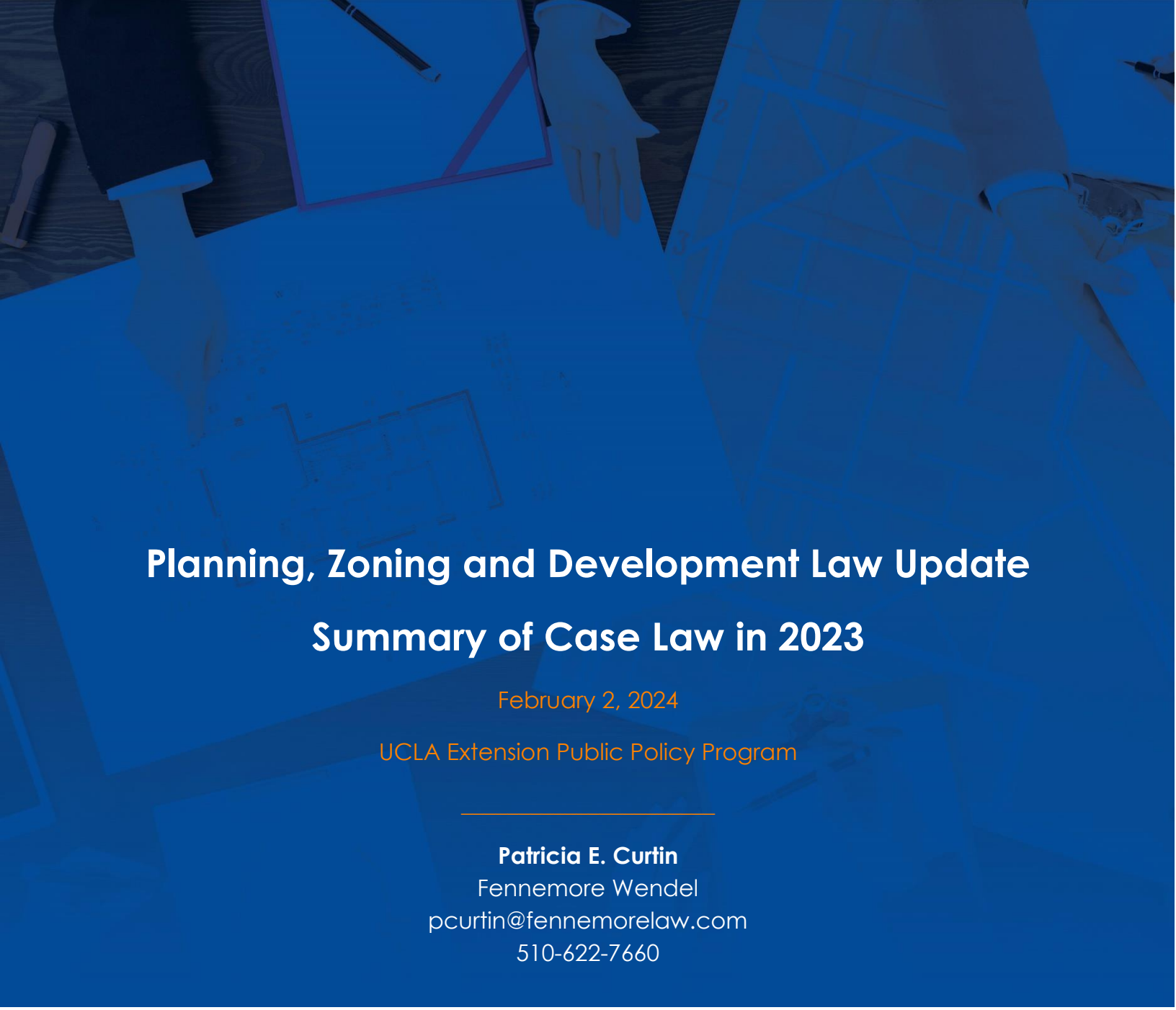

Planning, Zoning and Development Law Update

Summary of Case Law in 2023

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The following is a summary of 2023 case law that is most significant from a planning, zoning, and land use perspective. This summary does not include cases related to the California Environmental Quality Act ("CEQA"), which is covered in the CEQA Update segment of the program. This summary is not intended to be an exhaustive list of all reported cases in 2023 with planning and zoning implications.

