

ALSTON & BIRD

LAND USE MATTERS

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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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City of Los Angeles

Site Plan Review Exemption for Affordable Housing

On June 30, 2023, the city council adopted an amendment to the [Site Plan Review Ordinance](#) to exempt deed-restricted affordable housing units from counting toward the 50-unit threshold for site plan review. The exemption also applies to certain mixed-use development projects with 50% or more of the total project floor area set aside for restricted affordable units. The amendment furthers [Executive Directive 1](#), issued by Mayor Karen Bass on December 16, 2022, by accelerating the application and permitting process for affordable housing and thus lowering its costs of development. The ordinance becomes effective on August 16, 2023.

City Fees to Increase

On July 1, 2023, [planning and land use applications fees](#) increased by 4.9% based on the Consumer Price Index for urban consumers (CPI-U) for the calendar year ending December 2022, and the Affordable Housing Linkage Fee (AHLF) increased by 3.8% based on the CPI-U average for the 12-month period ending April 2023. The AHLF places a fee per square foot on certain new market-rate residential and nonresidential development projects to generate local funding for affordable housing. The AHLF fee schedule and Market Area Maps are in the [June 2, 2023 City Planning memorandum](#).

City Council Adopts Downtown Community Plan Update

On May 3, 2023, the city council voted to [adopt](#) the Downtown Community Plan Update (DTLA 2040) and the new Zoning Code. DTLA 2040 is a combined update to the Central City and Central City North Community areas. The plan supports the ongoing revitalization of downtown and substantially increases the area where housing (including permanent supportive and affordable housing) is permitted. The plan also is intended to reinforce the jobs orientation of downtown and promote transit-, bicycle-, and pedestrian-friendly environments. DTLA 2040 is the first community plan to apply the new zoning developed as part of a comprehensive update to the city's Zoning Code.



California Environmental Quality Act (CEQA)

***Lucas v. City of Pomona* (2nd App. Dist., June 2023)**

In this case, the plaintiff challenged the City of Pomona's designation of where cannabis businesses could operate given the city's zoning ordinance and general plan. The city determined this action was exempt from CEQA regulations because it did not introduce new land use designations or alter general land use or development patterns and would not cause new significant environmental effects or increase the severity of effects identified in a prior environmental impact report (EIR) for the city's general plan update.

The plaintiff, whose storefront property was excluded from the locations where cannabis businesses could operate, filed a suit seeking to compel the city to vacate its approvals for commercial cannabis activities and prepare an EIR. The court of appeal upheld the trial court's determination that the deferential substantial evidence standard (rather than the fair argument standard) applied to the city's exemption determination. Further, the court of appeal held that substantial evidence supported the city's exemption determination and decision not to prepare an EIR because the cannabis operations were consistent with existing land uses or development density; and there would be no impacts beyond those identified in the prior general plan EIR because cannabis-related development would remain subject to the city's existing zoning development standards.

***Tulare Lake Canal Company v. Stratford Public Utility District, et al.* (5th App. Dist., June 2023)**

This case involved a CEQA challenge to an easement granted for a water pipeline crossing beneath the subsurface of the Tulare Lake Canal. The petitioners filed a lawsuit contending that approval of the easement violated CEQA and requested a preliminary injunction to halt the construction and operation of the pipeline pending CEQA compliance. The petitioners argued that the public was not informed of how much water would be moved, where it would ultimately go, or when. The trial court denied the requested injunction, finding there was no evidence that allowing the project to go forward pending CEQA review would harm the public.

The court of appeal reversed, holding that (1) harm to the public interest in informed decision-making is a type of harm that must be considered in balancing the relative harms of granting or denying a preliminary injunction; and (2) it is not necessary for such a harm to be accompanied by a showing of a likely environmental harm when the CEQA violation occurs at the initial stage of CEQA review. The court concluded there was a reasonable probability the preliminary injunction would have been granted if the trial court had identified the harm to the public interest in informed decision-making when balancing the relative harms, and it reversed and remanded the case to the trial court for reconsideration.

***The Claremont Canyon Conservancy v. Regents of the University of California* (1st App. Dist., June 2023)**

In this case, the petitioners challenged the adequacy of an EIR for vegetation removal projects to reduce wildfire risk on the University of California, Berkeley's campus. Among other claims, the petitioners asserted that the project descriptions were insufficient because they did not include a tree inventory, specify the number of trees that would be removed, or identify which trees would remain. The trial court agreed, holding that the challenged project descriptions were "not accurate, stable and finite" as required by CEQA.



