Land Use and CEQA Litigation Update

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Cases Through April 9, 2021

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Tandon v. Newsom, -- U.S. ---, -- S. Ct. ---, 2021 WL 1328507 (Apr. 9, 2021).

BACKGROUND: Plaintiffs, who wished to gather for at-home religious purposes—namely bible studies and communal worship with more than three households in attendance—brought an action alleging that State's Blueprint System for restrictions on private gatherings during COVID-19 pandemic violated their First Amendment rights to free exercise of religion, free speech, and freedom of assembly and their Fourteenth Amendment substantive due process and equal protection rights. The United States District Court for the Northern District of California denied plaintiffs' motion for preliminary injunction, and they filed a motion for emergency injunction pending appeal. The United States Court of Appeals for the Ninth Circuit (Ninth Circuit) denied the motion, -- F.3d ---, 2021 WL 1185157 (Mar. 30, 2021). Plaintiffs applied for injunctive relief.

HOLDING: The Supreme Court, in a *per curiam* decision, held that: (1) California's restrictions on private gatherings contained myriad exceptions and accommodations for secular activities comparable to religious activities, triggering strict scrutiny for violation of Free Exercise Clause; (2) State was not excused from explaining why it could not safely permit at-home worshipers to gather in larger numbers while using precautions used in secular activities; and (3) plaintiffs were entitled to emergency injunctive relief pending appeal. The application for the injunction was granted. Chief Justice Roberts would have denied the application, and Justice Kagan filed a dissenting opinion, in which Justices Breyer and Sotomayor joined.

KEY FACTS & ANALYSIS: The Supreme Court found that California's Blueprint System contained myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny. Historically, noted the Court, strict scrutiny requires the State to further "interests of the highest order" by means "narrowly tailored in pursuit of those interests." (*Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993).).

The Court reasoned as follows: First, government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise (*citing*, *Roman Catholic Diocese of Brooklyn v. Cuomo,* 592 U. S. ---, 141 S. Ct. 63 (2020) (*per curiam*); Second, whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue, and comparability is concerned with the risks various activities pose, not the reasons why people gather (*id*., at ---, 141 S. Ct., at p. 66).

Third, the government has the burden to establish that the challenged law satisfies strict scrutiny, and to do so in this context, it must do more than assert that certain risk factors "are always present in worship, or always absent from the other secular activities" the government may allow (*citing, South Bay United Pentecostal Church v. Newsom*, 592 U. S. ---, 141 S. Ct. 716, 717 (Feb. 5, 2021) (statements of Justices Gorsuch and Barrett). Instead, narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other

activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too.

Fourth, even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. So long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants "remain under a constant threat" that government officials will use their power to reinstate the challenged restrictions.

These four principles dictated the outcome of the Court, as they did in *Gateway City Church v. Newsom*, 592 U.S. ---, -- S. Ct. ---, 2021 WL 753575 (Feb. 26, 2021). First, California treated some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time. Second, the Ninth Circuit did not conclude that those activities posed a lesser risk of transmission than the applicants' proposed religious exercise at home. The Supreme Court concluded, therefore, that the Ninth Circuit erroneously rejected these comparators simply because this Court's previous decisions involved public buildings as opposed to private buildings.

TAKE-AWAYS: Plaintiffs were found to likely succeed on the merits of their Free Exercise claim, under the majority's opinion that they are irreparably harmed by the loss of free exercise rights "for even minimal periods of time" and the State had not shown that "public health would be imperiled" by employing less restrictive measures. (*Roman Catholic Diocese, supra,* 141 S. Ct. at p. 68.)

NOTABLE DISSENTING OPINION: Justice Kagan dissented on the grounds that California's at-home restrictions to three households applied to all kinds of gatherings, not just religious-based gatherings. The dissent noted the following: First, "when people gather in social settings, their interactions are likely to be longer than they would be in a commercial setting," with participants "more likely to be involved in prolonged conversations." (*Citing, Tandon v. Newsom*, -- F. 3d ---, 2021 WL 1185157, *7 (9th Cir., Mar. 30, 2021). Second, "private houses are typically smaller and less ventilated than commercial establishments." (*Ibid*.) Third, "social distancing and mask-wearing are less likely in private settings and enforcement is more difficult." (*Ibid*.) The dissent also noted that the district court found each of these facts based on the uncontested testimony of California's public-health experts. According to the dissent, which "the *per curiam*'s reliance on separate opinions and unreasoned orders signals, the law does not require that the State equally treat apples and watermelons."

POSTSCRIPT: This was the fifth time the U.S. Supreme Court summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise. (*See, Harvest Rock Church v. Newsom*, 592 U.S. ---, 141 S. Ct. 889 (Dec. 3, 2020); *South Bay United Pentecostal Church v. Newsom,* 592 U.S. ---, 141 S.Ct. 716 (Feb. 5, 2021); *Gish v. Newsom*, 592 U.S. ---, 141 S. Ct. 1290 (Feb. 8, 2021); *Gateway City Church v. Newsom,* 592 U.S. ---, -- S. Ct. ---, 2021 WL 753575 (Feb. 26, 2021).) In each of these cases, the Court found that the individuals challenging California COVID-19 restrictions had shown a likelihood of success on the merits,

entitling them to preliminary injunctive relief. One of the more-followed cases, *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128 (9th Cir., Jan. 22, 2021), is reported below.

* * *

United States Fish & Wildlife Service v. Sierra Club, Inc., -- U.S. ---, 141 S. Ct. 777, 2021 WL 816352 (Mar. 4, 2021).

BACKGROUND: Requester brought Freedom of Information Act (FOIA) action against United States Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS, and collectively, Services) challenging their denial of request for records generated during the Environmental Protection Agency's (EPA) rule-making process concerning cooling water intake structures. The United States District Court for the Northern District of California granted in part and denied in part the parties' cross-motions for summary judgment. The government appealed. On denial of rehearing, the Ninth Circuit affirmed in part, reversed in part, and remanded. Certiorari was granted.

HOLDING: The Supreme Court, Justice Barrett, held that FOIA's deliberative process exemption protected Services' draft biological opinions, even if they reflected Services' last views on effect that the EPA's initial proposed rule was likely to have on certain endangered species. Reversed and remanded. Justice Breyer filed a dissenting opinion in which Justice Sotomayor joined.

KEY FACTS & ANALYSIS: The Environmental Protection Agency (EPA) proposed a rule in 2011 regarding "cooling water intake structures" used to cool industrial equipment. (76 Fed. Reg. 22174). Because aquatic wildlife can become trapped in these intake structures and die, the Endangered Species Act of 1973 required the EPA to consult with the Services before proceeding. Following this required consultation, the Services prepared an official "biological opinion" (known as a "jeopardy" or "no jeopardy" biological opinion) addressing whether the agency's proposal would jeopardize the existence of threatened or endangered species. (50 C.F.R. § 402.14(h)(1)(iv)). Issuance of a "jeopardy" biological opinion would require the EPA either to implement certain alternatives proposed by the Services, to terminate the action altogether, or to seek an exemption. (16 U.S.C. §§ 1536(b)(4), (g), 1538(a)). After consulting with the Services, the EPA made changes to its proposed rule, and the Services received the revised version in November 2013. Staff members at NMFS and FWS soon completed draft biological opinions concluding that the November 2013 proposed rule was likely to jeopardize certain species. Staff members sent these drafts to the relevant decisionmakers within each agency, but decisionmakers at the Services neither approved the drafts nor sent them to the EPA. The Services instead shelved the draft opinions and agreed with the EPA to extend the period of consultation. After these continued discussions, the EPA sent the Services a revised proposed rule in March 2014 that differed significantly from the 2013 version. Satisfied that the revised rule was unlikely to harm any protected species, the Services issued a joint final "no jeopardy" biological opinion.

Respondent Sierra Club, an environmental organization, submitted requests under FOIA for records related to the Services' consultations with the EPA. As relevant here, the Services invoked the deliberative process privilege to prevent disclosure of the draft biological opinions

analyzing the EPA's 2013 proposed rule. The Sierra Club sued to obtain these withheld documents, and the Ninth Circuit held that the draft biological opinions were not privileged because, even though labeled as drafts, the draft opinions represented the Services' final opinion regarding the EPA's 2013 proposed rule.

The Court considered the issue of whether the deliberative process privilege under FOIA protects draft documents that the FWS created as part of the process under Section 7 of the Endangered Species Act. First, the Court noted that the deliberative process privilege does not apply to an agency's final decision, and that it was not always self-evident whether a decision was final. The Court underlined that a document does not necessarily represent the final position of an agency just because nothing else follows it. What mattered, then, was not whether a document was last in line, but whether it communicated a policy on which the agency had settled.

To decide whether a document communicate the agency's settled position, courts must consider whether the agency treats the document as its final view on the matter. When it does so, the deliberative "process by which governmental decisions and policies are formulated" will have concluded, and the document will have "real operative effect." In other words, once cited as the agency's final view, the document reflects "the 'consummation' of the agency's decisionmaking process" and not a "merely tentative" position. (*Citing*, *Bennett v. Spear*, 520 U.S. 154, 177–178 (1997)). By contrast, a document that leaves agency decisionmakers "free to change their minds" does not reflect the agency's final decision. (*Citing*, *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp*., 421 U.S. 168, 189–190).

The Court then concluded that the draft biological opinions at issue in the case were protected by the deliberative process privilege because they reflected a preliminary view about the likely effect of the EPA's proposed rule on endangered species.

The Court noted that the documents were polished, lacking only a signature, that they were prepared by low-level staff, and that they were marked as drafts. Although in the case at issue, the documents ended up being the final versions of the recommendations, they were still part of the deliberative process between the Services and the EPA.

Despite the Sierra Club's warning that the Court's holding would allow agencies to stamp every document as "draft" and thus privilege them, the Court reiterated that the formal inquiry remained determining whether the agency's position was final. If evidence established that an agency had "hidden a functionally final decision in draft form, the deliberative process privilege [would] not apply."

TAKE-AWAYS: To the extent California Courts look to FOIA decisions for guidance in Public Records Act cases (*see, Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1338 [judicial construction of the FOIA serves to illuminate the interpretation of its California counterpart]), the Court's ruling on the deliberative process privilege may be helpful to cities engaged in environmental review with documents marked as "draft." Moreover, for federal environmental review at least, it appears there is no longer concern that documents which are later confirmed and represent the final decision of an agency will be producible while still in draft form.

NOTABLE DISSENTING OPINION: Justice Breyer , with whom Justice Sotomayor joined, dissented, arguing that the Court should have distinguished between "Draft Biological Opinions" and "Drafts of Draft Biological Opinions." The dissenting justices argued that the policy behind FOIA (preserving frank discussion) would not be impacted by disclosing the former, because transmitting the Draft Biological Opinion to the EPA simply allows the EPA to make its choice before a Final Biological Opinion. Furthermore, when a private party prompted the agency action under review, say, by seeking an EPA permit, regulations required the Services to make the Draft Biological Opinion available to the private applicant. (50 CFR § 402.14(g)(5)); *citing, Department of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1, 4–5 (2001)). The dissent argued that to hold that Draft Biological Opinions are discoverable when a private party seeks an EPA permit but not when, as in the case at issue, the EPA seeks to write a generally applicable rule that governs private party conduct, seemed highly anomalous.

In sum, the dissent opined that the likely finality of a Draft Biological Opinion, its similarity to a Final Biological Opinion, the similar purposes it serves, the agency's actual practice, the anomaly that would otherwise exist depending upon the presence or absence of a private party, and the presence of at least some regulation-based legal constraints, convinced the dissenting Justices that a Draft Biological Opinion would not normally enjoy a deliberative privilege from FOIA disclosure.

* * *

South Bay United Pentecostal Church v. Newsom, 985 F.3d 1128 (9th Cir., Jan. 22, 2021), *injunction issued in part,* 592 U.S. ---; 141 S. Ct. 716 (Feb. 5, 2021).

BACKGROUND: A church and bishop brought action against state and county officials alleging that state's restrictions on indoor worship services during COVID-19 pandemic violated the Free Exercise Clause. The United States District Court for the Southern District of California denied plaintiffs' motion for preliminary injunction, and they appealed.

HOLDING: The Court of Appeals held that: (1) strict scrutiny applied in determining whether the orders violated Free Exercise Clause; (2) state's interests in reducing community spread of COVID-19, protecting high-risk individuals from infection, and preventing overwhelming of its healthcare system, were compelling; (3) the district court did not abuse its discretion in concluding that the church failed to establish likelihood of success on merits; (4) the district court did not abuse its discretion in concluding that public interest did not favor preliminary injunction; (5) the church was likely to succeed on merits of its claim that California's 100-and 200-person attendance caps on indoor religious services violated Free Exercise Clause; and (6) the church failed to establish likelihood of success on the merits of its claim that ban on indoor singing and chanting violated Free Exercise Clause. Affirmed.

KEY FACTS & ANALYSIS: Under its COVID-19 mitigation framework (the Blueprint), California permitted unlimited attendance at outdoor worship services and deemed clergy and faith-based streaming services "essential," but had temporarily halted all congregate indoor activities, including indoor religious services, within portions of the state currently identified by objective measures as being at high risk.

The Blueprint assigned each county to one of four tiers, ranging from Tier 1 ("Widespread") to Tier 4 ("Minimal"), which reflected COVID-19's transmission risk in each county. The Blueprint also banned indoor singing and chanting in all indoor activities.

South Bay United Pentecostal Church (South Bay) challenged the restriction on indoor religious services, along with others, under provisions of the United States and California Constitutions. In its challenge brought under the Free Exercise Clause of the First Amendment of the United States Constitution, South Bay argued that the restrictions on indoor services prohibited its congregants' Free Exercise of their theology, which required gathering indoors. The district court made multiple findings of fact on an extensive evidentiary record and concluded that California's restrictions on indoor worship were narrowly tailored to meet its compelling—and immediate—state interest in stopping the community spread of COVID-19. The Ninth Circuit reviewed the district court's decision for abuse of discretion.

First, given the strong evidentiary record before the district court, the Ninth Circuit concluded that the district court did not abuse its discretion by denying South Bay's motion for a preliminary injunction and upholding the restrictions on indoor religious worship services. Although South Bay had demonstrated irreparable harm through the impact on South Bay's attendees' Freedom of Religion, it had not demonstrated that the likelihood of success, the balance of equities, or the public interest weighed in its favor. The Ninth Circuit found that the complete closure of indoor religious services in Tier 1 met strict scrutiny. The government interest in mitigating the harmful impacts of COVID-19 was compelling to save lives and manage California's overwhelmed healthcare system. Additionally, the closure was narrowly tailored to serve that interest. The district court carefully examined the disparity between what indoor services were closed at Tier 1 (bowling alleys, movie theatres, dine-in operations, etc.), to those which were opened indoors at a reduced capacity or under specific conditions (retail, grocery, public transportation, essential workplaces, and personal care services). The district court did not abuse its discretion in concluding that the restriction on indoor worship met strict scrutiny, because unlike the permitted activities, indoor worship necessarily involved individuals congregating, and previous attempts to permit indoor worship at a reduced capacity did not effectively prevent the spread of COVID-19. The public interest lay with the continued mitigation of the spread. (NOTE: This Ninth Circuit decision was negated by the United States Supreme Court, which granted injunctive relief with respect to the Tier 1 prohibition on indoor religious services but denied it for percentage-based capacity limitations in Tier 2 and 3, and for the prohibition on indoor singing and chanting, as discussed below (592 U.S. ---, 141 S.Ct. 716 (Feb. 5, 2021)).

Second, the Ninth Circuit concluded that the attendance caps in Tiers 2 and 3 of the Blueprint could not survive strict scrutiny and likely violated the Free Exercise Clause. California did not present evidence that indoor worship services limited to 100 or 200 people was narrowly tailored to limit the spread of COVID-19, particularly considering that under those tiers, grocery stores and retail establishments were able to operate at full capacity. The limitation would deprive some attendees the right to participate in the worship services, causing irreparable harm through violation of those attendees' First Amendment rights. California did not show any less restrictive measures, such as capping attendance based on building size, rather than the same number cap for every church. The Ninth Circuit thus determined that South Bay had established a likelihood of success on the merits for the Tier 2 and 3 restrictions. It accordingly remanded to

the district court to issue a preliminary injunction on that ground. A permissible alternative was to limit attendance based on percentage of capacity.

Finally, the Ninth Circuit determined that the ban on indoor singing and chanting did not violate the First Amendment. Those activities were established to increase COVID-19 transmission for which mask wearing could not impede the risk. South Bay had not established a likelihood of success on the merits.

U.S. SUPREME COURT INJUNCTION: An application for injunctive relief filed with the United States Supreme Court presented to Justice Kagan and referred to the full Court was granted in part. California was enjoined from enforcing the Blueprint's Tier 1 prohibition on indoor worship services against South Bay pending disposition of the petition for a writ of certiorari. The Supreme Court cited the disparate treatment between religious worship and other indoor services for which people were allowed at reduced capacity. It noted that California did not limit its citizens from running in and out of other establishments; no one was barred from lingering in shopping malls, salons, or bus terminals. Nor had California explained why more narrowly tailored options, like a reasonable limit on the length of indoor religious gatherings, would fail to meet its concerns. The application was denied with respect to a percentage capacity limitation, and California was not enjoined from imposing a 25% capacity limitation on indoor worship services in Tier 1. The application was denied with respect to the prohibition on singing and chanting during indoor services.

The Supreme Court justices disagreed as to which parts of the application should have been granted or denied, and which mitigation procedures, if any, should have been permitted. Notably, however, the Supreme Court's order issuing the injunctive relief was without prejudice to South Bay presenting new evidence to the district court that California is not applying the percentage capacity limitations or the prohibition on singing and chanting in a generally applicable manner.

POSTSCRIPT: Same rulings from the Ninth Circuit and United States Supreme Court resulted in *Harvest Rock Church, Inc. v. Newsom*, 985 F.3d 771 (9th Cir., Jan. 25, 2021). As with the above decision, the Supreme Court granted the preliminary injunction for the total ban on indoor religious services in Tier 1. California was still permitted to enforce percentage-based capacity restrictions.

* * *

United States v. State Water Resources Control Board, 988 F.3d 1194 (9th Cir., Feb. 24, 2021).

BACKGROUND: Simultaneous to filing state court action, the United States brought separate action in federal court against California State Water Resources Control Board (Board) for declaratory and injunctive relief, alleging state law claims for violations of California Environmental Quality Act (CEQA) regarding a water quality control plan for the Bay-Delta estuary, and asserting a federal discrimination claim for violation of intergovernmental immunity in requiring more stringent salinity standard for federal Bureau of Reclamation (Bureau). The United States District Court for the Eastern District of California, granted Board's motion for partial stay as to state law claims. United States appealed.

HOLDING: The Ninth Circuit held that: (1) pursuant to exception to finality rule under *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541 (1949), Court of Appeals had jurisdiction over appeal of the granting of a partial stay of state law claims issued per *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976); (2) as a matter of first impression, the district court abused its discretion in granting a *Colorado River* stay of state law claims; and (3) affirmance based on *Pullman* abstention would have impermissibly enlarged rights obtained under district court judgment.

