management and regulatory activities to be carried out or overseen by the Department against specific injurious pests throughout the state and provides a framework of management practices and mitigation measures for those activities. After releasing a draft program EIR for public review and comment, the Department certified a final program EIR. It determined that the Program would have a significant effect on the environment and adopted a statement of overriding considerations.

The Department Appellants first challenged the trial court's conclusion that the program EIR's tiering strategy and checklist violated CEQA. The Court of Appeal found that the tiering strategy and checklist violated CEQA because they permitted the Department to carry out a proposed activity without determining whether the proposed activity would have more significant or different potential significant environmental effects than were covered in the program EIR and, thus, whether an additional environmental document must be prepared under CEQA. The checklist would only ask whether an activity would have a significant effect on the environment not contemplated in the EIR in certain situations. Other activities could proceed without that determination.

The Department Appellants next argued that, contrary to the trial court's conclusion, when a proposed activity was within the scope of the program EIR, it was part of the project previously noticed and analyzed and not a separate project for which a new notice of determination is required under section 21108. The court analyzing the section, concluded that when the Department approved or determined to carry out an activity as being within the scope of the Program and

concluded that no new environmental document would be required under CEQA because the significant environmental effects of the activity were adequately covered in the program EIR, the Department was still required to comply with section 21108, subdivision (a) and issue a notice of determination.

The Department Appellants also argued that the program EIR properly incorporated ongoing activities into its environmental baseline and the baseline did not need to include unreported pesticide use data. Typically, the baseline for environmental analysis is the existing conditions of the environment at time the environmental analysis is performed. The Court of Appeal agreed with the EWG petitioners that the program EIR's baseline significantly understated existing pesticide use. The program EIR disclosed that typically, at most only about one-third of the pesticide active ingredients sold and used in a given year was reported. Inasmuch as a significant portion of pesticide used was not included in the baseline conditions for the program EIR, the baseline was not an accurate description of the existing physical conditions and, consequently, did not provide a reliable assessment of the environmental consequences of the Program.

Fourth, the Department Appellants challenged the trial court's rulings regarding mitigation measures BIO-CHEM-2 and WQ-CUM-1. The program EIR identified chemical management activities that could result in potentially significant impacts on special-status species. Site-specific mitigation measures for impacts on special-status species could not be formulated at the time of project approval because Program activities could occur anywhere pest infestations occurred in the state. Mitigation measure BIO-CHEM-2 aimed to avoid or minimize substantial adverse effects on, or the taking of, special-status species. It provided that the Department would first determine whether an area to be treated may contain suitable habitat for special-status wildlife species. Under WQ-CUM-1, the Department was required to determine whether a treatment location or quarantine area contained or was near any impaired waterbody before conducting a treatment or implementing a quarantine, and was require to implement Program management practices during the Program activity when an impaired waterbody was present. The program EIR concluded without discussion that implementation of Program management practices would avoid or minimize discharges to impaired waterbodies. It did not describe feasible measures to mitigate potential cumulative significant impacts when discharges to impaired waterbodies occur, even though it recognized that any additional contribution of pesticides or toxic substances by Program activities to impaired waterbodies would be a considerable contribution to a cumulative significant impact. The Court of Appeal agreed with the trial court that this shortcoming rendered the mitigation measures insufficient insofar as they did not contemplate mitigation for when discharges to impaired waterbodies occurred. For the same reason, the Court of Appeal agreed with the trial court that the addenda to the EIR were insufficient to the extent they relied on the inadequate mitigation measures.

Fifth, the Department Appellants challenged the trial court's conclusion that the program EIR's analysis of the no pesticide and organic pesticide alternatives was inadequate for failure to discuss how those alternatives would impact ongoing activities. The Court of Appeal agreed with the Department Appellants, reversing the opinion of the trial court on this point. The alternatives adequately described the alternatives, and discussed what pests would and would not be controlled by them.

The Department Appellants and the EWG petitioners both challenged the trial court's rulings regarding the program EIR's discussion of the Program's potential significant environmental impacts.

The EWG petitioners contended the Department failed to analyze the scenarios identified in Table 6.3-4 of the program EIR in relation to significant impacts on pollinators. The Court of Appeal agreed with EWG that the program EIR failed to mitigate potential significant adverse impacts on bees specifically. Because the program EIR disclosed that Program activities could have substantial adverse impacts on bees, it was required to discuss mitigation measures for those impacts. The Court of Appeal rejected several other arguments of the EWG petitioners for failure to raise it until its reply brief.

