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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

CEQA CONSIDERATIONS WHEN EVALUATING IMPACTS TO BIOLOGICAL RESOURCES

By Robbie Hull, Scott Birkey, and Clark Morrison

One of the stated legislative policies underlying the California Environmental Quality Act (CEQA) is to:

> . . .[p]revent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities. (Pub. Res. Code § 21001(c).)

To meet this goal, CEQA requires local agencies to review, analyze, and mitigate a project's anticipated impacts on biological resources, including impacts to threatened and endangered species, habitats, and wetlands.

The CEQA statute and the CEQA Guidelines leave a lot of questions unanswered, however. Some of these questions are rooted in legal considerations, while others reflect the practical realities of trying to evaluate unpredictable and variable biological systems. For example: What issues should a local agency consider when a project has the potential to impact biological resources? To what extent do those impacts inform the need for either an Environmental Impact Report (EIR) or a Mitigated Negative Declaration (MND)? What is the appropriate scope of the CEQA document's analysis of impacts to biological resources? What are acceptable thresholds of significance, and what triggers a determination that an impact is significant? What constitutes adequate mitigation to offset a project's significant impacts to biological resources? In what circumstances can that mitigation be deferred until later?

This article attempts to address these and other issues that often arise when consultants and lawyers prepare and review the biological resources discussion and analysis in CEQA documents. Though not exhaustive, this article is intended to provide for your consideration some thoughts on these issues to help you navigate the nuances of the biological-resources evaluation in a CEQA document. We presume the reader has at least a good working knowledge of fundamental CEQA principles, but to help place some of these issues into context, we remind the reader of certain basic concepts that apply more generally to CEQA documents and evaluation of projects.

Biological Resources Impacts and the Level of CEQA Clearance Required

During its preliminary review process, a lead agency must determine the appropriate type of CEQA clearance required for a project. A key consideration at this stage in the process is whether an exemption can be used as the CEQA clearance for the project. The potential for impacts to biological resources is sometimes one of the main reasons a project may not be eligible for an exemption. For example, a commonly used exemption—the "Class 32 Infill Exemption"—specifically disallows the use of the exemption in the event the project site has "value as habitat for endangered, rare or threatened species." (14 CCR § 15332(c).)

Relatedly, practitioners should keep in mind that a project may not rely on a "mitigated categorical exemption" to avoid CEQA review. In the context of biological resources, this issue typically arises when a project is in proximity to a sensitive environment or may have significant impacts on species or habitat and the applicant or lead agency seeks to incorporate mitigation into the project in order to make the proj-

ect fit within an exemption.

For example, in *Salmon Protection & Watershed Network v County of Marin,* 125 Cal.App.4th 1098, 1102 (2004), Marin County approved the construction of a single-family home pursuant to the Class 3 categorical exemption for "New Construction or Conversion of Small Structures." The home, however, was in a protected "stream conservation area," pursuant to the county's General Plan designation for areas adjacent to natural watercourses and riparian habitat. (*Id.* at 1102-03.) In approving the project, the county imposed various mitigation measures, including construction limitations, a riparian protection plan, and erosion and sediment control, aimed at minimizing adverse impacts. (*Id.* at 1102-04.)

According to the Court of Appeal, the county erred in relying upon mitigation measures to grant a categorical exemption:

> Reliance upon mitigation measures (whether included in the application or later adopted) involves an evaluative process of assessing those mitigation measures and weighing them against potential environmental impacts, and that process must be conducted under established CEQA standards and procedures for EIRs or negative declarations. (*Id.* at 1108; *see also, Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster,* 52 Cal.App.4th 1165, 1198-1200 (1997) [operation and minor alteration of existing landfill not exempt, despite mitigation measures addressing leaking of pollutants].)

In a somewhat complicated twist to this principle, a project may include design or operational features that reduce or avoid environmental impacts while remaining eligible for a categorical exemption. In *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.,* 242 Cal.App.4th 555, 570 (2015), the Court of Appeal held that a rodeo could rely on the Class 23 exemption for normal operations of existing facilities for public gatherings, despite the implementation of a manure management plan to minimize pollution to a nearby creek and the resulting indirect impacts to aquatic species. The court found that the management plan was not proposed as a mitigation measure for the rodeo project and, therefore, did not preclude the use of the Class 23 exemption. (*Id.*) Rather, it preexisted the project and was directed at preexisting concerns. (*Id.* at 570-71; *see also, Wollmer v. City of Berkeley,* 193 Cal.App.4th 1329, 1352-53 (2011) [dedication of left-hand turn lane as part of project design was not a mitigation measure].)

Another consideration to take into account are the CEQA Guidelines pertaining to "mandatory findings of significance." (14 CCR § 15065(a).) These Guidelines specifically refer to impacts to biological resources and specify that an EIR must be prepared in the event certain biological resources are impacted, subject to certain specific requirements. The Guidelines state:

> (a) A lead agency shall find that a project may have a significant effect on the environment and thereby require an EIR to be prepared for the project where there is substantial evidence, in light of the whole record, that any of the following conditions may occur:
>
> (1) The project has the potential to: . . . substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels; threaten to eliminate a plant or animal community; substantially reduce the number or restrict the range of an endangered, rare or threatened species . . .
>
> (b)(2) Furthermore, where a proposed project has the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species, the lead agency need not prepare an EIR solely because of such an effect, if:
>
> (A) the project proponent is bound to implement mitigation requirements relating to such species and habitat pursuant to an approved habitat conservation plan or natural community conservation plan;
>
> (B) the state or federal agency approved the habitat conservation plan or natural community conservation plan in reliance on an environmental impact report or environmental impact statement; and
>
> (C)(1) such requirements avoid any net loss of habitat and net reduction in number of the affected species, or

(2) such requirements preserve, restore, or enhance sufficient habitat to mitigate the reduction in habitat and number of the affected species to below a level of significance.

Practitioners should keep these "mandatory findings of significance" standards and requirements in mind for projects where the key consideration is biological resources impacts. These CEQA Guidelines can serve as the touchstone for whether an exemption can be used, and whether the lead agency is required to prepare an EIR rather than a negative declaration or MND.

A benefit of these mandatory findings is that they specifically allow the lead agency to rely on the provisions of an approved Habitat Conservation Plan (HCP) in determining that biological impacts have been addressed. Given that the Guidelines require the HCP to have been reviewed in an EIR or environmental impact statement (EIS), these benefits are probably limited to the regional HCPs and Natural Community Conservation Plans (NCCPs) that have been adopted in various counties in northern and southern California. Project-specific HCPs do not always generate the need for EIS- or EIR-level review. Moreover, they are rarely entered into prior to completion of CEQA review by the lead agency for the underlying project. Where such review has been conducted, however, a lead agency may rely on its provisions to obviate the need for EIR-level review at the local level. Moreover, projects within regional HCPs that have an aquatic focus may also benefit under the State of California's new wetlands policies, which provide streamlining for projects consistent with such HCPs where they serve as a "watershed plan."

The Substance of a Biological Resources Analysis

This section provides a discussion of how impacts to biological resources should be described, analyzed, and mitigated in a CEQA document.

Describing Biological Resources in the Project Description and Environmental Setting

An accurate, stable, and finite project description has been described as the "sine qua non" of a legally sufficient CEQA document. (*County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 193 (1977).) It should inform the public about the project's likely effect on the environment and ways to mitigate any significant impacts. Importantly, the project description must include a list of the permits and other approvals required for the project and a list of the agencies that will use the CEQA document in issuing those permits. (14 CCR § 15124.) Accordingly, if a project will require, for example, an incidental take permit or a wetland fill permit, the CEQA document must provide sufficient information for other governmental agencies to complete their decision-making processes as "responsible agencies" pursuant to CEQA. (14 CCR § 15096.) This may include, for example, a detailed discussion of any special-status species and their habitat located on or in the vicinity of the site, as well as any wetlands or other protected waters that exist and may be impacted by the project. In our experience, state agencies such as the California Department of Fish and Wildlife (CDFW) can be quite exacting in what they expect to see in a CEQA document in order for the agency to use that document as its own CEQA clearance for the issue of its permits. (*See, e.g.*, *Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal.5th 918 (2017).)

Like the project description, the environmental setting should provide a complete and accurate description of the project setting, *i.e.*, the existing environmental conditions and surrounding uses, to establish the baseline for measuring environmental impacts resulting from the project. (14 CCR § 15125; *see also*, *San Joaquin Raptor/Wildlife Rescue Ctr. v County of Stanislaus*, 27 Cal.App.4th 713, 729 (1994) [finding EIR inadequate without "accurate and complete information pertaining to the setting of the project and surrounding uses"].) To satisfy this requirement, lead agencies generally should incorporate a detailed review of biological databases (most notably the California Natural Diversity Database, or CNDDB), on-site data gathering and, if necessary, project-specific studies to determine existing environmental conditions. (*See, e.g.*, *North Coast Rivers Alliance v Marin Mun. Water District*, 216 Cal.App.4th 614, 644-45 (2013) [upholding EIR environmental setting based on database review and specific study to assess aquatic species].) As a practical matter, the level of this effort should be commensurate with the extent to which biological resources are a concern on the project site.

Thresholds of Significance for Impacts to Biological Resources

Once the project and environmental setting have been adequately described, the CEQA document must identify the environmental impacts likely to result from project development, followed by mitigation measures or project alternatives that will avoid or reduce these impacts. To determine whether mitigation is required, or if mitigation can reduce an impact to a level of insignificance, a lead agency must compare a project's impacts to thresholds of significance. (14 CCR § 15064.)

For biological resources, lead agencies often use the checklist from Appendix G of the CEQA Guidelines, which requires the lead agency to consider whether the project may:

- Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service?

- Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the California Department of Fish and Game or US Fish and Wildlife Service?

- Have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?

- Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?

- Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance?

- Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan?