I. HOUSING ACCOUNTABILITY ACT/HOUSING CRISIS ACT.

A. *Snowball West Investments LP v. Los Angeles*, (2023) 96 Cal.App.5th 1054.

Snowball West Investments, LP applied to build 215 homes in the Sunland/Tujunga area of the City of Los Angeles. The city informed the project would require a rezoning. The city denied Snowball's rezoning request, stating that more information was needed before homes could be built in a high wildfire hazard area.

Snowball sued and argued that under the rezoning exemption in the Housing Accountability Act ("HAA"), Government Code section 65589.5(j)(4)), the project was exempt from a rezoning. Both the superior and appellate courts ruled against Snowball.

Under the HAA, a proposed housing development project is not to be deemed inconsistent with zoning, and shall not require a rezoning, if the housing project is consistent with the objective general plan standards and criteria but the zoning for the site is inconsistent with the general plan. Gov Code 65589.5(j)(4).

In this case, the court determined that the zoning was consistent with the general plan even though the zoning wasn't specifically reference in the general plan. The court determined that the zoning was incorporated into the general plan by a footnote that states that each land use category includes the zones expressly listed, as well as any "more restrictive" zones not listed.

Because the rezoning exemption in section 65589.5(j)(4) only applies when "the zoning for the project site is inconsistent" with the applicable plan, the rezoning exemption in section did not apply here, and Snowball's project was not exempt from a rezoning. Further, the court wrote that the HAA does not apply, and the city's findings were sufficient and supported by substantial evidence.

B. *Save Lafayette v. City of Lafayette* (2022) 85 Cal.App.5th 842.

The applicant submitted an application in March 2011 for a 315-unit apartment project in the City of Lafayette. The project site was designated Administrative/Professional/Multi-Family Residential on the city's general-plan land-use map and was zoned Administrative/Professional which allowed housing. The application was deemed complete in July 2011.

The city certified an environmental impact report ("EIR") in 2013. Before the apartment project was approved, the applicant and the city entered into a processing agreement to suspend processing of the project while an alternative, smaller project was pursued. The parties agreed that if the city did not approve the project alternative, or if an appeal, challenge, or referendum was not resolved in a manner acceptable to the applicant, the applicant could terminate the process agreement and the city's processing of the apartment project application would immediately resume, with the parties situated as they were before the application was suspended.

In 2015, the applicant processed a 45 single family home project with a dog park, soccer field and drop off/pick up area for the nearby high school. The city approved the project. The approval required a general plan amendment and rezoning. Save Lafayette, a citizen's group, filed a referendum petition challenging the city's approval. The referendum was successful. The alternative project approval was rescinded, and the city adopted a rezoning to allow single family homes on larger lots, thereby preventing the alternative project.

In 2018, when it proved impossible to proceed with the alternative project, the applicant and the city "revived" the original apartment proposal, with some modifications. The city approved the apartment project in 2020, after the preparation of an addendum to the original EIR. Safe Lafayette, a citizen's group, claimed that the project conflicted with the city's general plan and zoning as it existed when the project was revived in 2011, and that the EIR was inadequate. The court of appeal affirmed the trial court's denial of the mandamus petition.

The question before the court was whether, under the HAA, the general plan and zoning standards in effect when the application was deemed complete in 2011 govern the project, or whether the Permit Streamlining Act's ("PSA") time limits deprived the city of the power to act on the application, such that the applicant must be treated as if it had resubmitted its application when it asked the city to resume processing the apartment application in 2018.

The challenger, Save Lafayette, argued that the application's 2011 complete determination lapsed under the PSA, or that the city lost power to act on the application 180 or 270 days after certifying the EIR. According to Save Lafayette, the applicant's request to resume processing should be treated as a resubmission in June 2018 of its project application, or the application should be deemed resubmitted and reviewed under the standards in effect on a new "'deemed complete'" date.

The court concluded that the PSA says no such thing. Rather, the consequence the statutory scheme provides for failure to act is that a project is deemed approved, if hearing and notice requirements are met. (Gov. Code, §§65956, subd. (b), 65957.)

