



# CEQA Case Report

Understanding the Judicial Landscape for Development  
2019 Year in Review

## CEQA Case Report: Understanding the Judicial Landscape for Development

**Public agencies prevailed in 71% of CEQA cases analyzed.**



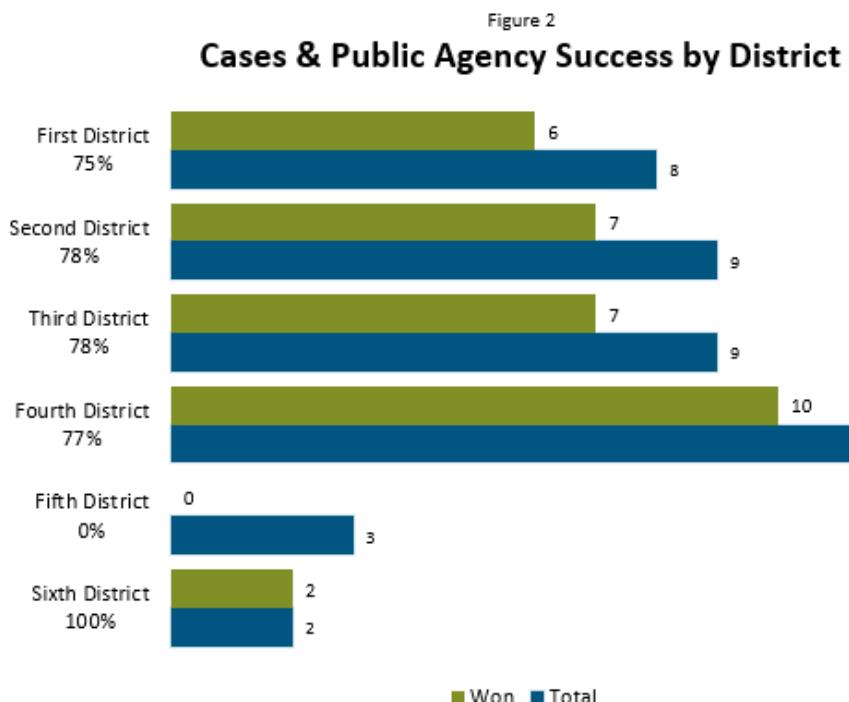
The Supreme Court explained that the test for whether a proposed activity constitutes a “project” under CEQA is whether, by its general nature, such activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment, and the test is applied without considering the likely actual impact of the activity.

Of the 45 appellate CEQA cases in 2019, 13 were published, 28 were unpublished, and 4 were partially published. Figure 1 (above) shows all 45 cases sorted by topic. The greatest number of cases (20 of the 45, or 44%) focused on Attorneys’ Fees, Justiciability, and Other Procedures. This category includes issues such as mootness, statutes of limitations, waiver, and res judicata. This represents a shift from 2018, when the plurality of CEQA cases (49%) centered around Environmental Impact Reports (EIRs). In 2019, just 14 of the 45 cases (31%) focused on EIRs. In 2019, five cases focused on Supplemental Review, three cases focused on Exemptions and Exceptions, and three cases focused on Mitigated Negative Declarations.

Figure 2 (right) shows the distribution of cases among California’s six appellate districts, as well as the percentage of cases in each district where the public agency prevailed. As was the case in 2018, the Sixth District was the only district in which the public agency prevailed in all cases.

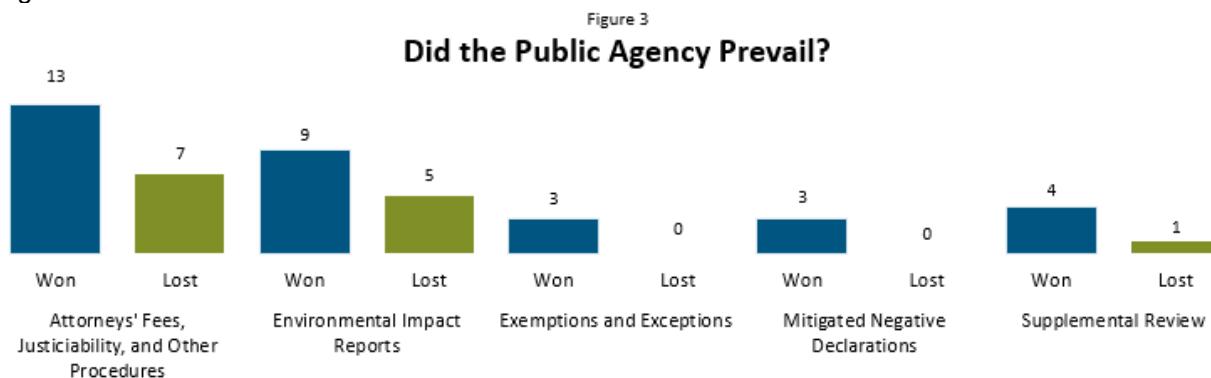
Latham & Watkins is pleased to present its third annual CEQA Case Report. Throughout 2019 Latham lawyers reviewed each of the 45 California Environmental Quality Act (CEQA) appellate cases, whether published or unpublished. Below is a compilation of the information distilled from that review and a discussion of the patterns that emerged from those cases. Latham has continued to monitor CEQA cases throughout 2020 and regularly posts key summaries to this [blog](#).

The California Courts of Appeal issued 44 CEQA opinions, while the California Supreme Court issued one CEQA opinion: *Union of Medical Marijuana Patients, Inc. v. City of San Diego et al.* Significantly, in *Union of Medical Marijuana Patients*, the Supreme Court considered CEQA’s definition of a project and held that a lead agency should consider reasonably foreseeable potential physical impacts on the environment at the beginning of the CEQA process and disagreed with arguments that a public agency may delay the environmental analysis of a zoning ordinance to a later



In contrast, public agencies did not prevail in a single case in the Fifth District, albeit with a small sample size of just three CEQA cases.

Figure 3 (*below*) separates cases by topic and shows whether the public agency prevailed in each type of case. For purposes of this summary, if the public agency lost on any issue it was deemed not to have prevailed. Overall, public agencies prevailed in 32 of the 45 cases, or 71% of the time, up slightly from a 65% win rate in 2018 and 2017. The public agency prevailed in 65% of Attorneys' Fees, Justiciability, and Other Procedures cases and 64% of EIR cases. Notably, the public agency prevailed in every Mitigated Negative Declaration case in 2019.



#### **COVID-19 Update: Statutes of Limitations Tolled in 2020**

COVID-19 reached California in early 2020 and resulted in statewide closures and shelter-in-place orders. The ongoing pandemic continues to impact civil litigation — including CEQA litigation — throughout the state.

On April 6, 2020, the Judicial Council of California issued Emergency Rule 9 tolling statutes of limitations for all “civil causes of action” until 90 days after the Governor lifts the COVID-19 pandemic state of emergency. Although the effect on all civil causes of action was significant, the rule was particularly remarkable with respect to limitation periods for challenging land use approvals, which are typically short — 30, 35, 90, or 180 days under CEQA and California’s Planning and Zoning Law.

However, on May 29, 2020, the Judicial Council amended Emergency Rule 9 to end the tolling for statutes of limitations and repose of 180 days or less on August 3, 2020. The Judicial Council stated that the amendment would “provide certainty and reasonable notice to litigants of the end of the tolling period, without overly impacting the construction industry and homebuilding or other areas in which the Legislature has mandated short statutes of limitation.” The result is a total tolling period of approximately four months. Some projects approved shortly before or during the COVID-19 emergency might be delayed as statutes of limitations run for longer than CEQA decrees. In light of the ongoing pandemic, Latham anticipates the issuance of some court opinions in CEQA cases to be delayed in 2020.

For insights and commentary on environmental issues and developments impacting business in California, the rest of the US, and the world, please visit Latham’s [Environment, Land & Resources blog](#).

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# 2019 CEQA CASE SUMMARIES

Attorneys' Fees, Justiciability, and Other Procedures					
	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
1	<a href="#">1100 Wilshire Property Owners Assn v. City of Los Angeles</a>	✓	2 <sup>nd</sup>	✗	<a href="#">1</a>
2	<a href="#">AIDS Healthcare Foundation v. City of Los Angeles</a>	✓	2 <sup>nd</sup>	✗	<a href="#">3</a>
3	<a href="#">Bootleggers2 v. City of Lancaster</a>	✓	2 <sup>nd</sup>	✗	<a href="#">5</a>
4	<a href="#">Capistrano Unified School District v. County of Orange</a>	✓	4 <sup>th</sup>	✗	<a href="#">7</a>
5	<a href="#">Carmichael v. City of Pacifica</a>	✓	1 <sup>st</sup>	✗	<a href="#">10</a>
6	<a href="#">Citizens Against the 24th Street Widening Project v. City of Bakersfield</a>	✗	5 <sup>th</sup>	✗	<a href="#">12</a>
7	<a href="#">City of Walnut v. Mount San Antonio Community College District</a>	✗	2 <sup>nd</sup>	✗	<a href="#">14</a>
8	<a href="#">County of San Joaquin v. Metropolitan Water District of Southern California</a>	✓	3 <sup>rd</sup>	✗	<a href="#">16</a>
9	<a href="#">Fudge v. City of Laguna Beach</a>	✓	4 <sup>th</sup>	✓	<a href="#">18</a>
10	<a href="#">Ione Valley Land v. County of Amador</a>	✓	3 <sup>rd</sup>	Partially	<a href="#">20</a>
11	<a href="#">KVB, Inc. v. County of Glenn</a>	✗	3 <sup>rd</sup>	✗	<a href="#">22</a>
12	<a href="#">La Jolla Shores Tomorrow v. City of San Diego</a>	✓	4 <sup>th</sup>	✗	<a href="#">24</a>
13	<a href="#">Lake Norconian Club Foundation v. Dept of Corrections and Rehabilitation</a>	✓	1 <sup>st</sup>	✓	<a href="#">26</a>
14	<a href="#">Los Angeles General Plan Consistency Coalition v. City of Los Angeles</a>	✓	2 <sup>nd</sup>	✗	<a href="#">28</a>
15	<a href="#">Oakdale Groundwater Alliance v. Oakdale Irrigation District</a>	✗	5 <sup>th</sup>	✗	<a href="#">31</a>
16	<a href="#">Protect Our Homes &amp; Hills v. County of Orange (attorneys' fees)</a>	✗	4 <sup>th</sup>	✗	<a href="#">33</a>

<b>17</b>	<a href="#"><u>San Diego Navy Broadway Complex Coalition v. California Coastal Commission</u></a>		4 <sup>th</sup>		<a href="#"><u>35</u></a>
<b>18</b>	<a href="#"><u>Save Lafayette Trees v. City of Lafayette</u></a>		1 <sup>st</sup>		<a href="#"><u>38</u></a>
<b>19</b>	<a href="#"><u>Turn Down the Lights v. City of Monterey</u></a>		6 <sup>th</sup>		<a href="#"><u>40</u></a>
<b>20</b>	<a href="#"><u>Union of Medical Marijuana Patients, Inc. v. City of San Diego et al</u></a>		Supreme Court		<a href="#"><u>42</u></a>

## Environmental Impact Reports

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
<b>21</b>	<a href="#"><u>Center for Biological Diversity v. California Dept of Conservation</u></a>		3 <sup>rd</sup>		<a href="#"><u>45</u></a>
<b>22</b>	<a href="#"><u>Chico Advocates for a Responsible Economy v. City of Chico</u></a>		3 <sup>rd</sup>	Partially	<a href="#"><u>48</u></a>
<b>23</b>	<a href="#"><u>Citizens for Positive Growth &amp; Preservation v. City of Sacramento</u></a>		3 <sup>rd</sup>		<a href="#"><u>51</u></a>
<b>24</b>	<a href="#"><u>Crenshaw Subway Coalition v. City of Los Angeles</u></a>		2 <sup>nd</sup>		<a href="#"><u>53</u></a>
<b>25</b>	<a href="#"><u>Grand Petroleum, Inc. v. County of Fresno</u></a>		5 <sup>th</sup>		<a href="#"><u>55</u></a>
<b>26</b>	<a href="#"><u>Highway 68 Coalition v. County of Monterey</u></a>		6 <sup>th</sup>		<a href="#"><u>59</u></a>
<b>27</b>	<a href="#"><u>Hollywoodians Encouraging Rental Opportunities (HERO) v. City of Los Angeles</u></a>		2 <sup>nd</sup>	Partially	<a href="#"><u>61</u></a>
<b>28</b>	<a href="#"><u>Jamulians Against the Casino v. Department of Transporation</u></a>		3 <sup>rd</sup>		<a href="#"><u>64</u></a>
<b>29</b>	<a href="#"><u>Living Rivers Council, et al v. County of Napa</u></a>		1 <sup>st</sup>		<a href="#"><u>66</u></a>
<b>30</b>	<a href="#"><u>Protect our Homes &amp; Hills v. County of Orange (merits)</u></a>		4 <sup>th</sup>		<a href="#"><u>70</u></a>
<b>31</b>	<a href="#"><u>Russell Covington et al v. Great Basin Air Pollution Control District et al</u></a>		3 <sup>rd</sup>		<a href="#"><u>73</u></a>
<b>32</b>	<a href="#"><u>Segal v. City of San Diego</u></a>		4 <sup>th</sup>		<a href="#"><u>75</u></a>

<b>33</b>	<a href="#"><u>South of Market Community Action Network v. City &amp; County of San Francisco</u></a>		1 <sup>st</sup>		<a href="#"><u>77</u></a>
<b>34</b>	<a href="#"><u>Stopthemillenniumhollywood.com v. City of Los Angeles</u></a>		2 <sup>nd</sup>		<a href="#"><u>81</u></a>

## Exemptions and Exceptions

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
<b>35</b>	<a href="#"><u>Berkeley Hills Watershed Coalition v. City of Berkeley</u></a>		1 <sup>st</sup>	Partially	<a href="#"><u>82</u></a>
<b>36</b>	<a href="#"><u>Fudge v. City of Laguna Beach</u></a>		4 <sup>th</sup>		<a href="#"><u>84</u></a>
<b>37</b>	<a href="#"><u>Holden v. City of San Diego</u></a>		4 <sup>th</sup>		<a href="#"><u>87</u></a>

## Mitigated Negative Declarations

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
<b>38</b>	<a href="#"><u>Community Science Institute v. County of Imperial</u></a>		4 <sup>th</sup>		<a href="#"><u>89</u></a>
<b>39</b>	<a href="#"><u>Maacama Watershed Alliance v. County of Sonoma</u></a>		1 <sup>st</sup>		<a href="#"><u>91</u></a>
<b>40</b>	<a href="#"><u>McVeigh v. City of La Quinta</u></a>		4 <sup>th</sup>		<a href="#"><u>94</u></a>

## Supplemental Review

	Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	Page Number
<b>41</b>	<a href="#"><u>Friends of Big Bear Valley v. County of San Bernardino</u></a>		4 <sup>th</sup>		<a href="#"><u>96</u></a>
<b>42</b>	<a href="#"><u>Jentz v. City of Chula Vista</u></a>		4 <sup>th</sup>		<a href="#"><u>98</u></a>
<b>43</b>	<a href="#"><u>Los Padres Forestwatch v. County of Ventura</u></a>		2 <sup>nd</sup>		<a href="#"><u>100</u></a>

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**44** Sacramentans for Fair Planning v.  
City of Sacramento  3<sup>rd</sup>  102

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**45** Save the Hill v. City & County of San  
Francisco  1<sup>st</sup>  105

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## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
1 1100 Wilshire Property Owners Assn v. City of Los Angeles		2 <sup>nd</sup>	

[1100 Wilshire Property Owners Association v. City of Los Angeles](#), California Court of Appeal, Second Appellate District, Division One, Case No. B286266 (March 5, 2019).

- *Compliance with CEQA is not required before modification of condition is imposed as a general project condition, rather than as a mitigation measure.*

### Background for Appeal

In 2004, 1100 Wilshire Commercial and 1100 Wilshire Garage (Wilshire Commercial) proposed the construction of a new, mixed-use development (Project) that would nearly double the size of the then-existing building. Upon review of the Project, the City of Los Angeles (City) planning department issued a mitigated negative declaration (MND) stating that Project implementation may result in insufficient parking capacity onsite, but that the impact, along with other environmental impacts, would be less than significant through the incorporation of mitigation measures. The City's planning department advisory agency (Advisory Agency) developed "Condition No. 11.b," which provided, among other things, that 697 on-site parking spaces must be maintained and not reduced.

Thereafter, the developer substantially reduced the proposed Project's size. The City issued an addendum to the MND stating that the previously issued mitigation measure for onsite parking was no longer necessary. Nevertheless, the City determined that certain measures, including parking capacity, could instead be included as "site-specific conditions" of the revised Project. Ultimately, Condition No. 11.b was listed as one of the site-specific conditions in the vesting tract map, but was not included as a mitigation measure designed to lessen a significant environmental effect, pursuant to CEQA.

### Modifying Condition No. 11.b Did Not Require CEQA Compliance

In September 2014, the Advisory Agency issued a letter of clarification to modify Condition No. 11.b, removing language requiring parking spaces to be maintained and not reduced because the development far exceeded the required number of parking spaces. Relying on revised Condition No. 11.b, the Department of Building and Safety issued building permits to Wilshire Commercial permitting the conversion of roughly 48 parking spaces into storage space.

In response, 1100 Wilshire Property Owners Association (Appellant) filed a petition for writ of mandate seeking to compel the City and area planning commission to set aside the determination letter, to compel the City to honor original Condition No. 11.b, and to compel Wilshire Commercial to restore the converted guest parking spaces. The Appellant alleged that original Condition No. 11.b was an environmental mitigation measure implemented pursuant to CEQA, and to modify original Condition No. 11.b, the City must comply with CEQA. Further, the Appellant argued that the City violated CEQA by issuing the building permits. The trial court denied the Appellant's CEQA claim, finding that after the initially proposed project was reduced in size, original Condition No. 11.b was imposed as a site-specific condition not subject to CEQA, and thus, the building permits did not violate CEQA.

The Court of Appeal agreed with the trial court, concluding that original Condition No. 11.b was not imposed as an environmental mitigation measure and, therefore, modification of the condition did not require compliance with CEQA. The Court distinguished conditions imposed as a result of CEQA analyses from those imposed as general project conditions. The Court explained that "[w]hen a condition

is imposed as a result of a CEQA analysis, then any subsequent modification of that mitigation condition requires compliance with CEQA ... In contrast, where a condition is imposed as a general project condition, compliance with CEQA is not required before modification of that condition."

Next, the Court clarified that although original Condition No. 11.b was initially proposed as an environmental mitigation measure, after the revised project was reduced in size, the condition was found not to be necessary as an environmental mitigation measure. The Advisory Agency adopted original Condition No. 11.b as a site-specific condition. As a result, the City was entitled to modify the condition without complying with CEQA.

### **Disposition**

The Court of Appeal affirmed the trial court's judgment, holding that the issuance of revised Condition No. 11.b, based on the letter of clarification, did not violate CEQA.

- Opinion by Presiding Justice Rothschild, with Justice Johnson and Justice Bendix concurring.
- Trial Court: Superior Court of Los Angeles County, No. BS166153, Judge James C. Chalfant.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
2 <i>AIDS Healthcare Foundation v. City of Los Angeles</i>		2nd	

[AIDS Healthcare Foundation v. City of Los Angeles](#), California Court of Appeal, Second Appellate District, Case No. B292816 (August 29, 2019).

- *An agency's resolution of an ambiguity in its municipal code is not an amendment of the code that would trigger a new EIR.*
- *The fact that zoning limitations were adopted to "prevent or mitigate the potential adverse environmental effects" of a change to zoning laws does not establish that the limitations were adopted pursuant to CEQA as mitigation measures.*
- *Errors in following CEQA procedures must be prejudicial to reverse an agency's decision.*
- *An advisory agency's approval of a tract map before an EIR is certified is not prejudicial error if a city council thereafter certifies the EIR and approves the tract map.*

### Background for Appeal

CH Palladium, LLC and CH Palladium Holdings, LLC (collectively, Real Parties) sought to redevelop the Hollywood Palladium theater and two adjacent parking lots into a residential, commercial, and entertainment complex consisting of a revitalized Hollywood Palladium theater, two 28-story residential towers, and extensive ground-level retail, restaurant, and park space (Project). Real Parties applied for a vesting tentative tract map, General Plan amendment, and zoning amendment in connection with the development.

In March 2015, the City of Los Angeles (City) issued the final environmental impact report (EIR) for the development. Over the next year, various City agencies held hearings in connection with the EIR, including the City's Director of Planning, which conditionally approved the tract map. In March 2016, the City Council certified the EIR and amended its General Plan to re-zone the Project's site parcels to align with the tract map, thus overruling the AIDS Healthcare Foundation's (Petitioner's) appeal of the tract map approval.

The following month, Petitioner filed a petition for a writ of mandamus, challenging the City's approval of the Project on the grounds that: (1) the City's interpretation of its own Municipal Code was invalid; (2) the City improperly removed conditions previously attached to the Project's site parcels; and (3) the City's EIR certification after the Director of Planning had approved the tract map violated CEQA. Following a hearing on cross-motions for judgment on the pleadings and a bench trial, the trial court denied all of Petitioner's claims.

### Resolution of an Ambiguity in the Municipal Code Is Not an Amendment of the Code Triggering an EIR Under CEQA

The City's zoning laws expressly authorized zone R5 "uses" in another zone — C4 with a Regional Center Commercial land use designation — but were silent as to whether the R5 "lot area requirements" could also apply to this C4 zone. The City determined that the "lot area requirements" could also apply.

Petitioner argued that this determination was an amendment of the code section and thus triggered a new EIR under CEQA. The Court of Appeal treated the silence in the code section as an ambiguity and found that the City's construction of the section was neither "plainly wrong" nor "clearly erroneous" and so was owed deference. The Court thus overruled this challenge.

### **Zoning Limitations to "Prevent or Mitigate" Environmental Harm Are Not CEQA Mitigation Measures**

Petitioner argued that zoning limitations in an ordinance adopted to "prevent or mitigate the potential adverse environmental effects" of a change to the City's zoning laws were CEQA mitigation measures. The Court of Appeal concluded that this language alone, without any further indication in the ordinance otherwise, was insufficient to establish that the limitations were adopted as CEQA mitigation measures. The Court also noted that an EIR was prepared along with the zoning changes effectuated by this ordinance, but that it could not assess whether the zoning limitations were, in fact, adopted as CEQA mitigation measures because Petitioner did not attach the report.

### **Errors in Following CEQA Procedures Must Be Prejudicial to Be a Basis for Reversal of an Agency's Decision**

Petitioner challenged the City's tract map approval prior to the EIR's certification as a violation of CEQA procedures. Petitioner argued that tract map approval was an action taken to approve the Project prior to the certification of the EIR by the lead agency. The Court of Appeal stated the general rule that "[e]rrors in following CEQA's procedures require reversal only if the error is 'prejudicial.'" The Court concluded that any error in the order of events "was not prejudicial for the simple reason that [Petitioner] appealed the tract map approval all the way to the City Council," and as a result, the tract map and EIR were both pending for the City's approval at the same time.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's judgment upholding the City's amendment of its General Plan and approval of the EIR for the Project.

- Opinion by Justice Hoffstadt, with Presiding Justice Lui and Justice Chavez concurring.
- Trial Court: Los Angeles County Superior Court, Case No. BS161771, Judge Yvette M. Palazuelos and Judge Amy D. Hogue.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
3 <i>Bootleggers2 v. City of Lancaster</i>		2 <sup>nd</sup>	

[Bootleggers2 v. City of Lancaster](#), California Court of Appeal, Second Appellate District, Division Five, Case No. B289315 (April 29, 2019).

- *In CEQA actions, the petitioner must name and timely serve the party receiving the approval as a real party in interest.*
- *The court may dismiss an action when a necessary and indispensable party has not been joined, and the statute of limitations for doing so has run.*
- *The court has no obligation to join necessary parties or real parties in interest on its own motion.*

### Background for Appeal

In 2017, the City of Lancaster (City) issued a conditional use permit (CUP), granting the project applicant (Real Party) the right to construct and operate a gas station, carwash, and mini-mart (Project). Petitioner, the owner of a nearby liquor store, filed a petition for writ of mandate, alleging that the City violated CEQA.

The petition's caption named no real parties in interest, but the body of the petition alleged that Real Party was the real party in interest for the CEQA claims. Petitioner mailed a "courtesy copy" of the petition to Real Party, but did not serve Real Party with a summons. The City moved for judgment on the pleadings, which the trial court granted with leave to amend. Petitioner's amended petition also did not name any real parties in interest in the caption, despite alleging in the body of the petition that Real Party was the real party in interest for CEQA claims. Petitioner again served Real Party with a copy of the petition, but did not serve Real Party with a summons.

The trial court dismissed the petition, concluding that Petitioner had failed to join Real Party, a necessary and indispensable party. The trial court also denied the petition on the alternative grounds that Petitioner lacked standing to pursue CEQA claims and that the City's findings were supported by substantial evidence. Petitioner timely appealed.

### Real Party Was a Necessary and Indispensable Party

First, the Court of Appeal concluded that Petitioner failed to join Real Party. The Court determined that sending Real Party a courtesy copy without a summons was insufficient; Petitioner was required to serve Real Party with a summons. The Court also determined that Petitioner violated CEQA's statutory requirement to name and timely serve any real party in interest.

Next, the Court concluded that Real Party was a necessary party. If the trial court had granted the petition and set aside the CUP, Real Party would no longer have the right to develop its Project. Thus, Real Party had a significant and cognizable interest in the outcome of the litigation, and Petitioner's failure to join Real Party impeded its ability to protect its interest. Further, under CEQA, the party receiving the approval is automatically a necessary party, and must be named as a real party in interest.

The Court also concluded that Real Party was an indispensable party because Real Party would be prejudiced by a judgment rendered in its absence. Although Petitioner may not have had a remedy if the

trial court dismissed the petition, Petitioner should have been aware that Real Party was the project applicant.

### **Petitioner's Arguments Opposing Dismissal Lacked Merit**

The Court of Appeal also rejected Petitioner's arguments opposing the dismissal of its petition.

First, Petitioner contended that its CEQA claim, which sought to set aside the CUP because the City's findings were not supported by substantial evidence, did not require the joinder of a real party in interest. The Court disagreed, explaining that seeking to set aside a permit issued to a real party was an "obvious" example of relief that would injure the real party's interests.

Next, the Court rejected Petitioner's argument that because Real Party did not own the property it sought to develop, Real Party did not have a vested or legal interest in the action. In CEQA cases, the recipient of the approval must be named. Further, ownership is not a prerequisite for a party to be necessary and indispensable. Real Party had been awarded a Project entitlement that Petitioner sought to invalidate.

Petitioner also asserted that its non-joinder of Real Party was immaterial because the City had the authority to rescind the CUP. The Court found any potential rescission speculative and irrelevant to whether Real Party's interests would be prejudiced if the petition were granted.

In addition, Petitioner contended that the trial court should have ordered Real Party to be joined. The Court of Appeal rejected this argument, finding no authority for the proposition that a trial court has an obligation to sua sponte join a party. Moreover, CEQA's statute of limitations to name and serve Real Party ended 20 days after Petitioner served the City, and the trial court could not compel Real Party's joinder after this date.

Finally, Petitioner argued that the City waived its right to have Real Party joined by failing to timely raise the issue. The Court disagreed, explaining that the City could not waive Real Party's right to participate in the action.

### **Disposition**

Accordingly, the Court of Appeal affirmed the superior court's judgment dismissing the petition for writ of mandate and upholding the City's issuance of the CUP.

- Opinion by Presiding Justice Rubin, with Justice Moor and Justice Kim concurring.
- Trial Court: Superior Court of Los Angeles County, Case No. BS169660, Judge Mary H. Strobel.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
4 <i>Capistrano Unified School District v. County of Orange</i>		4 <sup>th</sup>	

[Capistrano Unified School District v. County of Orange](#), California Court of Appeal, Fourth Appellate District, Division Three, Case No. G056177 (May 7, 2019).

- *CEQA's statute of limitations begins to run once an NOD is filed, even if the person who filed the NOD lacked authority to do so.*
- *CEQA's statute of limitations begins to run when a county files an NOD with the county clerk, and is unaffected by whether the NOD was filed with the state OPR.*
- *Agreements that commit an agency to a definite course of action constitute project approvals, even if they are not formal approvals.*

### Background for Appeal

The County of Orange (County), the Foothill/Eastern Transportation Corridor Agency (Corridor Agency), and the California Department of Transportation (CalTrans) (collectively, Respondents) proposed to construct a bridge over the Oso Parkway (Project). To analyze the environmental effects of the Project, the County prepared an addendum to two previously certified environmental impact reports (EIRs). On June 14, 2016, the County filed a notice of determination (NOD) with the County clerk, stating that the Project would not have a significant effect on the environment. The NOD was signed by a County planner.

On February 2, 2017, the County and CalTrans executed a Freeway Agreement authorizing the County to begin construction of the Project. On March 28, 2017, both the County and the Corridor Agency approved a Cooperative Agreement, under which the County would construct the Project and convey it to the Corridor Agency, which would eventually transfer the Project to CalTrans.

On December 20, 2017, the Capistrano Unified School District (Petitioner) filed a petition for writ of mandate, alleging various CEQA violations and arguing that the Project's construction would cause significant unmitigated impact on two nearby schools. Respondents demurred, arguing that Petitioner's claims were untimely. The trial court granted the demurrers, finding that Petitioner's claims were time-barred, and entered a judgment of dismissal. Petitioner timely appealed.

### The NOD Was Not Defective

Petitioner argued the County's NOD was defective and that a 180-day statute of limitations applied because:

- The NOD was signed by a County planner who lacked authority to file the NOD
- The NOD's description of the Project was misleading and inaccurate
- The County did not file the NOD with the state OPR.

The Court of Appeal rejected each of these arguments. First, the Court concluded that the County planner's filing of the NOD did not render the NOD defective. If the planner lacked authority to file the NOD, this would only excuse the need to exhaust administrative remedies. A lack of authority or the misuse of authority would not prevent the statute of limitations from beginning to run when the NOD was filed. The Court reasoned that Petitioner could and should have timely filed a petition alleging that the Project's approval was improper.

Second, the Court concluded that the NOD was not inaccurate or misleading. In evaluating an NOD, a court considers whether it substantially complies with content requirements. Here, it was enough that the NOD identified all applicable EIRs; the NOD was not required to explain how the previous EIRs related to the Project. The Court also found that the NOD unambiguously described the Project as a bridge over the Oso Parkway.