Other common examples of significance thresholds include the mandatory findings of significance discussed above or local regulations and plans created for species protection. Ultimately, lead agencies have significant discretion when devising significance thresholds, but their decisions must be supported by substantial evidence. (*See, Save Cuyama Valley v. County of Santa Barbara,* 213 Cal.App.4th 1059, 1068 (2013) [Appendix G's thresholds of significance "are only a suggestion" (alterations omitted)]; *Protect the Historic Amador Waterways v. Amador Water Agency,* 116 Cal.App.4th 1099, 1111-12 (2004) [setting aside EIR for failure to adequately discuss impacts of stream flow reduction]; *San Bernardino Valley Audubon Soc'y v County of San Bernardino,* 155 Cal.App.3d 738, 753 (1984) [setting aside project approval based on inconsistency with general plan policy protecting rare plants].)

Analysis of Biological Resources

When analyzing project-related impacts to determine if they exceed defined significance thresholds, lead agencies may use a variety of methods, provided that the chosen method is supported by substantial evidence. For example, an agency may employ protocol-level, species-specific surveys adopted or recommended by wildlife agencies to determine whether protected species or habitat exists on the project site. Or, a lead agency may use broader, reconnaissance-level studies to assess biological resources. (*See, Gray v County of Madera,* 167 Cal.App.4th 1099 (2008) [county not required to follow CDFW study protocols for California Tiger Salamander], 1124-25; *Association of Irritated Residents v County of* Madera, 107 Cal. App.4th 1383, 1396 (2003) ["CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project. The fact that additional studies might be helpful does not mean that they are required."])

Though CEQA does not require an agency to conduct all possible tests or surveys, additional tests or surveys may be necessary if previous studies are insufficient. In particular, lead agencies should beware of outdated studies and information. In *Save Agoura Cornell Knoll v. City of Agoura Hills,* 46 Cal.App.5th

665, 692-93 (2020), the Court of Appeal set aside a project approval based, in part, on a CDFW comment letter, which noted that botanical surveys older than two years may be outdated. CDFW also commented that surveys should be performed in conditions that maximize detection of special-status resources, to the extent feasible. (*Id.*) Surveys performed in a drought, for example, "may overlook the presence or actual density of some special status plant species on the [p] roject site." (*Id.* at 692.)

One important fact to consider is that CEQA's scope of review related to biological resources is quite broad. For example, the CEQA Guidelines broadly define "endangered, rare or threatened species" that must be evaluated in a CEQA document. (14 CCR § 15380.) The definition states:

> (a) "Species" as used in this section means a species or subspecies of animal or plant or a variety of plant.
>
> (b) A species of animal or plant is:
>
> (1) "Endangered" when its survival and reproduction in the wild are in immediate jeopardy from one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, disease, or other factors; or
>
> (2) "Rare" when either:
>
> (A) Although not presently threatened with extinction, the species is existing in such small numbers throughout all or a significant portion of its range that it may become endangered if its environment worsens; or
>
> (B) The species is likely to become endangered within the foreseeable future throughout all or a significant portion of its range and may be considered "threatened" as that term is used in the Federal Endangered Species Act.
>
> (C) A species of animal or plant shall be presumed to be endangered, rare or threatened, as it is listed in:
>
> (1) Sections 670.2 or 670.5, Title 14, California Code of Regulations; or
>
> (2) Title 50, Code of Federal Regulations Section 17.11 or 17.12 pursuant to the Federal Endangered Species Act as rare, threatened, or endangered.
> (D) A species not included in any listing identified in subdivision (c) shall nevertheless be considered to be endangered, rare or threatened, if the species can be shown to meet the criteria in subdivision
>
> (b).
> (E) This definition shall not include any species of the Class Insecta which is a pest whose protection under the provisions of CEQA would present an overwhelming and overriding risk to man as determined by:
>
> (1) The Director of Food and Agriculture with regard to economic pests; or
>
> (2) The Director of Health Services with regard to health risks.

As such, the scope of a CEQA document's evaluation of a project's impacts to biological resources typically go far beyond impacts to species listed under the federal or California Endangered Species Act as threatened or endangered.

This result is particularly noticeable with respect to plant species. Largely because of this expansive review, CEQA documents include an analysis of plant species based on the well-known ranking system established by the California Native Plant Society (CNPS), which is a non-governmental organization that has made its own determinations as to threats to plant species. Although the use of the CNPS ranking system in CEQA documents is generally accepted in the industry, CEQA's definition of special-status plant species does not reference the ranking system and thus, arguably the use of this system is not predicated on any actual legal foundation. Notably, some plant species identified as "rare, threatened, or endangered" (Rare Plant Rank 1B) by the California Native Plant Society are not listed as threatened or endangered under the federal or California Endangered Species Act.

Mitigation Measures for Impacts Related to Biological Resources

To satisfy CEQA's requirements that significant environmental impacts must be mitigated, lead agen-

cies must set forth and identify feasible mitigation measures. (Pub. Res. Code §§ 21002.1(a), 21100(b)(3); 14 CCR § 15126.4.) Significant case law exists regarding the concept of mitigation in the context of biological resources. Based on that case law, several themes are apparent.

Deferral

Generally, deferring the formulation of a mitigation measure is not allowed. However, deferral can be appropriate if it is impractical or infeasible to fully formulate the mitigation measure during the CEQA review process, provided that the agency commits itself to specific performance criteria for future mitigation. (14 CCR § 15126.4.) For example, a lead agency is not required to identify the exact location of off-site mitigation, provided that it adequately analyzes project-related impacts and imposes specific mitigation, i.e., preservation or creation of replacement habitat at a specific ratio. In such an event, the agency is entitled to rely on the results of future studies to fix the exact details of the implementation of the mitigation measures it identified in the EIR. (*California Native Plant Society v. City of Rancho Cordova*, 172 Cal.App.4th 603, 622 (2009); *see also*, *Endangered Habitats League, Inc. v. County of Orange*, 131 Cal.App.4th 777, 793-96 (2005) [enumeration of possible future mitigation options, including on- and off-site habitat preservation at specific ratios was not improper].)

Deferral also may be allowed if future mitigation is dependent on permits required by other regulatory agencies. For biological resources, this typically involves incidental take permits, Clean Water Act § 404 permits, and other similar species and habitat-related permitting requirements. (*See, e.g.*, *Clover Valley Foundation v. City of Rocklin*, 197 Cal.App.4th 200, 237 (2011) [requirement that project obtain all necessary federal and state permits from Army Corps of Engineers and CDFW for impacts to protected bird habitat was permissible].) But, even when it is expected that another agency will impose mitigation measures on a project, the project's CEQA document must still commit itself to mitigation, identify the methods the agency should consider and possibly incorporate, and indicate the expected outcome. (*See, Rialto Citizens for Responsible Growth v. City of Rialto*, 208 Cal.App.4th 899, 944-46 (2012) [holding that formal consultation with USFWS was appropriate, and that proposed methods, including avoidance, minimization, and purchase of off-site habitat, ensured impacts would be mitigated].)

With respect to permits issued by other agencies, and specifically permits protecting special-status species, CEQA does not require that a lead agency reach a legal conclusion on whether a "take" is expected to occur as a result of the project. A finding that a project will not significantly impact biological resources does not "limit the federal government's jurisdiction under the Endangered Species Act or impair its ability to enforce the provisions of this statute." (*Association of Irritated Residents v County of Madera*, 107 Cal.App.4th 1383, 1397 (2003).) Accordingly, a lead agency may disagree with federal or state wildlife agencies regarding the possible take of a species. Such a disagreement will not invalidate an EIR if the agency's conclusion is supported by substantial evidence in the record.

Relatedly, CEQA does not require that a lead agency compel a project applicant to obtain a federal or state take permit to mitigate impacts to species. (*Id.*) However, if project impacts to protected species are expected to be significant, CEQA imposes upon the lead agency an independent obligation to incorporate feasible mitigation measures which reduce those impacts.

Treatment of Unlisted Species

Pursuant to CEQA Guidelines 15380(d):

> . . .[a] species not included in any [federal or state] listing … shall nevertheless be considered to be endangered, rare or threatened, if the species can be shown to meet the criteria in subdivision (b).

In *Sierra Club v. Gilroy City Council*, 222 Cal. App.3d 30, 47 (1990), the court considered whether CEQA Guideline 15380 requires a lead agency to make specific findings as to whether an unlisted species may be considered rare or endangered. The court held that there is no mandatory duty to do so, as CEQA Guideline 15380 was intended to be directory rather than mandatory, and the ultimate authority to designate a plant or animal species as rare or endangered is delegated to the state and federal govern-

ments. (*Id.*) However, in that case, the court also noted that the lead agency extensively considered the potentially rare species and incorporated significant mitigation measures to assure its continued viability. (*Id.*) Accordingly, lead agencies should carefully consider impacts to unlisted species, particularly when presented with significant evidence that they may be rare or otherwise in jeopardy.

Replacement Habitat and Conservation Easements

CEQA Guideline 15370(e) provides that mitigation may include:

> . . .[c]ompensating for the impact by replacing or providing substitute resources or environments, including through permanent protection of resources in the form of conservation easements. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 278 [conserving habitat at a 1:1 ratio]; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 [on- or off-site habitat preservation at 2:1 ratio].)

Conservation easements over lands set aside as mitigation for impacts to biological resources is often a key element of preserving these lands in perpetuity, thereby justifying their mitigating effect.

There is, however, a growing split of authority on the adequacy of conservation easements as mitigation, at least in the context of easements related to impacts to agricultural resources. Some local governments in California take the position that, because conservation easements merely protect existing land from future conversion, but do not truly replace or offset the loss of converted land, the easements do not reduce project impacts on land conversion. In *King and Gardiner Farms v. County of Kern*, 45 Cal. App.5th 814, 875-76 (2020), the court found that:

> . . .the implementation of agricultural conservation easements for the 289 acres of agricultural land estimated to be converted each year would not change the net effect of the annual conversions. At the end of each year, there would be 289 fewer acres of agricultural land in Kern County.