KEY FACTS & ANALYSIS: The Board managed the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (the Bay-Delta). Included in the Bay-Delta system was the New Melones Dam, operated by the Bureau. The Bureau was required to comply with California law in operating the dam.

The Board first adopted a water quality control plan for the Bay-Delta in 1978. In December 2018, after completing a nine-year process, the Board approved an Amended Plan. The Amended Plan made a number of changes to the management of the Bay-Delta, including altering flow objectives and salinity levels. The United States claimed that these changes adversely affect operation of the New Melones Dam.

The United States simultaneously brought suits in the United States District Court and Sacramento County Superior Court. The United States pleaded three identical causes of action under California state administrative law in both suits, and later added a federal constitutional claim to its federal suit. The federal district court stayed the three state law claims pursuant to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) (*Colorado River*), and allowed the federal constitutional claim to proceed. The Board asked the district court to abstain from hearing the case or stay the case pursuant to *Colorado River*. The district court denied abstention under a number of doctrines, including *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496 (1941) (*Pullman*), but the district court also considered whether it could issue a *Colorado River* stay, ultimately deciding to stay the CEQA claims "until further notice" but allowing the intergovernmental immunity claim to proceed, subject to further briefing on ripeness and standing. The United States appealed the *Colorado River* stay. The Board did not cross-appeal the district court's decision to deny abstention pursuant to *Pullman*.

The Court of Appeal reviewed the district court's decision *de novo* as either a final order or as an exception to the finality rule under *Cohen v. Beneficial Loan Corporation*, 337 U.S. 541 (1949) (*Cohen*). In evaluating whether the partial *Colorado River* stay was appropriate, the Court of Appeal listed 8 factors it considered:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

In the case at issue, the eighth factor controlled the outcome of the analysis. Both the Supreme Court and the Ninth Circuit have suggested that partial stays are inappropriate. In *Colorado River* itself, the Supreme Court stated that a court should "giv[e] regard to conservation of judicial resources and *comprehensive disposition of litigation*." Similarly, in another case which clarified the doctrine, the Supreme Court noted that "the decision to invoke *Colorado River* necessarily contemplates that the federal court *will have nothing further to do in resolving any substantive part of the case*, whether it stays or dismisses." (*Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 28 (1983) (emphasis added)). A *Colorado River* stay is inappropriate when the state court proceedings will not resolve the entire case before the federal court.

In the case at issue, the United States' suits in state and federal court contained the same three CEQA causes of action. These claims mainly related to how the Board analyzed various items of evidence in arriving at its conclusions in the Amended Plan, and how the Board described details about the Amended Plan, in light of this analysis. The amended federal complaint additionally contained the intergovernmental immunity cause of action.

Because the eighth factor was "dispositive" in concluding that a stay of the entire case was not appropriate, the Ninth Circuit did not consider the other factors in the analysis. The state proceeding could not resolve the United States' intergovernmental immunity claim because the United States had not raised such a claim in that forum. The Court noted, however, that a partial *Colorado River* stay may be appropriate in cases with clear evidence of forum shopping. Because the state proceeding could not resolve the federal claim, the district court abused its discretion when it granted a partial *Colorado River* stay.

The Board also argued that the *Pullman* abstention doctrine was an additional ground to uphold the partial stay. Pursuant to the *Pullman* abstention doctrine, "federal courts have the power to refrain from hearing cases...in which the resolution of a federal constitutional question might be obviated if the state courts were given the opportunity to interpret ambiguous state law." (*Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716–17 (1996) (citing *Pullman*)). Thus, *Pullman* requires that the federal court abstain from deciding the *federal* question while it awaits the state court's decision on the state law issues.

The Board, which did not cross-appeal, could not ask the Ninth Circuit to affirm on *Pullman* grounds because the court would necessarily have to stay the intergovernmental immunity claim. Such a ruling would enlarge its rights under the district court's judgement.

TAKE-AWAYS: A *Colorado River* stay is inappropriate when the state court proceedings will not resolve the entire case before the federal court. There is a strong presumption that the presence of an additional claim in the federal suit means that *Colorado River* is inapplicable. However, because of the concern over forum shopping, there might be circumstances in which a district court could properly issue a partial *Colorado River* stay. If there is clear-cut evidence of forum shopping—meaning the party filing the federal suit clearly added a new claim to avoid state court adjudication—then the district court may analyze the claims separately and decide if a partial stay is appropriate. When there is concurrent federal and state court jurisdiction over the additional claim (as opposed to exclusive federal jurisdiction), there is stronger evidence of

forum shopping, as the plaintiff in the federal case could have pursued that additional claim in state court.

* * *

Center for Biological Diversity v. Bernhardt, 982 F.3d 723 (9th Cir., Dec. 7, 2020).

BACKGROUND: Conservation groups brought action challenging Department of Interior's Bureau of Ocean Energy Management's (BOEM) approval of an offshore oil drilling and production facility, alleging failure to comply with the National Environment Policy Act (NEPA), the Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPA).

HOLDING: The Court of Appeals held that: (1) Outer Continental Shelf Lands Act (OCSLA) provided the Court of Appeals with jurisdiction over groups' claim under the ESA; (2) BOEM did not arbitrarily and capriciously apply a different method of calculation in estimating emissions from action and no-action alternatives; (3) environmental impact statement (EIS) was arbitrary and capricious for failing to adequately consider foreign oil consumption; (4) rule regarding polar bears did not preclude Fish and Wildlife Service's (FWS) responsibility to include mitigation measures in biological opinion; (5) mitigation measures proposed by FWS were too vague to enforce; (6) FWS relied on vague mitigation measures, and thus conclusion that polar bears' critical habitat would not be adversely modified violated the ESA; and (7) FWS did not quantify nonlethal take that polar bears were expected to face, and thus violated the ESA. Petition for review granted in part and denied in part; vacated and remanded.

KEY FACTS & ANALYSIS: Hilcorp Alaska, LLC, was an energy management company seeking to produce crude oil from Foggy Island Bay, along the coast of Alaska in the Beaufort Sea. To extract the oil from under the Beaufort Sea, Hilcorp would need to construct an offshore drilling and production facility. The facility—referred to as "the Liberty project," or "the Liberty prospect"—would be the first oil development project fully submerged in federal waters. Hilcorp estimated that the site contained about 120 million barrels of recoverable oil, which it hoped to extract over the course of fifteen to twenty years.

The site of the Liberty project was within the outer Continental Shelf of the United States and thus governed by the OCSLA (43 U.S.C. § 1331 *et seq*.), which allows the Department of Interior—which houses the BOEM—to oversee the mineral exploration and development of the outer Continental Shelf. Administering the use of the Shelf under OCSLA may include leasing federal land for oil and gas production to entities like Hilcorp. OCSLA required BOEM to manage the outer Shelf in "a manner which consider[ed] [the] economic, social, and environmental values" of the Shelf's natural resources. (43 U.S.C. § 1344(a)(1)).

Relying on a biological opinion prepared by the FWS and BOEM's own EIS, BOEM's Regional Supervisor of Leasing and Plans signed a record of decision approving the Liberty project. The Center for Biological Diversity and four other conservation organizations (collectively, "CBD"), disputed the legality of BOEM's and FWS's actions, arguing that the agencies failed to comply adequately with the procedural requirements imposed by the NEPA, the ESA, and the MMPA. Specifically, CBD claimed that (1) BOEM violated the NEPA by arbitrarily and capriciously estimating the environmental consequences of the alternatives included in the EIS; (2) FWS

violated the ESA and MMPA by producing a legally inadequate biological opinion as required under the ESA; and (3) BOEM violated the ESA by relying on FWS's unlawful biological opinion to approve the Liberty project. Hilcorp intervened on behalf of BOEM. The Ninth Circuit agreed in part with CBD and vacated BOEM's approval of the project.

The Ninth Circuit reviewed under authority conferred by the OCSLA, BOEM, and the ESA. The Court reviewed the NEPA, the ESA, and MMPA claims under the Administrative Procedure Act (APA), which authorizes courts to set aside agency actions, findings, and conclusions if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," (5 U.S.C. § 706(2)(A)); see also *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt*., 387 F.3d 989, 992 (9th Cir., 2004)).

NEPA Claims

The Court first examined the NEPA claim that BOEM violated the NEPA by arbitrarily and capriciously estimating the environmental consequences of the alternatives included in the EIS. The purpose of an EIS is twofold: first and foremost, it is an action-forcing device, ensuring that the goals of the NEPA are infused into the government's actions. (40 C.F.R. § 1502.1.4). NEPA's requirements "are to be strictly interpreted 'to the fullest extent possible' in accord with the policies embodied in the Act." (*State of Cal. v. Block*, 690 F.2d 753, 769 (9th Cir., 1982) (quoting 42 U.S.C. § 4332(1))). Second, an EIS provides important information to the public and any party interested in the proposed environmental action. (*Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989)).

CBD argued that BOEM's EIS was arbitrary and capricious under the APA because BOEM improperly (1) relied on different methodologies in calculating the lifecycle greenhouse gas emissions produced by the no-action alternative and the other project alternatives, thus making the options incomparable, and (2) failed to include a key variable (foreign oil consumption) in its analysis of the no-action alternative.

The Court disagreed with the first claim because the record indicated that BOEM did not apply different methods in comparing the action and the no-action alternatives. The analysis was ultimately a relative comparison, sufficient for making a "reasoned choice among alternatives." (40 C.F.R. § 1502.22(a)).

However, the Court agreed with CBD's claim that BOEM arbitrarily failed to include emissions estimates resulting from foreign oil consumption in its analysis of the no-action alternative. In its EIS, BOEM concluded that the proposed action and the action alternatives would each produce about 64,570,000 metric tons of carbon dioxide equivalents. It then estimated that the no-action alternative would produce—somewhat perplexingly—89,940,000 metric tons of carbon dioxide equivalents, 25,370,000 more metric tons than if the land were leased under any scenario. The EIS explained that the no-action alternative will result in more emissions because the oil substituted for the oil not produced at Liberty would come from places with "comparatively weaker environmental protection standards associated with exploration and development of the imported product and increased emissions from transportation." CBD explained that BOEM reached this counterintuitive result by omitting a key variable in its analysis: foreign oil consumption. This omission, according to CBD, made BOEM's analysis

"misleading" because it failed to capture the emissions caused by increased global consumption in its estimate of Liberty's downstream emissions.

Courts typically accord significant deference to an agency's decisions that require a high level of technical expertise. (*Kleppe v. Sierra Club*, 427 U.S. 390 (1976)). But such deference applies only when the agency is making predictions within its area of special expertise. (*Baltimore Gas & Elec. Co. v. Nat. Resources Defense Council, Inc*., 462 U.S. 87 (1983)). The scope of BOEM's expertise did not include the economic analysis of greenhouse gas emissions. Therefore, the Ninth Circuit did not readily defer to BOEM's decision to exclude a discussion of foreign oil consumption, particularly in light of the Ninth Circuit's conclusion that BOEM's decision to do so was unreasonable. (*The Lands Council v. McNair,* 537 F.3d 981, 993 (9th Cir., 2008), overruled in part on other grounds, *Winter v. Nat. Resources Defense Council, Inc*., 555 U.S. 7 (2008)). The Ninth Circuit concluded that the EIS "should have either given a quantitative estimate of the downstream greenhouse gas emissions" that will result from consuming oil abroad, or "explained more specifically why it could not have done so," and provided a more thorough discussion of how foreign oil consumption might change the carbon dioxide equivalents analysis. In this regard, BOEM's alternatives analysis in the EIS was arbitrary and capricious.

ESA and MMPA Claims

The Ninth Circuit examined CBD's challenge that the FWS did not comply with the ESA when preparing its opinion discussing the effects of the project on all threatened species and their habitats. In the opinion, FWS concluded that polar bears—which are classified as threatened marine mammals—were present in the project area, but that the project was unlikely to jeopardize their continued existence or adversely modify their habitat.

Section 9 of the ESA regulates the "taking" of a threatened or endangered species. FWS may issue a temporary permit approving conduct normally barred by Section 9 if the taking is incidental to an otherwise lawful activity. However, before FWS may issue such a permit, it must find that (1) the applicant will minimize and mitigate the negative impacts of the taking; (2) the applicant will ensure adequate funding for the plan; and (3) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild. Section 7 of the ESA describes the process for agency consultation. Unlike Section 9, Section 7 does not contain an outright prohibition on take; it requires only that an agency consult with FWS or NMFS before it takes any action that may affect a species listed as threatened or endangered under the ESA.

The MMPA prohibits the take or harassment of animals, but its scope is narrower and its procedures distinct from those of Sections 7 and 9 of the ESA. It entirely prohibits the take of marine mammals in U.S. waters. Both the ESA and the MMPA apply when, as in the case at issue, an agency seeks approval for the incidental take of threatened and endangered marine mammals. The MMPA is more restrictive than the ESA; when the two statutes conflict, the relevant MMPA provision applies. CBD argued that FWS violated the ESA by (1) relying on uncertain, insufficiently specific mitigation measures in reaching its no-jeopardy and no-adverse-modification conclusions, and (2) failing to specify the amount and extent of "take" in the incidental take statement included within the BiOp.

The Ninth Circuit agreed with CBD that the mitigation measures proposed by FWS were too vague to enforce. The administrative record reflected a "general desire" to impose mitigation strategies, but it did not reflect a definite commitment to those improvements. The generality of the mitigation measures made it difficult to determine the point at which the action agency could renege on its promise to implement those measures. "[S]incere general commitment[s] to future improvement" are insufficient under Section 7. (*Nat'l Wildlife Foundation v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935-936 (9th Cir., 2008)). The measure referenced "possible" strategies, without selecting a mitigation measure from the incorporated list or committing BOEM or Hilcorp to carrying out any specific number of measures. For the Ninth Circuit, such noncommittal assurances could not shoulder the government's burden to identify a "clear, definite commitment of resources." *(Id.)* In addition, unauthorized, future mitigation measures under the MMPA could not satisfy the FWS's obligations under Section 7 of the ESA. The mitigation measures proposed in the BiOp were indefinite and did not constitute a "clear, definite commitment of resources," and FWS's reliance upon those measures to conclude that an animal's critical habitat (in this case, a polar bear's) would not be adversely modified by the Liberty project was arbitrary and capricious.

The Ninth Circuit also evaluated whether FWS unlawfully failed to specify the amount and extent of "take" in its incidental take statement. The government argued that any nonlethal disturbance did not rise to the level of take, and so FWS did not need to quantify any nonlethal take that may have occurred as a result of the project. The Ninth Circuit concluded that FWS contemplated that nonlethal harassment of polar bears may rise to the level of "take" under the ESA and should have quantified the nonlethal take of the bears. Because FWS contemplated that the harassment and disturbances polar bears would suffer could trigger re-consultation with FWS and did not quantify the nonlethal take that polar bears are expected to face (or explain why it could not do so), the Ninth Circuit held that that FWS's incidental take statement violated the ESA. It was therefore arbitrary and capricious under the APA.

Finally, the Ninth Circuit evaluated whether BOEM's reliance on FWS's biological opinion in its approval of the Liberty project was arbitrary and capricious. An agency cannot meet its Section 7 duties by relying on a legally flawed biological opinion or failing to discuss information that might undercut the opinion's conclusions. Because the Court concluded that FWS's biological opinion was, at least in part, invalid, BOEM's reliance on it was unlawful.

TAKE-AWAYS: This opinion suggests that an agency cannot rely on a legally flawed opinion from another body when it is accomplishing its obligations under Section 7 of the ESA. Cities should be on the look-out for this and review all reports prepared and considered when making its determinations under Section 7 of the ESA.

* * *

<u>*Hotop v. City of San Jose*, 982 F.3d 710 (9th Cir., Dec. 7, 2020).</u>

BACKGROUND: Owners of rent-stabilized rental housing in city brought civil rights action challenge on constitutional grounds to the disclosure obligations imposed on them by municipal ordinance. The United States District Court for the Northern District of California granted

motion to dismiss for failure to state cause of action, and owners, as lessors of the properties, appealed.

HOLDING: The Court of Appeals held that: (1) lessors did not adequately allege that they had reasonable expectation of privacy in information that they were required by ordinance to disclose, and did not state plausible claim to recover for municipality's alleged violation of their Fourth Amendment rights; (2) lessors did not state plausible claim for regulatory taking; (3) complaint contained only vague allegations that the ordinance affected lessors' contracts with tenants and did not state a Contracts Clause claim that was plausible on its face; (4) city had rational basis for the distinctions drawn in ordinance based, *inter alia*, on the significant resources that it would have to expend if ordinance were expanded to include duplexes; and (5) lessors did not state a plausible substantive or procedural due process claim against municipality. Affirmed. Bennett, Circuit Judge, filed opinion concurring in part and concurring in result.

KEY FACTS & ANALYSIS: In 2017, the City of San Jose passed Ordinance 30032 ("Ordinance") to amend the City's Apartment Rent Ordinance and adopted Resolution 78413 to establish regulations for implementing the Ordinance ("Regulations"). Certain provisions of the Ordinance and Regulations required landlords to disclose information about rent stabilized units to the City and condition landlords' ability to increase rents on providing that information. These provisions were challenged by individual apartment owners subject to the Ordinance and by the Small Property Owners Association-San Jose, an unincorporated trade association of San Jose landlords. Plaintiffs sued under 42 U.S.C. section 1983, claiming that the challenged provisions violated their Fourth, Fifth, and Fourteenth Amendment rights, as well as the Contracts Clause. The district court granted the City's motion to dismiss plaintiffs' first amended complaint without prejudice. Plaintiffs chose to stand on that complaint and appealed. Reviewing the district court's decision *de novo*, the Ninth Circuit affirmed.

Plaintiffs' Fourth Amendment claim was predicated on their theory that the Ordinance and Regulations violated the prohibition against unreasonable searches by requiring landlords to provide certain information to the City through the Director of the Department of Housing. The claim implicated three different disclosure requirements applicable to rent stabilized units.

The Ninth Circuit declined to decide whether the Fourth Amendment is implicated by only physical inspection of "papers" because the Court found that plaintiffs had failed to adequately allege they had a reasonable expectation of privacy in the information contained in the records sought by the Ordinance, and thus could not establish a Fourth Amendment claim. Specifically, the plaintiffs failed to allege that the information sought by the Ordinance differed meaningfully from the information landlords were already required to disclose by law in other contexts.

