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

**Increase to Planning Applications and Affordable Housing Linkage Fees**

On July 1, 2024, the fee for planning and land use applications increased by 3.5% based on the Consumer Price Index for All Urban Consumers (CPI-U) for the calendar year ending December 2023. The new fee schedule is set forth in the May 28, 2024 City Planning memorandum.

The Affordable Housing Linkage Fee (AHLF) increased by 3.8% based on the CPI-U average for the 12-month period ending April 2024. The AHLF assigns 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 set forth in the May 23, 2024 City Planning memorandum. The fee is due before building permits are issued.

## California Environmental Quality Act (CEQA)

***AIDS Healthcare Foundation v. Bonta*** **(2nd App. Dist., Mar. 2024)**

In 2021, the California legislature enacted Senate Bill 10, which authorizes local governments to adopt zoning ordinances allowing greater density for individual parcels located near transit or in an urban infill site. The law gives local governments the ability to supersede local housing density caps, even when those caps were enacted by voter initiative. The petitioner challenged the law, claiming SB 10 violates the initiative power in Article II, Section 11 of the California Constitution. The court of appeal affirmed the trial court's ruling denying the petitioner's claims and upholding SB 10 as constitutionally valid.

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First, the appellate court determined SB 10 supersedes even charter city housing density caps because the laws conflict, the housing shortage is a matter of statewide concern, and SB 10 is reasonably related to addressing the housing shortage. Second, the court found that the legislation preempts local voter initiatives establishing housing density caps because the laws conflict and the legislature expressed a clear intent to preempt these initiatives, including by requiring a two-thirds vote to supersede an initiative-based cap rather than the simple majority required to supersede a legislatively enacted cap. Last, because the legislature could have validly enacted a total nullification of local housing density caps statewide, the court found that SB 10's approach of cloaking cities in the mantle of state preemptive authority so that they have discretion to supersede local density caps is not constitutionally problematic. Parties can still seek administrative and judicial remedies if they believe a local legislative body abused its discretion in a specific zoning decision resulting from SB 10.

***Vichy Springs Resort Inc. v. City of Ukiah*** **(1st App. Dist., Mar. 2024)**

In this case, the petitioner asserted in pertinent part that the approval of permits for the demolition and redevelopment of a shooting range violated CEQA. The petitioner did not seek injunctive relief, and the project was completed during the pendency of litigation. The trial court sustained demurrers to the CEQA claims on the grounds that they were moot. The court of appeal reversed, holding that an order requiring CEQA compliance would not be a meaningless exercise of form over substance even after project completion. Rather, mitigation measures proposed in the petition could still be required to reduce or avoid the project's alleged significant environmental impacts, and the project's permit and certificate of occupancy could be revoked and held in abeyance pending the completion of any necessary environmental review. Accordingly, the matter was remanded to the trial court.

***Save the Capitol, Save the Trees v. Department of General Services*** **(3rd App. Dist., Apr. 2024)**

This case involved prior CEQA litigation that had challenged the Department of General Service's plans to demolish and rebuild the Annex portion of the California State Capitol building. In the prior litigation, the court of appeal held that certain portions of the project's EIR failed to comply with CEQA. The court of appeal remanded the matter and directed the trial court to issue a peremptory writ of mandate requiring the department to partially vacate its certification of the EIR and to revise and recirculate the deficient portions of the EIR consistent with the court of appeal's decision.

In response, the department revised, recirculated, and certified the revised EIR and then partially reapproved the project without one of the original project components, the visitor center. The trial court then discharged the writ, over the petitioner's objection, without determining whether the revised EIR remedied the CEQA violations identified in the court of appeal's opinion. The petitioner appealed the trial court's discharge of the writ, contending it was premature because (1) there had not yet been an adjudication of the adequacy of the revised EIR; and (2) the department had not yet reapproved the visitor center component of the project.

The court of appeal found that the trial court erred in discharging the writ. The trial court was required to determine that the revised EIR was consistent with the court of appeal's prior decision before discharging the writ, but only for the previously approved project components. The court of appeal denied the argument regarding the proposed visitor center because the approval of a project that is narrower than the originally proposed project is not an abuse of discretion.

***Make UC A Good Neighbor v. The Regents of the University of California*** **(Supreme Court, June 2024)**

In this case, the Supreme Court reviewed a well-publicized and controversial court of appeal decision holding that an EIR prepared for the University of California, Berkeley's proposed student housing project was deficient because it failed to evaluate the impacts of noise "from loud student parties in residential neighborhoods near the campus" and failed to justify the decision not to evaluate alternative locations for the project. After the Supreme Court granted review, the legislature passed urgency legislation adding two provisions to CEQA, through Public Resources Code Sections 21085 and 21085.2, providing that (1) the effects of noise generated by residential project occupants and their guests on human beings is not a significant effect on the environment under CEQA; and (2) public higher education institutions are not required to consider alternative locations in an EIR for residential or mixed-use projects when specified requirements are met.

The petitioner conceded that the new legislation applied to the case and established that the EIR was not required to evaluate "social noise" impacts for the project or alternative locations. But the petitioner contended the legislation did not apply to the EIR's consideration of UC Berkeley's long-range development plan, which guides the physical development of the campus, on the grounds that the plan did not qualify as a "residential project" subject to the legislation. The petitioner also argued the Supreme Court should evaluate its alternative locations argument for housing projects UC Berkeley might pursue in the future.

The Supreme Court rejected both arguments. First, the Supreme Court concluded that, based on its legislative history, the purpose of the new legislation makes clear that "residential project" should be interpreted broadly enough to include the long-range development plan at issue, or at least the portion of the plan addressing student housing goals. Second, the Supreme Court declined to issue an advisory opinion on how the new legislation might apply to future housing projects that were not before the court.

***Nassiri v. City of Lafayette*** **(1st App. Dist., July 2024)**

This case involved a 12-unit residential condominium project that a city found to be categorically exempt as an infill development under Guidelines Section 15332. The petitioner asserted that the categorical exemption did not apply because the project site allegedly had value as habitat for "rare" species and the project's construction would result in significant air quality impacts. The court of appeal upheld the trial court's decision to reject both arguments.

First, substantial evidence supported the city's decision that two species observed on the project site do not qualify as rare based on an expert's determination that the project site does not have habitat value for rare species. The species in question were locally and regionally abundant rather than species that exist in such small numbers that they may become endangered if their environment worsens. Second, expert analysis by the city's consultant that the project would not have significant air quality impacts provided substantial evidence supporting the city's determination. The court noted that the petitioner's expert did not conclude that emissions from project construction would exceed the relevant thresholds of significance and opined that the project "may" have significant effects, which is insufficient to preclude the exemption. In addition, the petitioner's expert did not accurately evaluate the scope of project emissions—the expert assumed a constant rate of emissions 24 hours per day throughout the six-month construction period, even though project construction would not occur all day or on weekends.

Finally, the court of appeal declined to consider the petitioner's argument that "unusual circumstances" precluded application of a categorical exemption, finding the petitioner had waived that argument by failing to raise it in the trial court. The court of appeal explained that the applicability of the unusual circumstances exception presents a question of fact reviewed for substantial evidence, rendering inapplicable the cases cited by the petitioner that allow reviewing courts to consider a new issue on appeal if it presents a pure question of law on undisputed facts.

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