The court noted that the PSA avoids deemed disapproval here because the court is not dealing with the PSA in a vacuum, but rather in its relation to the Housing Accountability Act ("HHA"). The court reviewed the intent of the HAA:

- California has a housing supply and affordability crisis of historic proportions and that millions of Californians are hurt by the consequences of failing to effectively and aggressively confront this crisis. (Gov. Code, §65589.5, subd. (a)(2)(A).)

-The Legislative intended in adopting and subsequently expanding the HAA "to significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects." (Id., subd.(a)(2)(K).)

- Courts are directed to interpret and implement the HAA to afford the fullest possible weight to the interest of, and the approval and provision of, housing. (Id., subd. (a)(2)(L).)

The court determined that these considerations weigh in favor of fixing the date on which the application was complete on the date when the city actually made that determination—in 2011—rather than at some later date after the city had twice down-zoned the project site to allow for much less housing development.

The court agreed with the applicant and city that the project was a "'housing development project' because it provided a portion of the units for very low, low-, or moderate-income households. The HAA provides that when a proposed housing development complies with objective general-plan, zoning, and subdivision standards and criteria in effect at the time the application is deemed complete, the local agency may disapprove the project or require lower density only if it finds the development would have specific adverse effects on public health or safety that cannot feasibly be mitigated.

The court found that the city properly applied the general plan and zoning standards in effect when the apartment application was deemed complete in 2011. The court also rejected challenges to the EIR.

Note – Save Lafayette also challenged the EIR. Only the court's opinion on the HAA and PSA was published the opinion on the CEQA issues was not.

C. *YIMBY v. Culver City* (2023) 96 Cal.App.5th 1103.

This was the first published case on SB 330 and the Housing Crisis Act.

The Housing Crisis Act of 2019 ("Act") was adopted to address the state's housing shortage. The Act prohibits affected cities from (1) enacting any policy that changes the zoning of parcels to "a less intensive use" or (2) "reducing the intensity of land use" within a zoning district to below what was allowed under zoning ordinances in effect on January 1, 2018.

The City of Culver City adopted an ordinance reducing the allowable floor area ratio ("FAR") for primary residences from .60 to .45, decreasing the square footage of a house that could be built on a lot.

Yes In My Back Yard ("YIMBY") filed a petition for writ of mandate seeking an order declaring the ordinance void. The trial court determined the ordinance violated the Act because the FAR reduction impermissibly reduced the intensity of land use.

The Second Appellate District affirmed in holding that the reduction in the FAR violated SB 330, which prohibits any policy that changes the zoning of parcels to "a less intensive use" or "reducing the intensity of land use" below what was in effect in 2018.

The court also affirmed the award of attorney fees to YIMBY. The court determined that YIMBY advanced the public's interest in the development of housing by challenging an ordinance that reduced the intensity of land use and residential capacity in the amount of $90,405 and added a multiplier for a total of $131,813.58.

II. HOUSING ELEMENT.

A. *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193.

During its fifth planning cycle, the City of Clovis was required to accommodate a "RHNA" allocation of 6,328 units, as well as 4,425 unbuilt units that were allocated in the previous fourth cycle.

To secure HCD's approval, the city amended its housing element to direct adequate zoning to cover the unaccommodated need from the previous cycle. Based on this directive, HCD certified the city's housing element in 2016.

The city never adopted the zoning so in 2018 HCD revoked certification of the housing element.

The city responded by amending its general plan and zoning ordinance to adopt a new overlay zoning district. This overlay district added another layer of permitted uses and standards over and beyond the existing (i.e., base layer) zoning. It did not remove the base zoning. So, both types of housing were allowed, causing multi-family housing development and single-family housing development competing for these sites. Following the city's adoption of the overlay zoning, HCD recertified the city's amended housing element.

The petitioner sued the city, alleging that it violated Housing Element Law because the amended housing element failed to accommodate city's carryover RHNA allocation.

Housing Element Law provides requirements for low-income housing that should have been accommodated during the previous cycle, but is rolled over to a new planning cycle. Specifically, when identifying certain sites to accommodate low-income units, jurisdictions must rezone those sites to 1) permit multifamily residential development by right where at least 20 percent of the units are affordable, and 2) provide certain *minimum density* requirements. The City's carryover units were subject to these more stringent requirements.