The Department Appellants claimed substantial evidence supported the program EIR conclusion of no cumulative impacts on impaired surface waters. The Court of Appeal disagreed, finding that the EIR was insufficient in that it failed to identify facts supporting its conclusion that the Program's contribution to a cumulative impact would be less than considerable. Additionally, the EIR acknowledged a significant impact of chemicals on waterbodies, which was at odds with its conclusion that the Program would have no cumulative impact on waterbodies.

The Department Appellants also challenged the trial court's ruling that the discussion of cumulative impacts in the program EIR were deficient because it did not provide sufficient information about other pesticide programs. The Department Appellants agreed with the trial court's assessment.

The Court of Appeal agreed with the trail court that the EIR was not defective for assuming that spraying would generally not occur near wetlands or other sensitive natural communities, and explaining its mitigation measure to avoid runoff into wetlands.

The EWG petitioners failed to demonstrate why the program EIR was required to consider U.S. Geological Service guidance, the California Department of Pesticide Regulation's regulations on groundwater protection, groundwater protection areas, high groundwater tables, and currently contaminated groundwater supplies in order to evaluate the potential impact of Program activities on groundwater. Accordingly, the Court of Appeal rejected the EWG petitioners' claims that the EIR was inadequate in that regard. The Court of Appeal also rejected the EWG petitioners' claims that the EIR failed to analyze impact on sediment toxicity, and that the EIR failed to discuss he impacts of dichlorvos and carbaryl as Proposition 65 listed toxicants.

The EWG petitioners also failed to demonstrate that the EIR did not adequately assess health impacts on adults over the age of 40, children under 2, and other sensitive populations. The program EIR explained why children, fetuses and the elderly are at greater risk to exposure to pesticides and describes studies showing links between pesticide exposure and adverse conditions in children, fetuses and the elderly. And the program EIR stated that the Department evaluated potential human health risks of Program activities to those sensitive receptors. The program EIR considered human health impacts on children and adults over 40 years and was adequate.

Next, the Court of Appeal disagreed with the EWG petitioners that the EIR improperly concealed mitigation measures as program features. The EWG petitioners failed to show that any mischaracterization of mitigation measures as Program management practices hindered the Department or the public's ability to understand the Program's significant environmental impacts relating to pesticide drift and the analysis of measures to mitigate such impacts.

Finally, the Court of Appeal declined to hear the NCRA petitioners' arguments of error, because they did not file an appeal.

In summary, the Court of Appeal affirmed in part and reversed in part the judgment of the trial court regarding the inadequacies of the EIR.

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Elfin Forest Harmony Grove Town Council v. County of San Diego (Cal. Ct. App., Oct. 14, 2021, No. D077611) 2021 WL 4785748 [unreported].

BACKGROUND: In consolidated appeals, appellant and real party in interest RCS-Harmony Partners, LLC challenged an order granting the writ of mandate of respondents Elfin Forest Harmony Grove Town Council, Endangered Habitats League, and Cleveland National Forest Foundation, which challenged the County of San Diego's (County) approval of the Harmony Grove Village South project (the Project) and certification of a final Environmental Impact Report (EIR) for the Project under the California Environmental Quality Act (CEQA). The superior court ordered County to set aside its approval of the Project, finding the EIR relied on unsupported greenhouse gas mitigation measures and failed to address certain fire safety issues or relied on unsupported fire evacuation measures. It found County failed to proceed in the manner required by CEQA by not including certain forecasts or analyses relevant to air quality impacts and failed to show the Project was consistent with a San Diego Association of Governments (SANDAG) regional plan for growth and development. The court finally found the Project inconsistent with County's General Plan's requirement that developers provide an affordable housing component when requesting a General Plan amendment, and also conflicted with a policy of the Elfin Forest and Harmony Grove San Dieguito Community Plan (Community Plan) that Elfin Forest development be served only by septic systems for sewage management.

Appellant contended the court erred by its ruling. It contended: (1) the Project's greenhouse gas emission mitigation measures were supported by substantial evidence and also satisfied the performance standards set forth by this court in *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467 (*Golden Door*), making them materially different from the non-CEQA-compliant mitigation measure M-GHG-1 invalidated in *Golden Door*; (2) the EIR adequately addressed fire safety and evacuation; (3) the EIR properly evaluated the Project's impact on air quality and land use plans; (4) the Project's approval was consistent with County's General Plan policy regarding affordable housing; and (5) the trial court incorrectly applied a septic policy to the Project.

