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CEQA YEAR IN REVIEW 2018

A SUMMARY OF PUBLISHED APPELLATE OPINIONS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

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The California Supreme Court issued its only CEQA opinion of 2018 at the end of the year. In *Sierra Club v. County of Fresno*, the court rejected a standard air quality impact analysis in the EIR for a typical mixed-use development project. The court declined to apply the substantial evidence standard of review to the EIR's discussion of the impact. Instead, the court independently decided that the EIR's discussion did not include "detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project."

In another case focused on air quality, a court of appeal upheld most aspects of an EIR for a new railyard and agreed that the project would reduce overall truck emissions, but it held that the EIR did not include sufficient information describing the impact of truck emissions along a four-mile truck route that adjoined residences and schools.

Several other 2018 decisions addressed whether comments by members of the public amounted to substantial evidence of significant environmental impacts, which would preclude the lead agency from adopting a negative declaration rather than preparing an EIR. Two of these opinions concerned projects in designated historic districts. These courts delivered a clear message that residents' statements that the mass, density, height, or materials of a proposed project are inconsistent with a historic district—as opposed to mere expressions of dislike of a project's design—can constitute substantial evidence of a significant aesthetic impact on the historic district, necessitating an EIR. In one of these cases, the court also found that observations of traffic conditions by nearby residents could prevail over both a traffic expert's report and a city's established traffic significance thresholds.

In a third case, however, the court examined project opponents' attempt to apply the noise analysis from one project to a different project in a different location, concluded that their statements did not constitute substantial evidence that the second project would cause a significant noise impact, and upheld the project's negative declaration.

Finally, the *Golden Door Properties* case illustrates the difficulties that lead agencies continue to face in developing quantitative thresholds for significant greenhouse gas impacts. The court rejected San Diego County's Guidance Document for analyzing GHG impacts, finding a violation of the rule that a lead agency's adoption of a threshold of significance must be adopted by ordinance, resolution, rule, or regulation and must be developed through a public review process. Substantively, the court held that substantial evidence did not support the Guidance Document's efficiency metric of 4.9 metric tons of carbon dioxide-equivalent per service population per year, because the evidence did not show why use of statewide GHG reduction levels would properly be used in the specific context of San Diego County.

LIST OF CASES

California Supreme Court

Courts of Appeal

A. EXCLUSIONS AND EXEMPTIONS FROM CEQA

1. Seven-Year Extension of Diablo Canyon Lease Held Exempt from CEQA

World Business Academy v. California State Lands Commission
(2018) 24 CA 5th 476 (2nd Dist.)

The court rejected CEQA challenges to a State Lands Commission lease extension, allowing the Diablo Canyon nuclear power plant to continue operating through 2025.

Pacific Gas & Electric Company plans to cease operating Diablo Canyon in 2025, when the plant's federal licenses will expire. The plant's cooling water intake and discharge structures are on state-owned submerged and tidal lands, for which the Commission had issued leases to PG&E expiring in 2018 and 2019. The Commission granted PG&E a consolidated lease extension through 2025, relying on CEQA's categorical exemption for continued operation of existing facilities.

CEQA's categorical exemptions are subject to several exceptions that can force a lead agency to prepare a negative declaration or an environmental impact report. The "unusual circumstances" exception applies "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Here, Diablo Canyon opponents argued that continued operation of the state's last nuclear power plant was rife with unusual circumstances that could cause significant environmental effects.

To show that the unusual circumstances exception applies, normally a challenger must show both (1) unusual circumstances; and (2) a reasonable possibility of a significant environmental effect due to those unusual circumstances. Here, the Commission had made no finding regarding unusual circumstances. With no finding before it, the court of appeal elected to assume unusual circumstances did exist and then proceeded to the second half of the test: whether there was a fair argument that the lease extension would cause significant environmental impacts.

The court began by holding that the baseline for its analysis consisted of existing operations under the lease. In so doing, the court followed an earlier case that applied the same rule with respect to Central Valley Project water contract renewals.

The court then reviewed each factor the challenger claimed raised a fair argument of significant environmental effects—Diablo Canyon's size, location, impacts on human health and marine life, fuel rod storage, reactor embrittlement, risks from seismic events and terror attacks, and status as the state's last remaining nuclear plant—and found that none of these conditions would be changed by the lease extension. Because there was no fair argument of significant environmental effects from the extension, the court held the Commission did not violate CEQA.

The court's opinion is instructive in two respects. First, it reinforces precedent holding that however damaging an existing environmental condition is alleged to be, that condition is still the baseline under CEQA, and only a project-caused worsening of that condition is a CEQA concern.

Second, the case is a reminder that if the lead agency fails to make findings supporting the conclusion that a proposed project involves no unusual circumstances, the court may assume that the project does involve unusual circumstances. The court will then proceed to ask whether project opponents have raised a fair argument that the project will cause significant environmental effects. Although project opponents often do not meet even this low threshold, lead agencies relying on potentially controversial categorical exemptions should minimize this risk by making findings regarding unusual circumstances.

- Julie Jones

2. CEQA Baseline for Development Permit Should Not Have Been Set Prior to Demolition of Historic Structure

Bottini v. City of San Diego
(2018) 27 CA 5th 281 (4th Dist.)

The court held that the CEQA baseline for construction of a new home should not have been set at a date prior to demolition of a potential historic structure on the site, where the demolition had already occurred before the permit application for the new home had been submitted.

The Bottinis applied to the City of San Diego for a Coastal Development Permit to construct a single-family home on a vacant lot. City staff determined that the project was categorically exempt under CEQA's Class 3 exemption for construction of a single-family home. On appeal, however, the city council found that full environmental review was necessary because the Bottinis had demolished a 19th-century cottage on the lot shortly before applying for the CDP. The city had itself previously concluded that cottage was not a historic resource, declared the structure to be a public nuisance, and authorized the Bottinis to demolish it. Nevertheless, the city council retroactively declared the cottage "historic," concluded that the demolition should be considered part of the new home project, and found that there was a reasonable possibility that CEQA's "historical resources" and "unusual circumstances" exceptions precluded use of the categorical exemption.

The Bottinis sued, contending that the city's baseline determination violated CEQA and that the city's decisions violated the Bottinis' due process rights and resulted in a regulatory taking.

With respect to the CEQA claims, the appellate court disagreed with the city's determination that the "CEQA project" included both the demolition and the proposed construction of a single-family residence. Reasoning that CEQA applies prospectively, and not to completed work, the court held that the correct baseline was the condition of the property when the Bottinis filed their permit application. At that time, the property was a vacant lot.

Using the correct project baseline, the court said, the Class 3 exemption clearly applied to the Bottinis' proposed single-family residence, and the historical resource and unusual circumstances exceptions were inapplicable.

- Rachael Rutkowski

3. Court Upholds Use of Small Facilities Exemption for Microcell DAS Project

Aptos Residents Association v. County of Santa Cruz
(2018) 20 CA 5th 1039 (6th Dist.)

The court of appeal upheld Santa Cruz County's use of a CEQA exemption to approve a distributed antenna system (often referred to as a DAS) for the provision of cell service.

The court found that the project fit squarely within the intended scope of CEQA's Class 3 categorical exemption for small facilities and structures. The court also rejected petitioners' arguments that there was an applicable exception that would have precluded the use of the exemption.

Background

The project involved 10 microcell transmitters that would be used as part of Crown Castle's distributed antenna system. Each microcell consisted of a two-foot by one-foot antenna mounted on an extender pole that would be attached to an existing utility pole. Crown Castle submitted a separate permit application for each microcell. Raising concerns about health and aesthetics, residents began mounting opposition to the project.

