ALSTON & BIRD

LAND USE MATTERS

A PUBLICATION OF ALSTON & BIRD'S LAND USE GROUP

December 2021

Land Use Matters provides information and insights into legal and regulatory developments, primarily at the Los Angeles City and County levels, affecting land use matters and new CEQA appellate decisions.

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Los Angeles Department of City Planning

New City Planning Application Fees Take Effect on December 27, 2021

In the fall, the Los Angeles City Council approved a comprehensive update to the Department of City Planning's application fees. The new fees were adjusted to reflect the department's rate of cost recovery from 63% to 83% of the estimated full cost of providing planning services to the public. Any department invoice that is dated on or after December 27, 2021 will be subject to the new fees.

Update to Mailing Notification Requirements

As of December 1, 2021, applicants will no longer be required to submit mailing labels for public hearing notices with the initial application package. Department of City Planning staff will now request the notification materials from the applicant approximately six to eight weeks before scheduling a public hearing or when the Letter of Determination is close to issuance. Applicants will still be required to provide an original Penalty of Perjury Statement when filing the application to certify the accuracy of the notification map.

California Environmental Quality Act & Land Use Cases

Farmland Protection Alliance v. County of Yolo (3rd App. Dist., November 2021)

The court of appeal held that the trial court erred in allowing a lead agency to prepare a targeted environmental impact report (EIR) to pair with a mitigated negative declaration (MND) when substantial evidence supported a fair argument of a project's potential significant environmental impacts. Yolo County had adopted an MND for the operation of a bed and breakfast and commercial event facility that would be supported by onsite crop production near the City of Winters. Operation of the facility was intended to provide visitors with an education in agricultural operations. Petitioners the Farmland Protection Alliance and Yolo County Farm Bureau challenged the county's

adoption of the MND on several grounds, alleging substantial evidence supported a fair argument under CEQA that the project would have a significant impact on biological resources, that the project was inconsistent with Yolo County's General Plan and provisions in the County Code, and that the project violated the Williamson Act.

The trial court granted the petition in part, holding that substantial evidence supported the allegation that the project may have a significant impact on three species. The trial court ordered the county to undertake further study and prepare a subsequent EIR to address only the potential impacts of the project on those three species. On appeal, the petitioners argued that the trial court erred in ordering the county to prepare a limited EIR. According to the petitioners, if there is substantial evidence of an environmental impact in any area, the lead agency must prepare an EIR for all impact areas. The court of appeal agreed, holding that CEQA Section 21168.9 allows courts to craft remedies for CEQA violations intended to facilitate compliance with CEQA, not as "a means to circumvent the heart of the Act – the preparation of an environmental impact report for the project." The court of appeal held that nothing in CEQA supports interpreting its provisions to support dividing a project's impact analysis across different tiers of environmental review, with some impacts reviewed in an MND and some in an EIR. Once the trial court found the fair-argument test had been met as to the three species, the only available remedy was to set aside the county's decision to adopt the MND as an abuse of discretion in failing to proceed in a manner required by law.

Save Berkeley's Neighborhoods v. Regents of University of California **(1st App. Dist., October 2021)**

The court of appeal affirmed the dismissal of a CEQA action against real parties in interest after those parties had not been named in the original petition within the statute of limitations but allowed the case to proceed against the lead agency. The Regents of the University of California had approved a new development with academic space, campus housing, and parking at the Berkeley campus. For the project, the Regents certified a supplemental environmental impact report (SEIR) and filed a Notice of Determination (NOD) for the CEQA approval. The NOD identified two parties that would undertake the project (the developer and ground lessee).

A group called Save Berkeley's Neighborhoods (SBN) filed a petition for writ of mandate, challenging the Regents' CEQA approval for alleged deficiencies. The original petition named only the Regents, president of the University of California, and chancellor of the University of California, Berkeley as respondents. More than 30 days after the NOD was filed, the petitioner filed a first amended petition adding the two real parties. The real parties filed a demurrer on the grounds that the petition did not name them within the statute of limitations. The trial court held the real parties were necessary and thus could be dismissed for not being timely served under Public Resources Code Section 21167.6.5. However, applying the balancing test of Code of Civil Procedure Section 389(b), the trial court held the real parties were not indispensable because the petitioner would have no way to challenge the SEIR if the case were dismissed and the real parties were in a related case challenging the same SEIR.