HOLDING: The Court of Appeal concluded the Project's greenhouse gas mitigation measures M-GHG-1 and M-GHG-2 suffered from many of the same flaws as M-GHG-1 in *Golden Door* in that they lacked objective performance criteria to ensure the effective and actual mitigation of

greenhouse gas emissions, and also improperly deferred mitigation. However, the Court of Appeal agreed with the appellant that the EIR adequately addressed fire safety and evacuation, as well as the Project's consistency with County's regional air quality and transportation/development plans. The Court of Appeal held the Project did not conflict with the Community Plan, but that County erred by finding it is consistent with its General Plan, which required developers to provide an affordable housing component when seeking a General Plan amendment. Accordingly, the Court of Appeal affirmed in part, reversed in part and remanded with directions.

Key FACTS & ANALYSIS:

Mitigation of Greenhouse Gas Emissions

The final EIR provided that the Project's construction activities and operation at full buildout would generate greenhouse gas emissions that may have a significant impact on the environment. However, it concluded that with mitigation, the impacts would be less than significant. Specifically, it stated that after analyzing feasible on-site measures to avoid greenhouse gas emissions, the Project applicant "ha[d] committed to reducing Project [greenhouse gas] emissions to 'net zero' through the purchase of additional off-site carbon credits.

The EIR concluded: "Through this offset of all Project GHG emission (i.e., to net neutrality), through [M-GHG-1 and M-GHG-2], the Proposed Project would have less than significant GHG impacts. The mitigated Project would not generate GHG emissions that may have a significant impact on the environment because the mitigated Project would have no net increase in GHG emission, as compared to the existing environmental setting .... Because the mitigated Project would have no net increase in the GHG emissions level, the mitigated Project would not make a cumulatively considerable contribution to global GHG emissions."

The Court found that the mitigation measures were deficient for the same reason as in *Golden Door*. The Project's measures had no objective criteria for making findings as to the sufficient number of credits, including no manner in confirming whether offsets from foreign country credits were real, permanent, verifiable, and enforceable. An improper deferral issue existed by the fact that the County's Planning Director was allowed to decide whether to approve offset credits on grounds a non-Board-approved registry was "reputable" to the County's Planning Director's "satisfaction." The Court of Appeal observed that under CEQA, mitigating conditions had to be enforceable through some legally binding instrument so as to result in permanent reductions, and not "mere expressions of hope."

Impacts Related to Fire Safety

The final EIR acknowledged that the Project was within an area statutorily designated as a "Very High Fire Hazard Severity Zone." It also lay within a "Wildland Urban Interface," which was an area where development is proximate to open space or lands with native vegetation and habitat prone to brush fires. Thus, the EIR stated, improper design and maintenance may facilitate the movement of fire between structures and vegetation.

The Court of Appeal found that the EIR adequately addressed the wild-fire related impacts. The EIR contained a CEQA-compliant discussion of the potential wildland fire risks or exacerbation caused by the Project and the fire risks in the Project's vicinity, and that substantial evidence supported the conclusion that the Project measures would reduce them to a level of insignificance. The County's fire plan was incorporated into the EIR as an appendix and thus was presented in a manner calculated to adequately inform the public of its conclusions.

Likewise, the EIR's discussion of evacuation routes satisfied CEQA. The EIR's conclusion that the Project fire safety measures reduced fire hazards to a level of insignificance was supported by substantial evidence, namely the fire-related expert studies on those measures. The measures were not not so "clearly inadequate and unsupported" as to be entitled to no judicial deference.

EIR's Analysis of Consistency with Air Quality and Land Use Planning Documents

The EIR concluded that the Project's inconsistency with the current Regional Air Quality Strategy (RAQS) caused a significant cumulative impact. The EIR nevertheless concluded that while the Project was not compliant with the RAQS and had a significant cumulative impact in that respect, it was in compliance with federal and state ambient air quality standards and would not result in significant air quality impacts with respect to the Project's construction and operational-related emissions of ozone precursors or criteria air pollutants, making it unlikely that the increased density would interfere with goals for improving air quality in the San Diego air basin. The Court of Appeal found that the EIR adequately analyzed the RAQS. The Project's inconsistency with the RAQS planning document was its addition of dwelling units beyond the plan's projections. This inconsistency would be resolved when the San Diego Association of Governments (SANDAG) updated its growth projections and provided them to the Air Pollution Control District, which would then prepare and update the RAQS and its modeling as it was required to do.

