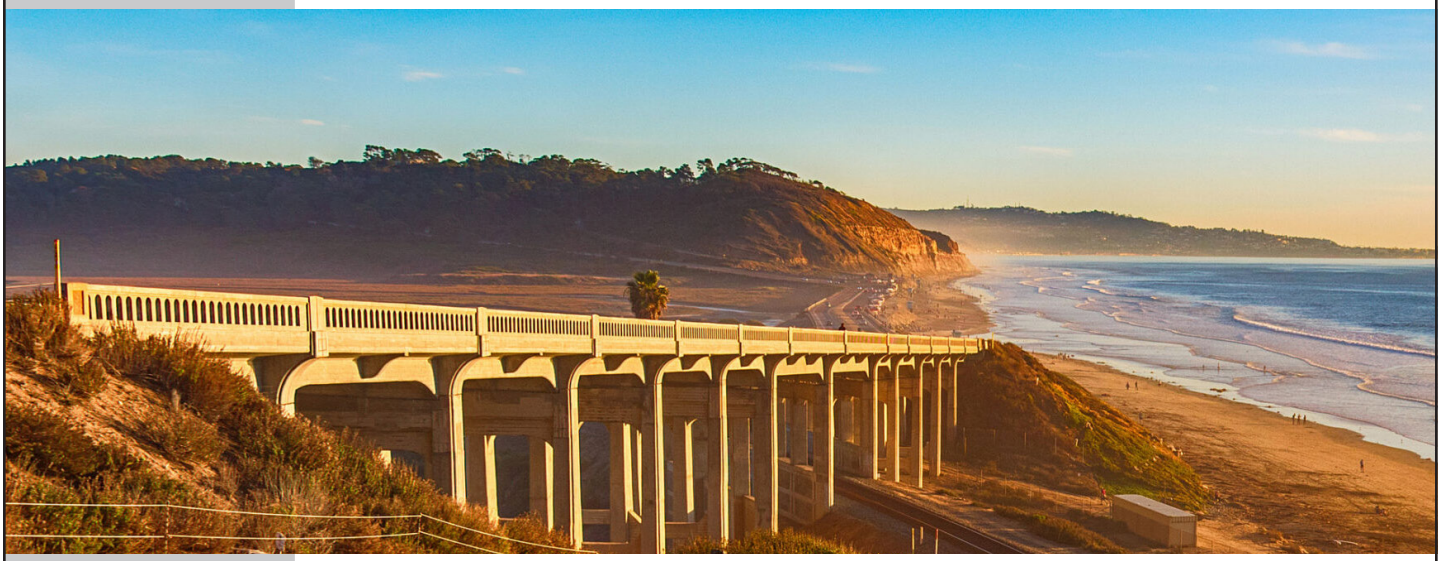
Downey Brand Compilation of Published CEQA Cases in 2023



The summary of 2023 CEQA cases are drawn from articles at Downey Brand's CEQA Chronicles

Compiled and edited by Arley Titzler, Dustin Peterson, and Tina Thomas

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Downey Brand Compilation of Published CEQA Cases in 2023

2023 served up roughly the same number of published appellate CEQA cases as 2022 with a defense win percentage of over 80 percent, which has been the case in many, if not all, of the past ten years. A prominent theme of upholding exemptions emerged, in particular the infill exemption and the commonsense exemption which are reviewed with the application of the substantial evidence standard of review. The cases also demonstrate that agencies often rely on multiple exemptions as a "belt and suspenders" defense tactic. The courts sanctioned the use of exemptions, striking down only one infill exemption citing a lack of evidence to support the agency's conclusions in that instance and underscoring the necessity of preparing detailed findings and citing to supportive evidence when using an exemption. (*United Neighborhoods for Los Angeles v. City of Los Angeles* (2023) 93 Cal.App.5th 1074.)

