

***The Lake Norconian Club Foundation v. Dept. of Corrections***  
**(Sept. 13, 2019) \_\_ Cal.App.5<sup>th</sup> \_\_**

The Lake Norconian Club Foundation (Foundation) brought suit against the Department alleging that the Department's failure to repair the roof of the historic Lake Norconian Club hotel building (which resulted in severe damage to the building from El Nino rains in 2014) was a CEQA project that required preparation of an EIR. The trial court held that the failure to repair was a CEQA project, but denied LNCF's petition for writ based on the statute of limitations. The Court of Appeal affirmed the judgment denying the petition on different grounds: that the department's inaction is not a project subject to CEQA.

Prior to bringing suit, the Foundation had worked with the Department to fund repairs to the historic hotel. However, the Department did not obtain sufficient funds to make those repairs prior to the El Nino rains. In a 2013 EIR prepared for the eventual closure of the prison on which grounds the hotel was located the Department had noted that it did not have the funds to both close the prison and preserve the hotel.

After examining the CEQA statute (which discusses projects in terms of "actions"), the Court concluded that inaction was not within the definition of "project:"

We agree that the failure to act is not itself an activity, even if, as may commonly be true, there are consequences, possibly including environmental consequences, resulting from the inactivity. The preparation of the 2013 EIR, precipitated by an express decision to close the prison adjacent to the former hotel, unquestionably was an activity and therefore a project subject to CEQA. However, the continuing failure to make repairs is no such activity and the issues presented by application of the statute of limitations to such a failure well illustrates the unworkability of deeming the inactivity a project. When would the limitations period commence? As the foundation acknowledges, "[t]he record documents many more than 180 days—indeed years—of discussions, correspondence, and documents relating to [the department's] long-term failure to maintain the landmark hotel after its closure . . . [¶] . . . [¶] The record reflects ongoing consideration of mothballing the hotel, sale to the City of Norco, declaring the hotel surplus property, and various plans and political action to move the adjacent prison that would in turn open up development opportunities for the hotel." The trial court undoubtedly was correct that in issuing the 2013 EIR the department expressly indicated its decision not to expend funds on the repair or maintenance of the former hotel, so that if that decision (as distinguished from the decision to close the prison) were deemed a project, the limitations period would have run by the time this action was filed. But as the foundation recognizes, the inactivity in fact began much earlier, and no particular date can be assigned to the failure to persuade the department to change its decision after issuance of the EIR.

The Court concluded that: "Were there a statute directing the department to maintain or repair the former hotel, the failure to do so would be correctible by a writ of mandate. But absent any such statutory duty, the department's failure to act cannot be deemed a project

or challenged for noncompliance with CEQA.”