The court of appeal affirmed, holding dismissal of the entire action for failure to name the real parties in interest is not mandatory under Public Resources Code Section 21167.6.5 and that Section 21167.6.5 was not intended to eliminate the equitable-balancing test of the Code of Civil Procedure Section 389(b). Rather, failure to name the real parties may be grounds for dismissal depending on the factors set forth in Code of Civil Procedure Section 389(b). Because there was a strong unity of interest between the Regents and real parties, the real parties were not indispensable parties to the litigation.

McCann v. City of San Diego **(4th App. Dist., October 2021)**

The court of appeal invalidated an MND approved by the City of San Diego for the city's failure to analyze the project's impacts on greenhouse gas emissions after the city did not adequately evaluate the project's consistency with its adopted Climate Action Plan (CAP). A petitioner challenged the city's approval of two sets of projects to convert overhead utility wires to an underground system in several neighborhoods. The projects would be supplemented with several above-ground transformers that would be housed in three-foot-tall metal boxes in the public right-of-way. The city approved the first set of projects, finding the projects exempt under CEQA. The petitioner challenged the city's finding of a CEQA exemption, but the trial court dismissed that challenge due to the petitioner's failure to exhaust her administrative remedies.

The city approved the second set of projects through an MND. The petitioner challenged the MND, alleging the city improperly segmented its environmental review into smaller projects, did not define the location of each transformer box before considering the environmental impacts, failed to consider atheistic impacts, and did not adequately analyze the project's potential impact on greenhouse gas emissions. The trial court denied the petition, while the court of appeal affirmed in part and reversed in part. The court of appeal agreed that the city complied with CEQA on all grounds except for the city's greenhouse gas analysis.

In 2015, San Diego adopted its CAP, which set forth five broad strategies to reach the city's specified emission reductions. The CAP included a Climate Action Plan Consistency Checklist, which allows project-specific documents, if eligible, to tier from and incorporate by reference the CAP's programmatic review of greenhouse gas impacts in their cumulative impact analysis. The city relied on the checklist for this project. However, the checklist expressly states it did not apply to projects that do not require certificates of occupancy, including infrastructure projects. The city did not otherwise evaluate the project's consistency with the CAP. The court did not hold an EIR was required, holding nothing in the record supported a fair argument that the project is inconsistent with the CAP. However, the city had to perform the required analysis to determine whether the project is consistent with the CAP for a valid MND. The court held that if the city determines the projects are inconsistent with the CAP and cannot be revised or the impacts mitigated, the city will be required to prepare a full EIR.

Protect Tustin Ranch v. City of Tustin **(4th App. Dist., September 2021)**

The court of appeal upheld the City of Tustin's approval of a CEQA exemption for a Class 32 infill project—a new gas station and ancillary facilities in an existing shopping center surrounded by commercial and residential uses in an area of the City of Tustin. The project site is within an existing shopping center located along a major commercial thoroughfare, adjacent to several other businesses, a large retail center, and some residential neighborhoods. The city approved a conditional use permit for the project and found the project was categorically exempt from further environmental review under CEQA as a Class 32 In-Fill Development Project (CEQA Guidelines Section 15332) because the project site was no more than 5 acres, surrounded by urban uses, had no value as habitat for endangered or threatened species, could be adequately served by required utilities and public services, and would not lead to significant effects on traffic, noise, air quality, or water quality.

Project opponents challenged the city's approval, alleging the project did not fit within the infill exemption and arguing that the project site occupied nearly 12 acres and that there were "unusual circumstances" that would exclude the project from the CEQA exemption pursuant to CEQA Guidelines Section 15300.2. The trial court denied the petition, and the court of appeal affirmed.