In two of the more interesting cases of the year, the courts lashed back at petitioners (and their attorneys) who abused the CEQA process. In *Jenkins et al. v. Brandt-Hawley et al.* (2022) 86 Cal.App.5th 1357, the court permitted a complaint for malicious prosecution to proceed against an attorney who had unsuccessfully challenged approval of a single-family dwelling under CEQA, finding that the attorney had misled the court by citing to incorrect and misleading citations to the administrative record and misciting, in fact not citing, the actual text of the Municipal Code. These infractions were sufficient for the court to conclude that plaintiffs, the former project applicants, were likely to prevail on a malicious prosecution claim. More specifically the court held that the plaintiffs were likely to prevail on the malice prong because the action was brought for an improper purpose. Similarly, in *Save Livermore Downtown v. City of Livermore* (2022) 87 Cal.App.5th 1116, the court not only upheld the city's determination that a residential housing project was exempt from further environmental review under the specific plan exemption, but also upheld the trial court's issuance of an order requiring that petitioners post a $500,000.00 bond as security for costs the defendants might incur a result of delay in carrying out the affordable housing project. Both of these cases are an indication that the courts are watching CEQA litigation closely and punishing petitioners with improper motives and those that harm or delay the production of affordable housing.

The EIR cases are interesting in multiple respects First, in the *Make UC A Good Neighbor v. Regents of University of California* (2023) 88 Cal.App.5th 656, the California Supreme Court granted the University of California's Petition for Review, agreeing to consider two important issues regarding "community noise" and alternatives analyses. In a rare move, Governor Gavin Newsom joined in that request for the Supreme Court to grant the Petition citing the need for CEQA change. I am looking forward to that oral argument at the Supreme Court and to any CEQA changes the Governor or the Legislature might propose. The results of the Little Hoover Commission Study will also provide insights into that Commission's year-long survey of the debate surrounding CEQA.

Another interesting case in the EIR section of this compilation is the Save *Our Capitol! v. Department of General Services* (2023) 87 Cal.App.5th 655. In this case, the court bent over backwards to rule in the petitioners favor and the dissent, in the opinion of the authors, provides a more reasoned explanation of the project description obligations under CEQA. In *Save Our Capitol* the court required the agency to prepare visual renderings, even though CEQA is silent

with regard to that obligation. The court's interpretation seems to rest on the conclusion that the Capitol is a "treasured historical resource," a term found nowhere in the statute or the Guidelines. Both agencies and applicants need to know precisely what their obligations are under CEQA and the CEQA Guidelines. If an obligation is not clearly set forth in the statute or Guidelines, agencies and applicants should not be held to a judicially interpreted "higher standard." Is the neighboring Senator Hotel or Sutter's Fort or the Sutter Club, for that matter, a "treasured historical resources" requiring a more detailed project description than that set forth in the statute? Unfortunately, the case law remains somewhat muddied.

In that same case, the respondents petitioned the court for a rehearing with regard to the remedy section of CEQA, section 21168.9. The court recognized the flexibility of the statute and allowed for partial decertification of the EIR and for demolition of the annex to continue. Remedies has been a hot topic in recent years and the recognition that the statute mandates flexibility is welcomed. (See also *McCann v. City of San Diego* (2023) 94 Cal.App.5th 284 (*McCann II*).)

Although not specifically mentioned in the Guidelines, wind impacts, and mitigation for these impacts in particular, were discussed at length in two published opinions in 2023: *East Oakland Stadium Alliance v. City of Oakland* (2023) 89 Cal.App.5th 1226 and *Yerba Buena Neighborhood Consortium, LLC v. Regents of the University of California* (2023) 95 Cal.App.5th 779. In *East Oakland Stadium Alliance*, which had to do with the city's approval of a proposed stadium project for the Oakland A's baseball team, the court determined that the wind mitigation in place to address the stadium's adverse wind impact lacked specificity. Though the city won on all other claims, the EIR's lack of specific performance standards and promise to "work with wind consultant" to mitigate these impacts shelved the city's approval of the project. Notably, the same appellate district in *Yerba Buena Neighborhood Consortium*, found that similar mitigation for wind impacts in that case were adequate, as those measures set specific wind hazard criteria and contained reasonably clear and objective boundaries regarding what types of actions would or would not be considered.

Finally it looks like the Third Appellate District may have finally resolved the confusion surrounding environmental review of greenhouse gas analyses since *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204 and *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467. In *Tsakopolulos Investments, LLC v. County of Sacramento* (2023) 95 Cal.App.5th 280, the court provided a detailed overview of the statutes and case law governing greenhouse gases and concluded that the County of Sacramento's threshold properly took into account countywide data when establishing significance thresholds by sector.

This compilation is a useful tool for understanding certain CEQA provisions interpreted by the courts last year. This introduction should be interpreted as the opinion of this author and not that of Downey Brand LLP or its clients.