The EIR also concluded the project was consistent with the San Diego Forward regional plan regarding transportation. The EIR discussed the Project's consistency with San Diego Forward both with respect to greenhouse gas emissions, which that plan seeks to reduce and also with regard to land use impacts. The Court of Appeal found that the County's determination that the project complied with the San Diego Forward plan was supported by substantial evidence.

Consistency with General and Community Plans

The County found that the Project complied with the County's General Plan despite the fact that it did not include affordable housing which was required. The Court of Appeal found that the County erred in concluding that the Project complied with the General Plan, despite the County's argument that it could not legally impose an affordable housing condition without an ordinance.

The Community Plan for one area (Elfin Forest) also required sewer systems consistent with the area's rural septic system. The Project included annexation into a sewer district, in direct conflict with that Community Plan. However, the Community Plan for another area (Harmony Grove) did not contain the same requirement. In reviewing the Project documents, the Court of Appeal concluded that the project was within Harmony Grove, and therefore not subject to the Community Plan for Elfin Forest.

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Genesee Friends v. County of Plumas (Cal. Ct. App., Oct. 12, 2021, No. C091033) 2021 WL 4739082 [unreported].

BACKGROUND: Plaintiff Genesee Friends and others (collectively, plaintiffs) brought a mandamus action against defendant County of Plumas, challenging the county's determination that the use of a helicopter and heliport for personal and agricultural purposes is permissible on land zoned agricultural preserve, as such use is functionally equivalent to uses already permitted under local land use law. Plaintiffs claimed that the county's determination violated various zoning and planning laws, and that the county erred in concluding its determination was a ministerial action exempt from the requirements of CEQA. The trial court granted summary judgment against plaintiffs, finding that they failed to exhaust their administrative remedies.

HOLDING: The Court of Appeal affirmed the judgment of the trial court, finding that the plaintiffs failed to exhaust their administrative remedies.

KEY FACTS & ANALYSIS: Real party in interest Genesee Valley Ranch, LLC (GVR) was a private 1,476 acre working cattle ranch with several residences and accessory buildings. It was located in the Genesee Valley area of Plumas County and was zoned agricultural preserve.

At some point, GVR decided that it wanted to use a portion of its property for private-use helicopter operations, including constructing a heliport and a storage building/hanger for a helicopter. On August 16, 2016, GVR filed an application with the county seeking a determination that the use of a heliport and helicopter on its property for personal and agricultural purposes was permissible on the basis that such use was a functionally equivalent use to existing uses permitted on land zoned agricultural preserve under local land use law.

On August 29, 2016, several members of Genesee Friends, an unincorporated nonprofit association, filed a complaint with the county claiming that GVR needed a special permit to construct a heliport on its property, and that GVR's use of a heliport on land zoned agricultural preserve was not permitted under zoning and planning laws. Plaintiffs submitted comments opposing the heliport. Counsel for plaintiffs appeared at the county planning director's hearing on GVR's application.

On June 30, 2017, the planning director concluded that GVR had a right to use a helicopter and heliport for agricultural and personal use. The planning director also concluded that the functionally equivalent use determination was exempt from CEQA. The planning director's decision specifically stated that, pursuant to Plumas County Code section 9-2.1001, it could be appealed to the Plumas County Board of Supervisors (board) within 10 days by filing an appeal in writing with the clerk of the board, in the manner specified in the Plumas County Code.

On July 10, 2017, plaintiffs filed an administrative appeal of the planning director's decision. The appeal was a two-page letter written on counsel's letterhead. It identified the challenged determination made by the planning director and the legal grounds for appeal, including that the decision violated CEQA as well as zoning and planning laws.

On July 12, 2017, GVR's counsel submitted a letter to the planning director, asserting that plaintiffs' administrative appeal was invalid for several reasons, including that plaintiffs failed to use the required appeal form. It was not disputed that plaintiffs' appeal did not comply with Plumas County Code Section 9-2.1002, which provided that, "An appeal shall only be filed on the official form provided by the Clerk of the Board ... together with such additional information as may be necessary."

The County's Board of Supervisors (Board) dismissed the administrative appeal as procedurally defective, as it had not been filed on the official form required by the Plumas County Code. The Board declined to address the merits of the appeal as requested by plaintiffs' counsel after counsel admitted that he did not ask the clerk of the Board for the form, even though he had read the code section stating that an appeal must be filed on the official form provided by the clerk.