By contrast, in *Masonite Corp. v. County of Mendocino*, 218 Cal.App.4th 230, 238 (2013), the court concluded that:

> ACEs [agricultural conservation easements] may appropriately mitigate for the direct loss of farmland when a project converts agricultural land to a nonagricultural use, even though an ACE does not replace the onsite resources. . . .ACEs preserve land for agricultural use in perpetuity.

While this split of authority generally pertains to mitigation for the loss of agricultural land, it may be relevant to mitigation for the loss of habitat land. Notably, CDFW and other natural resource agencies in the state routinely rely on this form of mitigation to offset impacts to biological resources. On-site or off-site preservation of comparable habitat, coupled with a conservation easement or other form or development restriction, is a typical form of mitigation included in many permits issued by both the state and federal natural resource agencies.

In-Lieu Fees

Impacts to biological resources are sometimes mitigated using in-lieu fees, either in conjunction with or independent of habitat restoration. The court in *California Native Plant Society v. County of El Dorado*, 170 Cal.App.4th 1026, 1055 (2009), however, cautions that an in-lieu fee system will only satisfy the duty to mitigate if the fee program itself has been evaluated under CEQA, or the in-lieu fees are evaluated on a project-specific basis. There, El Dorado County adopted by ordinance a rare plant impact fee program for use by developers to mitigate project impacts, which certain developers relied on in preparing an MND, rather than an EIR. (*Id.* at 1029.) After petitioners challenged the adequacy of the fee program, the court set aside the project MND, finding that:

> . . .[b]ecause the fee set by the ordinance have never passed a CEQA evaluation, payment of the fee does not presumptively establish full mitigation for a discretionary project. (*Id.* at 1030; *see also, Save Agoura Cornell Knoll v. City of Agoura Hills*, 46 Cal.App.5th 665, 701-02 (2020) [in-lieu fee payment for oak tree planting inadequate to mitigate project impacts; the

MND did not provide any evidence that the off-site tree replacement program was feasible].)

Mitigation Cannot Violate Other Laws

Perhaps it goes without saying, but mitigation measures, even those with laudable species protection and conservation goals, may not violate other laws. In *Center for Biological Diversity v. Dept. of Fish & Wildlife*, 62 Cal.4th 204, 231-32 (2015), for example, the court held that while the CDFW generally may conduct or authorize the capture and relocation of a fully protected species as a conservation measure, it could not as the lead agency rely in a CEQA document on the prospect of capture and relocation as mitigation for a project's adverse impacts. There, the Fish and Game Code expressly permitted capture and relocation as part of an independent species recovery effort. (*Id.* at 232.) However, outside of a species recovery program, those same actions were considered a take of the species: "[m]itigating the adverse effect of a land development project on a species is not the same as undertaking positive efforts for the species' recovery." (*Id.* at 235.)

Battle of the Experts

Litigation regarding the effectiveness of proposed mitigation measures often involves a battle of expert opinions. In these cases, the survival of the proposed mitigation, and the project's CEQA clearance, may depend on the type of CEQA document used for the project. An EIR is subject to the deferential "substantial evidence" standard of review, limiting the court's review to whether there is any substantial evidence in the record supporting the EIR. (*See, National Parks & Conservation Assn. v. County of Riverside*, 71 Cal. App.4th 1341, 1364-65 ["Effectively, the trial court selected among conflicting expert opinion and substituted its own judgment for that of the County. This was incorrect."].) For MNDs, however, courts apply the "fair argument" standard, which only requires that the petitioner demonstrate there is substantial evidence in the record supporting a fair argument that the proposed project may have a significant effect even after mitigation measures are considered. (*See, California Native Plant Society v. County of El Dorado*, 170 Cal.App.4th 1026, 1060 (2009) ["Where the views of agency biologists about the ineffectiveness of MND's plant mitigation measure conflicted with those of the expert who reviewed the project for the developer, the biologists' views were adequate to raise factual conflicts requiring resolution through an EIR."].)

How Biological Resources Might Inform Subsequent CEQA Analysis

Under Public Resources Code § 21166 and CEQA Guideline 15162, a project may require subsequent environmental review if new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available. In the context of biological resources, new information is often an issue when a species is newly listed as threatened or endangered. In *Moss v County of Humboldt*, 162 Cal.App.4th 1041 (2008), for example, the court held that the new listing of the Northern California coastal coho salmon as a threatened species was not new information requiring additional review, as there was no evidence that the species' habitat was located on or near the project site. (*Id.* at 1064-65.) In contrast, the newly listed coastal cutthroat trout did constitute new information, as evidence suggested the species was linked to a creek on the project site. (*Id.* at 1065.) As such, the court required that the lead agency undertake supplemental review with respect to the project's environmental impacts on the newly listed coastal cutthroat trout.

Conclusion and Implications

This article addresses only the tip of the proverbial iceberg. Over CEQA's 50-year history, much has been said about how lead agencies should approach impacts to biological resources. We hope this article has been helpful in identifying some of the key themes that we've seen in our practice as consultants and lawyers alike struggle (at times) to capture the nuances associated with impacts to biological resources and mitigation to offset those impacts.

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REGULATORY DEVELOPMENTS

JUDICIAL COUNCIL AMENDS EMERGENCY RULE TOLLING STATUTES OF LIMITATIONS AS THEY RELATE TO CALIFORNIA ENVIRONMENTAL QUALITY ACT ACTIONS

Back in early April, the California Judicial Council (Council) first adopted Emergency Rule No. 9 to suspend statutes of limitation on all civil cases until 90 days after Governor Newsom lifts the state of emergency related to the COVID-19 pandemic. However, the Council has amended the emergency rule so that it is no longer tied to the state of emergency declaration. The new rule will restart statutes of limitations on set dates—either August 3 or October 1, 2020. Under the amended Emergency Rule 9, the tolling period for actions brought under the California Environmental Quality Act (CEQA) and planning and zoning law expires on August 3, 2020.

Judicial Council Emergency Rule No. 9

On April 6, 2020, the Judicial Council adopted 11 temporary emergency rules in response to the COVID-19 pandemic. The Judicial Council's Emergency Rule No. 9 tolled statutes of limitations for all civil causes of action "until 90 days after Governor [Newsom] declares that the state of emergency related to the COVID-19 pandemic is lifted." Although it was unclear at the time, many worried that the rule would also apply to toll the deadline for filing a writ petition under CEQA because writs of mandate are considered special proceedings of a civil nature and are governed by the same rules in Part II of the Code of Civil Procedure that apply to ordinary civil actions. (Code Civ. Proc., § 1109.)

Because Emergency Rule No. 9 was so broad in scope, developers and anti-NIMBY groups were up in arms because this extended tolling period goes against the legislative intent behind having short statutes of limitations for CEQA and other land use-related legal challenges. For example, the time for filing certain initial pleadings under CEQA is 30, 35, or 180 days (Pub. Resources Code, § 21167); 60 days for claims under the California Coastal Act (Pub. Resources Code, § 30802) and validation actions (Code Civ. Proc., § 860); and 90 days for cases challenging governmental actions for which a shorter statute of limitations has not been set.

COVID-19's Ongoing Impacts in California

Although the Governor proclaimed a state of emergency on March 4, 2020, the state of emergency has not yet ended, and there is no indication when the emergency proclamation will be lifted. The uncertainty surrounding when the Governor's state of emergency order will be lifted put the deadline to file a CEQA challenge in flux, giving would-be challengers significantly more time to file an action. Under Emergency Rule 9, as it was originally drafted, the time in which to bring such actions could be tripled beyond the statutory time even after the state of emergency is lifted. This was problematic because a long tolling is inconsistent with the short limitation periods in statute and the legislature's intent that such causes of action be brought expeditiously. Various interested groups requested the Judicial Council to clarify how Emergency Rule No. 9 would affect CEQA actions. Up until the recent clarification, this was an evolving situation, with no clear answer regarding whether the rule applied to CEQA actions.

Amendments to the Emergency Rule

On May 29, 2020, the Judicial Council adopted amendments to Emergency Rule No. 9 to provide fixed dates for the tolling of civil statutes of limitations. The amendment suspends from April 6 to October 1 the statutes of limitations for civil causes of action that exceed 180 days, and suspends from April 6 to August 3 the statutes of limitations for civil causes of action that are 180 days or less. Causes of action with short-term statutes of limitation, such as CEQA actions, have the more immediate deadline of August 3 because those deadlines are designed to ensure that any challenges are raised more quickly.

The Judicial Council proposed August 3, 2020, as the earlier end date to ensure that courts will be able

to process the civil actions and provide certainty and reasonable notice to litigants of the end of the tolling period, without overly impacting the construction and homebuilding industry or other areas in which the legislature has mandated short statutes of limitation. All said, the amended tolling rule results in a total tolling period of approximately four months for those actions that have a statute of limitations under 180 days.

Conclusion and Implications

As California begins a phased re-opening and courts restore services shuttered due to the COVID-19 pandemic, we are likely to see an end to certain emergency measures that were adopted to address the global health hazard. However, because the pandemic presents an unprecedented crisis, the Judicial Council may re-institute certain emergency measures if health conditions worsen or change. Therefore, it is important to check court websites frequently to keep up to date with changes to critical filing deadlines.

The Judicial Council's Circulating Order Memorandum relating to the Emergency Rule No. 9 amendment is accessible at the following link: https://jcc.legistar.com/View.ashx?M=A&ID=790621&GUID=A0ED0998-D827-4792-9BD1-A3A4FC-F939AA.
(Nedda Mahrou)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT REQUIRES U.S. FOREST SERVICE TO PREPARE EIS AFTER IT FINDS ENVIRONMENTAL ASSESSMENT FOR RESTORATION PROJECT SEVERELY LACKING

Bark v. United States Forest Service, 958 F.3d 865 (9th Cir. 2020).