The Court of Appeal also rejected the contention that the County was required to file the NOD with the state Office of Planning and Research (OPR). Petitioner argued that the County violated a CEQA Guideline requiring a lead agency to file an NOD with the OPR for projects requiring discretionary approval from a state agency. The Court reasoned that the only filing required to trigger CEQA's statute of limitations was the obligation to file the NOD with the County clerk, which the County did in June 2016. The Court declined to reach the issue of whether CalTrans took a discretionary action on the Project, explaining that it would not affect the running of the statute of limitations.

Thus, the Court concluded that the NOD was not defective and that the exception to CEQA's 30-day statute of limitations for defective NODs did not apply.

### **The Freeway and Cooperative Agreements Were Project Approvals**

Petitioner argued that the Project had never been approved, alleging that the NOD was ineffective and that the Freeway Agreement and Cooperative Agreement were not real approvals. The Court rejected this argument, determining that Respondents approved the Project via the Freeway and Cooperative Agreements and that Petitioner's claims were time-barred.

Under CEQA, a project approval is a public agency decision that commits the agency to a definite course of action, and commitment does not require a formal approval. The Court of Appeal determined that the petition contained admissions that Respondents had approved the Project, which were binding for the purposes of demurrer. The Court also determined that CalTrans had irrevocably committed to the Project by agreeing that the County could begin construction in the February 2017 Freeway Agreement, and that the Freeway Agreement also bound the County by authorizing it to proceed after the County requested authorization. In addition, the Court noted that the County Board of Supervisors had formally approved the Cooperative Agreement in March 2017. The Court reasoned that even if the June 2016 NOD did not trigger the statute of limitations, the February 2017 Freeway Agreement and March 2017 Cooperative Agreement were project approvals that triggered a 180-day statute of limitations, and Petitioner's December 2017 claims were therefore time-barred.

### **No Relief Available Based on Potential Future Actions of Responsible Agencies**

Finally, Petitioner alleged that regardless of the statute of limitations, it was entitled to injunctive and declaratory relief against the Corridor Agency and CalTrans, because as responsible agencies under CEQA they had a continuing duty to monitor the Project for CEQA violations, citing CEQA Guidelines Section 15096. The Court rejected this argument, explaining that Section 15096 does not impose a continuing duty to monitor on responsible agencies. In essence, Petitioner argued that it was entitled to relief against these responsible agencies because at some point in the future, the County might have to prepare an EIR or negative declaration, which the Corridor Agency and CalTrans should be required to veto. The Court rejected this argument as premature and based on a hypothetical controversy, explaining that declaratory and injunctive relief require a current and actual controversy.

## **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's judgment.

- Opinion by Acting Presiding Justice Bedsworth, with Justice Moore and Justice Aronson concurring.
- Trial Court: Superior Court of Orange County, No. 30-2017-00963064, Judge Kim Garlin Dunning.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
5 Carmichael v. City of Pacifica		1 <sup>st</sup>	

[Carmichael v. City of Pacifica](#), California Court of Appeal, First Appellate District, Case No. A153630 (April 3, 2019).

- *A failure to exhaust administrative remedies is fatal to a CEQA action.*
- *Any arguments raised for the first time in a reply brief are waived.*

### Background for Appeal

In 2015, the City of Pacifica (City) Planning Commission prepared a report recommending the approval of the construction of four detached studio apartments on a triangular lot (Original Project). After concluding that the Original Project fell under a CEQA Class 3 exemption for “apartments, duplexes, and similar structures designed for not more than six dwelling units,” the Planning Commission granted a site development permit, a coastal development permit, a variance, and a parking exception. Petitioners appealed this decision to the City Council, which denied the appeal and upheld the Planning Commission’s approval of the Original Project.

Petitioners then appealed the coastal development permit to the California Coastal Commission (Coastal Commission). The developers prepared information responsive to the Coastal Commission’s requests and modified the Original Project, attaching the four apartments and combining them into a three-story building, while also providing for a 50-foot-wide buffer around the property’s wetland (Modified Project). The Coastal Commission issued a Notice of Intent to Issue a CDP for the Modified Project, and the developer then applied for approvals for the Modified Project with the City.

After the City received the developer’s application for an amended site development permit, a variance, and a parking exception, the Planning Commission prepared a report for the Modified Project. In its report, the Planning Commission recommended the approval of the Modified Project and again found that it qualified for the Class 3 exemption.

The Planning Commission also prepared a supplemental report, which focused on the revised design of the Modified Project’s storm drain infrastructure. This report determined that the revisions to the storm drain infrastructure were exempt from CEQA under Class 2 and Class 4 categorical exemptions for the “replacement or reconstruction of existing structures and facilities” and “minor public or private alterations in the condition of land.” At the conclusion of the hearing on October 17, 2016, the Planning Commission approved the Modified Project, granting an amended site development permit, a variance, and a parking exception.

Petitioners thereafter appealed this decision to the City Council. Although the City Council ultimately recommended approval of the Modified Project, it made suggestions regarding the amount of sidewalk to be installed. Acknowledging that the Coastal Commission may not approve of a sidewalk along the entire front of the property, the City Council recommended the installation of as much sidewalk as approved by the Coastal Commission with a mid-block crosswalk to connect the property to the future Coastal Trail. The City Council then denied the appeal and upheld the Planning Commission’s approval of the amendments to the development permit, variance, and parking exception, filing a Notice of Exemption.

On January 4, 2017, Petitioners filed a petition for a writ of administrative mandate, arguing that the Modified Project should not have been exempt from CEQA and that the site development permit and variance were improperly issued. On December 18, 2017, the trial court denied the petition. Petitioners timely appealed.

### **Exhaustion of Administrative Remedies**

Petitioners made three broad arguments related to CEQA. First, they argued that the wetland buffer and mid-block crosswalk did not fall under the Class 3 exemption. Second, they argued that the revised storm drain did not qualify for a Class 2 or Class 4 exemption. Finally, they argued that the Modified Project should otherwise be subject to CEQA because of its “cumulative impacts” and its presentation of “unusual circumstances” due to the “particularly sensitive environment.”

Real Parties in Interest (Real Parties) responded that Petitioners failed to demonstrate that they exhausted their administrative remedies by adequately raising these arguments at the administrative level. Petitioners pointed to various vague statements they made in letters to the Planning Commission and general arguments that the Modified Project did not fall within the terms of a categorical exemption as evidence of exhaustion. The Court of Appeal agreed with Real Parties and found that Petitioners’ position was without merit because Petitioners: (i) did not demonstrate that they had exhausted their administrative remedies, and (ii) had effectively waived making any additional arguments by only raising these matters for the first time on reply.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court’s judgment denying the petition for writ of administrative mandate.

- Opinion by Acting Presiding Justice Richman, with Justice Stewart and Justice Miller concurring.
- Trial Court: San Mateo County Superior Court, Case No. 17CIV00042, Judge George Miram.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
6 <i>Citizens Against the 24th Street Widening Project v. City of Bakersfield</i>		5 <sup>th</sup>	

[\*Citizens Against the 24th Street Widening Project v. City of Bakersfield\*](#), California Court of Appeal, Fifth Appellate District, Case No. F076352 (March 8, 2019).

- *A prevailing party is entitled as a matter of right to recover costs reasonably and necessarily incurred in preparation of the record in CEQA cases.*
- *Complying with a peremptory writ and having the writ discharged as a result cannot be the basis for prevailing party status in CEQA litigation.*

In response to the trial court's issuance of a peremptory writ requiring augmented environmental review for the 24th Street Widening Project (Project), the City of Bakersfield (City) certified a recirculated final environmental impact report (2016 R-FEIR), filed return to the writ, and delivered a supplemental administrative record (Supplemental Record). After ruling in the City's favor, the trial court granted Citizens Against the 24th Street Widening Project's (Petitioner's) motion, in part, to tax costs. The appeal concerned costs awarded to the City relating to the preparation of the Supplemental Record.

### Background for Appeal

The Project involved a series of improvements in the City, including the widening of 24th Street between Olive Street and D Street, and improvements at the Oak Street and 24th Street intersection. In 2012, the City prepared a draft EIR (2012 DEIR) for the Project. In response to resident comments on the 2012 DEIR, the City approved the construction of six new cul-de-sacs as a separate project with a negative declaration. In 2013, the City prepared a final EIR (2013 FEIR) incorporating a new cul-de-sac and a modification to another but excluding the other six as a separate project.

In 2014, Petitioner filed an action challenging the 2013 FEIR's sufficiency, arguing that it improperly piecemealed the six cul-de-sacs into a separate project and failed to sufficiently assess project alternatives. The trial court issued a peremptory writ requiring the City to augment its environmental review of the project.

In June 2016, the City certified its 2016 R-FEIR, filed a return to the writ, and delivered the Supplemental Record. Petitioner opposed the City's request to discharge the writ (*Citizens I*) and, in a separate action, challenged the 2016 R-FEIR on several grounds and requested a new writ of mandate (*Citizens II*). The trial court consolidated these actions and, after ruling in the City's favor, granted Petitioner's motion, in part, to tax costs. Petitioner challenged the award of costs relating to the City's preparation of the Supplemental Record.

### Awarding Cost Recovery to the City for the Supplemental Record Was Improper

The Court of Appeal considered whether the City was a prevailing party and, if so, the cost recovery to which it would therefore be entitled. After explaining that the City was a prevailing party only in *Citizens II*, the Court determined that the Supplemental Record was prepared as part of *Citizens I*, and therefore held that costs associated with its preparation could not be recovered by the City.

First, the Court explained that as a general matter “a prevailing party is entitled as a matter of right to recover costs in any action or proceeding,” including costs “reasonably and necessarily incurred in preparing the [record]” in CEQA cases.

The Court then noted that the consolidated proceedings before the trial court actually comprised two separate actions — *Citizens I*, involving the City’s motion to discharge the writ, and *Citizens II*, concerning Petitioner’s opposition to the 2016 R-FEIR. With respect to *Citizens I*, the Court explained that “[c]omplying with a peremptory writ and having the writ discharged as a result cannot logically be the basis for prevailing party status in CEQA litigation.” Therefore, while the City prevailed in its opposition to Petitioner’s motion in *Citizens II*, the Court held that the City’s ultimate compliance with the writ of mandate in *Citizens I* did not render the City a prevailing party in *Citizens I*.

Finally, the Court considered the Supplemental Record as it related to the two actions, ruling that the Supplemental Record was prepared in support of the City’s motion to discharge the writ in *Citizens I*, and not in opposition to Petitioner’s motion challenging the 2016 R-FEIR in *Citizens II*. In doing so, the Court also highlighted the fact that *Citizens II* was not filed until after costs associated with the Supplemental Record were incurred. Therefore, the Court held that “costs of preparing the supplemental administrative record were costs incurred in *Citizens I*,” and “because [P]etitioner was the prevailing party in *Citizens I*, the costs cannot be recovered by [the City].”

### **Disposition**

Accordingly, the Court of Appeal reversed the trial court’s order denying Petitioner’s motion to tax costs, in part.

- Opinion by Justice Poochigian, with Presiding Justice Hill and Justice Meehan concurring.
- Trial Court: Superior Court of Kern County, Case No. S1500CV281556, Judge Kenneth C. Twisselman II.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
7 <i>City of Walnut v. Mount San Antonio Community College District</i>		2 <sup>nd</sup>	

[City of Walnut v. Mount San Antonio Community College District](#), California Court of Appeal, Second Appellate District, Case No. B287619 (March 15, 2019).

- *A plaintiff does not need to prevail on all of its claims to be a successful party under Section 1021.5; rather, a full attorneys' fee award is proper if the plaintiff achieved excellent results or obtained its primary litigation objective.*

### Background for Appeal

#### The Project

The Mount San Antonio Community College District (District) proposed to construct a solar energy generation facility (Project) on undeveloped hillside within the Mount San Antonio Community College campus. In February 2013, the District approved the Project as part of a 2012 Master Plan Update and, as lead agency, cleared the Project by certifying the Project environmental impact report (EIR) on December 11, 2013.

Two years later, in December 2015, the District issued, and later approved, a draft addendum to the EIR, which included plans to extend construction truck hauling operations. The City of Walnut (City) opposed the addendum due to concerns about public safety related to construction traffic.

The District board approved the addendum, and the District obtained state and federal agency approvals, including approvals from the California Department of Fish and Wildlife and the Army Corps of Engineers. However, the District did not obtain a conditional use permit, a building permit, or a grading permit from the City. The City issued a stop work order on October 20, 2016, a few days before the District planned to begin construction.

#### Related Litigation

On December 21, 2015, the City filed a petition for writ of mandate and complaint for declaratory relief. The City's petition alleged that the District violated CEQA by failing to carry out adequate analysis in approving the Project; violated state planning and zoning law by failing to submit the Project to the City for a finding that it was consistent with the City's general plan; and violated the City's municipal code by failing to submit grading, hauling route, and other plans to the City for approval.

The City's declaratory action sought a declaration as to whether the District's approval of the addendum was proper; whether Government Code Sections 53091 and 53094 exempted the Project from the City's land use police powers and regulatory authority; and whether CEQA required or permitted the City to take over as lead agency for the Project.

The District filed a cross-complaint and cross-petition for writ of mandate against the City, alleging that it had received all necessary regulatory and permitted approvals and that the Project was exempt from local zoning and building controls pursuant to Government Code Section 53091. The District also alleged that the City exceeded its police powers when it issued the stop work order and sought an injunction against enforcement of it.

The trial court granted the City's petition in part, holding that the Project must comply with the City's grading and hauling requirements, but that the District need not comply with the City's other zoning requirements. Further, the trial court held that the District violated CEQA by failing to prepare and circulate an initial study for the Project and by improperly relying on the addendum.

The trial court also granted the District's cross-petition in part, holding that the Project was exempt under Government Code Section 53091 and that the District could proceed with construction without applying for zoning and building permits from the City, with the exception of grading and haul route approvals. In sum, the District was required to prepare and circulate an initial study and secure grading and haul route approvals from the City before beginning Project construction.

#### Attorneys' Fees

On August 23, 2017, the City filed a motion for attorneys' fees, requesting a total award of US\$543,731. The trial court granted the motion in full, holding that the City was the successful party under Section 1021.5, "having stopped the [P]roject for CEQA compliance and grading and hauling compliance." The trial court further determined that it would not allocate fees between the City's successful and unsuccessful claims, finding that the City obtained its primary litigation objective of enforcing CEQA compliance and the stop work order. The District appealed the award of attorneys' fees.

#### **The Trial Court Properly Awarded Attorneys' Fees**

The Court of Appeal held that the trial court acted within its discretion in awarding the City the full amount of requested attorneys' fees. Though the City did not prevail on all of its claims, the Court determined that the trial court did not abuse its discretion in refusing to reduce the fee award or allocate it between successful and unsuccessful claims. The trial court was in the best position to evaluate whether the City obtained its primary litigation objective, and the District did not demonstrate that the trial court's decision not to reduce or allocate the fee award "was beyond the bounds of reason, all circumstances being considered." Moreover, the District did not attempt to itemize or otherwise segregate the amount of fees the City expended on its successful and unsuccessful claims. Instead, the District simply argued for a 50% reduction to the lodestar. Without any factual support for the requested reduction, there was nothing in the record to suggest the trial court abused its discretion in refusing to allocate fees among the City's claims.

#### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's order, awarding attorneys' fees to the City.

- Opinion by Justice Kim, with Presiding Justice Rubin and Justice Moor concurring.
- Trial Court: Superior Court of the County of Los Angeles, Case No. BC576587, Judge James C. Chalfant.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
8 <i>County of San Joaquin v. Metropolitan Water District of Southern California</i>		3 <sup>rd</sup>	

[County of San Joaquin et al. v. Metropolitan Water District of Southern California](#), Court of Appeal, Third Appellate District, Case No. C087640 (December 30, 2019).

- *An agency is not required to undertake CEQA review of an approval to purchase land when it does not commit to any particular use or uses for that land.*
- *The requirement that petitioners exhaust administrative remedies extends to an agency's determination that a proposed project is categorically exempt from CEQA compliance.*

On March 8, 2016, the Metropolitan Water District of Southern California (MWD) authorized the purchase of approximately 20,000 acres in the Sacramento-San Joaquin Delta spanning five islands (Property) for \$175 million. As part of that authorization, MWD determined that the purchase was not subject to CEQA and, alternatively, categorically exempt from CEQA on the basis of the “common sense” exemption and the Class 25 exemption for the acquisition of land.

The County of San Joaquin, County of Contra Costa, Contra Costa County Water Agency, Central Delta Water Agency, Food & Water Watch, and Planning and Conservation League (collectively, Petitioners) filed a petition for writ of mandate on April 14, 2016, requesting that the trial court order MWD to “rescind its March 8, 2016 decision to purchase 20,369.80± acres of real property … located in the San Joaquin Delta.” The petition argued that MWD’s actions to authorize the purchase of the Property “do not satisfy … CEQA” and that as such, before going ahead with the project, MWD “must fully comply with CEQA, including preparing an initial study and environmental impact report.” The Petitioners alleged that MWD’s purchase would allow the then-contemplated Cal WaterFix project to “circumvent eminent domain proceedings.” The trial court denied the petition, and Petitioners timely appealed. The Court of Appeal affirmed the trial court’s decision.

### MWD’s Acquisition of the Property Was Not an Approval Subject to CEQA

Petitioners argued that MWD’s decision to acquire the Property was an “approval” under CEQA. Petitioners argued that when a purchase serves as the “impetus” to facilitate further growth, the purchase is subject to CEQA. Petitioners further argued that CEQA compliance is required prior to making the first discretionary approval for a project “even though further discretionary government decisions would be needed before any environmental change could occur.”

MWD responded to this argument by stating that the acquisition of the Property was not a project under CEQA because it had no direct or reasonably foreseeable indirect physical effect on the environment. MWD argued that when a public agency purchases property with no specific plans, the agency is not obligated to conduct environmental review under CEQA. MWD further claimed that the case law cited by Petitioners actually supported the trial court’s findings. MWD stated that taking title to the Property and nothing more confirmed that there would not be any direct or reasonably foreseeable indirect physical effects on the environment. MWD claimed that “CEQA review will occur if and when Metropolitan actually proposes to carry out or approve one or more projects on the Islands.”

The Court of Appeal agreed and held that because there was no certainty of future development at the Property and “[MWD] has not committed itself to ‘a definite course of future action,’” CEQA review was

not required. The Court further held that “[w]hile [MWD] may indeed *intend* to use the Islands to facilitate water delivery, Petitioners have not pointed to anything in the record that *commits* [MWD] to that use or precludes [MWD] from deciding not to so use the Islands and selling them.” Indeed, the Court noted that MWD could use the Property for any number of potential actions, and because of this “tremendous uncertainty and lack of definition of future use of the [Property], ‘preparation of an EIR would be premature. Any analysis of potential environmental impacts would be wholly speculative and essentially meaningless.’” Therefore, the Court held that MWD’s purchase of the Property was not a project under CEQA, and the Court did not need to consider MWD’s alternative argument that the purchase was exempt under CEQA.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court’s order denying Petitioner’s motion to tax costs, in part.

- Opinion by Justice Duarte, with Justice Raye and Justice Hull concurring.
- Trial Court: Superior Court of Kern County, Case No. S1500CV281556, Judge Kenneth C. Twisselman II.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
9 Fudge v. City of Laguna Beach		4 <sup>th</sup>	

[Fudge v. City of Laguna Beach](#), California Court of Appeal, Fourth Appellate District, Case No. G055711 (February 13, 2019).

- *The Commission's de novo review of a CDP application on appeal need not apply the same rules and procedures as lower agencies.*
- *The Commission's acceptance of an appeal of a CDP issued by a local agency nullifies the CDP and moots any challenges to the CDP.*

In 2017, Hany Dimitry obtained a coastal development permit (CDP) from the City of Laguna Beach (City) to demolish his Laguna Beach house. Dimitry's neighbor, Mark Fudge (Plaintiff), filed an action in state court attacking the City's decision to grant the CDP and concurrently appealed the decision to the California Coastal Commission (Commission). The Commission accepted Plaintiff's appeal. As a result, the trial court dismissed Plaintiff's claim, finding that it could offer no relief because the Commission had sole authority to review the City's CDP. Plaintiff appealed the trial court's decision, arguing that the Commission's review was not *de novo* and did not nullify the City's decision, and that the alleged CEQA deficiencies in the City's decision were still subject to challenge in court.

### The Commission's Review Was *De Novo* and Nullified Lower Agency Decisions

Plaintiff argued that under California Supreme Court precedent from 1937, *de novo* hearings must be conducted in the "same manner" as the original proceeding. Because the Commission conducts hearings according to the California Coastal Act (Coastal Act) and the City according to CEQA, Plaintiff claimed that the Commission's hearing was not conducted in the "same manner" as the City, and therefore was not *de novo*. If the Commission's review was not *de novo*, then the City's decision was not nullified, and Plaintiff's challenges to that decision were not moot. The Court of Appeal disagreed, explaining that the legislature had expressly provided for the Commission to use different rules and procedures by giving the Commission authority to conduct *de novo* review of appeals under the Coastal Act without including any "same manner" requirement. (See Pub. Resources Code, § 30621.) Moreover, the Court noted that more recent California Supreme Court precedent had omitted the "same manner" language upon which Plaintiff relied.

The Court further concluded that CEQA itself expressly allows environmental information to be used "in lieu of" an environmental impact report (EIR) as part of a regulatory program certified by the Secretary of Resources. (See Pub. Resources Code, § 21080.5.) The Commission's regulatory program is one such program. Thus, in cases where a CDP application is appealed to the Commission, the Commission's review under the Coastal Act is the functional equivalent of CEQA review. The Court explained that consolidating appeals under the Commission's authority prevents project opponents from getting two bites at the apple and supports the Commission's ability to implement uniform policies governing coastal development. Accordingly, the Court held that once the Commission accepted Plaintiff's appeal, the Commission had sole authority to review the City's CDP, the City's decision was nullified, and Plaintiff's challenges in court to any alleged CEQA deficiencies in the City's decision were moot.

## **Disposition**

The Court of Appeal affirmed the trial court's decision.

- Opinion by Acting Presiding Justice Bedsworth, with Justice Aronson and Justice Ikola concurring.
- Trial Court: Superior Court of Orange County, Case No. 30-2017-00930564, Judge Glenda Sanders.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
10 <i>Ione Valley Land v. County of Amador</i>		3 <sup>rd</sup>	Partially

[Ione Valley Land v. County of Amador](#), California Court of Appeal, Third Appellate District, Case No. C081893 (February 26, 2019).

- *Res judicata bars consideration of CEQA issues that were litigated and resolved, or could have been litigated and resolved, in prior proceedings.*
- *In recirculating an EIR, a party need not provide new responses to issues already addressed in a prior EIR, unless the party is presented with new information.*

In 2012, the County of Amador (County) certified a final environmental impact report (EIR) and approved the Newman Ridge Project (Project), owned by real parties in interest Newman Minerals and others. Lone Valley Land, Air, and Water Defense Alliance, LLC (Petitioner) filed a petition for writ of mandate, challenging the certification and approval, which the trial court granted as to traffic impacts only. The County then partially recirculated and certified the EIR, and approved the Project. Petitioner again filed a petition for writ of mandate, which the trial court denied. The Court of Appeal affirmed the trial court's judgment in full.

### Background for Appeal

The Project consists of two parts: a rock quarry and an adjacent processing and transportation facility. Following the County's approval of the Project in 2012, Petitioner filed a petition for writ of mandate, challenging Project approval on various CEQA grounds, as well as under the State Mining and Reclamation Act and the Planning and Zoning Law. In February 2014, the trial court granted in part and denied in part the petition, finding only two traffic-related deficiencies in the EIR that required reconsideration. The trial court ordered the County to vacate EIR certification and Project approval and recirculate a revised EIR pertaining to the traffic issues, and denied the petition as to all other alleged CEQA violations.

The County complied with the writ by addressing the traffic-related issues, certified a partially recirculated EIR, and approved the Project. The trial court then granted the County's motion to discharge the writ. Petitioner, however, filed a new petition for writ of mandate, alleging the EIR was deficient with respect to: water supply and quality; traffic and circulation; biological resources; air pollution; mitigation measures; recirculation of the entire EIR; evidence supporting overriding considerations; and response to public comment. The trial court denied the petition in its entirety.

### Petitioner's Non-Traffic Challenges Barred by Res Judicata

The Court of Appeal held that res judicata barred Petitioner from raising most of the issues in its second petition for writ of mandate. Other than the traffic-related impacts considered in the partially recirculated EIR, the remaining CEQA issues were litigated and resolved, or could have been litigated and resolved, in connection with the first petition. Though the trial court required that the County decertify the EIR following the first petition, the sufficiency of the non-traffic components of the EIR were litigated and resolved in the first petition. Petitioner had the opportunity to appeal the trial court's order denying in part the petition, but Petitioner did not. The unchallenged aspects of the EIR were therefore finally resolved, and the County was not required to revisit them in its recirculated EIR.

### **The Recirculated EIR Adequately Addressed Traffic Impacts**

The Court of Appeal further held that the County adequately addressed traffic-related impacts in its partially recirculated EIR. The Court found that, before addressing the traffic-related impacts, the County addressed comments from Caltrans related to Project access, by referring back to the original EIR. Petitioner failed to show why Caltrans' comments reflected new information that the County had not previously analyzed in the prior EIR.

The Court also found that the County sufficiently addressed new information related to the expansion of a neighboring project in its recirculated EIR. The County considered additional traffic from the neighboring project and determined that traffic impacts would remain within the same levels of significance as reported in the prior EIR. Thus, the County would obtain no additional useful information by updating its traffic impact study, and the court held no such update was required.

Finally, following recirculation of the EIR, the City of Galt (City) commented that the Project would generate additional train trips, causing delays at certain rail crossings. These rail crossings, however, were not located in the City, and the County adequately addressed rail crossings located within the City in its prior EIR. Additionally, Petitioner failed to show how other City comments provided new information the County had not already addressed in the prior EIR. The County was therefore not required to provide new responses to those comments.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's judgment, denying the petition for writ of mandate.

- Opinion by Justice Mauro, with Acting Presiding Justice Butz and Justice Hoch concurring.
- Trial Court: Amador Superior Court, Case No. 15CVC09240, Judge Leslie Nichols.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
11 KVB, Inc. v. County of Glenn		3 <sup>rd</sup>	

[KVB, Inc. v. County of Glenn](#), California Court of Appeal, Third District, Case No. C084188 (January 30, 2019).

- *A resolution requiring recirculation of an EIR was a final action subject to review via administrative mandamus.*

### Background for Appeal

In 2010, the County of Glenn (County) entered into a memorandum of understanding (MOU) with KVB, Inc (KVB) to construct a waste-to-energy project (Project). The MOU included two key provisions: 1) KVB would be allowed to collect out-of-county waste, which would result in a lower tipping fee for County residents, and 2) the Project would be built on land controlled by KVB. In addition, the MOU bound the County to assist KVB in obtaining the necessary permits and environmental clearances needed to complete the Project. After the MOU was executed, KVB paid for the preparation of an environmental impact report (EIR) analyzing the Project.

The County's Planning Commission approved a resolution supporting certification of the EIR prepared for the Project. A citizens group appealed that determination to the County Board of Supervisors (Board). The Board rejected the Planning Commission's resolution and adopted a resolution requiring recirculation of the EIR, limiting the daily tonnage of waste stream to preclude processing out-of-county waste, and expanding the discussion of locations for the facility to include land not controlled by KVB (the Resolution).

KVB sued the County, alleging that the County had breached the MOU by adopting the Resolution. The County demurred on the ground that judicial exhaustion precluded the complaint. KVB argued that it could not have forced the County to act differently, because there had been no final CEQA determination and the County did not make the required CEQA findings. The trial court sustained the demurrer without leave to amend, reasoning that the Board had a non-delegable duty to determine the adequacy of the EIR, that CEQA provides that any action to challenge CEQA must be made via mandamus, and that KVB could not claim that the Board's actions were in error because KVB failed to sue to set the Board's actions aside.

### Breach of Contract Claim

KVB's breach of contract claim alleged that the County undermined the MOU by refusing to certify the EIR and instead requiring that it be recirculated. The MOU stated that the County would support KVB's efforts to secure out-of-county waste that would be processed by the Project and would assist KVB in obtaining all of the necessary clearances to develop the Project. KVB contended that adoption of the Resolution violated these commitments. However, the Court of Appeal explained that for KVB to prevail on its breach of contract claim, the trier of fact would have to determine that the County incorrectly ordered recirculation of the EIR. As a result, the Court determined that KVB's claim was barred, because KVB failed to seek a writ of mandate challenging the Resolution. Before KVB could bring a civil suit for breach of contract, it must first have the Resolution set aside.

KVB further contended that the Resolution was not a final action and, thus, could not be attacked via mandamus. The Court disagreed and held that the Resolution was a final decision that could be challenged. The Board had made a decision related to the adequacy of the EIR by requiring recirculation,

and that decision was not subject to further administrative review. The Court explained that, because CEQA determinations can be reviewed only administratively or through traditional mandamus, allowing a civil suit to review discretionary CEQA decisions would frustrate the legislative purpose of limiting review to mandamus proceedings and could jeopardize the discretionary decisions CEQA vests in lead agencies.

#### **Leave to Amend**

Finally, KVB argued for leave to amend its complaint. The Court determined that although the remedy KVB sought would differ under a mandamus claim, the relation-back doctrine would still apply, saving KVB's claim from a statute of limitations challenge. Citing CEQA's periods of limitation, the Court reasoned that because no notice of determination was filed, KVB had not been notified that the statute of limitations had begun to toll. Thus, the Court determined that the County could not show that an amended complaint would be time-barred based on CEQA.

#### **Disposition**

Accordingly, the Court of Appeal reversed the trial court's judgment denying KVB's complaint with instructions to grant KVB leave to amend to allege a mandamus claim.

- Opinion by Justice Duarte, with Acting Presiding Justice Butz and Justice Hoch concurring.
- Trial Court: Glenn County Superior Court, Case No. 16CV01593, Judge Donald Byrd.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
12 <i>La Jolla Shores Tomorrow v. City of San Diego</i>	✓	4 <sup>th</sup>	✗

[La Jolla Shores Tomorrow v. City of San Diego](#), California Court of Appeal, Fourth Appellate District, Case No. D072140 (February 22, 2019).

- *Decision-making is not impermissibly bifurcated when nonelected subordinate decision-making bodies are simultaneously responsible for making project approval and environmental review determinations.*
- *CEQA requires that only environmental determinations made by unelected decision makers be appealable to the elected decision-making body.*

### Background for Appeal

In 2009, Bob Whitney and Playa Grande, LLC (Real Parties) applied for a development permit, coastal development permit, and tentative map waiver to demolish two existing buildings and construct a three-story mixed-use building in La Jolla Shores (Project). In 2010, the City of San Diego (City) prepared and circulated a mitigated negative declaration (MND). A City hearing officer adopted the MND and approved the Project's entitlements. The City's Planning Commission denied an appeal, adopted the MND, and approved the Project's entitlements. The City Council granted an appeal from that decision, but the Planning Commission again adopted the MND and approved the Project's entitlements. The City Council then granted a second appeal, finding substantial evidence that the Project may have significant environmental impacts.