The overlay adopted by the city allowed by-right approval for multifamily developments at the required densities (here, at least 20 units per acre) on any qualifying parcels. But the overlay left the lower base densities and discretionary approval requirements intact. The petitioner argued that the law required the RHNA sites to have a single minimum density of at least 20 units per acre, which the overlay failed to do because it did not replace the low-density allowed by the base zoning with a mandatory density of at least 20 units per acre. The city argued that the statute does not require <u>exclusive</u> zoning at a density of 20 units per acre.

The court agreed with the petitioner. The court concluded that overlapping densities in zoning did not comply with Housing Element law.

Note- Courts generally will not depart from the HCD's determination unless it is clearly erroneous or unauthorized. Here, HCD's approval of the overlay was clearly erroneous and inconsistent with the law.

III. TAKINGS/EXACTIONS/FEES.

A. *Hamilton & High, LLC v. City of Palo Alto* (2023) 89 Cal App.5th 528.

In 2013, as part of the city's approval of the Hamilton Avenue project, the developer paid $1.56 million in fees, which included a $972,000 in-lieu parking fee. At that time, the city had plans to use the fees to build a parking garage. In 2019, the council opted not to move ahead with the garage choosing instead to pursue a comprehensive strategy for parking.

The Mitigation Fee Act ("Act") requires public agencies to make findings every five years concerning unexpended development impact fees. The city made findings for the parking fees for the 2007-08 and 2012-13 fiscal years but did not make findings by the statutory deadline for the 2017-18 fiscal year (i.e., within 180 days of June 30). Developer demanded a refund of the fee. The appellate court agreed and ordered the city to refund all unexpended parking fees.

The court's opinion underscores the importance of compliance with the requirements and deadlines of the Act. Five-year findings must be made for all development fees that fall within the Act's definition and must cover all unexpended fees in the fund. Jurisdictions that fail to adopt findings as required by the Act are at risk of having to refund the fees.

B. *Beck v. City of Whitefish* 653 F. Supp.3d 81 (District Court, D. Montana, Missoula Division (2023).

The City of Whitefish charged impact fees for water and wastewater services upon the issuance of building permits. Plaintiffs argued that the city committed a taking in requiring the payment of fees on building permits that were grossly disproportionate to the actual impact of the proposed development.

The city argued that because the impact fees derive from legislative ordinances, and because the fees are uniformly calculated on a framework specified in the ordinance rather than discretionary decisions applied to individual landowners, as a matter of law, they cannot constitute a taking under *Nollan/Dolan,* and therefore, Plaintiffs failed to state a valid takings claim. The city moved for a judgement on the pleadings for this cause of action. The court denied the city's motion.

The court disagreed that a monetary exaction analysis under the *Nollan/Dolan* standard is inapplicable as a matter of law. The Ninth Circuit, in *Ballinger v. City of Oakland,* 398 F. Supp. 3d 560 (N.D. Cal. 2019) recognized that, while the Supreme Court has limited the scope of exactions claims to

administrative or adjudicative land-use decisions, "the doctrine barring unconstitutional conditions is broader than the exactions context." The Ninth Circuit declined to follow the lower court's holding that determined, as a matter of law, generally applicable legislation could never be an unconstitutional exaction (holding instead that because the ordinance at issue in that case did not "conditionally grant or regulate the grant of a government benefit, such as a permit," it did not fall under the unconstitutional conditions umbrella). The court suggested that "any government action, including administrative and legislative, that conditionally grants a benefit, such as a permit, [could] supply the basis for an exaction claim rather than a basic takings claim.

Therefore, the court held that the city did not establish that, as a matter of law, plaintiffs' takings claim necessarily fails under any legal theory. Accordingly, the court found that plaintiff's claim for a taking is sufficient and cannot be dismissed as a matter of law.