The Ninth Circuit concluded that the Plaintiffs' other claims also lacked merit. First, plaintiffs alleged no operative facts to bring a Fifth Amendment takings claim. Plaintiff's allegation that they could not increase rents on their tenants if they failed to comply with the Ordinance was not sufficient to support a takings claim. Second, Plaintiffs failed to sufficiently make a claim under the Contracts Clause because they did not specify how the Ordinance's disclosure requirements would affect their contracts with tenants. Third, Plaintiffs' equal protection claims failed under rational basis review because they failed to show how the Ordinance distinctions between unit

types requiring different information was irrational. Fourth, Plaintiffs' substantive and procedural due process claims failed because they failed to show that they were deprived of a "constitutionally protected life, liberty or property interest." (*Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir., 2008)). Plaintiffs argued that the Ordinance and Regulations infringed on their tenants' privacy rights, thus forcing plaintiffs to choose between "disclosing the tenants' personal information violating their due process rights (and possibly being sued)" or not complying with the Ordinance and "suffering severe...sanctions." The argument did not identify any harm to Plaintiffs' own liberty or property interests. Finally, Plaintiffs claim that the Ordinance violated the "unconstitutional conditions" doctrine under *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013) failed to allege any unconstitutionality.

TAKE-AWAYS: Landlords could not make constitutional claims based on privacy interests of their tenants under the Fourth Amendment, under equal protection, or under the unconstitutional conditions doctrine. The Court left open the question of whether tenants, whose information is disclosed, would be able to bring an equal protection claim under the same theory.

NOTABLE CONCURRING OPINION: Circuit Judge Bennett, concurring in part and concurring in the result, would have held that irrespective of whether plaintiffs had an "actual (subjective) expectation of privacy...that society is prepared to recognize as 'reasonable,'" (*Katz v. United States,* 389 U.S. 347 (1967) (Harlan, J., concurring)), the majority should have rejected Plaintiffs' Fourth Amendment claim on the ground that a "search" under the Fourth Amendment requires a physical intrusion or its functional equivalent, which do not encompass demands for information. Judge Bennett opined that other constitutional provisions regulate these types of information demands, such as the Due Process Clauses of the Fifth and Fourteenth Amendments, but the Fourth Amendment does not.

POSTSCRIPT: The League of California Cities participated as *amicus curiae* and filed a brief in support of San Jose in this case.

* * *

Bair v. California Department of Transportation, 982 F.3d 569 (9th Cir., Dec. 2, 2020).

BACKGROUND: Objectors to project to improve highway abutted by old-growth redwood trees in state park brought action against California Department of Transportation (Caltrans), challenging the project on various grounds, including failure to comply with National Environmental Policy Act of 1969 (NEPA). The United States District Court for the Northern District of California granted partial summary judgment in favor of objectors, enjoined the Caltrans from continuing project until it finalized appropriate environmental impact statement (EIS), and entered final judgment against Caltrans, which appealed.

HOLDING: The Court of Appeals held that: (1) Caltrans' environmental assessment (EA) sufficiently considered the effect of paving over portions of tree root zones; (2) The EA appropriately considered the effect of construction within root zones; (3) The EA adequately considered traffic volume and noise; (4) Caltrans' consideration in the EA of collisions with trees was not arbitrary and capricious; and (5) Caltrans was not required to consider the potential

severity of damage to trees in its EA under the circumstances. Reversed and remanded. Wardlaw, Circuit Judge, filed concurring opinion.

KEY FACTS & ANALYSIS: Richardson Grove State Park (the Grove) comprises approximately 2,000 acres within the redwood forests of southern Humboldt County and is bisected by U.S. Highway 101. Within the Grove, Highway 101 is a two-lane highway "on a nonstandard alignment" with tight curves and narrow travel lanes and roadway shoulders. A number of trees, including old-growth redwood trees, abut the roadway as it meanders through the Grove. In light of antiquated roadway design, there are restrictions on the types of vehicles that may travel that portion of the highway. Sixty-five foot long "California Legal" trucks are permitted, but industry-standard U.S. Surface Transportation Assistance Act of 1982 (STAA) trucks generally are not.

The STAA truck restriction at the Grove is the only remaining impediment to STAA trucks traveling into Humboldt County via Highway 101. Caltrans has long sought to remove that roadblock, but abandoned previous efforts because of the substantial projected expense, among other things. In 2007, Caltrans learned that the existing roadway could be strategically widened to render it accessible to STAA trucks, and Caltrans developed the Richardson Grove Operational Improvement Project (the Project) to do just that. Caltrans assumed responsibility for obtaining environmental approval for the Project pursuant to the NEPA.

The original 2010 EA included extensive analysis of the Project's environmental effects and efforts to minimize those effects. Caltrans ultimately determined that the impacts to the Grove would be minor and would primarily consist of "tree removal resulting from cuts and fills that are necessary to accommodate the highway improvements," as well as the effect on trees whose structural root zones were within the construction area. Although some trees would be removed, none of those would be old-growth redwoods. Caltrans issued the EA and Finding of No Significant Impact (FONSI) for the Project in May 2010.

Plaintiffs, which included environmentally concerned individuals and organizations, filed suit regarding the Project in both 2010 and 2014, each time making similar claims. In the first lawsuit, the district court granted partial summary judgment to the plaintiffs and ordered Caltrans to undertake additional studies, such as preparing new maps of each old-growth redwood tree, its root health zone, and the environmental impacts to each tree. Caltrans then revised its analysis accordingly. After commissioning a tree report from an arborist, it issued a 2013 Supplement to the 2010 EA. Caltrans then took public comments, responded to them, and finally issued a the NEPA Revalidation for the Project in January 2014. It found that the 2010 EA and FONSI remained valid.

In the second lawsuit, plaintiffs challenged the re-validated Project on many of the same grounds as in the first litigation. Since the original issuance of the EA in 2010, Caltrans had modified the Project to reduce its impact, primarily by narrowing the proposed roadbed (roadway shoulders).

Plaintiffs filed a third lawsuit in 2017, again raising claims similar to those that had been made in the first and second lawsuits, specifically: claims alleging various violations of NEPA, as well as claims for a violations of the Department of Transportation Act, the Wild and Scenic Rivers Act, the Administrative Procedure Act (APA), and a declaration that Caltrans is responsible for

plaintiffs' attorney's fees and costs. The district court granted plaintiffs' partial summary judgment as to some of the NEPA claims, in that Caltrans had not adequately considered: whether (1) redwoods would suffocate when more than half of their root zones were covered by pavement; (2) construction in a redwood's structural root zone would cause root disease; (3) traffic noise would increase because of the larger size of the STAA trucks or because of additional numbers of trucks; and (4) redwoods would suffer more frequent and severe damage as a result of strikes by STAA trucks. Citing those shortcomings in the EA, the district court concluded that substantial questions had been raised as to the effects of the Project and ordered Caltrans to prepare an EIS. The district court also enjoined Caltrans from proceeding with the Project until the EIS was finalized. Caltrans appealed.

The Ninth Circuit reversed the decision of the trial court, finding that Caltrans took the requisite "hard look" at the Project. First, as to redwood tree suffocation, Caltrans sufficiently considered the effect of paving over portions of tree root zones. The Project would also use a special material to allow 'greater porosity' and to 'promote air circulation' under the asphalt, and Caltrans considered the aggregate amount of new roadbed material that would be placed over the structural root zones. Second, as to construction within root zones, Caltrans appropriately considered the extent and effect of the construction activity that would occur in the structural root zones of redwood trees, including construction guidelines in a State Parks handbook. Third, as to traffic volume and noise, the district court erred when it decided that Caltrans failed to adequately consider how the visitor experience to the Grove would be affected by the presence of STAA trucks, particularly with regard to whether they would be more numerous or generate more noise. Caltrans' EA concluded that truck traffic would not increase as a result of the Project, and it properly relied upon record evidence to do so. Fourth, as to collisions with trees, the district court erred by determining that Caltrans should have analyzed whether the Project could cause trees to suffer more frequent collisions with trucks because STAA trucks are longer and more difficult to maneuver, and sustain more damage from collisions because STAA trucks are heavier and their engine compartments more protruding than California Legal trucks. The Ninth Circuit concluded that Caltrans' analysis was not arbitrary and capricious. As to damage severity, the Ninth Circuit had not located any comments or documents in the administrative record which indicated that STAA trucks would cause more damage when they stuck trees. Thus, it appeared that issue was not administratively exhausted. Even if it had, the district court's speculation that trees would suffer more severe damage from collisions because of the weight or shape of STAA trucks was not supported by any evidence in the record. It was thus reasonable for Caltrans' EA not to anticipate that unfounded speculation.

In light of its conclusion, the Ninth Circuit reversed the district court's judgment requiring Caltrans to produce an EIS and enjoining it from continuing the Project until it has done so. An agency must prepare an EIS if there is a substantial question whether an action 'may have a significant effect' on the environment. The district court's rationale for requiring an EIS was predicated on its erroneous conclusions about the Project's effects on redwood tree health and possible increases in truck traffic and noise. Because the Ninth Circuit had determined that the EA's analysis was adequate in those respects, the district court necessarily erred in setting aside the 2017 FONSI and ordering Caltrans to prepare an EIS if it desired to proceed.

TAKE-AWAYS: An EIS is not required when an agency sufficiently considered the environmental impact of a project and issued a FONSI based on use of special material to allow greater porosity

and promote air circulation, the aggregate amount of new material to be placed over structural root zones, and an arborist's conclusion that the project would not create extreme stress on protected species.

NOTABLE CONCURRING OPINION: Circuit Judge Wardlaw concurred but wrote separately to emphasize that any new data that is discovered, or if significant project changes were made, Caltrans may have needed to reevaluate its analysis and potentially prepare an additional revised EA or an EIS. The judge's opnion noted that such data was likely to arise during the construction, specifically with regard to the effect of construction on old-growth redwoods.

* * *

San Francisco Taxi Coalition v. City and County of San Francisco, 979 F.3d 1220 (9th Cir., Nov. 9, 2020).

BACKGROUND/SUMMARY: Taxi drivers and groups representing them filed state court action alleging that city municipal transit agency's rules favoring recent owners of taxi medallions over those who obtained theirs years ago violated California Environmental Quality Act (CEQA), as well as equal protection, substantive due process, and state anti-age discrimination law. After removal, the United States District Court for the Northern District of California granted San Francisco's motion for judgment on pleadings, and plaintiffs appealed.

HOLDING: The Ninth Circuit Court of Appeals held that: (1) rules did not violate equal protection rights of senior medallion holders; (2) rules did not constitute "project" subject to CEQA; and(3) city's taxi medallion program was not subject to state anti-age discrimination law. The Ninth Circuit affirmed the ruling of the district court and found that the rules were rationally related to the legitimate government interests of aiding beleaguered taxi drivers and easing taxi congestion at the airport. It also affirmed the judgment on the CEQA and age discrimination claims but remanded to the district court for considering leave to amend those claims in the event the taxi drivers could allege additional facts to support them.

KEY FACTS & ANALYSIS: The San Francisco Municipal Transportation Agency (SFMTA) established several rules favoring recent owners of taxi medallions over those who obtained theirs years ago to combat the loss in business due to ride-share services. For example, the new rules give priority for lucrative airport pick-up rides to recent medallion owners.

Applying *de novo* review, the Ninth Circuit confirmed the regulations were not a "project" under CEQA, and therefore, no CEQA determinations were required to be made. To determine whether an action is a "project" for CEQA purposes, an agency looks to the "general nature" of a proposed action to determine whether the activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment. An indirect effect is not reasonably foreseeable if the postulated causal mechanism connecting the activity and the effect is so attenuated as to be "speculative." If the activity is not a project under CEQA, then the action is not subject to CEQA at all. (*Muzzy Ranch Co. v. Solano Cty. Airport Land Use Comm'n*, 41 Cal.4th 372, 380 (2007)). The complaint did not allege that the regulations increased the number of taxis in circulation or authorized more fares, and thus failed to allege a direct effect or reasonably foreseeable indirect effect on the environment.

As for the remaining claims, the Ninth Circuit concluded the drivers failed to plausibly allege the regulations violated equal protection or substantive due process under the applicable rational basis standard. The City's interest in reducing traffic, encouraging drivers to service the city, and mitigating the economic fallout for the recent medallion purchasers was sufficient, and the regulations were reasonably related to those interests. The Court also held the regulations were not impermissible economic favoritism because softening the economic fallout suffered by those medallion holders who had paid a quarter-million dollars was a permissible state purpose, rather than a "naked attempt to raise a fortress" around them to insulate them from competition.

Finally, the Ninth Circuit found that the age discrimination claim under California Government Code section 11135 failed. A bare assertion that SFMTA generally receives some unknown quantity of state funding was not sufficient to meet the bar in Section 11135, which requires direct funding by the state of the activity at issue.

* * *

Pakdel v. City and County of San Francisco, 952 F.3d 1157 (9th Cir., Mar. 17, 2020), *reh'g en banc denied,* 977 F.3d 928 (9th Cir., Oct. 13, 2020).

BACKGROUND: Co-owners of multi-unit building, owned through tenancies-in-common, brought 42 U.S.C. section 1983 action, asserting federal regulatory takings claim against the City and County of San Francisco (City), its board of supervisors, and its department of public works. The claim related to a City ordinance's requirement for an expedited conversion program to clear a backlog in its lottery system for converting tenancy-in-common property to condominium property, and the ordinance's requirement that conversion applicants agree to offer any existing tenants lifetime leases in the converted property. The United States District Court for the Northern District of California granted defendants' motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim. Plaintiffs appealed.

HOLDING: The Court of Appeals panel held that: (1) the co-owners' belated request for exemption did not satisfy finality requirement for ripeness for a federal court's adjudication of the federal regulatory takings claim, and (2) discretion to excuse noncompliance with the prudential finality requirement would not be exercised. Judgement Affirmed by a two-circuit judge majority of Ronald M. Gould and Michelle T. Friedland. Circuit Judge Carlos T. Bea filed a dissenting opinion.

KEY FACTS & ANALYSIS: In the City, ownership of multi-unit buildings is often shared by different people through tenancy-in-common ownership. For years, those in the City who sought to convert their tenancy-in-common property into individually owned condominium property had to apply for permission through a lottery system administered by the City. Because conversion rights were granted through the lottery to a very limited number of properties each year, a backlog developed. To clear that backlog, the City temporarily suspended the lottery in 2013 and replaced it with an "Expedited Conversion Program" (ECP), which allowed a tenancy-in-common property to be converted into a condominium property on the condition that its owner agreed to offer any existing tenants lifetime leases in units within the converted property.

Plaintiffs purchased an interest in a tenancy-in-common property in 2009 and thereafter rented their portion of the property to a tenant. When the ECP began, Plaintiffs and their co-owners applied to convert their property. Plaintiffs initially advanced through the application process without a hitch: They agreed to offer their tenant a lifetime lease as a condition of converting and duly received final approval from the City to convert. During this process, Plaintiffs had several opportunities to request an exemption from the lifetime lease requirement but did not do so. Nevertheless, as described by the majority opinion, "at the eleventh hour" Plaintiffs balked. Refusing to execute the lifetime lease they had offered to their tenant, Plaintiffs instead sued the City, contending under various theories that the lifetime lease requirement violates the Takings Clause of the Fifth Amendment to the U.S. Constitution.

The district court dismissed Plaintiffs' takings claims because they had not sought compensation for the alleged taking in state court, which was required by *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172 (1985). That state-litigation requirement was eliminated by *Knick v. Township of Scott, Pennsylvania,* 588 U.S. ---. 139 S. Ct. 2162 (2019), so the Ninth Circuit concluded *Williamson County* was no longer a proper basis for dismissal. However, the Ninth Circuit also concluded that, because Plaintiffs did not ask the City for an exemption from the lifetime lease requirement, Plaintiffs failed to satisfy *Williamson County's* separate finality requirement, which survived *Knick* and continued to be a requirement for bringing regulatory takings claims (like Plaintiffs' claim) in federal court. As such, the Ninth Circuit held Plaintiffs' takings challenge was unripe.

The dissenting opinion agreed the majority was correct about federal law on "ripeness" of takings claims brought under Section 1983, in the wake of *Knick*, still barring a plaintiff from bringing suit for a taking until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue[,]" per *Williamson County*. The dissent parted ways, however, by opining the City had reached such a final decision, and therefore would have vacated the district court's order dismissing the takings claim and remand the case for further proceedings.

TAKE-AWAYS: The majority opinion referenced U.S. Supreme Court precedent that emphasized the finality requirement "responds to the high degree of discretion characteristically possessed by land-use boards" in granting variances from their general regulations with respect to individual properties. (*Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738 (1997).) In light of "such flexibility or discretion," the majority opinion relied on the conclusion that courts cannot make "a sound judgment about what use will be allowed" by local land-use authorities merely by asking whether a development proposal "facially conform[s] to the terms of the general use regulations." (*Id*., at pp. 738-739.)

The finality requirement also means that a plaintiff must "meaningful[ly]" request and be denied a variance from the challenged regulation before bringing a regulatory takings claim. Moreover, federal precedent noted that "[t]he term 'variance' is not definitive or talismanic; if other types of permits or actions are available and could provide similar relief, they must be sought." (*S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir., 1990).) Plaintiffs (like those in this case) who "have foregone an opportunity to bring their proposal" to use their property in a manner that diverges from the regulation alleged to effect a taking "before a decision-making

body with broad authority to grant different forms of relief" therefore "cannot claim to have obtained a 'final' decision." (*Id*.)

SUMMARY OF ORDER DENYING REHEARING *EN BANC*: The Ninth Circuit denied a petition for rehearing *en banc*. Circuit Judges Gould and Friedland voted to deny the petition for rehearing *en banc*, Judge Bea voted to grant the petition. The full court was advised of the petition for rehearing *en banc*, and circuit judge requested a vote on *en banc* rehearing. The matter failed to receive a majority of votes of non-recused active judges in favor of *en banc* consideration. Several circuit judges dissented from the denial of rehearing *en banc*.

NOTABLE DISSENTING OPINION ON DENIAL OF REHEARING *EN BANC*: The dissent opined that, under the facts of the case, the application of *Williamson County*'s finality requirement supported the ripeness of the case for review. The dissent concluded that San Francisco had definitively imposed the lifetime lease requirement on plaintiffs' property, and there was no further avenue open to them under local law to avoid that. Plaintiffs twice requested an exemption from the requirement, and the City rejected both requests. Neither San Francisco nor the panel majority contended that any route of administrative appeal remains available to plaintiffs. There was therefore no danger that a federal court would have to speculate as to how San Francisco would apply the lifetime lease requirement. The City's decision was final, the lifetime lease requirement applied, and therefore the dissent determined that the plaintiffs' suit was ripe. The dissent argued that the majority misapplied the finality requirement from *Williams County* in holding that, because plaintiffs failed to seek an exemption in the past, that the case was unripe, because no present avenues were available to it. The dissent would have remanded the case to the district court for consideration of the merits of plaintiffs' claim.

* * *

Sierra Club v. Trump, 977 F.3d 853 (9th Cir., Oct. 9, 2020).

BACKGROUND: States, environmental advocacy organization, and coalition of community and environmental organizations brought actions challenging the former president's invocation of the National Emergencies Act (NEA) to divert funds from military construction projects to border wall construction projects and to authorize border wall construction to proceed without complying with environmental laws. The United States District Court for the Northern District of California granted summary judgment, declaratory relief to plaintiffs, and permanent injunctive relief to the Sierra Club. The federal government appealed, and states cross-appealed.