The court of appeal reversed, finding that the EIR included sufficient detail to inform the public of the projects' environmental impacts. The challenged project descriptions identified the precise locations and boundaries of the projects, the projects' underlying purposes, and the objective criteria and methods that would be used. The court of appeal held that when a project is subject to variable future conditions, the project description must be "sufficiently flexible" to account for those conditions. Accordingly, the EIR was not required to include a highly detailed tree inventory. The court of appeal further held that "technical perfection," "scientific certainty," and "exhaustive analysis" are not required in an EIR, but rather the touchstone is "adequacy, completeness and a good-faith effort at full disclosure."

***Coalition for Historical Integrity v. City of San Buenaventura* (2nd App. District, June 2023)**

This case involved a challenge to the City of San Buenaventura's removal of a statue of Father Junípero Serra from its former location in front of San Buenaventura City Hall. Among other claims, the petitioner asserted that removal of the statue required CEQA review, violated the city's specific plan, and was a quasi-judicial act; and the city council "unlawfully acted with bias and prejudice."

Affirming the trial court, the court of appeal upheld the city's removal and relocation of the statue. First, the city had the right to find that the bronze replica of a previous concrete statue had no historical significance and was exempt from CEQA under the "common sense exemption." Substantial evidence supported the city's determination that, unlike the original statue, the bronze replica was never dedicated as a historical landmark and thus was not entitled to historical status. Second, while the city's plan calls for historic preservation, it allows for the removal of a historical resource the city found, on reexamination, never had historical value. Finally, the city's decision to remove the statue because it offended some in the community was a quasi-legislative policy decision, not a quasi-judicial decision.

***Save Berkeley's Neighborhoods v. Regents of the University of California* (1st App. Dist., May 2023)**

This case involved a challenge to the University of California, Berkeley's Upper Hearst development project's new academic, residential, and parking buildings and related increased student enrollment along with its certification of a supplemental environmental impact report (SEIR). The trial court agreed with the plaintiff, holding the "SEIR's analysis of increased student enrollment at UC Berkeley did not comply with CEQA." The trial court ordered the decertification of the SEIR as well as a suspension of student enrollment increases until the SEIR was revised.

The court of appeal reversed on two grounds based on developments after the trial court's ruling and during the pendency of the appeal. First, the court of appeal held that a long-range development plan (covering campus population increases) for which an EIR was certified in 2021 rendered moot the plaintiff's arguments regarding enrollment. Second, the trial court's decision to suspend further enrollment increases was unenforceable per Senate Bill 118, which passed in 2022 and established that enrollment increases do not constitute a "project" under CEQA. Senate Bill 118 also limits the court's ability to enjoin enrollment increases. These two changes prevented the court of appeal from providing relief to the parties. The trial court's order was vacated with directions to enter a new order dismissing the petition.

***Preservation Action Council of San Jose v. City of San Jose* (6th App. Dist., April 2023)**

This case involved a challenge to the proposed construction of three high-rise office buildings on a site with several historic structures in downtown San Jose. The petitioner alleged that the city's certification of a final SEIR was



inadequate because it failed “to study and impose ‘compensatory mitigation’ under [CEQA] for the project’s undisputed, significant impacts on historic resources.” The trial court denied the petition, and the developer demolished one of the historic buildings on the project site.

On appeal, the primary issue was whether the final SEIR was required to but failed to impose compensatory mitigation for the project’s impacts on historic resources. The court of appeal agreed with the trial court, holding that although compensatory mitigation is an option, CEQA does not require in-depth consideration of proposed mitigation without evidence the mitigation would substantially lessen a significant impact. No evidence was presented on the feasibility of proposed mitigation or that there were any comparable historic resources in the downtown area that could serve as “substitute resources or environments” for the historic resources at the project site. The court distinguished the use of compensatory mitigation for the replacement of an ecological habitat, a threatened or protected species, or farmland, when impacts can often be mitigated by providing equivalent resources or environments. Historic resources, on the other hand, are “unique, non-transferable element[s] of the built environment.”

***Friends of Oceano Dunes v. California Coastal Commission* (2nd App. Dist., April 2023)**

In this case, three community organizations challenged the California Coastal Commission’s authority to ban all off-highway vehicles at Oceano Dunes State Vehicular Recreation Area. The trial court denied the motion to intervene, holding the collective interests of the organizations were “adequately represented” by the California Coastal Commission and the Department of Parks and Recreation.