On August 8, 2017, the county filed a Notice of Exemption (NOE), finding that the "project" was exempt from CEQA because the planning director's functionally equivalent use determination was an interpretation of an existing code section, which is a ministerial action.

The petition for writ of mandate followed. Neither the original petition, nor the first amended petition contained an argument that the Board wrongfully denied the appeal. This argument was included in the plaintiffs' second amended petition, which the trial court found to be barred by the applicable 90-day statute of limitations under Government Code section 65009. The trial court granted GVR and the county's motion for summary judgment because the plaintiffs had failed to exhaust administrative remedies by failing to appeal to the Board.

Because the county, by ordinance, provided for an administrative appeal of the planning director's decision to the board, the question was whether the plaintiffs had demonstrated that they exhausted all the administrative remedies available to them once the planning director issued what plaintiffs considered to be a wrongful decision.

It was not disputed that plaintiffs' administrative appeal to the Board was dismissed as procedurally defective because they failed to use the official form required by county ordinance. The record did not disclose that plaintiffs' sought reconsideration of the Board's dismissal or otherwise challenged the dismissal at the administrative level following the August 1 Board meeting. Instead, the mandamus action was filed approximately six weeks later. Neither the original petition nor the first amended petition alleged that the Board's dismissal of the administrative appeal was erroneous. Nearly five months after the action was commenced and after the trial court ruled that plaintiffs had failed to allege facts demonstrating that they had exhausted their administrative remedies, plaintiffs amended their petition to add a cause of action challenging the Board's dismissal of their administrative appeal. The cause of action was subsequently dismissed because it was filed beyond the applicable 90-day statute of limitations. In short, because the record reflected that plaintiffs did not comply with the county's administrative appeal procedures and the board did not render a decision on the merits of their appeal, plaintiffs did not exhaust their administrative remedies. Accordingly, the Court of Appeal affirmed the judgment of the trial court.

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Rock v. Rollinghills Property Owners Assn. (Cal. Ct. App., Sept. 20, 2021, No. A160163) 2021 WL 4260607, reh'g denied (Oct. 13, 2021), *review denied* (Dec. 15, 2021) [unreported].

BACKGROUND: In 2002, Barbara and James Rock (Rocks) bought roughly 150 acres of timberland in Point Arena near the Mendocino County coast (Rock property), intending to eventually build a retirement home. They had been informed the property was landlocked, but they hoped to later negotiate an access easement from neighboring landowners. As it turned out, they lost their gamble. Fifteen years later, after repeated approaches to the county; the Rollinghills Property Owners Association (RPOA), the property owners' association for the adjacent Rollinghills subdivision; the subdivision's homeowners and other neighboring landowners proved fruitless, the Rocks sued the RPOA, its individual homeowners, and the original subdivider who owned a property abutting the subdivision to the south (collectively, defendants).

The complaint alleged the Rocks had a right to use the subdivision's private roads to access their parcel pursuant to theories of express easement, easement by estoppel, easement by necessity or implication, prescriptive easement, and equitable easement. Defendants cross-complained to quiet title and for a judicial declaration that the Rocks had no such right. After a four-day bench trial the trial court found the Rocks failed to establish an easement under any theory and entered judgment for defendants as to the entire action.

HOLDING: The Court of Appeal agreed that the trial court's findings and judgment were supported by substantial evidence and relevant law, and therefore affirmed.

KEY FACTS & ANALYSIS: There are three relevant properties: the Rock property, the Rollinghills subdivision, and the "Hay property" to its south, across which the subdivision's property owners have a private easement to access the nearest public road.

The Rock property was an undeveloped 146-acre parcel zoned for timber production, which their predecessor in interest accessed by a logging road across an adjacent parcel to the property's southeast. To the Rock property's south, the Rollinghills subdivision comprised approximately 530 acres subdivided into 25 roughly 20-acre lots. A segment of the subdivision's northern boundary abuts the southern boundary of the Rock property, while portions of its southern boundary abutted land owned by William Hay (Hay property), who developed the subdivision in the early 1970's. Among these three properties, only the Hay property had direct access to a public road. In 1974 Hay's partnership, H Bar H, subdivided the land now known as the Rollinghills subdivision. On the western side of the subdivision it intersected Pine Reef Road, which exited the subdivision to the south, crossed the Hay property and finally intersected with Eureka Hill Road (also called Riverside Drive), a public road. Pine Reef Road was the subdivision's sole connection to public roadways. The county approved and recorded the final subdivision map for the Rollinghills development in 1974. The map identified all of the roads within the subdivision as private roads.