In 2013, the City prepared and circulated a draft environmental impact report (DEIR). In April 2015, the Planning Commission certified the final environmental impact report (FEIR) and approved the Project's entitlements. In October 2015, the City Council denied an appeal and approved the certification of the FEIR. In November 2015, La Jolla Shores Tomorrow (Petitioner) filed a petition for writ of mandate seeking to set aside the City's approval of the Project under CEQA. Petitioner alleged that the City Council lacked authority to consider the Project approvals when it considered the FEIR. The trial court rejected Petitioner's claims, concluding that the City's environmental appeals process complied with CEQA's requirements. The trial court also denied Petitioner's motion for a new trial, and Petitioner appealed.

### The City's Environmental Appeals Process Did Not Violate CEQA

On appeal, Petitioner again argued that the City's processes for appeals of environmental decisions and project approvals violated CEQA by not requiring those determinations to be made by the same decision-making body. Specifically, Petitioner argued that the City's municipal code allowed appeal to the City Council of only the Planning Commission's certification of the FEIR and not its approval of the Project's entitlements. The Court of Appeal rejected this argument, concluding that the City's decision-making process did not violate CEQA.

CEQA prohibits bifurcated decision-making by requiring that the same decision maker who approves a project also consider and adopt the environmental review document. A lead agency may delegate authority to perform both of these tasks to a nonelected subordinate body so long as it provides for an appeal of the environmental determination to the lead agency's elected decision-making body. Lead agencies may also establish their own procedures for environmental appeals.

The City's procedures for project approval, environmental review, and appeals were set forth in its municipal code. In reviewing the Project, the City applied its "Process Three," which allows a hearing officer to make a decision on a project application and requires that the hearing officer comply with CEQA's environmental review and certification requirements. The hearing officer's decision to approve or deny a project may be appealed to the Planning Commission. Environmental determinations, such as the certification of an FEIR or adoption of an MND, may also be appealed. If the City Council grants an appeal of an environmental determination, that determination is set aside, the lower project approval decision is held in abeyance, and the City Council retains jurisdiction to act on both the revised environmental review document and associated project at a subsequent public hearing.

The Court of Appeal determined that, at the times of their respective decisions to adopt the MND and approve the Project's entitlements, both the City hearing officer and Planning Commission were responsible for complying with CEQA's environmental review requirements as well as approving the Project. The Court also determined that when the City Council granted the second appeal, it suspended the Planning Commission's decision to approve the Project and retained jurisdiction to consider both the revised environmental review document and the Project. The Court reasoned that in reaching its final October 2015 decision, the City Council considered both the Planning Commission's environmental determination and the Project, and in approving the certification of the FEIR, the City Council effectively approved the Planning Commission's previously suspended decision to approve the Project. The Court noted that CEQA does not require that an elected decision-making body accept appeals from every project approval. The Court concluded that the City's process satisfied CEQA's requirement that environmental determinations be appealable to the elected decision-making body, and there was no bifurcated decision-making. Thus, the City's decision-making process did not violate CEQA.

## **Disposition**

The Court of Appeal affirmed the trial court's judgment and awarded the City's and Real Parties' costs on appeal.

- Opinion by Justice Nares, with Presiding Justice McConnell and Justice Haller concurring.
- Trial Court: Superior Court of San Diego County, Case No. 37-2015-00037498-CU-TT-CTL, Judge Joel R. Wohlfeil.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
13 <i>Lake Norconian Club Foundation v. Dep't of Corrections and Rehabilitation</i>		1 <sup>st</sup>	

[Lake Norconian Club Foundation v. Department of Corrections and Rehabilitation](#), California Court of Appeal, First Appellate District, Division Four, Case No. A154917 (September 13, 2019).

- *An agency's failure to act is not in itself an activity, and therefore not a project subject to CEQA, even if the failure to act results in environmental consequences.*

The Lake Norconian Club (Hotel) is a former hotel that opened in 1929 and is listed on the National Register of Historic Places. The Hotel sits unoccupied in the grounds of a medium-security prison owned and operated by the Department of Corrections and Rehabilitation (Department). Lake Norconian Club Foundation (Petitioner) filed a petition for writ of mandate, alleging that the Department's failure to repair the hotel, allowing "demolition by neglect," was a project requiring CEQA review. The trial court denied the petition, concluding it was untimely. Petitioner appealed. The Court of Appeal affirmed the trial court's denial of the petition, concluding that the failure to repair was not a project subject to CEQA.

### Background for Appeal

In 2012, the Legislature enacted a bill requiring the Department to close the prison on the same property as the Hotel. In June 2013, the Department published a draft environmental impact report (EIR) analyzing, among other things, the impacts of the prison's closure on the Hotel. The EIR stated that the Department lacked funds to repair or maintain the Hotel, and continued deterioration of the Hotel was expected. In September 2013, the Legislature rescinded the statute requiring closure of the prison. In October 2013, the Department certified the final EIR, which indicated that while the prison would not be closed, the Department would not be able to repair or maintain the Hotel.

Petitioner filed a petition for writ of mandate in November 2014, arguing that the Department's failure to repair the Hotel is a *de facto* issuance of a demolition permit and therefore a project subject to CEQA. The trial court found that the Department's failure to seek or allocate funding for the Hotel was a project. However, the trial court rejected Petitioner's broader argument that the Department's failure to engage in routine maintenance or mere inaction constituted a project. Nevertheless, the trial court concluded that the statute of limitations began to run in 2013 when the EIR was certified, and the petition was therefore untimely. Petitioner timely appealed and the Department cross-appealed.

### An Agency's Failure to Act Does Not Constitute a Project Under CEQA

Petitioner argued that the Department's decision not to repair the Hotel was a project under CEQA. Petitioner contended that this decision was the equivalent of issuing a demolition permit, and thus it should not be excused from CEQA review.

The Court of Appeal concluded that the Department's failure to act to maintain or repair the Hotel was not a project subject to CEQA. The Court of Appeal also explained that the failure to act, even if there are environmental consequences, is not an activity, and therefore not a project under CEQA. CEQA defines a project as an activity, including an activity directly undertaken by a public agency, and the Court determined that the Department's continuing failure to make repairs was not such an activity. The Court reasoned that applying the statute of limitations to inaction would be unworkable, because the lack of maintenance was a long-term issue that Petitioner and the Department had discussed for years. The Court stated that the preparation of the 2013 EIR, precipitated by an express decision to close the prison

adjacent to the Hotel, was an activity subject to CEQA, but that the continuing failures to make repairs is not an activity.

As the question of whether an agency's failure to act constitutes a CEQA project was one of first impression for California courts, the Court of Appeal looked to NEPA case law. In general, federal courts have repeatedly rejected the argument that NEPA applies to agency inaction. However, NEPA, unlike CEQA, explicitly applies if an agency has a mandatory duty to act but fails to do so. The Court of Appeal rejected Petitioner's argument that the Department had a mandatory duty to maintain the Hotel as a historic landmark, finding no basis for such a duty.

The Court of Appeal also clarified that even if the failure to maintain or to allocate funds for the maintenance of the Hotel were deemed a project subject to CEQA, it agreed with the trial court that the Petitioner's petition would be time-barred by the statute of limitations.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's judgment denying the petition for a writ of mandamus. The Department's inaction is not a project subject to CEQA.

- Opinion by Presiding Justice Pollak, with Justice Streeter and Justice Brown concurring.
- Trial Court: Superior Court of Alameda County, Case No. RG1478503, Judge Brad S. Seligman.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
14 <i>Los Angeles General Plan Consistency Coalition v. City of Los Angeles</i>		2 <sup>nd</sup>	

[Los Angeles General Plan Consistency Coalition v. City of Los Angeles](#), California Court of Appeal, Second Appellate District, Case No. B291414 (December 20, 2019).

- *An agency's decision under CEQA is reviewed for abuse of discretion.*
- *When determining whether sufficient evidence exists to support a fair argument, courts defer to an agency's determinations, including its decision not to require an EIR, unless there is credible evidence to the contrary.*
- *A local government's determination that a project is consistent with a general plan is reviewed for abuse of discretion and the determination carries a strong presumption of regularity.*
- *A judgement of the trial court is presumed to be correct and the presumption of correctness imposes a burden on the appellant to affirmatively show that the lower court committed reversible error.*

### Background for Appeal

In 2014, the City of Los Angeles (City) considered Real Party in Interest and Respondent Nagi Gabaret's applications to develop five single family homes on contiguous lots in the Mount Washington neighborhood (Project). After reviewing the Project under CEQA, the City published a mitigated negative declaration (MND), which included environmental mitigation measures. In 2014 and 2015, the City's planning director approved all five of the proposed single family dwellings, finding that they substantially complied with the Mount Washington-Glassell Park Specific Plan (Specific Plan) provisions.

Los Angeles General Plan Consistency Coalition (Petitioner) challenged the City's approval, arguing that the City's decision violates the state's planning and zoning law because the Project's lot sizes and street frontages are inconsistent with the City's General Plan and zoning ordinances, and that the City failed to analyze properly the Project's environmental effects under CEQA. Specifically, Petitioner argued that in considering the Project's application, the City should have prepared an EIR, and not a MND. Petitioner also contended that the City's MND erroneously concluded that the Project conformed to the Northeast Los Angeles Community Plan (NECP), which includes zoning restrictions designating the area as "very low residential." In addition, Petitioner argued that the City could not rely on Section 12.22.C.18 and Section 12.23.E of the City of Los Angeles Zoning Code (the Zoning Exceptions) to approve projects that do not conform to the minimum lot sizes required by the City's General Plan. The trial court rejected Petitioner's arguments, concluding that: (1) the City was not required to prepare an EIR because Petitioner failed to show that CEQA required any mitigation measures not already included in the MND; (2) Petitioner failed to show any inconsistency with the NECP; and (3) Petitioner failed to show that the Zoning Exceptions did not apply. The Petitioner appealed and the Court of Appeal affirmed, primarily addressing the latter two issues.

### Inconsistency With Land Use Designation

Petitioner argued that the City violated CEQA by finding that the Project did not conflict with any applicable land use plan, policy, or regulation, including general and specific plans adopted for the

purpose of mitigating environmental effects. Petitioner contended that the Project conflicted with the property's land use designation and zone and that the City improperly relied on the Zoning Exceptions. Therefore, the Petitioner argued that the conflicts resulted in adverse environmental effects that must be analyzed under CEQA.

The Petitioner first argued, citing to legislative history, that Zoning Exception Section 12.22.C.18 was inapplicable to the Project, asserting that the exception only applies to lot subdivisions created on or after June 15, 1960 that are at least 8,800 square feet in size. The Court of Appeal disagreed, concluding that the clear language of Section 12.22.C.18 does not limit the scope of the exception and therefore there is no need to look to the legislative history. Further, the Court noted that even if it were appropriate to review the legislative history, the Petitioner failed to properly present supportive legislative materials, providing only a 99-page record citation.

Secondly, the Petitioner argued that the City implicitly overruled Section 12.23.E by adopting community plans that downzoned hillside areas, including the Project's parcels. The Court found that Petitioner failed to supply any legal authority to support its claim and therefore the Petitioner waived this argument.

Finally, Petitioner argued that the Zoning Exceptions could not be used to obstruct General Plan density limits. The Court ruled that the NECP does not impose mandatory density limits, but rather only recommendations. The Court reasoned that Ordinance No. 159748, which establishes that the density range is mandatory, does not apply to the Project because it fell under an exception for consistency determinations adopted or approved after January 1, 1979. Additionally, the Court reasoned that the General Plan Framework Element contemplates the continued use of exceptions to relieve hardships from strict adherence to zoning regulations.

Therefore, the Court concluded that Petitioner failed to show that the City violated CEQA by concluding that the Project did not conflict with any applicable land use plan, policy, or regulation.

### **Project Permit Compliance Determination**

Petitioner argued that, before approving the Project Permit Compliance for the Project, the Director of Planning should have made findings regarding whether the Project was consistent with the General Plan. However, neither the Specific Plan nor Zoning Code Section 11.5.7, which addresses Project Permit Compliance approvals, explicitly require a General Plan consistency finding. Petitioner did not seek to challenge the validity of the Specific Plan or Zoning Code Section 11.5.7, potentially because such a challenge would have been time-barred. The Petitioner also did not show that the Director's Specific Plan substantial compliance finding or the environmental review finding was erroneous. Therefore, the Court found that given that the Petitioner did not properly challenge the Director of Planning's findings, the Petitioner's disavowal of a challenge of the validity of the Specific Plan or Zoning Code Section 11.5.7 is dispositive as to Petitioner's effort to set aside the Project Permit Compliance determination.

### **Declaratory and/or Injunctive Relief**

The Court found that the Petitioner was not entitled to declaratory/injunctive relief to halt the City's practice of utilizing the Zoning Exceptions or to require all Project Permit Compliance decisions to make General Plan consistency findings, because the Petitioner declined to address the trial court's rationale for denying declaratory/injunctive relief. Therefore, the Court found that the Petitioner failed to overcome the presumption of correctness afforded to the trial court ruling.

### **Forfeiture of Other Arguments**

The Court held that Petitioner forfeited the following arguments: (1) the City's "No Impact" determination frustrated a fundamental purpose of CEQA: the right to public participation; (2) the MND failed to analyze the land use inconsistencies and grading issues, also preventing public participation; (3) the mitigation measures were deficient; (4) the City could not utilize Sections 12.22.C.18 and 12.23.E because it never disclosed intent to use any Zoning Exceptions; (5) if the Zoning Exceptions applied, the cumulative impact would thwart the fundamental purpose of the citywide downzoning process; and (6) even if the Zoning

Exceptions rendered the Project consistent with the General Plan or zoning, the City still failed to analyze properly significant environmental impacts.

The Court found these arguments procedurally deficient because, under CEQA, an agency's decision is reviewed only for abuse of discretion. Under this standard of review, the Court must defer to an agency's determination to not require an EIR unless there is credible evidence to the contrary. Further, the party asserting the CEQA claim bears the burden of demonstrating, by citation to the record, the existence of substantial evidence to support a fair argument of significant environmental impact.

The Court noted that Petitioner failed to set forth the legal and factual bases underlying each claim of error. Specifically, Petitioner forfeited these arguments because it: (1) raised certain arguments for the first time in its reply brief; (2) failed to sufficiently develop these arguments; and (3) attempted to advance claims of error not clearly articulated in appellate briefing. Moreover, the Court concluded that even assuming arguendo that the facts in this case were undisputed, the Court has discretion to consider new questions of law, and is not required to consider forfeited legal issues.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's judgement, rejecting all of Petitioner's claims for writ, declaratory, and injunctive relief.

- Opinion by Justice Bendix, with Justice Rothschild and Justice Weingart concurring.
- Trial Court: Los Angeles County Superior Court, Case No. BS161887, Judge Mary H. Strobel.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
15 <i>Oakdale Groundwater Alliance v. Oakdale Irrigation District</i>		5 <sup>th</sup>	

[Oakdale Groundwater Alliance v. Oakdale Irrigation District](#), California Court of Appeal, Fifth Appellate District, Case No. F077281 (January 31, 2019).

- *A court's decision requiring an agency to prepare an EIR confers a significant benefit for purposes of an attorneys' fee award regardless of whether the project approval at issue in the petition expired prior to the court's decision.*
- *A court may award attorneys' fees to a successful CEQA petitioner when the petitioner's own expected benefits exceed its actual litigation costs by a substantial margin, if the public benefits of the court's decision are "very significant."*

Oakdale Irrigation District (District) approved a one-year pilot on-farm water conservation program and transfer of consumptive use water (Project), concluding that there would be no significant environmental impacts based on its initial study and therefore adopting a negative declaration. Oakdale Groundwater Alliance and its members Louis F. Brichetto and Robert N. Frobose (Petitioners) filed a petition for a peremptory writ of mandamus directing the District to vacate and set aside its approval for the Project and prepare an environmental impact report (EIR) pursuant to CEQA. The trial court granted the petition and issued the writ, which the Court of Appeal then affirmed. Petitioners filed a motion for attorneys' fees, which the trial court granted. The District appealed.

The District argued that Petitioners were not entitled to attorneys' fees under CCP Section 1021.5 because no significant benefit was conferred to the general public when the approvals for the Project at issue expired and the EIR was never drafted. The statute allows courts to award fees to successful parties if:

- The case vindicated an important public right
- The case imparted a significant benefit on the public or a large class of persons
- The necessity and financial burden of enforcement make the award appropriate

### **CEQA Action Provided Significant Benefit to General Public**

First, the District argued that no significant benefit was conferred to the general public because the District ceased work on the Project when the petition was filed and the approval for the Project expired on its own terms before judgment was entered, meaning no EIR would occur. The Court of Appeal held that there was a significant benefit to the general public regardless of the expiration of the approval because the District was prevented from undertaking its "ill-considered intrusion on sensitive areas of the environment." The Court also explained that even absent any precedential value, a significant benefit flowed directly and immediately from the Court's decision on the petition.

### **Necessity and Financial Burden of Private Enforcement Made Award Appropriate**

Second, the District argued that Petitioners failed to demonstrate that the necessity and financial burden of private enforcement made an award of attorneys' fees appropriate. The Court of Appeal explained that

the necessity of the private enforcement portion of the test is met if a lawsuit is brought against a government entity that refuses to comply with its admitted statutory responsibilities. The Court concluded that, even assuming Petitioners' expected financial benefits in the outcome of the case would exceed their litigation costs by a substantial margin, the public benefit from the Court's decision was so significant that an attorneys' fees award was appropriate.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's award of attorneys' fees to Petitioners.

- Opinion by Justice Detjen, with Acting Presiding Justice Levy and Justice Franson concurring.
- Trial Court: Stanislaus County Superior Court, Case No. 2019380, Judge Roger M. Beauchesne.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
16 <i>Protect our Homes &amp; Hills v. County of Orange (attorneys' fees)</i>		4 <sup>th</sup>	

[Protect Our Homes and Hills v. County of Orange](#), California Court of Appeal, Fourth Appellate District, Division Three, Case No. G056618 (August 12, 2019).

- *A decision about entitlement to attorneys' fees on appeal is entirely separate from a decision about an award of costs on appeal.*
- *A CEQA lawsuit can confer a significant benefit for purposes of an attorneys' fee award regardless of whether the opinion is published.*
- *The trial court has discretion to reduce an attorneys' fee request based on the party's degree of success. The Court of Appeal declined to adopt a new rule restricting attorneys' fee awards solely to the time spent on issues that a petitioner prevails on, rather than also awarding fees for unsuccessful claims.*

Various environmental groups (Petitioners) petitioned for writ of mandate challenging the County of Orange's (County's) certification of an environmental impact report (EIR) for a 340-single family home project. The trial court issued a preemptory writ of mandate specifying steps for the County to take regarding its EIR. The Court of Appeal affirmed in part and reversed in part the trial court's judgment, identifying deficiencies in the EIR to be cured by the County on remand. The Court of Appeal ordered the parties to bear their own costs in the interests of justice. Petitioners moved for attorneys' fees related to the appeal, which the trial court granted, though it reduced the requested award. The project developer, Yorba Linda Estates, LLC (Real Party in Interest), appealed.

### **Distinction Between Awards of Costs and Entitlement to Attorneys' Fees**

First, Real Party in Interest argued that because the Court of Appeal previously ordered the parties to bear their own costs in the interests of justice, it similarly should not be in the interests of justice to award attorneys' fees to Petitioners. The Court held that Real Party in Interest waived this argument by failing to raise it before the trial court and also failed to provide any legal authority in support of its argument.

The Court further concluded that even if the argument was not waived, it failed because entitlement to attorneys' fees under California Code of Procedure (CCP) Section 1021.5 and an award of costs on appeal under California Rule of Court 8.278 are entirely separate matters. To recover fees under CCP Section 1021.5, a successful CEQA petitioner must show that: (1) the case vindicates an important public right; (2) the case imparts a significant benefit on the public or a large class of persons; and (3) the financial burden on the petitioner is out of proportion to its individual stake in the matter. The petitioner is deemed successful if it succeeds on any significant issue in litigation that achieves some benefit sought in bringing the suit. In contrast, an award of costs under California Rule of Court 8.278 is discretionary — Rule 8.278 states simply that the appellate court must specify the award or denial of costs in instances where the appellate court reverses the judgment in part. Therefore, the Court of Appeal's exercise of discretion to have each party bear its own costs in the first appeal in the case did not bind the trial court in its determination of whether Petitioners were a successful party entitled to attorneys' fees under Section 1021.5.

### **Eligibility for Attorneys' Fees Under Section 1021.5**

Second, Real Party in Interest argued that Petitioners were not entitled to attorneys' fees under CCP Section 1021.5 because Petitioners' partial success on appeal did not confer a significant public benefit, in part due to the unpublished status of the Court of Appeal's opinion. The Court disagreed, explaining that a case need not result in binding precedent in order to provide a significant benefit to the public. The Court held that its prior opinion conferred a significant benefit by requiring the County to revise its EIR in order to correct deficiencies associated with the project.

Real Party in Interest also argued that the third requirement for attorneys' fees was not met because Petitioners failed to show that litigation expenses would place a disproportionate burden on them. The Court rejected this argument, explaining that Petitioners provided evidence of the actual costs of litigation and asserted that they had no financial stake or economic interest in the outcome of the case, and Real Party in Interest offered no rebuttal for the latter point. Therefore, the Court concluded that the trial court did not abuse its discretion in determining that Petitioners were entitled to attorneys' fees under Section 1021.5.

### **Reduction of Attorneys' Fee Award**

Finally, Real Party in Interest challenged the amount of the attorneys' fee award, arguing for a new rule restricting attorneys' fee awards under Section 1021.5 solely to the time spent on issues that a petitioner prevails on, rather than also awarding fees for unsuccessful claims. The trial court discretionarily reduced the award by 20%, due in part to Petitioners' success on appeal being only partial. The Court of Appeal held that the reduction of an attorneys' fee award was within the trial court's discretion, and requiring the trial court to restrict an award to the time spent on issues prevailed on would be inconsistent with well-established precedent.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's award of attorneys' fees to Petitioners.

- Opinion by Justice Thompson, with Presiding Justice O'Leary and Justice Moore concurring.
- Trial Court: Orange County Superior Court, Case No. 30-2015-00797300, Judge William D. Claster.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
17 <i>San Diego Navy Broadway Complex Coalition v. California Coastal Commission</i>		4 <sup>th</sup>	

[San Diego Navy Broadway Complex Coalition v. California Coastal Commission](#), California Court of Appeal, Fourth Appellate District, Division One, Case No. D072568 (September 27, 2019).

- *An amended petition substituting a real defendant for a fictitious Doe defendant relates back to the filing of the original petition only if the petitioner was genuinely ignorant of the real defendant's identity. Genuine ignorance is determined by the facts actually known by the petitioner at the time the original petition was filed.*
- *Under CEQA, a public agency may approve a project with significant effects on the environment if it finds that economic or other considerations make mitigation measures infeasible and the project's specific benefits outweigh its environmental effects. CEQA does not require an approving agency to find that no other feasible mitigation measures exist or that mitigation has reduced environmental effects to a level of insignificance.*
- *An agency's CEQA findings are presumed to be supported by substantial evidence and a challenger bears the burden of showing otherwise.*

The San Diego Unified Port District (Port) certified a final environmental impact report (EIR) and approved a port master plan amendment (PMPA) to allow the expansion of the San Diego Convention Center and an adjacent hotel (Project). The California Coastal Commission (Commission) subsequently certified a revised version of the PMPA and adopted findings supporting its certification. San Diego Navy Broadway Complex Coalition (Petitioner) filed petitions for a writ of mandate, alleging that the Commission violated the Coastal Act by making findings that were insufficient and not supported by substantial evidence under CEQA. Although Petitioner made a number of other non-CEQA arguments that the Commission's certification violated the Coastal Act, which the Court of Appeal discussed at length, they are not discussed here. Defendants argued that Petitioner had failed to name indispensable parties within the statute of limitations and its petitions were therefore untimely, and that the Commission's certification complied with the Coastal Act and CEQA. The trial court rejected the statute of limitations defense but denied the petitions on the merits. Both Petitioner and defendants appealed. The Court of Appeal affirmed the denial of the petitions, concluding that they were both time-barred and without merit.

### Background for Appeal

In September 2012, the Port certified the final EIR and approved the PMPA for the Project — an expansion of the convention center by the City of San Diego (City) and a nearby hotel by One Park Boulevard, LLC (One Park). The Port then forwarded the PMPA to the Commission for certification pursuant to the Coastal Act. The Port revised the PMPA based on input from the Commission. The Commission certified the revised PMPA in October 2013 and made findings in support of its certification in February 2014.

In 2013 and 2014, Petitioner filed petitions for writ of mandate against the Commission, the Port, and fictitious Doe defendants. These petitions named the Port as the real party in interest and Project proponent. In 2015, after the City and One Park intervened and asserted a statute of limitations defense based on failure to name indispensable parties, Petitioner amended its petitions to substitute the City and One Park for the Doe defendants. The Commission, Port, City, and One Park (Defendants) argued that

as developers of the Project, the City and One Park were indispensable parties, and that because Petitioner had failed to name them within the statute of limitations, its petitions were time-barred. The trial court found that the City and One Park were indispensable parties, but that Petitioner had been genuinely ignorant of them, and the petitions were therefore timely. The trial court decided the petitions on the merits, concluding that the Commission's findings did not violate the Coastal Act or CEQA. Both Petitioner and Defendants timely appealed.

### **No Substantial Evidence Petitioner Was Genuinely Ignorant of Indispensable Parties**

The Court of Appeal concluded that there was no substantial evidence that Petitioner was genuinely ignorant of the City and One Park as indispensable parties and that the petitions should have been dismissed as untimely.

As an initial matter, the Court explained that a project developer is generally an indispensable party to a lawsuit challenging a decision regarding whether the project can proceed, and that the trial court's finding that the City and One Park were indispensable parties was not at issue on appeal.

Next, the Court explained that an amended petition substituting a real defendant for a fictitious Doe defendant relates back to the filing of the original petition only if the petitioner was genuinely ignorant of the identity of the real defendant. In determining genuine ignorance, a court inquires as to the facts actually known by the petitioner at the time it filed the original petition.

The Court determined that at the time Petitioner filed its petitions, Petitioner possessed information identifying the City and One Park as the Project developers, citing the draft and final EIRs and Notice of Determination (NOD). The Court explained that Petitioner had submitted an opposition letter to the Commission that included the EIRs and NOD as exhibits, and its petitions referenced the final EIR. The trial court's finding of genuine ignorance was based primarily on the Commission's admission to a portion of the petition stating that the Port was the proponent of the Project. But the Court reasoned that even if the Commission had admitted that the Port was the only proponent of the Project, this did not establish that Petitioner was genuinely ignorant of the City's and One Park's involvement as Project developers.

### **Commission's CEQA Findings Were Adequate and Supported by Substantial Evidence**

The Court of Appeal concluded that Petitioner's allegations that the Commission's findings were insufficient and not supported by substantial evidence were without merit.

Under the Coastal Act, the Commission was required to make findings that the project was consistent with CEQA, in support of its decision to certify the revised PMPA. A reviewing court presumes that agency findings and actions were supported by substantial evidence, and the party challenging an agency decision bears the burden of showing otherwise.

First, Petitioner contended that the Commission's mitigation findings were insufficient because it did not find that "there were no more feasible mitigation measures to reduce the [Project's] environmental impacts to a level of insignificance." The Court rejected this argument, explaining that CEQA allows a public agency to approve a project with significant effects on the environment provided it finds that economic or other considerations make mitigation measures infeasible and the project's specific benefits outweigh its environmental effects, as the Port and Commission did here. The Court stated that CEQA does not require an approving agency to find that no other feasible mitigation measures exist, but the Commission had nevertheless made such a finding. The Court also rejected the contention that CEQA requires an approving agency such as the Commission to find mitigation to a level of insignificance, reasoning that when an agency approves a project with significant adverse environmental effects using a statement of overriding considerations, CEQA is focused on the "substantial reduction" of environmental effects.

Second, Petitioner argued that the Commission's finding that a new pedestrian bridge was infeasible was not supported by substantial evidence. The Commission found that the new bridge would have improved pedestrian access, but that sufficient access would exist without the new bridge due to other measures.

The Court rejected the contention that an agency such as the Commission is required to find a mitigation measure such as the new bridge infeasible when it finds other measures effective. The Commission also found the new bridge infeasible due to cost and jurisdiction, explaining that because parts of the bridge would be outside of the Port's jurisdiction, the Port could not guarantee its construction. The Court determined that there was substantial evidence in the record to support a conclusion that the new bridge was economically infeasible, as the Commission could rely on the Port's representations of construction costs and base its conclusion on this evidence. The Court determined that Petitioner failed to meet its burden of establishing that the Commission's finding of jurisdictional infeasibility was not based on substantial evidence.

Thus, the Court of Appeal found the Commission's Coastal Act and CEQA findings were sufficient and supported by substantial evidence.

### **Disposition**

Accordingly, the Court of Appeal affirmed the superior court's judgment denying the petitions for writ of mandamus. The Commission's certification of the PMPA will stand.

- Opinion by Justice Dato, with Acting Presiding Justice Benke and Justice Huffman concurring.
- Trial Court: Superior Court of San Diego County, Case Nos. 37-2013-00077213-CU-TT-CTL and 37-2014-00006987-CU-TT-CTL, Judge Joel R. Wohlfeil.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
18 Save Lafayette Trees v. City of Lafayette		1 <sup>st</sup>	

[Save Lafayette Trees v. City of Lafayette](#), California Court of Appeal, First Appellate District, Division Three, Case No. A154168 (February 8, 2019).

- *If two statutes relate to the same subject matter and cannot be reconciled, the more detailed statute will control.*
- *Notwithstanding any other law, the period for timely service under Public Resources Code Section 21167.6 is within 10 days of filing.*

### Background for Appeal

A utility (Real Party) sought to pursue a major tree removal project (Project), per the City of Lafayette's (City's) municipal code, within its local natural gas pipeline rights-of-way. The City and Real Party agreed to process the Project under a municipal code section that allowed the City to remove protected trees "to protect the health, safety and general welfare of the community." Save Lafayette Trees, Michael Dawson, and David Kosters (collectively, Petitioners) filed a petition challenging the City's action and served the petition the following day. One of Petitioners' causes of action alleged that the City failed to comply with CEQA before approving its tree removal agreement with Real Party.