The county jointly considered the applications for the microcells and determined that they fell within the Class 3 exemption for small structures. After conducting site visits and reviewing photo simulations, the county concluded that the microcells would not result in any significant visual or other environmental impacts. Residents filed suit, contending that the county's approval of the project violated CEQA.

The Court's Decision

The residents' petition claimed that the county violated CEQA in several ways: by improperly segmenting the project, by finding that the project fell within the Class 3 exemption, and by using an exemption where an exception barred an exemption. The court of appeal found these claims unavailing.

Improper segmentation. The court rejected petitioners' contention that because Crown Castle applied for a separate permit for each microcell, the project was improperly segmented. The county expressly considered the project to be the entire group of microcells and found that the Class 3 exemption was applicable to all of the microcells. The fact that Crown Castle filed a separate permit for each microcell unit was irrelevant.

Applicability of exemption. The Class 3 categorical exemption applies to "limited numbers of new, small facilities or structures" including "electrical, gas, and other utility extensions." The court found the project to fall squarely within the class of projects intended to be covered by this exemption, recognizing that the exemption extends to multiple small structures in scattered locations.

Exceptions to the use of the exemption. Petitioners urged the court to find applicable several exceptions that would have precluded the use of the Class 3 exemption. The court declined, finding that that petitioners failed to meet their burden to identify evidence supporting an exception.

Cumulative impact exception. The cumulative impact exception bars an exemption where the cumulative impact of "successive projects of the same type in the same place, over time is significant." Petitioners claimed that this exception should apply because AT&T intended to implement its own distributed antenna system in the area at some time in the future. The court rejected this argument as amounting to "mere speculation," given that petitioners provided no evidence that AT&T was actually pursuing a project or any evidence of the location of AT&T's proposed facilities.

Location exception. The CEQA Guidelines prohibit use of the Class 3 exemption if the activity may have an impact on an environmental resource of "hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state or local agencies." The county's zoning of the project area as "Residential Agricultural" did not meet this requirement because nothing in the zoning ordinance specifically designated the zone as "an environmental resource of hazardous or critical concern."

Unusual circumstance exception. Under the CEQA Guidelines, an exemption cannot be used where there is "a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." The court found nothing unusual in microcells being built in rural areas, because such areas "clearly need utilities, including cell coverage."

4. Application of Small Facilities Exemption to Cell Tower in Neighborhood Park Upheld

Don't Cell Our Parks v. City of San Diego
(2018) 21 CA 5th 338 (3rd Dist.)

Verizon Wireless obtained approval from the City of San Diego to construct a cell tower in a dedicated neighborhood park. The petitioner challenged the city's decision that the facility was exempt from CEQA under the categorical exemption for small facilities, but the court of appeal upheld the city's determination.

The court first rejected the petitioner's argument the project did not qualify for the small facilities exemption because it was a stand-alone utility structure rather than an urban infill development. While none of the examples of exempt facilities listed in the exemption directly applied, the court found that the tower fell within the scope of the exemption: It is a small facility that is much smaller than the types of structures that are listed as examples, such as a residence, store, motel, office or restaurant.

The court also rejected the petitioner's argument that an exemption was barred by the "unusual circumstances" exception to the categorical exemptions. Under that exception, an activity cannot be found exempt where there is a reasonable possibility it will have a significant environmental effect due to unusual circumstances. The court found the circumstances were not unusual because at least 37 similar facilities are located in city parks. It also found that the city's detailed analysis of biological, aesthetic, recreation and construction impacts supported the city's finding there was no reasonable possibility the project would have a significant impact on the environment.

The petitioner's alternative contention that an exemption was barred by the "location exception," which is applicable to projects that may impact officially designated environmental resources of critical concern, also failed, given the absence of any such designation.

5. Settlement Agreement for Beach Restoration Project Found Exempt from CEQA

County of Ventura v. City of Moorpark
(2018) 24 CA 5th 377 (2nd Dist.)

The court of appeal upheld a settlement agreement between the City of Moorpark and the Broad Beach Geologic Hazard Abatement District, finding that the settlement agreement was statutorily exempt from CEQA. The court rejected the County of Ventura's argument that the settlement agreement and beach restoration project were separate, nonexempt projects under CEQA.

The district was formed to restore a 46-acre stretch of beach. The beach restoration project would require sand deposits of over 1.5 million cubic yards over a period of 20 years. During the project approval process, the city and district entered into a settlement agreement to address the city's concerns that hauling sand through the city would negatively impact residents.

The court of appeal rejected the county's argument that the beach restoration project and the settlement agreement should be treated as separate and distinct projects under CEQA. The court found that the district was formed with the mandate to make improvements to the beach to address geologic hazards, and the settlement agreement, which addressed trucks hauling sand through the city, is "one piece of a single, coordinated endeavor to address erosion at Broad Beach, and is thus part of the whole of the action." The court further held that the settlement agreement and the beach restoration project constituted a single project since the settlement agreement and restoration activities served a single purpose of abating a geologic hazard, and even if the beach restoration could be completed without the agreement, the two became linked when the settlement agreement was incorporated into the coastal development permit for the project.

Accordingly, the court of appeal upheld the settlement agreement and held that the entirety of the beach restoration project, including the settlement agreement, was exempt from the requirements of CEQA.

- Michelle Chan

B. NEGATIVE DECLARATIONS

1. Negative Declaration Survives Challenge Based on Non-Expert Opinion About Noise Impacts

Jensen v. City of Santa Rosa
(2018) 23 CA 5th 877 (1st Dist.)

Claims of significant noise impact unsupported by expert opinion, fact, or reasonable inference do not provide grounds for challenging a negative declaration.

The project, called the Dream Center, would provide emergency shelter for homeless youth and transitional housing for young adults, as well as counseling, health, education, and job placement services. The center would also provide outdoor recreational activities for residents, including a basketball area, pottery throwing area, and garden. The center would occupy a vacant building formerly used as a hospital. A wooden fence and landscaping separated the rear parking lot from an adjacent residential neighborhood.

The City of Santa Rosa adopted a negative declaration and approved a rezoning and conditional use permit for the project. Conditions of approval limited parking in the rear lot to employees during normal operating hours. The city's negative declaration relied on a noise study prepared by an engineering firm. The noise study concluded that noise impacts would be less than significant because noise would not exceed standards in the city's general plan or noise ordinance, and noise levels would not be increased more than 5 dBA Ldn above existing conditions. (Ldn is the average day/night noise level.)

The petitioners, who lived near the project, asserted that there was a fair argument the project would cause significant noise impacts from vehicles in the rear parking lot and from outdoor recreation activities. The petitioners based their main arguments on their own calculations, using data taken from a noise study for a different project in the city called Tower Market, a 24-hour convenience store and gas station.

The court held that no substantial evidence supported the petitioners' claims.

First, the court found that the petitioners misused noise data from the Tower Market study. The petitioners took the Tower Market study's noise level estimates for passing vehicles and argued that these estimates exceeded maximum noise levels that they had calculated. The court explained that the petitioners' calculations showed very little about noise impacts because they did not predict the average noise level over time. Further, the court noted, this methodology was not backed up by expert opinion.

Second, the court concluded the petitioners' argument regarding parking lot noise was grounded on speculation and hypothesis rather than fact, expert opinion, or reasonable inference. The petitioners asserted that cars and trucks could drive through the rear parking lot at all hours of the day and night. The court explained, however, that this claim was "most improbable and not a fair inference from the evidence," particularly in light of the project characteristics and the conditions of approval. The court also noted that it was "obvious" that Tower Market and the Dream Center were not similar projects: The rear parking lot at the Dream Center would have much less frequent car traffic (especially at night,

when employees would not be allowed to park in the rear parking lot) and would have minimal or nonexistent truck traffic, as compared to a 24-hour market and gas station.

