$1.50 VOL. 37 NO. 19 www.ocbj.com MAY 12-18, 2014

ORANGE COUNTY BUSINESS JOURNAL

Snell & Wilmer
LAW OFFICES

"CEQA-in-Reverse" Case Headed for the California Supreme Court

by Rick McNeil, Jon Frank, Partners, and Connie Bak, Associate, Snell & Wilmer

"CEQA-in-Reverse"

Real estate developers, public agencies and private businesses involved in land development or redevelopment may soon have to contend with a new far-reaching interpretation of the California Environmental Quality Act (CEQA).

It is widely known among those involved in real estate development that CEQA requires a public agency to prepare an Environmental Impact Report (EIR) for any *project* "that may have a significant impact on the environment." (California Public Resources Code Sections 21080, 21082.2, 21100, 21151.). CEQA, however, does not expressly provide that an EIR is required where it is claimed that the *existing environment* may have a significant impact on a proposed project.

The California Supreme Court is poised to decide in *California Building Industry Association v. Bay Area Air Quality Management District* (Supreme Court No. S213478 – review granted Nov. 26, 2013) whether this "reverse" EIR requirement is mandated by CEQA. Should the Supreme Court do so, this would have tremendous implications for real estate development projects of all kinds, and especially urban infill and development projects near transportation corridors.

"Thresholds of Significance" for Urban Infill/Transportation Projects

The underlying issue that gave rise to the *CBIA* lawsuit was the adoption of certain air quality "thresholds of significance" for toxic air contaminants (TACs) and PM2.5 by the Bay Area Air Quality Management District (BAAQMD).

Toxic air contaminants include, for example, industrial solvents, such as PCE, TCE and vinyl chloride, as well as a number of metals and particulates associated with industrial operations and motor vehicle emissions, such as lead, hexavalent chromium and cadmium.

PM2.5 refers to particulate matter with a diameter of 2.5 microns or less. An example of PM2.5 are nitrates, which are formed from emissions of nitrogen oxides from power plants, motor vehicles and other combustion sources and which are linked to causing or exacerbating respiratory and cardiovascular conditions.

Like the South Coast Air Quality Management District (SCAQMD), which adopts and enforces air quality rules for Orange, Los Angeles, Riverside and San Bernardino counties, the BAAQMD adopts and enforces air quality rules for a number of counties in and around the San Francisco Bay Area.

CEQA (through the CEQA Guidelines) provides for the adoption and publication by public agencies of "thresholds of significance." Thresholds of significance are quantitative or qualitative standards designed to promote consistency, efficiency and predictability to the process of determining whether a particular environmental impact may be "significant" under CEQA. (Section 15064.7.)

In this case, the BAAQMD sought to adopt thresholds of significance that would govern the potential impact of TACs and PM2.5 on proposed residential, commercial and other projects, particularly urban infill projects and projects near transportation corridors. For example, a land development project would not be considered to create a significant impact if its proposed TAC emissions would be below levels that would be projected to cause an increased cancer risk of 10 in 1,000,000 and if its proposed PM2.5 emissions would be below 0.3 micrograms per cubic meter of air.

"Reverse" Thresholds of Significance

However, in addition, the BAAQMD encouraged public agencies to consider a project's "Risks and Hazards" based on the impact of the existing environment on receptors within the project (i.e., persons who would be living or working on the site of the proposed project or within the area), based on the following rationale:

> "If a project is likely to be a place where people live, play, or convalesce, it should be considered a receptor… When siting a new receptor, a Lead Agency shall examine existing or future proposed sources of TAC and/or PM2.5 emissions that would adversely affect individuals within the planned project."

Notwithstanding the fact that the trial court invalidated the BAAQMD's thresholds of significance in this case (albeit on other grounds, namely, that the BAAQMD failed to conduct an appropriate CEQA review of the regulation), the BAAQMD has continued to encourage agencies to analyze impacts of existing pollution sources on future project residents (although it has acknowledged that the Threshold of Significance themselves should not be used pending the decision by the California Supreme Court). (See BAAQMD May 2012 CEQA Guidelines Section 5.2.5.)

As noted by the CBIA and others, there are multiple planning alternatives and other environmental laws available to address a potential health risk in a local community from air pollution.

As explained in CBIA's brief (at pp. 2-3):

> "Infill development near transportation infrastructure encourages the use of public transit, discourages use of vehicles and has a positive impact on air quality and other public health benefits compared with dispersed development that is dependent upon the automobile. The District's TAC receptor thresholds and Guidelines impede implementation of land use policies that seek to advance these and other social benefits – provision of high-density affordable housing, reduction of vehicle traffic and related emissions, efficient utilization of land resources and infrastructure, mixed-use development, energy conservation, and integration of jobs with housing. Municipalities need the flexibility to be able to consider air quality risks and benefits in the broader context of land planning."

