Land Use and CEQA Litigation Update

Thursday, September 23, 2021

William Ihrke, City Attorney, La Quinta, Partner, Rutan & Tucker

LAND USE AND CEQA LITIGATION UPDATE
SEPTEMBER 23, 2021

RUTAN & TUCKER, LLP
Bill Ihrke, Partner, Orange County Office

LEAGUE OF CALIFORNIA CITIES
2021 Annual Conference
Sacramento, California

Cases From April 21, 2021
through August 18, 2021

Table of Cases

FEDERAL CASES

Pakdel v. City and County of San Francisco, California (2021) -- U.S. ---, 141 S.Ct. 2226

BACKGROUND: Partial owners of a multi-unit residential building organized as a tenancy-in-common brought a 42 U.S.C. § 1983 (§ 1983) action against the city and county (San Francisco), its board of supervisors, and its department of public works, alleging an ordinance effected an unconstitutional regulatory taking by conditioning the conversion of the building to a condominium arrangement on the partial owners offering the tenant in their unit a lifetime lease. The District Court granted defendants' motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The owners appealed. The United States Court of Appeals for the Ninth Circuit (Ninth Circuit) affirmed and denied rehearing *en banc*.

HOLDING: Upon granting certiorari, the United States Supreme Court held that the owners did not have to comply with administrative procedures for seeking relief in order to satisfy the finality requirement for bringing a regulatory taking claim. Certiorari was granted, and the decision below vacated and remanded.

KEY FACTS & ANALYSIS: Petitioners were a married couple who partially owned a multiunit residential building in San Francisco. When petitioners purchased their interest in the property, the building was organized as a tenancy-in-common. When petitioners purchased their interest in the property, they signed a contract with the other owners to take all available steps to pursue a conversion.

Until 2013, the odds of conversion were slim because San Francisco employed a lottery system that accepted only 200 applications per year. When that approach resulted in a predictable backlog, however, the city adopted a new program that allowed owners to seek conversion subject to a filing fee and several conditions. One of these conditions was that non-occupant owners who rented out their units had to offer their tenants a lifetime lease.

Although petitioners had a renter living in their unit, they and their co-owners sought conversion. As part of the process, they agreed that they would offer a lifetime lease to their tenant. The city then approved the conversion. But, a few months later, petitioners requested that the city either excuse them from executing the lifetime lease or compensate them for the lease. The city refused both requests, informing petitioners that "failure to execute the lifetime lease violated the [program] and could result in an enforcement action."

Petitioners sued in federal court under § 1983. Among other things, they alleged that the lifetime-lease requirement was an unconstitutional regulatory taking. The District Court rejected this claim without reaching the merits. Instead, it relied on the U.S. Supreme Court's since-disavowed prudential rule that certain takings actions are not "ripe" for federal resolution until the plaintiff "seek[s] compensation through the procedures the State has provided for doing so." Because petitioners had not first brought "a state court inverse condemnation proceeding," the District Court dismissed their claims.

While petitioners' appeal was pending before the Ninth Circuit, the Supreme Court repudiated the requirement that a plaintiff must seek compensation in state court. The Court in *Knick v. Township of Scott* (2019) 588 U.S. ---, 139 S.Ct. 2162, explained that "[t]he Fifth Amendment right to full compensation arises at the time of the taking" and that "[t]he availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim." Any other approach would conflict with "[t]he general rule ... that plaintiffs may bring constitutional claims under § 1983 without first bringing any sort of state lawsuit."

Rather than remand petitioners' claims in light of *Knick*, a divided panel of the Ninth Circuit simply affirmed. Noting that *Knick* left untouched the Ninth Circuit's alternative holding that plaintiffs may challenge only "final" government decisions, the panel concluded that petitioners' regulatory "takings claim remain[ed] unripe because they never obtained a final decision regarding the application of the Lifetime Lease Requirement to their Unit." Although the city had twice denied their requests for the exemption—and in fact the "relevant agency c[ould] no longer grant" relief—the panel reasoned that this decision was not truly "final" because petitioners had made a belated request for an exemption at the end of the administrative process instead of timely seeking one "through the prescribed procedures." In other words, a conclusive decision is not really "final" if the plaintiff did not give the agency the "opportunity to exercise its 'flexibility or discretion'" in reaching the decision.

The Supreme Court found that the Ninth Circuit's view of finality was incorrect. The finality requirement is relatively modest. All a plaintiff must show is that "there [is] no question ... about how the 'regulations at issue apply to the particular land in question.'"

The city's position was that petitioners were required to "execute the lifetime lease" or face an "enforcement action." And there was no question that the government's "definitive position on the issue [had] inflict[ed] an actual, concrete injury" of requiring petitioners to choose between surrendering possession of their property or facing the wrath of the government. The Ninth Circuit's contrary approach—that a conclusive decision is not "final" unless the plaintiff also complied with administrative processes in obtaining that decision—was inconsistent with the ordinary operation of civil-rights suits. Petitioners brought their takings claim under § 1983, which "guarantees 'a federal forum for claims of unconstitutional treatment at the hands of state officials.'" That guarantee includes "the settled rule" that "exhaustion of state remedies is not a prerequisite to an action under ... § 1983."

The Supreme Court observed that Congress always has the option of imposing a strict administrative-exhaustion requirement—just as it has done for certain civil-rights claims filed by prisoners. But it has not done so for takings claimants. Given that the Fifth Amendment enjoys "full-fledged constitutional status," the Ninth Circuit had no basis to relegate petitioners' claim "'to the status of a poor relation' among the provisions of the Bill of Rights."

TAKE-AWAYS: The finality requirement for bringing a regulatory taking claim is relatively modest, in that all a plaintiff must show is that there is no question about how the regulations at issue apply to the particular land in question. It appears, then, that plaintiff land-owners bringing § 1983 suits

do not need to show strict compliance with the exhaustion of administrative remedies for violations of constitutional rights prior to seeking judicial review.

* * *

Cedar Point Nursery v. Hassid (2021) -- U.S. ---, 141 S.Ct. 2063

BACKGROUND: Agricultural employers brought an action against members of California's Agricultural Labor Relations Board (Board), in their official capacity, alleging that a California regulation granting labor organizations a "right to take access" to an agricultural employer's property in order to solicit support for unionization (Regulation) effected an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments by appropriating without compensation an easement for union organizers to enter their property, and seeking declaratory and injunctive relief prohibiting the Board from enforcing the Regulation against them. The District Court denied the employers' motion for preliminary injunction and granted the Board's motion to dismiss. The employers appealed, and the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) affirmed, and rehearing en banc was denied. Certiorari was granted.

HOLDING: The Supreme Court held that the Regulation appropriated the employers' right to exclude from their property, and thus constituted a *per se* taking that requires just compensation under the Takings Clause.

KEY FACTS & ANALYSIS: The Regulation, Cal. Code Regs., tit. 8, § 20900(e)(1)(C), granted labor organizations a "right to access" the property of agricultural employers for the purposes of soliciting support for unionization. Specifically, the Regulation required agricultural employers to allow union organizers on their property for up to three hours per day and 120 days per year. Labor organizations had to file a written notice with the Board and serve a copy on the employer prior to entering the employer's property. The labor organizations could not engage in disruptive conduct while on the employer's property.

In October 2015, representatives from the United Farm Workers union entered the property of Cedar Point Nursery, a strawberry grower. Cedar Point Nursery alleged that the labor organizers did not provide proper notice that they would enter the property and were disruptive while on the property.

In July 2015, representatives from the United Farm Workers union attempted to enter the property of the Fowler Packing Company, a grower and shipper of grapes and citruses. The Fowler Packing Company blocked the union organizers from entering, which prompted United Farm Workers to file an unfair labor practice charge against Fowler Packing Company. The charge was later withdrawn.

Because the companies feared that United Farm Workers would attempt to enter their property in the future, they filed suit in the Eastern District of California, seeking injunctive and declaratory relief against several members of Board. They argued that the Regulation's requirement that agricultural employers allow labor organizers on their properties constituted *per se* takings under the Fifth and Fourteenth amendments because the government had physically acquired their

private property for public use, and thus the government was required to provide the Plaintiffs with just compensation.

The District Court denied Plaintiffs' motion for a preliminary injunction and granted the Board's motion to dismiss. The District Court reasoned that the Regulation did not constitute the government physically acquiring private property for public use because the Regulation did not allow the public to access Plaintiffs' properties in a permanent and continuous manner for whatever reason, and thus was not a *per se* taking. Instead, the District Court saw the Regulation as a regulation restricting an owner's ability to use their property that, under *Penn Central Transportation Company v. City of New York* (1978) 438 U.S. 104 (*Penn Central*), made the Regulation subject to multi-factor balancing test to determine if it was a taking or not. The District Court's analysis of the multi-factor *Penn Central* test led it to the conclusion that the Regulation did not create any takings. Plaintiffs appealed.

The Ninth Circuit affirmed, reasoning that because the Regulation was merely part of a broader regulatory scheme and did not impose any permanent physical invasions on the properties or deprive the Plaintiffs of all economically beneficial uses of their properties, the Regulation did not amount to a *per se* taking and thus had to be evaluated using the multi-factor *Penn Central* test. Plaintiffs again appealed and Certiorari was granted.

In an opinion by Chief Justice Roberts, the U.S. Supreme Court reversed the lower courts, concluding that the Regulation did amount to a *per se* taking. While the Court agreed that a *per se* taking occurs when the government physically acquires private property for public use and that regulations merely imposing restrictions on an owner's ability to use the property are not *per se* takings (and are instead subject to *Penn Central*), it disagreed with the lower courts on whether the Regulation amounted to a physical appropriation of property. The Court reasoned that because the Regulation granted labor organizers a "right to take access" of the Plaintiffs' properties, it appropriated the Plaintiffs' right to exclude, which is a "fundamental element" of the property right for the enjoyment of third parties. (*Kaiser Aetna v. United States* (1979) 444 U.S. 164, 179-180.) Thus, the Regulation granting labor organizers a "right to take access" on the Plaintiffs' properties did in fact constitute *per se* takings and the Takings Clause of the Fifth Amendment, applied to California by way of the Fourteenth Amendment, and required the government to provide the Plaintiffs with just compensation.

The Court also noted that the duration of the appropriation by the Regulation was irrelevant to concluding whether it constituted a *per se* taking or not. A *per se* taking exists whenever appropriation takes place, whether permanent or temporary. The duration of the appropriation is only relevant to the amount of compensation due.

The Court went on the reassure that it was not declaring all state and federal regulatory schemes, which allow for entry onto private property, constitute *per se* takings for three reasons: First, the Court clarified that its opinion does not change the distinction between trespass law, for isolated physical invasions, and takings law, for appropriations, where government regulatory schemes that allow for a mere occasional trespass will not constitute takings; Second, the Court stated that many other government-authorized physical invasions would not amount to takings because they are consistent with longstanding restrictions on property rights; for instance, the government does not

appropriate property when it requires a landowner to abate a nuisance on their property, because the government is merely asserting a pre-existing limitation on the landowner's title (*i.e.* the landowner never had the right to engage in nuisance); Third, regulatory schemes that condition certain benefits, such as permits or licenses, on ceding a right of access, such as allowing health and safety inspectors to enter properties, generally do not constitute takings. So long as the permit- or license-condition bears an "essential nexus" and "rough proportionality" to the impacts of the proposed government use or access to the property, such regulatory schemes fall squarely within the government's legitimate police-power. (*Nollan v. California Costal Comm'n* (1987) 483 U.S. 825, 836; *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391.)

TAKE-AWAYS: It may be easier for plaintiffs to challenge laws and regulations that, through a city's police power, would grant the city or third parties physical access to private property without compensation when a "right to take access and right to exclude" attaches to that law or regulation. To avoid the *per se* takings trigger, cities should (when possible) turn to the application of the *Nollan* and *Dolan* concepts of a clear nexus and rough proportionality as justification for the law or regulation. Also, while the opinion is silent on how "just compensation" should be calculated in the circumstance raised in this *Cedar Point Nursery* case, the cumulative cost of a city (or county or state) regulation could prove overly burdensome. Again, cities looking to enact and enforce laws and regulations that grant physical access to private property without compensation should consult the three justifications for common regulatory schemes outlined in the opinion.

* * *

Center for Biological Diversity v. Haaland (9th Cir. 2021) 998 F.3d 1061

BACKGROUND: Environmental organization sought review of decision of Fish and Wildlife Service (FWS) reversing its prior decision that Pacific walrus qualified for listing as an endangered or threatened species under Endangered Species Act (ESA). The District Court granted summary judgment for FWS. The organization appealed.

HOLDING: The Court of Appeals held that Service did not sufficiently explain why it changed its prior position. The judgment was reversed and remanded.

KEY FACTS & ANALYSIS: Under the ESA, the Secretary of the Interior (Secretary) must maintain a list of species that qualify for protection. (16 U.S.C. § 1533(c).) A species qualifies if it is threatened or endangered by: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. The Secretary must make listing determinations solely on the basis of the best scientific and commercial data available, and after conducting a review of the status of the species.

Any interested person may petition the Secretary to list a species. Upon receiving a petition, the Secretary must determine whether it presents sufficient information to suggest that listing may be warranted. If so, the Secretary must review the species' status and issue a 12-month finding that listing is either (1) warranted, (2) not warranted, or (3) warranted but precluded by higher priority listing actions. Species in the third category become listing candidates, and their status is reviewed

annually pending a final "warranted" or "not warranted" finding. The Secretary had delegated authority to administer the Act with respect to certain species, including the Pacific walrus, to the FWS via 50 C.F.R. § 402.01(b).

In 2008, the Center for Biological Diversity (Center) petitioned the FWS to list the Pacific walrus as threatened or endangered, citing the claimed effects of climate change on its habitat. (*Endangered & Threatened Wildlife and Plants; 12-Month Finding on a Petition to List the Pacific Walrus as Endangered or Threatened*, 76 Fed. Reg. 7,634 (Feb. 10, 2011).) The Pacific walrus, one of three walrus subspecies, is the largest pinniped (fin or flipper-footed marine mammal) in the Arctic.

In February 2011, after completing a species status assessment, the FWS issued a forty-five page decision (2011 Decision), with citations to supporting studies and data, finding that listing of the Pacific walrus was warranted. Examining the statutory listing factors, the FWS identified a number of threats to the Pacific walrus, including sea-ice loss through 2100, that would cause substantial losses of abundance and an anticipated population decline that would continue in the foreseeable future.

Although the Pacific walrus qualified for listing, the need to prioritize more urgent listing actions led the FWS to conclude that listing was precluded at that time. So, the FWS added the Pacific walrus to a list of candidate species and reviewed its status annually through 2016, each time again finding listing warranted but precluded.

A settlement of an earlier lawsuit by the Center required the FWS to submit a proposed rule or not-warranted finding for the Pacific walrus by September 30, 2017. (*Endangered and Threatened Wildlife & Plants; 12-Month Findings on Petitions to List 25 Species as Endangered or Threatened Species*, 82 Fed. Reg. 46,618, 46,642 (Oct. 5, 2017).) In May 2017, the FWS completed a final species status assessment (Assessment). The Assessment "identif[ied] vital needs of the species and evaluat[ed] the current and future conditions affecting those needs." The Assessment expressly did "not constitute a decision document"; it was intended only to inform the FWS's listing decision and "form[ed] the scientific basis from which the [FWS would] draw conclusions and make a decision."

The Assessment concluded that environmental changes over the last several years such as sea-ice loss and associated stressors are impacting Pacific walruses, but that other stressors that were identified in 2011 have declined in magnitude. The review team believed that Pacific walruses are adapted to living in a dynamic environment and have demonstrated the ability to adjust their distribution and habitat use patterns in response to recent shifting patterns of sea ice. The team acknowledged, however, that the species's ability to adapt to or cope with increasing stress in the future is uncertain.

The Assessment did not offer a comparison between its findings and those in the 2011 Decision, only mentioning the 2011 process on limited occasions, and indicated uncertainty in several critical conclusions.

In October 2017, after reviewing the Assessment, the FWS issued a terse three-page final decision that the Pacific walrus no longer qualified as a threatened species (2017 Decision). The 2017 Decision referred to the 2011 Decision only in its procedural history.

The Center filed the lawsuit leading to the instant decision in 2018, alleging that the 2017 Decision violated the Administrative Procedure Act (APA) and the ESA. In particular, the Center argued that the FWS violated the APA by failing to sufficiently explain its change in position from the 2011 Decision. The District Court granted summary judgment to the FWS, and the appeal followed.

The Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the District Court's grant of summary judgment *de novo* to determine whether the FWS' decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (*Alaska Oil & Gas Assn. v. Pritzker* (9th Cir. 2016) 840 F.3d 671, 675 (quoting 5 U.S.C. § 706(2)).)

When an agency changes its position, it must (1) "display[ ] awareness that it is changing position," (2) show "the new policy is permissible under the statute," (3) "believe[ ]" the new policy is better, and (4) provide "good reasons" for the new policy. (*Organized Village of Kake v. U.S. Dept. of Agriculture* (9th Cir. 2015) 795 F.3d 956, 966 (quoting *Federal Communications Commn. v. Fox Television Stations, Inc*. (2009) 556 U.S. 502, 515-16).) Moreover, if a "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must provide a reasoned explanation for disregarding facts and circumstances that underlay or were engendered by the prior policy. (*Fox, supra*, 556 U.S. at pp. 515-16.) This framework applies to a change in position on whether a species warrants protection under the ESA. (*Center for Biological Diversity v. Zinke* (9th Cir. 2018) 900 F.3d 1053, 1070.)

The Center first argued that review was limited to the four corners of the three-page 2017 Decision. The Ninth Circuit disagreed. If a published decision incorporates by reference a separate, fully reasoned document explaining why the agency changed positions, courts may review that document as well. However, the Ninth Circuit was limited to the reasons given by the FWS for its action.

The essential flaw in the 2017 Decision was its failure to offer more than a cursory explanation of why the findings underlying its 2011 Decision no longer applied. If the agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," a sufficiently detailed justification is required. (*Fox, supra*, 556 U.S. at p. 515.) "In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." (*Id.* at pp. 515-16.)