The City and Real Party demurred to the petition on the grounds that it was time-barred by the requirement in Government Code Section 65009 that a challenge to a decision regarding a zoning permit be both filed and served within 90 days of that decision. In this case, the petition was not served until after the 90-day deadline in Government Code Section 65009, but before 180 days had passed. The trial court sustained the demurrer without leave to amend and entered judgment dismissing the petition. Petitioners timely appealed. In 2018, the Court of Appeal reversed the trial court's judgment as to Petitioners' CEQA claim, holding that Petitioners' CEQA claim was governed by the 180-day statute of limitations applicable to CEQA claims, not the 90-day statute of limitations provided in Government Code Section 65009, and that Petitioners' claim was timely served within 10 days of filing under Public Resources Code Section 21167.6. Subsequently, the Court of Appeal granted Real Party's petition for rehearing the Court's conclusion regarding the CEQA claim.

### When Two Statutory Provisions Conflict and Cannot Be Reconciled, the More Detailed Provision Prevails

On rehearing, the parties reiterated the arguments initially made on appeal regarding the CEQA issue. Again applying *de novo* review, the Court of Appeal largely adopted its initial reasoning and conclusions, which are explained in more detail in the summary of [Save Lafayette Trees v. City of Lafayette](#) in [Latham & Watkins' 2018 CEQA Case Report](#). The Court reconsidered its prior analysis of the conflict between the 90-day limitation period in Government Code Section 65009 and the 180-day limitation period in the applicable CEQA provisions. In so doing, the Court again noted the general rule that, when two statutes relate to the same subject, the more specific of the two will control unless they can be reconciled, and reached the same conclusion that application of the 90-day limitation period would impermissibly shorten the limitation period provided pursuant to CEQA. As such, the Court found that the trial court had erred in sustaining the demurrer on this basis.

### **Notwithstanding Any Other Law, the Period for Timely Service Is Within 10 Days of Filing**

The Court also found that, even if Government Code Section 65009 were determined to be the more specific provision, the petition was still timely filed because Public Resources Code Section 21167.6 provides a 10-day period for service from the date that the action was filed “notwithstanding any other law.” Here, Petitioners timely filed their CEQA claim under Government Code Section 65009 by filing on the 90th day and timely served under Public Resources Code Section 21167.6 by serving on the 91st day. Therefore, the Court affirmed its earlier holding that the trial court erred in sustaining the demurrer to the CEQA cause of action.

### **Disposition**

In this rehearing, the Court of Appeal reached the same holding as in its earlier decision, affirming in part and reversing in part the trial court’s decision, and ordered that the trial court enter an order overruling the demurrer to Petitioners’ CEQA cause of action.

- Opinion by Justice Pollak, with Acting Presiding Justice Siggins and Justice Ross concurring.
- Trial Court: Superior Court of Contra Costa County, Case No. MSN17-1142, Judge Steven K. Austin.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
19 <i>Turn Down the Lights v. City of Monterey</i>		6 <sup>th</sup>	

[Turn Down the Lights v. City of Monterey](#), California Court of Appeal, Sixth Appellate District, Case Nos. H044656, H045556 (February 28, 2019).

- *Whether a duty to exhaust administrative remedies is triggered in a categorical exemption case must be decided on a case-by-case basis.*
- *The notice necessary to trigger the duty to exhaust administrative remedies is notice of the ground for the agency's CEQA exemption determination and a hearing or other opportunity for members of the public to raise objections.*

### Background for Appeal

In November 2011, City of Monterey (City) Council approved a Street and Tunnel Lighting Replacement Project Contract (Project) involving the removal of an existing high-pressure-sodium street light and tunnel light fixture and installation of new LED street light fixtures and new induction tunnel fixtures. The agenda item for the City Council meeting stated: "Award Street and Tunnel Lighting Replacement Project Contract \*\*\*CIP\*\*\* (Plans & Public Works – 405-04)." The three-page staff report also contained an environmental determination section noting that the Project was exempt from CEQA under the categorical exemption for existing structures and facilities, as determined by the City's Planning, Engineering, and Environmental Compliance Division. Turn Down the Lights (Petitioner) did not object to the Project before City Council approved the contract. After the City's approval of the Project, Petitioner brought a petition for writ of mandate challenging the categorical exemption determination. The trial court granted the petition, finding the new LED bulbs and light fixtures were neither a structure nor a facility under the existing facilities exemption. The trial court also excused Petitioner from the duty to exhaust administrative remedies, finding that the exhaustion requirement did not apply because the City did not provide adequate notice.

### Exhaustion of Administrative Remedies

On appeal, the Court of Appeal concluded that the duty to exhaust administrative remedies was triggered such that Petitioner failed to exhaust. While Petitioner argued that reference to CEQA in the three-page staff report, without any reference on the City Council agenda, was inadequate notice to trigger Petitioner's duty to exhaust, the Court first noted whether a duty to exhaust is triggered in a categorical exemption case is decided on a case-by-case basis. The Court then held that the exhaustion requirement applies as long as the public agency "gives notice of the ground for its exemption determination, and that determination is preceded by public hearings at which members of the public had the opportunity to raise any concerns or objections." The Court found that City Council's agenda description describing the Project was sufficient to prompt residents concerned about the environmental effects of artificial lighting to investigate further by contacting City staff, reading the staff report, or attending the City Council meeting, and that a member of the public accessing the staff report would have found its CEQA discussion with relative ease. The City Council meeting thus provided an opportunity for the public to raise objections and triggered Petitioner's duty to exhaust administrative remedies. The Court did not consider the question of whether the Project fell within the categorical exemption.

## **Disposition**

Accordingly, the Court of Appeal reversed the trial court's judgment rejecting the City's approval of the Project.

- Opinion by Justice Grover, J., with Presiding Justice Greenwood and Justice Danner concurring.
- Trial Court: Monterey County Superior Court, Case No. M116731, Judge Lydia Villarreal.

## Attorneys' Fees, Justiciability, and Other Procedures

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
20 <i>Union of Medical Marijuana Patients, Inc. v. City of San Diego et al.</i>		Supreme Court	

[Union of Medical Marijuana Patients, Inc. v. City of San Diego](#), Supreme Court of California, Case No. S238563 (August 19, 2019).

- *The enactment or amendment of a zoning ordinance does not necessarily constitute a “project” under CEQA.*
- *The test for whether a proposed activity constitutes a “project” under CEQA is whether, by its general nature, such activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment, and the test is applied without considering the likely actual impact of the activity.*

### Background for Appeal

In 2014, the City of San Diego (City) adopted Ordinance No. O-20356 (Ordinance), which amended various City municipal codes to authorize the establishment and regulate the siting and operation of medical marijuana dispensaries. The Ordinance amended several zoning regulations to limit the number of dispensaries permitted in each of the City's nine districts and require dispensaries to be located specific distances from schools, parks, and residential zones. The Ordinance also added dispensaries to the list of permitted uses within certain commercial and industrial zones, expressly banned them from open space, agricultural, and residential zones, and required a conditional use permit for a dispensary's operation.

The City determined that the Ordinance did not constitute a “project” under CEQA because it did not have the potential to result in a direct physical change or a reasonably foreseeable indirect physical change to the environment. The Union of Medical Marijuana Patients, Inc. (Petitioner) disagreed, contending that the Ordinance was a project under CEQA because it had the potential to cause a change to the environment. Petitioner argued that under the Ordinance, siting restrictions would increase traffic by requiring thousands of patients to drive across town, the prohibition of unpermitted dispensaries would cause people to grow marijuana for their own use, and the limit on the total number of dispensaries would cause intensified development in select areas of San Diego County. The City rejected Petitioner's arguments and adopted the Ordinance without performing further environmental review.

Petitioner filed a petition for writ of mandate, challenging the City's failure to perform a CEQA review. The trial court denied the writ, and the Court of Appeal affirmed. Petitioner appealed to the Supreme Court of California.

### Amendment of a Zoning Ordinance Is Not Necessarily a CEQA Project

The Supreme Court first considered whether the amendment of a zoning ordinance constituted a project under CEQA as a matter of law. Specifically, the Court considered Petitioner's argument that, under Public Resources Code Section 21080, every zoning amendment constitutes a CEQA project regardless of whether the amendment may cause a direct or indirect physical change to the environment. The Court rejected Petitioner's argument, concluding that Section 21080 does not subject a zoning amendment to CEQA as a matter of law.

The Court rested its analysis on two sections of the Public Resources Code. Section 21065 defines a “project” as an activity directly undertaken by, supported by, or requiring the approval of a public agency which “may cause” a direct or reasonably foreseeable indirect physical change in the environment. Section 21080 provides that CEQA “shall apply to discretionary projects” proposed or approved by public agencies, “including, but not limited to, the enactment and amendment of zoning ordinances.”

The Supreme Court concluded that in using the term “project” in Section 21080, the legislature intended it to have the meaning provided in Section 21065, rejecting Petitioner’s argument. The Court reasoned that the activities listed in Section 21080 — including “the enactment and amendment of zoning ordinances” — provide “generic examples” of the type of discretionary activities that *may* be subject to CEQA, but are not projects merely because they are listed in Section 21080. The Court further reasoned that this interpretation was consistent with the CEQA Guidelines, there would be negative policy ramifications for subjecting certain actions to CEQA, including some zoning ordinances, that did not have the potential to effect the environment, and the fact that the legislature amended Section 21065 to limit the meaning of “projects” to those actions with the potential to cause environmental change. Therefore, the Supreme Court affirmed the Court of Appeal’s conclusion that a public agency’s amendment of zoning regulations must satisfy the conditions of Section 21065 — including the possibility of causing direct or indirect physical change to the environment — in order for the amendment to be classified as a project under CEQA.

### **The Ordinance Constitutes a Project Requiring Further CEQA Analysis**

Although Section 21080 alone did not render adoption of the Ordinance a project, the Supreme Court determined that the Ordinance nonetheless satisfied Section 21065’s definition of a project, reversing the Court of Appeal.

The Court concluded that the applicable test for whether a proposed activity constitutes a project under CEQA is whether “by its general nature, the activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment.” The Court explained that the determination of whether an activity is a project presumably occurs before formal inquiry into environmental impacts, and the question is not whether the activity will *in fact* affect the environment, but whether its *potential* for causing environmental change justifies further inquiry into the nature and likelihood that it will have environmental effects. This determination is made without considering whether the potential effects will actually occur under an activity’s specific circumstances. The Court noted that a reasonably foreseeable indirect physical change includes any effect that the activity “is capable, at least in theory, of causing,” while an indirect physical change is not reasonably foreseeable if the causal connection between the activity and the effect is lacking or “is so attenuated as to be ‘speculative.’” Therefore, even if a lead agency anticipates that an activity will not ultimately have any environmental impacts, such activity is nevertheless a “project” under CEQA to the extent it has the *potential* to result in a direct, or a reasonably foreseeable indirect, physical change to the environment.

Applying this test, the Supreme Court held that the City erred in determining that adoption of the Ordinance did not constitute a project under CEQA. The Court determined that the Ordinance permits the establishment of new businesses, which could foreseeably result in construction or change traffic patterns, and that these theoretical effects were sufficient to “raise the possibility” that the Ordinance may cause a reasonably foreseeable indirect physical change in the environment. The Supreme Court found the necessary causal connection between the Ordinance and these effects, citing the adoption of the Ordinance as a necessary (even if insufficient) step in the establishment of new businesses. However, the Court declined to assess the anticipated effects raised by Petitioner, explaining that consideration of the “likely *actual* impact of an activity” at this early stage of the CEQA process, where there is little or no factual record regarding environmental effects, would be putting “the cart before the horse.” The Court also rejected the City’s argument that environmental review would be more appropriate when dispensaries apply for conditional use permits, finding that the requirement for conditional use permits did not prevent the Ordinance from being considered a project.

## **Disposition**

Accordingly, the Supreme Court of California reversed the Court of Appeal's decision denying Petitioner's request for a writ of mandate and remanded for further proceedings.

- Opinion by Chief Justice Tani G. Cantil-Sakauye, with Associate Justices Ming W. Chin, Carol A. Corrigan, Goodwin H. Liu, Mariano-Florentino Cuéllar, Leondra R. Kruger, and Joshua P. Groban concurring.
- Court of Appeal: Fourth Appellate District, Division One, Case No. D068185, Acting Presiding Justice Irion, with Justice Nares and Justice Huffman concurring.
- Trial Court: Superior Court of San Diego County, Case No. 37-2014-00013481-CU-TT-CTL, Judge Joel R. Wohlfeil.

## Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
21 <i>Center for Biological Diversity v. California Dept of Conservation</i>		3 <sup>rd</sup>	

[Center for Biological Diversity v. California Department of Conservation, Division of Oil, Gas and Geothermal Resources](#), California Court of Appeal, Third Appellate District, Case No. C083913 (May 16, 2019).

- A CEQA cause of action is unripe if there is no specific project at issue requiring approval.
- Subsequent study volumes releasing new information made available after initial EIR preparation and certification do not require that the CEQA lead agency issue a supplemental EIR if the information is not included in the record before the court.
- Senate Bill 4 does not require an analysis of indirect impacts of well stimulation treatments.
- CEQA does not require adoption of formal mitigation measures when the lead agency prepares an EIR for informational purposes if (1) the agency commits to specific performance criteria within a Mitigation Policy Manual and (2) the agency reasonably concludes that mitigation measures are infeasible.
- CEQA requirements relating to findings and mitigation monitoring and reporting plans are not applicable to programmatic EIRs unrelated to a specific project.
- Field-specific analyses do not need to differ from the statewide analyses in the EIR if there is no evidence that impacts at these specific fields will be different.

### Background for Appeal

Senate Bill 4 (SB 4) required the study of well stimulation treatments. SB 4 addressed concerns about insufficient information regarding the impacts of stimulation treatments in a few ways. The bill (1) defined relevant industry terms; (2) required the California Natural Resources Agency (CNRA) to complete a scientific study evaluating the hazards and risks of well stimulation treatments; (3) required the California Department of Conservation, Division of Oil, Gas and Geothermal Resources (Department, renamed the California Geologic Energy Management Division on January 1, 2020) to adopt permanent well stimulation treatment regulations; (4) established new permit requirements for well stimulation treatments; and (5) established an interim statutory regime prior to the date permanent regulations would take effect. SB 4 further required that the Department prepare an environmental impact report (EIR) to “provide the public with detailed information regarding any potential environmental impacts of well stimulation in the state.”

The Department published a draft programmatic EIR in January 2015. The EIR did not contain mitigation measures for indirect impacts of well stimulation treatments, as the Department concluded that mitigation would be infeasible.

The Center for Biological Diversity (Center) filed a petition for writ of mandate and complaint for declaratory and injunctive relief. The Center alleged that the EIR was inadequate and therefore violated CEQA and SB 4 for: (1) failing to incorporate study information into the EIR; (2) failing to consider indirect impacts of well stimulation treatments; (3) failing to adopt enforceable mitigation measures; (4) failing to

adopt a mitigation monitoring and reporting plan; and (5) providing insufficiently specific field-specific analyses. The Department demurred on the grounds of ripeness because the EIR was an informational document and was unassociated with a specific proposed project. The trial court overruled the demurrer except as it related to the Center's CEQA cause of action. The trial court then held a hearing on the merits and issued an order denying the petition and sustaining the Department's demurrer. The Center appealed the trial court's decision.

### **CEQA Ripeness Requirements**

On appeal, the Center argued that the trial court erred in sustaining the Department's demurrer on ripeness grounds. The trial court determined that the Center's CEQA cause of action was unripe because there was no project before the Department requiring approval. The Center argued that the "project" was defined as "well stimulation in the state" by SB 4. The Court of Appeal rejected this argument, stating that the Center had not addressed the question of ripeness. Alternatively, the Center argued that the Department's activity in overseeing and permitting well stimulation would qualify as "carrying out" a program and is itself a "project" within the meaning of CEQA. The Court held that regulation of well-stimulation activities does not imply that the Department "directly undertake[s]" those activities within the meaning of a "project" for CEQA purposes. Additionally, the Court found that the regulatory program that the Department oversaw was not the "project" the Department was charged with examining.

### **Newly Available Information**

On appeal, the Center argued that the Department violated SB 4 and CEQA by failing to incorporate the complete CNRA study into the EIR, arguing that the statutory deadlines implied an intent that the Department incorporate the complete study into the EIR. The Court relied upon the language of the statute, holding that there is nothing in SB 4 to indicate that the study and the EIR were meant to be linked. Section 3160 of the statute, requiring completion of the study, does not mention the EIR. Likewise, Section 3161, requiring preparation of the EIR, does not mention the study. The Court therefore concluded that SB 4 does not require incorporation of the study into the EIR, and the Department properly relied on alternative information to conclude that "California is anticipated to experience declining production with the management of older reservoirs," consistent with the study's prediction.

Petitioner alternatively argued that the second and third volumes of the study constituted "new information of substantial importance," thus requiring preparation of a subsequent or supplemental EIR. The Court did not rule on this issue because the volumes were not in the administrative record and were not judicially noticeable.

### **Indirect Impacts**

On appeal, Petitioner argued that the Department did not analyze emissions caused by pumping and transporting oil and gas produced by stimulated wells. However, the Court concluded that the Department was not required to analyze the indirect impacts of well stimulation in the EIR, but nevertheless adequately analyzed them on a programmatic basis. The Court stated that it could not imply a "sweeping mandate" to analyze indirect impacts of statewide well stimulation treatments from SB 4's instruction to prepare an EIR "pursuant to [CEQA]." The Court noted that the Center was correct in its assertion that an EIR prepared "pursuant to [CEQA]" would generally require analysis of a project's indirect effects. The Court recognized, however, that SB 4 created inconsistent requirements with CEQA in regard to the scope of the EIR. The Court concluded that the language of Section 3161 directly addresses the EIR's scope, narrowing it to require only an analysis of the environmental effects of well stimulation treatments defined under Section 3157.

### **Mitigation Measures**

On appeal, the Center argued that the EIR violated CEQA by failing to propose enforceable mitigation measures and failing to mitigate the indirect impacts of stimulation treatments. The Court held that the Department did not have an obligation to adopt formal mitigation measures until it either approved or carried out a project. The Court emphasized that the EIR was not directed at any specific project for

discretionary approval, but was instead prepared for informational purposes. The Court further noted that even had there been a requirement to propose mitigation measures, the EIR would be satisfactory given that (1) the Department committed to specific performance criteria and (2) the Department reasonably concluded that mitigation measures for indirect effects were infeasible.

The Department compiled the mitigation measures included in the draft EIR in the Mitigation Policy Manual, which outlined measures with which future projects must be “substantially consistent.” The Center argued on appeal that the performance criteria were not sufficiently specific, but the Court concluded that the length and number of topics addressed indicated that the recommendations were “based on knowledgeable good faith.” The Center alternatively argued that the Department was not sufficiently committed to the specific performance criteria. The Court rejected this argument because the Department committed to: (1) using the Mitigation Policy Manual as a starting point for evaluating future well stimulation projects; (2) collaborating with local lead agencies to ensure adequate mitigation for all site-specific impacts; (3) complying with every measure set forth in the Mitigation Policy Manual for future projects; (4) imposing additional mitigation on future projects as appropriate; and (5) revising the Mitigation Policy Manual going forward.

The Center also argued that the EIR failed to mitigate the indirect effects of well stimulation treatments. The Department contended that it had considered mitigation measures for indirect effects, but had ultimately concluded that they were infeasible. The Court agreed with the Department, determining that substantial evidence supported the conclusion that mitigation of indirect effects would be infeasible. The Court noted “that the Center might have chosen another approach does not establish that the Department abused its discretion.”

### **Mitigation Monitoring and Reporting**

The Center argued that the EIR violated CEQA because it failed to make findings or adopt a mitigation monitoring and reporting plan. Although CEQA requires that an agency make findings and adopt a mitigation monitoring plan when the agency approves or carries out a project, the Court concluded that there was no project before the Department for approval. Thus, the CEQA requirement did not apply to this particular EIR.

### **Field-Specific Analyses**

Although the EIR was a statewide programmatic analysis, it contained a more detailed discussion of three specific fields. The Center argued on appeal that the field-specific analyses were legally inadequate and insufficiently specific to the fields. The Court concluded that although the analysis of air quality impacts was identical to that of the statewide analysis, the Center was unable to identify any evidence demonstrating that the air quality impacts would be different at these specific fields. Additionally, the Court asserted that nothing in the record suggested that the field-specific analyses were intended to preclude further environmental review on future projects. The Court therefore rejected the Center’s argument that the field-specific analyses were inadequate.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court’s judgment denying the Center’s petition for writ of mandate.

- Opinion by Justice Renner, with Acting Presiding Justice Blease and Justice Hull, Jr. concurring.
- Trial Court: Sacramento County Superior Court, Case No. 34201580002149CUWMGDS, Judge Michael P. Kenny.

## Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
22 Chico Advocates for a Responsible Economy v. City of Chico	✓	3 <sup>rd</sup>	Partially

[Chico Advocates for a Responsible Economy v. City of Chico](#), California Court of Appeal, Third Appellate District, Case No. C087142 (September 5, 2019).

- “Loss of close and convenient shopping” is not itself a potential environmental impact that an EIR’s analysis of urban decay must evaluate.
- Challenges to an EIR’s methodology in analyzing various impacts must amount to more than a difference of opinion in how to measure such impacts.
- Adopting a statement of overriding considerations is a policy decision subject to an agency’s discretion.

A retailer (Real Party) applied to the City of Chico (City), seeking approval to expand an existing store by approximately 98,000 square feet. In 2009, after preparing an environmental impact report (EIR), the City declined to approve the expansion. In 2015, Real Party returned to the City seeking approval for an approximately 64,000-foot expansion of the store, most of which would be devoted to grocery-related sales and support (Project). The City prepared a new EIR for the Project, which showed that the Project would have a significant and unavoidable traffic impact. The City then certified the EIR, approved the Project, and adopted a statement of overriding considerations, concluding that Project benefits outweighed the Project’s sole unavoidable environmental impact.

Chico Advocates for a Responsible Economy (Petitioner) filed a petition for writ of mandate challenging the City’s review of the Project. The trial court denied the petition, and Petitioner appealed, asserting that the EIR failed to adequately evaluate the Project’s urban decay impacts and that the City’s statement of overriding considerations was deficient. The Court of Appeal affirmed the trial court’s judgment, finding that the City’s EIR was not required to analyze the Project’s potential elimination of “close and convenient shopping” as an environmental impact, that Petitioner’s challenge to the EIR’s urban decay study simply amounted to differences in opinion as to proper study methodology, and that it was within the City’s discretion as a policy maker to conclude that Project benefits outweighed the Project’s impacts.

### The EIR Was Not Required to Analyze Loss of Close and Convenient Shopping

On appeal, Petitioner asserted that the City’s EIR violated CEQA by failing to analyze the Project’s “likely elimination of ‘close and convenient shopping’” as a significant environmental impact. The Court of Appeal rejected this argument, stating that potential loss of close and convenient shopping is not an environmental issue subject to CEQA review, because CEQA is only concerned with physical changes to the environment. An economic or social change by itself is not considered a significant effect on the environment and must only be addressed if it also causes changes to the physical environment.

Accordingly, the Court rejected Petitioner’s argument that the loss of close and convenient shopping is an environmental impact because it “decreases the quality of life in a community.” Specifically, while the loss of convenient shopping could affect some local residents psychologically and socially, the Court found that “such impacts are not, by themselves, environmental impacts.” The Court also concluded that the City had explained and supported its definition of “urban decay” and that its definition was consistent with

definitions of urban decay approved in other cases. As such, the City did not violate CEQA by failing to analyze the loss of close and convenient shopping as a possible environmental impact.

### **Substantial Evidence Supported the EIR's Urban Decay Analysis**

Petitioner argued that the urban decay study relied upon by the EIR was flawed, and therefore the EIR's conclusions regarding urban decay impacts were not supported by substantial evidence.

The EIR's urban decay impacts conclusion relied upon a 43-page urban decay analysis, supported by a 123-page study. The study was designed to assess the Project's economic impacts and determine whether sufficient market demand existed to support the Project without affecting existing retailers so severely as to cause urban decay. The study determined that the Project would have a negligible impact on sales of competing retailers, within the range of normal market fluctuation. As such, the EIR concluded that the Project alone would not cause the kind of severe economic effects that could lead to urban decay.

As to the Project's cumulative impacts, the study determined that the Project, combined with other nearby planned retail projects, could induce the closure of one existing grocery store. However, given the size of the retail base, the study concluded that the cumulative impacts would only increase local market vacancy rates by 1%. The study further stated that given the area's strong retail market, any vacancies would be well-maintained and would be filled quickly. Therefore, the EIR concluded that the Project would not have significant cumulative impacts related to urban decay.

Petitioner asserted that the study was flawed because it:

- Improperly used a storewide average of sales per square foot to estimate grocery sales per square foot
- Underestimated the Project's impact on Chico-area stores, as it assumed that shoppers from the town of Paradise would shop at the store
- Erroneously assumed that the Project's economic impact would be spread among existing stores in the total market area, rather than concentrated on the store's nearest competitor

The Court rejected Petitioner's arguments, noting that an agency's methodology used in an EIR's analysis must be upheld unless the agency's reasons for proceeding as it did are clearly inadequate or unsupported. The Court concluded that Petitioner's alleged flaws in the EIR's methodology amounted to nothing more than differences of opinion as to how to calculate the Project's impacts on market competitors and that the choice of one approach over the other did not render the EIR deficient. Therefore, Petitioner failed to establish that the EIR's urban decay analysis was not supported by substantial evidence.

### **Respondent's Statement of Overriding Considerations Was Adequate**

Finally, Petitioner argued that the City's statement of overriding considerations was inadequate because it did not reconcile the City's current approval of the Project with its 2009 denial of Real Party's larger expansion proposal. Relying on *Topanga Association for a Scenic Community v. County of Los Angeles*,<sup>1</sup> Petitioner asserted that, as when an agency adopts findings regarding the feasibility of project alternatives or mitigation measures, an agency's statement of overriding considerations must provide specific findings regarding each project benefit so as to "bridge the analytical gap between the raw evidence and the ultimate decision."

The Court of Appeal disagreed, concluding that while a statement of overriding considerations is similar to findings regarding the feasibility of mitigation measures or project alternatives, the two need not be

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<sup>1</sup> (1974) 11 Cal.3d 506.

treated the same. The Court stated that a decision to approve a project despite its significant impacts is a policy decision, committed to the agency's discretion. The CEQA Guidelines require that when adopting a statement of overriding considerations, the agency must include a statement of "specific reasons" for its policy decision. These reasons must be supported by substantial evidence, but the agency need not describe in detail the weight that it accorded to its competing policy objectives.

Here, the City had made the required findings for each significant Project impact and included a statement of its reasons as to why it determined that the Project's benefits outweighed its single significant and unavoidable impact. Moreover, in responses to comments, the City explained why its conclusions in the 2009 EIR had no impact on its new evaluation of the Project. The Court concluded that Petitioner's argument was essentially founded in a policy disagreement as to whether Project benefits outweighed the Project's costs and that it was not up to the Court to second-guess the City's policy decision in this instance.

### **Disposition**

Accordingly, in a partially published opinion,<sup>2</sup> the Court of Appeal affirmed the trial court's judgment denying Petitioner's petition for writ of mandate.

- Opinion by Justice Krause, with Acting Presiding Justice Hull and Justice Murray concurring.
- Trial Court: Butte County Superior Court, Case No. C087142, Judge Stephen E. Benson.

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<sup>2</sup> The portion of the opinion regarding the Project's statement of overriding considerations was not certified for publication.

## Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
23 <i>Citizens for Positive Growth &amp; Preservation v. City of Sacramento</i>		3 <sup>rd</sup>	

[\*Citizens for Positive Growth & Preservation v. City of Sacramento\*](#), California Court of Appeal, Third Appellate District, Case No. C086345 (November 26, 2019).

- CEQA Guidelines section 15064.3 provides that a project's effect on automobile delay does not constitute a significant impact.
- Courts will uphold the rejection of a "no project" alternative if the decision is based on substantial evidence.
- Recirculation of an EIR is not required if there is no significant new information.

### Background for Appeal

The City of Sacramento (City) released its draft 2035 General Plan (Plan) and draft environmental impact report EIR for public review in August 2014. The Planning and Design Commission reviewed the Plan and EIR and then recommended that the City Council certify the EIR and adopt the Plan. The recommendation included five supplemental changes to the EIR and the Plan. The City then issued a "special reminder" that the City Council would consider adopting the Plan and certifying the EIR at a meeting on March 3, 2015. In the reminder, the City provided a hyperlink to a document containing a "list of supplemental changes to the Draft 2035 General Plan." The document outlined 13 changes to the Plan and EIR, including the five changes previously considered by the Planning and Design Commission.

The City approved the Plan and certified the EIR with the proposed changes on March 3, 2015. Citizens for Positive Growth & Preservation (Petitioners) filed suit on April 1, 2015, seeking a writ of mandate, injunctive relief, and declaratory relief on the grounds that: (i) the City had not adequately addressed the increased traffic congestion discussed in the Plan, (ii) the "no project" alternative was not properly analyzed, and (iii) recirculation had been required in light of the supplemental changes.

In addition to the CEQA challenges, Citizens also challenged the Plan based on language in the introductory paragraph stating that the City had the "sole discretion" to determine whether any proposed project was consistent with the Plan. Citizens argued that the language violated Government Code section 65300.5 because it indicated that the Plan had internal inconsistencies that would lead to the approval of projects inconsistent from the Plan. The Court of Appeal rejected this argument because Citizen's could point to no actual inconsistencies within the Plan, nor could it point to any specific, foreseeable inconsistent projects that were currently pending approval.

### Traffic Analysis Challenge Was Moot

The Plan acknowledged that there would be an increase in traffic by 2035, compared with current conditions, but did not consider the increase in travel delays to be a significant impact. Citizens argued that the City's conclusion that revising traffic thresholds in the Plan would have no significant impact was incorrect, due to the potential for an increase in traffic congestion in certain parts of the City. A new CEQA guideline was adopted in December 2018 that mooted this argument. CEQA Guidelines section 15064.3 provides that, except for roadway capacity projects, "a project's effect on automobile delay shall not

constitute a significant environmental impact.” It further provides that, “[g]enerally, vehicle miles traveled is the most appropriate measure of transportation impacts.”

In mandamus proceedings, the law applied is that which is current at the time of judgment in the appellate court. Although Section 15064.3 was not in effect in 2015 when the City approved the Plan, it was in effect at the time of the appellate court ruling, rendering Citizens’ traffic impacts argument moot.

