ALSTON & BIRD

LAND USE MATTERS

A PUBLICATION OF ALSTON & BIRD'S LAND USE GROUP

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We are pleased to once again present *Land Use Matters*, our publication that provides updates on new CEQA court decisions as well as planning developments for the City of Los Angeles and the County of Los Angeles. We realize that we took a hiatus during the second half of last year, but we were all busy responding to the unusual events of 2020! But we are back on track and will be presenting *Land Use Matters* in 2021 with the same vigor and frequency as we have in past years. We appreciate your support and readership.

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California Environmental Quality Act

Sierra Club v. County of Fresno **(5th App. Dist., December 2020)**

This decision flows from the California Supreme Court's *Friant Ranch* decision in 2018 that held that under certain factual circumstances, an environmental impact report (EIR) may need to discuss in further detail the relationship between a project's significant air quality impacts and the effect on human health. In that Supreme Court decision, the court held that the air quality section of the EIR was deficient. In this subsequent court of appeal decision, the court addressed the issue of whether CEQA Section 21168.9 authorizes a trial court to allow the lead agency to "partially certify" an EIR when a section of the EIR had been found deficient by the courts. While recognizing that a decision from the Second Appellate District (which encompasses Los Angeles County) had held that a court may order partial decertification of an EIR if certain findings concerning the severability of the development project or activity at issue could be made by the court, the Fifth Appellate District held that partial certification is not authorized under CEQA Section 21168.9 because CEQA also mandates that the lead agency can certify the EIR in the first instance only if the agency determines that the *complete* EIR had been prepared in compliance with CEQA. Although this court of appeal reached that decision, it should be noted that the court also held that any new challenge to the sections of the EIR that had been upheld and not invalidated by the court would not be permitted.

Protecting Our Water & Environmental Resources v. County of Stanislaus **(CA Supreme Court, August 2020)**

In this case, the California Supreme Court addressed the distinction between discretionary and ministerial projects. The plaintiffs challenged Stanislaus County's classification that certain well construction permits were ministerial, alleging that the permits were discretionary and required review under CEQA. The Supreme Court held that a blanket classification that well construction permits are ministerial was unlawful. However, the court also rebuffed the plaintiffs' claim that well construction permits were necessarily discretionary. In reviewing the classification, the court considered the scope of the agency's authority to deny or condition approval of a well construction permit on environmental considerations. Drawing upon prior appellate decisions, the court noted that the functional determination that a project is ministerial is whether the approval applies adopted standards or allows the government to modify the project to respond to environmental impacts. Although the county was likely correct that many of its permitting decisions were ministerial under that test, *some* permit decisions could be discretionary. Therefore, a categorical classification violated CEQA, and well construction permits must be deemed discretionary or ministerial on a case-by-case basis.

Golden Door Properties, LLC v. Superior Court of San Diego County; County of San Diego **(4th App. Dist., July 2020)**

In a case with a long procedural history and multiple lawsuits filed under CEQA, the Public Records Act, and other statutes, the court held that CEQA Section 21167.6, which mandates the contents of the administrative record in lawsuits arising under CEQA, also mandates lead agencies to not destroy, but retain, the documents required for inclusion in the administrative record. In this case, the County of San Diego had apparently destroyed emails pursuant to a policy that allowed emails to be destroyed after 60 days unless they were designated as "official records." The court held that the language of Section 21167.6 was broad, inclusive, and mandatory as to the contents of the administrative record. Further, public disclosure lies at the core of CEQA, and allowing lead agencies to destroy documents identified for inclusion in the administrative record during the entitlement proceedings would be contrary to those goals. It should be noted that the court observed that documents that are attached to emails that would not otherwise be included in the administrative record, such as preliminary drafts of certain reports, would not have to be disclosed since they are not required documents in the administrative record. The court also held that civil discovery may be permitted when CEQA plaintiffs try to obtain records that are required for inclusion in the administrative record.

Save Berkeley's Neighborhoods v. Regents of University of California **(1st App. Dist., June 2020)**

In a case showcasing the broad reach of the term "project change" under CEQA, the court held that a university had an obligation to analyze the environmental impacts of subsequent student enrollment increases that were higher than those anticipated in a previously drafted program EIR for the university's development plan. The court noted that although no changes occurred with the physical development or land use components of the plan, CEQA applied to increases in enrollment because increases are discretionary decisions that have the potential to result in physical environmental effects. The court held that since new or more severe environmental impacts would likely result from the project change, a subsequent or supplemental EIR may have been necessary.

Willow Glen Trestle Conservancy v. City of San Jose **(6th App. Dist., May 2020)**

In a case further clarifying what constitutes a discretionary approval under CEQA, the court denied a CEQA petition alleging that the City of San Jose violated CEQA because the city did not perform a supplemental environmental review when it re-applied for an expired permit for an already approved project. The city previously approved the demolition of the Willow Glen Railroad Trestle after it completed a mitigated negative declaration (MND) and the California Department of Fish and Wildlife (CDFW) issued a permit called the streambed alteration agreement (SAA). Because the SAA expired before demolition, the city reapplied for the permit citing mitigation measures specified in the MND and the original SAA. The court held that CEQA did not apply because the re-issuing of the permit was an action by the CDFW and not a discretional approval by the city. The court noted that "project approval" should not be conflated with "any action in connection with a project."

Los Angeles City Planning

Zoning Code and Downtown Community Plan Update

In November 2020, City Planning released the public hearing draft Zoning Code, draft Processes and Procedures Ordinance (Article 13 of the proposed Zoning Code), and draft Downtown Community Plan (DTLA 2040). City Planning Commission (CPC) hearings for the draft Zoning Code and DTLA 2040 have not been scheduled; however, DTLA 2040 will be the first community plan area to apply the new zoning. The draft Processes and Procedures Ordinance is expected to go to the CPC in spring 2021. In the February edition of *Land Use Matters*, we will provide a summary of proposed approval processes for development projects that will be incorporated by reference into the Downtown Community Plan.

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