LATHAM&WATKINS

Client Alert Commentary

Latham & Watkins Environment, Land & Resources Practice October 3, 2016 | Number 2018

California Supreme Court Addresses CEQA Supplemental Review; Rejects "New Project" Test

Recent decision resolves appellate split regarding standard of review for agency decision to prepare supplemental environmental review.

On September 19, the California Supreme Court held that the substantial evidence standard of review applies to a lead agency's evaluation of whether a modified version of a previously approved project requires additional environmental review under the California Environmental Quality Act (CEQA). Accordingly, courts may not invalidate a lead agency's approval of the modified project based solely on a court's own independent evaluation of whether the agency's proposal is a "new project," rather than a modified version of an old one.

The *Friends of the College of San Mateo Gardens v. San Mateo County Community College District*, S214061 decision unanimously reversed the previous Court of Appeal decision, concluding the lower court erred in its application of a *de novo* new project test in determining whether a subsequent or supplemental environmental impact report (EIR) is appropriate. Instead of focusing on a possibly abstract characterization of whether the project is "new" or "old," the reviewing court must apply the substantial evidence standard of review to evaluate the lead agency's own determination of "whether the previous environmental document retains any relevance in light of the proposed changes,"[1] and if any major revisions to the document are required due to the involvement of new, previously unstudied significant environmental effects. The deferential substantial evidence standard of judicial review provides that a reviewing court must uphold the lead agency's decision if there is some evidentiary support for the agency's decision, even if there is equal or greater conflicting evidence before the public agency. In addition to addressing the standard of review used by a reviewing court, the California Supreme Court's decision states that lead agencies themselves must make a determination of whether the prior CEQA document "retains any relevance" to their own determinations as to the need for a supplemental CEQA document.

Background

Factual and Procedural Background

In 2006, San Mateo Community College District (the District) adopted a facilities master plan (Plan) proposing nearly US$1 billion in new construction and facilities renovations at the District's three college campuses. At the College of San Mateo (College), the Plan included a proposal to demolish certain buildings and renovate others, including the College's "Building 20 complex" which includes a garden, an interior courtyard and a classroom and lab structure. The District published an initial study and a mitigated negative declaration (MND), which stated that the Plan would not have a significant effect on the

environment with the implementation of certain mitigation measures. In 2007, the District certified its initial study and adopted the MND.

The District later failed to obtain funding for the planned Building 20 complex renovations, and in May 2011, the District issued a notice of determination, indicating that it would demolish rather than renovate the complex and replace it with a parking lot and landscaping improvements. The District concluded that a subsequent or supplemental EIR was not required. The District addressed the change in an addendum to its 2006 initial study and MND, concluding that the project changes would not result in a new or substantially more severe impact than previously disclosed.

Plaintiff Friends of the College of San Mateo Gardens filed suit challenging the approval. The District rescinded its original addendum and issued a revised addendum in August 2011, bolstering the analysis in the original addendum. After public comment and discussion, the revised addendum was adopted and the demolition of the Building 20 complex was reapproved. Plaintiff dismissed its prior suit, and challenged the revised addendum and reapproval of the demolition for failure to fully comply with CEQA. The trial court found that the demolition project was inconsistent with the previously approved plan, and that the impacts of the project were not addressed in the 2006 MND. The trial court thus granted Plaintiff's petition for a writ of mandate, ordering full compliance with CEQA.

In an unpublished opinion, the Court of Appeal affirmed, relying primarily on *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288 (*Lishman*), concluding that as a threshold matter, the proposed building demolition was a new project, rather than a project modification.[2] The Court of Appeal stated that the addendum:

> clearly [did] far more than make "minor technical changes or additions" to the ... 2006 MND for the [project]. The addendum change[d] "renovation" of the Building 20 complex to "demolition" of the complex's buildings and a substantial portion of the gardens

and was thus a completely new project.[3] Therefore, the Court of Appeal concluded that the agency is required to engage in an initial study of the project to determine whether an EIR is required under section 21151.

***Lishman – Mani Brothers* Divide**

In 2014, the California Supreme Court granted review, perhaps in part to resolve an appellate split regarding whether an agency's decision to prepare a subsequent EIR is reviewed under a substantial evidence standard of review or if the agency's decision subject to a threshold determination as to whether the modification of the project constitutes a "new project altogether," as a matter of law that arose following *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, 1301 (*Lishman*).

