ALSTON&BIRD
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Each month, *Land Use Matters* will provide information and insights into legal and regulatory developments, primarily at the Los Angeles City and County levels, affecting land use matters, as well as new CEQA appellate decisions.

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City of Los Angeles

City Council

PLUM Approves Clean Up Green Up Ordinance

On November 24, 2015, the Planning and Land Use Management Committee (PLUM) considered the draft Clean Up Green Up (CUGU) Ordinance that would establish a new Supplemental Use District (SUD) in Boyle Heights, Pacoima/Sun Valley, and Wilmington. As reported in Alston & Bird's August 2015 edition of *Land Use Matters*, the CUGU Ordinance proposes new development standards for various industrial land uses and requires approval of a conditional use permit (CUP) for new oil refineries and for existing refineries expanding beyond current property lines.

The business community has expressed concerns related to the implementation of the CUGU Ordinance. Questions have been raised regarding the plan and budget for code enforcement of unlawfully operating businesses, the duties of the ombudsperson and which department the position will be located in, the need for specific incentives for businesses to comply with CUGU, and the requirement for a CUP and submission of a health impact assessment (HIA).

The city administrative officer and chief legislative analyst presented to PLUM an informational report to address some of the concerns. The report noted three main findings: (1) a proactive code enforcement program to survey the 977 businesses within the three areas requires eight additional staff positions with a budget of $1.02 million from the general fund; (2) the ombudsperson position would be allocated to the Department of Public Works, Bureau of Sanitation; and (3) the city can require that an applicant provide an HIA, so long as any California Environmental Quality Act (CEQA) requirement, including the completion of a health risk assessment (HRA), is also met.

PLUM did not approve the City Planning Commission's (CPC) recommendation to give the zoning administrator authority to grant exceptions to CUGU district regulations with appeals to the CPC. PLUM approved the planning staff's original recommendation to have the Area Planning Commission as the initial decision maker for exceptions with appeals to the city council. PLUM approved CUGU and directed the city attorney to finalize the ordinance for consideration by the full city council. PLUM also directed the staff to prepare a report on incentives and return to PLUM at a date to be determined.

California Environmental Quality Act

San Francisco Baykeeper Inc. v. California State Lands Commission (1st App. Dist., 11/18/15)

While the 1st District Court of Appeal reversed a judgment in favor of the State Lands Commission and project applicant on non-CEQA grounds (application of the public trust doctrine), the court upheld the environmental impact report (EIR) prepared by the State Lands Commission for the continuation of a mineral extraction lease in, among other places, San Francisco Bay. The court first upheld the use of an environmental baseline that uses a five-year average for the volume of mining prior to the notice of preparation (NOP). The court also approved use of a "ratio" theory for the cumulative impacts analysis (i.e., assessing the project's contribution of the impact relative to the magnitude of the cumulative problem) because other methodologies were used to evaluate the significance of the project's contribution. Next, the court rejected the appellant's recirculation claim because the additional studies added to the final EIR only amplified on issues already discussed in the draft EIR. Finally, the court found that while the lead agency failed to carry out its obligation to consult with other agencies, the appellant failed to prove any prejudice from that error in the consultant process.

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Citizens for Environmental Responsibility v. State of California (3rd App. Dist., 11/23/15)

Based on the California Supreme Court's recent decision in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, the 3rd District Court of Appeal upheld the use of a categorical exemption for a rodeo show. The court held that the existing manure management program did not constitute a CEQA mitigation measure (which may have invalidated the categorical exemption) because it was "not a new measure proposed for or necessitated by the rodeo project. Rather, it is a preexisting measure previously implemented to address a preexisting concern." The court also ruled that the appellant failed to meet the "unusual circumstances" exception to categorical exemption because there was no "substantial evidence that the project *will* have a significant effect on Salsipuedes Creek."

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