The 2011 Decision, forty-five pages in length, contained specific findings, replete with citations to scientific studies and data, that detailed the multiple stressors facing the Pacific walrus and explained why those findings justified listing. The 2017 Decision, by contrast, was a Spartan document, simply containing a general summary of the threats facing the Pacific walrus and the agency's new uncertainty on the imminence and seriousness of those threats. Because the 2017 Decision inherently rejected the specific findings underlying the 2011 Decision, more was needed.

The 2017 Decision's incorporation of the Assessment did not remedy the deficiencies. The Assessment did not purport to be a decision document; it provided information but did not explain the FWS's reasons for its change in position in the 2017 Decision. Unlike the 2011 Decision, which arrived at specific conclusions as to each of the identified threats, the Assessment reflected substantial disagreement and uncertainty—both among the team and with respect to the relevant threats—and did not identify the agency's rationale for concluding that the specific stressors identified as problematic in the 2011 Decision no longer posed a threat to the species within the foreseeable future.

Although the Assessment contained some new information, the actual decision document did not explain why this new information resulted in an about-face from the FWS's 2011 conclusion that the Pacific walrus met the statutory criteria for listing. The Ninth Circuit found that neither the 2017 Decision nor the Assessment offered sufficient reasons to support reversal of the FWS' 2011 Decision and therefore reversed and remanded the District Court's ruling upholding the 2017 Decision.

TAKE-AWAYS: To survive the abuse of discretion standard of the federal APA, agencies must sufficiently justify their decisions to reverse a previous policy or action, including an explanation of why its previous observations, when contrary to a subsequent decision, are no longer applicable.

* * *

Friends of Animals v. Haaland (9th Cir. 2021) 997 F.3d 1010

BACKGROUND: Environmental organization brought an action challenging the Fish and Wildlife Service's (FWS) summary denial of its petition to list the Pryor Mountain wild horse population as a threatened or endangered distinct population segment under the Endangered Species Act (ESA). The District Court adopted in part and rejected in part the report and recommendation of the United States Magistrate Judge and entered summary judgment in the government's favor, and the organization appealed.

HOLDINGS: The Court of Appeals for the Ninth Circuit (Ninth Circuit) held that: (1) in a case of first impression, a final rule, requiring that private parties seeking to list species provide affected states a 30-day notice of their intent to file petition, was invalid; and (2) FWS's summary denial of the organization's petition was arbitrary and capricious. Judgment was reversed and remanded.

KEY FACTS & ANALYSIS: In May 2015, the National Marine Fisheries Services and the FWS (collectively, "the Services") published a proposed rule revision related to the petition process. (80 Fed. Reg. 29,286 (May 21, 2015).) The proposed modification would have required a petitioner to provide a copy of the petition to the state agencies responsible for the management and conservation of fish, plant, or wildlife resources in each state where the species occurs at least 30 days prior to submitting the petition to the Services, and would have required the petitioner to append any data or written comments from the state to their petition.

The Services promulgated the final rule revision in September 2016. (81 Fed. Reg. 66,462 (Sept. 27, 2016) (codified at 50 C.F.R. § 424.14).) In response to comments expressing concern about

the burdens on petitioners and state agencies, the final rule jettisoned the requirement that petitioners coordinate with states, requiring instead that a petitioner "provide notice to the State agency responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species that is the subject of the petition occurs" at least 30 days prior to submitting the petition.

The final rule revision was intended to improve the quality of petitions through clarified content requirements and guidelines, and, in so doing, better focus the Services' resources on petitions that merit further analysis. The Services explained that the rule revision would give affected states the opportunity to submit data and information to the Services in the 30-day period before a petition is filed, which the Services could then rely on in their 90-day review. The Services acknowledged that the use of state-supplied information in making the 90-day determination was a change from prior practice, but found that this change would expand the ability of the States and any interested parties to take the initiative of submitting input and information for the Services to consider in making 90-day findings, thereby making the petition process both more efficient and more thorough.

In 2017, an environmental group filed a petition requesting that the FWS list the Pryor Mountain wild horse population as a threatened or endangered distinct population segment under the ESA. The Pryor Mountain wild horse population resides in Montana and Wyoming and represents a unique Old-World Spanish genetic lineage. The environmental group contended that the Pryor Mountain wild horse population is critically small and its continued survival is threatened by curtailment of the horses' habitat range, inadequacy of existing regulatory mechanisms, and political pressure to remove or dispose of free-roaming wild horses.

On July 20, 2017, the FWS notified the environmental group that the submission did not qualify as a petition because it did not include copies of required notification letters or electronic communications to state agencies in affected states. The FWS did not identify any other deficiencies with the petition.

The Ninth Circuit reviewed *de novo* under the arbitrary and capricious standard of the ESA and APA. 5 U.S.C. § 706(2). Because the pre-file notice rule was enacted through notice-and-comment rulemaking procedures pursuant to 16 U.S.C. § 1533(h), the Court also reviewed under the two-step *Chevron* framework. (*Center for Biological Diversity v. Zinke* (9th Cir. 2018) 900 F.3d 1053, 1063 (*Zinke*) (*citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837, 842-43.) Under *Chevron,* a court first must determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for a court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If the statute is silent or ambiguous with respect to the specific issue, the question for a court is whether the agency's answer is based on a permissible construction of the statute. (*Chevron, supra,* 467 U.S. at pp. 842-43.

The environmental group first argued that the pre-file notice rule was contrary to the express intent of Congress as articulated in Section 4 of the ESA and therefore could not overcome *Chevron* step one. Defendants replied that the ESA is silent as to pre-petition procedures and notice requirements and therefore the agency action passes step one. The Ninth Circuit agreed. Although the ESA

includes guidance on when to involve the states, it did not prohibit the Services from providing notice to states and did not directly address procedures prior to filing a petition. Therefore, the pre-file notice rule survived step one of the *Chevron* inquiry.

Because the pre-file notice rule survived step one, the Ninth Circuit next assessed whether the Services' construction of the rule was reasonable. (*Center for Biological Diversity v. Salazar* (9th Cir. 2012) 695 F.3d 893, 902 (*Salazar*).) Although a court gives deference to agency actions under *Chevron*, it must reject administrative constructions which are contrary to clear congressional intent (*Friends of Animals v. U.S. Fish & Wildlife Serv.* (9th Cir. 2018) 879 F.3d 1000, 1010), or that frustrate the policy Congress sought to implement (*Biodiversity Legal Found. v. Badgley* (9th Cir. 2002) 309 F.3d 1166, 1175). The Services were entitled to a presumption of regularity, and courts may not substitute our judgment for that of the agency. (*San Luis & Delta-Mendota Water Auth. v. Jewell* (9th Cir. 2014) 747 F.3d 581, 601.) However, an agency's action must be upheld, if at all, on the basis articulated by the agency itself, not post-hoc rationalizations. (*Zinke, supra,* 900 F.3d. at p. 1069.)

Defendants argued that Congress had explicitly left a gap for the agency to fill with regard to petition procedure, that the pre-file notice rule was based on a permissible construction of the statute, and that it imposed only a small burden on petitioners. Defendants' briefing characterized the pre-file notice rule as a mechanism to increase efficiency during the 12-month review by providing affected states advanced notice to begin preparing materials for submission after the 90-day determination. However, the Services' comments in the Federal Register made clear that the purpose of the notice requirement was to encourage states to provide information that the Services can then consult when making their 90-day finding.

Defendants attempted to distinguish the pre-file notice rule, arguing that it did not mandate that states submit any information or that the Services consider any information submitted by a state, and therefore did not rise to the level of soliciting new information from states. The Ninth Circuit found this to be a distinction without practical effect.

The Services also used the pre-file notice rule as a justification for refusing to consider the environmental group's otherwise compliant petition. The ESA permitted the Services to establish requirements for petition content and procedure. The pre-file notice rule, on the other hand, created a procedural hurdle for petitioners that did not comport with the ESA. Congress's intent in establishing the citizen petition procedure in Section 4 was to "interrupt[ ] the department's priority system by requiring immediate review." (*Center for Biological Diversity v. Norton* (9th Cir. 2001) 254 F.3d 833, 840 (*Norton*) (quoting H.R. Rep. No. 95-1625, at p. 5 (1978)). The Services' authority to establish rules governing petitions did not extend to restrictions that frustrate the ESA by arbitrarily impeding petitioners' ability to submit—or the Services' obligation to review—meritorious petitions.

The Ninth Circuit found that the FWS used the pre-file notice rule to refuse to consider a petition that was properly submitted, complied with the substantive requirements in all other respects, and was otherwise entitled to a 90-day finding, while relying on an unreasonable justification that did not accord with the aims of the ESA. The FWS's denial of the petition was therefore arbitrary and in excess of statutory jurisdiction and was required to be set aside. As such, the Ninth Circuit

concluded the pre-file notice rule did not survive the second step of the *Chevron* test. Accordingly, the FWS's decision to deny the environmental group's petition because of its non-compliance with the pre-file notice rule was reversed.

TAKE-AWAYS: Separate from the issue decided in this case for those who practice ESA law, cities should exercise caution in impeding petitions otherwise clearly subject to submittal under applicable federal or state law. While exhausting administrative remedies has legal importance and justification, pre-filing impediments, affecting a petition that otherwise has compliant content, may be construed as contrary to the intent of statutes that allow for a right of review.

* * *

A Community Voice v. U.S. Environmental Protection Agency (9th Cir. 2021) 997 F.3d 983

BACKGROUND: Environmental groups petitioned for a writ of mandamus to compel the U.S. Environmental Protection Agency (EPA) under the Toxic Substances Control Act (TSCA), Residential Lead-Based Paint Hazard Reduction Act (PHA), and U.S. Administrative Procedure Act (APA), to act upon rulemaking petition it granted years previously concerning dust-lead hazard and lead-paint standards. The Court of Appeals for the Ninth Circuit (Ninth Circuit) granted that petition. After EPA promulgated its final rule, groups petitioned for judicial review.

HOLDINGS: The Ninth Circuit held that: (1) EPA was required to set dust-lead hazard standards solely on basis of its assessment of health risks; (2) EPA acted arbitrarily and capriciously in failing to update its definition of "lead-based paint"; (3) EPA's failure to update soil-lead hazard standards violated Subchapter IV of TSCA; and (4) EPA had to reconsider dust-lead clearance levels when it promulgated new hazard standards. The proceedings were remanded to the district court without *vacatur*. N. Randy Smith, Circuit Judge, dissented and filed opinion believing that the EPA acted within its discretion.

KEY FACTS & ANALYSIS: Lead-based paint was banned for consumer use in 1978, but it was not until more than a decade later, in 1992, that Congress enacted the Residential Lead-Based Paint Hazard Reduction Act (PHA). The PHA amended the TSCA, adding Subchapter IV entitled "Lead Exposure Reduction." (15 U.S.C. §§ 2681-2692.) Subchapter IV delegated to the EPA authority to establish lead-based paint hazards. Congress also established the original definition of lead-based paint with reference to the level of lead it contained, and provided the EPA could establish future levels that would apply in all locations other than older housing, where standards were to be set by the U.S. Department of Housing and Urban Development (HUD). Congress prescribed a rapid 18-month timeline for EPA's promulgation of lead-based paint hazards, but the EPA did not finalize standards until 2001. These standards were believed by the EPA, at the time, to be sufficient to maintain a safe blood lead level (BLL) in children.

Within a few years, however, scientific knowledge had progressed to the point where it was generally understood that there is no safe level of lead, so that the previous lead-based paint standards were inadequate. Yet the EPA did not act. By 2009, several entities, including the Petitioners became concerned with the EPA's inaction and filed an administrative petition with the EPA asking for rulemaking. They urged the EPA to lower the dust-level hazard standards (DLHS) and associated dust-lead clearance levels. The 2009 Petition also asked the EPA to broaden the

definition of lead-based paint to include all conditions that were then-known to be toxic. The 2009 Petition asked the EPA to reduce the level of lead in paint that would define a lead-based paint from 0.5 percent by weight to 0.06 percent by weight, with a corresponding reduction in the 1.0 milligram per square centimeter standard.

The EPA granted the 2009 Petition and conducted some follow-up studies but took no rulemaking action. Petitioners then filed the mandamus action that resulted in a 2017 opinion in which the Ninth Circuit held that the EPA had a duty to act and that it had unreasonably delayed in doing so.

The EPA in 2019 adopted the Final Rule before the Ninth Circuit (2019 Final Rule), but addressing only the DLHS, which complied with the requests in the 2009 Petition with regard to the DLHS. In promulgating the 2019 Final Rule, the EPA acknowledged that its earlier, 2018 proposed rule had drawn many comments that a lower standard was needed to protect children's health, but the EPA nevertheless adopted the 2019 Final Rule as originally proposed.

The EPA contended that, in promulgating a more lenient standard than that necessary to protect children's health, it properly took into consideration factors other than health, such as feasibility and efficacy, giving rise to the primary issue of statutory interpretation before the Ninth Circuit. Subchapter IV in the TSCA required the EPA to identify "any condition" of lead in dust, paint, and soil resulting in adverse human health effects. The EPA's position was that the statute granted it discretion to look to factors outside of adverse effects on health. The Ninth Circuit found that this interpretation was not supported by the language of Subchapter IV, or Congress's purpose in enacting its lead-based paint provisions, which are directed toward protecting children's health by reducing exposure to lead. The Ninth Circuit therefore resolved the issue in favor of the petitioners.

The 2019 Final Rule did nothing with respect to the lead-based paint definition, with the EPA explaining as it had in 2001 that it lacked sufficient data. The 2019 Final Rule also did nothing with respect to the soil-lead hazard standards, with the EPA taking a similar position that it lacked sufficient data to update the standards, and, further, that it was under no duty to do so by virtue of either the statute or the prior writ. Petitioners contended that the EPA's failure to update the lead-based paint definition and soil-lead hazard standards violated the EPA's ongoing statutory duty to maintain and update the lead-based paint hazard standards. The Ninth Circuit had already recognized such a duty in the writ proceeding *In re A Community Voice v. U.S. Environmental Protection Agency* (9th Cir. 2017) 878 F.3d 779. The Ninth Circuit therefore found that the EPA's continued reliance on inadequate information for approximately two decades was arbitrary and capricious and in violation of its statutory obligation of scientific currency.

The Ninth Circuit also directed the EPA to reconsider the dust-lead clearance levels which it found to be directly related to the DLHS. In the 2019 Final Rule the EPA, lowered the DLHS but did not even consider the associated clearance levels. The EPA established a separate rulemaking proceeding to establish new clearance levels, a proceeding unrelated to the 2019 Final Rule and hence detached from the DLHS rulemaking. The Ninth Circuit found that this ignored the close relationship between DLHS and the associated clearance levels.

The Ninth Circuit remanded the 2019 Final Rule and directed the EPA to reconsider the DLHS and to do so in conjunction with the dust-lead clearance levels that had been the subject of separate

proceedings. The Ninth Circuit also held that the EPA is statutorily required to engage in the appropriate rulemaking to update the definition of lead-based paint and soil-lead hazard standards. In the case at issue, the EPA had taken some action with respect to the DLHS, albeit insufficient, so the rule was remanded without *vacatur*.

* * *

STATE CASES

Save Lafayette Trees v. East Bay Regional Park District (2021) 66 Cal.App.5th 21

BACKGROUND: Neighbors and an interest group filed an amended petition/complaint seeking to vacate a regional park district's approval of a memorandum of understanding with a natural gas utility allowing for the removal of 245 trees from park district land. The Superior Court sustained the defendants' demurrers without leave to amend and dismissed the lawsuit, and neighbors and the interest group appealed.

HOLDINGS: The Court of Appeal held that: (1) a tolling agreement with the regional park district regarding the California Environmental Quality Act (CEQA) challenge was not binding on the utility; (2) the date on which CEQA's 180-day statute of limitations was triggered was the date of the public hearing; (3) statutory exception prohibiting a regional park district from interfering with public property that is either "owned or controlled" by a city did not require park district to comply with municipal tree protection ordinance; (4) park district's board was not bound by a district ordinance providing rules and regulations for the general public's use of district land; and (5) the district's actions were all quasi-legislative actions to which constitutional due process rights of notice and hearing were inapplicable. The judgment of the Superior Court was affirmed.

SPECIAL NOTE: *Petition for Review filed* (Aug. 10, 2021).

KEY FACTS & ANALYSIS: On March 21, 2017, following a public hearing, East Bay Regional Park District (EBRPD's) Board of Directors committed to accept Pacific Gas and Electric Company (PG&E) funding for environmental restoration and maintenance at Briones Regional Park and Lafayette-Moraga Regional Trail. The staff report prepared in connection with the approved funding explained:

> PG&E's Community Pipeline Safety Initiative helps to ensure that PG&E pipelines are operating safely by looking at the area above and around the natural gas transmission lines to be certain that first responders and PG&E emergency response crews have critical access to the pipelines in the event of an emergency or natural disaster. As part of this initiative, PG&E conducted an in-depth review of trees located up to 14 feet from the gas transmission pipeline on District property in Contra Costa County. The results of the review were shared with the District and it was determined that a total of 245 trees are located too close to the pipeline and will be removed for safety reasons. [¶] ... [¶] In consideration of the trees that will be removed for safety reasons, PG&E will provide the District with a payment of $1,000 for each tree that is being removed, for a total payment of $245,000. PG&E

> will also provide one replacement tree for each of the 31 District-owned trees within the City of Lafayette, per the City's ordinance. PG&E will work with the District on appropriate community outreach in advance of the planned safety work. In addition, PG&E will provide the District with $10,000 to be used on two years of maintenance related to maintaining pipeline safety at Briones Regional Park.

Following the March 21 public hearing, the Board issued Resolution No. 2017-03-065, passed by motion, authorizing the acceptance of funding from PG&E's Community Pipeline Safety Initiative for Environmental Restoration and Maintenance at Briones Regional Park and Lafayette-Moraga Regional Trail.