HOLDING: The Court of Appeals held that: (1) states had standing to bring action; (2) environmental organization had standing to bring action; (3) coalition relating to the international border had standing to bring action; (4) states fell within NEA's zone of interests; (5) environmental organization fell within Appropriations Clause's zone of interests; (6) NEA did not authorize the president to divert funds from military construction projects to border wall construction projects; (7) border wall construction projects on site assigned to military installation for real property accountability purposes could not be considered part of installation for purposes of NEA; (8) border wall construction projects did not fall within scope of NEA's definition of "military installation"; and (9) district court did not abuse its discretion in granting

environmental organization permanent injunction. Affirmed, and Circuit Judge Collins dissented.

KEY FACTS & ANALYSIS: The case involved the question of whether the emergency military construction authority provided by 10 U.S.C. section 2808 ("Section 2808") authorized eleven border wall construction projects on the southern border of the United States.

The Ninth Circuit concluded that it did not. For purposes of environmental analysis and review, at issue also was whether the district court properly granted the environmentally-based organizational plaintiffs a permanent injunction and improperly denied the state plaintiffs a separate permanent injunction. The Court affirmed the decision of the district court on both counts.

Section 2808 allows the U.S. Secretary of Defense ("Secretary") to undertake military construction projects in the event of a national emergency requiring the use of the armed forces, but the statute specifies that such projects must be "necessary to support such use of the armed forces." On September 5, 2019, the Secretary identified which military construction projects the Department of Defense ("DoD") intended to defer in order to fund border wall construction. The Secretary authorized the diversion of funding from 128 military construction projects , 64 of which are located within the United States, and 17 of which are located within the territory of nine plaintiff-states, including California (collectively, "State Plaintiffs"), totaling over $500 million in funds.

Pursuant to Section 2808, the Secretary authorized federal defendants to proceed with construction without environmental law compliance. The "organizational plaintiffs" in this case, Sierra Club and the Southern Border Communities Coalition ("SBCC") (collectively, "Sierra Club") and the State Plaintiffs filed separate suits challenging the federal defendants' anticipated diversion of federal funds to fund border wall construction pursuant to various statutory authorities, including Section 2808.

State Plaintiffs and Sierra Club separately filed motions for partial summary judgment on their Section 2808 claims The district court granted summary judgment and a declaratory judgment to the plaintiffs on their Section 2808 claims with respect to the eleven border wall construction projects. It also granted Sierra Club's request for a permanent injunction, enjoining "the Secretary and federal defendants from using military construction funds appropriated for other purposes to build a border wall in designated border-wall project areas. The district court denied State Plaintiffs' "duplicative request for a permanent injunction as moot."

The Secretary and federal defendants appealed the grant of summary judgment and declaratory relief to State Plaintiffs and Sierra Club, and the grant of a permanent injunction to Sierra Club. State Plaintiffs cross-appealed the denial of their request for a permanent injunction.

The Ninth Circuit first confirmed the State Plaintiffs had Article III standing. For California and joint-plaintiff New Mexico, the border wall would cut through important environmental habitations and infringe on those state's interests in their natural resources. All Plaintiff States also had interest in quasi-sovereign issues. For example, the ability to authorize construction under the NEA without regard to any other provision of law impacted California's ability to

enforce its state laws, including the Porter-Cologne Water Quality Control Act (Water Code § 13000 *et seq.*), California Endangered Species Act (Fish & Game Code § 2050 *et seq.*), and California's state implementation program under the Clean Air Act (42 U.S.C. § 7506(c)(1)). The remaining State Plaintiffs had standing under a theory of economic loss and the loss of tax revenue from diversion of federal resources for completion of the border wall.

The Ninth Circuit also confirmed Sierra Club and SBCC had standing to sue due to the former's member-interest in enjoying the habitat around the proposed site for the border wall, and the latter's member-interest "to monitor and respond to the diversion of funds and the construction caused by and accompanying the national emergency declaration."

On the claims, the Ninth Circuit concluded that State Plaintiffs had a cause of action under the Administrative Procedure Act (APA) to enforce Section 2808's limitations, and Sierra Club had a constitutional cause of action under the Appropriations Clause to claim that, because the diversion of funds was not authorized by the terms of Section 2808, it was unconstitutional. On the merits, the Ninth Circuit held the projects failed to satisfy two of the statutory requirements of Section 2808. They were neither necessary to support the use of the armed forces, nor were they military construction projects. The administrative record showed that the border wall projects were intended to support and benefit the U.S. Department of Homeland Security (DHS)—a civilian agency—rather than the armed forces, and the federal defendants had not established, or even alleged, that the projects were necessary to support the use of the armed forces. The Court noted that bringing land under military jurisdiction for real property accountability purposes did not render the border wall an activity under the jurisdiction of the military department, and thus was not appropriate under authority provided by Section 2808.

On the respective permanent injunction orders, the Ninth Circuit reviewed the district court's orders for an abuse of discretion. The Court held no abuse of discretion by the lower court's order finding Sierra Club was entitled to a permanent injunction enjoining the federal defendants from using military construction funds appropriated for other purposes to build a border wall in the project areas identified as environmentally sensitive; likewise, the Ninth Circuit found no abuse of discretion in ruling the State Plaintiffs' separate request for permanent injunction as duplicative and moot.

TAKE-AWAYS: California's interest as a sovereign in enforcing its various environmental and land-use statutes may confer Article III standing to challenge federal executive action which purports to ignore those statutes under the auspices the NEA.

NOTABLE DISSENTING OPINION: Circuit Judge Collins dissented, in part under the opinion that the construction projects were lawful under Section 2808. Judge Collins asserted that the 11 border-barrier construction projects qualified as military construction projects within the meaning of Section 2808 and were necessary to support the use of the military.

* * *

STATE CASES

Lent v. California Coastal Commission (Apr. 5, 2021) -- Cal.App.5th ---, 2021 WL 1248022.

BACKGROUND: This appeal is from a judgment of Los Angeles Superior Court. Warren and Henny Lent (Lents) purchased beachfront property in 2002. In 2007 the Coastal Commission (Commission) began asking the Lents to remove the structures to enable construction of a public accessway over the easement area. The Lents refused. In 2014 the Commission served the Lents with a notice of intent to issue a cease-and-desist order. The notice advised the Lents the Commission could impose administrative penalties under Public Resources Code section 30821 (Section 30821), a statute enacted that year authorizing the Commission to impose penalties on property owners who violate the public access provisions of the Coastal Act. The Lents refused to remove the structures.

Two weeks before the scheduled hearing on the cease-and-desist order, the Commission staff issued a report detailing the Lents' alleged violations of the Coastal Act. In the report the Commission staff recommended that the Commission impose a penalty of between $800,000 and $1,500,000 (and specifically recommended a penalty of $950,000) but stated that the Commission was justified under the circumstances in imposing a penalty of up to $8,370,000. At the hearing the Commission issued the cease-and-desist order and imposed a penalty of $4,185,000.

The Lents filed a petition for writ of mandate asking the trial court to set aside the Commission's order and penalty. In addition to contending substantial evidence did not support the Commission's determination that the Lents violated the Coastal Act, the Lents argued Section 30821 was unconstitutional on its face because it allowed the Commission to impose substantial penalties at an informal hearing where the alleged violator did not have the procedural protections traditionally afforded to defendants in criminal proceedings. The Lents also argued that Section 30821 was unconstitutional as applied to them and that the penalty violated the constitutional prohibition on excessive fines. The trial court granted the petition in part and denied it in part, ruling substantial evidence supported the Commission's decision to issue the cease-and-desist order and to impose a penalty. The court ruled, however, the Commission violated the Lents' due process rights by not giving them adequate notice of the amount of the penalty the Commission intended to impose. The trial court set aside the penalty and directed the Commission to allow the Lents to submit additional evidence. Both the Lents and the Commission appealed.

HOLDING: The Court of Appeal (Second District, Division 7) held substantial evidence supported the Commission's decision to issue the cease-and-desist order. It also held the Commission did not violate the Lents' due process rights by imposing a $4,185,000 penalty, even though its staff recommended a smaller penalty, because the Commission had previously advised the Lents it could impose a penalty of up to $11,250 per day and the Commission staff specifically advised the Lents that the Commission could impose a penalty of up to $8,370,000. Therefore, the Court of Appeal reversed the trial court's judgment remanding the matter to the Commission.

On the Lents' appeal of the penalty, the Court of Appeal concluded the Lents failed to show Section 30821 was unconstitutional, either on its face or as applied to them. It also concluded that the penalty did not violate the constitutional prohibition on excessive fines. Therefore, the Court of Appeal reversed the superior court's judgment and affirmed the Commission's order.

KEY FACTS & ANALYSIS: The Lents owned beachfront property in Malibu. In 1978 a prior owner of the property applied to the Commission for a coastal development permit to build a house. As a condition of approving the permit, the Commission required the prior owner to dedicate a vertical public-access easement on the eastern side of the property. In 1980 the prior owner recorded an offer to dedicate a five-foot-wide easement, for which a certificate of acceptance was recorded.

Nevertheless, the prior owner constructed a fence and gate adjacent to the sidewalk that blocked access to the easement area from the highway. The prior owner also built in the easement area a wooden deck that sat above the drainpipe and a staircase that provided access from the deck to the house. That staircase occupied 27 inches of the five-foot-wide easement, and the deck provided access to the sand through a (different) staircase.

In 1993 the California Coastal Conservancy (Conservancy) sent a letter to the owners of the property informing them of the easement and stating the Conservancy had "the right to open for public use a five-foot-wide corridor for pedestrian access to and from the shoreline." The Conservancy also stated, however, the easement would "remain closed until the Conservancy locate[d] a management agency and open[ed] this easement to public use." Observing that the gate blocked access to the easement area, the Commission asked the owners to "either remove the gate" or "seek the Conservancy's permission to keep the gate in place during the period that the accessway is officially closed" and remove the gate once the Conservancy decided to open the easement.

The Lents purchased the property in 2002. In April 2007 the Commission sent a letter to the Lents stating the structures in the easement area, including the deck, stairway, and the gate, were inconsistent with the easement and violated the Coastal Act and asking the Lents to remove all structures in the easement area.

During the next several years the Commission and the Lents' attorneys exchanged correspondence in which the Commission asked the Lents to remove the structures in the easement area and the Lents objected for various reasons. Having failed to resolve the issue, the Commission sent a letter to counsel for the Lents in June 2014 stating that, "under the newly enacted Section 30821, ... in cases involving violations of the public access provisions of the Coastal Act, the Commission is authorized to impose administrative civil penalties in an amount up to $11,250 per day per violation."

In September 2015 the Commission served the Lents with a new notice of intent to issue a cease-and-desist order and to impose penalties under Section 30821. In February 2016 the Lents served the Commission with a statement of defense. Among other arguments, the Lents contended the Commission had approved the structures in the easement area, the doctrine of laches barred the Commission from requiring the Lents to remove the stairway, and the

Commission could not impose penalties on the Lents because the Lents had not built the allegedly unpermitted structures.

On November 18, 2016, two weeks before the scheduled hearing on the cease-and-desist order, the Commission staff submitted a report with proposed findings and recommendations. The report stated that under Section 30821, the potential penalty that the Commission could impose was $8,370,000—$11,250 per day for 744 days, beginning November 24, 2014, the date the Commission advised the Lents that their violations of the Coastal Act could expose them to administrative penalties. The Commission staff, however, "taking the most conservative possible approach in weighing the relevant statutory factors," recommended the Commission impose a penalty between $800,000 and $1,500,000, and specifically $950,000. After the presentations, the Commissioners deliberated. Several commissioners stated the Lents' conduct was particularly egregious and warranted a penalty higher than the staff's recommendation. Ultimately, the Commission voted unanimously to issue the cease-and-desist order requiring the Lents to remove the structures in the easement area and to impose a penalty of $4,185,000.

In February 2017 the Lents filed a petition for a writ of mandate. In addition to making the arguments they made during the administrative proceedings, the Lents argued Section 30821 was unconstitutional on its face because it allowed the Commission to impose substantial penalties without providing property owners sufficient procedural protections. The Lents also argued the penalty was an excessive fine under the federal and state constitutions.

The trial court ruled that substantial evidence supported the Commission's cease and desist order, that laches did not bar the Commission from issuing the order, and that the Commission was authorized to impose penalties. Although the trial court ruled the penalty was not constitutionally excessive, the trial court also ruled the Commission violated the Lents' due process rights by deviating upward from the staff-recommended $950,000 penalty without providing the Lents an opportunity to argue against the Commission's reasoning for imposition of a considerably larger fine.

On appeal, the Lents argued that an owner who merely purchases property containing unpermitted structures, but who did not build the structures, does not undertake activity that requires a permit under the Public Resources Code section 30600 in the Coastal Act. According to the Lents, regardless of whether the structures in the easement area required a permit or violated the terms of the easement, the Commission erred in issuing the cease-and-desist order.

The Court of Appeal disagreed and pointedly concluded the law did not support Lents' argument. The Court cited *Leslie Salt Company v. San Francisco Bay Conservation & Development Commission* (1984) 153 Cal.App.3d 605, which reached a similar conclusion for nearly identical statutory language involving a challenge to the McAteer-Petris Act (Gov. Code § 66600 *et seq*.), in concluding that the Lents' interpretation of the Coastal Act was too narrow.

The Court of Appeal affirmed the decision of the trial court that substantial evidence supported the cease-and-desist order. It likewise affirmed that laches did not bar the issuance of the order. Even assuming laches can bar an administrative enforcement action where the agency acquiesces to a defendant's conduct (and there is no showing of prejudice), the Lents' evidence did not

compel the trial court to find the Conservancy and Commission acquiesced; the Lents had been notified on multiple occasions of the public easement.

Conversely, the Court of Appeal reversed the trial court's decision that the Commission violated Lents' due process rights in issuing a higher penalty than initially recommended. The Court of Appeal found that, in this case, the Commission in its 2015 notice of intent informed the Lents how their conduct violated the Coastal Act and provided them with citations to all applicable statutes. Although the Commission did not indicate the specific penalty amount it would impose, it cited Section 30821 and stated the Lents' conduct could warrant penalties of up to $11,250 "for each day the violation has persisted or is persisting, for up to five (5) years."

The Court of Appeal found that Section 30821 was not unconstitutional on its face under *Mathews v. Eldridge* (1976) 424 U.S. 319, or as applied to the Lents. On its face, the Coastal Act allowed for hearing procedures providing notice and authorized discretion for the Commission to impose penalties up to a daily cap. The Coastal Act was not unconstitutional because it did not require a minimum penalty; and while it was possible under the Coastal Act that the Commission could impose fines high enough to violate due process under the informal hearing procedures, the Lents did not make the required showing that such a violation would occur in the "great majority" of cases. Furthermore, the Lents did not show that more robust trial procedures would significantly reduce the risk that the Commission would impose an unjustified fine for a violation of the Coastal Act. The Coastal Act did not impose a quasi-criminal penalty simply because it was intended to deter future unlawful conduct; rather, the fine was a civil administrative penalty, and it did not expose defendants "to the stigma of a criminal conviction."

The Court of Appeal also concluded that the Lents failed to show evidence of bias on the part of the Commission which would render Section 30821 unconstitutional against them. While there may have been some incentive for the Commission to impose higher fees, which they could later expend, the Lents did not make a showing that the motive of the Commission was strong enough to reasonably warrant a "fear of partisan influence" on the Commission's judgment or to cause the commissioners not to hold the balance true between the state and the accused.

Finally, the Court of Appeal rejected the Lents' argument that the penalty against them violated the constitutional prohibition on excessive fines. The trial court found, and evidence supported, that the Lents had a high degree of culpability, there was a relationship between the harm to the public beach access and the penalty, similar penalties were imposed in similar cases for ongoing violations, and the Lents had not sufficiently demonstrated their inability to pay. Therefore, the Court of Appeal reversed the portions of the trial court decision that did not deny the petition in full.

TAKE-AWAYS: The Commission's penalty authority under Section 30821 was not unconstitutional, and the Court of Appeal validated the purpose behind the administrative fines even when (as happened in this case) those fines may be significant. Also, the Court's decision confirmed the permit requirements of the Coastal Act apply against subsequent owners even if a prior owner built the obstructions or unauthorized improvements within an area of the property subject to a permit requirement.

* * *

Felkay v. City of Santa Barbara (Mar. 18, 2021) 62 Cal.App.5th 30.

BACKGROUND: The owner of an oceanfront lot filed a petition for writ of administrative mandamus and complaint for inverse condemnation after the City of Santa Barbara (City) denied a coastal development permit to construct a residence on lot. The trial court denied mandamus relief but entered judgment on jury award for the owner and awarded attorney and expert fees. City appealed.

HOLDING: The Court of Appeal held that: (1) inverse condemnation claim was ripe; (2) any additional development proposals would have been futile and thus were not required; (3) the lot owner sufficiently exhausted administrative remedies; and (4) the City was estopped from arguing that lot owner's failure to challenge on mandamus the City's decision declining to waive the requirements of its coastal development policy precluded him from seeking damages for inverse condemnation. Judgment was affirmed.

KEY FACTS & ANALYSIS: In 2006, Plaintiff Felkay (Plaintiff) purchased an ocean-front residential lot (the property) in the City for $850,000. The property was a "flag lot" consisting of a narrow driveway from the street to the remainder of the property, which then sloped downward toward the ocean, ending in a sheer cliff above the beach.

Plaintiff submitted a proposal to build on the property. A planning commission staff report concluded the bluff top was located at 127 feet of elevation. Because the proposed construction site was located seaward of this elevation, the proposal was inconsistent with City's Local Coastal Plan, Policy No. 8.2 (Policy 8.2), which prohibits, with exceptions not relevant here, development on a bluff face. Staff concluded that, except for Policy 8.2, the proposed project would conform to all applicable zoning and building ordinances. The report also concluded that the area above 127 feet was "not developable." Nevertheless, staff recommended that the planning commission approve the application notwithstanding the inconsistency with Policy 8.2 to avoid an unconstitutional taking. The planning commission rejected the permit because it violated Policy 8.2.

After appealing to the city council, which found that the taking determination was not ripe because Plaintiff had not investigated other potential uses of the land, including development of the area above the 127-foot elevation, agricultural or educational uses, or merging the property with the adjoining lot he owned, Plaintiff filed an action in administrative mandamus under Code of Civil Procedure section 1094.5. Plaintiff also brought causes of action for inverse condemnation based on temporary and permanent regulatory takings, and by physical taking.

The City demurred to the inverse condemnation causes of action. The trial court overruled the demurrer as applied to the regulatory takings, rejecting the City's contentions that the claims were not ripe and that Plaintiff had not exhausted administrative remedies. The trial court sustained the demurrer to the cause of action for inverse condemnation by physical taking.