Generally, an agency's decision to prepare a supplemental or subsequent EIR is reviewed for substantial evidence.[4] However, *Lishman* departed from precedent and applied a new threshold question of "whether [an agency] is dealing with a change to a particular project or a new project altogether"[5] to determine whether a new environmental document was required under Public Resources Code section 21166. Under *Lishman*, "section 21166 and Guidelines section 15162 apply to the former but not the latter," and thus substantial evidence review does not apply. To determine the project was a new project not entitled to the substantial evidence standard of review provided under section 21166 and Guidelines section 15162, the *Lishman* court looked to the size of the project, its uses, road connections, whether the project has different proponents, and whether the latter project utilized any of the drawings or other materials connected with the earlier project as a basis for the new configuration of uses.[6]

Subsequent to *Lishman*, *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385 (*Mani Brothers*) rejected *Lishman*, explaining "where there is a previously certified EIR, changes in the size, ownership, nature, character, etc., of a project are of no consequence in and of themselves. Such factors are meaningful *only* to the extent they affect the environmental impacts of a project."[7] Thus, the decision to prepare a new EIR or a subsequent EIR is reviewed for substantial evidence because courts "view the issue of whether an agency proceeded properly in treating a project as subject to section 21166 not as a question of law, but rather as a question of the adequacy of evidence in the record to support the agency's determination."[8]

Further, the *Mani Brothers* court found that *Lishman*'s

> novel 'new project' test does not provide an objective or useful framework. Drastic changes to a project might be viewed by some as transforming the project to a new project, while others may characterize the same drastic changes in a project as resulting in a dramatically modified project. Such labeling entails no specific guidelines and simply is not helpful to our analysis.[9]

The *Mani Brothers* court held that "[t]reating the issue [*i.e.*, whether a new EIR should have been prepared] as a question of law, as the court did in [*Lishman*], inappropriately undermines the deference due the agency in administrative matters."[10] In addition, the new project test is of no objective value because changes to a project might be viewed as a project modification, while others will claim that there is a new project.[11]

Latinos Unidos de Napa v. City of Napa (2013) 221 Cal.App.4th 192, 202, followed the *Mani Brothers* decision, and evaluated the city's decision to proceed with a general plan amendment and zoning changes without preparing a subsequent or supplemental EIR pursuant to section 21166 under the deferential substantial evidence test. The city reasoned that the potential impacts to the changes were already analyzed in a prior programmatic EIR, and therefore the project would not create new or more severe environmental impacts over those already analyzed, and the court agreed. The *Latinos Unidos* court based its decision in part on the fact that CEQA prohibits courts from interpreting CEQA or the Guidelines so as to impose requirements beyond those expressly stated therein.[12] The court additionally suggested *Lishman*'s new project test was contrary to the principle that CEQA "must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development or enhancement."[13] As recognized in *Latinos Unidos*, the earlier decision in *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1052 n.6, noted the conflict between *Mani Brothers* and *Lishman*, but the *Moss court* did not take a direct stand on the issue because the *Moss* case did not raise the same type of factual assertions. In *Moss*, the county's argument did not raise or depend on any factual assertions about the nature of the project. The proposed subdivision project did not change in any substantial way, but the later project did not include a road upgrade that was part of the project's original approval. However, the *Moss* court agreed with the suggestion in *Mani Brothers* that a court should "tread with extraordinary care before reversing a local agency's determination about the environmental impact of changes to a project."[14]

The New Project Test

Acknowledging a split in authority arising from *Lishman*'s criticism in *Mani Brothers*, the Supreme Court addressed the proper inquiry for whether proposed changes to a project's EIR or negative declaration require the preparation of a subsequent or supplemental EIR.

Plaintiff Friends of the College of San Mateo Gardens argued, based on the reasoning in *Lishman*, that implicit in CEQA's statutory and regulatory scheme is a threshold question of law inquiry that determines

whether the subsequent review provisions properly apply in the first place. Plaintiff argued that because Public Resources Code section 21166 and CEQA Guidelines section 15162[1] refer to substantial changes to "a project," a court reviewing an agency's proposed approval of project changes must first satisfy itself that the project remains the same project as before, instead of an entirely "new" project requiring an EIR, before proceeding to evaluate whether the changes call for a subsequent or supplemental EIR under CEQA's supplemental review provisions.