Tina Thomas

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Exemptions

IBC Business Owners for Sensible Development v. City of Irvine **(2023) 88 Cal.App.5th 100**

The Irvine Business Complex, (IBC) was originally developed in the 1970s as a regional economic and employment base with mainly office, industrial, and warehouse uses. In 2010, the City amended its General Plan and adopted the IBC Vision Plan and Mixed Used Overlay Zoning Code (Vision Plan) to create a mixed-use community with urban neighborhoods in the IBC. The Vision Plan capped the total development within IBC at full buildout (post-2030). To stay within this cap, each parcel in the IBC was assigned a development budget. The Vision Plan allowed the City to approve transfer of development rights (TDRs) from one parcel to another within the IBC upon finding that the project would not result in adverse effects to the City's infrastructure and services and will not cause "adverse impact on the surrounding [traffic] circulation system."

The City also prepared the programmatic environmental impact report (PEIR) concurrently with the Vision Plan in 2010 to study the environmental effects of the Vision Plan's buildout post-2030. The PEIR's environmental analysis made several land use assumptions for development within the IBC, including assuming certain sites to be redeveloped and others not to be further redeveloped. The PEIR envisioned that as long as the future site-specific development within IBC would not result in new environmental effects or require additional mitigation measures than those identified in the PEIR, no additional environmental review would be required for the project. However, the PEIR acknowledged that a future project inconsistent with the PEIR assumptions would potentially require additional environmental review.

In 2019, Gemdale 2400 Barranca Holdings, LLC (Gemdale) proposed a project to replace an existing two story, 69,780-squre foot (sf) building with a 275,000-sf office complex, consisting of five- and six-story office buildings and a seven-story parking structure (Project). In order to approve the Project, the City considered and ultimately approved a TDR twice the size of any other previously approved TDR in the history of the Vision Plan.

Initially, City staff thought that the Project may be exempt from CEQA under the infill exemption, but later they decided to prepare an addendum to the PEIR (Addendum). The Addendum concluded that no further environmental review was required because all the Project's significant environmental impacts were within the scope of the PEIR and would be avoided or mitigated pursuant to mitigation measures adopted for the Vision Plan. The City also prepared a Traffic Impact Analysis (TIA) for the Project analyzing the study area intersections and roadways, and found that the Project would not have "adverse impact on the surrounding circulation system" with the inclusion of project design features (PDFs).

The City approved the Project and the petitioners filed suit. The trial court issued a writ setting aside the Project approval. The City and Gemdale appealed, and the Court of Appeal affirmed the lower court.

The Court held that the City's finding that the Project's environmental impacts were within the scope of the prior PEIR was not supported by substantial evidence for purposes of GHG impacts, but the Court upheld the City's findings regarding traffic impacts.

For traffic impacts, the petitioner argued that the Project's TIA was inadequate because the TIA relied on the level of service methodology and failed to perform a mandatory vehicle miles traveled (VMT) analysis, as required under CEQA Guidelines section 15064.3. The Court found that the Guidelines did not apply to the Addendum because the VMT requirement applied only prospectively "to steps in the CEQA process not yet undertaken" by July 1, 2020. While the City did not approve the Addendum until July 14, 2020, the Project's addendum process started in 2019, well before the effective date of Guidelines section 15064.3.

Regarding GHG emissions, the Addendum concluded that because the Project would incorporate all the PDFs and mitigation measures from the PEIR, not change the overall development intensity within IBC, and comply with the South Coast Air Quality Management District thresholds, the Project would comply with the PEIR's significance threshold of "net zero" GHG emissions. The Court found that substantial evidence in the record did not support the City's finding that mere transfer of development intensity from one site in IBC to another would not result in a substantial increase in GHG emissions. The Court noted that the Addendum failed to even quantify the GHG emissions for the Project. Additionally, the Court pointed out that the City had prepared a draft GHG emissions analysis of the Project, which was not ultimately included in the Addendum, finding that the Project could have significant GHG impacts that could not be mitigated to less-than-significant levels.

The Court also rejected the City's alternative argument that the Project was an infill project and categorically exempt from CEQA. The Court held that the exemption did not apply because there is a reasonable possibility that the Project will have a significant environmental impact due to unusual circumstances.