### **“No Project” Alternative Was Properly Analyzed**

Citizens argued that the City improperly rejected the no-project alternative because it failed to fully analyze traffic conditions under that alternative. However, the Court of Appeal found that the City adequately analyzed traffic conditions and that, in any case, the City’s rejection of the no-project alternative as infeasible was based on its findings that the alternative both failed to further some of the City’s objectives related to climate change and would not avoid any significant impacts associated with the Plan. Because Citizens did not demonstrate that the City’s findings were not based on substantial evidence, the Court rejected Citizens’ arguments.

### **Recirculation Was Not Required**

Citizens argued that four of the supplemental changes to the EIR released in February 2015 constituted significant new information, which required recirculation of the EIR. Primarily, Citizens was concerned with changes eliminating certain ratios used to measure traffic congestion in the Plan.

The Court held that these changes were not significant new information because the deletion of the ratios would not have any impact on the projected amount of traffic, the deleted ratios would only apply to future projects, and Citizens could point to no current future projects that would be impacted. The Court determined that Citizens’ arguments that the other changes required recirculation were not sufficiently supported by citations to the record and therefore were forfeited.

### **Disposition**

The Court of Appeal affirmed the trial court’s judgment, and awarded City costs on appeal.

- Opinion by: Justice Robie, with Presiding Justice Raye and Justice Krause concurring.
- Trial Court: Superior Court of Sacramento County, Case No. 34-2018-80002897, Judge Richard K. Sueyoshi.

## Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
24 Crenshaw Subway Coalition v. City of Los Angeles		2 <sup>nd</sup>	

[Crenshaw Subway Coalition v. City of Los Angeles](#), California Court of Appeal, Second Appellate District, Division Four, Case No. B285588 (April 17, 2019).

- *While an agency must consider a range of reasonable alternatives in an EIR, the agency may structure its analysis around the project's underlying purpose and need not study alternatives that cannot achieve that basic purpose.*
- *While an EIR must discuss inconsistencies between the proposed project and applicable general, specific, or regional plans, it is not required to discuss inconsistencies with draft plans that have not yet been adopted.*
- *A lead agency may defer the formulation of mitigation measures when it commits itself to mitigation and the measures include specific performance criteria or list the options to be considered, analyzed, and possibly incorporated into the mitigation plan.*

The City of Los Angeles (City) certified a final environmental impact report (EIR) and approved a mixed-use transit-oriented project (Project). A neighborhood organization (Petitioner) petitioned for writ of mandate challenging the City's approval, alleging that the EIR was inadequate. The trial court denied the petition for writ of mandate. Petitioner appealed, arguing that the EIR failed to consider a reasonable range of alternatives; failed to discuss conflicts between the Project and the draft community plan; and improperly deferred traffic mitigation. The Court of Appeal affirmed the denial of the petition.<sup>3</sup>

### Background for Appeal

In 2015, the Project developer submitted an application for the Project — 200,000 square feet of office space, 100,000 square feet of retail space, outdoor open spaces, and over 1,200 residential units. The Project, located across the street from a Metro station and within 100 feet of five bus lines, was designed to promote walkability. In its application, the developer acknowledged that the City was in the process of updating the applicable community plan, and that this update would establish an overlay to encourage pedestrian-friendly developments.

In 2016, the City Council certified the final EIR and approved the Project. Petitioner sought a writ of mandate, challenging the adequacy of the EIR and the City's compliance with its City Charter. The trial court denied the petition in 2017, and Petitioner timely appealed.

### The EIR Adequately Analyzed Alternatives

The Court of Appeal rejected Petitioner's argument that the EIR failed to evaluate a reasonable range of alternatives because, while the EIR included one alternative with reduced intensity, the EIR did not include a much smaller alternative or an alternative with fewer residential units. The Court found that it was reasonable for the City to structure its alternatives analysis around the Project's primary purposes: creating a development with enough density to attract residents and visitors, and taking advantage of

<sup>3</sup> Petitioner also raised arguments regarding compliance with the Los Angeles City Charter, which are not summarized here.

existing public transit systems. The City was not required to study alternatives that would not achieve these Project purposes. In addition, the Court found that it was reasonable for the City to limit the alternatives to projects with a significant number of residential units given the shortage of market-rate housing in the area.

Further, the Court explained that the key question was whether the range of alternatives discussed in the EIR fostered informed decision-making and public participation. Here, the EIR included a traffic study that analyzed Project-generated trips and traffic, and impacts on surrounding intersections. Because the traffic study provided information regarding the number of trips generated by each type of land use, the Court argued, the EIR provided sufficient information to allow decision makers and the public to evaluate a reduced-size project.

### **The EIR Was Not Required to Analyze Consistency With the Draft Community Plan**

The Court held that the EIR was not required to address the draft community plan that had not yet been adopted. CEQA requires an EIR to discuss inconsistencies between the proposed project and *applicable* planning documents, but nothing in CEQA requires an EIR to address draft plans. The Court decided against requiring the EIR to analyze inconsistencies between the Project and the draft community plan given that courts may not impose requirements beyond those explicitly stated in CEQA or the CEQA Guidelines.

### **The City Did Not Improperly Defer Mitigation**

The Court rejected Petitioner's argument that the EIR improperly deferred certain traffic mitigation measures. The Court explained that a lead agency may defer the formulation of measures when it commits itself to mitigation and the measures include specific performance criteria or list the options to be considered, analyzed, and possibly incorporated into the mitigation plan.

For instance, one challenged measure required that, prior to the issuance of a certificate of occupancy, the developer implement a transportation plan approved by the Los Angeles Department of Transportation. The Court found that the City had committed itself to mitigation, and the EIR listed specific strategies and identified the upgrades necessary to increase intersection efficiency. Similarly, two other measures appropriately required the development and approval of construction plans prior to the start of construction work, and described the required elements of these plans. The Court also concluded that deferral was necessary because the plans had to take into account conditions occurring at the time of Project construction.

### **Disposition**

Accordingly, the Court of Appeal affirmed the superior court's judgment denying the petition for writ of mandate and upheld the City's approval of the Project.

- Opinion by Acting Presiding Justice Willhite, with Justice Currey and Justice Dunning concurring.
- Trial Court: Superior Court of Los Angeles County, Case No. BS163238, Judge Mary H. Strobel.

## Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
25 Grand Petroleum, Inc. v. County of Fresno	X	5 <sup>th</sup>	X

[Grand Petroleum, Inc. v. County of Fresno](#), California Court of Appeal, Fifth Appellate District, Case No. F078035 (October 18, 2019).

- *Previously prepared reports for unrelated projects are not substantial evidence in support of a lead agency's conclusion to the extent they were not reviewed and relied upon during its review.*
- *Reliance on future permitting processes as a mitigation measure is appropriate only if there are sufficiently clear directives for mitigation relating to identified concerns.*

### Background for Appeal

In February 2016, Shawn Shiralian (Real Party) sought a conditional use permit to develop a truck stop along Interstate 5 (Project). The County of Fresno's (County's) initial study identified potential impacts relating to water use and treatment. Because the Project was located in a designated "water-short" area, the local water district refused to supply water, and Real Party was required to build a well and water treatment facility. The initial study also noted that wastewater generated from the Project would be treated and discharged according to a leach field dispersal plan.

Following the County's issuance of a mitigated negative declaration (MND), Grand Petroleum (Petitioner), owner of a neighboring truck stop, challenged the initial study and issuance of a conditional use permit, arguing that the County failed to adequately assess potential impacts related to groundwater consumption and wastewater management. The trial court denied the writ of mandate, and Petitioner appealed.

### The Initial Study Inadequately Addressed the Impacts of Withdrawing Well Water

Petitioner argued that the initial study failed to consider the potentially significant environmental impacts from withdrawing groundwater. Although the initial study concluded that the Project would have no significant impact on groundwater supplies or recharge and would yield no net deficit in aquifer volume or the groundwater table, Petitioner challenged the adequacy of the underlying analysis. Petitioner argued that there was no substantive analysis of potential impacts because the County merely noted that a well producing enough water to support the Project had been permitted and cited estimated water utilization rates without actually analyzing associated impacts.

The County argued that total Project water usage was insignificant and that no significant environmental impacts would ensue. Specifically, the County challenged Petitioner's increased estimates of daily water usage and pointed out that there were no other large users of groundwater in the Project's sparsely populated area. The County also contended that the Project passed a well yield test before receiving its building permit. As a result, the County properly elected not to require an aquifer study because officials were already knowledgeable of key factors concerning the use of well water for the Project.

The Court of Appeal ultimately determined that the County's analysis was cursory and inadequate. The Court explained that the County's review focused largely on water availability, but failed to assess impacts related to water consumption. The Court highlighted the fact that an early review of the Project cited the need to assess water usage impacts and that Petitioner flagged the County's failure to analyze impacts associated with water supply at multiple times throughout the process. Therefore, the Court held

that the initial study failed to analyze potential impacts related to water consumption and that the County's reliance on the initial study constituted an abuse of discretion.

### **The County Failed to Adequately Consider Wastewater Impacts**

Petitioner further argued that the County failed to consider potential impacts associated with the treatment and disposal of a highly saline water byproduct that may qualify as a hazardous material under certain circumstances. To the extent the County did assess the issue, Petitioner argued, the analysis relied on early-stage reports premised on outdated wastewater flow estimates.

The County disagreed, arguing that the Project's obligation to comply with Health and Safety Code requirements related to hazardous materials functioned as a satisfactory mitigation measure. Additionally, the County noted that its approval of the wastewater treatment plan was adequate because it required continued review throughout the permitting process. Finally, the County argued that two additional reports of CEQA-reviewed projects from the 1980s supported the County's conclusion that the Project's treatment measures were adequate.

The Court rejected both of the County's arguments. First, the Court highlighted the fact that there was no Project-specific analysis of wastewater generation, the proposed method of treatment, or the need for specific mitigation. As a result, the Court determined that the County erred in relying solely on hazardous materials laws because, absent any specific data, it was unclear whether those laws would actually function to mitigate potential impacts. Moreover, the Court decried the County's reliance on outdated reports, explaining that the foundational assumption of the report underlying the initial study included a maximum daily water flow that was less than half of the ultimate wastewater flow estimate. Thus, the Court explained, there was insufficient support for the conclusion that adequate soils existed to manage the expected wastewater flow, and therefore reliance on this report and failure to look at relevant data amounted to an abuse of discretion.

The Court also rejected the County's argument that continued permitting obligations functioned as an adequate mitigation measure. Acknowledging that reliance on future permitting can be a satisfactory mitigation measure in certain cases, such reliance is appropriate only if there are sufficiently clear directives for mitigation relating to identified concerns. Because the permitting process in this case merely involved the submission of building plans, the Court concluded that the County could not reasonably rely on future permitting as an adequate mitigation measure.

Finally, the Court rejected the County's attempt to cite the two 1980s reports in support of its position, explaining that there was no evidence the cited projects were comparable or that the County had relied on them in making its determination.

### **No Fair Argument Conclusion Was Reached**

The final issue considered by the Court concerned whether the record supported a fair argument that the Project may cause significant environmental impacts necessitating a full-fledged environmental impact report. Petitioner argued that there was a fair argument that significant environmental impacts may be caused by any of the following:

- Managing and disposing waste generated from groundwater treatment
- Withdrawing more water than stated in the Project application
- Managing and disposing of more wastewater than identified in the initial study

The Court ultimately did not reach a conclusion as to whether a fair argument existed despite Petitioner's arguments being factually supported by the record, in part because a finding of a fair argument at that time would not divest the County of its discretion to adopt another MND. For each of Petitioner's three arguments, the Court noted that the lack of information in the record left open the possibility that no substantial impact would occur or adequate mitigation measures could be implemented.

## **Disposition**

Accordingly, the Court of Appeal reversed the trial court's order denying the petition for writ of mandate and vacated the MND and conditional use permit approved by the lower court.

- Opinion by Presiding Justice Hill, with Justice Franson Jr. and Justice Smith concurring.
- Trial Court: Superior Court of Fresno County, Case No. 17CECG03813, Judge Kristi Kapetan

Environmental Impact Reports			
Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
26 Highway 68 Coalition v. County of Monterey		6 <sup>th</sup>	

[Highway 68 Coalition v. County of Monterey](#), California Court of Appeal, Sixth Appellate District, Case No. H045253 (July 26, 2019).

- A project description is adequate under CEQA if the basic characteristics of the project remain accurate and stable throughout the EIR process, even when various alternatives are considered.
- CEQA's feasibility requirements for an EIR's alternatives analysis apply to the project as a whole, and not to an individual component.

### Background for Appeal

The County of Monterey (County) circulated a draft environmental impact report (DEIR) for a residential subdivision development (Project) in 2012, and after receiving public comments, prepared a recirculated DEIR (RDEIR), identifying one of the Project's alternatives as the environmentally superior alternative. In 2014, the County Board of Supervisors (Board) approved the Project alternative and certified the final EIR.

In 2015, two nonprofit organizations, Highway 68 Coalition (Highway 68) and Landwatch Monterey County (Landwatch), filed petitions for writ of mandate, challenging the County's approval of the Project and alleging various CEQA violations. In 2017, the trial court consolidated the two petitions and rejected all claims of CEQA violations. Both nonprofits appealed from the judgment.

### Accurate and Stable Project Description

Highway 68 argued that differences in the Project description in the DEIR and RDEIR (related to a new, environmentally superior alternative in the RDEIR) violated CEQA's requirement that the description be accurate and stable due to substantial changes from the DEIR to the RDEIR. The DEIR contained four alternatives, and the RDEIR included a new alternative consisting of a refined version of one of the DEIR's alternatives that reduced visual impacts. The Court of Appeal determined that although numerous alternatives were proposed, with one ultimately being approved, the basic characteristics of the Project — a residential subdivision located on an 870-acre property — remained accurate and stable throughout the EIR process. Thus, while the County ultimately adopted an alternative to the originally proposed development, the RDEIR's project description was adequate under CEQA.

### Visual Impacts and Alternatives Analysis

Highway 68 argued that the EIR's analysis of the visual impacts of the Project were inadequate because the County did not comply with County policies related to visually sensitive properties. The Court of Appeal noted that the standard for determining the adequacy of an EIR's analysis of environmental impacts is whether the EIR has enough information to foster informed public participation and to enable the decision makers to consider all relevant environmental factors. The Court found that noncompliance with CEQA's information disclosure requirements was not reversible per se, as prejudice must be shown. Thus, the petitioner would need to show that an omission is prejudicial, or that the omission deprived the public or decision makers with the necessary information, in order for the Court to conclude that the omission violated CEQA. The Court determined that the EIR's otherwise extensive analysis of the visual

impacts was adequate under CEQA, since it provided sufficient information to enable decision makers to understand the potential visual impacts associated with the Project.

The Court of Appeal rejected Highway 68's allegation that the alternatives analysis was inadequate because the County failed to analyze a reasonable range of alternatives, the comparison of environmental impacts between the environmentally superior alternative and the original project was inadequate, and the County adopted an alternative that did not meet every Project objective. The Court found that Highway 68's contentions regarding the alternatives analysis all related to the fact that a conservation easement granted after the original project was proposed rendered the original project's planned entryway infeasible. As a result, the EIR analyzed alternatives that achieved the Project objectives while addressing the access issues associated with the original project's design. The Court held that CEQA's alternative analysis requirements relate to the development as a whole and not each individual component, such as access. The Court was unconvinced by Highway 68's arguments, concluding that the EIR's alternatives analysis was sufficient and that Highway 68 had failed to meet its burden to show that the alternatives analysis was inadequate.

### **Water Demand and Supply Analysis**

Landwatch argued that the water demand and supply analysis in the EIR was inadequate in a number of ways, and the Court of Appeal rejected all of Landwatch's arguments. Landwatch argued that the EIR's cumulative impact analysis was inadequate, that recirculation of the document was required, and that fee-based mitigation was inadequate to address impacts to water supply, among other arguments.

The Court held that the County's cumulative impact analysis complied with CEQA because the EIR considered whether the cumulative impact was significant and also whether the Project's incremental effects were cumulatively considerable.

Further, the Court stated that recirculation of an EIR is required under CEQA only when newly-added information results in the EIR changing in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect. Here, the Court determined that recirculation was not required because the new information was not significant.

Finally, the Court noted that when an impact is not unique to a single project, including impacts to water supply, fee-based infrastructure mitigation programs, including groundwater management programs, can serve as adequate mitigation measures under CEQA.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's decision rejecting all claims.

- Opinion by Justice Bamattre-Manoukian, with Acting Presiding Justice Elia and Justice Mihara concurring.
- Trial Court: Superior Court of Monterey County, Case Nos. M130660 and M130670, Judge Thomas Wills.

## Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
<b>27</b> <i>Hollywoodians Encouraging Rental Opportunities (HERO) v. City of Los Angeles</i>		2 <sup>nd</sup>	Partially

[Hollywoodians Encouraging Rental Opportunities \(HERO\) v. City of Los Angeles](#), California Court of Appeal, Second Appellate District, Division Three, Case No. B285553 (June 28, 2019).

- *The baseline for environmental analysis normally consists of the physical environmental conditions at the time the environmental analysis commences.*
- *If there is no substantial evidence that a project may have an adverse environmental impact, the lead agency is not required to analyze the cumulative impacts of the project.*
- *While CEQA requires the elected decision-making body to accept appeals of all environmental determinations, it does not require the body to accept appeals of all project-related approvals*

In 2016, the City of Los Angeles (City) adopted a mitigated negative declaration (MND) and approved the conversion of former rental housing into a boutique hotel (Project) proposed by the property owners (Real Parties). An environmental group (Petitioner) petitioned for writ of mandate challenging the City's Project approval. The trial court denied the petition, and Petitioner appealed, arguing: (i) the City's baseline was inappropriate and the City was required to prepare an environmental impact report (EIR); (ii) the initial study and MND were inadequate because the City failed to analyze the Project's cumulative impacts; and (iii) the City Council's failure to review other Project entitlements violated CEQA. The Court of Appeal affirmed the trial court's denial of the petition.

### Background for Appeal

In 2009, Real Parties applied to demolish an 18-unit apartment building subject to the City's Rent Stabilization Ordinance and replace it with a 39-unit residential condominium project. The City Council subsequently adopted an MND and approved the condominium project. In May 2013, Real Parties filed a notice of intent to withdraw all 18 units from rental housing use. By October 2013, all of the building's rental units were vacant, and the City subsequently approved its demolition. However, financing for the condominium project fell through in 2014.

In 2015, Real Parties applied for the Project, seeking to convert the property into a 24-room boutique hotel. The City prepared an initial study, which concluded that all potentially significant effects would be mitigated to less-than-significant levels. Regarding population and housing, the initial study concluded that the Project's impacts, including cumulative impacts, would be either less than significant or not significant, and therefore no further analysis was required. Specifically, the initial study concluded that the Project would not displace housing units or residents because the apartment units had been withdrawn from the market in 2013 and the building was vacant. Accordingly, the City prepared an MND.

Following a public hearing, the City Zoning Administrator adopted the MND and approved the requested Project entitlements, including a conditional use permit. Petitioner appealed the Zoning Administrator's decision to the City Planning Commission. At the Planning Commission hearing, two Commissioners were absent and the remaining Commissioners deadlocked in a 2-1 vote, resulting in the denial of the appeal and affirmation of the Zoning Administrator's decision. Petitioner then appealed to the City Council. Following a hearing, the City Council denied the appeal and upheld the adoption of the MND.

Petitioner then filed a petition for writ of mandate, which the trial court denied in its entirety.

### **The City Was Not Required to Prepare an EIR**

In the published portion of the opinion, the Court of Appeal concluded that the City used an appropriate baseline, that the City was not required to prepare an EIR, and that the initial study and MND were adequate.

#### ***1. The Vacant Building Was an Appropriate Baseline***

Petitioner argued that the City erred by not including the apartment units in the environmental baseline. Petitioner further argued that, using a baseline including the apartment units, the City was required to prepare an EIR because substantial evidence supported a fair argument that the Project would eliminate rent-stabilized housing in Hollywood and displace tenants, causing significant cumulative impacts to population and housing. The Court of Appeal disagreed. It concluded that the City's use of the vacant building as a baseline was appropriate because it reflected the existing condition of the building at the time the environmental review commenced. The building had been vacant for two years, and thus, the Project would not remove rent-stabilized units from the rental market or displace any tenants. There was no substantial evidence that the Project would have an adverse impact on the supply of housing or tenants, and therefore the City was not required to prepare an EIR.

The Court also rejected as speculative Petitioner's argument that the apartment units should have been part of the baseline, because Real Parties could have reversed their decision to stop renting the apartments.

In addition, the Court rejected Petitioner's assertion that the previously approved condominium project and the instant Project should be analyzed as a whole, finding that nothing in the record suggested that the Project was a reasonably foreseeable consequence of the condominium project.

#### ***2. The Initial Study and MND Complied With CEQA***

Petitioner argued that the City's initial study and MND were inadequate because they failed to analyze the Project's cumulative impacts to tenant displacement and loss of rent-stabilized housing. The Court of Appeal rejected this argument based on its previous conclusion that there was no substantial evidence that the Project would have an adverse impact to population and housing. The Court explained that, in this situation, the City could reasonably conclude that the Project's effects would not be cumulatively considerable.

### **CEQA Did Not Require the City to Provide for an Appeal of Other Project Entitlements**

In the unpublished portion of the opinion, the Court of Appeal rejected Petitioner's argument that the City Council violated CEQA by reviewing only the adoption of the MND without reviewing other Project entitlements, such as a conditional use permit. The Court explained that, although CEQA prohibits the splitting of decision-making authority, nothing in CEQA requires that the elected decision-making body accept appeals of every project approval separate and apart from environmental review. CEQA requires only that the environmental determination be appealable. Thus, the Court held that CEQA required the City to provide for an appeal of the MND adoption, but did not require the City to provide for an appeal of other Project-related approvals.

### **The Planning Commission's Actions Met Procedural Requirements**

Petitioner argued that the Planning Commission's 2-1 deadlocked vote violated Petitioner's right to have its appeal determined. In the unpublished portion of the opinion, the Court of Appeal concluded that the Planning Commission did act on Petitioner's appeal, but that it was unable to reach a decision and thus was not required to make findings in support of a decision. Per the City's Municipal Code, the Planning Commission's failure to reach a decision was deemed a denial of Petitioner's appeal and affirmation of the Zoning Administrator's decision.

Similarly, the Court rejected Petitioner's contention that the Planning Commission violated CEQA by failing to make any findings to support its decision to uphold the Zoning Administrator's decision and deny Petitioner's appeal. The Court explained that because the Planning Commission did not reach a decision, it was not required to make any findings.

### **Disposition**

Accordingly, the Court of Appeal affirmed the superior court's judgment denying the petition for a writ of mandate and upholding the City's Project approval.

- Opinion by Presiding Justice Edmon, with Justice Lavin and Justice Egerton concurring.
- Trial Court: Superior Court of Los Angeles County, Case No. BS163828, Judge John A. Torribio.

Environmental Impact Reports				
Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status	
28 <i>Jamulians Against the Casino v. Department of Transportation</i>		3 <sup>rd</sup>		

[\*Jamulians Against the Casino v. Dept. of Transportation\*](#), California Court of Appeal, Third Appellate District, Case No. C086184 (December 3, 2019).

- An EIR is an “informational document” that need only discuss a project in sufficient detail to allow the public to meaningfully understand and consider issues raised by the project.
- An EIR need only examine in detail those alternatives that the lead agency “determines could feasibly attain most of the basic objectives of the project.”

### Background for Appeal

Jamul Indian Village (JIV) is a Native American reservation in Jamul, California. JIV sought to construct and operate a casino (the Casino Project), but needed approval from the California Department of Transportation (Caltrans) and an encroachment permit to implement traffic mitigation measures, including highway improvements subject to CEQA. Caltrans accordingly prepared a draft environmental impact report (DEIR) and then a final environmental impact report (FEIR) for highway improvements along SR-94 to facilitate access to JIV’s tribal land and to mitigate traffic impacts from the casino’s construction (the SR-94 Project). In April 2016, Jamulians Against the Casino (Petitioner) filed a petition for writ of mandate complaint for declaratory and injunctive relief. Petitioner alleged that, in violation of CEQA, the FEIR failed to provide an adequate project description or consider a reasonable range of project alternatives that would satisfy the Project’s stated purpose and objectives. In September 2017, the trial court denied the petition. The Court of Appeal affirmed the trial court’s judgment.

### Adequacy of Project Description

Petitioner argued that the DEIR violated CEQA by failing to provide an accurate, stable, and finite description of the SR-94 Project, and that the DEIR did not identify a specific proposal as the actual project or a preferred alternative, rendering comparison of the project with its alternatives “utterly impossible.”

The Court of Appeal disagreed. The Court found that the DEIR:

- Presented a small number of closely related alternatives
- Analyzed and compared in detail the environmental impacts of each proposed alternative
- Discussed the proposed avoidance minimization and/or mitigation measures

The DEIR therefore provided enough detail to enable members of the public to review the issues raised by the proposed SR-94 Project.

## **Adequacy of Stated Project Alternatives**

Petitioner argued that Caltrans violated CEQA by failing to consider a reasonable range of project alternatives that satisfied the purpose and objectives of the SR-94 Project, and that Caltrans failed to study project alternatives capable of reducing traffic-related impacts south of the casino.

The Court found that Petitioner's argument failed on three grounds. First, Petitioner forfeited the claim by not raising it first during the administrative process. Petitioner's argument amounted to a request for Caltrans to expand the scope of the SR-94 Project or mitigate traffic-related impacts caused by the Casino Project, but it was not properly made to Caltrans during the administrative process.

Second, the Court determined that Petitioner's project alternatives argument failed on the merits, because an environmental impact report (EIR) need not consider every conceivable project alternative. Rather, an EIR need only examine in detail those alternatives that the lead agency "determines could feasibly attain most of the basic objectives of the project." Contrary to Petitioner's contention, the SR-94 Project did not seek to mitigate all casino-related traffic impacts, but only those traffic impacts caused solely by the Casino Project. Thus, Caltrans was only required to consider proposed project alternatives involving the Casino Project's direct traffic impacts.

Finally, the Court deferred to Caltrans' selection of alternatives because Petitioner failed to demonstrate that the chosen alternatives were "manifestly unreasonable" or submit evidence showing that the agency rejected a "feasible" and "adequate" alternative.

## **Disposition**

The Court of Appeal affirmed the trial court's judgment denying Petitioner's petition for writ of mandate and complaint for declaratory and injunctive relief.

- Opinion by Justice Butz, with Acting Presiding Justice Hull and Justice Duarte concurring.
- Trial Court: Sacramento County Superior Court, Case No. 34-2016-80002343-CU-WM-GDS, Judge Kenny Michael.

## Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
29 <i>Living Rivers Council, et al. v. County of Napa</i>	X	1 <sup>st</sup>	X

[Living Rivers Council v. County of Napa](#), California Court of Appeal, First Appellate District, Division Four, Case Nos. A154253, A154300, and A154314 (September 30, 2019).

- *An agency's factual conclusions in an EIR must be supported by substantial evidence from the record before the agency at the time made its decision.*
- *Because an agency has discretion in selecting the methodology to be used in evaluating environmental impact, a petitioner's disagreement with the choice of methodology is not enough to support reversal; the petitioner must also show a lack of substantial evidence to support the agency's decision.*
- *Cap-and-Trade addditionality requirements apply to CEQA mitigation for GHG emissions.*

In 2016, the County of Napa (County) certified a final environmental impact report (EIR) and approved a vineyard-conversion project (Project) proposed by Hall Brambletree Associates, LP (Real Party) on its property, Walt Ranch. LRC, Circle Oaks, and CBD filed petitions for writ of mandate challenging the County's approval, alleging that the EIR was inadequate. The trial court denied the petitions. LRC, Circle Oaks, and CBD appealed, arguing that the EIR did not comply with CEQA because it failed to apprise the public of the full extent of the Project's impact on endangered species, groundwater resources, watershed resources, roads and infrastructure, and the climate. The Court of Appeal affirmed the LRC and Circle Oaks petitions' denial. The Court reversed the denial of CBD's petition with respect to the EIR's analysis of greenhouse gas (GHG) emission impacts, and affirmed the denial in all other respects.

### Future Development Was Not Reasonably Foreseeable

CBD argued that the EIR should have analyzed the impacts of future residential development on Walt Ranch. CBD claimed that development of 35 large residences was reasonably foreseeable because the zoning of Walt Ranch would allow for such development without any future discretionary approvals, and the Project's expansion of water rights and road improvements would facilitate such development. The Court rejected CBD's arguments because substantial evidence supported the EIR's conclusion that the Project would not have a growth-inducing impact. The Court reasoned that the Project's construction of a vineyard did not compel or presume residential development, and there was no evidence that Real Party planned to build houses. Road and water supply improvements were not catalysts for future development because upgraded roads would not provide any new access, and the Project's water supply would not exceed capacity beyond what the vineyard required. CBD's assertion that development would occur was merely speculative based on Real Party's development on a different vineyard in a different county. The fact that residences may be developed at some point in the future did not show that possible expansion was a reasonably foreseeable consequence of the Project. The Court further noted that CBD's argument that the expansive nature of the agricultural zoning on Walt Ranch would make residential development certain to occur was essentially a zoning challenge, not a CEQA claim.

### EIR's Analysis of Special-Status Species Was Sufficient

CBD and LRC challenged the adequacy of the EIR's analysis of potential impacts on special-status species. LRC argued that the EIR's baseline analysis was informationally deficient because it presumed

the presence of California red-legged frogs at the Capell Creek watershed due to supportive habitat. The Court rejected LRC's argument, concluding that the record reflected intense effort to locate the frog, and the EIR therefore properly identified possible impacts to the species and proposed mitigation measures.

CBD and LRC argued that the baseline analysis was inadequate because surveys conducted at the Milliken Creek watershed failed to adhere to US Fish and Wildlife Service (USFWS) protocols regarding time and number of surveys, and the qualifications of surveyors. The Court disagreed, holding that the surveys sufficed. Although the survey timing did not fall within USFWS's guidelines for the "best survey period" for eggs, it fell within permissible guidelines for surveying for adult frogs, and the biologists conducting the surveys were qualified. The Court further rejected criticism of the methodologies used in the surveys because the issue was not whether other methodologies could have been used, but whether the surveys used were sufficiently credible to provide a substantial basis for an informed decision, which the Court concluded they were.

CBD also argued that the EIR failed to analyze potentially significant impacts caused by vehicle traffic on the foothill yellow-legged frog. CBD relied on a report from the Sierra Club, which the Court held was insufficient to meet CBD's burden of showing the County's finding was not supported by substantial evidence. Citing evidence in the EIR, the Court held that the County's finding that vehicle traffic would have an insignificant impact on the foothill yellow-legged frog was supported by substantial evidence.