While the California Supreme Court noted that Plaintiff was correct that subsequent review provisions only apply if a project has been subject to initial review, the Court rejected Plaintiff's overall approach; the Court noted that Plaintiff's overall approach would assign courts the obligation to determine whether an agency's proposal qualifies as a new project, without any standards to govern the inquiry. Likewise, neither *Lishman* nor the Court of Appeal offered standards to guide the inquiry. Absent a benchmark for measuring the newness of a given project, such a test would invite arbitrary results**,** according to the Court. The Court reiterated the *Mani Brothers* reasoning, stating that while drastic changes to a project might be viewed by some as transforming the project to a new project, others may view it as a dramatically modified project, and in either case such labelling was not helpful to a court's analysis.

The Court held that for purposes of determining whether an agency may proceed under CEQA's subsequent review provisions, the question is not whether the agency's proposed changes render a project new in an abstract sense, nor does the inquiry turn on the identity of the project proponent, the provenance of the drawings, or other matters unrelated to the environmental consequences associated with the project. Instead, the Court held that the agency's environmental review obligations turn on the value of the new information to the still-pending decision-making process. The Court noted that the subsequent review provisions were designed to ensure that an agency proposing changes to a previously approved project explores environmental impacts not considered in the original environmental document. The Court stated that this assumes that some of the environmental impacts of the modified project are considered in the original environmental document, such that the original document retains some relevance to the decision-making process. If the document is wholly irrelevant, then it is only logical that the agency start over from the beginning under Public Resources Code section 21151, according to the Court.

Substantial Evidence is the Proper Standard of Review

Plaintiff Friends of the College of San Mateo Gardens further argued that an agency's determination of whether a proposal qualifies as a new project is a question of law for courts to decide based on their independent judgment. Plaintiff likened the new project inquiry to the inquiry into whether a particular activity qualifies as a project within the meaning of CEQA Guidelines section 15378. The Court held that the Court of Appeal erred in treating the new project inquiry as a question for the court's independent determination under a *de novo* standard, noting that whether an initial environmental document remains relevant despite changed plans or circumstances, is a predominantly factual question. The Court stated that this is a question for the agency to answer in the first instance, drawing on its particular expertise and the facts of the case, and that a court's task is to decide whether the agency's determination is supported by substantial evidence. The Court "expect[ed] occasions when a court finds no substantial evidence to support an agency's decision to proceed under CEQA's subsequent review provisions will be rare."[15] The Court also stated that a court must "tread with extraordinary care" before reversing an agency's determination, whether implicit or explicit, that its initial environmental document retains some relevance to the decision-making process.[16]

After the reviewing court reviews the agency's determination as to whether the original environmental document remained relevant despite the project changes, the Court also noted that if the agency has next

determined that project changes will not require major revisions to its initial environmental document, due to the involvement of new or significantly more severe environmental effects, (as the District did in this case), the reviewing court must ask whether substantial evidence supports this second determination by the agency.

CEQA's Legislative History Did Not Preclude Section 21166's Application to Negative Declarations

Alternatively, Plaintiff argued that Public Resources Code section 21166 applies only to projects where an initial EIR was prepared, and CEQA Guidelines section 15162 is invalid to the extent it extends section 21166's subsequent review framework to projects initially approved via negative declaration, such as the campus improvement project. The Court disagreed, noting that despite section 21166's failure to refer to negative declarations, EIRs were the only type of environmental document explicitly referenced in CEQA at the time of section 21166's enactment in 1972, and the Legislature did not use the phrase "environmental impact report" with any specific intent to exclude negative declarations from its scope.

Plaintiff argued that the 1977 amendments to section 21166, which added a provision for the preparation of subsequent or supplemental EIRs based on the discovery of new information, illustrated that section 21166 does not apply to negative declarations because the amendments made no mention to negative declarations despite their existence at this time. Two other statutory provisions, added in the amendments, specifically referred to negative declarations. Plaintiff argued that the Legislature's failure to add a similar reference to section 21166 demonstrates the Legislature's intent to limit section 21166 to projects initially approved via EIR, and to treat changes to projects initially approved via negative declarations as if they were new projects for the purposes of section 21151 review.

The Court rejected this argument because the Guidelines expressly authorized the use of negative declarations without express statutory authorization prior to the 1977 amendments. Thus, the Legislature may not have perceived a need to add an express reference to negative declarations in section 21166. Any reference to negative declarations in the 1977 amendments was to affirm that a lead agency's decision to proceed by negative declaration is entitled to the same degree of finality as a decision to proceed by EIR. The Court concluded that Plaintiff's reading of the 1977 amendments to implicitly require agencies to start the environmental review process over each time there is a change in plans or circumstances — no matter how minor — was unfounded.