The trial court also denied the petition for writ of mandate. After a hearing, it concluded that substantial evidence supported the finding that the top of the bluff was located at the 127-foot elevation. The trial court noted that Public Resources Code section 30010 (Section 30010) authorizes the City to approve a project that violates coastal restrictions in order to avoid an

unconstitutional taking, but the court noted that Plaintiff had not presented evidence supporting the factors in *McAllister v. California Coastal Commission* (2008) 169 Cal.App.4th 912, 940 (*McAllister*), namely that the property was purchased with the expectation of residential use, that such expectation was reasonable, that the investment was substantial, and that the proposed development was commensurate with the reasonable investment-backed expectations for the site. Accordingly, the trial court deemed the taking claim abandoned for purposes of the writ petition.

After a series of stipulations of the parties, the trial court issued a statement of decision on the inverse condemnation claims that found: (1) Plaintiff's claims were ripe, (2) Plaintiff sought a variance or modification pursuant to Section 30010, (3) Plaintiff was not required to pursue futile applications, (4) denial of the permit rendered the property unbuildable and deprived Plaintiff of all economic benefit of the property, and (5) the denial constituted a total taking of the property. The court held that a de facto taking occurred because the only remaining use of the property was as vacant land for recreation, parking, or to preserve views. The court rejected the City's argument that "there must be more than one reasonable opportunity for a public agency to consider a meaningful project," and concluded that there would have been no point in Plaintiff going back to the city to pursue a different project.

After a damages trial, a jury found the City was liable to Plaintiff for the fair market value of $2.4 million. After judgment, the trial court ordered the city to pay attorney's and expert witness fees in excess of $1 million, per Code of Civil Procedure section 1036.

The Court of Appeal (Second District, Division 6) affirmed the decision of the trial court. Applying *de novo* review, the inverse condemnation claim was ripe even though Plaintiff did not submit a revised application because the City's decisions "made plain" that Plaintiff could not develop any of his property by rejecting a variance or waiver based on section 30010 as to the area below 127-foot elevation. (*Citing, Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 621 (*Palazzolo*))..

The trial court relied on substantial evidence in determining that Plaintiff exhausted administrative remedies because the rejection of the variance application and refusal to waive Section 8.2 of the policy made it evident "the agency's decision [was] certain to be adverse." (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1430 (*Howard*))..

Finally, the Court of Appeal disagreed with the City that Plaintiff failed to litigate his writ petition to conclusion because he did not argue the Section 30010 claim in those proceedings. In the writ proceedings, Plaintiff challenged the City's determination of the location of the bluff top. On administrative mandamus, the Court reviewed the decision whether to waive an environmental policy pursuant to section 30010 for abuse of discretion. (Code Civ. Proc. § 1094.5, subd. (b); *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515). The City argued that Plaintiff's failure to challenge on mandamus the City's decision declining to waive the requirements of Policy 8.2 pursuant to section 30010 estopped the Plaintiff from seeking damages for inverse condemnation.

In fact, per the Court of Appeal, the City was estopped from making this argument by its stipulation to limit the issues to be heard on mandamus, which reserved the inverse condemnation claims for trial. The City was found to have forfeited the issue by failing to object

to the apportionment of issues between the writ proceedings and trial. (*Bains v. Department of Industrial Relations* (2016) 244 Cal.App.4th 1120, 1126-1128). The City may not gain an advantage by taking a position incompatible with the stipulation it entered in the trial court. (Civ. Code § 3512; *People v. Castillo* (2010) 49 Cal.4th 145, 154-155).. Here, the administrative mandamus petition proceeded to a ruling, and the City proceeded to trial without objecting that a trial was barred by a deficiency in the mandamus proceedings. The City was not prejudiced by the failure to litigate denial of the variance in the writ proceedings, because the issue was heard immediately thereafter by the same judge in the trial court.

TAKE-AWAYS: Before seeking damages for a governmental taking of property through inverse condemnation, a property owner generally must submit more than one proposal to the permitting authority seeking zoning variances or reducing environmental impacts to the extent necessary to allow at least some economically beneficial or productive use of the property. Multiple applications, however, would not be required where a permit denial makes clear that no development of the property would be allowed under any circumstance. Moreover, practitioners may want to exercise caution when making stipulations that result in limitations of claims which, in the ordinary course, may be subject to administrative mandamus procedure and review.

* * *

San Luis Obispo Local Agency Formation Commission v. City of Pismo Beach (Mar. 3, 2021) 61 Cal.App.5th 595.

BACKGROUND: A county's local agency formation commission and Special District Risk Management Authority (SDRMA), an insurance risk pooling authority, that reimbursed the commission brought an action against a city and developer, seeking $400,000 for attorney's fees and costs incurred in defending an appeal brought by a city and developer after the commission denied their application for annexation of real property, which contained an indemnity agreement. The superior court granted the city and developer judgment on the pleadings, and denied the commission's request for leave to amend. The commission and SDRMA appealed.

HOLDING: The Court of Appeal held that: (1) the indemnification agreement was not supported by consideration, as required for a contract; (2) a section of Cortese-Knox-Hertzberg Act (Gov. Code § 56000 *et seq.,* and the "Act") authorizing a local agency formation commission to charge fees does not apply to post-administrative matters; and (3) the commission had no authority under the Act to require an agreement.

KEY FACTS & ANALYSIS: Central Coast Development Company (Central Coast) owned a 154-acre parcel of property within the sphere of influence of the City of Pismo Beach (City). Central Coast wanted to construct 252 single family residences and 60 senior housing units on the parcel. The City approved Central Coast's application for a development permit for the property. The City and Central Coast applied to the San Luis Obispo Local Agency Formation Commission (LAFCO) to annex the property pursuant to the Act.

The LAFCO application signed by the City and Central Coast contained the following indemnity agreement:

> "As part of this application, Applicant agrees to defend, indemnify, hold harmless and release the San Luis Obispo Local Agency Formation Commission (LAFCO), its officers, employees, attorneys, or agents from any claim, action or proceeding brought against any of them, the purpose of which is to attack, set aside, void, or annul, in whole or in part, LAFCO's action on the proposal or on the environmental documents submitted to or prepared by LAFCO in connection with the proposal. *This indemnification obligation shall include, but not be limited to, damages, costs, expenses, attorneys' fees, and expert witness fees that may be asserted by any person or entity, including the Applicant,* arising out of or in connection with the application. In the event of such indemnification, LAFCO expressly reserves the right to provide its own defense at the reasonable expense of the Applicant." (*Italics added*).

LAFCO denied the annexation application. Central Coast sued LAFCO, and the City appeared as a cross-defendant when LAFCO attempted to get its fees from the City. LAFCO prevailed and presented a bill to the City and Central Coast for more than $400,000 in attorney fees and costs. The City and Central Coast refused to pay.

The Special District Risk Management Authority (SDRMA), a public entity self-insurance pool, paid for LAFCO's fees and costs. LAFCO and the SDRMA sued the City and Central Coast to recover its fees and costs. The suit was based on the indemnity provision of the annexation application.

The trial court granted the City and Central Coast (hereafter collectively "the City") judgment on the pleadings against LAFCO and the SDRMA (hereafter collectively "LAFCO"). The court denied LAFCO's request for leave to amend its pleadings. LAFCO contended it had the authority under Government Code section 56383 (Section 56383) to require the indemnity agreement. However, the Court held that section 56383 does not apply to post-administrative matters, such as the action that generated the fees at issue. It concluded that LAFCO had given no consideration in exchange for the indemnity agreement. There was therefore no valid agreement authorizing the provision.

The Court noted that LAFCO ignored subdivision (b) of section 56383. That section provides that the fees and charges "shall be imposed pursuant to Section 66016." (§ 56383, subd. (b)). LAFCO did not comply with section 66016, subdivision (a). When a statute mandates a particular procedure, it does not imply that the procedure may be avoided by inserting a provision in an application form. Thus, LAFCO, pursuant to the Act, had no authority to require the City to agree to indemnify LAFCO for attorney fees and costs incurred after the conclusion of administrative proceedings. Even if construed as broadly as possible, the Act limited LAFCO's authority to charge fees to the administrative process, not post-decision court proceedings. (Gov. Code § 56383, subd. (a)).

Finally, LAFCO had no power implied from its purpose to require the indemnity agreement. LAFCO relied on *Zack v. Marin Emergency Radio Authority* (2004) 118 Cal.App.4th 617. In *Zack*, the question was whether a joint powers agency had the implied power to construct and operate an emergency communications system. The court in that case recognized that such agencies have implied powers necessarily arising or reasonably inferred from those expressly granted, or indispensable to fulfill the purposes for which it was organized. (*Id.,* at p. 633).

In LAFCO's case, however, the Court of Appeal was constrained by Code of Civil Procedure section 1021. That section provides, "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided." In the case at issue, those fees were not specifically provided by statute, nor was there a valid agreement for them.

TAKE-AWAYS: LAFCOs do not have authority under the Cortese-Knox-Hertzberg Act to charge fees for post-administrative decision court proceedings, such as attorney's fees and costs.

POSTSCRIPT: LAFCO filed a Petition for Review in the California Supreme Court. Possibly, there is more to come.

* * *

County of Los Angeles Department of Public Health v. Superior Court of Los Angeles County (Mar. 1, 2021) 61 Cal.App.5th 478.

BACKGROUND: Los Angeles County (County) petitioned for writ of mandate directing the Superior Court, Los Angeles County, James C. Chalfant, J., to immediately stay a preliminary injunction, issued in consolidated cases brought by restaurateurs, enjoining the County from enforcing a COVID-19 order that temporarily prohibited outdoor restaurant dining.

HOLDING: The Court of Appeal (Second District, Division 4) held that the matter was not rendered moot by the County's lifting of the prohibition on outdoor restaurant dining; the order was rationally related to a legitimate state interest of limiting spread of COVID-19; and the order was a reasonable restriction on time, place, and manner of protected assembly that was narrowly tailored to serve a significant government interest, and left open alternative channels for assembling. The County's petition was granted.

KEY FACTS & ANALYSIS: At a time when infection rates were surging, and Southern California's intensive care units were about to be overwhelmed by COVID-19 patients, the County's Department of Public Health issued an emergency order temporarily prohibiting outdoor restaurant dining. Indoor restaurant dining had already been banned. Although the County had no study specifically demonstrating that outdoor restaurant dining contributed to the spread of the disease, according to the County's Chief Medical Officer and Director of Disease Control, the wide consensus in the public health field was that pandemic risk reduction did not require definitive proof that a particular activity or economic sector is "the" cause of an increase in cases. Rather, best practices dictated that public health departments take steps to mitigate identified risks, particularly as infection rates and hospitalizations surged.

In response to the Order, the California Restaurant Association, Inc. (CRA) and Mark's Engine Company No. 28 Restaurant LLC (Mark's) (collectively, the "Restaurateurs"), filed separate suits against the County in superior court. CRA alleged the County "shut down outdoor dining without relying on or making available to the public any competent scientific, medical, or public health evidence stating that outdoor dining poses a substantial risk of unacceptably increasing the transmission of COVID-19." It brought claims for (1) writ of traditional mandate; (2) writ of

administrative mandate; (3) declaratory and injunctive relief; and (4) violation of due process and equal protection. Similarly, Mark's alleged the Order "[was] an abuse of Defendants' purported 'emergency powers' and [was] neither grounded in science, evidence nor logic, and thus should be deemed and adjudicated...to be unenforceable as a matter of law." It brought claims for (1) declaratory judgment; and (2) infringement of its right to liberty.

While the action was pending in the trial court, the California Governor issued a "Regional Stay At Home Order," which took effect on December 5, 2020 (Regional Order). The Regional Order, among other things, prohibited indoor and outdoor dining at restaurants in the Southern California region in the event available ICU beds in the region fell below specified capacity. The Regional Order was to remain in effect for at least three weeks and, after that period, would be lifted if the region's ICU availability projection for four weeks equaled or exceeded 15% of capacity.

On December 15, 2020, the trial court entered an order enjoining the County from enforcing or enacting any County ban on outdoor dining after December 16, 2020, unless and until its public health officers "conduct[ed] an appropriate risk-benefit analysis and articulate[d] it for the public to see."

Applying its *de novo* review to determine whether the County abused its discretion and referencing the deferential standard for evaluating state and local agencies' responses to public health emergencies, the Court of Appeal concluded there was no likelihood the Restaurateurs would prevail on the merits of their claims, and that the trial court abused its discretion by issuing a preliminary injunction. The appellate court also held the matter was not moot because the County made it clear it may re-impose its prohibition on outdoor dining if the region faced another surge. The matter therefore fit squarely within an exception to mootness: Where the challenged action was in its duration too short to be fully litigated prior to cessation or expiration, and there was a reasonable expectation that the same complaining party would be subject to the same action again.

In reversing the trial court's order, the Court of Appeal also noted that the Restaurateurs failed to satisfy their burden of demonstrating the County order was arbitrary, capricious, or without rational basis. The Court declined to second guess public health officials' actions in an area fraught with medical and scientific uncertainties, that the County had followed in issuing the order.

Mark's separately contended the County order violated its (or its patrons') First Amendment right to freedom of assembly under the United States Constitution. The Court of Appeal rejected Mark's argument on the merits, specifically referencing that states and public agencies may impose reasonable restrictions on the time, place, and manner of protected speech and assembly provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. The Court held that the Order met that standard.

First, the County order did not regulate assembly based on the expressive content of the assembly. Second, it was undisputed limiting the spread of COVID-19 was a legitimate and

substantial government interest. Third, the County order left open alternative channels for assembling, *i.e*., videoconference or in-person socially distant gatherings with face coverings. The Court of Appeal concluded this order did not violate Mark's purported First Amendment right to freedom of assembly or that of its patrons.

TAKE-AWAYS: Another COVID-19 case, supportive of public agency orders to mitigate the spread of the virus. The appellate court upheld government action that purports to protect the public health in an emergency unless the action has no real or substantial relation to the object of public health or is beyond all question, a plain, palpable invasion of rights secured by fundamental law. A public agency may rely on the advice of public health officials in acting to protect public health in an emergency and is not required to conduct its own risk-benefit analysis.

* * *

Sweeney v. California Regional Water Quality Control Board, San Francisco Bay Region (Mar. 18, 2021) 61 Cal.App.5th 1.

BACKGROUND: A duck hunting club and its president filed separate petitions for writs of mandate contesting the Regional Water Quality Control Board's (Board) cleanup and abatement order and administrative civil liability order regarding a levee which had been reconstructed on a wetland marsh island. The Solano County Superior Court granted the petitions. The Board appealed, and the appeals were consolidated.

HOLDING: The Court of Appeal (First District, Division 3) held that: (1) dredged fill material used to replace a breached levee constituted "waste" under the Porter-Cologne Water Quality Control Act (Wat. Code § 13000 *et seq.*, referred to as the Porter-Cologne Act); (2) the cleanup and abatement order did not violate the Suisun Marsh Preservation Act; (3) at least some discharges of fill material on a wetland island occurred in waters of the United States, for purposes of U.S. Clean Water Act; (4) evidence was sufficient to support a finding that the levee project violated a basin plan requirement prohibiting discharges into surface waters that affect beneficial uses; (5) substantial evidence supported a determination that the $2.8 million penalty correlated with the harm caused; (6) substantial evidence dispelled any appearance of vindictiveness; and (7) The Board sufficiently separated prosecution and advisory teams. The decision of the trial court was reversed and remanded with directions.

KEY FACTS & ANALYSIS: Point Buckler (the Site) is a 39-acre tract located in the Suisun Marsh. John Sweeney purchased the island and subsequently transferred ownership to Point Buckler Club, LLC (Club) (Sweeney and the Club are collectively referred to as Respondents). For months, Respondents undertook various unpermitted development projects at the Site, which included the restoration of an exterior levee surrounding it that had been breached in multiple places.

The consolidated appeals concerned two orders issued by the Board (San Francisco Bay Region) against Respondents. The first order was a cleanup and abatement order (CAO), which found Respondents' development activities were unauthorized and had adverse environmental effects. These included impacts to tidal marshlands, fish migration, and aquatic habitat. The second order imposed administrative civil liabilities (ACL) and required Respondents to pay

approximately $2.8 million in penalties for their violations of environmental laws and regulations.

Respondents successfully challenged both orders in writ proceedings in the superior court. On appeal, the Board contended that the trial court made numerous legal and factual errors leading it to improperly set aside the Board's orders. The Court of Appeal agreed and reversed both trial court judgements.

First, the appellate court reviewed the trial court's decision on the CAO under the substantial evidence test, reviewing issues of law *de novo*. The trial court set aside the CAO due to the Board's failure to comply with the requirements of Water Code section 13267 (Section 13267). The trial court reasoned the CAO had only "a conclusory statement asserting that it complie[d] with § 13267, but [did] not include the written explanation or otherwise explain why the burden [bore] a reasonable relationship to the need." The Board contended that the trial court misinterpreted the duty imposed by Section 13267 and that there was no violation warranting the setting aside of the CAO. Section 13627 requires the burden of conducting site investigations and producing reports to be reasonable in light of the benefits to be obtained. But Section 13267 contains no requirement that a CAO include any type of weighing or cost-benefit analysis. Under Section 13267 the Board had to (1) provide "a written explanation with regard to the need for the reports;" and (2) "identify the evidence that support[ed] requiring that person to provide the reports." (Wat. Code § 13267). Here, the CAO explained the need for the reports and identified the evidence supporting the Board's demand and thus complied with the section.

Second, the appellate court concluded the Board met the conditions for issuing a CAO under Water Code section 13304, subdivision (a) (Section 13304(a)). The dirt used to construct the levee on Respondents' property was "waste" under the Porter-Cologne Act as it resulted in excess sedimentation when deposited in the tidal marsh around the Site, and restricted the habitat used by various wildlife. That waste was discharged during the replacement of levies. The waste was discharged into the "waters of the state." Evidence of potential habitat harm was sufficient to qualify the waste as "pollution."

Third, the appellate court considered the effect of the Suisun Marsh Preservation Act on the Board's ability to issue the CAO. (Pub. Res. Code § 29113, subd. (a)).. The Court agreed with the Board that the Suisun Marsh Preservation Act did not apply to enforcement actions taken by state agencies under authorizing provisions of state law. Even if the Suisun Marsh Preservation Act applied to the actions of the Board, the Court concluded that the CAO did not violate it because that act allowed the California Attorney General, at the Board's request, to pursue actions to stop the pollution of wetlands. In the case at issue, the Attorney General had filed a cross-complaint against Respondents to enforce the CAO. The Suisun Marsh Preservation Act likewise did not exempt Respondents from the requirement to comply with other water quality laws, such as those under Water Code section 13304, subdivision (a).

Fourth, the appellate court considered the trial court's decision to set aside the ACL order. The Court reviewed the Board's decisions for substantial evidence, and the trial court's findings of law *de novo*. The Court found that substantial evidence supported the Board's fine on Respondents because the levee was constructed in violation of the applicable basin plan and the Clean Water Act. The levee construction converted the Site from a tidal marshland and

adversely affected the environment. The Court concluded that the fine was neither unreasonable nor excessive under the Eighth Amendment to the United States Constitution, considering the maximum liability and the cost of bringing suit. It also found that Respondents had the ability to pay. Additionally, as with the trial court's decision regarding the Suisun Marsh Preservation Act, it was reversible error to determine the ACL violated the Suisun Marsh Preservation Act.