The U.S. Ninth Circuit Court of Appeals recently rejected an Environmental Assessment (EA) prepared by the U.S. Forest Service (USFS) that determined that an Environmental Impact Statement (EIS) was not required. Instead, the court found that an EIS must be prepared under the National Environmental Policy Act (NEPA). As the court noted, the EA did not substantively address multiple expert opinions and evidence that the Crystal Clear Restoration Project (CCR Project) near Mount Hood would have significant environmental impacts and be ineffective at reducing forest fire danger. The court also found that the EA failed to properly assess cumulative impacts from the CCR Project. Ultimately, the decision again highlights the need for agencies conducting environmental assessments under the NEPA to perform a full and defensible assessment of potential environmental impacts, before determining that an EIS is not required. This is especially true for projects that are "highly controversial."

Factual and Procedural Background

The USFS proposed the CCR, which involved the sale of timber affecting 11,742 acres in the Mt. Hood National Forest. The USFS claimed that the forest stands in the project area were overstocked as a result of past management practices. According to the USFS, overcrowded forests, where trees are closer together, are more susceptible to insects and disease and to high-intensity wildfires. The CCR Project would allow for logging at specific locations pursuant to a technique called "variable density thinning." This process would give the USFS flexibility in choosing which trees to cut thus allowing the USFS to create variation within an area of forest so that it "mimic[ed] a more natural structural stand diversity." The CCR Project would leave an average canopy of 35-60 percent in the affected project site, with a minimum of 30 percent where the forest is more than 20 years old.

The USFS conducted an Environmental Assessment under NEPA. The EA determined that the CCR Project had no significant effects and USFS issued a Finding of No Significant Impact (FONSI) and did not prepare an EIS.

BARK, a conservation organization, filed a complaint against the USFS, bringing claims under NEPA and the National Forest Management Act (NFMA). The NEPA claim alleged that the USFS did not undertake a proper analysis of the environmental impacts of the Project or of alternatives to the Project. The U.S. District Court granted summary judgment against BARK on all claims.

The Ninth Circuit's Decision

The Ninth Circuit Court began by noting that Circuit Courts will review a District Court's grant of summary judgment *de novo*. Under the federal Administrative Procedure Act, a Circuit Court can overturn an agency's conclusions when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." An agency action is arbitrary and capricious if the agency:

> . . .relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. . .An agency's factual determinations must be supported by substantial evidence.

When reviewing an agency's finding that a project has no significant effects under NEPA, the court must determine whether the agency met NEPA's hard look requirement that:

> . . .based its decision on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project's impacts are insignificant.

The term "significant" includes "considerations of both the context and intensity of possible effects."

The court determined that based on the above principles, the USFS' decision not to prepare an EIS was arbitrary and capricious for two independent reasons: 1) the project's environmental effects were highly controversial and uncertain, meaning that an EIS must be prepared, and 2) the USFS failed to identify and meaningfully analyze the cumulative impacts of the project.

Project Effects Were Highly Controversial and Uncertain

The Ninth Circuit noted that the effects of the project were highly controversial and uncertain, thus requiring preparation of an EIS. Although the USFS claimed that the purpose of the project was to reduce the risk of wildfires and promote safe fire-suppression activities— BARK identified considerable evidence showing that "variable density thinning" will not achieve that purpose.

As the court noted, under NEPA, a project is:

> . . .highly controversial if there is a substantial dispute about the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.

A substantial dispute exists when evidence:

> . . .casts serious doubt upon the reasonableness of an agency's conclusions. . . .mere opposition alone is insufficient to support a finding of controversy."

The Risk of Fire

The USFS presented evidence that variable density thinning made treated areas more resilient to fire danger. However, substantial expert opinions were also presented by BARK that contradicted USFS claims regarding the effectiveness of the practice. BARK highlighted that it has become more commonly accepted that reducing fuels does not consistently prevent large forest fires, and seldom significantly reduces the outcomes of large fires. BARK also presented evidence that variable density thinning might exacerbate fire severity in some instances, and that a reduction in fuel does not necessarily suppress fire risk and intensity.

The court noted that the environmental analysis did not sufficiently address the opinions that were contrary to the USFS opinions regarding the variable density thinning program and merely incorporated conclusory statements such as "there are no negative effects to fuels from the Proposed Action treatments." Therefore, BARK showed that a substantial dispute existed about the effect of variable density thinning on fire suppression, even though the circuit court's role was not to assess the merits of variable density thinning. The court noted that while BARK pointed to numerous expert sources contradicting USFS theories as to the effectiveness of variable density thinning, the USFS merely reiterated its conclusions about vegetation management and did not meaningfully respond to the substantive research presented by BARK. Under NEPA, when one factor raises "substantial question" about whether an agency action will have a significant environmental effect, an EIS is warranted. Because the project was highly controversial and its effects uncertain, the court concluded that USFS's decision not to prepare an EIS was arbitrary and capricious.

Failure to Identify and Meaningfully Analyze Cumulative Impacts

The Ninth Circuit also noted that the USFS failed to identify and meaningfully analyze cumulative impacts of the CCR Project. Under NEPA, a cumulative impact is the:

> . . .impact on the environment which results from the incremental impact of the action where added to other past, present, and reasonably foreseeable future actions regardless of what agency. . .undertakes such other actions.

The court noted that although the USFS EA attempted to analyze the cumulative effects of the CCR Project by including a table listing other projects, the cumulative impacts analysis was insufficient because it included no meaningful analysis of any of the identified projects. The court found glaring shortcomings

in the USFS' cumulative impacts analysis as it simply listed other projects without including any information about any of the projects listed beyond naming them. Nonetheless, the USFS EA concluded that there were no direct or indirect effects that would cumulate from the project, and that the project would have a beneficial effect on forest stands by moving them towards a more resilient condition. As the court noted, "[t]hese are the kind of conclusory statements, based on vague and uncertain analysis that are insufficient to satisfy NEPA's requirements."

The court went on to highlight other parts of the USFS analysis that relied on conclusory assertions that the Project has "no cumulative effects," such as where it listed effects that may occur with relation to specific sub-topics such as fuels management, transportation resources and soil productivity.

Ultimately the court determined that there was nothing in the EA that could constitute "quantified or detailed information" about the cumulative effects of the project. This meant that the EA created substantial questions about whether the Project would have a cumulatively significant environmental impact, requiring an EIS.

Conclusion and Implications

Reviewing the case *de novo*, the Ninth Circuit's decision highlights the importance for agencies preparing Environmental Assessments of performing full and defensible analyses that takes a hard look at a project's potential environmental impacts before determining that an EIS is not necessary. This is *especially true* where controversy surrounds such projects. (Travis Brooks)

NINTH CIRCUIT FINDS RULES GOVERNING BREACH OF CONTRACT CLAIMS GOVERNED DEVELOPER'S LAWSUIT ALLEGING BREACH OF DEVELOPMENT AGREEMENT

Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 960 F.3d 603 (9th Cir. 2020).

A developer of bulk cargo shipping terminal brought action alleging that City of Oakland (City) breached a development agreement by enacting an ordinance prohibiting bulk shipping facilities in the City from shipping coal through the terminal. Following a bench trial, the U.S. District Court entered judgment in favor of developer, and the City appealed. The Ninth Circuit Court of Appeals affirmed, finding that rules governing breach of contract claims governed the developer's claim, and that the District Court did not commit clear error in finding the City lacked substantial evidence that the shipment of coal through bulk shipping facilities would be substantially dangerous.

Factual and Procedural Background

In an effort to revitalize the site of a former U.S. Army base, the City of Oakland agreed to have Oakland Bulk & Oversized Terminal, LLC (OBOT) develop a commercial terminal in West Oakland. In 2013, the City and OBOT entered into a Development Agreement (Agreement), giving OBOT the "right to develop the Project in accordance with . . . the City Approvals and the Existing City Regulations" (*i.e.*, those rules, regulations, and policies in force at the time of execution). Notably, the Agreement did not limit the types of bulk goods that could be shipped through the terminal. However, it did give the City the right to apply future regulations if it determined, based on substantial evidence, that a failure to do so would be substantially dangerous to health or safety.

Following public opposition after an announcement that coal would be transported through the terminal, Oakland moved to block coal via the passage of a new ordinance and resolution, claiming substantial evidence that the project would be substantially dangerous to health and safety. OBOT then sued, claiming breach of the development agreement. Following a bench trial, the U.S. District Court ruled against the City of Oakland, finding that its health and safety determination regarding the transportation of coal through the terminal was "riddled with inac-

curacies, major evidentiary gaps, erroneous assumptions, and faulty analyses." The City and intervenors appealed.

The Ninth Circuit's Decision

Standard of Review

On appeal, the Ninth Circuit found that one of the key legal issues was whether it should defer to the District Court's factual findings (*i.e.*, treat the case as a breach of contract case) or defer to the City's own health and safety findings (*i.e.*, treat the case as an administrative law proceeding). The City contended that the District Court should have adhered to administrative law review principles by limiting evidence to the record before the city council when it enacted the disputed resolution and by giving special deference to the City's health and safety determinations. This deferential standard of review, the City claimed, was mandated both by the terms of the Agreement and as a matter of law.

The Ninth Circuit disagreed, finding that the Agreement's reference to "substantial evidence" referred only to the amount of evidence required to make a health and safety determination (*e.g.*, "substantial evidence vs. "clear and convincing evidence"), and that nowhere did the Agreement state that "substantial evidence" would be the standard of review governing a judicial review of a claim of breach (nor could it provide as much). The Ninth Circuit also examined California case law and found no authority to the contrary. Moreover, the court found, giving deference to the government in this type of breach of contract dispute would "unfairly tilt the scales toward the government."

Merits of the Breach of Development Agreement Claim

Applying this conclusion, the Ninth Circuit proceeded to review the District Court's factual findings for clear error and its conclusions of law de novo. The court first addressed the issue of whether OBOT's coal operations would exceed state emission standards. In support of this claim, the City relied on an expert report that the District Court had found to be unreliable base on five flaws in the analysis. These flaws pertained to: 1) covers and surfactants; coal type and threshold friction velocity; 2) rate of emission during rail transport; 3) best available control technology for terminal operations; and 4) the authority of the local air district to regulate. Reviewing the analysis, the Ninth Circuit concluded that the District Court's reasoning and conclusions were reasonable.

