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## Court Upholds EIR Against Challenges to Energy Impacts Analysis, Extra-Jurisdictional Mitigation, and Amendments Following Planning Commission Review

Based upon numerous requests, the California Court of Appeals recently certified for full publication (after previously authorizing only a partial publication) an important CEQA case that provides guidance on

- (1) energy impacts analysis,
- (2) extra-jurisdictional mitigation, and
- (3) amendments to environmental analysis following advisory board review.

*Tracy First v. City of Tracy*, 177 Cal. App. 4th 1 (2009), affirms the City of Tracy's approval of a 95,000 square foot grocery store challenged by project opponents.

This alert discusses a key CEQA case which provides guidelines for preparing an EIR.

### Adequate Energy Impacts Analysis

The California Environmental Quality Act ("CEQA") and the CEQA Guidelines require an environmental impact report ("EIR") to include, when relevant, a discussion of energy conservation measures, as well as other appropriate mitigation measures. Examples of energy conservation measures are provided in Appendix F of the CEQA Guidelines ("*Appendix F*"). To date, there has been little guidance regarding the sufficiency of an energy impacts analysis. *Tracy* provides the following key guidelines in conducting the analysis:

- Less analysis is necessary when no specific building or use is proposed.
- The energy impacts of individual components of a project can be analyzed separately, and the level of analysis can vary between components based on the nature of the individual components.
- Discussions of future actions to be taken at later stages of the development process, such as energy conservation elements that will be incorporated into the building plans, are relevant.
- Comparisons with energy use on similar sites owned or operated by the applicant are useful.
- Compliance with the California Building Energy Efficiency Standards ("*Standards*") does not preempt further CEQA review of energy efficiency.



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It is appropriate for an environmental analysis to rely upon the Standards in determining whether a project's energy impact is significant. Document hosted at JDSUPRA™  
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- An EIR is not required to discuss every possible energy impact or conservation measure listed in Appendix F.

#### Infeasibility of Certain Extra-Jurisdictional Mitigation

The subject EIR in *Tracy* included a traffic study that identified significant impacts to two intersections outside the city's boundary in an unincorporated area of the county and proposed improvements to mitigate such impacts. While the county requested that the city require a fair share payment to the county's traffic mitigation fee program, the city declined to impose the requirement as a mitigation measure because the county's program did not guarantee that the noted improvements would be built. The city instead concluded that the mitigation measure could not be implemented and the impacts were significant and unavoidable. The court agreed with the city based upon the following conclusions:

- The payment of fees to another jurisdiction as mitigation for extra-jurisdictional impacts is not required when there is no evidence that the mitigation will actually occur.
- There must be a plan, enforceable by the lead agency, that ensures that the required mitigation funds actually go towards mitigating the extra-jurisdictional impacts.

#### No Requirement to Remand an Amended EIR to the Planning Commission for Review if the Underlying Project is Not Altered

The court in *Tracy* rejected the project opponent's argument that the EIR should have been remanded to the planning commission for further review after the EIR was amended following the planning commission's initial review based upon the following conclusions:

- When an advisory body is required to review an environmental document under state law, it is only required to review and consider the document in draft or final form.
- There is no statute or guideline that requires the decision-making body to remand the project application to the advisory body when amendments are made to the EIR but not to the project.
- So long as local law does not provide otherwise, an environmental document can be amended following review by an advisory body without the need for additional review by such advisory body, so long as the underlying project analyzed does not change.
- The difference between modifying a project and modifying an EIR is substantial because the former affects the ultimate land use while the latter does not.

Please contact us with any questions.

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