Fifth, the appellate court rejected Respondents' claims that the actions of the Board were vindictive prosecution. Even assuming that vindictive prosecution doctrine could apply outside of criminal proceedings, and that Respondents succeeded in making a prima facie case, there was substantial evidence showing the methodology and policy behind the CAO and ACL order.

Finally, Respondents failed to make a sufficient showing that the Board's administrative review and issuance of the CAO and ACL order were unfair or a deprivation of due process. The Board adhered to procedures regarding its adjudicative authority, and there was no establishment of an unacceptable risk of bias on the part of the Board.

TAKE-AWAYS: For practitioners in and around the Delta-Bay Area, the Suisun Marsh Preservation Act does not override authority granted under other state law, such as under the Porter-Cologne Act. More generally, dredged material, dirt, and other material can be "waste" for the purposes of the Porter-Cologne Act when they are deposited into a tidal marsh and impact surrounding habitats.

U.S. DISTRICT COURT DECISION: While the consolidated appeal was pending in the First District Court of Appeal, a federal district court decision was issued in *United States v. Sweeney* (E.D. Cal., Sept. 1, 2020) 483 F.Supp.3d 871 (*Sweeney* District Court Opinion), which adjudicated the federal government's claims against Respondents for their activities at the Site under the Clean Water Act. In that case, the district court entered judgment in favor of the plaintiff United States against Respondents. The district court determined Sweeney violated and remained in violation of the Clean Water Act as a result of unpermitted, non-exempt construction of a levee and other additions of pollutants (dredged or fill material) to waters of the United States on Point Buckler Island. The district court also found the Club in violation of the Clean Water Act for Sweeney's actions. In reaching its decision, the district court made several factual findings, including that the Respondents' levee blocked tidal flow into the island resulting in the destruction of wetlands vegetation and harm to water quality and aquatic habitat that adversely affected fish. In determining that Respondents violated the Clean Water Act, the court concluded as a legal matter that Respondents' discharges occurred in "waters of the United States" because "at the time [Respondents] initiated their activities, Point Buckler Island consisted almost entirely of tidal-water channels and marsh wetlands abutting tidal waters..., and [Respondents] discharged pollutants into those aquatic waters."

* * *

Organizacion Comunidad De Alviso v. City of San Jose (Feb. 9, 2021) 60 Cal.App.5th 783.

BACKGROUND: Plaintiff organization brought suit under the California Environmental Quality Act (CEQA), challenging a city's impact determination with respect to a particular project. The

Santa Clara County Superior Court entered judgment of dismissal after demurrer, and the organization appealed.

HOLDING: The Court of Appeal (Sixth District) held that: (1) a second Notice of Determination (NOD) posted by city, which corrected the earlier misidentification and was not claimed to be defective in any way, started the 30-day deadline under CEQA for challenges to that determination; (2) plaintiff's constructive notice, as resulted from corrected NOD posted at the county clerk's office, prevented it from relying on the "relation back" doctrine to establish the timeliness of its challenge; (3) any reliance on a defect in the original NOD was unreasonable as a matter of law, and thus insufficient to support an equitable estoppel claim against the city; and (4) leave to amend the petition was properly denied as futile. Judgement of the trial court was affirmed.

KEY FACTS & ANALYSIS: Mark Espinoza, a member of plaintiff Organizacion Comunidad de Alviso (Plaintiff), asked a planner for the City of San Jose (City) to place him on the public notice list for a proposed project which would rezone fallow farmland for light industrial uses. Plaintiff also twice specifically requested a copy of the NOD documenting the City's certification of an environmental impact report (EIR) and approval of a project—once after the city council initially approved the project and again after the council denied a motion for reconsideration and re-approved the project. The City filed two NODs for the project. The first NOD listed the wrong project applicant. The second NOD correctly listed Microsoft Corporation (Microsoft). Despite Plaintiff diligently and repeatedly requesting all notices for the project, the City, allegedly inexplicably and in violation of CEQA, failed to send Plaintiff the second NOD.

Relying on the first NOD that the city did email to Plaintiff, he named the wrong real party in interest in its initial petition for writ of mandate. Plaintiff did not file an amended petition naming Microsoft until well after the 30-day statute of limitations from the second, correct NOD, had run. The trial court determined that the initial petition was defective for failing to join Microsoft as a necessary and indispensable party, and the trial court dismissed the CEQA cause of action in the amended petition as untimely.

Plaintiff argued on appeal that the trial court applied the incorrect statute of limitations, and alternatively that the trial court should have applied either estoppel or the relation back doctrine (Code Civ. Proc. § 474) in light of the City's conduct. The Court of Appeal acknowledged that the City violated CEQA by failing to send the second NOD to Plaintiff, but CEQA contained no remedy for that violation. In any event, the second NOD was properly filed with the county clerk. Thus, the City provided constructive notice of the correct parties to sue, and Plaintiff did not timely amend its petition to name Microsoft per Public Resources Code section 21167, subdivision (c). On close examination of the relevant statutes, the Court concluded that dismissal of the CEQA action was not error.

Additionally, there was no reversible error when the trial court declined to apply the relation back doctrine of Code of Civil Procedure section 474, to allow substitution of Microsoft in place of a "Doe" real parties in interest. Because Plaintiff had constructive notice of the second NOD, the identity ignorance requirement for the relation back doctrine was not met. For this same reason, there was no reversible error by the trial court's conclusion not to apply equitable

estoppel. Additionally, there was no reversible error for the trial court to sustain the City's demurrer without leave to amend because there was no reasonable possibly that any defect identified in the demurrer could have been cured by amendment, *i.e.,* failure to timely sue Microsoft under CEQA.

TAKE-AWAYS: A corrected NOD that is otherwise not defective starts CEQA's 30-day clock, even as to an individual who requested receipt of any NOD but did not receive the corrected NOD. The Court of Appeal confirmed the doctrine of constructive notice, which was met here when the corrected NOD was posted at the county clerk's office.

* * *

Schmid v. City and County of San Francisco (Feb. 1, 2021) 60 Cal.App.5th 470.

BACKGROUND: Two taxpayers brought an action against the City and County of San Francisco (City) and affiliated defendants, seeking to overturn an order authorizing removal of a bronze sculpture. The trial court sustained a demurrer without leave to amend. Taxpayers appealed.

HOLDING: The Court of Appeal (First District, Division 4) held that: (1) taxpayers failed to allege any threats, intimidation, or coercion, as required to support their claim that City and affiliated defendants violated the Tom Bane Civil Rights Act (Civ. Code § 52.1, and referred to as the Bane Act) by removing a sculpture; (2) taxpayer failed to allege facts supporting his claim that the City's board of appeals' affirmance of a commission's grant of a certificate of appropriateness to take down a sculpture was motivated by discriminatory animus; (3) taxpayer failed to allege a viable basis for a claim that City acting through its board of appeals violated federal law pertaining to national historic district and grant money; (4) taxpayer failed to state a viable public nuisance claim; (5) taxpayer failed to exhaust administrative remedies under the California Environmental Quality Act (CEQA); (6) taxpayer did not have standing to enforce the terms of a charitable trust; and (7) taxpayer's challenge to removal of a sculpture prior to installation of a plaque explaining the removal did not provide a basis for issuance of a traditional writ of mandate. Judgment of the trial court affirmed.

KEY FACTS & ANALYSIS: At issue was an administrative decision made by the City's Board of Appeals (the Board of Appeals or the Board) authorizing the removal of a bronze sculpture known as "Early Days," which was originally part of a Civic Center monument to the pioneer period of California (the Pioneer Monument).

In 2018, at the request of the San Francisco Arts Commission, the San Francisco Historic Preservation Commission (HPC) granted a Certificate of Appropriateness (COA) "to alter a small scale character-defining feature in the Civic Center Landmark District"—specifically, to take down the sculpture titled "Early Days" and place it in storage. Acting upon evidence of "significant adverse public reaction over an extended period of time," HPC adopted a motion authorizing the removal of Early Days pursuant to the COA, and the Board affirmed it.

Plaintiffs Schmid and Briggs opposed the removal, sued the City and affiliated defendants, alleging that the Board abused its discretion in authorizing the removal of Early Days and that the manner of the removal, which took place in the pre-dawn hours of the day following the

Board's decision. Among Plaintiffs' many claims was a claim that HPC violated CEQA when finding that removal of Early Days did not require an environmental impact report (EIR).

The Court of Appeal reviewed the majority of the claims *de novo*, except for the mandamus action. Writ relief was sought under both Code of Civil Procedure sections 1094.5 and 1085 on two grounds: First, and primarily, Plaintiff Schmid alleged that, on September 13, 2018, "[the City], acting through and by its Board of Appeal[s] issued its final administrative order denying plaintiff's appeal." Second, Plaintiff alleged that, on September 14, "in a pre-dawn action, [the City] forcefully and by violent means removed the Early Days, desecrating, mutilating and altering it and the Pioneer Monument in the process." Plaintiff alleged that both of these administrative actions—first, the final adjudication affirming the grant of the COA, and second, the implementation of that final administrative decision—were "invalid" and constituted "abuses of authority."

The Court reviewed the Section 1094.5 claim for abuse of discretion, and the Section 1085 claim for whether it was arbitrary, capricious, or entirely lacking in evidentiary support, or whether the agency failed to follow the procedure and give the notices the law requires. The Court of Appeal found that Plaintiff Schmid alleged nothing to support his conclusory allegations that the Board of Appeals acted in excess of its authority or abused its discretion. The Court also found that the decision was not motivated by discriminatory animus under *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018) 584 U.S. ---, 138 S.Ct. 1719, did not violate his "right to the preservation of fine art under the California Arts Preservation Act, nor did it violate federal historic preservation standards, nor any trust duties, nor was the action a public nuisance.

The CEQA Claim

For purposes of CEQA claim, Plaintiff Schmid alleged the City, through the Board of Appeals, "failed its obligation to adhere to CEQA protection for historic resources by refusing to require an EIR." The Court of Appeal upheld the conclusion of the trial court that the CEQA allegations stated no cognizable claim because Plaintiff Schmid did not appeal the removal to the Board of Supervisors as required to exhaust administrative remedies under CEQA. (Pub. Res. Code § 21151, subd. (c)).

The exhaustion requirement mandates that each allegation of noncompliance with CEQA, including disagreement with a determination of a categorical exemption, must be "presented to the public agency" orally or in writing...prior to the close of the public hearing" at which the CEQA decision is made. (Pub. Res. Code § 21177 subd. (a)). A litigant must also have been personally responsible for raising some claim of noncompliance with CEQA before the decision was made. (Pub. Res. Code § 21177, subd. (b)). These two statutory prerequisites may be overlooked, however, if notice of the hearing was defective. (Pub. Res. Code § 21177 subd. (e)).

Here, the Court of Appeal agreed with Plaintiff that the notice of hearing was defective because it did not mention CEQA or indicate that a CEQA determination was going to be made. However, a defective HPC hearing notice only relieved Plaintiff from the requirements of Public Resources Code section 21177, subdivisions (a) and (b) that any objection he may have had to the categorical exemption be presented to the HPC. The defective HPC hearing notice did not

excuse Plaintiff from exhausting additional administrative review remedies that were available to him when he failed to appeal to the appropriate body (the Board of Supervisors).

Remaining Claims

Plaintiffs alleged violation of the Bane Act by removing Early Days and blocking access to a dedicated resource in a public forum. The essence of a Bane Act claim is that a defendant by specified improper means (*i.e.*, 'threats, intimidation or coercion') tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law. Because Plaintiffs could not allege conduct arising to a level of a threat of violence, and additionally failed to satisfy the requirement that the city engaged in coercion, the claim was dismissed as being without merit.

Separately, Plaintiff Briggs alleged that storage of the statue was a waste of public funds under Code of Civil Procedure section 526a. This section establishes the right of a taxpayer plaintiff to maintain an action against any officer of a local agency to obtain a judgment restraining or preventing illegal expenditure, waste, or injury of the estate, funds, or property of the agency. The Court of Appeal upheld the trial court's sustaining the demurrer with respect to this cause of action because expending City funds to store the statue was within the discretion of the arts commissioner.

Finally, Plaintiffs Schmid and Briggs contended that the trial court abused its discretion when refusing to grant them leave to amend the first amended complaint to cure the defects for which dismissal was ordered. The Court of Appeal disagreed. Based on repeated insistence by Plaintiffs that they had already alleged enough to support the pleaded claims, the trial court concluded that this evidentiary proffer would have added nothing materially new to the first amended complaint. The Court of Appeal concluded that the trial court did not abuse its discretion by refusing to grant leave to amend.

TAKE-AWAYS: A defective hearing notice regarding CEQA determinations for a meeting at an intermediary review board or commission (*e.g.,* planning commission) does not excuse opponents of a project, potentially subject to or exempt from CEQA, from exhausting additional administrative review remedies that are available.

* * *

City of Duarte v. State Water Resources Control Board (Feb. 19, 2021) 60 Cal.App.5th 258.

BACKGROUND: City of Duarte (City) petitioned for writ of mandate, challenging a decision by the State Water Resources Control Board (State Board) and Los Angeles Regional Water Quality Control Board (Regional Board, and collectively the Boards) to impose water quality-based effluent limitations (WQBELs) in the City's National Pollutant Discharge Elimination System (NPDES) permit. Following transfer from Los Angeles County, the Orange County Superior Court granted City's petition by invalidating portions of the permit that imposed numeric effluent limitations. The Boards appealed.

HOLDING: The Court of Appeal (Fourth District, Division 3) held that: (1) it would not take judicial notice of summaries of regulatory total maximum daily loads (TMDL) for pollutants within the area covered by a permit; (2) any error by the trial court in failing to issue a statement of decision was harmless; and (3) as matter of first impression, the Boards gave sufficient consideration to economic effects of a permit's numeric WQBELs before issuing permit. Judgment reversed and case remanded to deny the writ and enter judgment for the Boards.

KEY FACTS & ANALYSIS: This case involved a NPDES permit issued by state and local water control boards that requires 86 Southern California municipalities to reduce or prevent pollutants discharged through storm sewer systems by meeting numeric effluent limitations. The trial court found that, because the permit obligated the municipalities to meet more stringent standards than required by federal law, the water boards had to consider the factors identified in Water Code section 13241 (Section 13241), including but not limited to economic considerations (§ 13241, subd. (d)), before issuing the permit. The trial court also found that the water boards had not sufficiently considered the Section 13241 factors, and invalidated the portions of the permit that imposed the numeric effluent limitations. Conversely, the Court of Appeal held that, under the applicable standard of review and giving appropriate consideration to the Boards' expertise and discretion in the interpretation of Section 13241, the permit's numeric effluent limitations had to be upheld as a matter of law. As such, the Boards' consideration of the relevant factors was sufficient.

More specifically, in November 2012, the Regional Board issued a NPDES permit to 86 municipal entities in Los Angeles County (the Permittees), Order No. R4-2012-0175, NPDES Permit No. CAS004001. In June 2015, the State Board upheld the permit with modifications in Order No. WQ-2015-0075 (Permit). The Permit defined the measures the Permittees must take to prevent or reduce the amount of pollutants discharged via their MS4s and includes numeric effluent limitations.

The City owned and operated an MS4 and was one of the Permittees. In the State Board's order upholding and modifying the Regional Board's 2012 permit, the State Board noted that, while all MS4 discharges must reduce pollutants to the maximum extent practicable, strict compliance with water quality standards by imposing numeric effluent limitations is at the discretion of the permitting agency. The State Board further noted that many MS4s within the Los Angeles water basin were not meeting existing water quality standards even with using best management practices. Therefore, the State Board approved the Regional Board's decision to adopt numeric WQBELs rather than best management practices-based WQBELs in the Permit.

The issues in the case were two-fold: Did the numeric effluent limitations in the Permit require more than is required under federal law? And if so, did the Boards sufficiently consider the economic considerations factor required by Section 13241 before issuing the Permit?

On the first issue, the Court of Appeal assumed, without deciding, the Permit was more stringent than federal law. Thus, the Boards were required to consider the factors set forth in Section 13241. The Court of Appeal reviewed the trial court's factual findings under the substantial evidence standard and its legal conclusions under the *de novo* standard. The Court reversed the judgment because, among other things, the Boards explained that the cost of regulating MS4 discharges is "highly variable" among the Permittees, provided ranges and

averages of cost data and economic impacts in several categories, considered how much more the Permittees' costs might be under the Permit's terms, identified potential sources of funds to cover the costs of the Permit, and concluded the failure to regulate would increase health-related expenses. The appellate court concluded that the Boards' analysis of economic considerations was well within their discretion.

The considerations in the case were not an exclusive list of the facts to be considered under Section 13241, subdivision (d). Indeed, the Court of Appeal highlighted that every case arising under this statute will differ as to what economic considerations must be evaluated. The Court noted that its opinion illustrated by example the extent of the Boards' discretion, but that discretion is not unlimited and is subject to judicial review. In the case at issue, the record showed that the Boards explained their reasoning and acted within their discretion.

The City contended that the Boards were required to do a more detailed analysis for each Permittee. The appellate court found no support in precedent for such an extensive requirement, concluding there is "no authority for the proposition that a consideration of economic factors under Section 13241 must include an analysis of every conceivable compliance method or combinations thereof or the fiscal impacts on permittees." Further, a TMDL that includes "estimated costs of several types of compliance methods and a cost comparison of capital costs and costs of operation and maintenance...is adequate and does not fall under the arbitrary or capricious standard." The Court also ruled that any error by the trial court in failing to issue a statement of decision was harmless.

TAKE-AWAYS: To comply with Section 13241, the Regional Board must only consider costs of compliance in setting effluent limitations, without application of a detailed analysis explaining those costs for each permittee subject to a NPDES permit. Practitioners thus have little "black and white" court guidance, as every case arising under this statute will differ as to what economic considerations may (or must) be evaluated.

* * *

Self v. Cher-Ae Heights Indian Community of Trinidad Rancheria (Jan. 26, 2021) 60 Cal.App.5th 209.

BACKGROUND: Plaintiffs brought an action against Native tribe to quiet title to public easement for coastal access on tribal property. Humboldt County Superior Court granted the tribe's motion to quash service of process and to dismiss the complaint, and plaintiffs appealed.

HOLDING: The Court of Appeal held that tribal immunity barred the action. Judgment was affirmed.