Plaintiff's arguments highlighted a gap in CEQA's statutory structure, according to the Court. No provision of CEQA directly addresses the subsequent environmental review of a negative declaration. However, the California Natural Resources Agency, charged with certifying and adopting the CEQA Guidelines and amendments thereto, may fill such gaps in the statutory scheme in a manner consistent with the statute. Following the 1977 amendments, the Guidelines filled that gap by extending CEQA Guidelines section 15162's predecessor to projects initially approved by negative declarations.

The Court observed that limiting post-approval review obligations for negative declarations is consistent with a statutory scheme that gives a presumption of finality to negative declarations and EIRs once they are adopted. The Court noted that section 21166 comes into play precisely because in-depth review of the project has already occurred, and the question is whether circumstances have changed enough to justify repeating a substantial portion of the review process. The Court reasoned that the same principles apply if a negative declaration was found to satisfy the environmental review requirements of CEQA. The Guidelines reasonably concluded that there must be some limitations on post-approval environmental review of projects approved via negative declaration. Requiring environmental review every time

circumstances change or new plans come to light, as Plaintiff proposed, would have unraveled the presumption of finality for negative declarations embedded in the statutory scheme.

Closing the Standard of Review "Loophole"

Plaintiff additionally argued that applying the substantial evidence standard to projects approved via negative declaration creates a loophole in the statutory scheme, allowing agencies to evade their obligation to prepare an EIR based on the more demanding "fair argument" standard. That loophole would exist so long as the potential environmental effects of the projects are caused by changes in the project after a negative declaration had been approved.

The Court rejected this argument, noting that the substantial evidence test in the Guidelines does not refer to substantial evidence that the project as modified will have significant environmental effects. Instead, the Court held that the test is whether there is substantial evidence that the proposed modifications will involve "substantial changes" requiring major revisions of the previous EIR or negative declaration due to the involvement of new or significantly more severe environmental effects. A negative declaration is permitted when there is "no substantial evidence that the project or any of its aspects may cause a significant effect on the environment."[17] When there is a proposal to modify a project originally approved through an EIR, no "major revision" is required if the initial EIR already adequately addresses any additional environmental effects that may be caused by the proposed modification.

The Court explained the distinction between subsequent review of an EIR and subsequent review of a negative declaration by noting that when a project is initially approved by a negative declaration, a major revision to the negative declaration will necessarily be required if the proposed modification *may* produce a significant environmental effect that had not previously been studied. Thus, the CEQA Guidelines do not permit agencies to avoid their obligation to prepare subsequent or supplemental EIRs to address new, and previously unstudied, potentially significant environmental effects. Therefore, CEQA Guidelines section 15162 constitutes a valid "gap-filling measure" to projects initially approved via negative declaration, and supports CEQA's intent that both EIRs and negative declarations are entitled to a presumption of finality once adopted.

Additional Arguments Raised by Plaintiff Were Unavailing

Finally, Plaintiff contended that both Public Resources Code section 21166 and CEQA Guidelines section 15162 were inapplicable because the District's initially approved project at issue was akin to a program rather than a simple project. Plaintiff argued that the proposed changes to the Building 20 complex should be treated as a new site-specific project that riggers environmental review under CEQA's provisions for "tiered" EIRs. The Court rejected this argument because the initial study and MND were not labeled as a tiered EIR and they did not purport to defer analysis of certain details of later phases of a complex project until those phases are up for approval. The District's documents expressly concluded that "all potential impacts" of the entire project were mitigated to a point where no significant impacts would occur. The Court stated that to treat the prior MND as a tiered EIR now would completely ignore the substance of the District's conclusions to allow Plaintiff to raise an untimely challenge to the adequacy of the MND. The Court's opinion on this issue establishes a firm rule that courts may not later recharacterize a previous EIR as a "program" EIR versus a "project" EIR in order to conclude that Section 21166 is inapplicable to a specific proposed revision in a previously approved project. In other words, the Court's decision appears to indicate thatCEQA's provisions regarding subsequent environmental review for later projects to be conducted based on a previously approved tiered or program EIR (Public Resources Code Section 21094), do not apply unless the previous EIR was in fact labeled as a program EIR.