Third, the court rejected the petitioners' interpretation of the city's noise ordinance. The city's noise ordinance set forth base ambient noise levels based on a property's zoning and time of day. The petitioners treated these noise levels as thresholds of significance. The noise ordinance, however, specified that the base noise levels were intended to be used for comparative purposes, and noise level is one of 12 factors to be considered in determining whether a noise impact violates the noise ordinance.

Finally, the court rejected the petitioners' arguments that the noise from outdoor recreation activities (basketball, pottery, and gardening) would be significant. The court held that the petitioners' methodology was "vague" and hard to grasp, was not a "legitimate factual or scientific basis for finding a significant impact," and was "not supported by expert opinion."

In this case, the petitioners' only evidence of significant noise impacts was their own calculations and opinions. The court held that this was not enough to support a fair argument of significant impact. The take-home message is that petitioners challenging a negative declaration based on noise impacts or other technical issues have to support their arguments with expert opinion if they are to prevail.

- Jacob Aronson

2. Opinions of Local Residents that Building Proposed Within Historic Area Would Have Negative Aesthetic Impact Was Sufficient to Trigger Need for EIR

Georgetown Preservation Society v. County of El Dorado
(3rd Dist., No. C084872, 12/17/18)

Georgetown, a former gold rush camp located in the Sierra Nevada foothills, is a state historical landmark. The county approved a Dollar General chain discount store on Main Street, within the town's historic commercial district, relying on a mitigated negative declaration. Local residents objected, commenting that the building did not belong in a historic community, that the store's size and appearance would have a negative aesthetic impact, and that the design of the building was incompatible with nearby historic buildings.

Not surprisingly, the county's decision to approve the project was followed by a lawsuit claiming that an EIR should have been prepared to evaluate the project's significant aesthetic effects. The court of appeal ruled for the opponents, and in its opinion, it issued rulings on three important questions relating to evaluation of aesthetic impacts in a negative declaration and the effect of comments by members of the public about such impacts.

Design review by the lead agency is not a substitute for CEQA compliance. The county had determined that the new store would not have adverse aesthetic impacts because it satisfied the criteria in the county's Historic Design Guide. On appeal, the county and developer argued that subjective opinions of several residents about the aesthetic merits of the project should not override the county's design review determinations. The court ruled, however, that design review under the zoning code is

not a substitute for review of a project under CEQA. The design review process can provide relevant evidence, but when the agency is considering a negative declaration, it does not shield the project from review of its impacts under the fair argument standard.

Public comments can establish a fair argument that aesthetic impacts may be significant. The county and developer contended that public commentary by nonexperts should not be enough to support a fair argument that the project may cause significant aesthetic impacts. They argued that subjective opinions about aesthetic issues, standing alone, signal a public controversy but are not evidence that the impact is significant. The court disagreed, noting that a number of persons objected to the size and appearance of the building, asserting that it was too big and too boxy or monolithic to blend in and that its presence would damage the look and feel of the historic town center. The county should have taken account of this body of evidence, according to the court, because it related to nontechnical matters on which residents were capable of giving an opinion, such as the building's size and general appearance. Further, its evidentiary value was enough to satisfy the "fair argument" test, which triggers an EIR. As the court put it: "Despite the subjective nature of aesthetic concerns, it is clear that the project may have a significant adverse environmental impact."

A lead agency cannot argue that evidence in the record was unfounded or not credible unless it made specific findings to that effect. When considering comments relating to potential environmental impacts, a lead agency may disregard evidence that is unfounded or not credible for other reasons. Here, the county argued that it had properly discounted the public comments the court cited due to their lack of foundation or creditability. The court held, however, that in order to preserve attacks on comments based on lack of foundation or credibility, the lead agency must have made findings showing it had rejected the evidence for those reasons. The county had not done so here.

Conclusion. Criticisms of a project's design or complaints about its attractiveness, standing alone, are not enough to show a significant aesthetic impact. While CEQA is concerned with adverse impacts on the human environment, it is unconcerned with aesthetic values that are merely a matter of personal preference. In this case, the evidence was sufficient to persuade the court that the aesthetic objections to the project rested on broader community values: The court found there was sufficient evidence "to show this project in this location might significantly impair the central district's unique and treasured Gold Rush character."

- Stephen Kostka

3. Aesthetic and Traffic Issues in Historic Overlay District Necessitate EIR

Protect Niles v. City of Fremont
(2018) 25 CA 5th 1129 (1st Dist.)

The court of appeal overturned the city's mitigated negative declaration for a small mixed-use development in a historic overlay district, holding that aesthetic and traffic issues require the preparation of an environmental impact report.

The proposed project, comprising 98 housing units and 3,500 square feet of commercial uses, was to be located in the Niles Historic Overlay District within the City of Fremont. The city approved a mitigated

negative declaration for the project, finding that with mitigation incorporated, the project would cause no significant environmental impacts necessitating an EIR.

Residents sued, alleging that an environmental impact report was required because substantial evidence supported a fair argument that the project would cause significant impacts, due to (1) aesthetic incompatibility with the historic district; and (2) traffic impacts that were not acknowledged in the expert traffic report prepared for the city's analysis. The court of appeal upheld both challenges and required that an EIR be prepared.

Aesthetics. With respect to aesthetics, the court cited CEQA's express concern for aesthetic and historic environmental qualities, as well as case law holding that a project's context is vital to assessment of its aesthetic impacts. Here, members of both the public and the city's Historical Architectural Review Board had cited the project's "siting, massing, scale, size, materials, textures and colors" as inconsistent with the historic district's "small town feeling."

The court first held that a project's visual impact on a surrounding officially designated historical district is an appropriate topic for aesthetic review under CEQA and that such an aesthetic analysis does not undermine the separate scheme for CEQA review of environmental impacts on historical resources. Next, recognizing that aesthetic judgments are inherently subjective, the court observed that objections raised by HARB members and others "were not solely based on vague notions of beauty or personal preference, but were grounded in inconsistencies with the prevailing building heights and architectural styles of the Niles HOD." The court found that these personal observations constituted substantial evidence that the project would cause a significant aesthetic impact in the context of the historic district.

Traffic. The court next concluded that the city's expert traffic report could not prevail over individuals' observations of existing traffic conditions and predictions of hazards. The traffic report concluded that a new left-turn pocket in front of the project, while recommended, was not necessary, based in part on the posted speed limit. Commenters stated, however, that the posted speed limit was often ignored, and that without a left-turn pocket, the combination of high speeds, queued drivers waiting to turn left into the project, and a blind curve would result in dangerous conditions. The court identified these comments as substantial evidence supporting a fair argument that the project would create a traffic safety hazard.

Nor did the city's established significance threshold for deterioration in traffic level of service protect it from the need to prepare an EIR. The city acknowledged that with the proposed project, the level of service nearby would deteriorate from an unacceptable LOS E to a still worse LOS F, but under the city's significance thresholds, this did not constitute a significant impact. The court, citing residents' and officials' reports of extreme traffic backups under existing conditions, concluded that these comments "supported a fair argument that unusual circumstances in Niles might render the thresholds inadequate to capture the impacts."

Conclusion

The *Protect Niles* opinion highlights the importance that courts can attach to comments by the public where an agency proposes to rely on a negative declaration rather than an EIR. Because CEQA is designed to favor EIRs over negative declarations, plausible fact-based comments (as opposed to

generalized complaints) can, depending on the circumstances, prevail over both expert reports and agency significance thresholds, leading to the need for an EIR.

- Julie Jones

4. Possibility that Zoning Standards Might Be Violated in Final Design Did Not Mandate EIR at Tentative Map Stage

Friends of Riverside's Hills v. City of Riverside
(2018) 26 CA 5th 1137 (4th Dist.)