Because the City failed to make any express findings regarding the unusual circumstances exception to categorical exemptions, the Court was constrained in affirming the City's implied findings that no exceptions applied. Relying on *Respect Life South San Francisco v. City of South San Francisco* (2017) 15 Cal.App.5th 449, the court explained that in order to affirm the City's implied findings for exemption for the Project, it "must assume that the [City] found that the [P]roject involved unusual circumstances and then conclude that the record contains no substantial evidence to support either (1) a finding that any unusual circumstances exist. . . [,] or (2) a fair argument of a reasonable possibility that any purported unusual circumstances identified by the petitioner will have a significant effect on the environment . . . ." The Court could not affirm under either of those findings.

First, the Court found that the record demonstrated that unusual circumstances existed because the Project is much larger than neighborhood development and significantly increases the

development intensity budgeted for the Project site that was allocated in the Vision Plan. In fact, the TDR for the Project would be the largest of the 29 approved TDRs in the history of the Vision Plan. Thus, due to the size and the scale of the Project and magnitude of the requested TDR, the Court found sufficient evidence to support a finding of unusual circumstances. Second, the Court found that the record showed that there was a reasonable possibility of the Project's significant environmental impacts because the Project could have potentially significant GHG impacts that could not be mitigated below the level of significance. The City and Gemdale failed to point to any evidence in the record that clearly refuted the contradictory record evidence and demonstrated that the Project is consistent with the PEIR's goal of net zero GHG emissions. Thus, the Court found that the unusual circumstances exception precluded application of the infill exemption.

Click here for Downey Brand's full analysis of this opinion.

***Arcadians for Environmental Preservation v. City of Arcadia* (2023) 88 Cal.App.5th 418**

Beginning in 2018, Julie Wu (Wu) sought approval to expand her single-family home. In response to an initial denial from the applicable architectural review board. Following two denials and project revisions, Wu appealed the denial to the City of Arcadia (City) Planning Commission. City staff recommended that the expansion be approved and that it was exempt from CEQA under the Class 1 categorical exemption as an addition to an existing facility. Community members spoke both in favor and against the project, including Wu's neighbor, who expressed privacy concerns. The Planning Commission voted to approve the project, relying on the CEQA exemption. The neighbor administratively appealed to the City Council but the appeal was denied.

The neighbor then formed Arcadians for Environmental Protection (AEP) and filed a lawsuit challenging the approval under CEQA and Planning and Zoning Law. Specifically, AEP argued under CEQA that the exemption did not apply and that City failed to consider whether any exception to the exemption existed. The trial court denied the petition, finding that AEP had failed to exhaust administrative remedies by not raising its arguments at the administrative level, and rejected the contentions on the merits as well. AEP timely appealed, though abandoned its Planning and Zoning Law claim on appeal.

The Court of Appeal first considered exhaustion of administrative remedies. Under Public Resources Code section 21177, alleged grounds for noncompliance with CEQA must be presented to the approving agency as a prerequisite to filing a lawsuit. Here, AEP argued that the neighbor's comments to the City made reference to CEQA and potential environmental impacts, satisfying the requirement. However, the Court found the general references insufficient to satisfy issue exhaustion. While the neighbor had argued that an EIR was required, this alone failed to provide adequate notice of the neighbor's complaint as the objection had not identified why the exemption's requirements might not be satisfied.

AEP also argued that the exhaustion requirement was excused because the notice of the hearing describing the basis for application of the exemption contained minor inconsistencies with the

subsequent notice of exemption. But the Court found these to be inconsequential, as no member of AEP addressed application of the exemption in any way.

The Court also upheld denial of the petition on the merits. AEP argued that the record lacked evidence that the City considered whether any exception foreclosed application of the categorical exemption. However, the Court recognized that an agency's finding that a categorical exemption applies necessarily implies that the agency has also concluded that no exception applies. AEP also argued affirmatively that the cumulative effects exception applied because the expansion, when considered with other projects in the area, could cause significant, cumulative impacts. However, the Court found that AEP had not carried its burden to produce evidence to support its argument. The neighbor's administrative references to other projects in the area, which did not contain evidence of impacts created by the projects, were insufficient. As such, the Court upheld denial of the petition in full.

The facts here closely mirror those of another recent case, in which petitioners challenged a single-family home project under CEQA despite the applicable CEQA exemption and also failed to exhaust administrative remedies. (See *Jenkins v. Brandt-Hawley* (2022) 86 Cal.App.5th 1357.) As described in our summary of that case (see below), the attorney who represented those petitioners is now facing a malicious prosecution action arguing that the suit was frivolous, which the First District ruled has a reasonable probability of succeeding.