The court of appeal affirmed the trial court’s ruling. First, the court of appeal held the appellants’ “interest in this litigation is identical to that of the State defendants” and the appellants didn’t compellingly show that the respondents could not adequately represent the organizations’ interests. Second, the court held that trial courts have broad discretion in evaluating a permissive intervention request and the trial court did not abuse that discretion. Instead, the trial court likely avoided unnecessary burdens and delays since the organizations would have advanced the same positions as the California Coastal Commission. Third, the court held there was no abuse of discretion when the trial court declined to admit as evidence a stipulation submitted by the organizations with their reply brief that they claimed showed the state defendants would not adequately represent their interest. The stipulation was not authenticated, and the trial court had discretion to decline to admit evidence submitted for the first time with a reply brief.

***Valley Investments-Redwood LLC v. City of Alameda* (N.D. Cal., April 2023)**

In this case, the plaintiff challenged three City of Alameda ordinances in federal district court alleging constitutional and CEQA claims over a private marina the plaintiff purchased in December 2021. The private marina caters to floating homes and “liveaboard vessels” owned by third parties. The three ordinances applied rent control measures and COVID-19 eviction moratorium protections to floating homes and liveaboard vessels—affecting both the plaintiff’s ownership of the marina and the third parties’ residential tenancies.

The plaintiff alleged the three city ordinances were a “project” under CEQA, requiring environmental review because they would directly affect the plaintiff’s “land use decisions.” The plaintiff claimed the ordinances would prohibit it from raising the revenue needed for repairing sewage lines and accessing utilities and could consequently cause environmental impacts, such as increased water pollution and wildlife disruption.



The district court granted the city's motion to dismiss, finding that the ordinances were not a project because the plaintiff did not plausibly allege that the ordinances will result in the plaintiff's inability to maintain the property or allege any "nonattenuated" connection between an inability to maintain the property and an environmental impact. The allegation of potential environmental impact was based on mere speculation, which was insufficient.


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Contributing Authors



Jeffrey Carlin
Partner
Environment,
Land Use &
Natural Resources
jeff.carlin@alston.com



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



Gina Angiolillo
Senior Associate
Environment,
Land Use &
Natural Resources
gina.angiolillo@alston.com



Megan Ault
Senior Associate
Environment,
Land Use &
Natural Resources
megan.ault@alston.com



Ytran Hoang
Associate
Environment,
Land Use &
Natural Resources
ytran.hoang@alston.com



Kalina Zhong
Associate
Environment,
Land Use &
Natural Resources
kalina.zhong@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
+1 404 881 4609
leeann.anand@alston.com

Greg Christianson
+1 415 243 1012
greg.christianson@alston.com

Kevin Minoli
+1 202 239 3760
kevin.minoli@alston.com

Gina Angiolillo
+1 213 576 2606
gina.angiolillo@alston.com

Jeffrey Dintzer
+1 213 576 1063
jeffrey.dintzer@alston.com

Vickie Chung Rusek
+1 404 881 7157
vickie.rusek@alston.com

Doug Arnold
+1 404 881 7637
doug.arnold@alston.com

Ronnie Gosselin
+1 404 881 7965
ronnie.gosselin@alston.com

Hillary Sanborn
+1 202 239 3640
hillary.sanborn@alston.com

Megan Ault
+1 415 243 1056
megan.ault@alston.com

Maya Lopez Grasse
+1 213 576 2526
maya.grasse@alston.com

Shannon Vreeland
+1 404 881 7429
shannon.vreeland@alston.com

Greg Berlin
+1 213 576 1045
greg.berlin@alston.com

Krista Hernandez
+1 213 576 2531
krista.hernandez@alston.com

Sara Warren
+1 404 881 7472
sara.warren@alston.com

Jennifer Bonneville
+1 213 576 1148
jennifer.bonneville@alston.com

Hannah Hess
+1 213 576 1217
hannah.hess@alston.com

Matt Wickersham
+1 213 576 1185
matt.wickersham@alston.com

Meaghan Goodwin Boyd
+1 404 881 7245
meaghan.boyd@alston.com

Ytran Hoang
+1 213 576 2610
ytran.hoang@alston.com

Kalina Zhong
+1 415 243 1018
kalina.zhong@alston.com

Jeff Carlin
+1 213 576 1008
jeff.carlin@alston.com

Jason Levin
+1 213 576 2518
jason.levin@alston.com

Nicki Carlsen
+1 213 576 1128
nicki.carlsen@alston.com

Clay Massey
+1 404 881 4969
clay.massey@alston.com

Edward Casey
+1 213 576 1005
ed.casey@alston.com

Camille Smith McMakin
+1 404 881 7456
camille.mcmakin@alston.com