

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

Proposed Citywide Adaptive Reuse Ordinance

In 1999, the city council adopted the Adaptive Reuse Ordinance (ARO) that enabled the conversion of commercial buildings constructed in the downtown area in 1974 or earlier into thousands of housing units. To address the current housing crisis and post-COVID-19 economic recovery, City Planning prepared and released earlier this month the [second draft of the Citywide ARO](#) that will apply to all areas of the city outside the Downtown Community Plan Area. Commercial building conversions in downtown will continue to be covered by the 1999 ARO.

The proposed Citywide ARO establishes a by-right approval process to convert existing commercial buildings that are at least 15 years old into housing. A by-right approval process is also proposed to convert parking structures or parking areas within an existing building into housing units if at least five years have passed since a certificate of occupancy for the structure or building was issued. Commercial buildings at least five years old may be converted to housing subject to zoning administrator approval of a conditional use permit.

The Citywide ARO permits existing building conditions such as height, setbacks, floor area, parking, and loading areas deemed to meet Zoning Code standards. Housing units within adaptive reuse projects will be exempt from zoning requirements for minimum unit size; however, each unit must meet minimum City of Los Angeles Building Code standards. To encourage the voluntary inclusion of affordable housing units within adaptive reuse projects, the Citywide ARO provides incentives such as permitting the construction of up to two additional stories above the existing building height. City Planning is expected to hold a public hearing on the current Citywide ARO in the spring, with the draft going before the city planning commission in the summer.



California Environmental Quality Act (CEQA)

Natural Resources Defense Council Inc. v. City of Los Angeles and China Shipping (North America) Holding Co. Ltd., et al. (4th App. Dist., December 2023)

In 2019, the Port of Los Angeles certified a supplemental environmental impact report (SEIR) for the continued operation of a shipping container terminal for China Shipping, a lessee of and in the port. The South Coast Air Quality Management District and several community coalitions appealed a trial court's determination that substantial evidence supported some, but not all, of the port's determinations that the proposed mitigation measures were infeasible. They also challenged the trial court's remedy, which was to set aside the SEIR and allow operations to continue in the meantime. The appeals court held the following.

First, the port did not need to adopt a "demonstration program for zero- or near-zero-emission cargo handling equipment" because mitigation measures must actually reduce a project's adverse environmental impact. A demonstration program, as a "test" project, does not do so. Second, the port's decision not to include the adoption of a "greenhouse gas emissions fund" as a mitigation measure in the SEIR was not supported by substantial evidence.

Third, the port adequately responded to comments requesting that it appoint an independent monitor for mitigation measure compliance under CEQA. Fourth, the port's decision to delete a mitigation measure that appeared in an earlier version of the SEIR and that would phase out diesel-powered trucks' entry into the terminal and phase in LNG-fueled drayage trucks' entry was supported by substantial evidence because the port relied on findings in a report that studied the feasibility of this mitigation measure.

Fifth, the port abused its discretion in modifying a mitigation measure to require 95% compliance with the port's vessel speed reduction program (VSRP) (this changed the mitigation measure in the earlier EIR requiring 100% compliance with the VSRP) because the port modified the measure without pointing to a report or other facts.

Finally, the court of appeal determined that the trial court erred in limiting its remedy to setting aside the SEIR and allowing operations to continue. Public Resources Code Section 21168.9(a) allows a trial court to use one or a combination of three options to ensure CEQA compliance: (1) void the agency's action; (2) suspend project activities; or (3) direct the agency to undertake specific actions to bring its decision-making into compliance. The court of appeal remanded the matter for the trial court to exercise its discretion to fashion an appropriate remedy.

Planning and Conservation League v. Department of Water Resources (3rd App. Dist., Jan. 2024)

This consolidated appeal centered on the Department of Water Resources' approval of amendments to long-term contracts with local government agencies that receive water through the State Water Project. The original contracts were executed in the 1960s, with 75-year terms ending between 2035 and 2042. The amendments extended the contract terms to 2085 and made other changes to the contracts' financial provisions, including expanding the facilities listed as eligible for revenue bond financing.

The department reviewed the amendments under CEQA and determined they would not have an environmental impact because they would not create new water management measures, alter existing authority to build or modify State Water Project facilities, or change water allocation provisions in the contracts. The department subsequently

filed an action to validate the amendments. Several conservation groups and public agencies asserted either affirmative defenses or challenges to the amendments. In a coordinated proceeding, the trial court ruled in favor of the department.

The petitioners appealed, contending that the amendments violated CEQA, the Sacramento-San Joaquin Delta Reform Act, and the public trust doctrine. The court of appeal affirmed the trial court's ruling in favor of the department, finding that the amendments would not have a significant effect on the environment. The court of appeal rejected all the petitioners' CEQA claims, finding that (1) the EIR's impact analysis was not flawed; (2) the project description was accurate and stable; (3) the EIR properly considered alternatives; and (4) the department was not required to recirculate the draft EIR.