KEY FACTS & ANALYSIS: Defendant Cher-Ae Heights Indian Community of the Trinidad Rancheria (Tribe) was a federally recognized Indian tribe. (84 Fed.Reg. 1200-01, 1201 (Feb. 1, 2019)). It purchased the coastal property at issue in fee simple absolute. The Tribe had applied to the federal Bureau of Indian Affairs (Bureau) to take the property into trust for the benefit of the Tribe. (*See* 25 U.S.C. § 5108). The Bureau determined the Tribe's proposal was consistent with state coastal policies, including public access requirements in the state Coastal Act. (*See*

Pub. Res. Code § 30210 ["maximum access...and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse"]; *see also, e.g.*, Pub. Res. Code §§ 30211, 30212, 30214).

According to the complaint, Plaintiff Jason Self used the Tribe's coastal property to access the beach for recreational purposes and for his kayaking business. Plaintiff Thomas Lindquist also used the property to access the beach for recreation. They alleged that the prior owner of the property dedicated a portion of it to public use, either expressly or impliedly, between 1967 and 1972. (*See* Civ. Code § 1009 subd. (b) [limiting implied dedications of public easements to those established prior to March 4, 1972]). The complaint sought to quiet title to a public easement for vehicle access and parking on the property.

Plaintiffs did not allege that the Tribe had interfered with their coastal access or that it planned to do so. They worried that the Tribe might do so in the future, and they filed this case out of "an abundance of caution." Once land is placed in trust, the federal government would hold title to it for the benefit of the Tribe. (*See* 25 U.S.C. § 5108). The United States is immune to actions to quiet title to Indian trust land. (28 U.S.C. § 2409a, subd. (a)).

In the trial court, the Tribe entered a special appearance and, citing sovereign immunity, moved to quash service of process and to dismiss the complaint for lack of subject matter jurisdiction. The trial court granted the motion and dismissed the case with prejudice. On appeal Plaintiffs argued that the trial court should have recognized an existing common law exception to sovereign immunity typically held by an Indian tribe absent a waiver or congressional abrogation of the tribe's immunity. Plaintiffs contended that, at common law, sovereigns such as states and foreign governments were not immune to property disputes, under the immovable property exception. The Court of Appeal observed that the United States Supreme Court had never applied such an exception to a tribe and recently declined to decide the question in *Upper Skagit Indian Tribe v. Lundgren* (2018) 584 U.S. ---, 138 S.Ct. 1649, 1652 (*Upper Skagit*).

The Court of Appeal reviewed the immunity issue *de novo*. (*People v. Miami Nation Enterprises* (2016) 2 Cal.5th 222, 250). The Court decided that Plaintiffs were correct that states and foreign sovereigns were not immune to suits regarding real property located outside of their territorial boundaries. The Court was not persuaded, however, that a common law exception extends to tribes or that the Court should have departed from the standard practice of deferring to Congress to determine limits on tribal immunity.

In this regard, the Court of Appeal noted that the history of precedent weighed strongly in favor of deferring to Congress to weigh the relevant policy concerns of an immovable property rule in light of the government's solemn obligations to tribes, the importance of tribal land acquisition in federal policy, and Congress's practice of selectively addressing tribal immunity issues in property disputes.

Lastly, the Court of Appeal observed that this case was a poor vehicle for extending the common law exception for immovable property to tribes. There was no alleged injury or consideration of the public interest.

TAKE-AWAYS: States and foreign sovereigns are not immune to suits regarding real property located outside of their territorial boundaries. However, the United States Supreme Court has not yet answered whether the sovereign immunity of Native tribes is also abrogated for suits regarding real property outside the territory of a tribe. Thus, courts likely will defer to Congress for undecided issues which may potentially abrogate the sovereign immunity of tribes.

POSTSCRIPT: The was a concurring opinion, but with distinct reasoning from the panel majority. The concurring opinion would have held that the immoveable property common law exception to sovereign immunity did apply to tribes, but that once a tribe petitions to bring land within federal trust, the nuanced scheme created by Congress for consideration of such petitions preempts litigation like this case.

* * *

Decea v. County of Ventura (Jan. 15, 2021) 59 Cal.App.5th 1097.

BACKGROUND: Landowner petitioned for "exclusion" under the Subdivision Map Act (Gov. Code § 66410 *et seq.,* and referred to as the Map Act), seeking orders to declare a parcel map void and restoration of the historical lot lines, which would allow the landowner to reconfigure parcel into two lots. Ventura County Superior Court dismissed the petition, and the landowner appealed.

HOLDING: The Court of Appeal (Second District, Division 6) held that laches barred the landowner's petition for exclusion.

KEY FACTS & ANALYSIS: Appellant bought a house in the Lake Sherwood community of Ventura County (County) in 2007. The house sat within "Parcel A" on a map recorded by a former owner in 1974. The 1974 map also included historical lot lines from a subdivision map recorded by the original developers in 1923. Parcel A overlayed three of these historical lots and parts of two others. They totaled 1.04 acres.

In 2017, Plaintiff landowner (Plaintiff) sought to reconfigure Parcel A into two half-acre lots. The plan stalled when the County Surveyor told Plaintiff that Parcel A consisted of one legal lot, not five. This meant Plaintiff could not subdivide the property without falling below the area's one-acre minimum lot size. Plaintiff disputed the validity of the 1974 parcel map and whether the former owner legally merged the five original lots into one. The County did not change its position.

Plaintiff sought relief by petitioning for "exclusion" under the Map Act, seeking orders to declare the 1974 parcel map void and restoration of the historical lot lines. Plaintiff claimed that, even if the 1974 map were properly recorded, it would not erase the 1923 lots and merge them into Parcel A. Plaintiff's evidence included excerpts of audio recordings discussing the parcel map at two administrative hearings in 1985, and the petition cited Sixth District Court of Appeal's decision in *Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, one of the few authorities to explore the Map Act's merger provisions.

The County responded by objecting to Plaintiff's petition and asserting the 1974 map's validity. It pointed to parts of the hearing transcripts indicating the owner knew officials considered Parcel A one legal lot yet failed to contest the interpretation. The County requested the court dismiss the petition under the doctrine of laches.

Substantial evidence supported the finding that the original owner knew the 1974 map contained at least one error he could fix by submitting a corrected parcel map. The prior owner did not. Admittedly, the error identified in 1985 was a single misplaced lot line. The hearings did not directly address the core issue of Plaintiff's petition, *i.e*., whether the historical lots within Parcel A's boundaries legally merged into one under the Map Act. The original owner's dialogue with the County, though, showed he acknowledged the 1974 map's validity and knew what he had to do to correct any errors. The County heard nothing further from the original owner or his successors until 2017.

As the trial court observed, the testimony of the original owner and his contemporaries "would have been highly probative" to the issues raised in Plaintiff's petition. The loss of this testimony thus constituted substantial evidence of prejudice. The Court of Appeal declined to second guess the trier of fact where, as in the case at issue, the evidence was susceptible to more than one reasonable factual conclusion. The Court affirmed the decision of the trial court and concluded that laches barred the petition because the time to address the map's purported errors occurred 35 years ago, and it would be inequitable to awaken them now.

* * *

Santa Clara Valley Water District v. San Francisco Bay Regional Water Quality Control Board (Dec. 29, 2020) 59 Cal.App.5th 199.

BACKGROUND: Water district petitioned for a writ of administrative mandate challenging regional water quality control board's order under federal Clean Water Act, Porter-Cologne Water Quality Control Act (Wat. Code § 13000 *et seq*. (Porter-Cologne Act)), and California Environmental Quality Act (Pub. Res. Code § 21000 *et seq*. (CEQA)) to mitigate environmental effects of flood control project. Contra Costa County Superior Court denied the petition, and the water district appealed.

HOLDING: The Court of Appeal (First District, Division 4) held that: (1) the project's sedimentation effects constituted a discharge of "waste" within meaning of Porter-Cologne Act; (2) any failure by the regional board to challenge adequacy of mitigation measures in the district's final environmental impact report (EIR) pursuant to CEQA did not bar the regional board from imposing additional mitigation requirements under Porter-Cologne Act; (3) the regional board was not collaterally estopped from imposing additional mitigation requirements; and (4) substantial evidence supported the regional board's decision to require larger compensatory mitigation area than the area impacted by project. Judgement affirmed.

KEY FACTS & ANALYSIS: The Regional Water Quality Control Board, San Francisco Bay Region (Regional Board) ordered the Santa Clara Valley Water District (District) to mitigate the environmental effects of a flood control project. The order, which was issued when construction on the project was almost complete and two years after the EIR for the project was prepared,

stated that it was rescinding and superseding the previous section 401 certification and replacing it with a new certification and waste discharge requirements (WDRs). The order also stated that it was issued under the authority of Water Code section 13263, subdivision (a), which is part of the Porter-Cologne Act, and title 23, California Code of Regulations, section 3857. The District sought review of the Regional Board's order from the State Water Resources Control Board (State Board) in May 2017.

While its petition for review before the State Board was pending, the District filed a petition for writ of administrative mandamus under Code of Civil Procedure section 1094.5 challenging the Regional Board's order under CEQA. After the State Board denied the District's petition for review by taking no action on it within the time allotted by regulation (*see* Cal. Code Regs., tit. 23, § 2050.5, subd. (b)), the District amended its administrative writ petition to add several causes of action challenging the order under section 401 of the Clean Water Act (Section 401), Porter-Cologne Act, and CEQA. Following briefing on the merits and a hearing, the trial court denied the petition, and the District appealed.

The District offered four arguments as to why the trial court erred in denying its administrative writ petition challenging the Regional Board's WDR order. First the District argued the Regional Board's rescission and reissuance of the section 401 certification violated the one-year limit for a certificate under Section 401 and was therefore invalid. (*See* 33 U.S.C. § 1341(a)(1)). However, the Court of Appeal declined to examine this issue in detail because the District had not shown that the allegedly invalid rescission and reissuance of the Section 401 certification would justify reversal.

Second, the District argued the Regional Board did not have authority to issue WDRs for the project because the project's sedimentation effects, on which the WDRs were based, did not constitute the discharge of waste. However, the District did not challenge the interpretation of "waste" under Water Code section 13050, as construed in *Lake Madrone Water District v. State Water Resources Control Board* (1989) 209 Cal.App.3d 163 (*Lake Madrone*), as potentially including silt and sediment, nor did the District raise a challenge to the sufficiency of the evidence as to the trial court's factual findings relating to its interpretation of the term "waste."

Instead, the District's argument aimed at the legal question of whether something like sediment must be useless, unneeded, left over, or discarded to qualify as waste under Water Code section 13050 and *Lake Madrone.* The District posited that this requirement was not met in the case at issue because the project's effect of collecting sediment did not qualify as the discarding or discharging of a useless substance. The Court of Appeal declined to decide whether the District's interpretation was correct because the Court concluded that, even if sediment has to be useless, left over, or discarded for its discharge to be covered under Water Code section 13263, that test would be met in the case at issue. The additional sediment was not useful or needed because it obstructed the flow of water in the creek and, as the trial court found, would likely require periodic removal that could disrupt the generation of plants and wildlife in the creek. The Regional Board therefore had jurisdiction to impose mitigation requirements related to the project. (Wat. Code § 13263, subd. (a)).

Third, the District argued that the Regional Board's failure to impose mitigation requirements through the avenues available to it under CEQA barred it from later imposing those requirements

through the WDRs under the Porter-Cologne Act. The District's CEQA argument rested on CEQA Guidelines section 15096 (Section 15096), which governed the division of responsibility for CEQA compliance between lead and responsible agencies. The District contended the Regional Board's mitigation requirements in the WDR order ran afoul of Section 15096, subdivision (e), which states, "If a responsible agency believes that the final EIR or negative declaration prepared by the lead agency is not adequate for use by the responsible agency, the responsible agency must either: [¶] (1) Take the issue to court within 30 days after the lead agency files a notice of determination; [¶] (2) Be deemed to have waived any objection to the adequacy of the EIR or negative declaration; [¶] (3) Prepare a subsequent EIR if permissible under [CEQA Guidelines] Section 15162; or [¶] (4) Assume the lead agency role as provided in [CEQA Guidelines] Section 15052(a)(3)." The District argued that, because the Regional Board failed to raise its disagreement through one of the avenues specified in Section 15096, subdivision (e), the Regional Board must be deemed to have waived its mitigation concerns under Section 15096, subdivision (e)(2), thereby preventing the Regional Board from exercising its Porter-Cologne Act authority to issue the WDR order. The District further contended that absent a challenge to an EIR within the statutory period via an administrate writ petition, CEQA's interest in finality takes precedence and the EIR had to be conclusively presumed valid unless it was fundamentally inaccurate or misleading.

Here, the Court of Appeal noted that Section 15096 may prevent a responsible agency from requiring additional environmental review after a lead agency has completed its CEQA review, as long as the responsible agency does not have its own independent authority to enforce or administer an environmental law. (*See Ogden Environmental Services v. City of San Diego* (S.D. Cal. 1988) 687 F.Supp. 1436, 1451-1453). But in the case at issue, the Regional Board had independent authority—and indeed the obligation—to administer and enforce the Porter-Cologne Act. (Wat. Code § 13263, subd. (a) [regional boards "shall prescribe requirements" as to the nature of any proposed discharge, existing discharge, or material change in an existing discharge]).

CEQA's savings clause in Public Resources Code section 21174 (Section 21174) made clear that CEQA did not prevent the Regional Board from discharging its Porter-Cologne Act responsibilities. Section 21174 provides in relevant part, "No provision of this division is a limitation or restriction on the power or authority of any public agency in the enforcement or administration of any provision of law which it is specifically permitted or required to enforce or administer[.]" The trial court relied on Section 21174 in its ruling that the Regional Board's duties under CEQA did not deprive it of its independent authority under other laws to impose the mitigation requirements in its order. Section 21174 directly refuted the District's argument.

Finally, the District raised arguments against specific aspects of the mitigation requirements that the Regional Board imposed in its WDR order, claiming they were excessive under substantial evidence review. The Court of Appeal affirmed the judgement of the trial court that these claims were without merit.

TAKE-AWAYS: An agency may have independent statutory authority under the Porter-Cologne Act to impose mitigation requirements, so failure to do so during CEQA review does not bar later imposition of those requirements in a Waste Discharge Requirement Order. Moreover, CEQA's savings clause in Section 21174 may likewise permit other agencies with independent

statutory authority to administer and enforce their authority, even after failing to do so during CEQA review.

* * *

11 Lagunita, LLC v. California Coastal Commission (Dec. 4, 2020) 58 Cal.App.5th 904.

BACKGROUND: Property owners filed a petition for writ of mandate challenging California Coastal Commission's (Commission) cease and desist order requiring removal of a seawall and imposing a $1 million administrative penalty for violation of their coastal development permit (CDP). Orange County Superior Court denied the petition as to cease and desist order, but granted the petition as to penalty. Parties filed cross-appeals.

HOLDING: The Court of Appeal held that: (1) the Commission was not equitably estopped from issuing cease and desist order; (2) the Commission was not collaterally estopped from issuing cease and desist order; (3) doctrine of *res judicata* did not bar the Commission from issuing its cease and desist order; (4) the Commission acted within the scope of its jurisdiction when it issued its cease and desist order; (5) substantial evidence supported the Commission's determination that property owners violated CDP's special conditions; and (6) the Commission did not abuse its discretion in imposing $1 million administrative penalty. The decision of the trial court was affirmed in part and reversed in part.

KEY FACTS & ANALYSIS: This case involved a CDP issued in 2015 for the reinforcement of an existing seawall, which had been installed years earlier at the base of a 1950's era Laguna Beach home. A condition of the CDP provided it would expire and the seawall would have to be removed if the home were "redeveloped in a manner that constitutes new development." The homeowners reinforced the seawall, but they also remodeled the home without consulting the Commission. The Commission found that the homeowners had violated the CDP by redeveloping the residence in a manner that constitutes new development. The Commission issued a cease and desist order requiring the removal of the seawall and further imposed a $1 million administrative penalty for the violation. The homeowners filed a writ of mandate challenging the decision. The trial court affirmed the Commission's ruling as to the cease and desist order but reversed it as to the penalty.

The Court of Appeal found substantial evidence supporting the Commission's finding that the plaintiffs remodeled in a manner constituting new development, having involved demolition, reconstruction, and alteration of the building. Reviewing for abuse of discretion, the Court found that neither the Commission nor the trial court abused their discretion.

Next, the Court turned to the Commission's issuance of the administrative penalty for the violation of the CDP.

> In determining the amount of civil liability, the Coastal Commission considers: (1) The nature, circumstance, extent, and gravity of the violation; (2) Whether the violation is susceptible to restoration or other remedial measures; (3) The sensitivity of the resource affected by the violation; (4) The cost to the state of bringing the action; and (5) With respect to the violator, any voluntary restoration or remedial measures undertaken, any prior history of violations, the degree of culpability, economic profits,

if any, resulting from, or expected to result as a consequence of, the violation, and such other matters as justice may require.

The Court concluded that the Commission reasonably could conclude the property owners deliberately sought to avoid the Commission's review of their proposed remodel of the home because they knew, or reasonably should have known, that the Commission staff would have found that the proposed redevelopment constituted new development in violation of the 2015 CDP. Further, the Commission reasonably could conclude the homeowners sought approval for the remodel from the City rather than the Commission in order to maintain the existing seawall, in further violation of the CDP. Consequently, the Court concluded that the Commission did not abuse its discretion in finding the homeowners were not acting with a reasonable good faith belief in the legality of their actions. The Court reversed the trial court's order granting the petition for writ of mandate as to the administrative penalty.

TAKE-AWAYS: The Commission may issue weighty penalty where there is evidence of violating a CDP in bad faith.

* * *

Sierra Club v. County of Fresno (Nov. 24, 2020) 57 Cal.App.5th 979.

BACKGROUND: Nonprofit organizations petitioned for writ of mandate challenging county's approval of an environmental impact report (EIR) issued under the California Environmental Quality Act (CEQA) for residential development. Following a bench trial, Fresno County Superior Court entered judgment for Fresno County (County) and developer Friant Ranch L.P. (Developer). Organizations appealed, and the Court of Appeal (Fifth District) reversed and remanded. Developer petitioned for review, and the California Supreme Court affirmed in part, reversed in part, and remanded. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502). On remand, the superior court issued writ of mandate ordering the County to set aside its approval and directing the County not to approve the project before preparing a revised EIR. Developer and County appealed.

HOLDING: The Court of Appeal held that the writ of mandate did not violate CEQA by failing to include a provision directing the County to partially decertify the completion of the EIR. The Court affirmed the judgement of the trial court, but to reduce the potential for further disputes on remand, directed the trial court to issue an amended writ of mandate with the more detailed instructions.

KEY FACTS & ANALYSIS: This was the latest appeal involving Friant Ranch in Fresno County. The Developer proposed locating a master planned community for persons age 55 or older on a 942-acre site in north central Fresno County near the San Joaquin River. In August 2010, after the draft EIR was released and public comments received, the County issued the final EIR. On February 1, 2011, the County's Board of Supervisors approved the project by adopting resolution No. 11-031, which certified the completion of the final EIR and approved general plan amendment No. 511, which updated the Friant Community Plan (a component of the Fresno County General Plan) and authorized the proposed Friant Ranch Specific Plan.