CBD and LRC argued that the EIR's mitigation measures were inadequate because they failed to consider the effect of pesticide drift on the western pond turtle, California red-legged frog, and foothill yellow-legged frog. The Court disagreed, holding that the proposed mitigation measures were sufficient. CBD argued that the EIR's integrated pest management (IPM) requirement was illusory because it was only required "where feasible," and that the EIR impermissibly relied on compliance with existing regulations as mitigation. The Court rejected both arguments because IPM and compliance with regulatory programs were only two of many measures in the EIR designed to mitigate impacts on special-status species. LRC argued that the EIR impermissibly deferred development of mitigation measures because it did not specify the IPM techniques to be used. The Court held that this was not fatal because the IPM techniques would depend on the ground conditions, and the IPM plan committed Real Party to using permanent crop cover, beneficial insects, and minimal use of pesticides, in addition to compliance with all applicable regulations, standard operating procedures for vineyards, and best management practices. CBD also argued that riparian buffers proposed as a mitigation measure were inadequate to protect special-status species. The Court held that CBD's disagreement with the efficacy of buffer zones did not render the EIR inadequate, and substantial evidence supported the EIR's conclusion that buffer zones would avoid significant impacts from sediment and agricultural runoff. Finally, CBD and LRC argued that the County unlawfully compressed the assessment of the potential impact of pesticide drift on sensitive species with the identification of mitigation measures. The Court, however, concluded that the EIR fulfilled its informational purpose concerning pesticide drift by disclosing pesticide drift as a potentially significant impact and proposing mitigation to reduce that impact.

### **EIR's Groundwater Analysis Was Sufficient**

CBD and Circle Oaks challenged the adequacy of the EIR's groundwater analysis. CBD and Circle Oaks argued that the EIR lacked sufficient information regarding groundwater conditions because the County failed to use current average precipitation rates, which resulted in an inflated groundwater recharge rate, allowing Real Party to extract an unsustainable amount of groundwater. The Court held that substantial evidence supported the County's use of long-term average precipitation, and the County's conclusion that the demand and recharge estimates would be sustainable. CBD and Circle Oaks further argued that the pump test used to calculate the recharge rate was not reflective of baseline conditions, and an additional pump test should have been conducted. The Court held that this merely amounted to a disagreement with the methodology used and was not enough to invalidate the EIR.

CBD argued that the EIR failed to address the potential impact of pumping on Capell Creek and Milliken Creek stream flows, and the effect of reduced stream flows on special-status species. The Court

concluded that there was no need to address CBD's claim because substantial evidence supported the EIR's conclusion that groundwater pumping would not adversely affect stream flow at either location.

Circle Oaks challenged the adequacy of the EIR's groundwater impacts with respect to impacts to Circle Oaks-owned wells, which neighbored Walt Ranch. The Court held that in doing so, Circle Oaks failed to meet its burden of demonstrating that the modeling used by the EIR was clearly inadequate or unsupported: rather, Circle Oaks merely disagreed with the methodologies used in the EIR.

CBD and Circle Oaks argued that the groundwater monitoring and mitigation plan, and the County's conditions of approval requiring groundwater monitoring, were inadequate because monitoring is not mitigation, it unlawfully defers development of mitigation until after Project approval, the EIR fails to specify performance standards, and any mitigation is premised on Real Party's own determination that the impacts are due to the operation of Walt Ranch. The Court held that the EIR's mitigation measures were supported by substantial evidence, reasoning that monitoring is an appropriate component of mitigation that would allow the County, not Real Party, to determine whether pumping at Walt Ranch adversely affects groundwater resources and if so, what to do about it based on the specific mitigation measures set forth in the EIR, the details of which could properly be determined at a later date.

### **EIR's Watershed Resources Analysis Was Sufficient**

LRG argued that the EIR failed to sufficiently analyze watershed resource impacts because the Project would result in increased stormwater runoff, causing downstream transport of sediment that would negatively impact salmonids and their habitat. LRG claimed that the EIR failed to test whether "deep ripping" of the soil would permanently increase soil moisture. The Court held that the EIR's failure to mention a need for such testing was an insubstantial or merely technical omission that did not afford grounds for relief because the EIR's analysis was supported by the County conducting field testing that LRG sought in its post-EIR comments. LRG additionally argued that the EIR inadequately analyzed and improperly omitted the effects of the Project's engineered drainage facilities on runoff. The Court disagreed, concluding that the EIR provided an in-depth evaluation of the Project's effect on runoff, including with respect to the engineered drainage facilities. The Court explained that LRG's disagreement with the methodology and modeling used in the EIR did not support reversal. LRG also argued that the County's adoption of a condition of approval requiring verification of hydrological soil group classifications was proof that pre-approval verification testing was feasible and should have been performed in preparing the EIR. The Court rejected this argument, reasoning that there is nothing improper about incorporating a condition into a project that requires field surveys prior to breaking ground, and the condition of approval was not an impermissible deferral of mitigation and allowed for additional future mitigation measures.

Moreover, LRG argued that the trial court abused its discretion in denying its motion in limine requesting admission of engineering drawings that had been marked up by one of its experts. Although the drawings were part of the County's record, the mark-ups were not. The Court held that the trial court properly excluded the evidence because the only relevant evidence in a CEQA case is the record before the agency at the time it made its decision.

### **EIR's Roads and Infrastructure Analysis Was Sufficient**

Circle Oaks argued that the EIR failed to adequately analyze the Project's impact on roads and infrastructure based on wear-and-tear to area roads from construction traffic and subsequent operational traffic. The Court held that the EIR's analysis of potential impact on roads and infrastructure was adequate because, although the EIR did not contain a detailed analysis of possible sub-surface infrastructure damage, it incorporated Circle Oaks' comments and was sufficient in light of what analysis was reasonably feasible. Circle Oaks also argued that mitigation measures aimed at reducing the Project's impacts during construction failed to address damage caused during operation. The Court held that the EIR's conclusion that wear-and-tear during operation would be minimal and therefore specific separate mitigation for operations-period impacts was not needed was supported by substantial evidence. Therefore, the EIR did not need to discuss alternate access routes as alternative mitigation. Circle Oaks finally argued that the EIR failed to adequately respond to a comment letter regarding concerns that

heavy construction equipment could exacerbate preexisting road problems. The Court disagreed, reasoning that the EIR sufficiently responded to the comment and even incorporated some of Circle Oaks' suggestions from the comment.

### **GHG Emission Impacts Were Not Offset by Trees That Would Have Otherwise Remained**

CBD challenged the EIR's conclusion that the Project's GHG emissions would have no significant adverse impact on the environment. CBD argued that the EIR failed to use site-specific data to calculate the number of trees cut down and the associated carbon-sequestration loss, and failed to disclose or estimate the amount of GHG emissions that would be released into the atmosphere. The Court, classifying these arguments as challenges to the EIR's methodology, held that CBD failed to show that the County abused its discretion by using the CalEEMod and the 2012 BAAQMD Climate Change Guidelines.

CBD also argued that the preservation of existing woodlands did not constitute adequate mitigation for the GHG impacts because there was no evidence that the acreage would otherwise be destroyed but for the preservation. The Court agreed, holding that CBD met its burden of showing that substantial evidence did not support the EIR's conclusion that the Project as mitigated would have less-than-significant GHG emissions impact. The Court reasoned that the Compliance Offset Protocol U.S. Forest Projects' and California's Cap-and-Trade program's concepts of additionally applied to the CEQA GHG mitigation context. Accordingly, the Court reversed the trial court's judgment denying CBD's petition on this issue because preservation would not have offset value for GHG emissions if the trees would have reasonably remained otherwise. The Court remanded to the trial court to grant the petition to ensure that the GHG emissions associated with the Project as mitigated constitute a less-than-significant impact. The Court affirmed the trial court's denial of the petitions in all other respects.

### **Disposition**

The Court of Appeal affirmed the trial court's judgment as to LRC and Circle Oaks, and affirmed in part and reversed in part the trial court's judgment as to CBD.

- Opinion by Justice Brown, with Acting Presiding Justice Streeter and Justice Tucher concurring.
- Trial Court: Napa County Superior Court, Case Nos. 17CV000055, 17CV000060, and 17CV000063, Judge Thomas Warriner.

## Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
30 Protect our Homes & Hills v. County of Orange (merits)		4 <sup>th</sup>	

[Protect Our Homes & Hills v. County of Orange](#), California Court of Appeal, Fourth Appellate District, Case No. G055716 (May 8, 2019).

- *The jurisdiction of a trial court presented with a return to a writ includes determining whether an agency has complied with CEQA by remedying previously identified deficiencies in an EIR.*
- *An EIR's conclusion that a mitigation measure is infeasible must be supported by substantial evidence.*
- *A preemptory writ of mandate requiring that an EIR be remedied may only be discharged once all identified deficiencies have been remedied.*

### Background for Appeal

Yorba Linda Estates, LLC proposed building 340-single family homes located on a previously undeveloped site (Project) in an unincorporated area of the County of Orange (County). The County prepared and certified an environmental impact report (EIR) for the Project.

Protect Our Homes and Hills (Petitioner) filed a petition for writ of mandate challenging certification of the EIR, alleging a number of defects. The trial court rejected most of Petitioner's arguments, but concluded that the EIR's greenhouse gas (GHG) analysis was flawed because it arbitrarily limited consideration of mitigation measures and impermissibly deferred the formulation of GHG mitigation measures. The trial court issued a writ of mandate. Petitioner appealed the partial denial of its petition, but did not raise any GHG-related issues in that appeal.

While that appeal was pending, the County revised the EIR in an attempt to remedy the flawed GHG emissions analysis and thereafter filed a motion in the trial court seeking an order discharging the writ. Petitioner opposed, contending that the revised EIR failed to correct the GHG-related defects. The trial court concluded that: (i) Petitioner's arguments were waived for failure to raise them in its original challenge to the EIR; and (ii) the revised EIR's conclusions were supported by substantial evidence and adequately remedied the previously identified defects. As such, the trial court granted the County's motion and discharged the writ. Petitioner appealed.

### Petitioner's Arguments Were Not Barred in Full

Petitioner argued that the trial court erred by finding that it was barred from arguing that (i) the County erroneously failed to consider and analyze additional GHG-related mitigation measures; and (ii) the revised EIR impermissibly accounted for GHG reductions from statewide programs in its analysis of the Project's GHG impacts.

The Court of Appeal agreed that Petitioner's first argument was not barred. Public Resources Code Section 21168.9 provides that the jurisdiction of a trial court presented with a return to a writ extends to determining that the public agency has complied with CEQA. Here, compliance with CEQA meant revising the EIR to resolve the deficiencies identified by the trial court. Thus, the trial court was obligated to evaluate whether the County corrected the previously identified flaws in a manner consistent with

CEQA and the court's order. Petitioner's argument related to the adequacy of the revised EIR's GHG mitigation was not barred because it "went to the heart of" whether the modifications in the revised EIR corrected the EIR's shortcomings.

The Court of Appeal, however, affirmed the trial court's finding that Petitioner's second argument was barred, based on common law waiver principles. The trial court had previously rejected Petitioner's argument related to the statewide programs, and Petitioner had not raised the argument in its appeal from the original judgment. Thus, Petitioner waived its second argument.

Consequently, the Court of Appeal undertook a *de novo* review of whether the County abused its discretion under CEQA regarding the feasibility of potential GHG mitigation measures.

### **Infeasibility Determinations Were Not Supported by Substantial Evidence**

Petitioner argued that the County rejected solar PV roof panels as a potential GHG-related mitigation measure as infeasible without any evidence to support its conclusion. The Court of Appeal agreed, determining that the County's rejection of solar PV roof panels as infeasible was not supported by substantial evidence.

In the revised EIR, the County provided a number of reasons why the use of on-site solar power was infeasible, stating: "Residential development, not commercial development, and no location or ability to install on site solar power plant. Also cost prohibitive. Most residences do not have sufficient resources to install solar generation, due to location or design, and there are no regulations in place for production and/or sale of the electricity to Southern California Edison. It would also change aesthetic appearance of neighborhood." However, the Court noted that there was no financial or aesthetic evidence in the record concerning solar PV roof panels to support the County's reasons.

The Court stated that while an EIR does not need to analyze every imaginable mitigation measure, it must respond to specific suggestions for mitigating a significant environmental impact unless they are facially infeasible.

The County pointed to a separate document in the administrative record, arguing that it provided sufficient basis for the County's board of supervisors to make a finding of infeasibility. But the Court determined that reasoning conflated two stages of analyzing feasibility. The first stage of analyzing feasibility occurs in the EIR, which answers whether a particular mitigation measure is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." The second stage takes place at the time the lead agency considers whether to certify the EIR and includes broader policy considerations that would be inappropriate in the first stage. The Court explained that the County's rejection based on these broader considerations in the second stage did not remedy the failure to properly analyze feasibility in the EIR.

### **Disposition**

The Court considered whether to decertify the entire EIR or to implement a more limited remedy, decertifying only the portions of the EIR related to solar-energy options for homes. The Court determined a more limited remedy was appropriate. Because the sole deficiency of the revised EIR concerned one particular aspect of the Project — the construction of homes — and the County had already included a mitigation measure requiring that all homes be constructed "solar ready," the Court deemed that this aspect was severable from the remainder of the Project, and decertified only that portion.

Accordingly, the Court directed the trial court to vacate the order discharging the preemptory writ of mandate and enter a new order stating that the County's non-compliance with the peremptory writ and denying the County's request for an order discharging the writ. In addition, the trial court was directed to modify the writ to require the County to decertify and modify the parts of the revised EIR addressing solar-energy options in the GHG context and suspend all Project activities regarding the installation, or non-installation, of solar PV roof panels on each residence unless and until the County complied with CEQA.

In conclusion, the Court emphasized that the trial court retains jurisdiction until it has determined the County's compliance with CEQA, and should the County fail to proceed in good faith while implementing corrective action, the trial court shall decertify the revised EIR, vacate all Project-related approvals, and suspend all Project-related activity pending the County's compliance with CEQA.

- Opinion by Justice Thompson, with Presiding Justice O'Leary and Justice Moore concurring.
- Trial Court: Superior Court of Orange County, Case No. 30-2015-00797300, Judge William D. Claster.

## Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
31 Russell Covington et al. v. Great Basin Air Pollution Control District et al.		3rd	

[Covington v. Great Basin Unified Air Pollution Control Dist.](#), California Court of Appeal, Third Appellate District, Case No. C080342 (November 26, 2019).

- *If permit conditions set emissions limits, and mitigation measures ensure compliance with such limits, the record need not contain substantial evidence supporting an emissions estimate at the permitted level.*
- *When responding to comments proposing additional mitigation measures, the lead agency must provide a good-faith response explaining its conclusion that such measures are infeasible, and the conclusion must be supported by substantial evidence.*
- *The agency with the greatest responsibility for supervising or approving the project as a whole is the proper lead agency, even if this agency has a single or limited purpose rather than general governmental powers.*

### Background for Appeal

The Great Basin Unified Air Pollution Control District (District) prepared and certified an environmental impact report (EIR) for the Casa Diablo IV Geothermal Development Project, a proposed geothermal energy facility on national forest land in Mono County (Project). The objective of the Project was to produce commercially viable electricity from clean and renewable resources. However, normal pentane (n-pentane), a non-toxic reactive organic gas (ROG), was expected to leak from the Project's closed-loop system, resulting in "fugitive emissions." Laborer's International Union of North American Local Union No. 783 and individual union members (collectively, Petitioners) filed a petition for writ of mandate, alleging that the District's finding that daily fugitive emissions would be limited to a certain amount and its conclusion that there were no additional feasible mitigation measures available to reduce emissions were not supported by substantial evidence. Petitioners also contended that the District abused its discretion by acting as the lead agency. The trial court denied the petition, finding that: (i) the permit to operate conclusively set the n-pentane emissions limit, (ii) the District had properly concluded that the additional mitigation measures were not feasible, and (iii) the District was the proper lead agency. Petitioners made the same arguments on appeal.

### Substantial Evidence of Emissions Was Not Required Due to Permit Conditions

The Court of Appeal concluded that because the District's operational permit set an emissions limit for n-pentane and mitigation measures would ensure emissions detection and reporting, and enforcement within the limit, the District and real party in interest were not required to present evidence supporting the EIR's emissions estimate. Petitioners argued that the record did not contain any facts supporting the EIR's conclusion that n-pentane emissions would be limited to 410 pounds per day, citing their own expert evidence showing that actual emissions would be much higher. However, noting that other cases have held that compliance with performance standards is a substitute for substantial evidence to support of finding of mitigation, the Court found this lack of evidence was immaterial because the Project must comply with operational permit conditions limiting n-pentane emissions to 410 pounds per day. The Court

also found that mitigation measures requiring an emission management plan and the use of a leak detector would ensure that fugitive emissions were adequately detected, reported, and enforced.

### **Lead Agency Failed to Explain Why Additional Mitigation Measures Were Infeasible**

Petitioners argued that comments to the draft EIR raised two feasible mitigation measures, the District's response to these comments was inadequate, and the District abused its discretion by not adopting these measures. The EIR found that ROG emissions would be significant and unavoidable, even with mitigation, and that these emissions were almost exclusively related to the fugitive n-pentane emissions. The EIR also found that no additional feasible mitigation measures were available to substantially reduce these emissions. An EIR must respond to specific suggestions for mitigating significant impacts unless the suggestion is facially infeasible and incorporate feasible mitigation measures that would substantially lessen significant effects. Here, the Court of Appeal found that the District made no attempt to show that the first proposed mitigation measure was infeasible, and provided only a conclusory response regarding the second. Thus, the Court concluded that the District failed to provide a good-faith, reasoned response to the comments proposing additional mitigation measures, and thus, there was insufficient evidence in the record to find that these mitigation measures were not feasible.

### **The District Was the Proper Lead Agency**

Petitioners argued that Mono County, rather than the District, was the proper lead agency because it was the agency with general governmental powers. Petitioners alleged that this tainted the entire CEQA process and invalidated the EIR. The Project is located almost exclusively on federal land, with only a small section of the pipeline running across private property. When the approval process began, the agencies involved believed that the only non-federal agency with authority over the Project was the District, so the District became the lead agency. Later, as the project developed, the agencies discovered that the pipeline would cross over private property, and a conditional use permit from Mono County would be required. The Court of Appeal concluded that while the CEQA Guidelines state a preference for an agency with general governmental powers to be the lead agency, this preference does not apply when another agency has greater responsibility for supervising or approving the project as a whole. In this case, the District was responsible for issuing and enforcing an operational permit, whereas Mono County only approved a conditional use permit for a small portion of the Project. Thus, the District was the proper lead agency under CEQA.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's judgment with respect to the adequacy of the EIR's estimate of emissions and the propriety of the District as the lead agency, but reversed with respect to the infeasibility of proposed mitigation measures. The Court remanded to the trial court, directing it to order the District to provide a reasoned analysis supported by factual information in response to the proposed mitigation measures.

- Opinion by Justice Blease, with Presiding Justice Raye and Justice Butz concurring.
- Trial Court: Mono County Superior Court, Case No. CV140075, Judge Stanley Eller.

## Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
32 Segal v. City of San Diego		4 <sup>th</sup>	

[Segal v. City of San Diego](#), California Court of Appeal, Fourth Appellate District, Case No. D072215 (February 22, 2019).

- *The question of whether CEQA's requirement for meaningful public participation had been violated was waived, as it was not raised before the trial court and was not a purely legal question.*
- *CEQA does not require that an FEIR consider the cumulative impact of future projects that are not reasonably foreseeable.*

### Background for Appeal

Real party in interest Playa Grande, LLC applied for a development permit, coastal development permit, and tentative map waiver to demolish two existing buildings and construct a three-story mixed-use building in La Jolla Shores (Project). In April 2015, the City of San Diego (City) Planning Commission certified the final environmental impact report (FEIR) and approved the Project's entitlements. In October 2015, the City Council denied an appeal and approved the certification of the FEIR.

In November 2015, Bernard Segal (Petitioner) filed a petition for writ of mandate seeking to set aside the City's approval of the Project, alleging that the City had violated CEQA by failing to adequately address the cumulative impacts of the Project, in addition to other claims. The trial court rejected Petitioner's claims and denied its subsequent motions to vacate its judgment and, in the alternative, for a new trial. Petitioner appealed.

### Meaningful Public Participation Argument Waived

On appeal, Petitioner argued that the City's municipal code contained subjective and unenforceable standards regarding floor-area ratios, scale, and bulk, which violated CEQA by precluding meaningful public participation. However, Petitioner did not make this argument before the trial court. The Court of Appeal found that this new theory was a mixed question of law and fact, which could not be decided for the first time on appeal, and had therefore been waived.

The Court further determined that, even if Petitioner had not waived its argument, the administrative record showed that there had been meaningful public participation on the Project's scale and bulk. The Court rejected the notion that municipalities must adopt objective development regulations, such as regulations addressing floor-area ratio to comply with CEQA. Thus, the Court concluded that the City had not violated CEQA by denying meaningful public participation.

### FEIR Not Required to Consider Cumulative Impacts of Speculative Future Projects

Petitioner contended that the FEIR did not adequately address the cumulative impacts of the Project. Specifically, Petitioner argued that approving the Project would set a precedent for the size and bulk of development in the neighborhood, and the City should have considered the cumulative impact of future development projects that would likely be triggered by the Project.

An EIR must discuss the environmental effects of future actions that are a reasonably foreseeable consequence of a project. The Court determined that there were no reasonably foreseeable future projects that would be triggered by the Project. The Court noted that the FEIR considered future projects in the area, the Project was the only proposed mixed-use development in the area at the time, and Petitioner failed to identify any other reasonably foreseeable future projects. The Court found Petitioner's supposition that future developers might use the City's approval of the Project to develop properties of a similar scale and bulk in the future too speculative to constitute awareness of a proposed or probable future project. Therefore, the FEIR was not required to evaluate the impacts of speculative future projects.

### **Disposition**

The Court of Appeal affirmed the trial court's judgment and awarded the City's and real party's costs on appeal.

- Opinion by Justice Nares, with Presiding Justice McConnell and Justice Haller concurring.
- Trial Court: Superior Court of San Diego County, Case No. 37-2015-00037498-CU-TT-CTL, Judge Joel R. Wohlfeil.

## Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
33 <i>South of Market Community Action Network v. City &amp; County of San Francisco</i>		1 <sup>st</sup>	

[South of Market Community Action Network v. City & County of San Francisco](#), California Court of Appeal, First Appellate District, Case No. A151521 (February 22, 2019).

- *An EIR may permissibly describe one project with two options as long as it presents sufficient information for both options and independently evaluates their impacts.*
- *An agency's discretion to select the methodology to be used in evaluating an environmental impact extends to determination of the geographic area impacted by a proposed project.*

In 2015, the City and County of San Francisco (City) certified a final environmental impact report (EIR) and approved a mixed-use business and residential project (Project) proposed by real parties in interest Forest City California Residential Development, Inc. and Hearst Communications, Inc. South of Market Community Action Network, Save Our SoMa, and Friends of Boeddeker Park (collectively, Petitioners) filed a petition for writ of mandate, challenging the certification and approval, which the trial court denied. The Court of Appeal affirmed the trial court's judgment in full.

### Background for Appeal

The Project, covering four acres in downtown San Francisco, consisted of two options as described in the draft environmental impact report (DEIR) released in October 2014: an office scheme and a residential scheme. The schemes shared similar footprints, with varying use mixes and densities. The Planning Department published the final environmental impact report (FEIR) in August 2015, which the Planning Commission certified along with adopting various Project approvals. Petitioners appealed the approvals and certification to the San Francisco Board of Supervisors (Board). The Board denied the appeal, affirmed certification of the FEIR, and, two weeks later, adopted CEQA findings and approved the Project. In December 2015, Petitioners filed a petition for writ of administrative mandate in superior court, alleging CEQA violations and seeking to set aside certification of the FEIR and approval of the Project. The court heard arguments and denied the petition in its entirety. Petitioners appealed, asserting numerous defects in the agency's CEQA review.

### Project Description Adequacy

Petitioners argued that the environmental impact report's (EIR's) project description was inadequate on three grounds:

- The DEIR's presentation of two alternative schemes was "confusing."
- The DEIR did not include certain renderings.
- The FEIR adopted a proposed plan based on a "revised" project.

First, the Court of Appeal found that the EIR appropriately described one project with two options for different allocations of residential and office units and that the analysis was not curtailed, misleading, or inconsistent. The DEIR presented sufficient information for both options, including in response to comments, and evaluated the environmental impacts of each scheme independently.

Second, the Court explained, “when assessing the legal sufficiency of an EIR, we do not look for perfection, but ‘adequacy, completeness, and a good faith effort at full disclosure.’” The EIR provided renderings showing the massing of the existing site, the proposed office and residential schemes, the revised project, and the alternative schemes, as well as views of the project site from various points in the city. Renderings showing specific architectural detailing, “street level” views, or perspectives of how the development would appear from surrounding neighborhoods were not necessary.

Third, the Court declined to consider if the project description were inadequate because the ultimate approval adopted characteristics of one of the proposed alternatives, which “in fact, is one of the key purposes of the CEQA process.” Petitioners failed to identify any component of the revised project that was not addressed in the DEIR or subject to public comment.

Therefore, the Court concluded that the project description was adequate under CEQA.

### **Cumulative Impacts Analysis Adequacy**

Petitioners argued that the EIR used an outdated project list to analyze the cumulative impact of probable future projects and “artificially constrained the study area” to exclude future projects. Noting that “[i]t is well established an agency has discretion in selecting the methodology to be used in evaluating environmental impact, subject to review for substantial evidence,” the Court found that Petitioners failed to show that the City’s choice of methodologies, decision to use a 2012 project list, or selection of the geographic area impacted by a proposed project was unsupported by substantial evidence.

Petitioners also asserted that the EIR undercounted the number of office workers in the cumulative impacts analysis, but, as the City was entitled to rely on its own experts and consultants, the Court upheld the City’s density calculations as supported by substantial evidence.

Petitioners’ argument that the project would result in density-related cumulative impacts because it did not include a stepdown transition for building heights as proposed in a Central SoMa Plan was forfeited by being raised for the first time on appeal. The Court also noted that the EIR explained that the Project was not subject to the Central SoMa Plan.

Petitioners further claimed that it was unclear whether population projections cited in the EIR were actually applied to the cumulative traffic impacts analysis and whether a memorandum on population and employment projections was used in the DEIR to assess cumulative traffic impacts. But the Court was satisfied that the record reflected that the cumulative traffic impacts analysis relied on a model incorporating population, housing units, and employment growth assumptions. The Court also found that the memorandum was sufficiently addressed.

Therefore, the Court held that Petitioners failed to show the EIR was deficient for failing to properly consider the Project’s cumulative impacts.

### **Adequacy of Traffic and Circulation Impacts Discussion**

Petitioners argued that the EIR’s consideration of traffic and circulation impacts failed to:

- Include intersections adjacent to impacted ones in its analysis of potentially significant impacts
- Consider the impact of the Safer Market Street Plan
- Adequately discuss mitigation measures and evaluate community-proposed alternatives

Petitioners argued that the EIR used an artificially small study area to avoid review of potentially significant impacts and that more intersections should have been included in the traffic analysis. However, the Court again noted that the City has discretion to select the geographic area impacted by a proposed development and determined that Petitioners failed to demonstrate that the City’s methodology constituted an abuse of discretion.

In response to Petitioners' contention that the EIR should have evaluated the Safer Market Street Plan (SMSM), the Court explained that the SMSM was approved two and a half years after the notice of preparation (NOP) for the Project was published and that Petitioners did not provide evidence that the SMSM was a "probable future project" at that time. Additionally, Petitioners failed to establish that the SMSM would have any adverse traffic impacts. Thus, the Court determined that the City's lack of consideration of the SMSM did not constitute an abuse of discretion.

Petitioners contended that the City failed to consider specific mitigation measures, including reducing trip-generating uses, funding public transportation, implementing a transportation demand management plan, and reviewing Petitioners' suggested alternatives. The Court found that the first three measures were adequately discussed in the DEIR. The Court also explained that the City was not required to study specific alternatives proposed by members of the public but only to select a reasonable range of alternatives, and that Petitioners failed to show that the City's alternatives were unreasonable or that their proposed alternatives were feasible and capable of attaining most of the basic objectives of the project. Accordingly, the Court approved the EIR's consideration of mitigation measures.

Therefore, the Court held that the EIR adequately addressed traffic and circulation impacts.

### **Adequacy of Wind Impacts Discussion**

Petitioners argued that the EIR inadequately analyzed wind impacts by inappropriately comparing the revised project's impacts to the initial project's impacts rather than to existing conditions and by failing to comply with a planning code requirement for projects exceeding wind limits to show that the building could not be redesigned to avoid the exceedance without unduly restricting development potential.

The Court stated that these arguments were waived because they were not raised during the administrative process and proceeded to address them on the merits. The Court held that the EIR did compare the revised project's wind impacts to existing conditions and that the Project did not exceed the wind threshold established by the City. Thus, the Court upheld the EIR's wind impacts analysis.

### **Adequacy of Open Space Provision**

Petitioners' argued that the Project did not provide adequate on site open space. The Court rejected their contention because the EIR noted that the Project provided more open space than required by code and would result in less-than-significant environmental impacts related to demand on existing parks and open spaces, and because Petitioners did not provide any legal authority in support of the argument that the Project's provision of open space was "inadequate and fails to provide asserted benefits."

### **Adequacy of Shade and Shadow Impacts Analysis**

Petitioners contended that the EIR failed to disclose shadow impacts, propose adequate mitigation, or consider feasible alternatives. However, the Court noted that the Project's shadows would not exceed the significance thresholds established by the City, which Petitioner did not challenge. Thus, the City was not required to consider mitigation, and the Court upheld the EIR's discussion.

### **Failure to Show Inconsistency With Area Plans and Policies**

Petitioners argued that the EIR failed to account for inconsistencies between the Project and applicable area plans and policies. The Court found that certain plans were not applicable to the Project or were not yet approved, that the EIR appropriately disclosed required amendments and rezonings, that Petitioners failed to identify inconsistencies with certain plans, that Petitioners failed to raise certain alleged inconsistencies during the administrative process or in the trial court, and that Petitioners failed to provide a reasoned argument in support of certain alleged inconsistencies. Thus, the City held that the administrative record reflected that the City made a good-faith effort to discuss inconsistencies with applicable general plans.