In 2001 the Rocks purchased the Rock property. Before going through with the purchase, the Rocks received a preliminary title report that expressly excluded from coverage "[t]he lack of a legal right of access to and from a public street or highway." The Rocks acknowledged that they "READ, UNDERSTOOD & ACCEPTED" this report. The Rocks were unsuccessful with negotiating an easement through the Rollinghills subdivision to access the public road.

Nevertheless, in 2011 the Rocks applied to the county for a permit to construct a road to their property. The RPOA protested, and the Rocks withdrew the application after the county informed them they "likely do not have a deeded easement for access" because their property was not part of the subdivision.

In 2017 the Rocks sued defendants on theories of express easement, easement by estoppel, easement by necessity or implication, prescriptive easement, and equitable easement. Defendants cross-complained to quiet title and for a judicial declaration that the Rocks had no such right. The trial court held for defendants on both the complaint and cross-complaint. The Court of Appeal upheld the judgment of the trial court.

There was no express easement because the subdivision map did not indicate an intent to grant an easement for the benefit of the Rock property. The map made no mention of such an easement even though the map expressly referenced other easements affecting the subdivision, including public utility easements and an easement across the Hay property for the subdivision's homeowners. There was likewise no extrinsic evidence supporting the contention that the private road at issue was intended to provide public road access for the rock Property.

Alternatively, the Rocks contended the trial court erred in interpreting the subdivision map because the county's subdivision laws required that Hay provide access to their property. Title 17 of the Mendocino County Code addressed the division of land. Section 17-53, subdivision (C) (section 17-53(C)) provided that "*[a]ll streets shall, insofar as practicable be in alignment with existing adjacent streets by continuation of the centerlines thereof, or by adjustments by curves, and shall be in general conformity with plans made for the most advantageous development of the area in which the division of land lies. Where a division of land adjoins acreage, provision shall be made for adequate street access thereto*." Relying on that section the Rocks argued their property was "acreage" that adjoined the Rollinghills subdivision (a "division of land). Thus, section 17-53(C) required Hay to grant them legal access through the subdivision to the nearest public street. The trial court disagreed with the Rocks' construction of section 17-53(C), reasoning that their interpretation would lead to absurd results and finding it unsupported by the evidence. The court further concluded that construing section 17-53(C) to require the grant of an easement to a private adjoining landowner "would violate the Constitution as an unlawful taking without just compensation. The Court of Appeal agreed. Assuming that section 17-53(C) was susceptible to the Rocks' ascribed meaning, the trial court properly rejected their construction because it would raise a serious question about the provision's constitutionality under the Takings Clause.

Next, the Rocks argued the network of private roads shown on the Rollinghills subdivision map "[b]y definition" must provide access across the subdivision to their parcel, because Mendocino County Code section 17-54 prohibited the approval of private roads within subdivisions unless they "will not be a substantial detriment to the adjoining properties ...." This argument, too, was unpersuasive to the Court of Appeal. There was no indication in the record that the Rock parcel historically had either a legal right to traverse the Rollinghills land or a pattern of doing so.

There was likewise no estoppel argument that defendants were estopped from denying the Rocks an easement across the subdivision because Hay accepted the benefits of the subdivision, a requirement of which included providing street access to and from the acreage that was the Rock property. However, in *Rock*, the county *agreed* that H Bar H was not required to build the road

and that its purpose was to provide the subdivision with access to a public road in the north if the Rock property were developed in the future. As an appellate court, the Court of Appeal declined to reweigh that evidence.

Similarly, the Rocks did not obtain a prescriptive easement. The trial court found the RPOA prevented the creation of a prescriptive easement by posting Civil Code section 1008-compliant signage from 2002 onward.

Finally, the Court of Appeal concluded that the Rocks were not entitled to an equitable easement. Plaintiffs did not purchase their property with a good faith belief that an access easement existed. The purchase price was at a reduced rate due to a lack of access. The purchase agreement and policy of title insurance clearly stated there was no access. Plaintiffs purchased the property in spite of knowing they did not have access with the hope that they would eventually gain access through negotiations with the adjacent property owners. Accordingly, there was no reason to provide the Rocks with an equitable easement.

The Court of Appeal declined to award sanctions against the Rocks, not finding that their arguments were made in bad faith.