Prior Decisions Rejecting the "Reverse" CEQA Analysis

It is probable that one reason the California Supreme Court granted review in the *CBIA* case is that the First District's decision conflicts with prior CEQA appellate decisions that already determined that CEQA does not require an EIR to be prepared based upon the impact the environment may have on a proposed project.

For example, the Fourth District Court of Appeal (which hears appeals from Orange County trial courts) rejected a claim similar to that made by the BAAQMD in the *CBIA* case in the case of *South Orange County Wastewater Authority v. City of Dana Point*, 196 Cal. App. 4th 1604 (2011). In that case, the South Orange County Wastewater Authority (SOCWA) challenged the approval of a residential development zoning change by the City of Dana Point based on the argument that an EIR (and not just a Mitigated Negative Declaration) was required to assess the impact that odors and noise from the SOCWA's sewage treatment plant might have on future residents. The Fourth District rejected the "CEQA-in-Reverse" argument made by the SOCWA, stating:

> "SOCWA's objection to the adoption of the MND for the rezoning essentially turns CEQA upside down. Instead of using the act to defend the existing environment from adverse changes caused by a proposed project, SOCWA wants to use the act to defend the proposed project (the future residences) from a purportedly adverse existing environment (smells from the sewage treatment plant)…. The Legislature did not enact CEQA to protect people from the environment. Other statutes, ordinances, and regulations fulfill that function..."

The First District did not expressly disapprove of the *SOCWA* decision (and three other cases that previously held that CEQA did not apply to impacts of the environment on a project, including *Baird v. County of Contra Costa*, 32 Cal. App. 4th 1464 (1995)). Instead, the First District noted only that "[t]he continuing validity of *Baird et al* is better reserved for a case in which the receptor thresholds have actually been applied to a project."

Future Implications for Orange County Urban Infill/Transportation Projects

As noted above, proposed infill redevelopment and transportation projects to be sited in Orange County are subject to the jurisdiction of the South Coast Air Quality Management District, including the requirements contained in the SCAQMD's CEQA Air Quality Handbook. The SCAQMD, like the BAAQMD, also has adopted thresholds of significance.

Notably, the District filed an *amicus curiae* ("friend of the court") brief in support of the BAAQMD in the *CBIA* case and, in so doing, alerted businesses and public agencies in Orange County that the SCAQMD, like the BAAMQD, can be expected to encourage public agencies to assess any potential harm of the environment on future projects (the "CEQA-in Reverse" concept), should the California Supreme Court permit it and other agencies the latitude to do so. By way of example, the District asserted in its *amicus* brief:

> "As the home to approximately half of California's population and an extensive network of freeways, railyards and port activity, the residents of the South Coast Air Basin are experiencing significant harm from exposure to toxic air contaminants. These impacts fall disproportionately on low-income and minority populations. As a result, the evaluation and mitigation of toxic air contaminants is a serious priority for the SCAQMD. This brief will aim to assist the Court by highlighting the health impacts of exposure to toxic air pollution and its environmental justice implications, and by demonstrating that such an analysis is consistent with the policies underlying CEQA. This brief will also aim to explain the benefits of evaluating the potential for harm under CEQA as opposed to relying on other regulatory frameworks."

The *CBIA* case has been fully briefed and oral argument is anticipated to take place this fall.

Rick McNeil

Rick McNeil is a partner in the firm's commercial litigation practice group. He has over 25 years of experience representing businesses in the defense, aerospace, chemical, energy, waste disposal, manufacturing, food processing, printing, dry cleaning, real estate development and other industries against environmental claims. Reach McNeil at 714.427.7517 or rmcneil@swlaw.com.

Jon Frank

Jon Frank is a partner in the firm's real estate practice group. His practice is concentrated in general real estate, including purchase, sale and development transactions involving income producing property, hotels and resorts, retail, residential, vacant land, solar, alternative energy and other uses; commercial leasing; Mexico real estate law; and zoning and land use. Reach Frank at 714.427.7022 or jfrank@swlaw.com.

Connie Bak

Connie Bak is an associate in the firm's real estate group. Her practice focuses on all aspects of real estate development including resort, hotel, retail, and office development and disposition; office/retail leasing; zoning and land use; partnerships and joint ventures; real estate financing; and construction. Reach Bak at 213.929.2625 or cbak@swlaw.com.