The Ninth Circuit next addressed another expert report regarding state and national air quality standards. Again, the District Court had found the analysis to be flawed because it carried over data and assumptions from a dissimilar situation, and the Ninth Circuit found the District Court's conclusions to be reasonable in light of the record. The Ninth Circuit then agreed with the District Court's rejection of the City's argument that *any* emission of coal particulate matters poses a substantial danger to health, agreeing that this view would render the word "substantial" meaningless.

The Ninth Circuit then addressed the issue of whether substantial evidence showed that the risk of fire from OBOT's coal operations would pose a substantial danger. The court again found that the District Court's conclusions, which found the evidence in support to be speculation, contradicted by the record, and lacking consideration of the fire department's oversight, to be supported in the record. Finally, the Ninth Circuit rejected the City's contention that, in addition to the proffered expert reports, the record before the City when it passed the resolution contained other, independently substantial evidence of a substantial danger. The court found that this evidence suffered from the same flaws that the District Court identified in its findings of fact.

Conclusion and Implications

The case is significant because it contains a substantive discussion of the standard of review applicable to a breach of development agreement claim. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/05/26/18-16105.pdf

(James Purvis)

NINTH CIRCUIT FINDS GRAZING AUTHORIZATIONS CONSISTENT WITH FOREST PLAN PURSUANT TO THE NATIONAL FOREST MANAGEMENT ACT

Oregon Natural Desert Association v. United States Forest Service, 957 F.3d 1024 (9th Cir. 2020).

Environmental organizations brought suit against the U.S. Forest Service's issuance of grazing permits, permit modifications, and annual operating instructions (AOIs) authorizing grazing in the Malheur National Forest. Plaintiffs claimed the Forest Service acted arbitrarily and capriciously in applying the Administrative Procedure Act (APA) and the National Forest Management Act (NFMA) by failing to show that grazing authorizations were consistent with the applicable forest plan. The Ninth Circuit Court of Appeals disagreed, finding that, although the challenges were ripe, the authorizations were consistent with the forest plan, and upheld the grant of summary judgment.

Factual and Procedural Background

The Forest Service manages the Malheur National Forest (located in Eastern Oregon) pursuant to a 1990 Forest Plan. The NFMA, and the regulations promulgated pursuant to its authority, provide for the creation of forest plans and define their role in the Forest Service's management of national forests. In 1995, the Forest Service adopted the Inland Native Fish Strategy (INFISH), providing interim direction in the management of inland fish habitats in Eastern Oregon and surrounding areas.

INFISH establishes six Riparian Management Objectives (RMOs), which are used to measure the Forest Service's progress in achieving INFISH's goals: bank stability, lower bank angle, stream width-to-depth ratio, pool frequency, large woody debris, and water temperature. A 1995 Forest Service Decision Notice and Finding of No Significant Impact (Decision) amended the region's forest plans to incorporate the INFISH standards. Livestock grazing in the Malheur National Forest, pursuant to a permitting regime established by the Federal Land Policy and Management Act of 1976, is subject to the Forest Plan as amended by INFISH.

As part of its grazing program, the Forest Service issues ten-year grazing permits and yearly AOIs (collectively, grazing authorizations) for specified allotments. While grazing permits contain general limitations on the amount and intensity of grazing allowed for the allotment in question, AOIs provide detailed yearly directives to the ranchers for their grazing allotments, including scheduled pasture rotations, authorized number of livestock, and timing restrictions. Both grazing permits and AOIs include "move triggers," like grass stubble height and stream bank alteration, which indicate, based on physical measurements of grazing impacts, when livestock needs to be moved to other grazing areas.

Litigation started in 2003, when the Oregon Natural Desert Association (ONDA) sued the Forest Service to challenge grazing practices in the Malheur National Forest. In 2016, after years of parallel litigation and failed settlement discussions, ONDA filed its fifth amended complaint, alleging that 117 Forest Service grazing authorizations, issued from 2006 through 2015, violated the NFMA, and, by extension, the APA. The challenged grazing authorizations include 11 grazing permits, five grazing permit modifications, and 101 AOIs on seven allotments in the Malheur National Forest.

ONDA ultimately moved for summary judgment, requesting: 1) declaratory relief as to all challenged grazing authorizations; and 2) injunctive relief barring livestock grazing in bull trout critical habitat and certain other areas until the Forest Service could demonstrate compliance with the Forest Plan. The Forest Service and intervenor defendants cross-moved for summary judgment. In April 2018, the U.S. District Court granted summary judgment for the Forest Service and dismissed the action.

The Ninth Circuit's Decision

On appeal, ONDA argued that the grazing authorizations were unlawful because the Forest Service failed to analyze and show their consistency with the following two Forest Plan standards:

(1) INFISH Standard GM-1 ("Standard GM-1"): Modify grazing practices (e.g., accessibility

of riparian areas to livestock, length of grazing season, stocking levels, timing of grazing, etc.) that retard or prevent attainment of Riparian Management Objectives or are likely to adversely affect inland native fish. Suspend grazing if adjusting practices is not effective in meeting Riparian Management Objectives.

(2) Forest Plan Management Area 3A Standard 5 ("Standard 5"): Provide the necessary habitat to maintain or increase populations of management indicator species: bull trout, cutthroat trout, and rainbow/redband trout.

Justiciability

The Ninth Circuit first addressed the Forest Service's argument that the legal challenge was not justiciable pursuant to the doctrines of ripeness and mootness. With respect to ripeness, the court explained that plaintiffs must challenge specific agency actions, as opposed to forest-wide management practices. While the court found that the case "pushe[d] the boundaries" by challenging a large number of grazing authorizations, the fact that the lawsuit challenged specific grazing authorizations ultimately persuaded the court the lawsuit was ripe. Regarding mootness, the Forest Service argued that many of the grazing authorizations already had expired. Because some form of relief for the alleged violation could still be given, however, (*e.g.*, halting grazing prospectively and allowing the allotments' riparian habitats to recover from the alleged cumulative years of grazing), the court found the dispute was not moot.

Procedural Claims

The Ninth Circuit next addressed ONDA's procedural claims that the grazing authorizations were an arbitrary and capricious application of the APA and the NFMA because, before issuing them, the agency failed to adequately "analyze and show" their consistency with Standards GM-1 or 5. The Ninth Circuit rejected this argument, finding that the Forest Service was not obligated by statute, regulation, or caselaw to memorialize each site-specific grazing authorization's consistency with the Forest Plan, and that the court would not otherwise impose a procedural requirement not explicitly enumerated.

Substantive Claims

The Ninth Circuit next addressed substantive claims that the grazing authorizations failed to be consistent with the approved Forest Plan. The court first addressed whether the authorizations complied with Standard GM-1, which requires the Forest Service to modify its grazing practices to the extent those practices retard or prevent attainment of RMOs or are likely to adversely affect inland native fish. It also requires the agency to suspend grazing if adjusting practices is not effective in meeting RMOs. The court found that the record demonstrated the Forest Service had done just that. While the court recognized that the bull trout continued to struggle in the Malheur National Forest, it noted that it is not a "panel scientists," and that many factors beyond livestock grazing could be contributing to the bull trout's decline.

For similar reasons, the Ninth Circuit also found that the authorizations were not inconsistent with Standard 5, which requires the Forest Service to provide the necessary habitat to maintain or increase populations of management indicator species: bull trout, cutthroat trout; and rainbow/redband trout. The court found that the Forest Service was actively engaged in protecting bull trout habitats from the effects of livestock grazing by monitoring the effects of grazing on various habitat indicators and implementing site-specific grazing limitations. These activities, the court concluded, were reasonable means of ensuring consistency with Standard 5.

Conclusion and Implications

The case is significant because it involves a substantive discussion of justiciability principles as well as issues pertaining to forest management. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/05/01/18-35514.pdf (James Purvis)

RECENT CALIFORNIA DECISIONS

THIRD DISTRICT COURT OFFERS ITS SOLUTION TO REDEVELOPMENT AREA TAX INCREMENT PAYMENT CALCULATIONS AFTER DISSOLUTION OF REDEVELOPMENT AGENCIES

City of Chula Vista v. Sandoval, ___Cal.App.5th___, Case No. C080711 (3rd Dist. May 27, 2020).

After the California Legislature disbanded more than 400 redevelopment agencies in 2011, county auditors and controllers have dealt with a fundamental lack of clarity as to how redevelopment property tax increments that used to be paid to redevelopment agencies (and other funds) should be distributed to local agencies. The method of calculation is important, because Proposition 13 severely limits the amount of property taxes that local agencies collect and often results in a shortfall in the amount of property tax funds paid out to local agencies based on statutory calculations. This case was a dispute between local agencies with pre-1994 redevelopment passthrough agreements and agencies without them. The Third District Court of Appeal concluded that despite fundamental conflicts in post 2011 statutes, county auditor controllers must pay the full amount owed to local agencies under passthrough agreements before determining each local agency's proportionate share of property tax and redevelopment tax increments.

Factual and Procedural Background

In the wake of the last fiscal crisis, the California Legislature dissolved the state's redevelopment agencies, numbering more than 400, and redistributed the former tax increment generated by redevelopment between various local taxing entities. *Sandoval* emerged as a fight between local agencies that negotiated various favorable "passthrough agreements" allowed under state law before 1994 for direct payment of tax increments from redevelopment areas, and those agencies without such agreements.

Before voters approved Proposition 13 in 1978, cities and counties in California levied their own property taxes. Proposition 13 capped *ad valorem* taxes (*i.e.* taxes based on the assessed value of property, including real property taxes) imposed by all local agencies at one percent of the taxed property. Proposition 13 did not however resolve how property taxes collected should be allocated, meaning that the proposition:

> . . .largely transferred control over local government finances from the state's many political subdivisions to the state, converting the property tax from a nominally local tax to a de facto state-administered tax subject to a complex system of intergovernmental grants.

