ALSTON&BIRD

# LAND USE MATTERS

A publication of Alston & Bird's Land Use Group

**December 2015**

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.

Please visit the firm's website for additional information about our Land Use Group.

---

## City of Los Angeles

### *City Planning Commission*

#### *CPC Recommends Approval of Amendments to Mobility Plan 2035*

Mobility Plan 2035 (Plan), adopted by the city council in August 2015, included three amendments related to equity, Plan implementation, and public safety that had not been considered by the City Planning Commission (CPC). On November 25, 2015, the city council rescinded its resolution adopting the Plan and adopted the Plan as previously recommended for approval by the CPC and mayor earlier this year.

On December 17, 2015, the CPC recommended approval to amend the Plan with provisions related to equity, city council oversight, public safety, community input, and flexibility in implementation, as well as technical and map corrections. Click here to review the staff report and recommended amendments.

### *Department of City Planning (DCP)*

#### *DCP Releases Drafts for Three Zoning Code Amendments*

Unapproved Dwelling Unit (UDU) Ordinance

The proposed UDU Ordinance will create a process for granting legal status to unapproved dwelling units in existing multifamily zones when certain affordability criteria are met. The ordinance would only apply to properties where unapproved units can be proven to have already existed as of December 10, 2015. The public benefit process in Zoning Code Section 14.00 will be used for the application, and the proposed provisions are similar to the existing state-required density bonus program and will require a percentage of existing units to be set aside as long-term restricted affordable housing. The public hearing will be held on January 13, 2016, and comments will be accepted through January 22, 2016.

UDU Draft Ordinance

Small Lot Ordinance

The Small Lot Ordinance was first adopted in 2005 as a tool to encourage the development of alternative fee-simple homeownership in multifamily and commercial zoned areas. The proposed amendment will establish new enforceable development standards, including greater front and rear yard setbacks, the creation of a division of land process for "adaptive reuse" small lot projects, and the addition of an administrative clearance process. Public hearings will be held on January 20, 2016, and January 26, 2016, and the DCP will accept comments through February 26, 2016.

Small Lot Draft Ordinance

Baseline Mansionization Ordinance/Baseline Hillside Ordinances (BMO/BHO)

In early December 2015, the DCP held four public hearings on proposed amendments to the BMO/BHO, the current regulations for limiting height, setbacks, and floor area ratio for all single-family residential zoned properties. The proposed new regulations are intended to reduce what some consider to be the proliferation of out-of-scale development in single-family neighborhoods. The DCP is accepting comments through January 11, 2016.

BMO/BHO Draft Ordinance

## California Environmental Quality Act

### *California Building Industry Association v. Bay Area Quality Management District* (California Supreme Court, 12/17/2015)

This month the California Supreme Court put to rest any questions concerning whether CEQA requires lead agencies to analyze impacts of the existing environment on proposed projects. The California Building Industry Association (CBIA) challenged new significance thresholds proposed by the Bay Area Air Quality Management District (BAAQMD), alleging that a proposed threshold for toxic air contaminants impermissibly required evaluation of the impacts of the existing environment on a given project. Evaluating CBIA's challenge, the court reaffirmed prior precedent and held that CEQA generally does not require lead agencies to analyze the impact of existing environmental conditions on a project's future users or residents.

The court also held that there are existing exceptions in CEQA to that general rule. For example, a lead agency must consider the potential impacts of existing hazards on future residents or users if a proposed project will exacerbate those environmental hazards. As the court further explained, for instance, when a project is proposed to be built on a site with contaminated soil and the project threatens to disperse that soil contamination upon construction, CEQA requires a lead agency to evaluate that existing condition (i.e., the soil contamination) as part of its environmental review. Yet as the court continued to make clear in the soil contamination example, it is the project's impact on the environment—not the environment's impact on the project—that compels the evaluation of how exacerbated conditions may affect future residents and users.

The court also held that specific provisions in CEQA require analysis of the existing environmental conditions in certain contexts, such as for airport, school, and certain housing development projects. Otherwise, the court upheld the general rule that CEQA does not require analysis of the environment on a project, consistent with prior precedent set forth in *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889; *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604; and *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455. The court also invalidated a portion of CEQA Guidelines Section 15126.2(a) to the extent that the guidelines impermissibly require analysis of the environment on the project.