### **Adequacy of Statement of Overriding Considerations**

Finally, Petitioners argued that the statement of overriding considerations adopted by the City was not supported by substantial evidence because the City considered the benefits before considering feasible mitigation measures or alternatives. The Court explained that the statements cited by Petitioners regarding the “benefits” of the Project were appropriately made by elected officials during the hearing at which CEQA findings and the statement of overriding considerations were adopted.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court’s judgment, denying Petitioners’ petition for writ of mandate.

- Opinion by Justice Margulies, with Presiding Justice Humes and Justice Kelly concurring.
- Trial Court: San Francisco City and County Superior Court, Case No. CPF-15-514691, Judge Garrett Wong.

## Environmental Impact Reports

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
34 <i>Stopthemillenniumhollywood.com v. City of Los Angeles</i>	X	2 <sup>nd</sup>	<input checked="" type="checkbox"/>

[Stopthemillenniumhollywood.com v. City of Los Angeles](#), California Court of Appeal, Second Appellate District, Case No. B282319 (July 31, 2019).

- *CEQA requires that a project description be accurate, stable and finite.*

Stopthemillenniumhollywood.com and others, (collectively, Appellees) challenged the adequacy of an environmental impact report (EIR) for a four-and-a-half-acre mixed-use development in Hollywood. The EIR described several potential development scenarios, but did not include the final project arrangement or density of specific land uses, siting, or massing characteristics, in an admitted effort to provide the developer with flexibility. Instead, the EIR contemplated only an “illustrative scenario” to demonstrate a “potential development program.”

The trial court found that the EIR failed to comply with CEQA because: (1) the project description was not stable and finite, (2) the transportation impact analysis used a flawed methodology, (3) the traffic impact analysis was not supported by substantial evidence, and (4) a qualified condition of approval imposed by the lead agency impermissibly expanded the scope of the project beyond the EIR’s analysis. Millennium Hollywood LLC, the City of Los Angeles, and the Los Angeles City Council (collectively, Appellants) appealed the trial court’s decision on all four grounds. The League of California Cities and California State Association of Counties filed amicus briefs in support of Appellants. Appellees cross-appealed on seismic issues. The Court of Appeal affirmed the trial court’s finding that the project description failed to comply with CEQA and determined that it need not address Appellants’ other contentions or Appellee’s cross-appeal.

### An EIR Must Define a Project, Not a “Set of Environmental Impact Limits”

The Court of Appeal found that the project description was not only inconsistent, but also that it failed “to describe the siting, size, mass, or appearance of any building proposed to be built at the project site.” “The requirement of an accurate, stable, and finite project description [is] the *sine qua non* of an informative and legally sufficient EIR[.]” The Court explained that concept scenarios and potential designs, none of which may ultimately be constructed, do not meet CEQA’s requirement of a stable and finite project description. The Court rejected Appellants’ argument that so long as the worse-case-scenario environmental effects had been analyzed and mitigated, CEQA’s purpose was satisfied. By failing to provide a project description that evaluated what may actually be built, the Court determined that the EIR prevented the public from effectively participating in the approval process. Thus, the Court held that the lack of an accurate, stable, and finite project description prejudicially precluded informed decision-making and public participation.

### Disposition

The Court of Appeal affirmed the trial court’s decision granting Appellees’ petition for writ of mandate, directing the City to set aside its project approval and EIR certification.

- Opinion by Justice Jones, with Presiding Justice Edmon and Justice Lavin concurring.
- Trial Court: Superior Court of Los Angeles, Case No. BS144606, Judge James C. Chalfant.

## Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
35 <i>Berkeley Hills Watershed Coalition v. City of Berkeley et al.</i>		1 <sup>st</sup>	Partially

[Berkeley Hills Watershed Coalition et al. v. City of Berkeley et al.](#), California Court of Appeal, First Appellate District, Division One, Case No. A153942 (January 30, 2019).

- *A bifurcated standard of review applies to CEQA's location exception to a Class 3 exemption: a court reviews an agency's project location determination under the substantial evidence standard and environmental impact conclusion under the fair argument standard.*
- *Earthquake fault zones and earthquake-induced landslide areas are not environmental resources, and the location exception does not apply to these areas as a matter of law.*

### Background for Appeal

The owners of three contiguous parcels (Real Parties) filed applications to construct one new single-family home on each parcel (Project). Real Parties' consultant prepared a report on geotechnical and geologic hazards, which concluded that part of the three-parcel site was within an earthquake fault zone and that the site was located in a potential earthquake-induced landslide area. The City of Berkeley (City) approved the permits, finding the Project exempt from CEQA under the Class 3 categorical exemption for "up to three single-family residences" in an urbanized area.

Two nonprofit entities, Berkeley Hills Watershed Coalition and Center for Environmental Structure (Petitioners), filed a petition for writ of mandate seeking to overturn the City's approval of use permits for the Project. Petitioners asserted that the City's determination that the Project was exempt from CEQA under the Class 3 categorical exemption was erroneous because the unusual circumstances and location exceptions applied. The trial court ruled in favor of the City, and Petitioners timely appealed.

### A Bifurcated Standard of Review Applies to the Location Exception

As an initial matter, the Court of Appeal concluded that the bifurcated standard used to review the unusual circumstances exception was applicable to the location exception. The location exception applies to projects that may impact an "environmental resource of hazardous or critical concern" that has been designated and precisely mapped by a government agency.

Under the bifurcated location exception inquiry, a court first reviews the agency's determination of whether the project is located where there is a designated and mapped "environmental resource of hazardous or critical concern" for substantial evidence. The Court of Appeal reasoned that the deferential substantial evidence standard of review was appropriate because the location determination was a factual inquiry.

In the second prong of the location exception inquiry, a court reviews the agency's conclusion of whether the project may have a significant impact on a designated and mapped "environmental resource of hazardous or critical concern" for a fair argument. In this prong, the court asks whether there is substantial evidence of a fair argument that the project may impact a mapped environmental resource.

## **Location Exception Does Not Apply**

The Court of Appeal concluded that because earthquake and landslide zones are not “environmental resources,” the location exception does not apply to them as a matter of law, and therefore the location exception did not apply to the Project.

Petitioners argued that the location exception applied to the Project because the geotechnical report stated that the Project was within an earthquake fault zone and a potential earthquake-induced landslide area, contending that these areas were “environmental resources of hazardous or critical concern.” The Court rejected this argument, finding that earthquakes and landslides are hazardous geologic events, but are not “resources” under the plain meaning of this term. The Court reasoned that the purposes of the hazard mapping and zoning acts discussed in the geotechnical report were to prevent economic losses and protect public health and safety, rather than to identify and map environmental resources. The Court further reasoned that the location exception is concerned with a project’s effects on the environment, rather than the impact of existing environmental conditions — such as seismic and landslide risks — on a project.

Petitioners also argued, for the first time on appeal, that the risk of landslides could impact a community of protected coast live oak trees on the site. The Court declined to consider this argument because Petitioners did not raise it during the administrative process and were thus barred by the exhaustion requirement. The Court also found that Petitioners failed to meet their burden on appeal because they had not cited any evidence in support of this argument.

Finally, Petitioners argued that finding the Project exempt from CEQA review was inconsistent with Public Resources Code subsections 21159.21(h)(4) and (h)(5), which provide that housing projects qualify for a CEQA exemption if they are not subject to seismic and landslide hazard areas. Petitioners contended that section 21159.21’s exceptions for seismic and landslide hazard areas were evidence of the legislature’s intent that projects in seismic and landslide hazard areas cannot be exempted from CEQA review. The Court rejected this argument, finding that the explicit seismic and landslide area exceptions in section 21159.21(h) coupled with the lack of similar exceptions for Class 3 projects suggested that the legislature did not intend to subject Class 3 projects to the same seismic and landslide hazard requirements. The Court further reasoned that section 21159.21(h) provides specific exceptions to the general rule that CEQA requires an agency to consider only a project’s effect on the environment, not the environment’s effect on project users, and it would be improper for a court to extrapolate this to a general exception such as the location exemption.

In sum, the Court found that the City’s determination regarding the factual location inquiry was supported by substantial evidence. In addition, the Court concluded that Petitioners did not satisfy the second prong of the location exception inquiry, as they failed to identify substantial evidence to support a fair argument that the Project would have an adverse effect on the environment. The location exception did not apply to the Project because the Project did not meet either element of the applicable standard of review.

## **Disposition**

The Court of Appeal affirmed the trial court’s judgment in full.

- Opinion by Acting Presiding Justice Marguiles, with Justice Kelly and Justice Banke concurring.
- Trial Court: Superior Court of Alameda County, Case No. RG17853768, Judge Frank Roesch.

Exemptions and Exceptions			
Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
36 Fudge v. City of Laguna Beach		4 <sup>th</sup>	

[Fudge v. City of Laguna Beach](#), California Court of Appeal, Fourth Appellate District, Case No. G056403 (November 15, 2019).

- *A project is not improperly piecemealed if there is no evidence that the previous project legally compelled or practically presumed its completion.*
- *An agency with “general governmental powers” takes precedence as lead agency over agencies with limited authority or purpose, even if the latter acted first.*
- *A lead agency is entitled to rely on the Coastal Commission’s environmental review as a functional equivalent of the CEQA environmental review process.*
- *A party challenging the applicability of a categorical exemption bears the burden of showing that an exception to a CEQA exemption applies.*
- *Once a conditional use permit has been approved under CEQA, subsequent related approvals are not separate projects subject to CEQA review.*

### Background for Appeal

Laguna Beach Golf and Bungalow Village, LLC (Real Party in Interest or Real Party) owned two adjacent parcels, an 84-acre property called the Ranch at Laguna Beach (Ranch) and a two-acre property formerly used as a Girl Scout camp (Scout Camp). Real Party sought to renovate and expand the Ranch. In 2014, the City of Laguna Beach (City) approved the land use and coastal development permits (CDPs) for the Ranch project. In another action, Petitioner litigated and lost challenges to the land use permits associated with the Ranch project. The petitioner-respondent and cross-appellant, Mark Fudge (Petitioner), also appealed the approval of the CDP to the California Coastal Commission (Commission), which approved the CDP, subject to certain conditions regarding the Scout Camp. The City then approved permits for use of the Scout Camp, relying on the Commission’s prior environmental review. The City separately approved a site lighting plan for the Ranch project. In all cases, the City found that the projects were categorically exempt from CEQA.

Petitioner filed for a writ of mandate, challenging the City’s approval of both the Scout Camp permits and the Ranch site lighting plan. Petitioner argued that: (i) consideration of the Scout Camp was improperly piecemealed from consideration of the Ranch project; (ii) the City could not rely on the Commission’s environmental review in making its CEQA determinations; (iii) the City’s findings were not supported by substantial evidence; and (iv) the City had improperly applied a CEQA exemption to the site lighting plan for the Ranch project. The trial court granted in part and denied in part this petition, finding that the City had improperly piecemealed the Ranch project and that the City was not permitted to rely on the Commission’s environmental findings, but that Petitioner’s challenge to the site lighting plan was barred by *res judicata* since the related conditional use permit had been the subject of prior litigation between the parties.

Petitioner appealed the trial court’s decision on the Ranch site lighting plan. The City and Real Party appealed the trial court’s decision on the Scout Camp project.

### **A Piecemeal Challenge Fails if a Previously Approved Project Does Not Legally Compel or Practically Presume Completion of a Later Project**

Petitioner argued that the City improperly piecemealed its CEQA review by failing to consider the Scout Camp project in connection with a previously approved phase of the Ranch project. The City and Real Party argued that because the Scout Camp project was a separate project and the Commission, rather than the City, was the lead agency for the project, there was no basis for a piecemeal claim. The Court of Appeal agreed in part with the City and Real Party, concluding that the Scout Camp project was a separate project because the Ranch project was previously approved and no evidence suggested that the Ranch project was “the first step toward” or “legally compel[ed] or practically presume[d] completion of” the Scout Camp project, or that Real Party contemplated the Scout Camp project at the time it applied for approval of the Ranch project. In any event, the Court determined that Petitioner had not administratively exhausted his piecemeal challenge and had therefore forfeited it.

However, the Court agreed with Petitioner that the City, not the Commission, was the lead agency for the Scout Camp project. Although the Commission acted first on the Scout Camp project, agencies such as cities or counties with “general governmental powers” have precedence over agencies with single or limited purposes, such as the Commission. (See CEQA Guidelines, § 15051(b)(1), (c).) Accordingly, the City, not the Commission, was the proper lead agency and responsible for determining whether the Scout Camp project was exempt from CEQA review.

### **A City May Base Its Categorical Exemption Finding on the Coastal Commission’s Findings in an EIR-Equivalent Process**

Petitioner argued that the City’s application of an existing facilities exemption from CEQA to the Scout Camp project lacked substantial evidence and that, if an exemption did apply, it was subject to an exception requiring preparation of an environmental impact report (EIR). The trial court agreed, finding that the record did not contain sufficient evidence of the intensity of prior or existing usage of the Scout Camp. The Court disagreed, determining that the record did contain such evidence, since the record indicated that the frequency and amount of participants in overnight camping and special events uses would continue at prior levels. Further, the Court noted that the Commission’s environmental review “is functionally equivalent to the CEQA EIR process” and thus the Commission’s findings that the approved Scout Camp uses constituted “negligible or no expansion of existing or former use” supported the City’s finding of an existing facilities exemption.

Petitioner alleged several exceptions to the existing facilities exemption from CEQA. The Court concluded that Petitioner bore the burden and failed to produce evidence supporting such an exception. In rejecting Petitioner’s arguments, the Court explained that: (i) the location exception was inapplicable to an existing facilities exemption; (ii) the cumulative impact exception did not apply because the two projects involved different actions on two separate parcels and so were not “successive projects of the same type in the same place”; and (iii) the significant effect exception did not apply because Petitioner failed to show “a reasonable possibility that the [Scout Camp project] will have a significant effect on the environment.” In addressing this exception, the Court noted that the fact that unpermitted developments and uses were already in place at the Scout Camp was “irrelevant to CEQA baseline determinations.”

### **Conditions of Prior Permits Are Not Separate Projects Under CEQA**

The Court rejected Petitioner’s challenge to the City’s finding that the site lighting plan was categorically exempt from CEQA. The Court determined that the site lighting plan was a condition of a prior project, and its approval was a step in the completion of that project, not a separate project subject to CEQA review. The Court also found that substantial evidence supported the City’s categorical exemption finding because the City had found that the plan would result in an overall reduction in site lighting and that the Ranch project, including the site lighting plan, would not have a significant environmental impact.

## **Disposition**

The Court of Appeal affirmed in part, and reversed in part, the trial court's decision.

- Opinion by Justice Aronson, with Acting Presiding Justice Bedsworth and Justice Ikola concurring.
- Trial Court: Superior Court of Orange County, Case No. 30-2016-00884488, Judge William D. Claster.

## Exemptions and Exceptions

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
37 Holden v. City of San Diego		4 <sup>th</sup>	

[Holden v. City of San Diego](#), California Court of Appeal, Fourth Appellate District, Division One, Case No. D074474 (December 13, 2019).

- *The CEQA Guidelines require a project to be consistent with a general plan's land use designations and policies, but do not require a project to conform rigidly to the general plan.*
- *An agency may balance the objectives of the general and community plans with conflicting environmental regulations when determining whether a project is consistent with the general plan for CEQA purposes.*
- *Arguments that are unsupported by substantive legal analysis in an opening brief are forfeited or waived.*

### Background for Appeal

In 2014, a developer submitted an application to the City of San Diego (City) for the demolition of two single-family homes on adjacent parcels and the construction of seven detached residential condominium units at the site (Project). The Project is located along a canyon hillside with a steep slope that is considered by the San Diego Municipal Code to be environmentally sensitive land. In early 2015, City planning staff told the developer that the Project did not comply with the minimum density recommendations for the site under the general plan and Greater North Park Community Plan (Community Plan). Both the general plan and the Community Plan's housing element recommended a minimum of residential units. In late 2015, the City told the developer that the Project could be approved with only seven units, due to the site's environmentally sensitive nature, which made reduced density appropriate.

In 2016, City staff determined that the Project was categorically exempt from CEQA as an infill development project under CEQA Guidelines Section 15332. In April 2017, the City Council voted unanimously to approve the Project, and the City filed a notice of exemption. Petitioner thereafter sought a writ of mandate, challenging both the City's exemption determination and Project approval. The trial court denied the petition, and Petitioner timely appealed.

### The City's General Plan Consistency and Categorical Exemption Determinations Were Proper

The Court of Appeal concluded that the City did not err by finding that the Project was exempt from CEQA under the infill development categorical exemption, thereby rejecting Petitioner's argument that the density recommendations in the Community Plan and general plan are strict requirements that cannot be modified. The Court explained that, under CEQA Guidelines Section 15332, the Project must be "consistent with the applicable general plan designation and all applicable general plan policies." The Court determined that this consistency requirement does not require the Project to "rigidly conform" to the general plan.

Additionally, the Court held that it was reasonable for the City to balance competing policies. Here, the objectives of the general plan and Community Plan to provide multi-family housing with medium-high density conflicted with the regulations designed to protect environmentally sensitive lands. The Court

determined that the City presented extensive findings to show that it considered the general plan, the Community Plan, and the steep hillside development regulations in approving the Project. Thus, substantial evidence supported the City's finding of plan consistency. And in turn, substantial evidence supported the City's finding that the Project was exempt from CEQA as an infill development project.

### **Arguments Not Supported by Legal Analysis Were Waived**

The Court concluded that Petitioner forfeited a government code claim regarding density by failing to support the claim with reasoned argument and citations to authority. Before the trial court, Petitioner raised this claim only in a footnote of his opening brief and failed to provide substantive legal analysis. Additionally, Petitioner's opening appellate brief failed to provide any substantive analysis or cite relevant portions of the government code. The Court explained that an "appellant cannot bury a substantive legal argument in a footnote and hope to avoid waiver of that argument." Thus, the Court determined that Petitioner forfeited or waived this claim.

### **Disposition**

Accordingly, the Court of Appeal affirmed the superior court's judgment dismissing the petition for writ of mandate. The City did not err in approving the Project based on a categorical exemption.

- Opinion by Justice Aaron, with Acting Presiding Justice Haller and Justice Guerrero concurring.
- Trial Court: San Diego County Superior Court, Case No. 37-2017-00018417-CU-TT-CTL, Judge Gregory Pollack.

## Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
38 <i>Community Science Institute v. County of Imperial</i>	✓	4 <sup>th</sup>	✗

[Community Science Institute v. County of Imperial](#), California Court of Appeal, Fourth Appellate District, Division One, Case No. D073676 (June 21, 2019).

- While an agency should typically use existing conditions as the baseline for CEQA analysis, it has discretion to use a different baseline if supported by substantial evidence.
- If a project implements measures that reduce potential impacts on the environment before the completion of the environmental review process, a negative declaration, rather than a mitigated negative declaration, is appropriate.

### Background for Appeal

Pyramid Construction (Pyramid) sought to construct an asphalt plant on an abandoned mine property (Project). Imperial County (County), the CEQA lead agency, concluded that the Project would have no significant impacts on the environment and issued a negative declaration under CEQA. The County granted Pyramid a conditional use permit (CUP) to build and operate the Project. Community Science Institute and others (Petitioners) filed a petition for writ of mandate contending that: (i) the County was required to prepare an environmental impact report (EIR) to assess potential impacts on threatened species, (ii) significant air quality impacts would occur, and (iii) that, at a minimum, a mitigated negative declaration (MND) was required. Upon initial review, the trial court denied Petitioners' petition. The Court of Appeal affirmed.

In 2007, Pyramid was granted a competitive contract to conduct aggregate mining at a former gold mine. As part of the bidding process for that contract, Pyramid assessed the potential for mining operations to result in impacts to threatened species. The US Department of the Interior, Bureau of Land Management (BLM) subsequently approved an Environmental Assessment for the mining authorized under the contract, concluding that no environmental impact statement was required pursuant to NEPA. The Environmental Assessment projected that a maximum of 250 truck trips per day would occur during peak periods of activity and that no significant environmental impacts would occur. BLM also mandated that Pyramid institute a series of measures to protect the desert tortoise and other species. Separately, Pyramid was required to obtain a CUP and reclamation plan from the County, which approved these entitlements after certifying an MND.

In 2015, Pyramid sought a permit from the County's Air Pollution Control District (APCD) to construct and operate the Project near the mining site. The Project would allow aggregate that would otherwise be hauled off to be processed into asphalt on-site, resulting in no additional truck traffic beyond the initially anticipated 250 daily trips. APCD additionally determined that the Project would result in no significant air quality impacts because Pyramid would purchase emissions offsets and comply with Best Available Control Technology (BACT) requirements. Separately, Pyramid applied for a CUP from the County to authorize construction and operation of the Project. The County concluded that the Project would not result in significant environmental impacts but required Pyramid to continue to comply with the previously instituted measures aimed at protecting the desert tortoise. Accordingly, the County issued a negative declaration. Project opponents, including an ecologist, wrote to the County asserting that an EIR was required to analyze potential impacts to other wildlife associated with the Project. Nonetheless, the County approved the CUP for the Project.

Petitioners filed a petition for writ of mandate challenging the County's decision to permit the Project, arguing that an EIR or MND was required. Petitioners also sought a preliminary injunction to halt all activity associated with the Project. The trial court denied the preliminary injunction and the writ petition.

On appeal, the Court of Appeal first addressed the issue of whether an EIR was required. The Court found that Petitioners failed to provide evidence backing their claim that truck trips would pose a risk of harm to special-status species. The site study prepared in connection with the Environmental Assessment associated with Pyramid's mining contract concluded that desert tortoises were not expected to be found on site and that the mitigation measures previously imposed by BLM provided adequate protection in case any tortoises were found.

Next, the Court rejected Petitioners' contention that the County failed to properly address traffic considerations because it failed to conduct a traffic analysis to determine "baseline" trip data. Relying on *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310 (*Communities*), Petitioners argued that the baseline for CEQA analysis must be the existing physical conditions in the affected area rather than the level of development activity that could or should have been present due to a plan or regulation. The Court explained that while agencies "should normally use existing conditions as the baseline ... neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule." Here, evidence demonstrated that the baseline was calculated assuming a goal of extracting 500,000 tons of rock, which was the limit to what Pyramid was authorized to mine under its existing contract. Therefore, unlike the baseline rejected in *Communities*, the Court determined that the County's baseline "was not merely hypothetical." As such, the County's exercise of discretion was supported by substantial evidence. Finally, the Court determined that Petitioners' argument that the Project site was of the type that could be used by an ecologist to maximize observations of wildlife movement did not constitute substantial evidence. Substantial evidence for CEQA purposes does not include speculation or unsubstantiated opinion or narrative.

Petitioners next made several claims contending that an EIR was required to assess air quality impacts caused by the Project. The argument underlying each claim was that the 250 truck trip baseline established by the County was faulty, and that the maximum daily trips threshold relied upon understated actual daily truck trips. In response, the Court reiterated that the County's analysis demonstrated that the Project would reduce, not increase, the number and length of daily trips by locating asphalt production closer to the repaving sites. The Court similarly concluded that the County's emissions estimates were accurate because they considered both stationary and mobile sources, and the County correctly concluded that a traffic analysis was not required since the Project would reduce truck trips.

Lastly, Petitioners argued that because the County relied on mitigation to find insignificant air quality effects, the County was required to prepare an MND, at a minimum. The Court explained the general rule that if an initial study identifies potentially significant environmental effects but project revisions would mitigate the effects to a point where no significant impact would occur, an MND may be used. In this case, however, the offsets that Pyramid bought and the BACT equipment were put in place before the review process for the initial study was complete.

## **Disposition**

Accordingly, the Court of Appeal concluded that a negative declaration, not an MND, was appropriate. The Court therefore affirmed the trial court's judgment.

- Opinion by Justice O'Rourke, with Acting Presiding Justice Nares and Justice Aaron concurring.
- Trial Court: Superior Court of Imperial County, Case No. ECU09723, Judge L. Brooks Anderholt.

## Mitigated Negative Declarations

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
39 Maacama Watershed Alliance v. County of Sonoma	<input checked="" type="checkbox"/>	1 <sup>st</sup>	<input checked="" type="checkbox"/>

[Maacama Watershed Alliance, et al. v. County of Sonoma](#), California Court of Appeal, First Appellate District, Division Four, Case No. A155606 (September 6, 2019).

- *The test for whether an EIR must be prepared is whether there is substantial evidence in the record to support a fair argument that a project would entail significant environmental effects.*
- *Mere argument, speculation, or unsubstantiated opinion — even expert opinion — are not substantial evidence for a fair argument.*
- *Expert criticism that data, findings, and conclusions of an agency's expert are inadequate does not constitute substantial evidence for a fair argument of a significant impact. Petitioners have the burden to identify substantial evidence in the record supporting a fair argument that the project (as mitigated) may have significant environmental effects.*
- *An expert's technical conclusions regarding site conditions that are in opposition to an agency expert's conclusions are not a fair argument of a significant impact if the project's impacts are less than significant with mitigation.*

### Background for Appeal

In 2017, the County of Sonoma (County) adopted a mitigated negative declaration (MND) and approved a use permit for the construction and operation of a winery that would include a two-story, 5,500-square-foot building with an adjoining 17,500-square-foot wine cave, wastewater treatment and water storage facilities, fire protection facilities, and mechanical areas, on 2.4 acres (Project).

The County determined that there was no substantial evidence that the Project, as mitigated, would have a significant environmental effect. Maacama Watershed Alliance and Friends of Spencer Lane (collectively, Petitioners) filed a petition for writ of mandate, arguing that the County should have prepared an environmental impact report (EIR) instead of an MND because there was a fair argument that the construction and operation of the winery would cause significant environmental effects. The trial court rejected Petitioners' challenge, and Petitioners appealed.

### No Substantial Evidence of Significant Impacts on Geology or Erosion

Petitioners contended that the County erred in adopting an MND because substantial evidence in the record supported a fair argument that the Project would have significant impacts on geology and erosion. The Court of Appeal rejected Petitioners' argument. Contrary to Petitioners' assertions that the MND did not provide sufficient information in the form of a geologic map or cross sections, the Court found that technical reports contained such maps and cross-sections. And despite Petitioners' argument that the technical experts had differences of opinion regarding the deposits on the property, the Court found that the technical experts agreed that the Project would be geotechnically feasible. In addition, the Court was unpersuaded by Petitioners' argument that digging the wine cave would affect slope stability, finding it speculative and unsubstantiated, and thus not substantial evidence for a fair argument. Similarly, the

Court rejected Petitioners' contention that there was substantial evidence to support a fair argument that Project-related erosion, especially runoff from cave spoils, would cause significant effects on a nearby creek and degrade salmonid habitat. The Court reasoned that nothing in the record indicated a fair argument of substantial impacts on water quality after mitigation.

Finally, the Court rejected the argument that the County improperly deferred mitigation of environmental impacts by relying on best management practices and grading ordinance standards to mitigate unknown future effects. The Court reasoned that the County had performed a detailed geologic investigation, incorporated recommendations for slope stability and a monitoring program to confirm that the mitigation conformed to anticipated conditions, and provided a mechanism to implement additional measures based on observed conditions. Thus, there was no improper deferral of mitigation.

### **No Substantial Evidence of Significant Impacts on Groundwater Supply**

Petitioners argued that there was substantial evidence in the record supporting a fair argument that the Project would have significant impacts on groundwater supply. The Court concluded that there was no substantial evidence to support a fair argument that the Project's groundwater use would significantly affect salmonids, neighboring wells, or fire suppression. The Court reasoned that the Project's water demand would be less than that of a residence and only a small fraction of mean annual groundwater recharge. Even if there were a geologic connection between the groundwater aquifers underlying the Project and the nearby creek, there was no evidence that the Project would have a perceptible effect on the water flowing from one aquifer to another, and hence the creek. The Court explained that conditions of approval required no net increase in groundwater use over current conditions, and measuring systems and reporting requirements would ensure compliance with this performance standard.

### **No Substantial Evidence of Significant Aesthetic Impacts**

Petitioners argued that there was substantial evidence in the record supporting a fair argument that the Project would have significant aesthetic impacts, because parts of the Project might be visible from scenic corridors. The Court concluded that Petitioners did not meet their burden. The Court found Petitioners' primary evidence — pictures of an existing residence located above the Project site — were not comparable to or indicative of the Project. The Project was distinguishable from the existing residence because it would require dark exterior colors and landscaping to provide screening and was not located along a ridgeline. Thus, the Court determined that there was no substantial evidence that the Project would have a significant aesthetic impact.

### **No Substantial Evidence of Significant Fire Hazards**

Petitioners argued that there was substantial evidence in the record supporting a fair argument that the Project would have significant effects on the risk of wildfires. Petitioners argued that the County failed to address risks posed by the Project's electrical system and the limited capacity of the volunteer fire department, noting that the Project would be located in a very high fire hazard severity zone and would have limited groundwater capacity. The Court was unpersuaded. The Project would be subject to the County's permit requirements, which include fire suppression measures such as sprinklers, an emergency water supply, and adequate access for firefighters. Thus, there was no indication that the Project would cause an elevated risk of fire. The record lacked substantial evidence to support a fair argument that, as mitigated, the Project was reasonably likely to cause significant environmental effects. Therefore, the Court held that the County properly adopted the MND.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's judgment denying the petition for a writ of mandate, upholding the County's approval of the Project.

- Opinion by Justice Tucher, with Presiding Justice Pollak and Justice Brown concurring.
- Trial Court: Sonoma County Superior Court, Case No. SCV261451, Judge Rene A. Chouteau.

Mitigated Negative Declarations			
Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
40 <i>McVeigh v. City of La Quinta</i>	✓	4 <sup>th</sup>	✗

[Joseph McVeigh v. City of La Quinta](#), California Court of Appeal, Fourth Appellate District, Division Two, Case No. E069020 (January 14, 2019).

- Courts give an agency's general plan consistency determination a strong presumption of regularity.
- An agency may defer mitigation as long as it commits to mitigating the significant impacts of a project. The details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study.
- The possibility of significant adverse environmental impact is not raised simply because of individualized complaints regarding the aesthetic merit of a project.
- Categorical exemptions are properly raised by an agency in the initial review process rather than for the first time on appeal.

### Background for Appeal

In April 2016, the City of La Quinta (City) issued a conditional use permit and adopted a mitigated negative declaration (MND), approving a 5,929 square foot single-family residence on approximately 3.16 acres near the Santa Rosa and San Jacinto Mountains in La Quinta (the Project). In May 2016, Joseph McVeigh (Petitioner), who owned a single-family residence adjacent to the Project, filed a petition for writ of mandate, challenging the City's approval of the Project under CEQA. Specifically, Petitioner argued that the City should have prepared an environmental impact report (EIR) rather than an MND because there was a fair argument that the Project would have significant impacts. In addition, Petitioner claimed that the Project was inconsistent with the General Plan, state planning laws, and the City's zoning code. The trial court rejected Petitioner's challenge, and the Court affirmed the trial court's judgment.