As the court noted:

> . . .this created a zero-sum game in which political subdivisions (cities, counties, special districts, and school districts) would have to compete against each other for their slices of a greatly shrunken pie.

In the years since 1978, multiple propositions approved by voters, complicated the allocation process of property tax funds and further strained the local agency budgets. This gave rise to a "shell game" among local entities where the only way to obtain more funds was to take them from another agency. Redevelopment Agencies, with their collection of significant amounts of tax increments were powerful mechanisms for winning out in these shell games, and they received approximately 12 percent of all property tax revenue in the state in 2011. Before 1994, state law allowed local agencies to negotiate passthrough agreements with redevelopment agencies to directly offset the fiscal impacts (schools, police, public services, *etc.*) of development in redevelopment areas. After 1994, state law required mandatory statutory passthrough payments.

In 2011, the Legislature dissolved all of the state's redevelopment agencies and transferred control of re-

development agency assets to successor agencies. The legislation implementing this dissolution required unencumbered balances of redevelopment agency funds, and proceeds from redevelopment agency asset sales to be remitted to county auditor controllers for distribution to local agencies. Moreover, tax increment revenues that previously went to redevelopment agencies were deposited in a local trust fund administered by county auditor controllers. Accordingly, county auditor controllers played a crucial role in winding down redevelopment agencies. One of their many responsibilities vis-a-vis the disbanded redevelopment agencies was to administer trust funds from which payments and distributions are made of remaining tax increment payments.

A Conflict of Legislative Mandate Exists

Unfortunately, the direction the Legislature provided to county auditor controllers in 2011, in how they disburse funds previously slated for redevelopment agencies by prior legislation includes two statutes that are fundamentally in conflict. First, Health and Safety Code § 3183 provides that payments pursuant to passthrough agreements that predated 1994 must be made before proportionate distributions of property tax increments are made to other taxing entities. However, Health and Safety Code § 34188 provides that the pro-rata share of what redevelopment tax increments (and other funds) to be paid to the redevelopment agencies, be paid out to all taxing entities, without first paying out passthrough agreements in full. Subsequently, in 2012, Assembly Bill 1484 passed, which stated that passthrough agreement payments should be made in full before other local agencies receive disbursements.

San Diego County Moves Forward

The defendant in the case, the county auditor for the County of San Diego interpreted the above statutes as requiring her to pay out passthrough agreements in full before determining each local agency's share of tax revenues based on each party's proportionate share of the pool of remaining funds based on statutory calculations. Accordingly, when determining each party's pro rata share of funds, the auditor did not include: 1) amounts that were first required to be paid through passthrough agreements, 2) other enforceable obligations, 3) administrative costs. If available, the residual amount of tax proceeds, including redevelopment tax increments, was then paid out based on the statutory shares. This meant that a local agency with a pass-through agreement could receive residual amounts on top of their full pass-through payment that were greater than their pro-rata shares of the defined pool of property tax revenues.

Cities Sue for Clarification

Multiple Cities without passthrough agreements sued arguing that the pool of tax revenue to be paid based on statutory pro-rata shares should include the amounts owed in passthrough payments and other obligations and administrative costs. The Superior Court agreed with the cities' interpretation and the San Diego County Auditor appealed.

The Court of Appeal's Decision

The Third District Court of Appeal began by noting that there was a fundamental inconsistency between §§ 3183 and 3188, but that AB 1484 did not provide any real clarity. While § 3183 and § AB 1484 included language indicating that passthrough payments must be paid in full to local agencies with passthrough agreements before each agency's pro rata share of residual tax revenues is calculated, § 3188 required passthrough payments to be included in the calculation of each agency's pro-rata share of tax revenues. The court re-iterated each of the arguments outlined above noting that each party was simply trying to surmise legislative intent by construing both statutes together in a manner that made sense. Ultimately the court found that this was a rare instance where no such sense could be made:

> Simply put, this is one of the rare cases in which a court cannot divine harmony where there is none. ..The requirement that courts harmonize potentially inconsistent statutes when possible is not a license to redraft the statutes to strike a compromise that the Legislature did not reach...

Ultimately the court determined that because portions of §§ 3183, 3188 and AB 1484 *cannot* be harmonized, certain uncodified language of AB 1484, a later enactment must prevail. The Court of Appeal determined that AB 1484, which stated that passthrough payments must be paid in full before pro-

rata payments are made, impliedly repealed language in § 3188 that appeared to require passthrough payments to count towards the pool of tax revenue paid out on a pro-rata basis to each local agency within a county. Accordingly, San Diego County's auditor's distribution method must prevail. Pursuant to the court's decision, when county auditors distribute incremental tax revenues previously paid to redevelopment agencies, and other funds, on a statutory pro-rata basis, entities with passthrough agreements will receive passthrough payments in full before pro-rata distributions are made.

Conclusion and Implications

Ultimately, the *Sandoval* decision highlights the confusion that the legislation disbanding redevelopment agencies in 2011 caused for local agencies and county auditor controllers in determining how to distribute tax increments from redevelopment areas after redevelopment agencies folded. Whether or not the court's solution, boosting payments to local agencies with passthrough agreements, and leaving those agencies without them at a disadvantage, makes sense or not, in the end, it will likely fall on shoulders of the Legislature to remedy the fundamental conflict in the relevant statutory language found in §§ 3183, 3188, and AB 1484. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C080711.PDF.
(Travis Brooks)

FIRST DISTRICT COURT FINDS COSTA-HAWKINS DOES NOT EXEMPT INDIVIDUALLY RENTED ROOMS IN THE SAME SINGLE-FAMILY HOME FROM LOCAL RENT CONTROL PROVISIONS

Owens v. City of Oakland Housing, Residential Rent and Relocation Board, ___Cal.App.5th___, Case No. A157663 (1st Dist. May 29, 2020).

The First District Court of Appeal in *Owens v. City of Oakland Housing, Residential Rent and Relocation Board* affirmed an order denying a petition for administrative mandate challenging the City of Oakland Housing, Residential Rent and Relocation Board's (Board) determination that petitioners' rented rooms were not exempt from the city's rent control ordinance for single-family homes.

Factual and Procedural Background

In May 2016, petitioner's tenant filed a petition pursuant to Oakland's Rent Adjustment Program alleging her housing was unsuitable due to disruptive construction work and hazardous conditions on the premises. The tenant further alleged that petitioner failed to adhere to the notice requirements of the Rent Adjustment Program and that he had terminated her lease as a form of retaliation when she sought a reduction in rent due to the construction work.

The Board set an administrative hearing. Prior to the hearing, petitioner filed an unlawful detainer complaint against tenant. Tenant's lease was month to month subject to 60-day notice to terminate after one year. At the hearing, petitioner argued that because the room he rented was in a single-family home "separate from the title of any other dwelling unit," it was exempt from provisions of the local rent control ordinance under the Costa-Hawkins Act (Civil Code, § 1954.50, *et seq.*), which provides that, under certain circumstances a single-family home is exempt from local rent regulations.

The hearing officer found, however, that the Costa-Hawkins Act did not apply because when petitioner chose to rent rooms separately to people, he effectively converted the single-family home into a multi-unit dwelling. The hearing officer nevertheless dismissed tenant's petition on the grounds that she was not behind on rent.

Petitioner appealed the hearing officer's decision to the Board, asserting that the hearing officer's determination that his property was not exempt under the Costa-Hawkins Act was erroneous. The Board unanimously affirmed the hearing officer's decision.

Petitioner then filed a petition for writ of adminis-

trative *mandamus* alleging that the Board's determination on the basis that he had been "deprived of his rights to an exemption from rent control" under the Costa-Hawkins Act.

The trial court affirmed the Board's determination holding that the dwelling unit in question was not petitioner's four-bedroom single-family home, but rather each individual room rented to tenants. The court reasoned that each room, itself, could not be exempt as a condominium or single-family home and therefore petitioner could not rent to individual tenants without complying with the provisions of the Rent Adjustment Program. In reaching its conclusion, the court interpreted a dwelling unit as not the entire property but rather "any area understood to be committed to the habitation of a given tenant or tenants to the exclusion of others."

This appeal followed.

The Court of Appeal's Decision

At the outset, the First District Court of Appeal noted that as a question of statutory construction it was to be reviewed independently. The court went on to set forth the rules for interpreting statutory language—including consideration of legislative intent and the plain meaning rule—and subsequently applied those rules to the following section of the Costa-Hawkins Act at issue:

> Notwithstanding any other provision of law, an owner of residential real property may establish the initial and all subsequent rental rates for a dwelling or a unit about which any of the following is true: … It is alienable separate from the title to any other dwelling unit[.]
> (Civil Code, § 1954.52, subd. (a)(3)(A).)

Based on this provision, petitioner asserted that the plain language of the statute unconditionally exempts single-family rooms from local rent control, "including individual bedrooms rented to separate tenants." In other words, because the single-family home, itself, has its own title and can be sold separately from any other structure, no areas within the structure, even if separately rented to third parties, are subject to rent control. The court disagreed.

In rejecting petitioner's argument, the Court of Appeal found that the problem with his position was that the plain language of the statute focuses on the rent set for the "dwelling" or "unit." The court found that the relevant question is not whether the single-family home was separately alienable—but rather whether each room separately rented out by petitioner was itself separately alienable from the title to any other dwelling unit. The court reasoned that the statutory definition of a "dwelling unit" is "a structure or the part of a structure that is used as a home, residence or sleeping place[.]" As petitioner did not claim that tenant's unit was separately titled from the rest of the house or that a plain reading of the statute would lead to an absurd result, the appellate court found that the trial court had correctly determined that the dwelling units rented by petitioner were not exempt from local rent control provisions.

Finally, the court declined to address petitioner's argument that while he had separate agreements with everyone renting a room, each tenant was renting and sharing the entire home—as the issue was raised for the first time on appeal, without providing good cause for failure to present it earlier.