The petitioners also argued that the amendments qualified as a "covered action" under the Delta Reform Act, requiring the department to submit written certifications of consistency with the Delta Plan before approving the amendments. The court of appeal disagreed, finding that the amendments were not a covered action that physically occurred in the delta. Instead, the amendments merely extended the length of existing contracts and expanded the department's ability to finance improvements to State Water Project facilities.

Finally, the court of appeal rejected the petitioners' claim that the department violated its duty of continuing supervision under the public trust doctrine when approving the contract amendments. As the court of appeal noted, the department reached the reasoned conclusion that the amendments would not have an environmental impact on a public trust resource. As a result, the department does not bear the duty of weighing public trust interests or considering additional protections to those interests.

***Guerrero v. City of Los Angeles* (2nd App. Dist., January 2024)**

This case involved a real estate development project that was approved by the City of Los Angeles in three stages. In the first stage, the Planning Department approved a vesting tentative tract map and adopted a mitigated negative declaration (MND). The city then filed and posted a notice of determination (NOD) reflecting these approvals. In the second stage, the Planning Commission adopted the previously prepared MND, made zoning determinations, and recommended a zone change, which was followed by the issuance of a second NOD. In the third stage, the city adopted the recommended zone change and MND, and filed and posted a third NOD.

The plaintiffs filed a petition for writ of mandate alleging the city's approvals violated CEQA. The trial court determined that the petition was timely filed within 30 days of the third NOD and vacated the city's approvals. The court of appeal reversed, concluding that the petition was barred by CEQA's applicable 30-day statute of limitations because it was filed more than a year after the first NOD was filed and posted. The court held that for projects subject to multiple discretionary approvals, the first approval triggers the statute of limitations under CEQA.

The court reasoned that the CEQA Guidelines call for CEQA review at the earliest opportunity, and the "mere possibility" that a project may change throughout the planning process does not preclude applying CEQA requirements at the earliest stages of review. The city made its earliest "firm commitment" to the project when it approved the vesting tentative tract map, which triggered the limitations period. Further, there were no changes to the project requiring a subsequent or supplemental MND, so the city's later adoption of the same MND subject to the first approval did not restart or retrigger a new limitations period.



***Fix the City Inc. v. City of Los Angeles* (2nd App. Dist., February 2024)**

This case involved the City of Los Angeles' approval of a general plan amendment, zoning ordinances, and specific plan to regulate development along a portion of a light rail line between downtown Los Angeles and Santa Monica. The petitioner filed a lawsuit seeking to rescind approval of the specific plan and zoning ordinances on the grounds that they were inconsistent with the city's general plan, but the lawsuit was filed more than a year before the specific plan was approved.

In the published portion of this opinion, the court of appeal affirmed the trial court's dismissal of the challenge to the specific plan as untimely. The court held that the lawsuit was premature because it was filed before the specific plan was approved. Further, the petitioner's attempts to amend the pleading, made after the 90-day limitations period to challenge the specific plan under Government Code Section 65009 had expired, failed because the amended petition did not satisfy the "relation back doctrine." The court concluded that it made little sense to apply the relation back doctrine when the conduct essential for the cause of action to accrue (the adoption of the specific plan) occurred after the lawsuit was filed.

The court of appeal found this reasoning to be particularly significant in the context of the 90-day limitations period for challenges to local planning and zoning decisions under Section 65009. Because Section 65009's short limitations period was intended to provide certainty to the validity of land use decisions and reduce litigation delay given the state's housing crisis, these statutory purposes would be thwarted by allowing a premature lawsuit to be used to assert subsequent, untimely challenges to a local government's land use decisions.

***Hilltop Group Inc. v. County of San Diego* (4th App. Dist., February 2024)**

In this case, a developer sought approval to develop a recycling facility on land designated for industrial use in San Diego County's general plan update (GPU), which was approved in 2011 with a program EIR. Although county staff originally determined that the project would require an EIR, and the developer submitted a draft EIR, the staff subsequently concluded the project was exempt under CEQA Guidelines Section 15183, which applies to projects that are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified, except to the extent further review might be necessary to examine project-specific environmental effects "peculiar" to the project or its site. Despite the staff's recommendation, the county board of supervisors found the project was not exempt and had peculiar environmental effects that needed to be reviewed in an EIR.

The developer filed a lawsuit challenging this determination, which was denied by the trial court. The court of appeal reversed and found that Guidelines Section 15183 applied because the project was consistent with the GPU, for which a program EIR was certified. The court of appeal clarified that the substantial evidence standard governs whether the Section 15183 exemption applies—the court determines whether substantial evidence supports an agency's determination that the environmental effects of the project were analyzed in a prior EIR. Further, even if a project has peculiar environmental effects, additional review is not required if uniformly applied development policies or standards have been previously adopted by a city or county with a finding that those policies or standards will substantially mitigate that environmental effect when applied to future projects. Finally, the court found that the record did not support the board of supervisors' findings that the project had peculiar effects that would not be substantially mitigated by previously adopted uniform policies and procedures.


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