Download Opinion

### *Center for Biological Diversity v. Cal. Department of Fish and Wildlife, et al.* ("Newhall Ranch Decision") (California Supreme Court, 11/30/2015)

In its recent Newhall Ranch Decision, the California Supreme Court held that the lead agency's analysis of a development project's impacts on greenhouse gasses (GHGs) was insufficient under CEQA. The case involved approval of the Newhall Ranch housing development, including 20,885 new housing units. The Department of Fish and Wildlife (DFW) served as the lead agency for the environmental review under CEQA, concluding the project would have a less than significant impact on GHGs after taking into account the project's design and existing regulatory standards.

In a challenge to the DFW's environmental review, the court held that a lead agency could use a project's consistency with the goals set forth in the California Global Warming Solutions Act of 2006 ("AB 32") as a CEQA significance criterion for a project's potential GHG impacts. To achieve AB 32's GHG reduction goals, the California Air Resources Board developed a Scoping Plan in 2009 that included GHG reduction targets from the "business-as-usual" (BAU) emission levels projected for 2020, assuming no conservation or regulatory efforts beyond what existed when the forecast was made.

Following the targets in the 2009 Scoping Plan, the DFW determined the Newhall Ranch project would not lead to significant GHG impacts because the project's reduction in GHG emissions exceeded the reduction target in the 2009 Scoping Plan when comparing the project's actual GHG emissions to a BAU scenario. The court upheld the use of the BAU model and a project's consistency with statewide reduction goals as a permissible significance criterion given the distinct global aspects of GHG emissions. However, the court invalidated the DFW's GHG analysis, holding the record did not contain substantial evidence to show how the Newhall Ranch's "*project-level* reduction" is consistent with achieving AB 32's "*statewide* goal" of GHG reductions.

The court was troubled that the DFW's record did not include any evidence to show how the required percentage reduction from the BAU in the Scoping Plan is the same for an individual project, such as Newhall Ranch, as for the entire state population and economy. The court reasoned that some projects may need a greater degree of GHG reductions to achieve the overall statewide GHG reduction goals. The court provided some guidance for lead agencies to evaluate GHG impacts properly under CEQA. An agency could evaluate the data behind the Scoping Plan's BAU model to determine what GHG reduction level a particular project may need to achieve to help further the statewide BAU reduction goal. A lead agency could also assess a project's consistency with AB 32's goal by evaluating compliance with regulatory programs designed to reduce GHG emissions from particular activities. A lead agency could also rely on existing numerical thresholds of significance for GHG emissions.

Apart from the GHG analysis, the court also held that the DFW violated the state's Fish and Game Code because certain mitigation measures adopted to protect against the project's impacts to special status wildlife and plant species constituted a taking of a fully protected species in violation of Fish and Game Code Section 5515.

Download Opinion

Subscribe to Land Use Matters

## Contributing Authors


Edward J. Casey, Partner
Environment, Land Use & Natural Resources
ed.casey@alston.com

Kathleen A. Hill, Planning Director
Environment, Land Use & Natural Resources
kathleen.hill@alston.com

Andrea S. Warren, Associate
Environment, Land Use & Natural Resources
andrea.warren@alston.com


This publication by Alston & Bird LLP provides a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:


Doug Arnold
404.881.7637
doug.arnold@alston.com

Sarah Babcock
404.881.7632
sarah.babcock@alston.com

Paul Beard
916.498.9954
paul.beard@alston.com

Ward Benshoof
213.576.1108
ward.benshoof@alston.com

Meaghan Goodwin Boyd
404.881.7245
meaghan.boyd@alston.com

Andrew Brady
213.576.2527
andrew.brady@alston.com

Nicki Carlsen
213.576.1128
nicki.carlsen@alston.com

Edward Casey
213.576.1005
ed.casey@alston.com

Lee DeHihns
404.881.7151
lee.dehihns@alston.com

Skip Fulton
404.881.7152
skip.fulton@alston.com

Maureen Gorsen
916.498.3305
maureen.gorsen@alston.com

Ronnie Gosselin
404.881.7965
ronnie.gosselin@alston.com

Maya Lopez Grasse
213.576.2526
maya.grasse@alston.com

Clay Massey
404.881.4969
clay.massey@alston.com

Elise Paeffgen
202.239.3939
elise.paeffgen@alston.com

Bruce Pasfield
202.239.3585
bruce.pasfield@alston.com

Geoffrey Rathgeber
404.881.4974
geoff.rathgeber@alston.com

Beverlee Silva
404.881.4625
beverlee.silva@alston.com

Jocelyn Thompson
213.576.1104
jocelyn.thompson@alston.com

Andrea Warren
213.576.2518
andrea.warren@alston.com

Jonathan Wells
404.881.7472
jonathan.wells@alston.com