Conclusion and Implications

The First District Court of Appeal determined that it lacked authority to extend the local rent control exemption to the Costa-Hawkins Act in this context where rooms within a single-family home are separately rented without evidence that each room is separately alienable. Thus separately-rented rooms in a larger single-family dwelling are subject to local rent control ordinances, providing more protections to renters in areas dealing with housing scarcity. This decision also provides a further reminder of the general rule against raising issues for the first time on appeal. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A157663.PDF.

(Christina Berglund, Mina Arasteh)

SIXTH DISTRICT COURT FINDS SEEKING STREAMBED ALTERATION AGREEMENT FROM DEPARTMENT OF FISH AND WILDLIFE IS NOT A 'FURTHER DISCRETIONARY APPROVAL'

Willow Glen Trestle Conservancy v. City of San Jose,
___Cal.App.5th___, Case No. H047068 (6th Dist. May 18, 2020).

In ruling on petitioners' second attempt to halt the demolition of the Willow Glen Trestle, the Sixth District Court of Appeal held that the act of seeking a new streambed alteration agreement (SAA) from the California Department of Fish and Wildlife (CDFW) for the previously reviewed project was not a "new discretionary approval," and therefore subsequent environmental review was not required.

Factual and Procedural Background

In 2014, the City of San Jose (City) approved a Mitigated Negative Declaration (MND) for the demolition and replacement of the Willow Glen Railroad Trestle, a wooden railroad bridge built in 1922. When the City approved the MND, the trestle was not listed in the *California Register of Historical Resources*. The Friends of the Willow Glen Trestle filed a lawsuit challenging the MND. The Superior Court concluded that substantial evidence supported a fair argument that the trestle was a historical resource, and the City was therefore required to prepare an environmental impact report. The Court of Appeal remanded the matter to the trial court, holding that the substantial evidence standard of review, not the fair argument standard, applied to the City's determination of historical status. (*Friends of Willow Glen Trestle v. City of San Jose*, 2 Cal.App.5th 457 (2016).)

In May 2017, the California State Historical Resources Commission approved listing the trestle in the California Register of Historical Resources. Also, in 2017, the City's SAA with CDFW expired. The City submitted a new notification to CDFW, which subsequently issued a final SAA in August 2018. Petitioners filed a lawsuit alleging that entering into the SAA was a discretionary approval by the City that triggered supplemental review under Public Resources Code § 21166 of the California Environmental Quality Act (CEQA).

The trial court temporarily enjoined the City from proceeding with demolition of the bridge, but ultimately denied the petition. The trial court found that the City's actions in connection with the 2018 SAA were not a discretionary approval—reasoning that the City's approval of the 2014 MND included approval of the SAA.

Petitioners appealed the trial court's decision. Additionally, petitioners sought a writ of *supersedeas* from the Sixth District Court of Appeal, which was granted, enjoining the destruction of the bridge pending resolution of appeal.

The Court of Appeal's Decision

Public Resources Code § 21166 and CEQA Guidelines § 15162 require supplemental environmental review, in limited circumstances, when an agency must make a "further discretionary approval" for a project for which the agency has already completed review. Petitioners argued that the City's submission of a notification to CDFW in order to obtain a new SAA amounted to an approval by the City, requiring supplemental environmental review. The Court of Appeal disagreed, holding that approval of the SAA was an action by CDFW, not the City.

Petitioners argued that the City's act of seeking and accepting the SAA was a discretionary approval. Quoting the California Supreme Court in *Friends of College of San Mateo Gardens v. San Mateo Community College District*, 1 Cal.5th 937, 945 (2016) (*San Mateo Gardens*), the Sixth District Court of Appeal emphasized that §§ 21166 and 15162 limit the circumstances under which a subsequent or supplemental Environmental Impact Report (EIR) must be prepared, and promote the interests in finality and efficiency. If every action in connection with a project were considered an "approval," the court said, each and every step of a lead agency would reopen environmental review under CEQA.

Petitioners also argued that different rules should apply because this was the City's own project, rather than a private project. Petitioners asserted that because the City retained discretion to reconsider or alter the project, its failure to abandon the project

was itself a new discretionary approval. The Court of Appeal rejected this argument, reiterating that the purpose of § 15162 is to limit subsequent environmental review. Additionally, the court stated that § 15162 makes no distinction between public and private projects.

The court concluded that the City was implementing the project when it submitted a new notification to CDFW and when it accepted the SAA. The only new approval was CDFW's, a decision which petitioners left unchallenged.

Conclusion and Implications

Applying the principles espoused by the California Supreme Court in *San Mateo Gardens*, the Court of Appeal offered further clarity on what triggers supplemental analysis under CEQA. It also serves as an important reminder to carefully track all further discretionary decisions made by responsible agencies—as failing to do so may forfeit any further challenge to a project.

https://www.courts.ca.gov/opinions/documents/H047068.PDF.

(Elizabeth Pollock, Christina Berglund)

SUPERIOR COURT ISSUES ORDER DENYING WRIT CHALLENGE TO CUPERTINO HOUSING PROJECT APPROVED UNDER SB 35

Friends of Better Cupertino v. City of Cupertino, Case No. 18CV330190 (Santa Clara Super. Ct. May 6, 2020).

On May 6, 2020, Honorable Helen E. Williams of the Superior Court for the County of Santa Clara issued an order in *Friends of Better Cupertino v. City of Cupertino*, denying a controversial challenge to a developer's application to build a housing project on the site of the former Vallco Fashion Mall in the City of Cupertino (City). The case was originally filed in 2018, after the City approved the redevelopment of the large housing project under the streamlined procedures of "SB 35," codified as Government Code § 65913.4 (referred to herein as SB 35 or § 65913.4).

Factual Background

Senate Bill SB 35 was authored by Senator Scott Wiener and passed in 2017, as part of a comprehensive legislative package of housing bills intended to address California's housing crisis. The bill created a streamlined, ministerial approval process for infill developments in areas that have failed to meet their regional housing needs assessment goals. Following the passage of SB 35, a developer proposed to redevelop an outdated shopping mall in the City of Cupertino (City) with a mixed-use project which would include 2,402 residential units, half of which would be designated as affordable units. The City determined that the proposed project complied with SB 35's eligibility criteria for streamlined review and issued final approval in September 2018.

However, before the City even approved the project, petitioners had filed a petition for writ of mandate, claiming that the City had a ministerial duty to reject the application because the project was allegedly ineligible for streamlined review and approval. Petitioners also argued that the project failed to comply with certain objective planning and design standards that were prerequisites for streamlined review.

The Superior Court's Ruling

All of petitioner's claims were based on the assumption that the City had a ministerial duty to *reject* an application submitted for streamlined review if the project conflicts with objective planning standards set forth in § 65913.4, subdivision (a). Thus, the court's order was centered on the fact that petitioners were mistaken in assuming that SB 35's authorization for ministerial *approval* of eligible projects also imposed a corresponding ministerial duty to *reject* a nonconforming project. Acknowledging that there is no appellate precedent on this issue, the court concluded that the statute does not impose a ministerial duty on agencies to undertake the review or to reject a nonconforming application.

Petitioners also argued that the project did not qualify for ministerial approval under SB 35 because the City made various discretionary decisions in evaluating the project application. This led the court

to analyze whether project review and approval under the statute is actually a strictly ministerial process. Although SB 35 was meant to include ministerial, non-discretionary review, the court determined that an agency may still be required to make decisions that involve some element of discretion. The number, nature, and complexity of the enumerated eligibility standards and the application of unenumerated local standards necessarily take matters out of the domain of purely ministerial review. As such, the statute allows for a "hybrid review process" in which objective criteria are evaluated through a mechanism that is still adjudicatory in nature and involves the exercise of some agency discretion. Here, the City had no choice but to exercise some discretion in order to comply with § 65913.4. Accordingly, petitioners could not show that the City violated the statute.

Aside from the flawed premise for petitioner's claim for writ relief, the court determined that petitioners' substantive claims also lacked merit. Petitioners incorrectly treated the City's decision to approve the project as a purely ministerial one, but they failed to substantiate their arguments under a non-deferential standard of review and also did not present arguments capable of review under a deferential, abuse of discretion standard. Therefore, petitioners failed to show their entitlement to any writ relief. Further, the court was not impressed by petitioner's briefing, which was described as disorganized and creating more questions than answers.

Conclusion and Implications

The City of Cupertino has indicated that it is in the process of issuing permits to prepare the site for project development. It is unclear at this time whether petitioners plan to file an appeal of the trial court's order. While the trial court's ruling is not binding precedent, it is nevertheless an important win for project proponents that hope to benefit from the streamlining procedure of SB 35.
(Nedda Mahrou)

LEGISLATIVE UPDATE

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

We strive to be current, but deadlines require us to complete our legislative review several weeks before publication. Therefore, bills covered can be substantively amended or conclusively acted upon by the date of publication. All references below to the Legislature refer to the California Legislature, and to the Governor refer to Gavin Newsom.

Due to COVID-19 the Legislature has generated fewer bills than usual for us to report on.

Coastal Resources

•**AB 2619 (Stone)—**This bill would establish the Program for Coastal Resilience, Adaptation, and Access for the purpose of funding specified activities intended to help the state prepare, plan, and implement actions to address and adapt to sea level rise and coastal climate change.

AB 2619 was introduced in the Assembly on February 20, 2020, and, most recently, on June 3, 2020, was held under submission in the Committee on Appropriations.

Environmental Protection and Quality

•**AB 2323 (Friedman; Chiu)—**This bill would require, in order to qualify for the California Environmental Quality Act (CEQA) exemption in Public Resources Code § 21155.4 for certain residential, employment center, and mixed-use development projects meeting specified criteria, that the project is undertaken and is consistent with either a Specific Plan prepared pursuant to specific provisions of law or a community plan. In addition, this bill would repeal Government Code § 65457, which provides, among other things, that an action or proceeding alleging that a public agency has approved a project pursuant to a Specific Plan without having previously certified a supplemental environmental impact report for the Specific Plan, when required, to be commenced within 30 days of the public agency's decision to carry out or approve the project.