On June 27, 2017, EBRPD filed a Notice of Exemption (NOE) under CEQA in the county clerk's office, announcing that the Board of Directors had reviewed and determined the related Memorandum of Understanding (MOU) was not an activity subject to CEQA. It was further determined that "any activity related to the MOU would be categorically exempt" under CEQA, citing to Public Resources Code section 21080.23 (Work on Existing Pipelines), and Guidelines (14 Cal. Code Regs.) Sections 15301(b) (Existing Facilities), 15302 (Replacement or Reconstruction), and 15304 (Minor Alterations to Land).

On July 31, 2017, appellants Save Lafayette Trees and EBRPD entered into an agreement to toll all applicable statutes of limitations for 60 days (tolling agreement). PG&E did not consent to the tolling agreement.

Within the 60-day tolling period, on September 29, 2017, appellants commenced the action by filing a petition/complaint challenging EBRPD's approval of the MOU against EBRPD as respondent/defendant and PG&E as real party in interest. Appellants also filed a proof of service that they had given EBRPD the required mail notice of their intent to file a CEQA action on September 28. The petition/complaint was personally served on EBRPD on September 29, and personally served on PG&E's representative on October 2, within 20 days of service on EBRPD.

The first amended petition/complaint alleged EBRPD failed to undertake a CEQA analysis of the potential environmental impact of the removal of trees before approving the MOU (CEQA cause of action). The second cause of action alleged, in pertinent part, that EBRPD's approval of the MOU violated the procedural and substantive requirements of the City of Lafayette Tree Protection Ordinance and EBRPD Ordinance 38. The third cause of action alleged EBRPD violated appellants' state constitutional due process rights by approving the MOU without providing public notice "reasonably calculated to apprise [appellants] and other directly affected persons that hundreds of trees near their properties and along many miles of highly popular public recreational trails would be removed, and their property interests would be thereby affected." The trial court sustained PG&E's demurrer to the CEQA cause of action without leave to amend based upon its findings that it was time-barred under both the 35-day and 180-day limitations periods set forth in Public Resources Code section 21167.

The trial court found the 180-day limitations for the CEQA cause of action began to run on March 21, 2017, the date of the EBRPD's public decision to carry on the project, expired on September 18, and, accordingly, the CEQA cause of action was time-barred as the lawsuit was filed "eleven

days" late on September 29, 2017. The Court of Appeal agreed. The Court also found that the trial court properly concluded that the tolling agreement was ineffective because PG&E was a necessary and indispensable party to the CEQA cause of action and did not consent to the tolling agreement. The Court therefore concluded that the CEQA cause of action was time-barred despite the tolling agreement.

On the other claims, the Court of Appeal found that the municipal tree protection ordinance did not apply to the approval of the MOU, that Ordinance 38 did not apply to the ERBPD's actions taken under its statutory authority, and that the cause of action for a violation of the appellants' due process rights failed to state a cause of action because the pleading failed to allege a general rezoning or governmental deprivation of a significant or substantial property interest. EBRPD's March 21, 2017 public hearing, the approval of Resolution No. 2017-03-065, and the execution of the MOU with PG&E were all quasi-legislative acts to which constitutional due process rights of notice and hearing were inapplicable.

TAKE-AWAYS: Tolling agreements for CEQA statutes of limitation are not binding on necessary and indispensable parties to the underlying CEQA causes of action who do not agree to their terms.

* * *

Linovitz Capo Shores LLC v. California Coastal Commission (2021) 65 Cal.App.5th 1106

BACKGROUND: Owners of beachfront mobilehomes petitioned for writ of mandate declaring that the coastal development permits they sought from the California Coastal Commission (Commission) were deemed approved by operation of law under the Permit Streamlining Act (Streamlining Act). The Superior Court denied the petition, and homeowners appealed.

HOLDING: The Court of Appeal held that: (1) as a matter of first impression, the Commission and California Department of Housing and Community Development (HCD) have concurrent jurisdiction with respect to mobilehomes located in the coastal zone; (2) evidence supported the trial court's finding that did not withdraw their permit applications before the Commission; and (3) the Commission's public hearing notice provided "public notice required by law" such that necessary prerequisites to deemed approval were satisfied. The decision of the Superior Court was reversed and remanded.

SPECIAL NOTE: *Petition for Review filed* (Aug. 4, 2021).

KEY FACTS & ANALYSIS: Appellants were owners of beachfront mobilehomes in Capistrano Shores Mobile Home Park located in the City of San Clemente. Prior to the events giving rise to this lawsuit, each of their mobilehomes was a single-story residence.

Between 2011 and 2013, appellants each applied for, and received, a permit from HCD to remodel their respective mobilehome. They planned to change interior walls, outfit the exteriors with new materials, replace the roofs, and add second stories.

Appellants also applied for coastal development permits from the Commission. Their applications expressly indicated they were not addressing any component of the remodels for which they obtained HCD permits, including the addition of second stories. Rather, their coastal development

permit applications concerned desired renovations on the grounds surrounding the mobilehome structures, including items such as carports, patio covers, and barbeques.

In February 2014, the Commission issued notices to appellants that the then-complete renovation of their residential structures was unauthorized and illegal without a coastal development permit. The Commission gave appellants two options to avoid substantial fines and civil penalties. First, appellants could revise their previously submitted coastal development permit applications to instead request authorization to remove the allegedly unpermitted remodels and resubmit the applications within 30 days. Alternatively, appellants could apply for "after-the-fact" authorization to retain the unpermitted development. The notice, however, indicated Commission staff would not support requests to retain the second story additions. Appellants believed the Coastal Commission did not have any authority over their structure renovations, but nevertheless chose to apply for "after-the-fact" permits, reserving their right to later challenge the Commission's jurisdiction. They submitted the necessary materials and paid the mandated fees—five times the amount of the standard permit fees.

The Commission held public hearings on all applications. At one point, a commissioner suggested continuing the matters to a future date to allow more time for negotiations; however, the Commission's legal counsel stated that was not an option due to an impending deadline under the Streamlining Act. Appellants' representative made a proposal concerning the remaining applications that would allow for further discussion about alternatives to Commission staff's recommendation. He indicated appellants' desired to withdraw the applications and resubmit them right away, and he simultaneously requested a commissioner make a motion to waive the standard six-month waiting period for resubmittal and waive all additional fees.

The Commission discussed and voted on both aspects of appellants' request. First, the Commission unanimously voted to allow immediate resubmission of the applications without any waiting period. Second, the Commission rejected the request to waive or reduce the required fees for resubmittal. Following these votes, the Commission's chair adjourned the meeting. Neither appellants nor the Commission took any further action concerning the pending applications. Importantly, the appellants never withdrew their applications.

A few months later, appellants filed a petition for writ of mandate. They requested declaratory relief stating their applications were approved, without conditions, by operation of law under the Streamlining Act. They moved for judgment, which the Commission opposed. The Commission contended: (1) appellants withdrew their applications prior to the time at which the applications could be deemed approved under the Streamlining Act; (2) the applications were not deemed approved under the Streamlining Act because the requisite notice was not given; and (3) contrary to appellants' assertion, the Commission had jurisdiction to require coastal development permits in the first instance.

The trial court heard the matter, ultimately finding in favor of the Commission. It rejected the Commission's argument concerning withdrawal of the applications, but agreed the Commission had jurisdiction and that the notice prerequisite to deemed approval under the Streamlining Act was not satisfied.

Appellants asserted that the trial court erred in denying their writ petition for two reasons. First, they claimed that the Commission lacked jurisdiction to require a coastal development permit for their projects because HCD has exclusive jurisdiction over mobilehome construction and design. Second, they argued that the applications should have been deemed approved under the Streamlining Act when the Commission failed to approve or disapprove their projects within the time required by law. The Court of Appeal for the Fourth District, Division Three agreed with the second contention and reversed the decision of the Superior Court.

The Court of Appeal first harmonized the Mobile Home Parks Act (MPA) and the Coastal Act and found a system of overlapping jurisdiction between HCD and the Commission. The Court found that there is no inherent conflict between HCD having authority over the construction and reconstruction of mobilehomes for purposes of ensuring health, safety and general welfare, and giving the Commission authority to protect the natural and scenic resources, as well as the ecological balance, in the Coastal Zone. Accordingly, the Commission did not exceed its jurisdiction by requiring appellants to obtain a coastal development permit for their respective structural remodels.

Noting the lack of action by the Commission, appellants contended that their applications were deemed approved, without conditions, by operation of law under the Streamlining Act. The Commission did not dispute the lack of action but nevertheless maintained that deemed approval did not occur because (1) appellants withdrew their applications, and (2) the requisite public notice required for an application to be deemed approved was never given. The Court agreed with the appellants. The Court found the Commission's contention that the appellants withdrew their applications was at odds with the facts at trial, which the Court of Appeal would not reweigh.

The Court then considered the Commission's argument relating to the Streamlining Act's provision for public notice "required by law" before permits can be approved by operation of law. The Commission urged the Court to adopt the same interpretation as in *Mahon v. County of San Mateo* (2006) 139 Cal.App.4th 812 (*Mahon*), the only published case interpreting the statutory language at issue. There, the First District Court of Appeal concluded "public notice required by law" given by an agency must contain language stating that deemed approval will occur if the agency does not act within 60 days. The Court declined to adopt *Mahon*'s interpretation. The Commission provided the notice required by the applicable Coastal Act statutes considering the permit applications. The Court therefore determined that the Commission had provided the public notice "required by law" even if it did not state that the approval would occur in the absence of agency action. The Court also found that due process considerations did not require such a statement. Therefore, the Court concluded that the applications were deemed approved under the Streamlining Act.

TAKE-AWAYS: This case is useful for cities that are within the Coastal Zone and have within that boundary any mobilehome parks. Concurrent jurisdiction by HCD and the Commission has been confirmed. As far as the Streamlining Act is concerned, cities in Northern California (First District Court of Appeal) and Southern California (Fourth District Court of Appeal) appear to have separate legal consequences for noticing. According to the Fourth District, proper notice of permit considerations under the Streamlining Act does *not* require notice that an application will be "deemed approved" after a certain time if an agency fails to act. "We disagree with the interpretation of the Streamlining Act set forth in [*Mahon*], as the plain language of [Government

Code] section 65956(b), does not require an agency's public notice to include a statement that the permit at issue will be deemed approved if the agency does not act on it within a specified number of days." (*Linovitz Capo Shores, supra,* 65 Cal.App.5th at p. -- (280 Cal.Rptr. 511, 515). As noted above, a Petition for Review has been filed. Stay tuned...

* * *

Martin v. California Coastal Commission (2021) 66 Cal.App.5th 622

BACKGROUND: Landowners petitioned for a writ of administrative mandate challenging the Coastal Commission's (Commission's) imposition of special conditions placed on the development of their vacant oceanfront lot, which required landowners to eliminate a basement from their proposed home, and to set back their home 79 feet from bluff edge. The trial court granted in part and denied in part the petition. Landowners appealed and the Commission cross-appealed.

HOLDING: The Court of Appeal held that: (1) the Commission correctly interpreted the City of Encinitas Local Coastal Program (LCP) requirement regarding calculation of setback from bluff edge; (2) substantial evidence supported the Commission's decision requiring 79-foot setback from the bluff edge; (3) the Commission's imposition of a special condition prohibiting landowners from constructing a basement was consistent with the LCP removability requirement; and (4) substantial evidence supported the Commission's imposition of a special condition prohibiting landowners from constructing a basement. The decision of the trial court was affirmed in part and reversed in part.

KEY FACTS & ANALYSIS: Landowners Gary and Bella Martin appealed from a judgment entered after the trial court granted in part and denied in part their petition for writ of administrative mandate challenging the imposition of certain special conditions placed on the development of their property, a vacant oceanfront lot in Encinitas, by the Commission. The Commission also appealed the judgment. The Martins' appeal challenged a condition requiring them to eliminate a basement from their proposed home, while the Commission challenged the trial court's reversal of its condition requiring the Martins to set back their home 79 feet from the bluff edge. Because the Court of Appeal for the Fourth District, Division One agreed with its recent decision in *Lindstrom v. California Coastal Commission* (2019) 40 Cal.App.5th 73 (*Lindstrom*), interpreting the same provisions of the city's LCP and Municipal Code at issue in the case, the Court reversed the trial court's invalidation of the Commission's setback requirement and affirmed the trial court's decision to uphold the basement prohibition.

At issue were two special conditions placed on a CDP for the Martins' home remodel after they consolidated two adjacent lots: a 79-foot setback and a basement prohibition, although a 40-foot setback was all that was required to comply with the public access requirements of the Coastal Act. In part, the Commission found that, in conjunction with sea level rise, if a shoreline protective device became necessary to protect the structure, the installation of such protection would lead to the loss of beach access. In the Commission staff's view, a 79-foot setback, among the other conditions, was necessary to avoid this impact.

In addition to seeking a writ of mandate reversing the Commission's conditional approval, the Martins also sought a declaration that the Commission's bluff-edge setback methodology was unlawful, an injunction to preclude the Commission's future use of the methodology, a declaration that the Commission's policy of requiring the waiver of future shoreline protection as a condition of approval was unlawful, and an injunction preventing the Commission from enforcing or implementing such policy.

The trial court issued an order finding that the setback requirement was inconsistent with the LCP and an abuse of discretion. It also agreed that the Commission's prohibition of a bluff and shoreline armoring device as a condition of approval was an abuse of discretion.

In September 2019 the Court issued its opinion in *Lindstrom*, a case presenting issues that overlapped with those presented in this case, and which explicitly resolved the same setback question presented here in favor of the Commission. Like this case, *Lindstrom* involved the development of a home on a coastal bluff in Encinitas. Like the Martins, the Lindstroms obtained a CDP from the City, which was then challenged by the Commission. The Commission appealed the City's approval of a 40-foot setback. As in this case, the Commission concluded the 40-foot setback was insufficient under the LCP because it failed to consider the bluff's stability and predicted erosion rate of the coastline. The LCP required the applicant to demonstrate that a specified safety factor for erosion be maintained for 75 years, not just under present conditions. Thus, to assure an adequate safety factor for the expected life of the development, it was necessary to calculate the total setback as equal to the sum of the bluff retreat setback and the slope stability setbacks. Adopting this interpretation of the LCP, the Commission imposed a special condition requiring a 60-62 foot setback from bluff edge, which it found would allow the owners to construct a 3,500 square foot home (or larger home if a variance of the front setback requirement was obtained). Moreover, the City's Municipal Code expressly required that a structure be reasonably safe from failure and erosion over its lifetime. The Lindstroms challenged the decision and, as in this case, the trial court concluded the Commission's interpretation of the LCP was wrong. The Court disagreed and found that the Municipal Code, when combined with the LCP, supported the Commission's analysis and setback requirement.

Lindstrom, which was issued after the trial court's decision in this case, definitively rejected the argument advanced by the Martins that the Commission wrongly interpreted the LCP in its calculation of the required setback. The fact that the Commission had incorrectly applied its setback calculation in the past was not persuasive.

Likewise, substantial evidence supported the Commission's decision requiring a 79-foot setback from the bluff edge based upon a 0.52 feet-per-year erosion rate. The Martins hired an independent geotechnical firm, which opined that a 40-foot setback complied with the LCP, and certified that the home would be safe from coastal bluff retreat over its 75-year design life without the need for shoreline protection. The Commission also had in-house staff and an independent geotechnical consultant. According to the Court of Appeal, the Commission's staff used well-accepted scientific methodology to support its setback recommendation to the Commission, including, with respect to projected erosion, recent sea level rise data. The Commission staff also examined the geological specifics of landowners' site, and landowners did not establish that the Commission failed to adequately account for the strength of material at the bottom of the bluff. The Court ultimately concluded that the evaluation of competing evidence was within the discretion of the Commission.

Likewise, the condition prohibiting the Martins from installing a basement was not improperly imposed. The prohibition was consistent with the removability requirement set forth in the LCP, which required that all new construction be designed and constructed for removal, applied to all new construction, and was not limited to new construction within 40 feet of the bluff edge. There was substantial evidence to support the Commission's conclusion that the removal or relocation of an installed basement would potentially destabilize the bluff.

In the trial court, the Martins also successfully challenged special condition 3(a), which provided that, by accepting the permit, the Martins agreed that no bluff or shoreline armoring device will ever be built to protect the new home. The Martins had abandoned this challenge on appeal and thus the Court agreed with the Commission that the trial court's invalidation of special condition 3(a) should be reversed.

The judgment of the decisions of the trial court were reversed to the extent they held for the Martins. The Commission's special conditions were therefore upheld in full.

TAKE-AWAYS: This case is a "classic" example of a court deferring to the agency with expertise when deciding whether substantial evidence supports a condition of approval. Plaintiffs and the Commission both had geotechnical experts to support their respective positions on erosion rate and adequate setback requirements. Here, the Commission's evidence, and weighing of other evidence presented, was found to be sound and legally sufficient.

* * *

Newtown Preservation Society v. County of El Dorado (2021) 65 Cal.App.5th 771

BACKGROUND: A public interest group filed a petition for writ of mandate, challenging a county's adoption of a final mitigated negative declaration for a bridge replacement project. The trial court denied the writ and entered judgment for the county. The group appealed.

HOLDING: The Court of Appeal held that the county was not required under California Environmental Quality Act (CEQA) to prepare an Environmental Impact Report (EIR). The decision of the trial court was affirmed.

KEY FACTS & ANALYSIS: The CEQA challenge at issue concerned adoption of a Mitigated Negative Declaration (MND) for and approval of the Newtown Road Bridge at South Fork Weber Creek Replacement Project (the project) by El Dorado County (County) and its board of supervisors (collectively respondents). The proposed project was the replacement of an existing bridge. Petitioners Newtown Preservation Society, an unincorporated association, and Wanda Nagel (collectively petitioners) challenged the MND, arguing, among other things, the project may have significant impacts on fire evacuation routes during construction and, thus, the County was required to prepare an EIR. The MND contained alternative evacuation procedures, and found that the proper procedure would be decided with the safety authority at the time of an emergency. The trial court upheld the MND. The petitioners appealed.