A project opponent's argument that the project might violate zoning laws in the future is not sufficient to require a city to prepare an EIR under CEQA.

The Lofgrens requested a permit to build six single-family homes on an 11-acre parcel in Riverside. The proposed development was within the city's RC – Residential Conservation Zone, which had unique zoning standards to preserve the area's topographic conditions. These included two different sets of standards for lot size, dwelling density, and lot coverage depending on whether the development was "conventional" or a "Planned Residential Development." City zoning laws allowed subdivisions qualifying as PRDs more flexibility to create smaller lots in existing neighborhoods and promoted clustering of lots on less sensitive sections of the property to preserve open space. The Lofgrens applied for a PRD permit with a six-lot tentative tract map and a list of mandatory project requirements that would qualify the project as a PRD.

In response to objections from Friends of Riverside's Hills to their original application, the Lofgrens also submitted a revised five-lot subdivision map that complied with conventional zoning requirements. The City of Riverside approved the PRD permit, finding the project in compliance with all PRD standards for residential development in the RC Zone. The city conditioned the Lofgrens' ability to obtain a grading permit on submission of a final tract map and evidence that natural features on steeper portions of the property were preserved as open space. The city also required that future building permits comply with RC Zone "superior design standards."

The city adopted a negative declaration, concluding that the project did not conflict with any land use provisions that were adopted to avoid or mitigate environmental impacts.

Friends of Riverside's Hills sued, contending an EIR was required because, in violation of RC Zone standards, the project would require excessive grading and did not cluster residential lots in the least steep portion of the site. Additionally, the organization alleged the city abused its discretion when it approved the permit because it did not provide evidence of the average slope of the lots and deferred the selection of superior design elements to the building-permit stage.

The court held that these claims were too speculative at the tentative map stage because the Lofgrens did not yet have a proposal for the final lot placement and finish grading. The claim that a project *might* violate zoning standards was not enough to require the city to prepare an EIR. The appropriate time for the petitioner's CEQA challenge over RC Zone violations, the court said, would be when the city approved the grading permit for the proposed project. At that time, the Lofgrens would need to submit a

final tract map that complied with RC Zone requirements. Only then would an EIR potentially be required based on deviation from zoning code standards.

- Rachael Rutkowski

5. Mitigated Negative Declaration for Infill Project Upheld Against Claims Parking and Traffic Impacts Would Be Significant

Covina Residents for Responsible Development v. City of Covina
(2018) 21 Cal. App. 5th 712 (2nd Dist.)

The petitioner, CRRD, challenged the mitigated negative declaration for a 68-unit, mixed-use infill project. Its principal CEQA claims related to the project's parking and traffic impacts. The court of appeal found both claims were meritless.

The project's parking impacts were exempt from CEQA. Under Public Resources Code section 21099(d)(1), the parking impacts of qualifying infill projects within a half-mile of a major transit stop are exempt from CEQA. The court found that the project easily qualified: it would be located in an urban area, on a site that had been previously developed, within a quarter-mile of a commuter rail station. As a result, any claim that the project lacked adequate parking was barred. While the statute does not exempt impacts relating to air quality, noise, or safety that may occur as secondary parking impacts due to resulting traffic congestion, the adequacy of parking itself is exempt from CEQA review.

The MND's review of traffic impacts was properly tiered from the applicable specific plan EIR. The mitigated negative declaration relied on the analysis of traffic impacts in the EIR certified for the city's Town Center Specific Plan. CRRD argued that the traffic impacts that might result from a shortage of project parking might be significant and that those impacts were not anticipated by the specific plan EIR. The court disagreed: The city had conducted a project-specific trip analysis and required the project to comply with relevant mitigation requirements for road improvements, and CRRD had not identified any evidence showing this was insufficient.

C. ENVIRONMENTAL IMPACT REPORTS

1. California Supreme Court Sets Standard for Air Quality Impact Analyses

Sierra Club v. County of Fresno
Cal. Supreme Court Case No. S219783 (Dec. 24, 2018)

The California Supreme Court overturned the environmental impact report for a mixed-use development project, holding that the EIR inadequately explained the human health consequences of significant air pollutant emissions that would result from the development. In so doing, the court both clarified the standard of review that courts must apply to an EIR's explanation of significant environmental impacts and increased the obligation of EIR preparers to provide those explanations.

The court also responded to challenges to the EIR's air quality mitigation measures. The court required that the EIR's claim of "substantial" pollution reduction through mitigation be supported with substantial evidence, but the court upheld mitigation measures that allowed for subsequent replacement based on new technologies and provided for implementation through future county review.

Facts

In the case before the Supreme Court, the county's analysis of criteria air pollutants appears to have been typical. The EIR generally explained the health impacts of exposure to ozone, particulate matter, carbon monoxide, and nitrogen dioxide but, except for ozone, did not identify the concentrations at which symptoms would be expected. The EIR then quantified the tonnages of air pollutants that would be emitted each year as a result of the project, compared those amounts to the regional air district's tonnage-based significance thresholds, and concluded that the project's air quality impacts would be significant because the emissions would substantially exceed the thresholds. The EIR then identified mitigation measures that would reduce the emissions, but not enough to bring them below the thresholds. The EIR did not attempt to quantify the extent to which each of the project's air pollutant emissions might affect human health in the air basin.

Standard of Review

The Sierra Club and other parties challenged the EIR's discussion of air quality impacts as well as the mitigation measures it identified. The court began by addressing the standard of review that courts must apply to such challenges. Under CEQA, courts are to apply a deferential "substantial evidence" standard of review to an EIR's factual determinations (e.g., which scientific methodology to use for analysis of a particular impact), but a non-deferential "de novo" standard to the question of whether the agency preparing the EIR has followed the correct procedures. The court acknowledged that some questions that arise under CEQA are both factual and procedural, and create uncertainty regarding the appropriate standard of judicial review.

Where the question is whether an EIR's discussion of significant environmental impacts is "adequate," the court identified "three basic principles":

- An agency has considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR;
- However, a reviewing court must determine whether "the EIR comports with its intended function of including 'detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project'"; and
- The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency's factual conclusions. The court explained: "For example, a decision to use a particular methodology and reject another is amenable to substantial evidence review. But whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence."

The EIR's Air Quality Discussion

Applying these principles, the court found the county's EIR inadequate because it did not explain how the proposed project would change air quality in the air basin; it did not indicate the concentrations at which PM, CO and sulfur dioxide would trigger health symptoms; and, even as to ozone, for which the EIR did identify concentrations that would trigger symptoms, it did not identify how many parts per million of ozone would result from the project.

Briefs submitted to the court attempted to explain that the connection between emissions and human health that plaintiffs sought could not be provided given the current state of environmental science modeling. The court responded that this explanation should have been provided in the EIR rather than in litigation: "if it is not scientifically possible to do more than has already been done to connect air quality effects with potential human health impacts, the EIR itself must explain why, in a manner reasonably calculated to inform the public of the scope of what is and is not yet known about the Project's impacts."

Mitigation Measures

The plaintiffs also challenged the EIR's air quality mitigation measures on four grounds. The court upheld the first of these challenges, holding that the EIR lacked facts or analysis to explain its conclusion that the mitigation measures would "substantially reduce air quality impacts."

