ALSTON&BIRD
LAND USE MATTERS
A publication of Alston & Bird's Land Use Group

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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, as well as new CEQA appellate decisions.

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State of California

Density Bonus for Commercial Development

On September 28, 2016, Governor Jerry Brown signed Assembly Bill 1934 (AB 1934), requiring a city, county, or city and county, until January 1, 2022, to grant a development bonus to a commercial developer that partners with an affordable housing developer to build housing through a joint project or two separate projects incorporating affordable housing. The commercial developer may build the affordable residential units, donate a portion of the project site or an offsite property for development with affordable housing, or make a cash payment to the affordable housing developer for use towards the costs of constructing an affordable housing project. Offsite housing must be within the boundaries of the local government, in close proximity to schools and employment centers, and within one-half mile of a major transit stop.

The bonus will be an incentive mutually agreed upon by the developer and the jurisdiction that may include up to a 20% increase in maximum floor area or building height, a 20% reduction to the minimum parking requirements, a limited-use elevator for upper floor accessibility, or an exception to a zoning ordinance. To qualify for the bonus, the commercial developer must provide a minimum of 30% of the total residential units for low-income households or a minimum of 15% of the units for very-low-income households. Nothing in the bill precludes an affordable housing developer from seeking a density bonus, concessions/incentives waivers/reductions of development standards, or parking ratios approved under Senate Bill 1818. AB 1934 goes into effect on January 1, 2017.

California Environmental Quality Act

The following are the reported appellate court decisions involving the California Environmental Quality Act (CEQA) rendered in September and October 2016.

Friends of the College of San Mateo Gardens v. San Mateo County Community College District (Cal. S.Ct., 9/19/16)

The California Supreme Court resolved conflicts between different appellate courts concerning when an addendum to a certified environmental impact report (EIR) or mitigated negative declaration (MND) could be used for a proposed modification to a previously approved project. Certain appellate courts had formulated a test for when a modification to

a prior project constituted a "new" project; an addendum cannot be used for a new project. (*Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288.) The California Supreme Court rejected the "new" project test embraced by *Save Our Neighborhood*. Instead, the court articulated the following test:

> When there is a change in plans, circumstances, or available information after a project has received initial approval, the agency's environmental review obligations "turn on the value of the new information to the still pending decisionmaking process." … If the original environmental document retains some informational value despite the proposed changes, then the agency proceeds to decide under CEQA's subsequent review provisions whether project changes will require major revisions to the original environmental document because of the involvement of new, previously unconsidered significant environmental effects.

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Bay Area Clean Environment Inc. v. Santa Clara County (6th App.Dist. 9/1/16)

In a matter involving approval of a reclamation plant for the closing of a mining operation, the court held that the EIR's analysis of cumulative impacts was valid even though it did not consider, either as a related project or a reasonably foreseeable future project, the applicant's new quarry permit because that application was withdrawn before the publication of the EIR. The court also upheld the lead agency's CEQA findings because of the detailed nature of, and the substantial evidence supporting, those findings.

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Coastal Hills Rural Preservation v. County of Sonoma (1st App.Dist. 9/1/16)

This action involved a challenge to a proposed expansion of a Buddhist retreat center, which also included a significant printing press operation. The court upheld the county's approval of the project and certification of the MND. The court first rejected the plaintiff's claims under the general plan and related zoning ordinances. Citing to well-established law according substantial deference to a city's or county's interpretation of its own general plan and zoning ordinances, the court upheld the issuance of use permits (the plaintiff's claims included the interpretation of what constitutes an "accessory" building and an "ancillary" use). Looking at the plaintiff's CEQA claims, the court found that the proposed expansion was a modification to an existing use and, therefore, an addendum to an MND was appropriate (rejecting the plaintiff's claim that the expansion constituted a new project). The court also rejected the plaintiff's claim that mitigation measures were improperly deferred because mitigation measures properly required compliance with local regulations concerning, among other things, fire protection.

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Citizens for Ceres v. City of Ceres (5th App.Dist. 9/12/16)

In a case upholding a city's approval of a new Wal-Mart store, the court held (in the only published portion of this appellate decision) that the real party in interest may properly seek recovery of its costs incurred in connection with the preparation of the administrative record. The plaintiff requested that the city prepare the administrative record, and the city directed its outside legal counsel to do so. Pursuant to an indemnification agreement with the real party, Wal-Mart reimbursed the city for the fees charged by its outside counsel. Since the record was prepared in a manner allowed by CEQA, the court held that the real party could seek to recover those costs from the plaintiff.

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Union of Medical Marijuana Patients Inc. v. City of San Diego (4th App.Dist. 10/14/16)

The court upheld a city's decision that an ordinance adopting regulations for the establishment and location of medical marijuana consumer cooperatives was not a "project" within the meaning of CEQA. The court held that not every ordinance is subject to CEQA; only those ordinances that have a potential for resulting in either a "direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment" are subject to CEQA. The court also rejected all of the plaintiff's claims that this particular ordinance would cause such environmental impacts, finding the plaintiff's alleged evidence "speculative."

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