Petitioners argued the trial court erred in upholding the MND because: (1) substantial evidence supported a fair argument of potentially significant impacts on resident safety and emergency

evacuation; (2) the County impermissibly deferred analysis of temporary emergency evacuation impacts; (3) the County impermissibly deferred mitigation of such impacts; and (4) the County deferred analysis of impacts pertaining to construction of a temporary evacuation route.

In the published portion of the opinion, the Court of Appeal for the Third District explained that petitioners' framing of the fair argument test for CEQA challenges to MNDs in terms of the project having "potentially significant impacts on resident safety and emergency evacuation" was erroneous. The test, instead, is whether the record contains substantial evidence that the project may have a significant effect on the environment or may exacerbate existing environmental hazards. The Court concluded that petitioners had failed to carry their burden of showing substantial evidence supports a fair argument of significant environmental impact in that regard.

In the unpublished portion of the opinion, the Court of Appeal concluded the County did not impermissibly defer mitigation and declined to consider the two remaining arguments. Finding no merit in petitioners' contentions, the Court affirmed.

Petitioners essentially contended that there was substantial evidence in the record to support a fair argument that the project will have a significant impact on public safety in that the bridge will be closed without the County committing to construction of a sufficient evacuation route in the event of fire while the bridge is being replaced, leaving Newtown bridge unavailable for evacuation of homes in the vicinity. Petitioners also claimed that the many alternative evacuation plans set forth in MND were insufficient and area residents would be exposed to the dangers of wildfires without evacuation during the closure of the bridge.

The trial court found that the petitioners had not cited to substantial evidence in the record that raised a fair argument that this project may have a significant non-mitigated impact on the environment due to a failure to provide adequate evacuation routes for project area residents during a wildfire or other emergency during construction of the project.

The Court of Appeal found that petitioners had incorrectly framed the fair argument test. The question was not whether substantial evidence supported a fair argument that the proposed project would have significant impacts on resident safety and emergency evacuation. The question was whether the project would have a significant effect on the environment. The resident concerns in the administrative record all focused on the potential impact on public safety of the project if no adequate alternate routes were available.

While lay testimony may constitute substantial evidence when the personal observations and experiences directly relate to and inform on the impact of the project under consideration, in the case at issue, the comments lacked factual foundation and failed to contradict the conclusions by agencies with expertise in wildfire evacuations with specific facts calling into question the underlying assumptions of their opinions as they pertained to the project's potential environmental impacts. While petitioners asserted that the residents' past experiences with fires indicated that fires to the west of the Project area make using Newtown Road Bridge the only viable evacuation route, the comments relied upon did not establish that fact, nor did petitioners cite to the record in support of that assertion.

Because the Court of Appeal found that the petitioners failed to identify substantial evidence in support of a fair argument that the project might have a significant impact on the environment or may exacerbate existing environmental hazards, it declined to consider the petitioners' other arguments.

In the unpublished portion of the opinion, the Court of Appeal found that the County did not impermissibly defer mitigation. The MND set forth various alternative evacuation plans, and provided that the County would work with the Emergency Services Office at the time of an emergency to select the proper plan depending on the situation. The Court found that the agency with the expertise (the Emergency Services Office) and authority over evacuations approved of the mitigation proposed, and would continue to play a key role in determining which mitigation measures to employ in a given emergency. The MND provided that the contract plans would include the construction of the temporary evacuation route, and the County would consult with the Emergency Services Office, County Fire, and the County Department of Transportation, prior to construction of the project to determine whether the temporary evacuation route should be constructed. The MND further provided that the decision whether to construct the temporary emergency evacuation route would be made prior to the project's construction, and the criteria for that decision would include the timing of the construction in relation to the fire season. The Court opined that deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. The Court noted that this is particularly true in emergency situations which are unpredictable. Disagreeing with the petitioners' assertions that the County failed to commit itself to a course of action, failed to commit to any mitigation, and failed to provide a timetable or trigger for construction of the temporary emergency evacuation route, the Court concluded the County need not commit to a particular mitigation measure as long as it commits to mitigating the impacts of the project, which it found that it did.

The Court of Appeal did not consider the remainder of petitioners' arguments, having found that they failed the fair argument test and because the petitioners had forfeited other arguments by failing to raise them at trial.

TAKE-AWAYS: This case has a helpful discussion for framing the "fair argument" test, confirming that lay testimony and personal observations included in an administrative record are not necessarily, in and of themselves, sufficient to show a CEQA violation. Additionally, the unpublished portion of the opinion held *Save Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665 was not analogous to the facts surrounding the instant case's approach in the MND to mitigate impacts—*i.e.,* the emergency mitigation measures in this case were specific performance criteria that could be implemented to prepare for and respond to a fire or other emergency.

* * *

Kracke v. City of Santa Barbara (2021) 63 Cal.App.5th 1089

BACKGROUND: Manager of short-term vacation rentals (Petitioner) filed a petition for writ of mandate to compel the City of Santa Barbara (City) to allow short-term vacation rentals in its

Coastal Zone as it had done before instituting new policy that banned such rentals in the Coastal Zone. The trial granted the petition. The City appealed.

HOLDING: The Court of Appeal held that City's ban on short-term vacation rentals in the Coastal Zone constituted a "development" under the Coastal Act that required a coastal development permit (CDP) or an amendment to its certified Local Coastal Program (LCP).

KEY FACTS & ANALYSIS: Prior to 2015, the City encouraged the operation of short-term vacation rentals (STVRs) along its coast by treating them as permissible residential uses. In June 2015, the City began regulating STVRs as "hotels" under its municipal code, which effectively banned STVRs in the coastal zone. The City did not seek a CDP or an amendment to its certified LCP prior to instituting the ban.

Petitioner sought a writ of mandate under Code of Civil Procedure section 1085 enjoining the City's enforcement of the STVR ban in the coastal zone unless it obtained a CDP or LCP amendment approved by the California Coastal Commission (Commission) or a waiver of such requirement. The trial court granted the petition on the ground that the ban on STVRs was a "development" encompassed by the Coastal Act's CDP requirements. The City appealed. The Court of Appeal for the Second District, Division Six affirmed.

The Coastal Act requires that any person who seeks to undertake a development in the Coastal Zone obtain a CDP. "Development" is broadly defined to include, among other things, any change in the density or intensity of use of land. The court observed that public access and recreational policies of the Coastal Act should be broadly construed to encompass all impediments to access, whether direct or indirect, physical or nonphysical. This included closing a gate that would usually provide public access to the beach, posting "no trespassing" signs, and fireworks displays.

The Court of Appeal examined the facts in *Greenfield v. Mandalay Shores Community Assn.* (2018) 21 Cal.App.5th 896, where a homeowners association banned STVRs in a city that had traditionally allowed them, and where the court found that the ban changed the intensity of use and access to single-family residences in the Oxnard Coastal Zone, and therefore held that the decision to ban or regulate STVRs must be made by the City and Commission, not a homeowner's association. Here, the Court found similarly that the coastal STVR ban should not have been accomplished without the Commission's input or approval. The Court noted that the LCP in the present case and in *Greenfield* were both certified in the late 1980s, before STVRs became popular or common, which is why it disagreed with the City that the lack of express reference to STVRs in the LCP meant that they should be excluded. The Court was also swayed by the fact that the City did not "turn a blind eye" to STVRs, but rather benefited from the payment of transient occupancy taxes for years. It agreed with the trial court that "'[t]he City cannot credibly contend that it did not produce a change because it deliberately acted to create a change' in coastal zone usage and access." Because that change constituted a development, the trial court properly struck down STVR regulation in the coastal zone.

The City contended that because STVRs were not expressly included in its LCP, they were therefore excluded, giving the City the right to regulate them without regard to the Coastal Act. The Court disagreed and held that regulation of STVRs in the Coastal Zone must be decided by the City and the Commission. The City could not act unilaterally, particularly when it not only

allowed the operation of STVRs for years but also benefited from the payment of transient occupancy taxes.

TAKE-AWAYS: The STVRs saga continues. Cities in the Coastal Zone at a minimum need to assess whether enacting or changing their STVR regulations would impact public coastal access and accessibility. While cities may have different approaches on how to address the Commission's involvement whenever STVR regulations may be at issue, processing an amendment to a local coastal program may be an option.

POSTSCRIPTS: The League of California Cities filed an Amicus Curiae brief in support of the City. Also, review was denied (Aug. 11, 2021).

* * *

Issakhani v. Shadow Glen Homeowners Association, Inc. (2021) 63 Cal.App.5th 917

BACKGROUND: A condominium complex guest brought an action against a condominium complex owner, asserting claims for negligence and premises liability arising from injuries she sustained from being struck by a car while crossing the street where she parked to get to the condominium complex, which allegedly had too few onsite parking spaces for guests. The trial court entered summary judgment for the owner. The guest appealed.

HOLDING: The Court of Appeal held that: (1) the owner did not have a common law duty of care to protect the guest from an accident that occurred as she traveled to the premises, and (2) the local ordinance of the City of Los Angeles (City) did not create duty of care to provide adequate guest parking. The judgment of the trial court was affirmed.

KEY FACTS & ANALYSIS: A pedestrian who decided to jaywalk across a five-lane highway at night was struck by a car. The pedestrian sued the owner of the condominium complex she was trying to visit for negligence and premises liability for having too few onsite parking spaces for guests.

The appeal presented the following questions: Does a landowner owe a duty of care to invitees to provide adequate onsite parking either (1) under common law principles or (2) by virtue of a 1978 City ordinance that rezoned the complex's specific parcel for multifamily dwellings and conditioned that rezoning on providing a specific number of guest parking spaces? The Court of Appeal for the Second District, Division Two concluded the answer to both questions is "no."

In *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077 (*Vasilenko*), the California Supreme Court held that a landowner who does no more than own a site and maintain an offsite parking lot that requires invitees to cross a public street to reach the landowner's premises does not owe a duty to protect those invitees from the obvious dangers of the public street. The case foreclosed the possibility that landowners had duties to provide onsite parking to invitees. California courts have likewise refused to impose duties on landowners to protect invitees from the dangers of crossing nearby streets to the property, as long as they do not exacerbate the dangers to invitees coming and going from the property.

Under the analysis explained in *Rowland v. Christian* (1968) 69 Cal.2d 108 (partially superseded by statute on other grounds, *see, Smith v. Freund* (2011) 192 Cal.App.4th 466, 473, fn. 5), which

considers certain foreseeability and public policy factors for imposition of premises liability, neither the foreseeability of a guest electing to park offsite across a highway then cross the five-lane highway, nor the public policy of imposing duties on landlords to protect against injuries to guests coming from offsite parking, supported the guest's arguments for a duty of care. Finding no duty, the Court found no common law negligence.

Of particular relevance for cities, the Court of Appeal similarly concluded that the local parking ordinance, aimed at preserving the aesthetic character of the surrounding neighborhood rather than protecting against traffic accidents, could not supply a statutory duty on which the guest could support a negligence claim. Instead, the ordinance was a parcel-specific enactment that served as the culmination of a process of an internal, parcel-specific administrative review. The original developer of the complex filed an application to rezone its parcel of property (and only its parcel of property), and that application proceeded through several levels of administrative review by City officials until the City Council, as the final level of that review, approved the developer's rezoning application. Although the City Council's mechanism for doing so was through enacting the ordinance, that was necessary because the City's zoning map was set forth in an ordinance (at the time, Los Angeles Municipal Code section 12.04) and thus could be modified only through another ordinance. However, the mechanism of enacting an ordinance did not alter the fundamental character of the City Council's act as embodying merely a parcel-specific policy that was tied to the facts peculiar to the individual case. Because that ordinance embodied no general public policy, it could not be used as a fulcrum to create a duty of care. Moreover, the fact that the City introduced its zoning provisions as being for the purpose of health, safety and welfare, was insufficient to infer a duty from the particular ordinance at issue.

TAKE-AWAYS: City parking ordinances and other related zoning and planning ordinances will not confer a statutory duty of care on property owners unless those ordinances embody a fundamental public policy and are created to protect the class of plaintiff invoking the ordinance from the harm against which it was designed to protect. A parking ordinance for the purpose of preserving aesthetic character supplies no such duty. Nevertheless, cities may want to consider the purposes underlying their ordinances and have an awareness that they may create a statutory duty of care.

POSTSCRIPT: *Petition for Review denied* (Aug. 18, 2021).

* * *

Dunning v. Johnson (2021) 64 Cal.App.5th 156

BACKGROUND: Developer brought an action against owner of a commercial horse ranch and its attorneys, asserting claims for malicious prosecution arising from their pursuit of an underlying environmental lawsuit against the developer, alleging that its project for constructions of a private secondary school adjacent to the ranch violated the California Environmental Quality Act (CEQA), which failed on the merits. The trial denied owners' and the attorneys' anti-SLAPP special motions to strike the malicious prosecution claims, and they appealed.

HOLDINGS: The Court of Appeal held that: (1) the owner and attorneys lacked probable cause for pursuing the underlying action; (2) the owner acted with malice in pursuing the underlying action;

and (3) there was no evidence that attorneys acted with malice in pursuing the underlying action. The judgment of the trial court was affirmed in part and reversed in part.

KEY FACTS & ANALYSIS: In 2013, Developers Cal Coast Academy RE Holdings, LLC, and North County Center for Educational Development, Inc. (collectively Cal Coast) purchased land in Carmel Valley with the intent to construct and operate a private secondary school on the property. The property sat on a bluff above State Route 56, a busy divided highway, and was adjacent to an equestrian facility owned and operated by Clews Horse Ranch. The property was situated at the end of Clews Ranch Road, a private driveway that also provided access to the ranch. Clews Ranch Road connected with Carmel Country Road. At that intersection, a public parking lot served as recreational bicycle and hiking trails in the area.

Cal Coast applied to the City of San Diego (City) for the approvals necessary for the project. The City prepared an initial study in which its staff determined the project would not have a significant impact on any environmental factors with the exception of cultural resources. City staff concluded the impact on cultural resources would be less than significant if mitigation measures were adopted. They also determined a farmhouse on the project site was a historical resource, but the project's effect on the farmhouse would be less than significant. Further, they determined the project was compatible with the community plan, would not expose people or structures to a significant risk of loss, injury, or death involving wildland fires, and would have no environmental impact on noise, recreational resources, or traffic and transportation.

Based on the initial study, City staff prepared a draft Mitigated Negative Declaration (MND) for the project. The draft MND described the project, identified the potential impact on cultural resources, and discussed the mitigation measures required to lessen any such impact.

Interested parties submitted comments to the draft MND. One of the attorneys submitted a comment on behalf of Clews Horse Ranch challenging the use of an MND and asserting an environmental impact report (EIR) was necessary to assess the project's potential impacts on historical resources, fire hazards, noise, and transportation and traffic. As relevant here, the comment posited that potential noise from the school, such as buzzers and bells, may "spook horses, distract riders and seriously annoy professional trainers" at the ranch. A rider associated with Clews Horse Ranch also submitted a comment opposing the project and noting that on at least three occasions riders had been thrown from terrified horses due to loud, unanticipated noises, or blowing plastic sheets that were improperly tied down.

A City hearing officer then considered the project at a public hearing during which attendees spoke in favor of and against the project. One of the owners of Clews Horse Ranch spoke in opposition to the project and stated the project would "condemn" his horse ranch, which had lost three boarded horses just because of the threat of the school. Regarding the issue of noise, the owner stated the school's fire alarms might produce noise if they needed to be tested or if they malfunctioned. A speaker who boarded a horse at the ranch also spoke in opposition to the project, stating he would not ride his horse on a trail located to the north of the project site out of concern that the school would be noisy. Notwithstanding these and other stated concerns, the hearing officer approved the project and adopted the MND.

At the time, the City Municipal Code provided that a hearing officer's decision may be appealed to the City's Planning Commission within 10 business days, but any appeal from an environmental determination—including adoption of an MND—must simultaneously be made to the City Council within the same period. The attorney defendants, on behalf of Clews Horse Ranch, appealed the hearing officer's decision to the Planning Commission, which denied the appeal and granted a coastal development permit and site development permit for the project. The attorney defendants did not timely appeal the adoption of the MND to the City Council on behalf of Clews Horse Ranch.

Clews Horse Ranch then purported to appeal the Planning Commission's decision to the City Council and indicated it was appealing both the project approval and the adoption of the MND. The City rejected Clews Horse Ranch's appeal. It stated the Planning Commission's decision was final as to the permit approvals and the attempted appeal from the adoption of the MND was untimely.

Represented by the attorney defendants, Clews Horse Ranch filed a petition for writ of mandate to compel the City to set aside its approval of the project and adoption of the final MND, as well as a complaint for declaratory and injunctive relief, violation of procedural due process, and equitable estoppel (referred to generally as the CEQA Litigation). The petition asserted the project may have significant environmental impacts in the areas previously discussed and that the City violated CEQA by failing to require an EIR for the project. Further, it claimed the City violated CEQA by including significant new information in the final MND that was not circulated for public comment. Finally, it alleged the project violated applicable land use plans and the City's historical resources regulations.

After briefing and argument, the trial court denied the petition and denied recovery for Clews Horse Ranch. The trial court rejected Clews Horse Ranch's estoppel argument and found its CEQA claims were barred due to its failure to exhaust administrative remedies. The trial court did not expressly address the argument that the City's administrative appeals process violated CEQA.

As an alternative basis for denying the writ petition, the court found that the MND was the appropriate environmental document for the modest project in question. The court stated it searched for substantial evidence in the record that would support a "fair argument" that significant impacts or effects may occur and will not be mitigated, but it found none. The trial court opined that "much of what motivated [Clews Horse Ranch's] objection to the building of the school next door ha[d] nothing [to] do with environmental concerns. [Clews Horse Ranch] just [did] not want the academy as a neighbor because [it felt] it [would] affect [it] adversely from an economic perspective."