The court rejected the plaintiffs' three remaining challenges. First, the court approved a "substitution clause" in the mitigation measures that allowed the county to substitute new mitigation measures for those listed in the EIR if the new measures were shown to be equally effective. Whereas the plaintiffs considered this unlawfully deferred mitigation, the court responded that allowing future substitutions for equal or more efficient technology would promote CEQA's goal of environmental protection. Second, the court rejected plaintiffs' challenge to mitigation measures that would not reduce a project's impacts below the threshold of significance. The court noted that under CEQA, agencies may approve projects that have significant unavoidable environmental impacts so long as they adopt all feasible mitigation

measures and issue a statement of overriding considerations. Finally, the court held that the mitigation measures were not vague or otherwise unenforceable. The county's mitigation monitoring plan explained when in the development process the various mitigation measures were to be implemented and imposed the duty on the county to ensure that the measures were implemented. If the county were to fail in this duty, its abuse of discretion could be corrected in a court mandamus proceeding.

Conclusions

The *Sierra Club* decision reinforces the importance of careful explanations of significance determinations in EIRs and, in particular, the importance of presenting the analytical connection between raw data and the resulting impacts to the physical environment. Every effort should be made to provide clear explanations in an EIR, including a discussion of the evidentiary basis for health-based significance standards, so that decision makers and members of the public can better understand the

magnitude of a project's contribution to risks to human health. Notably, the court recognized that an EIR need not be exhaustive, and perfection is not the legal standard. But this decision raises the bar for achieving legal adequacy under CEQA.

- Julie Jones & Barbara Schussman

2. EIR For Railyard Omitted Important Information About Air Quality Impacts

City of Long Beach v. City of Los Angeles
(2018) 19 CA 5th 465 (1st Dist.)

Rejecting most challenges to the environmental impact report for a new railyard near the Port of Los Angeles, the court of appeal nevertheless held that the EIR must be decertified because it did not adequately address air quality impacts in the vicinity of the new yard.

When BNSF Railway Company proposed the project, the port was served by on-dock railyards, one near-dock railyard five miles north of the port, and two off-dock railyards 24 miles north. Trucks are used to transport cargo containers between the port and the near-dock and off-dock railyards. One of the effects of the new near-dock railyard would be to substitute four-mile trips on surface streets for many existing 24-mile trips via a freeway to and from the off-dock railyards. Project opponents concerned about the impacts of this shift in port truck traffic sued under CEQA.

The court held that crucial information regarding air quality was omitted from the EIR. The EIR showed that total particulate matter emissions from trucks would be reduced by the project compared to the "no project" alternative, because a four-mile truck trip is shorter than a 24-mile trip. But the court concluded the EIR did not adequately explain that in the vicinity of the proposed railyard, air quality would be substantially *worse* with the railyard than without it, and that the vicinity included homes and schools.

In addition, the EIR did not estimate how frequently or for what length of time the level of particulate air pollution in the area surrounding the new railyard would exceed the EIR's standard of significance. Rejecting the port's argument that it would be impractical to run the air quality model for every year of the railyard's projected operation, the court found that selecting a reasonable number of benchmark

years for analysis might be acceptable, but that in this case, "the decision to perform only a single modeling run with a 50-year analysis range does not comply with CEQA."

The court also rejected one element of the EIR's analysis of cumulative air quality impacts, holding that the EIR did not adequately focus on the combined impacts of the proposed project and another large railyard expansion proposed by Union Pacific adjacent to the proposed project. The fact that independent CEQA analysis of the Union Pacific project had been delayed did not excuse the port from a focused, rather than general, discussion of two large railyard expansions proposed to be located next to one another.

The result in the *City of Long Beach* case is consistent with a long line of CEQA decisions, including the California Supreme Court's recent decision in *Sierra Club v. County of Fresno*, that have focused with particular intensity on claims that an EIR did not adequately describe the impacts of air pollution on the nearby community.

- Julie Jones

3. Court Rejects County Guidance Document's Recommended Significance Standards for GHG Emissions

Golden Door Properties v. County of San Diego
(2018) 27 CA 5th 892 (4th Dist.)

The court of appeal rejected San Diego County's 2016 "Guidance Document" for preparation of climate change analysis reports to be used in CEQA documents.

In ruling the county had violated CEQA by adopting the Guidance Document, the court first found that the "efficiency metric" defined in the Guidance Document was designed to establish a recognized and recommended threshold of significance for use in CEQA documents. The county contended that the Guidance Document merely suggested a methodology for evaluating GHG emissions. The court disagreed, however, pointing to the fact that the defined efficiency metric of 4.9 metric tons of CO2 per service population per year established a single, quantifiable volume of omissions—a level above which a project's GHG impact would be significant, and below which the impact would be less than significant. The court then ruled that because the Guidance Document established a threshold of significance for general use, under CEQA it was required to have been developed through a public review process and to be adopted by ordinance, resolution, rule, or regulation. But it was not.

The court also found that the EIR for the county's general plan update included mitigation measures that required the county to prepare a climate action plan and to revise its guidelines for determining significance of GHG emissions based on that plan. But no climate action plan was in place when the county published the Guidance Document, nor was it circulated for public review, as required by the county's CEQA guidelines.

Additionally, the court held that the efficiency metric in the Guidance Document was not supported by substantial evidence. The efficiency metric had relied on statewide standards, but there was no evidence showing why it would be sufficient for use by projects in San Diego County. The efficiency

metric also did not account for variations among different types of development or explain why it would be appropriate to apply it evenly despite project differences.

- Anne Beaumont

4. EIR for Revisions to Housing Element Properly Used Future Population Projections as the Baseline

***San Franciscans for Livable Neighborhoods v. City and County of San Francisco* (2018) 26 Cal. App. 5th 596 (1st Dist.)**

The court ruled the city did not err by certifying an EIR for revisions to its housing element that relied in part on 2025 population projections as a baseline. While the environmental baseline in an EIR should normally reflect existing conditions, use of a future-conditions baseline is permissible where an existing-conditions baseline would be misleading or without informational value.

After certifying an EIR, defendant City and County of San Francisco adopted a 2009 update to its general plan housing element. San Franciscans for Livable Neighborhoods challenged the adequacy of that EIR on several grounds, including that it improperly relied on population projections, rather than existing conditions, as an environmental baseline for its traffic and water supply impacts analysis. SFLN argued that the EIR's use of 2025 population projections by the Association of Bay Area Governments improperly inflated the baseline in an "analytical sleight of hand."

The court sided with the city, finding that a comparison of existing conditions with and without the housing element was not required. The city had not declined to consider the impacts of the housing element by suggesting that regional population growth was inevitable, as SFLN claimed. Rather, the EIR had discussed projected growth at length, and analyzed traffic and water supply impacts based on those projections.

The court viewed the housing element as a "growth-accommodating rather than growth-inducing" policy. The housing element update was thus distinguishable from other projects where approval would clearly lead to population growth in a previously undeveloped area. The court concluded that "when an amendment to a general plan takes a long view of city planning, the analysis of the amendment's impacts should do so as well."

The lengthy opinion also rejected SFLN's numerous other challenges to the EIR concerning the EIR's impacts analysis for traffic and water supply, the EIR's baseline and impacts analysis for land use and visual resources, the city's decision not to recirculate the EIR, the EIR's alternatives analysis, and the feasibility of certain proposed mitigation measures.

- Christian Termyn

5. Court Rejects Challenge to Refinery EIR's Project Description, GHG Emissions Analysis and Hazards Assessment

Rodeo Citizens Association v. County of Contra Costa
(2018) 22 Cal. App. 5th 214 (1st Dist.)

The county certified an EIR and approved a land use permit for a propane recovery project at an existing oil refinery. The project would modify some existing equipment and add other equipment to allow the refinery to recover butane and propane as a byproduct of the refining process and to ship it by rail for commercial sale.

The trial court found the EIR's air impact analysis inadequate but rejected the petitioner's other claims. Unsatisfied with that result, the petitioner appealed, but the court of appeal also ruled against the petitioner on those claims.