* * *

Environmental Council of Sacramento v. City of Elk Grove (Cal. Ct. App., Aug. 30, 2021, No. C089384) 2021 WL 3854906 [unreported].

BACKGROUND: The City of Elk Grove (City) proposed modifying an environmental impact report (EIR) it had prepared for the development of 1,200 acres of largely agricultural lands. In the initial EIR, the City concluded that the proposed development would destroy foraging habitat for the Swainson's hawk, a species listed as threatened under California's Endangered Species Act. To mitigate the impact, the City required the developer to acquire, before any site disturbance, replacement foraging habitat that the California Department of Fish and Wildlife found suitable. But years later, the developer asked the City to modify the EIR to add an alternative mitigation option that would allow it to acquire replacement foraging habitat at a ranch known as the Van Vleck Ranch. The City agreed to the request and, in an addendum, it found the proposed change would not trigger the need to prepare a subsequent or supplemental EIR. Appellants Environmental Council of Sacramento, Sierra Club, and Friend of Swainson's Hawk (collectively Environmental Council) afterward challenged that decision, alleging the City's decision was not supported by substantial evidence. But the trial court disagreed.

HOLDING: The Court of Appeal affirmed. At bottom, Environmental Council's arguments showed that different experts disagreed about the mitigation value of the Van Vleck Ranch site. One appeared to find the site inadequate. Another found differently. But a disagreement among experts was not reason, in itself, to conclude the decision was not supported by substantial evidence. The Court of Appeal thus rejected Environmental Council's challenge to the City's decision and affirmed the trial court's judgment in the City's favor.

KEY FACTS & ANALYSIS: For many projects, the preparation of an EIR "is the end of the environmental review process. But like all things in life, project plans are subject to change. When

such changes occur, [Public Resources Code] section 21166 provides that 'no subsequent or supplemental environmental impact report shall be required' unless at least one or more of the following occurs: (1) '[s]ubstantial changes are proposed in the project which will require major revisions of the environmental impact report,' (2) there are '[s]ubstantial changes' to the project's circumstances that will require major revisions to the EIR, or (3) new information becomes available." (*Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 945 (Friends); see also CEQA Guidelines, §§ 15162, subd. (a) [describing when a subsequent or supplemental EIR is required], 15163 [describing the difference between a subsequent and a supplemental EIR].)

Environmental Council contended the City's approval of the addendum to the EIR was not supported by substantial evidence. It reasoned that (1) allowing for mitigation more than 10 miles from the project site was inadequate and (2) because the record showed that the Van Vleck Ranch did not support the same density of Swainson's hawk nests as in the project area, substantial evidence did not support a finding that the project would be mitigated. It argued these changes would have a significant impact on the environment and therefore would require a supplemental EIR.

On the first argument, Environmental Council noted that the City's own website previously said mitigation lands would "ideal[ly]" be located within 10 miles of a project site. The Van Vleck Ranch was not within 10 miles. This contention did not merit reversal. A mitigation measure was not insufficient merely because it was not "ideal." The City was only required to adopt mitigation measures that would reduce potential impacts to a less than significant level — or, if that were not possible, to adopt a statement of overriding considerations. (Pub. Resources Code, § 21081; *see also Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503, 528.) Both the old mitigation measure and the new one satisfied this standard.

Second, although the Department of Fish and Wildlife estimated that the Van Vleck Ranch would be an inferior foraging habitat, the developer's consulting biologist, and expert witness acknowledged that the Van Vleck Ranch would be a suitable foraging habitat, and described it as "a good tradeoff." Because the Court of Appeal found that Environmental Council had only indicated a disagreement among expert witnesses, and that alone was not enough to show a lack of substantial evidence to support the City's determination that no supplemental EIR was required, the Court of Appeal affirmed the judgment of the trial court.

TAKE-AWAYS: Evidence that experts disagree on a particular determination is not sufficient to demonstrate that an agency lacks substantial evidence under CEQA.

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"I Am" School, Inc. v. City of Mount Shasta (Cal. Ct. App., Aug. 23, 2021, No. C091575) 2021 WL 3721409, *reh'g denied* (Sept. 13, 2021), *review denied* (Nov. 10, 2021) [unreported].