### General Plan Consistency

First, Petitioner argued that the MND did not address the Project's inconsistency with the General Plan's natural open space designation for the Project site. The Court disagreed. Specifically, the City's zoning ordinance permitted single-family residences in natural open space-designated areas pursuant to a conditional use permit. Although the General Plan designated the Project site as natural open space, it also provided that the City's specific plans regulated land use and provided more detailed parcel information. The General Plan did not eliminate the land use designations in existing specific plans. Since the applicable specific plan designated the Project site as low-density residential, and had been adopted prior to the General Plan, the Court concluded that the MND addressed the Project's consistency with the General Plan. For the same reasons, the Court concluded that the Petitioner failed to show any inconsistency with the General Plan under the state planning law (Government Code Section 65860(a)) or under the City's zoning code.

## **Hydrological Impacts**

Second, Petitioner argued that the City violated CEQA by failing to prepare an EIR to analyze potentially significant hydrological impacts from the Project. The Court concluded that there was no substantial evidence in the record showing that the Project's hydrological elements may have a significant effect on the environment. The Court reasoned that in the MND, the City concluded that the Project would not violate any water quality or waste discharge standards, would have less than a significant impact on the alteration of the existing drainage, and that a final plan would control polluted runoff during construction and long-term. Petitioner also argued that the City's deferral of the final drainage-and-retention system until issuance of the grading permit constituted impermissible deferral of mitigation. However, the Court disagreed, concluding that this was not impermissible deferral because the City required the City engineer to have final approval to ensure compliance with City water requirements.

## **Aesthetic Impacts**

Third, Petitioner argued that the City violated CEQA by failing to prepare an EIR to analyze potentially significant aesthetic impacts from the Project. The Court concluded that there was no substantial evidence creating a fair argument that the Project was visually out of character with the surrounding community, and that the protestations of a few surrounding homeowners was insufficient evidence of a significant environmental impact. The Court reasoned that there were large single-family residences on three sides of the Project, the Project's visual simulations demonstrated that the design blended into the desert landscape, and the Project site was chosen to minimize impact on surrounding neighbors. Therefore, the Court held that the City properly adopted the MND and that no EIR was required.

## **CEQA Exemption**

Lastly, in a footnote in the City's brief, the City argued that the project would have been categorically exempt from CEQA under CEQA Guidelines Section 15303(a), which exempts single-family residences from CEQA review. Petitioner argued that the City could not raise a categorical exemption for the first time on appeal, and regardless, the City's adoption of mitigation measures under the MND indicated that the Project would have a significant impact on the environment. The Court agreed with Petitioner, holding that since the City did not invoke a CEQA exemption during the administrative process, the categorical exemption could not be raised for the first time on appeal. The Court distinguished categorical exemptions from statutory exemptions, which are absolute, and may be raised for the first time on appeal.

## **Disposition**

Accordingly, the Court of Appeal affirmed the superior court's judgment denying Petitioner's petition for a writ of mandate and upholding the City's approval of the Project. Although remand may have been appropriate to allow the City to invoke a CEQA exception and provide for public notice and comment, the Court determined that remand would only cause unnecessary delay given its decision to affirm the trial court judgment.

- Opinion by Acting Presiding Justice Miller, with Justice Slough and Justice Raphael concurring.
- Trial Court: Superior Court of Riverside County, Case No. RIC1606159.

## Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
41 Friends of Big Bear Valley v. County of San Bernardino		4 <sup>th</sup>	

[Friends of Big Bear Valley v. County of San Bernardino](#), California Court of Appeal, Fourth Appellate District, Division Two, Case No. E067447 (June 7, 2019).

- *If circumstances arise in which an agency may prepare an addendum rather than a supplemental EIR, the addendum must be attached to an EIR.*
- *An addendum to an earlier EIR need not discuss the potential environmental impact of greenhouse gas emissions if such information was known or could have been known at the time the EIR was certified.*

### Background for Appeal

In 1983, Marina Point Development Associates and Irving Okovita (Real Parties) applied to the County of San Bernardino (County) to build condominiums along the shore of Grout Bay in Big Bear Lake. An environmental impact report (EIR) concluded that the project would have significant adverse effects on groundwater, traffic, and schools. The County approved the project and certified the EIR with a statement of overriding considerations. The project approval then expired in 1990 before project construction commenced. Real Parties filed an application for a new project in 1991. The County conducted an initial environmental study, in which it concluded that the new project was “very similar to the design of the original project approved in 1983,” and therefore, it was appropriate to reuse the original EIR. The County then approved the new project relying on the original EIR.

In 2014, Real Parties proposed revisions to the 1991 project, including adjustment of building layout and adding structures. Friends of Big Bear Valley (Friends) and the Center for Biological Diversity (collectively, Petitioners) requested that the County prepare a new EIR. Instead, the County issued an addendum to the prior EIR, concluding that no new EIR was required because the “proposed minor revision” carried no new significant impacts not previously disclosed in the “1991 EIR.” The County approved the revised project. Petitioners filed a petition for writ of mandate and complaint for declaratory and injunctive relief, alleging that: (1) the County was required by CEQA to conduct a new, subsequent, or supplemental EIR, and (2) the County violated the County Code by approving a minor revision to an expired development permit. The trial court granted the writ only as to the adequacy of the addendum in analyzing the revised project’s size, and its corresponding traffic and water supply impacts. The trial court denied the writ as to the adequacy of the addendum in analyzing bald eagle habitat, greenhouse gas emissions, and fire hazards. Real Parties appealed. Friends cross-appealed. The Court of Appeal affirmed the trial court’s judgment.

### No Substantial Evidence for “Minor Revision” Under County Code

Real Parties appealed the trial court’s partial grant of the petition, arguing that the trial court erred by not following the County’s interpretation of San Bernardino County Development Code Section 85.12.030, which defines a “minor revision” as requiring only an addendum rather than a supplemental EIR. The County interpreted “minor revision” as meaning: (1) not increasing the number of units or (2) expanding the footprint of the project by 10% or less. The County concluded that the revised project fell within both of these definitions, and therefore, no additional environmental review was required. The Court of Appeal held that the trial court properly concluded that the County’s interpretation based on the number of units

was clearly erroneous because there was no mention of the number of units in Section 85.12.030. The Court also held that the trial court correctly applied the County's footprint expansion rule to determine there was not substantial evidence in the record to support a finding that the revisions expanded the project's footprint by 10% or less. Therefore, additional environmental review was required to analyze effects related to the project's change in size, including its corresponding traffic and water supply impacts.

### **Addendum Was Properly Attached to a Final EIR**

Friends appealed the partial denial of the petition, arguing that the entire addendum must be set aside because it referred to a nonexistent "1991 EIR." In its review of the record, the Court found that the County failed to follow proper procedures for environmental review in 1991 by failing to circulate the 1983 EIR as the draft 1991 EIR. The Court also found that the 1983 EIR did not substantively match the 1991 development plan. Nonetheless, the Court held that substantial evidence supported the conclusion that a 1991 EIR did exist because in 1991 the County certified the 1983 EIR for the revised project and filed a notice of determination. Because no one sued to challenge the adequacy of the 1991 EIR, it was final and an addendum could attach to it.

### **Addendum Need Not Address Climate Change**

Friends also challenged the adequacy of the addendum in addressing climate change. Friends argued that the County was required to analyze the expected greenhouse gas emissions arising from the project because there was new information about the threat of climate change since the EIR was prepared in 1983. The Court rejected this argument, explaining that the relevant inquiry was whether the administrative record included substantial evidence showing that the potential environmental impact of greenhouse gas emissions was known or could have been known at the time the EIR was certified. The Court concluded that analysis of climate change was not necessary because it was a known issue in 1991, as evidenced by the initial study conducted at that time, which asked if there would be "alteration of air movement, moisture or temperature, or any change in climate, either locally or regionally."

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's judgment.

- Opinion by Justice Miller, J., with Acting Presiding Justice McKinster and Justice Slough concurring.
- Trial Court: San Bernardino County Superior Court, Case No. CIVDS1512175, Judge Gilbert G. Ochoa.

## Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
42 Jentz v. City of Chula Vista		4 <sup>th</sup>	

[Jentz v. City of Chula Vista](#), California Court of Appeal, Fourth Appellate District, Case No. D073189 (February 6, 2019).

- *An addendum is appropriate if a project does not create any new significant effects on the environment beyond those identified in the EIR.*
- *The court's role is not to replace a city's factual findings regarding whether a project complies with the EIR's mitigation measures with its own findings.*

### Background for Appeal

In 2007, the City of Chula Vista (City) adopted a land use plan — the Urban Core Specific Plan (UCSP) — and approved the related environmental impact report (EIR) for an area that included a proposed residential development (Project).

Beginning in 2015, the Project's developer submitted a design review application for the Project and revised the Project specifications in response to City and public meeting commentary. Specifically, the developer reduced the building height and mass, reduced the number of residential units (to 71 units), reduced the floor area ratio, created additional parking, removed and recessed balconies, and added more privacy landscaping. Earl Jentz and Gloria Gonzales (Petitioners) opposed the Project at each stage of the City's approval process and public meetings.

In June 2016, the City's Planning Commission held a public meeting to consider adoption of an addendum to the EIR and two approval resolutions for the Project. After public testimony, the Planning Commission adopted the addendum and the approval resolutions. Petitioners appealed the Planning Commission decision to the City Council, asserting that, among other issues, the addendum to the EIR was insufficient under CEQA. The City Council denied the appeal, and Petitioners filed a petition for writ of mandate. The trial court rejected Petitioners' contentions, and Petitioners filed an appeal. In addition to the CEQA claims, Petitioners alleged violations of the City's general plan and public financing requirements; these claims are not discussed here.

### No Supplemental EIR Required

Petitioners asserted that the addendum to the EIR was insufficient under CEQA and that the City should be required to revise the EIR. The Court of Appeal agreed that the City's determination to rely on an addendum, rather than a supplemental EIR, was supported by substantial evidence. Critically, Petitioners did not identify any evidence of impacts that were not addressed in the EIR or the addendum.

The addendum showed that the Project was within the area covered by the UCSP and that it did not create any new significant impacts beyond those identified in the UCSP, specifically stating that:

- Eight technical studies prepared for the Project showed that it would not result in any additional significant impacts or increased severity of impacts previously identified in the EIR.
- No relevant new information became available after the EIR was prepared.

- The mitigation measures in the EIR would govern the Project.

The Court concluded that the addendum and supporting technical studies were sufficient to support the City's decision that CEQA did not require a supplemental EIR for the Project. The Court further noted that Petitioners' argument could be summarized as an improper request for the Court to replace the City's factual findings with the Court's own findings.

### **Project Complied With Relevant Mitigation Measures**

Petitioners asserted that the Project failed to comply with various mitigation measures required by the UCSP and the EIR.

Petitioners argued that the Project failed to incorporate suggestions contained in the UCSP to address air quality issues. The record reflected that the Project included elements that minimize air pollutant emissions, such as LEED Gold-compliant building design and street improvements that facilitate pedestrian activity. The Court of Appeal held that ample evidence supported the City's determination that the Project complied with air quality mitigation measures.

Petitioners also argued that the Project failed to comply with a traffic assessment mitigation measure. The record showed that even though an assessment was not required for the Project, one was conducted and it indicated that the Project would not result in any significant traffic impacts. The Court held that the record sufficiently supported the City's determination.

Petitioners next argued that the Project failed to comply with a soil and geologic evaluation mitigation measure. The record demonstrated that the developer complied with this measure by its submission of a preliminary soil and geotechnical report. The City also noted that an updated report would be submitted as a condition of approval for the building permit phase.

The Court similarly rejected Petitioners' challenges to noise, light, and visual character mitigation measures. The Court found that modifications were made to the Project to address noise impacts before approval and the addendum itself addressed the Project's noise impacts and mitigation efforts. Regarding light, the Court concluded that the addendum addressed the light issues, and the building permit was conditioned on the Project satisfying the relevant UCSP regulations.

The Court found that the administrative record contained sufficient evidence to support the City's determination that the Project complied with each of the EIR's mitigation measures.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's decision to deny the petition.

- Opinion by Acting Presiding Justice O'Rourke, with Justice Dato and Justice Guerrero concurring.
- Trial Court: Superior Court of San Diego County, Case No. 37-2016-00032228-CU-TT-CTL, Judge Katherine A. Bacal.

## Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
43 Los Padres Forestwatch v. County of Ventura		2 <sup>nd</sup>	

[Los Padres Forestwatch v. County of Ventura](#), California Court of Appeal, Second Appellate District, Case No. B291481 (May 1, 2019).

- *In determining whether additional environmental review is necessary for a project previously analyzed in and approved through a mitigated negative declaration, courts apply the fair argument standard of review.*
- *An addendum, rather than a subsequent EIR, is appropriate if there are no significant changes in a project or its circumstances, or no new significant environmental impacts or a substantial increase in the severity of previously identified significant impacts.*
- *An agency is not required to prepare a subsequent EIR and make findings if a new permit or approval contains conditions that adequately address the same impacts previously identified and mitigated in an earlier environmental review document.*

### Background for Appeal

In June 1978, the Ventura County Planning Commission (Planning Commission) certified an environmental impact report (1978 EIR) and approved a conditional use permit (CUP) modification permitting 36 wells to be drilled on six sites (1978 CUP).

In 1983, a mitigated negative declaration was also approved (1983 MND) to allow the transfer of 17 of the wells and the creation of a new drill site (Drill Site No. 7). In response to an appeal of the 1983 MND approval, the County of Ventura (County) also prepared an EIR (1984 EIR) to provide a traffic alternatives analysis. The County Board of Supervisors (Board) then approved the 1984 EIR and a modification to the 1978 CUP, permitting 36 wells on seven drill sites (1985 CUP). In October 2013, the operator of the well sites applied to renew the expiring 1985 CUP to extend the drilling period to February 2045 and place into production 19 previously approved oil and gas wells, which included five new wells at Drill Site No. 7 (Project). The Planning Director and Planning Commission granted a CUP for the Project (2015 CUP) and certified an addendum (Addendum) to the 1978 EIR, 1984 EIR, and 1983 MND. Los Padres Forestwatch (Petitioner) then appealed the Planning Commission's approvals of the Project, and the Board approved the 2015 CUP and Addendum, and denied Petitioner's appeal.

In November 2015, Petitioner petitioned for a writ of mandate challenging the Board's approval (Petition). The trial court denied the Petition, concluding that substantial evidence supported the County's determination that the Project did not require a subsequent or supplemental EIR. Petitioner timely appealed.

### Fair Argument Standard of Review

First, Petitioners argued that when a project is approved by an MND rather than an EIR, the fair argument standard applies to the question of whether additional environmental review is necessary, instead of the more deferential substantial evidence standard. In particular, Petitioners asserted that the fair argument standard applied to the Board's approval of the Project because the Project was approved by the 1983 MND, rather than the 1984 EIR. The Court of Appeal agreed. Because impacts associated with oil drilling

and operations at Drill Site No. 7 were only analyzed in the 1983 MND, and non-traffic related impacts were never analyzed in an EIR, the Court concluded that the correct standard of review was the fair argument standard.

### **Subsequent EIR vs. Addendum**

Next, Petitioners argued that the County should analyze the environmental impacts of Drill Site No. 7 in a subsequent EIR. The Court of Appeal disagreed, explaining that a subsequent EIR is unnecessary when environmental impacts have been previously considered. The Court reasoned that the environmental impacts on Santa Paula Trail hikers, Southern Steelhead Trout, and possible flooding of wells were previously considered in the 1983 MND. The Court also determined that the installation of an additional drain pipe not considered by the 1983 MND did not create any additional environmental impacts for Santa Paula Creek's water quality. Finally, even though the 1983 MND did not evaluate impacts on endangered California condors, there was also no substantial evidence in the record that the Project would significantly impact California condors. Because Petitioner did not identify any evidence of new significant environmental impacts beyond those previously identified, the Court concluded that a subsequent EIR was not required.

### **Deletion of Mitigation Measures**

Finally, Petitioner argued that a subsequent EIR should be prepared because the County deleted a mitigation measure required by the 1978 EIR by failing to enforce a measure requiring the installation of automatic shut-off valves on both sides of the Santa Paula Creek and the construction of a suspension bridge. The Court disagreed, concluding that the 1978 EIR only required the installation of automatic safety valves on the shipping line. Further, the Court determined that the 2015 CUP's conditions regarding the installation of automatic shut-off valves adequately attended to the risks previously addressed by the 1978 mitigation measure, while also being safer due to technological advances. Moreover, the Court held that the 1978 EIR's statement that "a properly designed suspension bridge would reduce the likelihood of pipeline breakage from flooding" was an observation rather than a required mitigation measure. Thus, no mitigation measures were improperly deleted, and a subsequent EIR was not necessary.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's judgment denying the petition for writ of mandate.

- Opinion by Justice Yegan, with Presiding Justice Gilbert and Justice Tangeman concurring.
- Trial Court: Superior Court of Ventura County, Case No. 56-2015-00474693-CU-WM-VTA, Judge Kevin G. DeNoce.

## Supplemental Review

Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
44 <i>Sacramentans for Fair Planning v. City of Sacramento</i>		3 <sup>rd</sup>	

[Sacramentans for Fair Planning v. City of Sacramento](#), California Court of Appeal, Third Appellate District, Case No. C086182 (July 3, 2019).

- *SB 375 permits local agencies to streamline CEQA review of a transit priority project through use of a sustainable communities environmental assessment, so long as the project is consistent with a promulgated RTP/SCS.*
- *A city may rely on a prior general plan and regional EIRs to evaluate the cumulative impacts of a project if the project qualifies for analysis in a sustainable communities environmental assessment.*

### Background for Appeal

2500 J Owners, LLC (Real Party in Interest) applied to the City of Sacramento (City) to build a mixed-use condominium building (Project) on a site designated by the City's general plan as Urban Corridor Low. City planning staff reviewed the Project's environmental impacts pursuant to CEQA, and determined that the Project as mitigated would not have a significant impact on the environment, and that the Project qualified for streamlined review using a sustainable communities environmental assessment (SCEA) instead of the traditional negative declaration or environmental impact report (EIR). An SCEA serves as an alternative method for conducting truncated CEQA review for certain projects that assist the state in meeting greenhouse gas reduction targets. After the City's approval, Sacramentans for Fair Planning (Petitioner) filed a writ of mandate, claiming that the City's approval violated state planning and zoning laws, as well as CEQA.

The trial court denied the writ petition, and Petitioner appealed on, among other things, the grounds that: (1) the approval was inconsistent with the general plan and zoning code standards for building intensity and height, and resulted in an unlawful delegation of legislative authority; (2) the City committed various procedural errors in approving the Project; (3) the City could not rely on a regional transportation and emissions reduction strategy (RTP/SCS) to justify streamlined CEQA review; and (4) the City's CEQA review improperly tiered off prior EIRs.

The Court of Appeal affirmed the trial court's judgment in its entirety, finding that: (1) approval pursuant to a general plan policy authorizing more intense development than zoning otherwise allowed because the project provided a significant community benefit did not violate constitutional law or implied-in-law zoning uniformity rules, nor did it constitute an unlawful delegation of legislative authority; (2) Petitioner had waived its procedural arguments by failing to raise them before the City and the trial court; (3) the City was authorized by statute to rely on the RTP/SCS to justify streamlined environmental review; and (4) CEQA authorized the City to rely on prior EIRs as part of its streamlined review of the Project.

### The City Properly Relied on the RTP/SCS to Justify Streamlined CEQA Review

On appeal, Petitioner argued that the City could not rely on the RTP/SCS to justify reviewing the Project with an SCEA because the RTP/SCS was inadequate for that purpose. The Court rejected this argument.

Pursuant to SB 375, “transit priority projects,” i.e., high-density, majority residential developments located within one-half mile of transit stops or corridors, may utilize a streamlined CEQA review. If a transit priority project: (1) “is consistent with the general use designation, density, building intensity, and applicable policies specified for the project area” in the RTP/SCS; and (2) incorporates all feasible mitigation measures, performance standards, and criteria set forth “in the prior applicable environmental impact reports” and which were adopted as findings, then the approving agency may review the transit priority project’s environmental effects in a streamlined manner using an SCEA. An SCEA is not required to analyze growth-inducing impacts or climate change impacts that may result from car and light truck trips generated by the project. Further, if the agency determines that a cumulative effect has been addressed and mitigated in prior EIRs, then that cumulative effect is not subject to further environmental review in the SCEA.

The City determined that the Project qualified as a transit priority project under SB 375 and that it was consistent with Sacramento’s RTP/SCS — as such, the City used an SCEA to review the Project and concluded that the Project was consistent with the applicable land use policies in the RTP/SCS. Petitioner contended that the City could not rely on the RTP/SCS to justify the use of an SCEA because the RTP/SCS lacked the specified density and building intensity standards necessary to enable the Project’s significant effects to be mitigated.

The Court of Appeal disagreed, stating that rather than providing a site-specific zoning ordinance, the RTP/SCS’s purpose is to establish a regional pattern for development which, if implemented, will reduce greenhouse gas emissions that would otherwise result from new development. The Court stated that SB 375 only required the RTP/SCS to identify the general location of development uses and intensities in the region, identify a transportation network to serve the region, and forecast a development pattern to reduce greenhouse gases — nothing more specific was required by the statute. The Court concluded that the RTP/SCS met these standards imposed by SB 375, as confirmed by the California Air Resources Board. As such, SB 375 authorized the City to review the Project via an SCEA if the Project was consistent with the RTP/SCS. There was no dispute that substantial evidence supported the City’s finding that the Project was consistent with the RTP/SCS.

### **The City Did Not Improperly Rely on Prior EIRs With Respect to Cumulative Impacts**

Petitioner also asserted that the City improperly relied on EIRs prepared for its general plan and the RTP/SCS to avoid analyzing the Project’s cumulative impacts. Petitioner claimed that SCEA review here was inappropriate because no prior environmental analysis had ever considered the cumulative impacts of high-rise development in the area approved via the City’s development intensity exception.

The Court of Appeal concluded that CEQA authorized the City to rely on the prior EIRs in order to streamline review of the Project, including with respect to cumulative impacts. The Court explained that CEQA required the City, before drafting the Project’s SCEA, to prepare an initial study for the Project. This initial study was required to identify the Project’s significant or potentially significant impacts, including cumulative impacts, except for those impacts excused from review by SB 375. The initial study was required to identify any cumulative effects that had already been adequately addressed and mitigated in prior applicable EIRs. If the City determined that a cumulative effect was adequately addressed and mitigated in prior applicable EIRs, it did not need to analyze that effect further.

The Court found that the initial study for the Project complied with these requirements. It relied on and incorporated analysis and mitigation measures contained in the EIRs for the general plan and the RTP/SCS. In fact, contrary to Petitioner’s claims, the EIR for the RTP/SCS specifically analyzed the cumulative impacts of building more housing in the region than otherwise allowed in the zoning code. CEQA allowed the City to rely on these prior EIRs, hence there was no violation of CEQA with respect to cumulative impacts. Moreover, the City was not required to analyze the Project’s potential to change building density over time, as CEQA specifically exempted the SCEA from requirements to review the Project’s growth-inducing impacts.

## **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's judgment denying Petitioner's petition for writ of mandate.

- Opinion by Acting Presiding Justice Hull, with Justice Butz and Justice Duarte concurring.
- Trial Court: Sacramento County Superior Court, Case No. 34201680002396CUWMGDS, Judge Timothy M. Frawley.

Supplemental Review			
Case Name	Did the Public Agency Prevail?	Court (Appellate District or Supreme Court)	Publication Status
45 Save the Hill v. City & County of San Francisco		1 <sup>st</sup>	

[Save the Hill v. City and County of San Francisco](#), California Court of Appeal, First Appellate District, Case No. A153549 (July 22, 2019).

- *An agency may streamline environmental review if the project falls under a community plan exemption.*
- *An agency may exclude aesthetic and parking impacts from an EIR if the project meets the requirements of Section 21099.*
- *A project opponent need not administratively exhaust specific feasibility findings.*

### Background for Appeal

In August 2008, the City and Board of Supervisors of San Francisco's (collectively, City's) Planning Commission certified an environmental impact report for a community plan (Plan EIR) that would develop and rezone areas in East South of Market, the Mission, and Potrero (Eastern Neighborhoods Plan). The Planning Commission adopted CEQA findings and a statement of overriding considerations for the Eastern Neighborhoods Plan, and the City rezoned the site to urban mixed-use.

In 2014, Potrero Partners LLC submitted an application for a developmental project (Project) on the site. On February 11, 2015, the Planning Commission circulated a notice of reparation (NOP) and a community plan exemption (CPE) checklist for the Project. The CPE checklist determined that the Project would not result in new or more severe impacts than those identified in the Plan EIR. Additionally, aesthetic and parking impacts would be exempt from CEQA review per Section 21099 of the CEQA Guidelines, since the Project was a mixed-use residential project on an infill site located within a transit priority area. Thus, the Project was permitted to proceed via streamlined review under the CPE, allowing the City to rely on the Plan EIR for the majority of environmental review, with the exception of transportation and historic resource impacts, which would require further analysis in a focused EIR.

In August 2015, the Planning Commission circulated the Project's draft EIR covering transportation and historic resource impacts, held a public hearing for comments, and then released a final EIR, which included responses and revisions. On May 12, 2016, the Planning Commission certified the draft and final EIR, adopted CEQA findings, including the infeasibility of project alternatives, and approved the Project. On June 10, 2016, Save the Hill and Grow Potrero Responsibly (collectively, Petitioners) filed an appeal with the Board of Supervisors opposing the Plan EIR certification, challenging the decision to streamline CEQA review, and challenging the adequacy of the Plan EIR. On July 26, 2016, the Board of Supervisors denied the appeal and affirmed certification. Petitioners filed for writ of mandate, and the trial court denied the petition. Petitioners timely appealed.

### City Properly Decided to Streamline Review Under Community Plan Exemption

On appeal, Petitioners challenged the City's decision to proceed under the CPE. Under Section 21083.3 of the CEQA Guidelines, streamlined environmental review is required for projects that are consistent with developmental densities established by an existing community plan for which an EIR has been previously

certified. CEQA review is limited to environmental effects that were not addressed as significant effects in the prior EIR. The Court of Appeal concluded that the City properly determined to proceed under the CPE because the record contained substantial evidence that the Project was consistent with the developmental densities established by the City's community plan, for which the Plan EIR was certified.

### **Additional Analysis of Cumulative Impacts Was Not Required**

Petitioners argued that further analysis of non-traffic and historic resource cumulative impacts was required because residential growth had exceeded the growth anticipated in the Plan EIR and because more residential units were built before the date of the Plan EIR's certification than the Plan EIR reflected. The City found that the Project would not result in new cumulative impacts or cumulative impacts of greater severity than those found in the Plan EIR, so further review was not required. The Court of Appeal rejected both arguments set forth by Petitioners. First, the Court concluded that Petitioners failed to provide evidence of residential growth that exceeded the growth listed in the Plan EIR. Second, the Court found that Petitioners' argument that the Plan EIR did not properly reflect the number of existing residential units constituted a challenge to the baseline that should have been made before certification of the Plan EIR. Because Petitioners did not challenge the validity of the Plan EIR, the Court concluded that the Plan EIR and its cumulative impacts analysis were presumed valid.

### **Aesthetic and Parking Impacts Were Properly Exempted**

Petitioners claimed that the City erred by exempting the Project's aesthetic and parking impacts from environmental review. Section 21099 of the CEQA Guidelines provides that "[a]esthetic and parking impacts of a residential, mixed-use residential, or employment center project on an infill site within a transit priority area shall not be considered significant impacts on the environment." Here, the Project fit the requirements of Section 21099 because it was a mixed-use residential project on a site that met the definition of an infill site within a transit priority area. Thus, the Court rejected Petitioners' argument, affirming the trial court's determination that substantial evidence supported the City's determination to rely on Section 21099 in exempting aesthetic and parking impacts from environmental review.

### **Adequate Analysis of Traffic Impacts**

On appeal, Petitioners argued that the City's discussion of cumulative traffic impacts in the Plan EIR was inadequate, and that the City failed to consider implementation of certain traffic-calming measures. CEQA requires an EIR's cumulative impacts analysis to reflect a good-faith effort at full disclosure, but does not require analysis to be exhaustive. Here, the City's methodology for analyzing the cumulative impacts on traffic was supported by substantial evidence and reflected a good-faith effort at full disclosure. Thus, the Court concluded that the Plan EIR's cumulative traffic impacts analysis was sufficient.

Additionally, CEQA requires an EIR to list mitigation measures for significant adverse impacts. Here, the City provided several traffic mitigation measures and responded to public comments that the Project would not have significant adverse impacts on other traffic-related concerns. Thus, the Court concluded that the City properly and adequately explained why the EIR did not incorporate the additional mitigation measures suggested by Petitioners.

### **Administrative Exhaustion Requirement for Specific Feasibility Finding**

Petitioners argued that the City improperly concluded that a specific project alternative was infeasible, and claimed that the City improperly failed to consider their appeal of this issue. In response, the City argued that Petitioners did not exhaust their administrative remedies with respect to the infeasibility claim, and that substantial evidence supported the City's infeasibility finding. Petitioners contended that they did exhaust their administrative remedies because their challenge to the Planning Commission's CEQA feasibility findings was appealable to the Board of Supervisors under the City's local CEQA regulations. The City countered that the Board of Appeals — a separate entity — had to hear this part of Petitioners' appeal, not the Board of Supervisors.

The Court rejected the City's argument, explaining that if the Board of Supervisors affirmed the Plan EIR certification, all actions approving the Project taken prior to appeal, including the determination of feasibility of project alternatives, were presumed valid. Further, all other appeals processes, including before the Board of Appeals, were stayed pending a decision from the Board of Supervisors. Thus, requiring a feasibility challenge to go before the Board of Appeals would be meaningless since the Board of Supervisors' decision would ultimately control. Thus, the Court concluded that the Board of Appeals could not give Petitioners relief, and Petitioners were not required to appeal to the Board of Appeals to exhaust their administrative remedies.

Despite having found that the claims were exhausted, the Court concluded that the City's infeasibility findings with respect to alternatives were supported by substantial evidence.

### **Disposition**

Accordingly, the Court of Appeal affirmed the trial court's judgment denying Petitioners' writ of mandate challenging the City's certification of the Plan EIR and the Board of Supervisors' approval of the Project.

- Opinion by Justice Brown, with Acting Presiding Justice Streeter and Justice Tucher concurring.
- Trial Court: San Francisco City and County Superior Court, Case No. CPF-16515238, Judge Cynthia Ming-mei Lee.



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