The project description was accurate and adequate. The petitioner contested the EIR's project description, arguing that the project would involve more frequent processing of "nontraditional" crude feedstocks—such as imported tar sands and Bakken crudes—which would contain higher levels of propane and butane, together with higher levels of dangerous chemicals that would increase emissions of air pollution. The court, however, found no support for the claim, concluding the evidence showed that the project was proposed and designed as an adjunct to existing operations, not to change the types or amount of crude oil that can be processed at the refinery. The project would allow recovery of butane and propane produced by ongoing refinery operations, but it would not increase the amount of butane and propane that are produced and would not change any of the other process units at the refinery.

An analysis of downstream GHG emissions would require undue speculation. The petitioner further argued the EIR was deficient because it did not analyze greenhouse gas emissions from combustion of the propane and butane that would be sold to downstream users. The EIR explained, however, that propane and butane have many non-fuel uses that generate negligible greenhouse gas emissions and that they can also be used to replace fuels with higher emissions. Given the uncertainty regarding end uses, coupled with the highly changeable nature of the propane and butane market, any attempt to quantify downstream GHG emissions would be speculative, so a downstream emissions analysis was not required.

Public and environmental hazard impacts were adequately analyzed. The petitioner also challenged the EIR's findings that the project would not have a significant impact on the public or the environment from the handling and transportation of hazardous materials, including a claim that the EIR failed to analyze the project's contribution to the cumulative risk of rail-related accidents. The EIR concluded that because the project would add tank cars to existing trains, and not add new train trips, the cumulative risk of train accidents would not increase. The court found this explanation "not unreasonable." It also rejected the petitioner's other arguments regarding hazard impacts, finding that the EIR's exceptionally detailed risk analysis was plainly sufficient.

- Michelle Chan

6. Size Limit on Retail Tenants Not Likely to Cause Urban Decay

Visalia Retail, LP v. City of Visalia
(2018) 20 CA 5th 1 (5th Dist.)

The court of appeal ruled that a general plan policy that limited the size of retail tenants in certain areas of a city was not likely to cause urban decay and was not inconsistent with other general plan policies encouraging infill development.

The City of Visalia's general plan update included a policy that Neighborhood Commercial areas should be anchored by a grocery store and could not have individual tenants greater than 40,000 square feet. Visalia Retail, which owned property designated Neighborhood Commercial, filed a petition for a writ of mandate seeking to invalidate the city council's certification of the EIR and adoption of the general plan update. Visalia Retail argued that the EIR should have analyzed the potential for the tenant size cap to cause urban decay and that the general plan was internally inconsistent.

The petitioner had submitted a report from a real estate broker explaining that the tenant size cap policy would likely lead to vacancies, physical blight, and urban decay because, in his opinion, it was unlikely a grocery store anchor would be willing to lease a space that was smaller than 40,000 square feet. In support, the real estate broker stated in his report that (1) he was personally unaware of any grocers willing to build new stores under 40,000 square feet, (2) a typical grocery store for four grocery chains must be at least 50,000 square feet to be profitable, (3) stores sized 10,000–20,000 square feet that were launched by a large grocery chain had been unsuccessful, and (4) three grocery stores in Visalia under 40,000 square feet had closed.

While an EIR does not need to study economic and social changes resulting from a project, physical changes to the environment that are caused by a project's economic or social impacts are environmental effects that must be considered under CEQA. The court of appeal concluded that the real estate broker's report did not provide substantial evidence that the 40,000-square-foot limit would cause urban decay in the form of significant physical effects on the environment.

The court explained that the real estate broker's report did not support an argument that no grocers would be willing to build stores under 40,000 square feet. The court noted that the report's conclusion was based only on the real estate broker's personal knowledge, the typical store size for four grocery chains, and one chain's experience with stores under 20,000 square feet. The court also noted that the report indicated that some grocers in some circumstances had built stores under 40,000 square feet, which contradicted the real estate broker's conclusion that no grocers would build stores under 40,000 square feet. Moreover, the court noted that the report did not provide a reason why the three stores in Visalia under 40,000 square feet had closed. Finally, the court determined that the real estate broker's report did not demonstrate that any vacancies in Neighborhood Commercial areas as a result of the tenant size cap would be so rampant as to cause urban decay.

- Jacob Aronson

7. EIR for General Plan Update Adequately Addressed Reasonably Foreseeable Future Development

High Sierra Rural Alliance v. County of Plumas
(2018) 29 CA 5th 102 (3rd Dist.)

In 2013, Plumas County adopted a comprehensive update to its 1984 General Plan, relying on a "first-tier" programmatic environmental impact report. A key goal of the general plan update was to focus new population growth and housing within specific geographic "planning areas" to prevent "rural sprawl" and preserve natural resources. The EIR and plan update anticipated little population growth or development outside of the planning areas due to historical development patterns and the new general plan policies. Petitioner High Sierra Rural Alliance asserted that the EIR was deficient because it did not adequately assess the impacts of development outside of the designated planning areas. The court of appeal concluded, however, that the EIR adequately addressed reasonably foreseeable development within the county.

The policies in the plan update called for future development to be located adjacent to or within existing planning areas. Accordingly, the update and EIR forecasted little growth or development outside the identified planning areas in the foreseeable future. High Sierra claimed the EIR was deficient because it failed to address the potential for construction of multiple buildings on a single parcel without discretionary review and it did not adequately describe the impacts of allowing new clustered subdivision development in rural areas.

The EIR explained, however, that the assumption in both the update and the EIR that future growth would largely occur in county planning areas was based on a historic development patterns within the county. High Sierra contended the update would invite small subdivisions that would create "rural sprawl" outside of the designated planning areas. The court held, however, that it was not enough for High Sierra to argue that policies in the update might be interpreted to allow such development; it had to demonstrate the county erred in relying on the evidence indicating only limited growth would occur outside the planning areas in the reasonably foreseeable future. That evidence included population forecasts, historic land use data, and the development standards in the update itself. Indeed, population forecasts indicated the county's population was actually expected to decrease, and this reasonably foreseeable lack of demand for new housing supported the EIR's conclusions. Relying on the fundamental rule that an EIR is required to study only reasonably foreseeable consequences of a proposed project, and need not examine an unlikely worst-case scenario, the court held that the EIR was legally adequate.

- Rachael Rutkowski

D. SUPPLEMENTAL ENVIRONMENTAL REVIEW

1. EIR Addendum Process Upheld Against Facial Challenge

Save Our Heritage Organisation v. City of San Diego
(2018) 28 CA 5th 656 (4th Dist.)

The court rejected a facial challenge to the EIR addendum process and held that an agency is not required to make new findings in connection with approval of an EIR addendum.

Background

In 2012, the City of San Diego certified an EIR and approved a project to revitalize Balboa Park, a large urban park in the city. The project involved restricting vehicles from entering many of the central roadways and plazas, building a new road to bypass the car-free areas, and constructing an underground parking structure. Four years later, the city approved minor modifications to the project to account for changed conditions at the project site after the initial project approval, comply with current building and stormwater standards, accelerate the project construction schedule, and reduce project costs. The city adopted an addendum to the EIR, which concluded that a subsequent or supplemental EIR was not required.

Facial Challenge to Addendum Process Rejected

The petitioner claimed the addendum process described in the CEQA Guidelines conflicts with CEQA's public review requirements and is not expressly authorized by the statute. The court rejected both claims.

The court began its analysis by noting that the addendum guideline implements CEQA section 21166, which sets forth conditions under which project changes, changed circumstances, or new information requires the agency to prepare a subsequent EIR. The court explained: "the addendum process fills a gap in CEQA for projects with a previously certified EIR requiring revisions that do not warrant the preparation of subsequent EIRs. CEQA authorizes the Resources Agency to fill such gaps in the statutory scheme, so long as it does so in a manner consistent with the statute." The court determined that the addendum process is consistent with and furthers the objectives of CEQA "by requiring an agency to substantiate its reasons for determining why project revisions do not necessitate further environmental review."