Clews Horse Ranch appealed and the Court of Appeal for the Fourth District, Division One affirmed the judgment in *Clews Land & Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161. The Court of Appeal concluded the challenge to the adoption of the final MND was barred because Clews Horse Ranch did not exhaust its administrative remedies. In doing so, the Court rejected the argument that the City's administrative appeals process, as implicated by the project, violated CEQA. Further, the Court noted that the estoppel argument raised in the trial court was not pressed on appeal. The Court concluded the challenge to the MND failed on the merits as well,

as the Court determined the project was consistent with applicable land use plans, the City adhered to its historical resources regulations, and Clews Horse Ranch failed to show there was substantial evidence supporting a fair argument that the project may have a significant effect on the environment in the areas of fire hazards, traffic and transportation, noise, recreation, or historical resources.

Regarding the issue of noise, the Court of Appeal noted that individuals associated with Clews Horse Ranch predicted significant noise impacts because noises from school activities could disrupt ranch operations. However, the Court concluded the possibility that noise would impact the horse ranch's operations was insufficient to warrant an EIR because under CEQA, the question is whether a project will affect the environment of persons in general, not whether a project will affect particular persons. Further, the Court explained that the noise likely generated by the school (children laughing and playing, cars driving, doors closing, etc.) would be insignificant in the context of the environment as a whole, especially given the project's location near a busy highway, State Route 56, and Clews Horse Ranch's large ranch. In that case, Clews Horse Ranch filed a petition for rehearing, which was denied.

Subsequently, Cal Coast filed a malicious prosecution action against the attorney defendants, Clews Horse Ranch, and Carmel Creek Ranch, LLC, the alleged successors in interest to the defendants in the initial action. The complaint asserted the CEQA Litigation terminated in Cal Coast's favor and the defendants pursued the CEQA Litigation without probable cause and with malice.

The complaint alleged three theories as to why the defendants acted with malice. First, it alleged Clews Horse Ranch pursued the CEQA Litigation to prevent or delay development on Cal Coast's property. Second, it stated that the owner, Christian Clews, pleaded guilty to federal criminal charges of possessing and distributing child pornography. According to the complaint, the defendants pursued the CEQA Litigation "to maintain the seclusion that allowed Christian Clews to continue his grotesque sexual abuse and exploitation of children visiting his ranch." Third, the complaint alleged the attorney defendants pursued the CEQA Litigation because they hoped prolonged litigation would cause Cal Coast to abandon its project, which in turn would reduce the likelihood of Clews Horse Ranch filing a legal malpractice claim or State Bar complaint against them for failing to timely appeal the adoption of the MND.

The attorney defendants filed a special motion to strike the complaint under the anti-SLAPP law. Together with the motion, the attorney defendants filed declarations. The declarants denied they were motivated by a desire to avoid a potential malpractice action or State Bar complaint and averred they did not learn of Christian's criminal conduct until after they appealed the judgment in the CEQA Litigation. They further averred they believed there were reasonable grounds to pursue the CEQA Litigation.

Cal Coast opposed the anti-SLAPP motion. Together with the opposition, it filed declarations from plaintiff Dunning and Matthew Peterson, an attorney who represented Cal Coast in the CEQA Litigation. Both declarants averred that Cal Coast agreed to numerous concessions (*e.g.*, using shuttle vans to transport students, locating the school building away from the horse ranch), but Clews Horse Ranch demanded unreasonable concessions (*e.g.*, the construction of a 12-foot wall

along the property line, a 40-student enrollment cap, and closure of the school when there was a red flag fire alert anywhere in the county) during settlement negotiations. According to Peterson, these "bad faith" negotiations demonstrated the defendants' "real purpose and motivation" was to block the project or cause Cal Coast to abandon it. Dunning averred as to the details of Christian's criminal arrest and expressed a belief that Christian wanted to prevent the development of the property to keep his illegal activities private. Cal Coast also filed declarations from individuals indicating that Clews Horse Ranch interfered with use and development on the project site in the past.

After a hearing, the trial court denied the anti-SLAPP motion. It found Cal Coast's malicious prosecution claim arose from protected activity falling within the scope of the anti-SLAPP statute. However, it denied the motion after finding that Cal Coast demonstrated a probability of prevailing on its claim against all of the defendants. The court found there was at least minimal merit to Cal Coast's argument that the defendants filed or maintained the CEQA Litigation without probable cause. The defendants appealed the order denying the anti-SLAPP motion. The Court of Appeal reversed in part, finding that Cal Coast had established a probability of prevailing against Clews Horse Ranch, but not against the attorney defendants because Cal Coast had not established the malice element of malicious prosecution claims against the attorneys.

Cal Coast claimed that the attorney defendants acted with malice because their client, Clews Horse Ranch, had improper motives. It also asserted that the CEQA claims were so lacking in probable cause or frivolous that the Court had to infer the attorney defendants harbored malice. However, the Court found that it would be improper to simply impute the motives of a client to its attorney. Further, while a lack of probable cause is relevant to the issue of malice, it was insufficient, standing alone, to support a finding of malice. The alleged lack of probable cause and Clews Horse Ranch's asserted motives did not constitute a *prima facie* showing of malice for the attorney defendants. While the appellate record contained evidence from which it could be inferred there was an apparent lack of evidentiary support for one or more theories asserted in the CEQA Litigation, a lack of factual investigation by the attorney defendants, and a client [Clews Horse Ranch] who may have had actual ill will against Cal Coast, there was no evidence from which it could be inferred that the attorney defendants knowingly pursued untenable claims or otherwise acted with malice. The record was therefore insufficient as a matter of law to establish malice as to the attorney defendants. Therefore, the order denying the anti-SLAPP motion to the attorney defendants was reversed.

TAKE-AWAYS: Even if a client has a malicious basis for asserting a CEQA claim against a developer, that client's malice will not be imputed to the attorney, even where there is an apparent lack of evidentiary support, lack of factual investigation, and a client who may have had ill will. The attorneys must be shown to have acted with malice independent of their client to support a malicious prosecution claim.

POSTSCRIPT: *Petition for Review denied* (Aug. 18, 2021).

* * *

Stop Syar Expansion v. County of Napa (2021) 63 Cal.App.5th 444

BACKGROUND: A community group filed a writ proceeding, challenging the county planning commission's modified approval of quarry expansion. The trial court denied the petition. The group appealed.

HOLDING: The Court of Appeal held that the commission properly determined the project was consistent with its general plan under California Environmental Quality Act (CEQA).

KEY FACTS & ANALYSIS: Stop Syar Expansion (SSE) long opposed an expansion of Syar Industries, Inc.'s (Syar) aggregate operation. Syar filed an application for expansion in May 2008. After more than seven years of environmental review and numerous hearings, the Napa County (County) Planning Commission, in October 2015, certified the final Environmental Impact Report (EIR) and approved a modified project and a permit for an expansion half the size originally sought and subject to more than 100 pages of conditions and mitigation measures. SSE appealed both the EIR certification and the project and permit approvals to the County Board of Supervisors (Board), asserting in the respective appeals that the EIR and the project and permit approvals were deficient in a multitude of respects. After nearly a year of additional environmental review and hearings, the Board, in a 109-page decision, rejected SSE's appeals, certified the EIR, and approved a further modified project and permit.

SSE filed a CEQA writ proceeding, challenging the certification of the EIR. It ultimately winnowed down its claims to 16 asserted deficiencies. After briefing by the parties and a hearing, the trial court, in a 42-page ruling, denied the writ petition on a variety of grounds, reaching the merits as to some issues and concluding SSE failed to exhaust administrative remedies as to others. SSE appealed and contended the EIR was deficient in five respects. The Court of Appeal for the First District, Division One, affirmed.

In the case at issue, the County provided an appeal process for actions by the planning commission to the Board. The County's procedures provided SSE with an appeal from the Planning Commission's decision but required that SSE specify the particular subject or grounds of the appeal. And while the Board will exercise its independent judgment in determining whether the decision appealed was correct, the appeal was bounded by the grounds set forth in the appeal packet. The Court of Appeal noted SSE was required to do both to exhaust administrative remedies.

In the unreported portion of the case, the Court of Appeal considered the five issues with the EIR raised by SSE. The first issue was whether the EIR failed to address the project's alleged inconsistencies with the general plan. The Court found that this was not a CEQA issue; while an EIR must discuss any inconsistencies, the Court noted there was (and is) no requirement that an EIR itself be consistent with the relevant general plan. An agency's decisions regarding project consistency are reviewed by ordinary mandamus, and an agency's findings that the project is consistent with its general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion. (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603.) SSE did not seek leave to amend to add ordinary mandamus to its writ petition, and while SSE claimed it was challenging only the failure to disclose inconsistencies, the Court found it to be challenging the County's consistency

determination itself. The Court found no support for SSE's contention that the consistency analysis was somehow different under CEQA than general planning and land use law.

Even assuming SSE's argument had merit, which was rejected, the Court of Appeal found ample evidence that the project's consistency with the general plan was addressed throughout the environmental review process. Moreover, the Board addressed SSE's claims of inconsistency in detail, concluding that aggregate mining and processing activities were allowed on the permittee's property with a surface mining permit. The County General Plan policies contemplate mining. Because the current land use and zoning designations allow mining, neither a general plan land use re-designation nor a rezoning of the property were necessary to accommodate the project. The Board on review further noted that the quarry had been in existence since the 1800s and that the County Code permits surface mining. Thus, the County found no merit to SSE's inconsistency argument, and the Court held that it was "emphatically not the role of the courts to micromanage such decisions." Thus, the judgment was affirmed.

TAKE-AWAYS: While an EIR must discuss inconsistencies, there is no requirement that an EIR itself be consistent with the relevant general plan, and CEQA does not have a different standard than general planning and land use law for evaluating consistency.

POSTSCRIPT: *Petition for Review denied* (Aug. 11, 2021).

* * *

California Coastkeeper Alliance v. State Lands Commission (2021) 64 Cal.App.5th 36

BACKGROUND: Environmental organization filed a petition for writ of mandate, alleging that the State Lands Commission (Commission) failed to comply with the requirements of the California Environmental Quality Act (CEQA) in certifying a final supplemental environmental impact report (EIR) for a desalination plant and in approving a lease amendment for power plant operator to build and operate the water desalination plant. The trial court denied the petition in its entirety, and the group appealed.

HOLDINGS: The Court of Appeal held that: (1) substantial evidence supported the determination that project changes would necessitate only minor additions or changes to a prior EIR and thus the Commission could proceed pursuant to a supplemental EIR; (2) the Commission was not required as a former responsible agency to step in as the lead agency; (3) approval of the supplemental EIR did not result in improper piecemealing; (4) the EIRs adequately considered and rejected project alternatives; (5) the Commission did not improperly defer consideration of alternatives to the Regional Water Board; and (6) the issue of whether a county water district or another body might elect to employ a different water distribution system was speculative and not reasonably foreseeable. The judgment of the trial court was affirmed.

KEY FACTS & ANALYSIS: For a number of years, real party in interest Poseidon Resources (Surfside) LLC (Poseidon) planned to establish a desalination plant at a site in Huntington Beach. In 2010, nonparty City of Huntington Beach (Huntington Beach), serving as lead agency performing environmental review of the proposed project pursuant to CEQA, certified a subsequent environmental impact report (the 2010 subsequent EIR). However, the project did not move forward. Following changes in circumstances including significant regulatory changes,

Poseidon proposed modifications to the project, which it addressed in a proposed lease modification with the Commission. The Commission determined that it needed to prepare a supplemental EIR to supplement Huntington Beach's 2010 subsequent EIR. In 2017, the Commission certified its final supplemental EIR. Plaintiffs filed a petition for a writ of mandate asserting, among other things, that the Commission failed to comply with the requirements of CEQA. The trial court denied the petition.

California Coastkeeper Alliance (Plaintiff) asserted the Commission prejudicially abused its discretion by (1) failing to assume the role of CEQA lead agency and perform the attendant obligations, and (2) unlawfully piecemealing/segmenting its environmental review in several respects. Plaintiff characterized its appeal as addressing whether the Commission failed to proceed in a manner authorized by CEQA and therefor subject to *de novo* review. The Commission and Poseidon asserted that the true issues on appeal were whether the Commission properly proceeded with supplemental review and the results of that review, characterized as factual matters subject to substantial evidence review. Both standards of review were implicated, and the Court of Appeal for the Third District concluded that the Commission properly elected to prepare a supplemental EIR, did not err in refusing to assume lead agency status, and did not unlawfully piecemeal or segment environmental review, thus affirming the decision of the trial court.

The Court of Appeal first considered the argument that the Commission failed to assume the role of CEQA lead agency and perform the attendant obligation. It found that CEQA Guidelines section 15052 did not mandate that the Commission assume lead agency status under the circumstances presented. The Court concluded that substantial evidence supported the Commission's election to prepare a supplemental EIR instead of a subsequent EIR because the changes to the project would only necessitate minor additions or changes to make the previous EIR adequately apply to the project in the changed situation. Because, under these circumstances, the Commission could properly elect to proceed via supplemental EIR and forego preparing a subsequent EIR, one of the requirements of CEQA Guidelines section 15052, subdivision (a)(2), was not satisfied: that "[a] subsequent EIR is required pursuant to Section 15162." And because this requirement was not satisfied, the obligation imposed by CEQA Guidelines section 15052, subdivision (a)(2), that a former responsible agency step in as lead agency, was inapplicable.

The Court of Appeal also disagreed with the Plaintiff's argument that a supplemental EIR was required. The Court found that, where the circumstances permit an agency to prepare a supplemental EIR rather than a subsequent EIR because, among other things, only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation, then a subsequent EIR necessarily is not required. The Court noted that CEQA Guidelines section 15052, subdivision (a), is buttressed by statutory and regulatory language indicating a supplemental EIR may be prepared by a responsible agency. Additionally, Public Resources Code section 21166 provides in pertinent part, "When an [EIR] has been prepared for a project ..., no subsequent or supplemental [EIR] shall be required by the lead or by any responsible agency" unless one of several triggering conditions occur.

Thus, the Court of Appeal found that, where the election to prepare a supplemental EIR is proper, the determination to do so removes the subsequent review from the scope of the CEQA Guidelines section 15052 requirement to step in as lead agency. CEQA Guidelines section 15163 allows a responsible agency to proceed by a supplemental EIR without assuming lead agency status.

Therefore, the Court found the Commission did not fail to proceed in the manner CEQA provides by declining to assume the role of lead agency.

The Court of Appeal then evaluated the unlawful piecemealing argument under the rule that CEQA forbids piecemeal review of significant environmental impacts of a project. Here, the Commission determined that only a supplemental EIR pursuant to CEQA Guidelines section 15163 was required, a determination supported by substantial evidence. "A supplement to an EIR 'need contain only the information necessary to make the previous EIR adequate for the ... project as revised' and 'may be circulated by itself without recirculating the previous draft or final EIR.'" (*Melom v. City of Madera* (2010) 183 Cal.App.4th 41, 57). The Court concluded the supplemental EIR here satisfied that requirement.

The 2010 subsequent EIR prepared by Huntington Beach, which was never legally challenged, was conclusively presumed to comply with CEQA for purposes of its use by the Lands Commission. That EIR analyzed the project in its entirety as of 2010. The 2017 supplemental EIR incorporated by reference the 2010 subsequent EIR. The Court found that the supplemental EIR analyzed the new changes as was required, but that it did not need to review the impact of the entire project. The Court found that the supplemental EIR supplemented the previous EIR and the two were considered as a comprehensive whole for CEQA purposes. Congruously, the Court found that Plaintiff's argument the Commission's preparation of the supplemental EIR was an improper deferral of environmental analysis was inapposite.

Next, because the supplemental EIR was incorporated into the originals, the Court of Appeal rejected Plaintiff's argument that the Commission was required to reevaluate alternatives to the project discussed in the 2010 subsequent EIR. Further, the Court found that the Commission did not improperly defer consideration of alternatives, including subsurface intake alternatives, to the Regional Water Board when approving supplemental EIR because the original EIR, with the supplemental EIR, considered subsurface intake alternatives and found them infeasible, and also addressed alternative sites, designs, technology, mitigation measures, and a no-project alternative. There was no authority supporting the contention that the Commission was required to reevaluate all of the alternatives considered in the 2010 subsequent EIR, even in light of a change in the regulatory scheme. The 2017 supplemental EIR's observation that the Regional Water Board had the duty to perform a Water Code section 13142.5, subdivision (b) analysis for the proposed desalination plant, and Commission members' statements consistent with that premise at the public hearing, did not signal an improper deferral to the Regional Water Board. Plaintiff's claim that reduced Orange County water demand obviated the desalination project failed to lay out contrary evidence in the record from the Regional Water District concerning the need for the project to add to the County's water supply, and thus failed under the substantial evidence standard.

Finally, according to the Court of Appeal, the issue of whether the county water district or another body might elect to employ a different water distribution system than what was reviewed in the 2010 EIR was speculative and not reasonably foreseeable, and thus the Commission was not required to consider that issue when approving supplemental EIR for the project. While the water district board of directors was presented with a number of distribution options to consider, and directed staff to further explore one of those options, the water district did not require changes to the distribution system and affirmatively represented that it had no intention of conducting further analysis of distribution options. Therefore, the Court found that no CEQA analysis was required.

TAKE-AWAYS: Construction of key CEQA Guidelines are included in this case. Notably: a responsible agency may prepare a supplemental, as opposed to subsequent, EIR for CEQA purposes without being required to step into the shoes of the lead agency for a project.

POSTSCRIPT: *Petition for Review denied* (July 28, 2021).

* * *

UNREPORTED COURT OF APPEAL CASES

Boppana v. City of Los Angeles (Cal. Ct. App., July 16, 2021, No. B305928) 2021 WL 3012620 [Unreported].