In March 2011, three nonprofit organizations, Sierra Club, League of Women Voters of Fresno, and Revive the San Joaquin (collectively, Plaintiffs), filed a petition for peremptory writ of mandate and complaint for declaratory and injunctive relief. Plaintiffs challenged the approval of the project and certification of the completion of the final EIR by alleging violations of CEQA and of the Planning and Zoning Law (Gov. Code § 65000 *et seq*.) requirement that land-use decisions be consistent with the applicable general plan.

In December 2012, the trial court issued its ruling denying plaintiffs' claims and entering judgment in favor of the Developer and County. On appeal following oral argument, the Court of Appeal issued its opinion. (*Sierra Club v. County of Fresno* (2014) 226 Cal.App.4th 704). Like the trial court, the appellant court rejected Plaintiffs' claims under the Planning and Zoning Law and the claims under CEQA involving wastewater but concluded the EIR's discussion of issues relating to air quality was inadequate. Based on this failure to comply with CEQA, the appeal opinion directed the trial court to issue a writ of mandate compelling the County to vacate its approval of the project and not approve the project before preparing a revised EIR that cured the CEQA defects.

In July 2014, Developer filed a petition for review with the California Supreme Court, which was granted. A significant procedural question addressed by the Supreme Court was the standard of judicial review applicable to CEQA claims challenging the adequacy of an EIR's discussion of a specific topic. (*Sierra Club, supra,* 6 Cal.5th at pp. 511-516). On the standard of review, the California Supreme Court concluded that the ultimate inquiry "is whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.' [Citations]."

Developer contended the trial court misinterpreted the combined opinions and abused its discretion by adopting an overly broad remedy that did not comply with CEQA, and specifically Public Resources Code section 21168.9. In Developer's view, the trial court should have issued a narrow writ, partially decertifying the environmental impact report (EIR) and leaving most of the project's approvals in place.

Public Resources Code section 21168.9, subdivision (a) provides that, if a court finds "any determination, finding, or decision of a public agency has been made without compliance with [CEQA], the court shall enter an order that includes one or more of the following: [¶] (1) A mandate that the determination, finding, or decision be voided by the public agency, in whole or in part." A court's authority to void an agency determination "in part" is the textual basis for the concept of partial decertification.

Statutory interpretation provided one ground for rejecting Developer's contention that the trial "court should have issued a limited writ ordering the County to rescind certification of the EIR's operational air quality analysis...." Developer's arguments did not track the statutory language or otherwise acknowledge that what is being certified is "the completion of" the EIR. (Pub. Res. Code §§ 21100, subd. (a), 21151, subd. (a)).

Based on alternate conclusions that (1) partial decertification of the completion of the EIR was not authorized by CEQA or (2) partial decertification of the completion of the EIR was authorized by CEQA only if severance findings allowed a portion of the project approvals to

remain in place, the Court of Appeal concluded the writ of mandate did not violate CEQA by failing to include a provision directing the County to partially decertify the completion of the EIR.

The Court of Appeal's conclusion comported with the analysis adopted in *Ione Valley Land, Air, & Water Defense Alliance, LLC v. County of Amador* (2019) 33 Cal.App.5th 165 (*Ione Valley*). The plaintiff there argued that "section 21168.9 allows for partial decertification of an EIR, and, therefore, the trial court's order directing full decertification of the EIR allowed new challenges to parts of the EIR that had already been upheld by the trial court." (*Id.*, at p. 172). The appellate court rejected this argument about new challenges "because whether the EIR has been decertified does not alter the fact that the sufficiency of a component of the EIR has been litigated and resolved."

In the case at issue, the sufficiency and CEQA compliance of most components of the EIR had been litigated and resolved. Based on the principle set forth in *Ione Valley*, new challenges to the parts of the EIR that were upheld were not allowed in proceedings on remand. Thus, the Court of Appeal concluded an order of partial decertification was not necessary to protect the Developer from re-litigating the CEQA compliance of parts of the EIR not affected by the errors relating to air quality impacts. Instead, Developer was protected by *res judicata*, collateral estoppel and the requirement for the exhaustion of administrative remedies.

TAKE-AWAYS: The requirement that an agency certify the completeness of an EIR under CEQA is not compatible with later "partial decertification," but decertification does not undermine components of the EIR that have already been found legally sufficient under CEQA.

* * *

Spotlight on Coastal Corruption v. Kinsey (Nov. 24, 2020) 57 Cal.App.5th 874.

BACKGROUND: A watchdog nonprofit group brought an action against California Coastal Commissioners (Commissioners) for violating provisions of California Coastal Act (Coastal Act) prohibiting nondisclosure of certain *ex parte* communications and participation in a matter without disclosing related *ex parte* communications. The superior court entered judgment for nonprofit, and the Commissioners appealed.

HOLDING: The Court of Appeal (Fourth District, Division 1) held that: (1) nonprofit's complaint did not contain cause of action for writ of mandate needed for public interest standing on nondisclosure claims, and (2) the Coastal Act section providing for fine of up to $30,000 for "any violation" in addition to a specified development violating the Coastal Act does not apply to violations of the Coastal Act's *ex parte* disclosure provisions. Concluding that the nonprofit lacked standing and that Public Resources Code section 30820(a)(2) was inapplicable, the Court of Appeal reversed with directions to enter judgment for the Commissioners.

KEY FACTS & ANALYSIS: The case turned on whether (1) Plaintiff Spotlight on Coastal Corruption (Plaintiff) had standing to pursue its claims under Public Resources Code sections 30324 and 30327; and whether (2) the up to $30,000 penalty for "any" violation of the Coastal

Act in section 30820, subdivision (a)(2) (Section 30820(a)(2)) applied to *ex parte* disclosure violations.

Plaintiff, a lawyer-created entity that never appeared at a Commission hearing, filed the action against Commissioners Steve Kinsey, Erik Howell, Martha McClure, Wendy Mitchell, and Mark Vargas. The operative fourth amended complaint alleged a cause of action for "Violation of Laws Governing Ex Parte Communications," which Plaintiff divided into three counts. Count 1 alleged violations of Public Resources Code section 30324 (Section 30324). Plaintiff alleged 70 such violations by Kinsey, 48 by Howell, 42 by McClure, 60 by Mitchell, and 75 by Vargas. In count 2, Plaintiff alleged that on the same number of occasions, each Commissioner knowingly attempted "to use his or her official position as a member of the Coastal Commission to influence a Commission decision about which each defendant Commissioner knowingly had an ex parte communication that was not reported in accordance with...section 30324." In count 3, Plaintiff alleged that each violation of Sections 30324 and 30327, subdivision (a) was "separately punishable" under Section 30820(a)(2).

The Court of Appeal held that Plaintiff lacked public interest standing for its first two counts because Plaintiff was not beneficially interested in a writ of mandate. The Court noted that it was clear the action was about civil fines and attorney's fees. Although there was a prayer for a writ of mandate in the complaint, the complaint lacked essential allegations for a writ of mandate. For example, it failed to allege facts showing no other plain, speedy, and adequate remedy. The Court therefore reversed the decisions of the trial court with direction to enter judgement for Commissioners on counts 1 and 2.

The Court of Appeal then turned to statutory interpretation of Section 30820(a)(2) and its application to violations of *ex parte* communication disclosure statutes, reviewing *de novo*. With respect to disclosure of *ex parte* communications, the statutory framework of the Coastal Act included Public Resources Code sections 30324, 30327, and 30824. According to the Court, if Section 30820(a)(2) addressed *ex parte* nondisclosure violations, it did so only generally, as a subclass of all violations of the Coastal Act other than those punishable under Section 30820(a)(1). Thus, although when read in isolation, the phrase "any violation" in Section 30820(a)(2) was unambiguous, the existence of Sections 30324, 30327, and 30824 at the very least reasonably indicated that the Legislature intended to exclusively deal with that topic in those statutes, and not in the more general Section 30820(a)(2).

The Court of Appeal looked at the legislative history of Section 30820(a)(2) as well. As originally enacted in 1976, Section 30820 did not penalize a commissioner's failure to disclose an *ex parte* communication. It was not until 1992 that the Legislature enacted statutes requiring such disclosure and penalizing nondisclosure. Even in 1992, Section 30820 did not apply to penalize a commissioner's violation of the *ex parte* disclosure statutes. As amended in 1992, Section 30820 applied only to one who "performs or undertakes development in violation of this division, or inconsistent with any coastal development permit...." (Stats. 1992, ch. 955, p. 4532). Violation of *ex parte* disclosure statutes was punished separately, with fines up to $7,500 per violation, plus an aggrieved person could seek a writ of mandate to overturn an affected decision. (Pub. Res. Code §§ 30327, 30824, 30328). The Court concluded that the available legislative history indicated the Legislature did not intend Section 30820(a)(2) to apply to a commissioner's violation of *ex parte* disclosure statutes.

The Court of Appeal reasoned that the reasonable interpretation of Section 30820(a)(2) is that the phrase "in addition to any other penalty" exists to cross-reference the two types of disclosure violations. For example, a commissioner who violates the disclosure rules and also participates in the Commission's decision on the measure involved is subject to a fine under Section 30327(b), plus an additional penalty for the nondisclosure itself under Section 30824, for a total exposure of up to $15,000. The "in addition to any other applicable penalty" allows a court to apply both $7,500 penalties in such circumstances. The language does not necessarily mean that a court may also impose up to an additional $30,000 under Section 30820(a)(2).

The Court of Appeal therefore reversed the decisions of the trial court on count 3 on the applicability of Section 30820(a)(2) to the Coastal Act's *ex parte* disclosure provisions.

TAKE-AWAYS: The Court of Appeal's holding regarding the non-applicability in this case of the $30,000 fines turned on well-established rules of statutory construction. The State Attorney General persuasively argued, "The Legislature could not have intended a fine of up to $30,000 if a staff member ... fails to assist a member of the public ...." While Plaintiff acknowledged this point, Plaintiff attempted to rely on the general rule that interprets a statute according to its "plain meaning." Acknowledging that courts generally strive to effectuate the plain meaning of statutes, the "primary goal is to implement the legislative purpose, and, to do so, [courts] may refuse to enforce a literal interpretation of the enactment if that interpretation produces an absurd result at odds with the legislative goal[]" and citing *Lateef v. City of Madera* (2020) 45 Cal.App.5th 245, 253.

* * *

Communities for a Better Environment v. Energy Resources Conservation and Development Commission (Nov. 20, 2020) 57 Cal.App.5th 786.

BACKGROUND: Nonprofit environmental groups brought an action against Energy Resources Conservation and Development Commission (Commission) for declaratory and injunctive relief, challenging the constitutionality of a statute that limited judicial review of Commission's decisions on the siting of thermal powerplants. Alameda County Superior Court sustained Commission's demurrer, but that judgment was reversed on appeal. (*Communities for a Better Environment v. Energy Resources Conservation and Development Commission* (2017) 19 Cal.App.5th 725). Later, the superior court granted groups' motion for summary judgment. The Commission appealed.

HOLDING: The Court of Appeal held that: (1) statute that bars certain courts from reviewing Commission decisions conflicts with constitutional provision granting these courts original jurisdiction; (2) no other constitutional provision authorizes the statute; and (3) statute that bars judicial review of the Commission's findings on questions of fact is an unconstitutional seizure of judicial power.

KEY FACTS & ANALYSIS: Nonprofit environmental groups Communities for a Better Environment and Center for Biological Diversity (Plaintiffs) brought a constitutional challenge

to Public Resources Code section 25531 (Section 25531), a statute that limits judicial review of decisions by the Commission on the siting of a thermal powerplant.

Section 25531, subdivision (a) (section 25531(a)) provided that a Commission siting decision is "subject to judicial review by the Supreme Court of California." Plaintiffs contended that that provision abridged the original jurisdiction of the superior courts and courts of appeal over mandate petitions, as conferred on them by Article VI, section 10 of the California Constitution. Plaintiffs also challenged Section 25531, subdivision (b) (section 25531(b)), which provided that findings of fact in support of a Commission siting determination "are final." That provision allegedly violated the separation of powers doctrine by depriving courts of their essential power to review findings of an administrative agency. (*See* Cal. Const., Art. III, § 3; Art. VI, § 1; all references to "Articles" are to the California Constitution). The trial court agreed with Plaintiffs on both points and granted them summary judgment.

The Court of Appeal (First District, Division 4) reviewed the trail court's grant of summary judgement *de novo*. The Court first concluded that the trial court did not err by entertaining Plaintiffs' facial challenge, nor by finding that Section 25531(a) divested the superior courts and courts of appeal of original jurisdiction that Article VI, section 10 confers on them. This impingement was not authorized by Article XII, and the Commission identified no other provision of the Constitution that expressly or impliedly conferred power on the Legislature to divest the courts of their original jurisdiction. Section 25531(a) was, accordingly, unconstitutional.

Second, the Court of Appeal affirmed the trial court's finding that Section 25531(b) was an unconstitutional seizure of judicial power. Section 25531(b) purported to eschew both the substantial evidence and independent judgement standards by mandating that the Commission "findings and conclusions...on questions of fact [were] final and…not subject to review." Under either standard, the Court concluded that Section 25531(b) was unconstitutional. The Commission did not have the same constitutional grant of judicial authority as the Public Utilities Commission (PUC), for which decisions would have been upheld if there was any evidence before them that would justify a finding. (*Southern Pacific Co. v. Public Utilities Com.* (1953) 41 Cal.2d 354, 362 (*Southern Pacific*)). Because the Constitution endowed the PUC with certain judicial authority, the "any evidence" standard was acceptable for judicial review of PUC decisions (*Southern Pacific*, *supra*, 41 Cal.2d at pp. 359-360), but the Legislature later opted to amend the Public Utilities Code to require substantial evidence review. (Pub. Util. Code § 1757, subd. (a)(4))). There was no similar constitutional provision vesting judicial authority in the Commission; thus, preventing superior courts and courts of appeal from hearing those cases was an unconstitutional seizure of the judicial powers granted to those courts by the California Constitution.

TAKE-AWAYS: Query whether the holding in this case may be extended to other state statutes limiting judicial review of public agency decisions. The Court of Appeal focused on constitutional provisions in determining agencies not vested with judicial powers may not exercise such powers. Decisions from such agencies must be appealable to the superior courts and courts of appeal which are granted original jurisdiction by the California Constitution.

* * *

AMCAL Chico LLC v. Chico Unified School District (Nov. 5, 2020) 57 Cal.App.5th 122.

BACKGROUND: Developer of a private dormitory for students at a state university within school district boundaries brought an action for refund of school impact fees imposed by a school district. Butte County Superior Court granted school district's motion for summary judgment, and the developer appealed.

HOLDING: The Court of Appeal held that the district was not required to determine whether the dormitory would generate new students for school district in order to justify fee. The trial court's judgement was affirmed.

KEY FACTS & ANALYSIS: Education Code section 17620 authorizes public school districts to levy a fee against new residential developments in order to fund the construction or reconstruction of school facilities to accommodate the increase in students likely to accompany the new developments. In order to impose the fee, a school district must comply with Government Code section 66001 (Section 66001), which requires the district determine that (1) there is a reasonable relationship between the fee's use and the type of development on which the fee is imposed and (2) there is a reasonable relationship between the need for the school facilities for which the fees will be used and the residential development upon which the fee is imposed.

Plaintiff AMCAL Chico, LLC (Plaintiff) constructed a dormitory complex that would house unmarried university students within the boundaries of defendant Chico Unified School District (District). The District imposed school impact fees on the complex and Plaintiff filed suit seeking a refund of the fees. The trial court granted the District's motion for summary judgment. Plaintiff appealed, arguing the fees had to be refunded because the District failed to comply with Section 66001, the fee was an invalid special tax, and the fee was an improper taking.

Plaintiff developed a "building intended to house college students" (the Project) within the boundaries of the District. The Project contained over 600 beds to be leased to students at the local state university. Renters had to be 18 years old and enrolled in a degree program.

In December 2016, Plaintiff provided a rationale for the District to exempt the Project from the school impact mitigation fees. Plaintiff argued the facility would be rented by the bed, with locks on each bedroom and bathroom for security and privacy, furnished units, shuttle service to the campus, 12-month leases, and residential assistants to work with students. In addition, the physical layout of the building was tailored for students, not the general rental market. However, the Project was not associated with any college, but was a private 173-unit, 216,476-square-foot residential apartment complex. The Project was zoned as "medium high density residential." Plaintiff therefore could not refuse to rent to families with children.

In January 2017, Plaintiff renewed its claim that the Project was exempt from school impact mitigation fees, but recognized they would have seven fulltime employees, which would result in a fee of $6,098 under the District's formula. Based on the fee justification study, the District assessed the Project at the residential fee rate, citing its zoning as a multi-family residential structure and not entitled to an exemption under Education Code section 17620, subdivision (a)(1) or Government Code sections 65995 through 65998. Under protest, Plaintiff paid $537,576.50 in fees calculated at the residential rate of $3.48 per square foot in March 2017.

Plaintiff submitted a protest letter requesting the District provide documents supporting the imposition of the fees.

In May 2017, Plaintiff filed a complaint alleging three causes of action: The District failed to comply with the Mitigation Fee Act; the fee constituted an invalid special tax because the fee exceeded the cost of the school facilities needed to mitigate the impact of the Project; and the imposition of the fee constituted an invalid taking because there was no nexus between the fee imposed and the impact of the Project.

In reviewing the adequacy of the District's fee justification study, the Court of Appeal reviewed the record to ensure the District had adequately considered all relevant factors and had demonstrated a rational connection between the factors, the choice made, and the purposes of the enabling statute. On appeal, the Court presumed the District's choices were correct and declined to question its wisdom or substitute other choices where the issues were debatable. The Court relied on the holding in *Tanimura & Antle Fresh Foods, Inc. v. Salinas Union High School District* (2019) 34 Cal.App.5th 775 (*Tanimura*). It reasoned that a careful consideration of the Mitigation Fee Act does not support a developer's claim that a school district must make an individualized determination for each particular project. Instead, as in the case at issue, the school district must make findings based on the general type of construction, such as residential construction. The Court of Appeal determined that District's fee study conclusion was reasonable, and the mitigation fee was proper. Furthermore, because the imposed fee was reasonable and complied with the Mitigation Fee Act, the fee was not an invalid special tax.

Finally, the Court of Appeal held that the mitigation fee was not a taking which would entitle Plaintiff to a refund. Developer fees generally do not constitute a taking if the fee is reasonably related to the impacts of the type of new residential development on the school district's school facilities and meets the requirements of the Mitigation Fee Act. (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854). In this case, the District's fee complied with the Mitigation Fee Act and therefore was not a taking.

TAKE-AWAYS: The showing of a reasonable relationship between a development and the costs of increased school district services, as required to justify a school impact fee, may properly be derived from districtwide estimations concerning anticipated new residential development and impact on school facilities. The district need not make an individualized determination for each particular development project before imposing an impact fee; instead, the district must make findings based on the general type of construction, such as residential construction.

* * *

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

Thank You:
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