The court also held that the absence of a public review process for addenda was not inconsistent with CEQA. Rather, it reflected the nature of an addendum as a document describing project revisions too insubstantial to require subsequent environmental review. Finally, the court noted that the Legislature's failure to modify CEQA to eliminate the addendum process in 35 years was a strong indication that it was consistent with legislative intent.

New Findings on Project's Significant Impacts Not Required

The petitioner also argued that the city was required to make new findings on the project's significant impacts when it approved the addendum. The court rejected this argument as well. The court held that

nothing in the statute or Guidelines required new findings when an agency approves changes to a project based on an addendum. The court explained that the purpose of findings is to address new significant effects, but an addendum is proper only where there are no new significant effects; thus, no purpose would be served by requiring new findings to address the same significant effects that had already been addressed when the project was first approved.

- Jacob Aronson

E. CERTIFIED REGULATORY PROGRAMS

1. Air Resources Board's Regulatory Relief for Small Truck Fleets Violated CEQA

John R. Lawson Rock & Oil, Inc. v. State Air Resources Board
(2018) 20 CA 5th 77 (5th Dist.)

A court of appeal has held that the California Air Resources Board violated CEQA when it issued a "regulatory advisory" notifying small trucking operations that they need not meet ARB's regulatory deadline for retrofitting their truck engines and that the regulation would soon be relaxed. The court rejected ARB's argument that it did not need to prepare the equivalent of an environmental impact report before issuing the regulatory advisory.

In 2008, ARB adopted its Truck and Bus Regulation, requiring retrofits or upgrades to large diesel vehicles so that their air pollutant emissions would not exceed those of model year 2010 or newer trucks. January 1, 2014, was to be the deadline for small fleets to bring at least one of their trucks into compliance. By October 2013, the vast majority of the 260,000 California-registered trucks were in compliance; of those that still needed retrofits, most were in small fleets.

In November 2013, ARB decided to ease the rules applicable to small fleets, issuing a "regulatory advisory" that it would take no enforcement action against noncompliant truck operators before July 1, 2014, and that operators could rely on five regulatory changes ARB planned to adopt in 2014 that would make the Truck and Bus Regulation more lenient.

In 2014, ARB approved the revised regulations without preparing an EIR-equivalent CEQA document under its certified regulatory program. ARB reasoned: "The amendments only change the mid-term timing of clean-up of the truck fleet and, therefore, do not result in any increase in emissions compared to existing environmental conditions." A truck operator that had complied with the regulation on time sued, alleging ARB had violated CEQA and the Administrative Procedures Act.

Citing the California Supreme Court's decision in *Save Tara v. City of West Hollywood*, the court held that ARB violated CEQA when it approved the regulatory advisory in 2013, because it had publicly announced that the regulation would be changed and that its existing terms would not be enforced. In so doing, ARB significantly furthered its proposed 2014 regulatory changes in a manner that foreclosed alternatives or mitigation measures, including the alternative of not going forward with the project. Accordingly, CEQA compliance was required at that point.

The court ruled that that ARB was required to prepare the equivalent of an EIR for its relaxation of the Truck and Bus Regulation, based on the difference between future conditions with and without its proposed regulatory change. The court cited CEQA's requirement that a lead agency discuss any inconsistencies between the proposed project and applicable plans, including the State Implementation Plan for air pollutant reductions and the state's plans for reductions in greenhouse gas emissions. Because there was a fair argument that ARB's action would conflict with these plans, at least in the short- to medium-term, an EIR-equivalent document was required.

The decision in *Lawson* demonstrates both the difficulties that ARB faces in conforming its regulatory decision-making to the demands of CEQA and the heightened attention that courts pay to air quality and greenhouse gas impacts.

- Julie Jones

F. CEQA LITIGATION

1. Attorneys' Fees Can Be Awarded to CEQA Litigants Hoping to Preserve Their Home Values

Heron Bay Homeowners Association v. City of San Leandro
(2018) 19 CA 5th 376 (5th Dist.)

Successful petitioners under CEQA who are motivated to file suit, in part, by their private financial interests are not necessarily ineligible for an award of attorneys' fees under the public interest fee statute.

Halus Power Systems sought approval from the City of San Leandro for a zoning variance to construct a 100-foot-tall wind turbine on a five-acre industrial parcel. The property is located in the San Francisco Bay Estuary, where many species of waterfowl and shorebirds, including four threatened or endangered species, reside. The property is also roughly 500 feet from the 629-unit Heron Bay residential development. The city approved the construction of the turbine based on a mitigated negative declaration, finding that the significant environmental effects of the project could be reduced to insignificance through 11 mitigation measures.

The Heron Bay Homeowners Association filed suit under CEQA, asserting that the city needed to prepare an EIR for the project. The trial court rejected the mitigated negative declaration, finding a fair argument that the project as mitigated would still have a significant effect on biological and aesthetic resources and noise. It entered judgment in favor of the HOA and directed the city to set aside its approvals and halt any further action on the project until an EIR was certified. Halus Power and the city did not appeal the decision, and Halus Power ultimately abandoned the project.

Heron Bay HOA then requested an award of attorneys' fees under California Code of Civil Procedure section 1021.5, which authorizes an award of attorneys' fees to the prevailing party in a case that enforces an important right affecting the public interest. The trial court awarded the HOA only part of the fees it sought, finding that the HOA "had a significant financial incentive to initiate the litigation." The court found that the HOA members had brought the suit in part because they feared the turbine would

cause their property values to decrease. But it also found that they were also motivated by "non-pecuniary" concerns for the project's impact on wildlife, aesthetics, health, and noise levels. As a result, the court apportioned financial responsibility for their attorneys' fees during the administrative proceedings entirely to the HOA, but because of the "different risks and much larger financial commitment" of CEQA litigation, it divided equally the responsibility for the fees the HOA incurred for the litigation between the HOA on one side, and the city and Halus Power on the other.

Halus Power and the city appealed the award of attorneys' fees, arguing that a fee award was not appropriate because the value of the benefit to the members of the HOA (i.e., maintenance of their property values) far exceeded the financial burden of litigation.

The court of appeal disagreed. It found that any financial benefit to the homeowners was speculative since the litigation was not certain to prevent construction of the turbine or even change the project, and preservation of property values was not immediately or certainly "bankable." And while the exact amount of personal benefit to the HOA members was uncertain, the fees could nevertheless be apportioned because the record supported an implied finding that the HOA's motivation to litigate was not purely financial self-interest. Thus, the court of appeal ruled, the trial court's apportionment and partial award of attorneys' fees was not an abuse of discretion.

The court of appeal affirmed the trial court's award to the Heron Bay HOA of a little over $181,000 in attorneys' fees for the CEQA litigation, which was less than half the amount that the HOA had requested. The court also awarded the HOA its attorneys' fees for successfully defending the appeal.

This decision exemplifies the rule that trial courts have considerable discretion in awarding and apportioning attorneys' fees under section 1021.5 based on the particular facts of each case. More importantly, it makes it crystal clear that CEQA plaintiffs that might avoid a decrease in their property values by successfully challenging a project are not cut off from recovering attorneys' fees under section 1021.5.

- Lindsey Quock

2. An Agency Can Take Over Preparation of the Record When a Petitioner that Elects to Prepare the Record Unreasonably Delays Preparing It

Landwatch San Luis Obispo County v. Cambria Community Services District
(2018) 25 CA 5th 638 (2nd Dist.)