Click here for Downey Brand's full analysis of this opinion.

***Robinson v. Superior Court of Kern County* (2023) 88 Cal.App.5th 1144**

In 2022, Southern California Edison (SCE), an investor-owned public utility, filed a complaint in eminent domain to condemn an easement across a landowner's property for the purpose of accessing and maintaining existing power transmission lines, and filed a motion for prejudgment possession of the property. The trial court granted SCE's motion, and the property owners filed a petition for writ of mandate challenging the order of prejudgment possession with the Court of Appeal asserting, among other things, that SCE was not entitled to take the property because they had not complied with CEQA.

In the writ proceeding, the Court noted that CEQA applies only to "discretionary projects proposed to be carried out or approved by public agencies," and that CEQA's definition of public agency did not include investor-owned public utilities such as SCE. While the Court acknowledged that some scenarios would require SCE to obtain California Public Utilities Commission (CPUC) approval and comply with CEQA, the circumstances in this instance allowed for SCE to condemn the property without CPUC approval. The Court concluded that its literal interpretation of public agency would not produce the "absurd" result of allowing a privately owned utility to exercise the power of eminent domain without any regard to environmental effects because the statutory conditions for exercising the power required the court to evaluate whether the planned action is compatible with the greatest public good while, at the same time, creating the least private injury to a property owner.

Click here for Downey Brand's full analysis of this opinion.

Pacific Palisades Residents Assn., Inc. v. City of Los Angeles **(2023) 88 Cal.App.5th 1338**

The proposed project is a four-story eldercare facility with 82 residential rooms and various commercial uses in a 64,646 square foot building (Project), located on a vacant one-acre lot in an area of the Pacific Palisades within the Coastal Zone. In 2017, the developer applied to the City of Los Angeles (City) planning department for permission to build the Project, which included an application for a Coastal Development Permit (CDP). Following multiple layers of review and administrative appeals, the City approved the Project, issued the CDP, and found the project fell within the Class 32 exemption. The California Coastal Commission (CCC) also weighed in on appeal, finding no substantial issue in connection with the City's issuance of the CDP. Pacific Palisades Residents Association (Association) filed suit against the City and the CCC, alleging a wide variety of violations of CEQA and the Coastal Act. The trial court denied the Association's writ petition in 2020, and the Association appealed. On appeal, the Association made a number of unsuccessful arguments, which are not discussed further in this summary, regarding the proposed building's consistency the City's planning documents, aesthetic consistency, and the CCC's decision.

The Association also alleged that the City erred in granting the project an infill development CEQA exemption, which applies when: 1) the project is consistent with the applicable general plan designation and all applicable general plan policies, in additional to applicable zoning designation and regulation; 2) the project is within city limits on a site no more than five acres substantially surrounded by urban uses; 3) the site has no value as habitat for endangered, rare, or threatened species; 4) project approval would not result in any significant effects related to traffic, noise, air quality, or water quality; and 5) the site can be adequately served by all required utilities and public services.

The Association argued that the project "will be architecturally incompatible with the neighborhood, and the project will spoil the view." Applying the deferential substantial evidence standard, the Court rejected these arguments in turn, finding that the City's decision to approve the project, and findings in support of that approval, were "eminently reasonable."

On the issue of compatibility with the neighborhood and impacts on views, the Court found that the Association was effectively arguing for "architectural uniformity," which was not required, and upheld the City's finding that the architectural character of the proposed project was compatible with the urbanized area and the community plan for Brentwood and the Pacific Palisades.

Click here for Downey Brand's full analysis of this opinion.

Coalition for Historical Integrity v. City of San Buenaventura **(2023) 92 Cal.App.5th 430**

In 1936, a concrete statue of Junipero Serra was erected in front of what is now San Buenaventura City Hall; the City of San Buenaventura (City) later adopted a resolution declaring the statue to be a historic landmark. In 1983, however, the statue, which was starting to fall apart, was replaced with a bronze replica. It was then placed on a list of landmarks in the City in 2002. When the City's General Plan was updated in 2005, the environmental impact report included the statue on a list of landmarks and the General Plan marked the location of the statue as a

historical site. In 2007, Historic Resources Group (HRG) conducted a survey that affirmed the status of the statue as a landmark.