Conclusion and Remaining Questions

The Court reversed the judgment of the Court of Appeal, holding that the District's decision to prepare an addendum to the 2006 MND following the project's change was entitled to substantial evidence under Public Resources Code section 21166 and CEQA Guidelines section 15162. The Court remanded for further proceedings consistent with this conclusion. However, the Court noted that its opinion did not end the case because the Court of Appeal did not address certain questions raised by the Plaintiff, including: (i) Plaintiff's argument that the District abused its discretion in approving the Building 20 complex demolition based on the 2006 MND and the 2011 addendum; and (ii) Plaintiff's argument that CEQA Guidelines sections 15162 through 15164 improperly authorize lead agencies to approve certain proposed project modifications through the use of addenda without public comment. It will be important to monitor the Court of Appeal's later proceedings in the case to see how these issues are handled by the Court. Any future decision upholding a challenge to CEQA Guidelines sections 15162 through 15164 would be a new and significant ruling affecting many other projects.

Ultimately, the Court reaffirmed Public Resources Code section 21166 and CEQA Guidelines section 15162's application to supplemental review of EIRs, mitigated negative declarations, and negative declarations, rejecting the new project test promulgated in *Lishman* and followed by the Court of Appeal. In doing so, the Court enumerated a two-step review process for courts examining an agency's determination regarding supplemental review. First, the court will determine whether substantial evidence supports the agency's decision regarding the prior document's relevance. Second, if an agency has determined that project changes will not require major revisions to the project's initial environmental document, the reviewing court must ask whether substantial evidence supports that determination. This inquiry applies equally to a mitigated negative declaration or negative declaration, consistent with the statutory scheme's presumption of finality.

If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Christopher Garrett
christopher.garrett@lw.com
+1.858.523.5458
+1.619.405.2895
San Diego

David Amerikaner
david.amerikaner@lw.com
+1.212.906.1697
New York

Lucas Quass
lucas.quass@lw.com
+1.213.891.8532
Los Angeles

Samantha Seikkula
samantha.seikkula@lw.com
+1.858.509.8457
San Diego

You Might Also Be Interested In

Clean Energy Law Report: California Supreme Court Addresses Subsequent Review Under CEQA; Rejects Lishman "New Project" Test

Clean Energy Blog: Updated CEQA Guidelines Proposal in California

California Supreme Court Protects CEQA Categorical Exemptions

Clean Energy Law Report: Climate Action Plan for San Diego County Struck Down Under CEQA

Endnotes

1 *Friends of the College of San Mateo Gardens*, S214061 at p. 4 (Sept. 19, 2016).

2 *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2013) 2013 Cal. App. Unpub. LEXIS 6950.

3 *Id.* at 14.

[4] *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 201-202 [applying substantial evidence test in review of agency decision under Pubic Resources Code § 21166]; *Abatti v. Imperial Irrigation Dist.* (2012) 205 Cal.App.4th 650, 675 [same]; *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1402-1402 [same] ("*Mani Brothers*"); *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 703 [same]; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317-18 [same]; *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1543-45 [same]; *River Valley Preservation Project v. Metropolitan Transit Development Board* (1995) 37 Cal.App.4th 154, 166-68 [same]; *Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, 798-99 [same]; *Benton v. Bd. of Supervisors* (1991) 226 Cal.App.3d 1467, 1481-82 [same]; *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1074 [same]; see also Guidelines, §§ 15164, subd. (e), 15064, subd. (f)(7).

[5] *Lishman*, *supra*, 140 Cal.App.4th at 1301.

[6] *Id*. at 1300.

[7] *Mani Brothers*, *supra*, 153 Cal.App.4th at 1400.

[8] *Ibid*.

[9] *Ibid*.

[10] *Id.* at pp. 1400-1401; see also; *Latinos Unidos*, *supra,* 221 Cal.App.4th at p. 201-202 (agreeing with *Moss* and rejecting *Lishman's* standard of review in favor of substantial evidence).

[11] *Mani Brothers*, *supra*, 153 Cal.App.4th at 1400.

[12] *Id*. at 202, fn. 8.

[13] *Ibid*.

[14] *Id. at* 201, citing *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1052 n.6.

[15] *Friends of the College of San Mateo Gardens*, S214061 at p. 16 (Sept. 19, 2016).

[16] *Ibid*.

[17] CEQA Guidelines § 15063(b)(2); see also Pub. Resources Code §§ 21151, 20164.5.