In a case brought under CEQA to challenge an agency determination or other action, the petitioner may elect to prepare the administrative record, subject to the agency's certification of its accuracy. The petitioner here filed an action challenging an exemption determination by the community services district for an emergency water supply project and notified the district it would prepare the record.

It took the petitioner nine months to provide the district with a draft administrative record index. The district notified the petitioner that a key document had been omitted and other documents should have been excluded because they postdated the approval. The district also notified the petitioner that in

order to expedite the process, it had prepared a new index and would immediately certify the record based on that index.

Subsequently, at the petitioner's request, the court ordered that the record be augmented with additional documents and included in an appendix to the administrative record that the district had certified. After the petitioner failed to assemble the appendix, the district prepared the appendix itself.

Ultimately, the trial court denied the petition, finding that the district had properly determined the project was exempt from CEQA. The court awarded the district $21,160 in costs for preparation of the record and the supplemental appendix.

On appeal, the petitioner objected that the cost award was improper because it had elected to prepare the record. Noting CEQA's 60-day time limit for preparation of the record, the court of appeal ruled that the petitioner had unreasonably delayed preparation of the record. As a result, the petitioner had forfeited its right to prepare the record, and it was appropriate for the district to step in and prepare the record itself.

3. City Approval of Agreement for Tree Removal Triggered 90-Day Statute of Limitations Under Planning and Zoning Law

Save Lafayette Trees v. City of Lafayette
(2018) 28 CA 5th 622 (1st Dist.)

Broadly construing Government Code section 65009, which establishes a 90-day limitations period for claims under the Planning and Zoning Law, an appellate court held that approval of an agreement allowing removal of trees constituted a "decision regarding a permit," triggering the 90-day filing deadline.

The City of Lafayette entered into an agreement with PG&E allowing removal of approximately 270 trees within a natural gas pipeline right-of-way. Petitioners sued, contending that the agreement had been approved in violation of the Planning and Zoning Law and CEQA. The trial court dismissed the complaint on the ground that it had not been filed and served within the 90-day limitations period under section 65009.

Government Code section 65009 provides that an action challenging "any decision" regarding "permits, when the zoning ordinance provides therefor" must be filed and served within 90 days of the decision. On appeal, petitioners argued that section 65009 was inapplicable because the city entered into an agreement allowing tree removal and did not issue any permits. The appellate court disagreed, finding "no meaningful difference between the two in this instance." It noted that the staff report to the City Council regarding the agreement expressly referred to the project as a "major tree removal project" that required a permit under the municipal code. Approval of the agreement allowing removal of the trees, the court said, was properly considered to be a decision regarding a permit subject to section 65009.

Petitioners also argued that their action was subject to a longer, 180-day statute of limitations in the City's municipal code governing challenges to decisions of the City Council. The court concluded that this provision was preempted by section 65009 because it expressly conflicted with the statute's 90-day

period. In dicta, the court noted that most local statutes of limitations regarding challenges to planning and Planning and Zoning Law decisions had likely been preempted by the enactment of section 65009.

The court also found, however, that petitioners' CEQA challenge was subject to the 180-day limitations period under the Public Resources Code, not the 90-day period under section 65009. Concluding that the two statutes could not be reconciled because they established different deadlines, the court held that the CEQA limitations period, as the more specific, controlled.

Note: On November 26, the court of appeal granted a request for rehearing filed by PG&E.

- Geoffrey Robinson

4. A Decision that Resolves All Claims Alleged in a Petition on the Merits Is an Appealable Final Judgment Even Though It Is Not Labeled as a Judgment

Alliance of Concerned Citizens Organized for Responsible Development v. City of San Juan Bautista
(2018) 29 Cal. App. 5th 424 (6th Dist.)

Plaintiff filed a petition for a writ of mandate challenging the city's approval of a mitigated negative declaration for a gas station, convenience store, and quick-serve restaurant. After hearing the case, the trial court issued a decision labeled "Peremptory Writ of Mandate of Interlocutory Remand for Reconsideration of Potential Noise Impacts." That decision required the city to set aside its approvals, and reconsider the significance of the project's potential noise impacts, before taking further action on the project. The plaintiff did not appeal from that decision.

In response, the city set aside its prior approvals, conducted a new noise analysis, adopted a new MND, and reapproved the project. The city then filed a return with the court describing the steps it had taken to comply with the peremptory writ of mandate. The court found the city had complied, and issued a decision labeled as "Final Judgment on Petition for Writ of Mandamus." The petitioner then filed an appeal from that decision.

The court of appeal found that the trial court's initial decision disposed of all issues raised in the petition, and the substance and effect of that decision was that it was a final judgment for purposes of appeal. Even though that decision contained language stating it was not to be construed as the final judgment, its self-description was not determinative. A decision or order that does not leave any issues for further consideration except for whether its terms have been complied with is an appealable final judgment, regardless of the label that is applied to it.

Because the court's initial decision was an appealable final judgment, the plaintiff forfeited appellate review of the trial court's determinations by failing to file a timely appeal. Therefore, the court concluded that the plaintiff's appeal from the court's subsequent decision that the city had complied with the trial court's peremptory writ of mandate was limited to the question whether the trial court had erred in finding that the city had complied.

In an unpublished portion of the opinion, the court of appeal found that the plaintiff failed to satisfy its burden to prove that the new MND the city adopted failed to comply with CEQA.

- Rachael Rutkowski

5. CEQA Challenge to Development Proposal Barred by Doctrine of Res Judicata

Inland Oversight Committee v. City of San Bernardino
(2018) 27 CA 5th 771 (4th Dist.)

Plaintiffs were barred from relitigating a CEQA challenge to modifications to a development proposal because the same claims had been raised and rejected in an earlier lawsuit.

The Development Proposal and Prior Litigation

In 1982, the City of San Bernardino approved a specific plan and certified an environmental impact report for a proposed residential development. Three years later, the city amended the specific plan to allow for the construction of low- and moderate-income multi-family units where single-family units had been originally planned. The Highland Hills Homeowners Association filed suit challenging that change.

The HOA lawsuit resulted in a settlement agreement that, for over a decade, continued to evolve as development plans changed. A 2001 second addendum to the settlement (court-approved as a stipulated judgment) introduced a new application process to facilitate approval of future "minor modifications" to the project.

In 2014, the developer applied for approval of modified construction plans as minor modifications. The city's development director agreed that the changes were minor and approved them. At the request of the developer and the city, the trial court that had overseen the settlement agreement agreed that the proposed modifications were "minor" and therefore further action under CEQA was not required. The HOA appealed, and the court of appeal upheld the trial court order.

Plaintiffs Barred from Relitigating CEQA Claims

While the appeal of the HOA lawsuit was pending, the HOA, along with two other organizations, filed a separate suit alleging that the city's approval of the proposed changes under the minor modifications process was "illegal." They claimed that changes to the construction plans required further CEQA review in light of their environmental impacts. They also alleged that the modifications should not have been approved without preparation of a water supply assessment. The trial court dismissed the suit, and the appeals court upheld the dismissal.

The court explained that, in the CEQA context, "if two actions involve the 'same general subject matter,' but 'involve distinct episodes of purported noncompliance,' the doctrine of res judicata does not apply." The HOA's contention that the city violated CEQA by approving the development as a minor modification had, however, been addressed in the earlier lawsuit. The court there had rejected the

HOA's arguments regarding each of the purported significant adverse environmental impacts that were alleged.

The court also held that the plaintiffs' allegation that preparation of a water supply assessment was required for the modified development proposal rested on the premise that the modifications constitute a discretionary project requiring further CEQA review. The court in the first case had, however, determined that supplemental CEQA review was not required for the modification, and plaintiffs were barred from relitigating that finding.

- Christian Termyn