In 2020, public attitude toward the statue began to shift. Protests and vandalism at the statue resulted in a letter signed by the mayor and other representatives of the community calling for relocation of the statue. The City again hired HRG to conduct an analysis of the statue, however, this time HRG concluded that the bronze statue did not meet the criteria for a historic landmark because it was not at least 40 years old. Based on the report, the City's Historic Preservation Committee voted that the replica statue was not eligible for landmark status.

The city council adopted this finding and also determined that relocating the statue was exempt from CEQA under the common sense exemption. The common sense exemption applies when there is no possibility that the activity in question may have a significant effect on the environment. In July 2020 the Coalition for Historical Integrity (Coalition) petitioned the trial court for a writ of mandate and injunctive relief, which the trial court denied.

The Coalition first alleged that removal of the bronze replacement statue was an action that requires review under CEQA. Petitioner argued that the statue qualifies as presumptively historical and therefore falls under the definition of "environment" under CEQA, which includes "objects of historic or aesthetic significance." (Pub. Resources Code, § 21060.5.) CEQA includes a statutory presumption that historical resources listed in a local register are presumptively historically or culturally significant. But this presumption is rebuttable by a preponderance of the evidence.

The Court found that despite the presumption, the City's determination that the statue was not historically significant should be upheld because the City's finding was supported by substantial evidence. In determining that the 2020 HRG report was substantial evidence, the Court noted that municipal agencies can properly consider and base decisions on evidence that would not be admissible in court. Reliance on the report was therefore acceptable despite its lack of first-hand testimony or evidence that the author of the report was qualified as an expert. The Court also found that it was within the City's discretion to begin treating the original and replacement statues as separate entities, even though the City had originally treated both the original and replacement statue as one statue subject to historic preservation. The HRG report could therefore reasonably find that the replacement statue, which was less than 40 years old, was never historically significant. Because the replacement statue had no historical significance, the City properly applied the common sense exemption.

Click here for Downey Brand's full analysis of this opinion.

***Lucas v. City of Pomona* (2023) 92 Cal.App.5th 508**

In 2016, California voters passed the Control, Regulate and Tax Adult Use of Marijuana Act, which legalized activities relating to the distribution and sale of cannabis products. In response, the City of Pomona (City) established a formal application process for obtaining a license to operate a commercial cannabis business within the City. To designate locations where cannabis-related land uses would be permitted, the City passed an ordinance to establish a commercial

cannabis overlay district allowing certain types of proposed cannabis land uses in designated areas (Project).

The City had developed the General Plan Update (GPU) in 2013 and certified an EIR in 2014. The City prepared a "Determination of Similarity" (DOS) to evaluate whether the Project was consistent with existing land uses and density in the General Plan and would therefore qualify for a CEQA exemption. CEQA Guidelines section 15183 provides a statutory exemption for projects "consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified." The City determined that the cannabis uses described in the DOS were consistent with existing land uses designations in the GPU. The City also employed a third-party consultant to prepare "Findings of Consistency" that analyzed the environmental effects of the Project. Based on both the DOS determination and Findings of Consistency, the City concluded that the Project was consistent with the existing land uses and density in the GPU and would not have new or increased significant environmental effects beyond those identified in the 2014 GPU EIR, and therefore qualified for the exemption under section 15183.

Gregory Lucas filed a petition for writ of mandate alleging that section 15183 was incorrectly applied to the Project. The trial court denied Lucas's petition, finding that the City was entitled to rely on section 15183 and that the Project was consistent with the GPU.

Notably, the Court of Appeal declined to address several procedural issues raised by the City, including standing, mootness, and exhaustion, in order to proceed in evaluating the merits. As a preliminary matter, the Court concluded that the substantial evidence standard of review applies to an agency's decision that a statutory exemption applies to a project.

Lucas argued that section 15183 did not apply to the project because the project was not consistent with the 2014 GPU, as "there [we]re no density-related standards contained in the zoning applicable to the parcels to which the [cannabis overlay] relates, [and] there is no way for the Project to be deemed 'consistent.'" Lucas also noted that the word density was not included anywhere in the Findings of Consistency. Accordingly, he argued that the City lacked substantial evidence to support the finding that the project's density was consistent with the 2014 GPU.

But the Court found this approach to be too literal, noting that there was no requirement that the findings use specific language, and that land distribution and density were in fact discussed in the 2014 GPU EIR. Furthermore, the DOS and Findings of Consistency expressly provided that the proposed cannabis uses had similar characteristics and were not denser than the non-cannabis uses listed in the land use districts where the commercial cannabis uses would be located.