BACKGROUND: Appellants Rao and Rita Boppana (Boppana) filed a petition for writ of administrative mandate challenging three building permits issued by the City of Los Angeles (City) to Boppana's next-door neighbor, Real Party in Interest Robert Nolan (Nolan). The trial court denied the petition, concluding that Boppana was not denied a fair administrative hearing, the City did not abuse its discretion by granting the three building permits, and Boppana failed to exhaust some of their administrative remedies. Boppana appealed, urging that (1) they were denied a fair hearing because the City refused to consider a 1987 geotechnical report they submitted with their administrative appeal, (2) the City abused its discretion by granting Nolan a permit to build retaining walls that exceeded applicable height limitations, (3) the City abused its discretion by granting Nolan a permit to build a recreation room that violated an eight foot set-back requirement, and (4) the City abused its discretion by allowing Nolan to drain surface water onto protected wetlands and Boppana's property.

HOLDING: The Court of Appeal held that Boppana was not denied a fair hearing, and the City did not abuse its discretion by refusing to revoke the challenged permits. Accordingly, the Court of Appeal affirmed the judgment of the trial court.

KEY FACTS & ANALYSIS: On March 30, 2012, Nolan submitted an application to build an accessory recreation building (the recreation room). The City accepted the application into plan check on April 5, 2012, and issued a building permit (permit no. 12010-30000-00748) on March 24, 2015 (the recreation room permit). It issued a certificate of occupancy on July 31, 2017.

On April 15, 2013, Nolan submitted an application to build two rows of six-foot retaining walls at the rear of his property. The City accepted the application into plan check on May 16, 2013, and issued a building permit (permit no. 13020-30000-00849) on March 24, 2015 (the retaining wall permit). The permit was finalized on September 29, 2015.

On July 18, 2014, Nolan submitted an application to grade a portion of the property. The City issued the grading permit on March 24, 2015, and finalized it on July 25, 2016.

In March and May 2016, Boppana's counsel sent letters to the Los Angeles Department of Building and Safety (LADBS) requesting revocation of the recreation room and retaining wall permits. Subsequently, on May 23, 2016, Boppana filed a "Request for Modification of Building Ordinances" appealing the issuance of the permits. Boppana asserted, among other things, that the

recreation room caused the property's total square footage to exceed that permitted by ordinance, the retaining walls were higher than six feet when measured from the property's natural grade, and surface water from the property unlawfully drained into coastal bluffs and wetlands.

LADBS denied Boppana's appeal. In a written decision, LADBS found that (1) the recreation room was within the allowable residential floor area because it and the existing three-story house collectively occupied less than 45 percent of the lot area, (2) the retaining walls were within the allowable height of six feet above the natural grade, and (3) the drainage from the new recreation building would be directed to Berger Street by use of a sump pump. LADBS therefore concluded that the permits complied with all applicable Los Angeles City Codes.

In November 2016, Boppana filed an appeal from the LADBS's decision to the Director of Planning. On October 31, 2017, Associate Zoning Administrator Theodore Irving (Irving), on behalf of the Director of Planning, denied the appeal. Irving found the administrative record and testimony at a public hearing provided substantial evidence that LADBS did not err in issuing the building permits.

Boppana filed a further appeal to the Area Planning Commission (APC) on November 14, 2017. The APC heard the appeal on February 7, 2018. At the conclusion of the hearing, the four-person APC unanimously voted to uphold the decision of the Director of Planning.

Boppana filed a petition for writ of administrative mandate (Code Civ. Proc., § 1094.5) in the superior court on March 15, 2018, and filed the operative first amended petition on May 11, 2018. The court denied the petition in full on March 20, 2020.

The Court of Appeal affirmed the judgment of the trial court, finding no abuse of discretion in the City's failure to revoke the wall and recreation room permits, and no denial of a fair hearing.

Boppana first asserted that the City erred in granting the retaining wall permit because the walls were more than six feet high when measured from the property's natural grade. Specifically, they contended (1) the City refused to consider evidence establishing the natural grade of the property, and (2) substantial evidence established that Nolan illegally raised grades on the property and the City incorrectly measured the artificial grade.

On the first claim, the Court of Appeal found that the City relied on substantial evidence finding that the walls were not over six feet. In their appeal to the Director of Planning, Boppana continued to urge that the retaining wall permit was issued in error because the height of the permitted retaining walls had been measured from finished grade, not natural grade. The director relied on 2012 maps, rather than on a 1987 report which Boppana contended showed a change in the natural grade of Nolan's property. However, the Court found that the 2012 map, combined with soil samples, provided substantial evidence on which the City could justifiably rely without abusing its discretion on the matter.

On the second claim, the Court of Appeal found no abuse of discretion in relying on the 2012 maps rather than the 1987 report which was prepared before the property was developed. It also remarked that the soil samples would have revealed an artificial change in grade that Boppana argued the 1987 report demonstrated. Construing the administrative record as a whole, the Court did not find an abuse of discretion in granting the retaining wall permit.

The Court of Appeal also opined that Boppana was not denied a fair hearing. The City had asked for specific page references to the 1987 report supporting Boppana's claims. The City considered Boppana's testimony of that of a lay witness although Boppana claimed to be an engineer, because Mr. Boppana provided no evidence of his certification. The Court found no denial of a fair hearing in this regard because the record showed that the City considered the evidence presented to it and allowed Boppana to testify as a lay witness.

Next, the Court of Appeal refused to consider Boppana's claim that the City abused its discretion by issuing the recreation room permit because the structure's rooftop deck did not have an eight-foot setback as required by the municipal code. Boppana did not exhaust his administrative remedies with regard to this issue, and thus the trial court refused to consider it. The Court of Appeal agreed. The City did not issue the supplemental permit allowing construction of the rooftop deck until May 2017, nearly a year after Boppana filed his appeal with LADBS—and thus the deck could not have been a subject of the LADBS appeal. Moreover, the first time Boppana asserted the deck was subject to an eight-foot setback requirement was in their appeal to the APC—the final level of his administrative appeal.

Finally, the Court of Appeal noted that Boppana's final contention that the City abused its discretion by issuing the recreation room, retaining wall, and grading permits because Nolan failed to divert all surface water from the property onto the street, as the law requires, was without merit. The facts in the administrative record were not persuasive evidence that the City erred in finding that Nolan abided by the drainage requirements and approving the permits. The Court of Appeal upheld the trial court's judgment in full and awarded costs to the City.

* * *

Steinbruner v. Soquel Creek Water District (Cal. Ct. App., July 12, 2021, No. H047733) 2021 WL 2932764 [unreported].

BACKGROUND: This CEQA action arose from the proposal of respondent Soquel Creek Water District (District) for the Pure Water Soquel: Groundwater Replenishment and Seawater Intrusion Prevention project (Pure Water Soquel project), which had the objective of supplementing the natural recharge of the groundwater basin with purified water obtained by treating secondary effluent from the Santa Cruz Wastewater Treatment Facility. After preparing an environmental impact report (EIR) for the proposed Pure Water Soquel project and holding a hearing, the District's Board of Directors approved the Pure Water Soquel project.

Plaintiff Rebecca Steinbruner, a self-represented litigant appearing in the public interest, challenged the District's approval of the Pure Water Soquel project by filing a petition for writ of mandate alleging violations of CEQA's requirements for environmental review. After a hearing, the trial court denied the petition, and the judgment denying the first amended petition for writ of mandate was filed on November 26, 2019.

In her appeal, Steinbruner contended that the trial court erred in denying the amended petition because (1) the EIR's analysis of growth impacts was inadequate; (2) the EIR's analysis of impacts on groundwater quality was inadequate: and (3) the EIR's analysis of project alternatives was inadequate.

Steinbruner also contended that the trial court erred in denying several of her pretrial *ex parte* applications and motions, including (1) the order denying her motion to vacate a case management order; (2) the order denying her motion for a change of venue; (3) the order denying her motion for leave to file a second amended writ petition; (4) the order denying her motion to continue the merits hearing; and (5) the order denying her request for judicial notice.

HOLDING: The Court of Appeal affirmed the judgment of the trial court, finding no merit in Steinbruner's contentions on appeal.

KEY FACTS & ANALYSIS: The District relied upon groundwater for 100 percent of its water supply. In 2014 the District declared a critical groundwater overdraft emergency. The District has also detected seawater intrusion in its groundwater supply aquifers. To increase the sustainability of the water supply, the District proposed the Pure Water Soquel project, with the objective of supplementing the natural recharge of the groundwater basin with purified water obtained by treating secondary effluent from the Santa Cruz Wastewater Treatment Facility.

In 2018 the District circulated the draft EIR (DEIR) analyzing the environmental impacts of the Pure Water Soquel project for public review. The DEIR identified three project alternatives, including the no project alternative, the reduced project with surface water purchase alternative, and the local seawater/brackish desalination alternative. The DEIR determined that the proposed project was the environmentally superior alternative.

After receiving public comments on the DEIR, the District released the final EIR in December 2018. The District's Board of Directors also adopted resolution No. 18-31 approving the Pure Water Soquel project as described in the Final EIR, consisting of these components: water treatment facilities at one or two sites, a pipeline alignment for secondary or tertiary effluent, a pipeline alignment for purified water, a pipeline alignment for brine concentrate, and recharge wells and appurtenances at up to three (3) sites, from the components evaluated in the Final EIR.

The Court of Appeal first ruled on the trial court's denial of several of her motions. The Court of Appeal found that (1) the challenges to the order denying her motion to vacate a case management order were not timely filed as peremptory challenges, and Steinbruner failed to show a due process violation based on the judge set to manage the case; (2) the challenge to the order denying the motion for a change of venue failed to show actual prejudice sufficient for a change of venue, nor that an impartial hearing could not be held in Santa Cruz County; (3) the order denying the motion for leave to file a second amended writ petition after a seven month delay and less than one month before the merits hearing was not an abuse of discretion even if Steinbruner was a *pro-se* litigant; (4) the challenge to the order denying the motion to continue the merits hearing did not demonstrate that the order deprived Steinbruner of a fair-hearing; and (5) the order denying Steinbruner's request for judicial notice of a document concerning County Growth Goals for 2020, wherein it is stated that lack of water supply has limited development in Santa Cruz County, was not an abuse of discretion because that document was outside of the administrative record and therefore irrelevant in the CEQA action.

The Court of Appeal then turned to the CEQA challenges. First, Steinbruner contended that the EIR's analysis of the growth-inducing impacts of the Pure Water Soquel project was inadequate because an expanded reliable wastewater supply source would in fact remove all barriers to allowing new service connections in the Soquel Creek Water District service areas, hence removing any barriers to growth. The District responded that Steinbruner could not raise the issue of the EIR's adequacy with respect to the growth-inducing impact of the Pure Water Soquel project because she did not raise the issue below in her amended writ petition. Additionally, the District pointed out that Steinbruner's contentions relied on a document that is outside the administrative record. As to the merits, the District maintained that substantial evidence in the record showed that the EIR properly analyzed potential growth inducing impacts from the Project. The Court of Appeal concluded that under the applicable standard of review, Steinbruner had not met her burden on appeal. The standard of review that applies to the EIR's conclusions regarding the growth-inducing impact of a project is substantial evidence. In her briefing, Steinbruner made no attempt to set forth the District's findings regarding the growth-inducing impacts of the Pure Water Soquel project. The Court found that the EIR for the Pure Water Soquel project contained an extensive discussion of the project's potential for growth-inducing impacts. For example, the EIR stated, in the chapter on growth-inducing impacts, that by improving the District's water supply sustainability, the Pure Water Soquel Project would support a degree of planned growth within the District's service area. Steinbruner also made no attempt to show that the evidence in the EIR could not reasonably support the District's findings regarding the growth-inducing impact of the Pure Water Soquel project. Since Steinbruner failed to set forth all of the evidence material to the District's findings regarding the project's growth-inducing impacts, and then show that the evidence could not reasonably support the findings, the Court determined that she had not met her burden on appeal. The Court found no merit in her contention that the EIR was inadequate with respect to the project's growth-inducing impacts.

Next, the Court of Appeal turned to the second CEQA claim that the EIR did not include a final anti-degradation evaluation and analysis. The District disagreed that the EIR's analysis of the Pure Water Soquel project's impact on groundwater quality was inadequate, noting that the draft of a 2018 anti-degradation report was not the basis for the EIR's analysis and conclusions. Further, the District asserted that substantial evidence supported the EIR's conclusion that the impact of the project on groundwater quality was less than significant. The Court of Appeal concluded that Steinbruner failed to meet her substantial evidence burden on the second claim. Moreover, Steinbruner provided no authority for the proposition that an EIR's analysis of a project's impact on groundwater quality must include a final antidegradation evaluation. The Court therefore found no merit in her contention that the EIR was inadequate with respect to the project's impact on groundwater quality.

Finally, the Court of Appeal considered the third and final CEQA claim. Steinbruner contended that the EIR's analysis of alternatives was inadequate. The EIR identified three project alternatives, including the no project alternative, a reduced project with surface water purchase alternative, and a local seawater/brackish desalination alternative. The EIR determined that the proposed Pure Water Soquel project was the environmentally superior alternative. Steinbruner contended that the EIR's analysis of alternatives was inadequate because it did not analyze the alternatives of conjunctive water use with the City of Santa Cruz, expanded water rights, or surface water transfers. Steinbruner also contended that the EIR failed to identify the environmentally superior

alternative. The District argued that Steinbruner's contention that the District did not select the environmentally superior alternative was barred because Steinbruner did not raise that issue below. Additionally, the District argued that Steinbruner failed to support her contentions regarding the alternatives analysis with citations to the record, failed to demonstrate prejudicial error, and failed to show that the EIR's alternatives analysis was not supported by substantial evidence.

The Court of Appeal found that Steinbruner failed to meet her burden of showing that the District's decision to certify the EIR was incorrect. Several alternatives were discussed and considered, and Steinbruner failed to demonstrate that the alternatives analysis in the EIR is inadequate under CEQA. Accordingly, the Court of Appeal affirmed the judgment of the trial court.

* *

Tchejeyan v. City Council of City of Thousand Oaks (Cal. Ct. App., July 7, 2021, No. B309108) 2021 WL 2819393 [unreported].

BACKGROUND: Gregory Tchejeyan appealed from a judgment of dismissal after he failed to timely serve his amended petition for writ of administrative mandate on the City of Thousand Oaks (Gov. Code, § 65009, subd. (c)(1)).

HOLDING: The Court of Appeal affirmed the judgment of the trial court.

KEY FACTS & ANALYSIS: In August 2019, the City of Thousand Oaks (City) Planning Commission (Planning Commission) approved Verizon Wireless's land use permit to install a wireless telecommunication facility on property owned by a water company. The property was located near Tchejeyan's home. Tchejeyan appealed the Planning Commission's decision to the City Council. On January 14, 2020, the City Council denied the appeal and adopted Resolution No. 2020-002 (the Resolution), in which it upheld the Planning Commission's approval of the land use permit. Two days later, the city clerk certified the Resolution.

In June 2020, Tchejeyan filed a petition for a writ of administrative mandate (Code of Civ. Proc., § 1094.5) in Ventura County Superior Court. Tchejeyan did not serve the City with the original petition. In July 2020, Tchejeyan filed an amended petition, in which he sought to set aside the Resolution. Tchejeyan served the City with the amended petition on August 13. He did not name Verizon Wireless as a party to the action. In September 2020, Tchejeyan served the City with a summons.

The City moved to dismiss the amended petition on the grounds that Tchejeyan (1) did not timely serve the amended petition, and (2) did not name Verizon Wireless as an indispensable party. The trial court granted the City's motion to dismiss, finding the amended petition was not served within the 90-day deadline pursuant to Government Code section 65009, subdivision (c)(1)(E). Because the court determined the action was time-barred, it deemed as moot the issue whether Verizon Wireless was an indispensable party.

On appeal, Tchejeyan contended the trial court erred when it dismissed his amended petition because (1) it applied the wrong statute of limitation, (2) even if a 90-day statute applied, the petition was timely served, (3) its error deprived him of the opportunity to name Verizon Wireless

as a party to the action, and (4) relief should have been granted pursuant to Code of Civil Procedure section 473.

On appeal, Tchejeyan first argued that the deadline to serve the petition was 180 days pursuant to Government Code section 65009, subdivision (d)(2)(C), and not 90 days pursuant to subdivision (c)(1)(E). The Court of Appeal disagreed, finding that subdivision (d) was inapplicable because it relates to governmental actions pertaining to regional housing. The approval of the land use permit was not an action under Government Code section 65863.6. The permit approved the installation of a telecommunication facility on property owned by a water company. It did not relate to an ordinance concerning regional housing needs. Moreover, Section 65863.6 was neither mentioned in the Planning Commission's nor the City Council's decisions on the permit, nor in Tchejeyan's amended petition. The Court concluded that Government Code section 65009, subdivision (d) did not apply.

Next, Tchejeyan argued that he did not miss the 90-day statute of limitations. The Court of Appeal again disagreed. The City Council adopted the Resolution on January 14, 2020. Tchejeyan served the City on August 13, 2020. Because of the Judicial Council's Emergency rule 9(b) related to COVID-19, the 90-day time period was tolled from April 6 to August 3. (Cal. Rules of Court, Appendix I: Emergency Rules Related to COVID-19, Emergency rule 9(b).) Including this emergency tolling period, Tchejeyan was required to file and serve the amended petition no later than August 11 (the limitation period ran for 82 days from January 15 and April 5, and eight days from August 4 and August 11).

Tchejeyan argued that the statute of limitation commenced on January 16, when the Resolution was certified by the city clerk, and not on January 14. The Court of Appeal disagreed. Tchejeyan was required to file and serve the petition "within 90 days after the legislative body's decision." (Gov. Code, § 65009, subd. (c).) The City Council rendered its decision and adopted the Resolution on January 14, and it was effective immediately. (*See, Marquez v. Medical Bd. of California* (2010) 182 Cal.App.4th 548, 558.) The Court therefore concluded that the action was time barred.

Finally, Tchejeyan contended the trial court erred when it denied relief pursuant to Code of Civil Procedure section 473. The Court of Appeal again disagreed. Code of Civil Procedure section 473, subdivision (b) allows a trial court to set aside a decision procured by mistake, inadvertence, surprise, or excusable neglect. The Court of Appeal reviewed for an abuse of discretion. Here, the trial court did not abuse its discretion because relief under Section 473(b) is generally unavailable when the Legislature has made the limitations period mandatory. (S*ee, Alliance for Protection of Auburn Community Environment v. County of Placer* (2013) 215 Cal.App.4th 25, 31-32; *Kupka v. Board of Administration of Public Employees Retirement System* (1981) 122 Cal.App.3d 791, 794-795.) Because Tchejeyan did not meet the 90-day deadline, the court did not abuse its discretion when it denied his motion.