BACKGROUND: Health and Safety Code section 11362.768, subdivision (b) states: "No medicinal cannabis cooperative, collective, dispensary, operator, establishment, or provider who possesses, cultivates, or distributes medicinal cannabis pursuant to this article shall be located within a 600-foot radius of a school." This case addresses whether the 600 feet is measured from the parcel upon

which a school is located or from additional parcels owned by the school upon which no school building currently exists. The appellant, "I Am" School, Inc, (Appellant) appealed from the trial court's entry of judgment against them in their declaratory relief action. The appellant contended it had vested rights in all of the lots it acquired, the court erred in failing to find the 600-foot radius applied to all of the lots, and the ruling infringed on their First Amendment right to practice and teach their religion. It further contended that the trial court erred in failing to address the remainder of its complaint petitioning for a writ of mandate and administrative mandamus and other relief.

HOLDING: The Court of Appeal held that the trial court correctly determined that the 600-foot limit was measured from the lot upon which the school exists at the time, meaning the lot upon which the school was located; undeveloped lots upon which there was no school were not counted, even if owned by the school. The Court of Appeal found that it did not have jurisdiction to address the remaining arguments, and accordingly affirmed.

Key FACTS & ANALYSIS: Appellant was a private, faith-based school located in Shasta City, Siskiyou County. Appellant owned one parcel which contained its school, and several other parcels which were subject to a conditional use permit (CUP) and which could accommodate classroom use. The City approved development of a cannabis dispensary more than 600 feet from the school parcel, but less than 600 feet from one of the other parcels owned by the school.

Appellant sought a declaration that: stated the City's amendment to the Shasta Municipal Code addressing cannabis businesses did not comply with the California Environmental Quality Act (CEQA), ordered the City to rescind the law due to insufficient and deficient public notice, began CEQA review of the ordinance in question, vacated the ordinance's exemption from CEQA review, and stayed permitting future and current cannabis industry use within certain zones until CEQA review was complete. Appellant further sought an order requiring the City to measure the buffer zone for cannabis businesses from the perimeter property line of all lots identified in its CUP, notwithstanding the lack of any infrastructure on the property. Appellant also sought unspecified attorney fees, general damages, punitive damages, and costs.

In December 18, 2019, Appellant also filed a "Notice of Motion and for the Issuance of an Order" (the motion or motion), which sought an order declaring: the 600-foot measurement be made from the perimeter of all property owned by appellant, a 600-foot buffer zone be ordered for all schools, the City had not properly permitted in certain zones to include the cannabis industry, the school property be considered what was included in the CUP, the City be enjoined from granting the proposed cannabis license within 600 feet of school property, and summary judgment be entered. The City opposed the motion on the grounds it was procedurally defective, summary judgment was premature, there was insufficient evidence to support granting a preliminary injunction, and the requested relief was not properly obtained through a motion.

On January 9, 2020, Appellant filed a request for a CEQA hearing. That same day, at a hearing on the motion, both attorneys acknowledged that the motion's essence was a determination of the minimum buffer zone under Business and Professions Code section 26054 and Health and Safety Code section 11362.768, subdivision (c), and how it should be measured, and that "resolution of this issue could resolve the litigation matter." The parties agreed that prompt resolution of this issue would be in all their best interests.

The motion was heard on February 13, 2020. The trial court denied the motion, finding appellant did not have vested rights in the undeveloped parcels at issue.

The Court of Appeal first found that it did not have jurisdiction to address the claims not subject to the trial court's judgement. (Code Civ. Proc., § 904.1, subd. (a)(1).) The Court of Appeal found that the parties effectively narrowed the scope of the despute to the 600-foot limit declaratory action, and thus limited its review to that claim. .

The Court of Appeal then analyzed the relevant statutes. Business and Professions Code section 26054 establishes the 600-foot limit for cannabis businesses and defers how that limit is to be determined to Health and Safety Code section 11362.768. Under section 11362.768, the 600-foot limit is measured from the property line of the school, and school is defined as the place "providing instruction in kindergarten or any of grades 1 to 12, inclusive," which the Court of Appeal found clearly referred to the place where the children are taught rather than property that is owned by an educational institution but where children are not educated.

The fact that Appellant had a CUP allowing educational facilities on a lot was of no consequence because Appellant had not developed that lot and therefore had no vested right in it. The Court of Appeal therefore affirmed the judgment of the trial court.

* * *

Notes on the Summaries:
"BACKGROUND" and "HOLDING" for cases are from the WestLaw Synopses.
"KEY FACTS & ANALYSIS" and "TAKE-AWAYS" for cases are from the text of cases and, occasionally, from published on-line analyses.

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