AB 2323 was introduced in the Assembly as an urgency statute on February 14, 2020, and, most recently, on June 9, 2020, was in the Senate where it was read for the first time and sent to the Committee on Rules for assignment.

•**AB 2991 (Santiago)—**This bill would extend the authority of the Governor to certify a project for streamlining benefits provided by that act related to compliance with the California Environmental Quality Act and streamlining of judicial review of action taken by a public agency under the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 from January 1, 2020, to January 1, 2025, and provide that the certification expires and is no longer valid if the lead agency fails to approve a certified project before January 1, 2026.

AB 2991 was introduced in the Assembly on February 21, 2020, and, most recently, on June 2, 2020, had its first hearing in the Committee on Appropriations cancelled at the request of its author, Assembly Member Santiago.

•**AB 3279 (Friedman)—**This bill would amend the California Environmental Quality Act to, among other things: 1) require that a court, to the extent feasible, commence hearings on an appeal in a CEQA lawsuit within 270 days of the date of the filing of the appeal; 2) reduce the time in which the petitioner must file a request for a hearing from within 90 to within 60 days from the date of filing the petition; 3) reduce the general period in which briefing should be completed from 90 to 60 days from the date that the request for a hearing is filed; and, 4) authorize a plaintiff or petitioner to prepare the record of proceedings only when requested to do so by the public agency.

AB 3279 was introduced in the Assembly on February 21, 2020, and, most recently, on June 9, 2020, was in the Senate where it was read for the first time and sent to the Committee on Rules for assignment.

•**SB 974 (Hurtado)—**This bill would exempt from the California Environmental Quality Act certain projects that benefit a small community water system that primarily serves one or more disadvantaged communities, or that benefit a non-transient

non-community water system that serves a school that serves one or more disadvantaged communities, by improving the small community water system's or non-transient non-community water system's water quality, water supply, or water supply reliability, or by encouraging water conservation.

SB 974 was introduced in the Senate on February 11, 2020, and, most recently, on June 18, 2020, was read for a second time, amended and ordered to a third reading.

•**SB 995 (Atkins)**—This bill would extend the authority of the Governor under the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 to certify projects that meet certain requirements for streamlining benefits provided by that act related to compliance with the California Environmental Quality Act and streamlining of judicial review of action taken by a public agency, and further provide that the certification expires and is no longer valid if the lead agency fails to approve a certified project before January 1, 2025.

SB 995 was introduced in the Senate on February 12, 2020, and, most recently, on June 18, 2020, was read for a second time, amended and ordered to a third reading.

Housing / Redevelopment

•**AB 2345 (Gonzalez)**—This bill would amend the Density Bonus Law to, among other things, authorize an applicant to receive: 1) three incentives or concessions for projects that include at least 12 percent of the total units for very low income households; 2) four and five incentives or concessions for projects in which greater percentages of the total units are for lower income households, very low income households, or for persons or families of moderate income in a common interest development.

AB 2345 was introduced in the Assembly on February 18, 2020, and, most recently, on June 11, 2020, was in the Senate where it was read for the first time and sent to the Committee on Rules for assignment.

•**AB 2405 (Burke)**—This bill would require local jurisdictions to, on or before January 1, 2022, establish and submit to the Department of Housing and Community Development an actionable plan to house their homeless populations based on their latest point-in-time count.

AB 2405 was introduced in the Assembly on February 18, 2020, and, most recently, on June 11, 2020, was in the Senate where it was read for the first time and sent to the Committee on Rules for assignment.

•**AB 2580 (Eggman)**—This bill would authorize a development proponent to submit an application for a development for the conversion of a structure with a certificate of occupancy as a motel, hotel, or commercial use into multifamily housing units to be subject to a streamlined, ministerial approval process, provided that development proponent reserves at least 20 percent of the proposed housing units for persons and families of low or moderate income.

AB 2580 was introduced in the Assembly on February 20, 2020, and, most recently, on June 3, 2020, was held under submission in the Committee on Appropriations.

•**AB 3107 (Bloom)**—This bill, notwithstanding any inconsistent provision of a city's or county's General Plan, Specific Plan, zoning ordinance, or regulation, would require that a housing development in which at least 20 percent of the units have an affordable housing cost or affordable rent for lower income households be an allowable use on a site designated in any element of the General Plan for commercial uses.

AB 3107 was introduced in the Assembly on February 18, 2020, and, most recently, on June 11, 2020, was in the Senate where it was read for the first time and sent to the Committee on Rules for assignment.

•**AB 3155 (Rivas)**—This bill would amend the Subdivision Map Act to, among other things, authorize a development proponent to submit an application for the construction of a small lot subdivision that meets certain specified criteria, including that the subdivision is located on a parcel zoned for multifamily residential use, consists of individual housing units that comply with existing height, floor area, and setback requirements applicable to the pre-subdivided parcel, and that the total number of units created by the small lot subdivision does not exceed the allowable residential density permitted by the existing General Plan and zoning designations for the pre-subdivided parcel.

AB 3155 was introduced in the Assembly on February 21, 2020, and, most recently, on June 3, 2020, was held under submission in the Committee on Appropriations.

•**AB 3234 (Gloria)**—This bill would amend the Subdivision Map Act to specify that no tentative or final map shall be required for the creation of a parcel or parcels necessary for the development of a subdivision for a housing development project that meets specified criteria, including that the site is an infill site, is located in an urbanized area or urban cluster, and the proposed site to be subdivided is no larger than five acres, among other requirements.

AB 3234 was introduced in the Assembly on February 21, 2020, and, most recently, on June 8, 2020, was ordered to the inactive file at the request of Assembly Member Gloria.

•**SB 902 (Wiener)**—This bill would require a local planning agency to include in its annual report to the Department of Housing and Community Development outlining, among other things, the number of housing development applications received and the number of units approved and disapproved in the prior year, whether the city or county is a party to a court action related to a violation of state housing law, and the disposition of that action.

SB 902 was introduced in the Senate on January 30, 2020, and, most recently, on June 18, 2020, was read for a second time and ordered to a third reading.

•**SB 1079 (Skinner)**—This bill would authorize a city, county, or city and county to acquire a residential property within its jurisdiction by eminent domain if the property has been vacant for at least 90 days, the property is owned by a corporation or a limited liability company in which at least one member is a corporation, and the local agency provides just compensation to the owner based on the lowest assessment obtained for the property by the local agency, subject to the requirement that the city or county maintain the property and make the property available at affordable rent to persons and families of low or moderate income or sell it to a community land trust or housing sponsor.

SB 1079 was introduced in the Senate on February 19, 2020, and, most recently, on June 18, 2020, was read for a second time and ordered to a third reading.

•**SB 1120 (Atkins)**—This bill would amend the Subdivision Map Act to extend the limit on the additional period for the extension for an approved or conditionally approved tentative tract map that may be provided by ordinance from 12 months to 24 months.

SB 1120 was introduced in the Senate on February 19, 2020, and, most recently, on June 18, 2020, was read for a second time and ordered to a third reading.

•**SB 1410 (Gonzalez)**—This bill would establish a Housing Accountability Committee within the Housing and Community Development Department and set forth the committee's powers and duties, including reviewing appeals regarding multifamily housing projects that cities and counties have denied or subjected to unreasonable conditions that make the project financially infeasible, vacating a local decision if the committee finds that the decision of the local agency was not reasonable or consistent with meeting local housing needs, and directing the local agency in such case to issue any necessary approval or permit for the development.

SB 1410 was introduced in the Senate on February 20, 2020, and, most recently, on June 19, 2020, was read for a second time, amended and re-referred to the Committee on Governance and Finance.

Public Agencies

•**AB 2028 (Aguiar-Curry)**—This bill would amend the Bagley-Keene Open Meeting Act, except for closed sessions, to require that a notice of a public meeting of a state agency, board or commission include all writings or materials provided for the noticed meeting to a member of the state body by staff that are in connection with a matter subject to discussion or consideration at the meeting, and require these writings and materials to be made available on the internet at least ten days in advance of the meeting.

AB 2028 was introduced in the Assembly on January 30, 2020, and, most recently, on June 9, 2020, was in the Senate where it was read for the first time and sent to the Committee on Rules for assignment.

Zoning and General Plans

•**AB 2421 (Quirk)**—This bill would revise the definition of "wireless telecommunications facility," which are generally subject to a city or county discretionary permit and required to comply with specified criteria as distinguished from a "collocation facility," to include, among other equipment and network

components listed, "emergency backup generators" to emergency power systems that are integral to providing wireless telecommunications services.

AB 2421 was introduced in the Assembly on February 19, 2020, and, most recently, on June 11, 2020, was in the Senate where it was read for the first time and sent to the Committee on Rules for assignment.

•**AB 3153 (Rivas)—**This bill would amend the Planning and Zoning Law to require a local jurisdiction, as defined, notwithstanding any local ordinance, General Plan element, Specific Plan, charter, or other local law, policy, resolution, or regulation, to provide, if requested, an eligible applicant of a residential development with a parking credit that exempts the project from minimum parking requirements based on the number of non-required bicycle parking spaces or car-sharing spaces provided subject to certain conditions.

AB 3153 was introduced in the Assembly on February 21, 2020, and, most recently, on June 9, 2020, was in the Senate where it was read for the first time and sent to the Committee on Rules for assignment.

•**SB 1138 (Wiener)—**This bill would amend the Planning and Zoning Law to, among other things, revise the requirements of the General Plan housing element in connection with identifying zones or zoning designations that allow residential use, including mixed use, where emergency shelters are allowed as a permitted use without a conditional use or other discretionary permit. If an emergency shelter zoning designation where residential use is a permitted use is unfeasible, the bill would permit a local government to designate zones for emergency shelters in a nonresidential zone if the local government demonstrates that the zone is connected to amenities and services that serve homeless people.

SB 1138 was introduced in the Senate on February 19, 2020, and, most recently, on June 18, 2020, was read for a second time and ordered to a third reading. (Paige Gosney)

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