* * *

Patane v. County of Santa Clara (Cal. Ct. App., June 30, 2021, No. H048133) 2021 WL 2679034 [unreported].

BACKGROUND: This CEQA action arose from the proposal of real party in interest Shamrock Seeds Company (Shamrock Seeds) to expand and modernize its agricultural research facility in unincorporated Santa Clara County (County) by, among other things, building new greenhouses. After preparing an environmental impact report (EIR) concerning the proposed project and holding a hearing, the County's Board of Supervisors approved the Shamrock Seeds project.

Plaintiff Carmen Patane (Patane), a neighboring property owner, challenged the County's approval of the Shamrock Seeds project by filing a petition for writ of mandate alleging violations of CEQA's requirements for environmental review with respect to aesthetics and historical resources. The trial court denied the petition for writ of mandate and on May 4, 2020, and judgment was entered in favor of respondents.

On appeal, Patane contended that the trial court erred in denying the petition for writ of mandate because (1) the EIR's conclusions regarding the aesthetic impact of light emitted from the proposed greenhouses during non-daylight hours, specifically sky glow on cloudy skies, were not supported by substantial evidence; (2) the EIR's mitigation measures for greenhouse lighting were inadequate; and (3) the County's response to comments by Patane's lighting expert were inadequate.

HOLDING: The Court of Appeal found no merit in Patane's contentions and affirmed the judgment.

KEY FACTS & ANALYSIS: On the light-emission claim, Patane argued that the EIR's conclusion that light emitted from the proposed greenhouses would cause a less than significant aesthetic impact from sky glow on cloudy skies was not supported by substantial evidence. The basis for Patane's argument was the opinion of Patane's lighting expert, that the County's lighting expert improperly relied on a model for calculating the impact of manmade sky glow that did not address cloudy night skies because the model was designed to assess the impact of sky glow on astronomy.

The County responded that its expert used a calculation grid to determine that the amount of greenhouse illumination at typical cloud height would not exceed the threshold of significance, and therefore the EIR's conclusions regarding sky glow were supported by substantial evidence. The County also argued that the disagreement between the parties' experts with regard to the impact of sky glow did not render the EIR inadequate due to lack of substantial evidence. The Court of Appeal agreed.

The Court cited to *Chico Advocates for a Responsible Economy v. City of Chico* (2019) 40 Cal.App.5th 839 (*Chico Advocates*) for the proposition that challenges to the scope of an EIR's analysis, the methodology used, or the reliability or accuracy of the data underlying an analysis, must be rejected unless the agency's reasons for proceeding as it did are clearly inadequate or unsupported. The Court opined the experts had different opinions as to the methodology and the underlying data that should be used to calculate the aesthetic impact of the sky glow emitted from the proposed greenhouses on cloudy skies. The County was permitted to favor the opinions and estimates of its lighting expert over Patane's expert. Accordingly, it determined that Patane had not met its burden to show that the EIR's conclusion was not supported by substantial evidence.

On the lighting measures claim, Patane generally contended that the EIR did not contain mitigation measures that were adequate for the prevention of light pollution on neighboring properties and sky glow. Patane also asserted that the EIR failed to address the feasibility of black out curtains as a mitigation measure, as recommended by Patane's lighting expert, to prevent sky glow and other light pollution. Additionally, Patane argued that the ordinances of other jurisdictions regulating greenhouse lighting show that many counties required minimizing the emission of artificial night-time light in order to mitigate the impacts from the artificial night-time light.

The County responded that black out curtains were not a feasible mitigation measure because black out curtains are not used in the vegetable seed industry due to curtains holding seed contaminants such as fungus, mold, and pollen. The County also emphasized that its expert concluded the impact of nighttime light from the proposed greenhouses would be less than significant, with the exception of vertical illumination that would be mitigated to a less than significant impact by the solid barriers. As to Patane's argument regarding the greenhouse ordinances of other jurisdictions, the County asserted that the EIR's site-specific findings were not required to be consistent with general ordinances in other jurisdictions.

The Court of Appeal found no merit in Patane's claims regarding lighting measures. The different opinions of Patane's expert did not render the EIR inadequate. Moreover, mitigation measures were not required for impacts found to be less than significant. Finally, Patane had not provided any support for its contention that the County had to abide by ordinances of other jurisdictions regarding lighting.

Finally, on the comment response claims, Patane contended that the comments of its lighting experts were not adequately addressed during the public review and comment period. According to the County, its Final EIR included a thorough summary of and responses to the expert's comments on the project's lighting impacts, and the County expert's subsequent technical memorandum attached as exhibit 3 to the resolution responded to the post-Final EIR comments.

Having reviewed the EIR, the Court of Appeal found that it met the standard for an agency's response to expert comments. The EIR provided a summary of Patane's expert's opinions regarding CEQA aesthetic violations. The EIR's responses to the comments explained in detail the County's acceptance of its own expert lighting analysis rather than Patane's expert's opinions and conclusions, thereby satisfying the requirement of CEQA Guideline section 15088, subdivision (c).

Moreover, where, as in this case, the project opponent's comments on the EIR are submitted on the eve of the agency's public hearing, "CEQA does not require an agency to respond to comments that are received after close of the designated public review period. [Citations]; Guidelines, § 15207." (*Chico Advocates*, *supra*, 40 Cal.App.5th at pp. 851-852, fn. 9.) "Although the lead agency need not respond to late comments, the lead agency may choose to respond to them." (CEQA Guidelines, § 15207.) For those reasons, the Court of Appeal found that Patane did not meet the burden to show the EIR's response to expert comments was inadequate.

* * *

Rudisill v. California Coastal Commission (Cal. Ct. App., June 22, 2021, No. B299331) 2021 WL 2548826 [unreported].

BACKGROUND: This appeal arose out of the construction by Lighthouse Brooks, LLC and Ramin Kolahi (collectively, Lighthouse) of four homes in Venice (the Project). Lighthouse obtained a coastal development permit from the California Coastal Commission (Commission) after Lighthouse had substantially completed the Project. Robin Rudisill and Jenni Hawk, two Venice residents who opposed the Project, filed a petition for a writ of administrative mandate. The trial court granted the petition and directed the Commission to set aside the permit and reconsider whether the Project complied with the Coastal Act. The trial court also stayed the Project. The Commission and Lighthouse appealed, and the Court of Appeal reversed the judgment and directed the trial court to deny the petition for writ of mandate. (*Rudisill v. California Coastal Com*. (Dec. 9, 2020, B294460) [nonpub. opn.] (*Rudisill I*).)

While the appeal was pending, Lighthouse took certain steps to enable residents to occupy the homes, including requesting and obtaining certificates of occupancy from the City of Los Angeles. The trial court granted a request by Rudisill and Hawk to sanction Lighthouse under Code of Civil Procedure section 177.5 for violating the stay. The trial court also ordered the City, which at that point was no longer a party to the case, to revoke the certificates of occupancy. Finally, the trial court denied a motion by Rudisill and Hawk for attorneys' fees. All of the parties appealed: (1) Lighthouse Brooks, LLC and Kolahi from the order sanctioning each of them $1,500; (2) the City from the order requiring it to revoke the permits; and (3) Rudisill and Hawk from an order denying their motion for attorneys' fees.

HOLDING: In the case at issue, the Court of Appeal reversed the first two orders ((1) and (2)) and affirmed the third (3).

KEY FACTS & ANALYSIS: Regarding the certificates of occupancy, the City argued the trial court lacked jurisdiction to order it to revoke the certificates of occupancy because the City was not a party to the action at the time the court made the order. The Court of Appeal found that the trial court erred in issuing the order against the City. There was no evidence the City acted as an agent of Lighthouse; specifically, there was no evidence the City, in issuing the certificates of occupancy, agreed to act on behalf of and subject to the control of Lighthouse or that the City otherwise had authority to act on behalf of Lighthouse. As the trial court stated at the hearing on the order to show cause, the City had "no dog in this hunt" in terms of the certificates of occupancy. The trial court found no fault on the part of the City, and even recognized the City was not normally an agent of the real party, but nevertheless concluded the City was an agent of Lighthouse. The Court of Appeal found that to be error and reversed the decision of the trial court regarding revoking the certificates of occupancy.

On the sanctions issues, the Court of Appeal reversed the opinion of the trial court and found that Lighthouse acted with substantial justification when it applied for permits and certificates of occupancy for the homes and performed some minor work such as removing a temporary power pole. The Court noted that courts have generally equated substantial justification with or where a position is well ground in law and fact. Lighthouse's position—that it did not violate the stay by applying for permits or performing other minor work at the Project—was well-grounded in law

and fact, and its conduct was excusable, because the scope of the stay in the trial court's original judgment was vague. In its November 2018 order the trial court stated the Project was stayed pursuant to Section 30623 of the Coastal Act, which stays "the operation and effect" of a coastal development permit during the pendency of an appeal from a local government to the Commission. Because, however, the Project was already built, it was not clear how Lighthouse was supposed to act or what conduct would violate the stay. On the one hand, the trial court may have intended to prohibit Lighthouse from conducting any activity or using any of the existing structures on the Project. On the other hand, the November 2018 trial court order only directed the Commission to set aside the coastal development permit so that the Commission could reconsider whether the Project complied with the Coastal Act; the trial court order did not direct the Commission to revoke the permit for the Project. Thus, the trial court may have intended only to prohibit Lighthouse from further developing the Project and to maintain the *status quo*, not to prohibit Lighthouse and others from using the homes Lighthouse had already built.

The Court of Appeal found that, because the trial court's November 2018 order was vague, and until the court issued a new order in February 2019 clarifying that the City could not issue any permits while the stay was in effect, Lighthouse was substantially justified in, and had a valid excuse for, applying for the certificates of occupancy and a permit for a previously built awning. Lighthouse was also substantially justified in, and had a valid excuse for, removing a temporary power pole used for construction that was no longer needed—an action that, if anything, complemented a stay on further construction. Substantial evidence also did not support a finding Lighthouse violated the stay by performing corrective work on the Project.

Finally, the trial court found Lighthouse violated the February 2019 order clarifying the scope of the stay by obtaining the final certificate of occupancy shortly after the court issued that order. The February 2019 order stated that "no further permits ... shall be issued." Although there was no evidence Lighthouse did anything after the trial court issued the February 2019 stay to cause the City to issue the certificate later in the day of the hearing, Lighthouse did not deny it used the certificate after obtaining it. But this was still not enough to show Lighthouse violated the February 2019 order without substantial justification or a valid excuse. While the February 2019 order stated the City shall not issue any permits, it did not direct Lighthouse to withdraw any pending permit applications or to return any permits it might receive in the interim. And, the trial court stated at the hearing in February 2019 that, if Lighthouse had everything in place, it could rent the units, and the February 2019 order stated Lighthouse could continue to use the property. The Court of Appeal reversed on the ground that Lighthouse had substantial justification for its actions. Lighthouse was substantially justified in receiving the permit based on a pre-stay application and in using the property consistent with the permit.

* * *

Sasan v. County of Marin (Cal. Ct. App., June 10, 2021, No. A160325) 2021 WL 2373509 [unreported].

BACKGROUND: Beth and Tim Sasan (Sasans) appealed from the trial court's denial of a petition for writ of administrative mandamus challenging the Marin County (County) denial of their design review application to build a new home on a San Anselmo hillside. The Sasans contended the Final

Resolution and supporting findings were legally defective and unsupported by substantial evidence.

HOLDING: The Court of Appeal affirmed the judgment of the trial court.

KEY FACTS & ANALYSIS: In July 2016 the Sasans applied to the County's Community Development Agency (Agency) for discretionary design review of their plans for a 3,328 square foot single-family home. At the same time the Sasans applied for a permit to remove two mature trees, a 12-inch heritage buckeye and a 6-inch protected coast live oak, from the proposed building site. After the Sasans made some changes to their plans in response to planning staff and community concerns, in April 2017 the Agency approved their design review and tree removal applications. Unhappy with that decision, a group of neighboring homeowners who had opposed the project at the Agency level appealed it to the County Planning Commission (Commission). The administrative appeal raised issues as to the incompatibility of the home's modern design with the character of nearby homes and the natural surroundings; its size, at nearly twice that of many neighboring properties; its inclusion of a second unit; and its siting on an exposed hillside where it would interfere with views from neighbors' homes.

The Planning Commission approved the project subject to conditions aimed at minimizing its visual impacts. While the modern design remained the same, the Commission required the Sasans to eliminate the lower-level living space, reduce the size of two exterior terraces, incorporate earth-toned coloring and texturing on the retaining walls, add landscaping to screen the home and retaining walls, and provide a trail access easement. The Sasans revised their project plans accordingly.

The neighbors appealed that decision to the County's Board of Supervisors (Board). One of the supervisors commented that significant re-siting of the home would allow for serious reduction on the length of driveway, the retaining wall and other issues, which would be better for visual impact. The supervisor proposed the Board uphold the appeal without prejudice and suggested that staff come back with a resolution that would speak to her objection. She encouraged the Sasans to submit a revised project that would minimize outward facing bulk. A second supervisor also expressed the understanding of the neighbor's concerns relating to the visual impacts of the site as proposed.

The Board voted to grant the administrative appeal and deny the Sasans' applications. At its direction, Department staff prepared and the Board unanimously executed a Final Resolution stating its findings and decision. In its findings, the Board found the Sasans' proposal also failed to comply with a number of County mandatory design review criteria. Among other things, the Board found that (1) the project's scale and mass were incompatible with the surroundings; (2) it would adversely affect neighbors' views because the project would stand out in stark contrast to the surrounding natural and built environments; (3) it required excessive grading and earthwork; and (4) it was visually out of scale with other development in the vicinity and incompatible with the site conditions. The Board also rejected the Sasans' application to remove the mature oak and buckeye trees pursuant to Marin County Code section 22.62.050, based on its determinations that the need to remove *any* trees could be avoided by re-siting the structure southward on the Sasans' property, and that retaining existing trees around the project site would provide screening and privacy.

The Sasans filed a petition for writ of administrative mandamus in the superior court challenging the Board's decision. The trial court found that the Board's findings were supported by substantial evidence and upheld the Board's decision. The Sasans appealed and contended that the Board's findings and Final Resolution were legally defective and unsupported by substantial evidence. The Court of Appeal disagreed and affirmed the trial court's decision.

The Sasans contended the findings were legally inadequate because (1) they failed to demonstrate the Board's analytical route between the evidence and its decision to uphold the appeal; and (2) they were inadequately linked to supporting evidence. The Court of Appeal disagreed, finding that the Board's findings satisfied the *Topanga* standard iterated in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [must show the "analytic route the administrative agency traveled from evidence to action"].) Reference to the administrative record left "no mystery" about the Board's findings supporting its conclusion that the project as designed violated county codes and policies, and the findings were specifically linked to facts.

The Sasans also argued that the Board's Final Resolution failed to expressly cite the particular evidence the Board relied on for its findings. They argued, "the Board Resolution fails to show that the County considered neighbor testimony, or the slide [depicting the project] in reaching its findings." The Court of Appeal disagreed, noting there was no legal requirement that design review resolutions and findings must include specific citation to the administrative record, and that such a requirement would be at odds with the established rule that findings "'are generally permitted considerable latitude with regard to their precision, formality, and matters reasonably implied therein'" and "do not need to be extensive or detailed." (*Young v. City of Coronado* (2017) 10 Cal.App.5th 408, 421 [italics omitted].) The Court ruled it was plain from the record that the Board reviewed the project documentation, considered the neighbors' input on the proposal, and concluded from those sources that the project violated county design review criteria.

Finally, the Sasans asserted that the trial court erred by ignoring the evidence supporting the Planning Commission's decision to approve the project instead of considering all the evidence in the administrative record. The Court of Appeal found that, even were this claim substantiated by the record, which it was not, the claim was irrelevant. The trial court's conclusions and disposition of the issues were not conclusive on the court of appeal. (*Alberstone v. California Coastal Com.* (2008) 169 Cal.App.4th 859, 863.) To the extent the Sasans' argument was that the Board's decision was unsupported by substantial evidence, the Court of Appeal likewise disagreed, as it was satisfied the project documents and the neighbors' written and oral input on the project's impacts on their neighborhood provided a sufficient basis for the decision.

Nor did it matter that, as the trial court acknowledged, the administrative record contained evidence that could support the opposite decision to grant the Sasans' application. "In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's [determination] on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, our task 'is not to weigh conflicting evidence and determine who has the better argument.'" (*Vineyard Area Citizens for Responsible Growth, Inc., v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.)

Finally, the Court of Appeal was also satisfied the record supported the Board's decision to deny the Sasans' tree removal application. The Sasans emphasized the evidence supporting the Commission's decision to grant the permit, namely its finding that the home could not be re-sited below the Sacramento Avenue right of way without removing additional trees. Again, however, the Court noted that did not matter if the Board could have reached the same conclusion as the Commission on the evidence before it. The question, rather, was whether there was substantial evidence for the Board's contrary determination that the Sasans could avoid the need for any tree removal by shifting the building site southward on the lot. The Court concluded that there was such substantial evidence. The documentation before the Board showed the property's boundaries and constraints, including the topography and the unbuildable right of way. Apprised of those factors, and well-suited to evaluate the possibility of legally abandoning the undeveloped right of way to expand the options for siting the project, the Board had an adequate basis for its finding the home could be built in a different location without sacrificing existing trees.

* * *

Carmel Valley Association, Inc. v. County of Monterey (Cal. Ct. App., May 19, 2021, No. H046187) 2021 WL 1999807 [unreported].