The court of appeal found substantial evidence supported the city's factual determinations. Citing to *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal. 4th 1086 (2015), and CEQA Section 21168.5, the court further held two different standards of review apply to an agency's determination that the unusual circumstances exception is inapplicable. Whether a particular project presents unusual circumstances for projects in an exempt class is essentially a factual inquiry, subject to the substantial-evidence test. As to whether there is a reasonable possibility that an unusual circumstance will produce a significant effect on the environment, the court reviews whether substantial evidence supports a fair argument of a reasonable possibility the project will have a significant effect on the environment. In this case, the court of appeal held that substantial evidence supported the city's conclusion that the project is not unusual in relation to other infill development that would qualify for the exemption. Because there was no adequate showing of an unusual circumstance, the court did not need to reach the question of whether there is a fair argument of a reasonable possibility of a significant environmental effect.

California Renters Legal Advocacy & Education Fund v. City of San Mateo **(1st App. Dist., September 2021)**

The court of appeal found the City of San Mateo improperly denied a proposed housing project based on local height guidelines because the local guidelines were neither objective nor quantifiable. The Housing Accountability Act (HAA) requires a city to approve a project that complies with the city's "objective general plan and zoning standards" and would not cause a "specific, adverse impact upon the public health or safety." In an action seeking to enforce the HAA, the reviewing court inquires whether there is substantial evidence that would allow a reasonable person to conclude that the housing development project complies with the pertinent standards. In denying the project, the city found that the project was inconsistent with the height standards set forth in the city's general plan and its "Multi-Family Design Guidelines." The design objectives for height under the guidelines state that a project should "[a]void changes in building height greater than one story from adjacent structures." The court of appeal found the city's decision was improper because "a standard that cannot be applied without personal interpretation or subjective judgment is not 'objective' under the HAA."

The court of appeal also considered and rejected several of the city's constitutional objections to the HAA. First, the city argued that San Mateo's right to "home rule" as a charter city rendered it immune from complying with the HAA because the rule allocates some autonomy to a local government. The court cited evidence that "a shortage of housing in our state has led to escalating costs that for many have rendered adequate shelter unaffordable" and concluded the HAA is sufficiently tailored to that interest. Second, the court held that the HAA's "substantial-evidence" standard does not unconstitutionally delegate municipal authority because the statute does not cede municipal authority to any private person. Third, the court rejected the argument that the HAA's substantial-evidence standard deprives neighboring property owners of their due process rights to a meaningful hearing on housing approvals. The court stated that an "action involving only the nondiscretionary application of objective standards" does not entitle landowners to due process protections.

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Contributing Authors

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

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

Julia Consoli
Associate
Environment,
Land Use &
Natural Resources
julia.consoli@alston.com

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

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

Lee Ann Anand
404.881.4609
leeann.anand@alston.com

Gina Angiolillo
213.576.2606
gina.angiolillo@alston.com

Doug Arnold
404.881.7637
doug.arnold@alston.com

Megan Ault
415.243.1056
megan.ault@alston.com

Greg Berlin
213.576.1045
greg.berlin@alston.com

Caleb Bowers
415.243.1038
caleb.bowers@alston.com

Meaghan Goodwin Boyd
404.881.7245
meaghan.boyd@alston.com

Jeff Carlin
213.576.1008
jeff.carlin@alston.com

Nicki Carlsen
213.576.1128
nicki.carlsen@alston.com

Edward Casey
213.576.1005
ed.casey@alston.com

Greg Christianson
415.243.1012
greg.christianson@alston.com

Ha Chung
213.576.1151
ha.chung@alston.com

Julia Consoli
213.576.2517
julia.consoli@alston.com

Jeffrey Dintzer
213.576.1063
jeffrey.dintzer@alston.com

Leland Frost
404.881.7803
leland.frost@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

Camille Smith McMakin
404.881.7456
camille.mcmakin@alston.com

Kevin Minoli
202.239.3760
kevin.minoli@alston.com

Vickie Chung Rusek
404.881.7157
vickie.rusek@alston.com

Shannon Vreeland
404.881.7429
shannon.vreeland@alston.com

Megan Walker
404.881.7942
megan.walker@alston.com

Andrea Warren
213.576.2518
andrea.warren@alston.com

Sara Warren
404.881.7472
sara.warren@alston.com

Matt Wickersham
213.576.1185
matt.wickersham@alston.com