Note- Last year we looked at Sheetz v. County of El Dorado, (2022) *84 Cal.App. 5th 394,, wherein the court determined that a $23,420 traffic mitigation fee imposed by El Dorado County for construction of a single-family home as required in the county's General Plan did not amount to an "unconstitutional condition" in violation of the takings clause under the Fifth Amendment.*

Mr. Sheetz challenged the imposition of the fee in arguing it violated the unconstitutional conditions doctrine under Nollan *and* Dolan. *The Nollan/Dolan heightened scrutiny test is used in reviewing "ad hoc exactions" imposed on a property owner on an individual and discretionary basis, and not on fees imposed pursuant to a legislatively authorized fee program that generally applies to all new development projects. Relying on this authority, the court concluded that the fee was not unconstitutional because the traffic fee was imposed under a legislatively authorized fee program (through the general plan) that generally applied to all new residential development within the county.*

This case is now before the U.S. Supreme Court. Oral arguments were heard on January 9, 2024 and a ruling should come out soon.

C. *Discovery Builders, Inc. v. City of Oakland* (92 Cal. App.5th 799 (Ist Dist., Div. 3, June 22, 2023).

This development project involved the closing and reclamation of a 128-acre quarry site, for the development of over 400 residential units, a community center, a park, pedestrian trails, and other recreational areas. In 2005, the developers entered into an agreement with the City of Oakland to pay certain fees to cover the costs of its project oversight. The agreement provided that the

fees set forth in the agreement satisfied "all of the Developer's obligations for fees due to the city for the Project."

In 2016, Oakland adopted ordinances that imposed new impact fees on development projects, intended to address the effects of development on affordable housing, transportation, and capital improvements. The city assessed the new impact fees on the project, then more than a decade into development, when the developers sought new building permits.

The trial court agreed with the developer and directed the city from assessing any fee not specified in the agreement. The court of appeal reversed, finding that any provision in, or construction of, the parties' agreement that prevents Oakland from imposing the impact fees on the development project constitutes an impermissible infringement of the city's police power and is therefore invalid.

IV. PREEMPTION.

A. *California Restaurant Association v. City of Berkeley* (9th Cir. 2023).

The City of Berkeley enacted a building code that prohibits natural gas piping into all that exists in buildings and in new buildings, rendering the gas appliances useless. The California Restaurant Association ("CRA"), whose members include restaurateurs and chefs, challenged Berkeley's regulation in claiming that the Energy Policy and Conservation Act ("EPCA"), preempts local regulations concerning the energy use of many natural gas applications, including those used in household and restaurant kitchens.

The district court dismissed the suit. The Ninth Circuit reversed the district court's dismissal. The panel held that, by its plain text and structure, the Act's preemption provision encompasses building codes that regulate natural gas use by covered products. By preventing such appliances from using natural gas, the Berkeley building code did exactly that. The panel reversed and remanded for further proceedings.

The city requested a rehearing stating that the court made significant errors in its interpretation of federal law. The Biden administration submitted an amicus brief in support of the city's petition for a rehearing as it seeks to preserve its ban on gas hookups in new buildings.

On Jan. 2, 2024, the federal appeals court declined to rehear the case. Following the split decision by the court's 29 judges to decline a new hearing, the ruling will become final unless the Supreme Court decides to review the case. Contra Costa County, Oakland, San Francisco, Los Angeles and San Jose

have similar regulations regarding the use of natural gas in new construction that could be invalidated by the ruling.

V. BUILDERS REMEDY.

Government Code section 65589.5(d)(5), known as the "Builder's Remedy," is a provision in the Housing Accountability Act ("HAA") that prevents jurisdictions without a substantially compliant housing element from denying certain housing projects, even if such projects are "inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation" at the time an application is deemed complete. Any jurisdiction that missed its deadline to adopt a substantially compliant housing element is immediately out of compliance with Housing Element Law, and subject to the Builder's Remedy.

The Builder's Remedy is available for residential projects that meet the HAA's definition of a "Housing Development Project," which is a project that contains either:

- Residential units only.
- Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use.
- Transitional housing or supportive housing.

The Builder's Remedy applies to projects that meet the following affordability thresholds:

- Twenty percent of the total units sold or rented to lower-income households;
- One-hundred percent of the units sold or rented to moderate-income households; or
- The project must be an emergency shelter.

Note- An applicant that submits a preliminary application while a jurisdiction does not have a compliant housing element maintains a vested right to develop the project in accordance with the Builder's Remedy even after the jurisdiction adopts a compliant housing element.