BACKGROUND: This case arose from the proposal of Rancho Cañada Ventures, LLC and R. Alan Williams (collectively, Rancho Cañada) to develop a residential subdivision in Monterey County (County) known as the Rancho Cañada Village project. The project generally consisted of a residential subdivision of approximately 40 acres, including affordable housing and mixed uses, located on an approximately 80-acre portion of a former golf course in the Carmel Valley. After preparing an environmental impact report (EIR) pursuant to CEQA concerning the proposed project and holding a hearing, the County's Board of Supervisors (Board) approved a 130-unit alternative for the project as the environmentally superior alternative. The Board also amended the County's General Plan to reduce the minimum percentage of affordable housing in the special treatment area of Rancho Cañada Village to 20 percent and rezoned most of the special treatment area to medium density residential.

Carmel Valley Association, Inc. (Association) challenged the County's approval of the Rancho Cañada project by filing a petition for writ of mandamus alleging violations of CEQA's requirements for environmental review and also alleging that the County had violated both a General Plan policy regarding the evaluation of new developments and the County's inclusionary housing ordinance, Section 18.40 of the Monterey County Code of Ordinances (Section 18.40 and MCCO, respectively).

The trial court granted the petition for writ of mandamus and, on July 6, 2018, entered an amended judgment in favor of the Association. The amended judgment directed that a peremptory writ of mandate issue commanding the County to set aside its approval of the Rancho Cañada Village project and to amend its inclusionary housing ordinance, MCCO section 18.40. Both Rancho Cañada and the County appealed from the amended judgment, and the Association cross-appealed.

HOLDING: The Court of Appeal found that Rancho Cañada's and the County's arguments on appeal had merit, but the Association's cross appeal did not. Therefore, the Court of Appeal reversed the

judgment and remanded the matter to the trial court with directions to issue a new order denying the petition and vacating the peremptory writ of mandate.

KEY FACTS & ANALYSIS: In 2004, Rancho Cañada's predecessor filed an application with the County for development of a residential subdivision in the Carmel Valley area of unincorporated Monterey County, known as the Rancho Cañada Village project. The application was deemed complete in 2005, and the County began preparation of an EIR.

In 2008, the County circulated the draft EIR (DEIR). After receiving numerous public comments on the DEIR, the County intended to prepare a revised DEIR (RDEIR). However, according to the County, in 2009 Rancho Cañada put the project on hold while a different EIR was being prepared in connection with an update of the County's 1982 General Plan. The 2010 General Plan was subsequently approved in October 2010. Relevant here, the 2010 General Plan included a specific plan for the Carmel Valley, entitled the Carmel Valley Master Plan (CVMP), which imposed a subdivision cap.

In 2016, the County circulated an RDEIR for the Rancho Cañada Village project. The project alternatives identified in the RDEIR included six numbered alternatives, and an unnumbered 130-unit alternative. After a draft final EIR was released, the County's Planning Commission received a staff report and held a public hearing in November 2016 regarding the Rancho Cañada Village project. The Planning Commission recommended that the Board certify the EIR and approve the Rancho Cañada Village project described in the 130-unit alternative. The Final EIR was released in December 2016.

The Board held a public hearing on the Rancho Cañada Village project on December 13, 2016, and adopted a resolution certifying the EIR selecting the 130-unit alternative for approval and approving the Rancho Cañada Village project. Additionally, the Board amended one of the 2010 General Plan policies to reduce the minimum percentage of affordable housing in the special treatment area of Rancho Cañada Village to 20 percent, approved a combined development permit, and adopted a mitigation monitoring and reporting plan. By separate ordinance, the Board rezoned the Rancho Cañada Village special treatment area to medium density residential, with a few acres rezoned low density residential.

The Association filed a petition for writ of mandamus setting aside the County's approval of the Rancho Cañada Village project and sought injunctive relief. In its writ petition, the Association raised the following claims of CEQA violations: (1) the project description in the EIR was unstable and shifting; (2) Rancho Cañada had effectively abandoned the proposed 281-unit Rancho Cañada Village project in favor of the 130-unit alternative; and (3) the EIR did not analyze a reasonable range of alternatives.

The Association also raised two non-CEQA claims. First, the Association alleged that the County had violated the General Plan land use policy by failing to establish a "Development Evaluation System" by October 2011. Second, the Association alleged that the County's approval of the Rancho Cañada Village project violated the inclusionary housing ordinance, MCCO section 18.40, as well as the General Plan land use policy, which required a minimum of 25 percent of new housing units to be affordable to a range of low income households.

After a trial, the trial court issued its intended decision rejecting the Association's contention that the County abused its discretion in failing to develop and promulgate a Development Evaluation System as specified in the General Plan land use policy. However, the trial court ruled that the County's failure to amend MCCO section 18.40 to be consistent with the General Plan land use policy within a reasonable time was arbitrary and capricious. The trial court also ruled that there was not substantial evidence to support the Board's decision to exempt the Rancho Cañada Village project from the requirement of MCCO section 18.40.110.A, under which a residential project set aside eight (8) percent of the total units in the development for moderate-income households, six (6) percent for low-income households, and an additional six (6) percent for very-low-income households.

As to the CEQA claims, the trial court rejected the claim that the project description was unstable and shifting but ruled that the project's history demonstrates the 130-unit Alternative effectively replaced the project as the true project under consideration, and that consequently, the existing "project description" was inaccurate. The trial court also ruled that the EIR's analysis of project alternatives did not satisfy CEQA because the EIR effectively examined only a single feasible alternative.

In its appeal, Rancho Cañada contended that the trial court erred in granting the petition for writ of mandamus because (1) the trial court erred in ruling that the project description for the Rancho Cañada Village project did not comply with CEQA; (2) the trial court erred in ruling that the EIR's alternatives analysis did not comply with CEQA; and (3) the trial court erred in ruling that the County's approval of the project's moderate-income inclusionary housing was not supported by substantial evidence.

The County contended in its appeal that the trial court erred in (1) ruling the County's failure to amend the inclusionary housing ordinance to be consistent with the affordable housing requirements stated in the General Plan was arbitrary and capricious; and (2) ordering a writ to issue commanding the County to amend MCCO section 18.40 because it was inconsistent with General Plan land use policy (specifically, Land Use Policy 2.13).

On cross-appeal, the Association contended that the trial court erred in rejecting the Association's argument the County violated its mandatory duty under the General Plan land use policy to timely establish a Development Evaluation System.

In reviewing the RDEIR and Final EIR, the Court of Appeal found that the basic characteristics of the project—a residential subdivision of approximately 40 acres including affordable housing and mixed uses, located on an approximately 80-acre portion of a former golf course in the Carmel Valley—remained accurate and stable throughout the EIR process. The two primary changes in the 130-unit alternative (which was clearly identified as an alternative in the EIR) from the project as originally proposed were the reduction in residential units from 281 to 130, and the reduction in the percentage of affordable residential units from 50 percent to approximately 20 percent. Changing a project to reduce or avoid environmental impacts, such as by reducing the number of residential units, was one of the key purposes of the CEQA process. Therefore, based on the Court's independent review of the EIR, it determined that the project description was adequate

because the basic characteristics of the project remained accurate, stable, and finite throughout the EIR process.

The Court of Appeal then turned to the alternatives analysis. The project alternatives stated in the RDEIR, in addition to the 130-unit alternative, included six numbered alternatives. The Court determined that the Association failed to demonstrate that the alternatives analysis was inadequate. Regarding the approval of moderate-income inclusionary housing, the Court found that letters from Monterey County Bank and 1st Capital Bank, stating that they could not provide financing due to the low-profitability of low income housing was substantial evidence in support of the Board's finding of unusual or unforeseen circumstances, consisting of the financial infeasibility of the 130-unit alternative due to the requirements of MCCO section 18.40.110.A for low-income and very low-income housing in residential developments, allowed modification of the requirements as authorized under section 18.40.050.B.2. Accordingly, the Court found that the Board's decision to exempt the 130-unit alternative project from the affordable housing requirements of MCCO section 18.40.110.A was sufficient to bridge the analytical gap between the evidence of the bank letters and the Board's finding under MCCO section 18.40.050.B.2 that unusual or unforeseen circumstances, consisting of financial infeasibility, allowed the exemption. For these reasons, the Court concluded that the Association failed to meet its burden to show that the Board's decision to exempt the Rancho Cañada Village project from the requirements of MCCO section 18.40.110.A was not supported by substantial evidence.

The Court of Appeal next turned to the County's appeal, in which the County contended the trial court erred in (1) ruling that the County's failure to amend the Inclusionary Housing Ordinance, MCCO section 18.40.070.A, to be consistent with the affordable housing requirements stated in the General Plan land use policy was arbitrary and capricious; and (2) ordering that a writ issue commanding the County to amend MCCO section 18.40.070 because it is inconsistent with the General Plan land use policy.

1

The County contended that the delay in amending MCCO section 18.40.070.A to be consistent with the General Plan land use policy was not arbitrary and capricious or without evidentiary support for several reasons, including the County's comprehensive approach to affordable housing policies and new case law regarding the validity of affordable housing ordinances. According to the County, it exercised its discretion to take that comprehensive approach to updating its ordinances in light of the County's four General Plan policies relating to affordable housing, rather than simply amending MCCO section 18.40.070.A to add a 5 percent workforce affordability requirement. Moreover, the County asserted that it was actively engaged in affordable housing updates after the adoption of the 2010 General Plan, including a state mandated update of the Housing Element of the General Plan and the work of its Housing Advisory Committee in recommending revisions to MCCO section 18.40.070 and other ordinances in relation to the General Plan's affordable housing policies. The County also argued that it exercised its discretion not to simply amend MCCO section 18.40.070.A due to the uncertainty caused by new case law regarding a local government's authority to require affordable housing in new developments. In particular, the County was concerned that two decisions might impact the validity of MCCO section 18.40.070, including *Palmer/Sixth St. Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396, 1409 [city's affordable housing ordinance preempted by Costa-Hawkins Rental Housing Act] and *California Building Industry Association v. City of San Jose* (2015) 61 Cal.4th

435, 442 [city's inclusionary housing ordinance deemed constitutional].) The Association disagreed, arguing that the trial court correctly ruled that the County's seven-year delay in amending MCCO section 18.40.110.A to be consistent with General Plan Policy LU 2.13 constituted an abuse of discretion. The Court of Appeal concluded that the Association failed to meet its burden because it did not combat the County's asserted reasoning for the delay.

The Court then considered the Association's cross-appeal, which concerned the time limit provided by the General Plan for establishment of a Development Evaluation System. The General Plan provided in part that the "Development Evaluation System shall be established within 12 months of adopting this General Plan" The County's 2010 General Plan was adopted on October 26, 2010, and the Development Evaluation System had not been formally established at the time of the proceeding.

The trial court ruled that the County had significant discretion to develop the Development Evaluation System and to allocate resources for its development. The trial court therefore concluded that the Association was not entitled to a writ of mandate, ruling that "the County's decision as to the timing of its implementation of the [DES] is legislative in character, and may be overridden only if it is 'arbitrary, capricious or entirely lacking in evidentiary support.'" On appeal, the parties disputed whether the time line was directory or mandatory. The Court of Appeal agreed with the County that it was directory because "requirements relating to the time within which an act must be done are directory rather than mandatory or jurisdictional, unless a contrary intent is clearly expressed. [Citations.]" (*Edwards v. Steele* (1979) 25 Cal.3d 406, 410; *see also California Correctional Peace Officers Assn. v. State Personnel Board* (1995) 10 Cal.4th 1133, 1145.)

In summary, the Court of Appeal reversed the judgment of the trial court and remanded with directions to (1) vacate its original order granting the petition for writ of mandamus; (2) enter a new order denying the petition for writ of mandamus; and (3) vacate the peremptory writ of mandamus.

* * *

Coston v. Stanislaus County (Cal. Ct. App., May 19, 2021, No. F074209) 2021 WL 1992309 [unreported].

BACKGROUND: Appellants and plaintiffs challenged respondent Stanislaus County's (County) approval of a well permit, alleging the County failed (1) to perform environmental review required under the CEQA, and (2) to afford plaintiffs due process protections before issuing the permit. Prior to November 25, 2014, the County had a policy not to apply CEQA's environmental review procedures to the approval of well permits. The permit at issue was approved under this policy.

The County obtained judgment on the pleadings on the grounds that its approvals of nonvariance well permits were ministerial under CEQA. Thereafter, the State Supreme Court decided *Protecting Our Water & Environmental Resources v. County of Stanislaus* (2020) 10 Cal.5th 479 (*Protecting Our Water*). In that opinion, the Supreme Court invalidated the County's categorical classification of well permit approvals as ministerial. As a result, the grounds for County's judgment on the pleadings had been negated.

The County initially contended the judgment on the pleadings could still be affirmed on alternate grounds: There was substantial evidence the specific permit at issue was properly classified as ministerial.

HOLDING: The Court of Appeal reversed the decision of the trial court and remanded for further proceedings.

Key FACTS & ANALYSIS: The County required permits for water well construction, repair, or destruction. The County's municipal code also allowed for variance permits, which may be conditioned. The County's CEQA regulations treated most nonvariance permits for wells as ministerial and therefore not subject to CEQA review.

On October 16, 2015, seven individuals who owned nearby properties filed a CEQA action, seeking a writ of mandate invalidating the permit. Specifically, the petition claimed that Chapter 9.36 of the Stanislaus County Code required that the County exercise discretion in deciding whether to issue well construction permits. The chapter read in pertinent part:

> Except as may be otherwise provided by this chapter, standards for the construction, repair, reconstruction, or abandonment of wells shall be as set forth in Chapter II of the Department of Water Resources Bulletin No. 74, 'Water Well Standards' (February 1968), or as subsequently revised or supplemented, which are incorporated in this chapter and made a part of this chapter.

The bulletin gave the Department discretion to impose other standards in certain circumstances. Plaintiffs asserted that because the decision was discretionary, CEQA required environmental review, which the County did not perform.

In a second cause of action, the petition alleged that the County violated plaintiffs' procedural due process right to notice and an opportunity to be heard before a government's adjudicative decision deprived them of a significant property interest. Specifically, the petition alleged the County's issuance of the well permit had caused and threatened to continue to cause a substantial interference with plaintiffs' property interests, including but not limited to loss of groundwater supply in plaintiffs' wells; increased traffic congestion; increased risk of traffic accidents; increased air pollution by dust, pesticide drift, diesel pump generator exhaust, and increased noise pollution.

More than a year before the suit began, another lawsuit was filed in Stanislaus County Superior Court challenging the County's policy of treating standard well construction permits as non-discretionary. That case was decided by the same judge and was titled *Protecting Our Water and Environmental Resources, et al. v. Stanislaus County et al*., Stanislaus County Case No. 2006153 (the "*POWER* case"). On February 16, 2016, the trial court entered judgment in the *POWER* case in favor of the County, after concluding that the issuance of standard well permits under Chapter 9.36 was a ministerial act under CEQA.

Shortly after judgment was entered in the *POWER* case, the County moved for judgment on the pleadings in the present case. The County asked the superior court to take judicial notice of its own

decision in the POWER case, which it argued disposed of this case as well. The superior court granted the County's motion for judgment on the pleadings with leave to amend, concluding that the issuance of the well construction permit was ministerial, and that fact was fatal to plaintiffs' CEQA and due process claims.

In an unpublished decision filed on August 24, 2018, the Court of Appeal reversed the trial court's judgment. (*Coston et al. v. Stanislaus County et al.* (Aug. 24, 2018, F074209) [nonpub. opn.] at p. 25 (*Coston I*).) In that opinion, the Court of Appeal focused on Standard 8.A of the bulletin, which provided: "All water wells shall be located an adequate horizontal distance from known or potential sources of pollution and contamination." The Court held that "[d]etermining whether a particular spacing is 'adequate' inherently involves subjective judgment", and, therefore, the well permit issuances were discretionary under CEQA.

Plaintiffs also appealed the judgment in the *POWER* case, which the Court of Appeal also reversed in a separate, unpublished decision filed August 24, 2018 (*POWER I*, *supra*, F073634 at p. 24). The State Supreme Court granted review of *POWER I* and determined that the holding was too broad because Standard 8.A only applies when there is a contamination source "near" a proposed well. Absent a nearby contamination source identified during the permit approval process, the issuance of a construction permit may be ministerial. Therefore, the Supreme Court held that while plaintiffs were entitled to a judicial declaration that the County's blanket ministerial categorization was unlawful, they were not entitled to a declaration that well permit issuances are always discretionary because of Standard 8.A.

The Supreme Court noted that "the fact that an individual project is classified as discretionary does not mean that full environmental review, including an EIR, will always be required. The project may qualify for another CEQA exemption, or the agency may be able to prepare either a negative declaration or a mitigated negative declaration after its initial study. Any of these circumstances would obviate the need for an EIR." (*Protecting Our Water*, *supra*, 10 Cal.5th at p. 501.) After deciding *Protecting Our Water*, the Supreme Court transferred the present matter back for reconsideration in light of that opinion.

The County moved for judgment on the pleadings on the ground that the petition failed to allege a cause of action because the County's "well permit approvals are ministerial actions" and CEQA and Due Process principles do not apply to ministerial actions. The trial court concluded that, because the County's issuance of well construction permits was in fact a ministerial decision, the County was entitled to judgment on the pleadings. The Court of Appeal reversed. The question, according to the Court of Appeal, is not whether the moving party's substantive factual assertions are supported by substantial evidence. Rather, the question is whether the allegations in the opposing party's pleadings have stated a cause of action (regardless of whether they are supported by evidence). Whether there was a contamination source "near" the approved site was a factual question on which plaintiffs' cause of action could be predicated. The County had not pointed to conclusive evidence that there was no nearby contamination source; however, the Court of Appeal observed that it could do so in a future proceeding. Due to the outstanding question of material fact on which the cause of action was based, the Court reversed the trial court's grant of judgment on the pleadings.

* * *

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.

Thank You:
The author wants to thank Jessica Sanders, Associate, and Mia Slobodien, Assistant, at Rutan & Tucker, LLP, for their assistance with this paper and power point presentation; and to thank Dave Fleishman, Of Counsel at Richards, Watson & Gershon, for his review and comments.