Lucas also argued that additional environmental review was necessary because the 2014 EIR did not directly discuss marijuana or cannabis. Once again, the Court found this reading to be overly literal. The Court upheld the determination in the DOS that the commercial cannabis land use categories were practically similar to existing land uses, and therefore would not generate more environmental impacts. The Court also confirmed that no Project-specific effects were created by creation of the overlay zone.

Finally, the Court rejected Lucas's assertion that the Project would have impacts on traffic, air quality, greenhouse gas emissions, land use, noise, and public services that were not addressed in the 2014 GPU EIR. In addressing each potential impact, the Court focused on the similarity between existing uses and those proposed by the Project. Because the Project would not alter the general land use patterns or development standards already in place, the Court concluded that these impacts would not be increased beyond what was considered in the 2014 GPU EIR. The Court likewise found that substantial evidence supported a determination that odors from cannabis operations would not be significant because the City's municipal code already addressed such issues through its provision regulating odor control devices. Consequently, the Court rejected the City's use of a categorical exemption.

Click here for Downey Brand's full analysis of this opinion.

United Neighborhoods for Los Angeles v. City of Los Angeles **(2023) 93 Cal.App.5th 1074**

Real party in interest and property owner, Whitley Apartments, proposed to demolish an apartment complex with 40 rent-stabilized units in the City of Los Angeles (City) and construct a 156-room hotel in its place (Project). The Los Angeles Department of City Planning (Department) reviewed the Project, approved the site plan review, and determined that a CEQA Class 32 in-fill exemption applied. The Department did not address the project's consistency with the Housing Element of the City's General Plan, only the Framework Element. United Neighborhoods for Los Angeles (Petitioner) unsuccessfully appealed the Project approval to both the Central Area Planning Commission and the Los Angeles City Council (City Council). Petitioner then sought a writ of mandate challenging the Project, claiming that the in-fill exemption did not apply because the Project was inconsistent with the Housing Element's policy regarding preservation of affordable housing.

The City argued that the Housing Element did not apply to the Project because it was a hotel, rather than housing, project. The City also argued that the City Council had made an "implied finding" that the Housing Element did not apply to the Project and that the trial court did not apply appropriate deference to the City's determination. The Court of Appeal rejected each argument in turn.

The Court rejected the City's arguments that (1) because the project did not propose housing, it did not implicate housing policy, and (2) rent-stabilized housing did not qualify as "affordable housing" as the term is used in the Housing Element. The Court found that the Housing Element policies and programs emphasized the importance of preservation of housing. A project that does not propose the production of new housing may nevertheless impact the preservation of housing. The Court found that the City should have considered whether the proposed Project was consistent with the Housing Element policies to preserve housing. The Court addressed the City's second argument that rent-stabilized housing was not "affordable housing" by finding that "affordable housing" was not a term of art in the General Plan and should therefore be given its ordinary meaning. The court found that rent stabilized units are a form of "affordable housing" because they prohibit landlords from raising rents under certain circumstances.

Finally, the Court acknowledged that, though its review of consistency findings was deferential, that standard did not relieve the City of its obligation to consider the Project's consistency with

Housing Element policies in the first instance. Generally, courts give agencies deference in balancing competing priorities in complex General Plan documents, but here "the issue was not '*how* the City exercised its discretion and balanced competing policies and concerns,' but '*whether* the City even considered the ... Housing Element and how those policies might be balanced against other General Plan policies.'" Although an agency need not make an express consistency finding, there must be some indication that the agency actually considered applicable policies.

Click here for Downey Brand's full analysis of this opinion.

California Construction and Industrial Materials Association v. County of Ventura **(2023) 97 Cal.App.5th 1**

Prior to its implementation of an ordinance creating overlay zones to protect wildlife mitigation corridors in rural parts of Ventura County (Project), the County of Ventura (County) had no standards or regulations governing wildlife movement corridors. Wildlife movement issues had previously been decided through a discretionary permitting process and environmental review. The Project involved a County ordinance creating two overlay zones covering approximately 163,000 acres of less developed areas to preserve corridors that allow wild animals to move freely throughout the zones. The ordinance also amended the County's general plan and other ordinances to carry out its purpose.

The California Construction and Industrial Materials Association and Ventura County Coalition of Labor, Agriculture Business (collectively, Petitioners) brought separate petitions for writs of mandate ordering the County to set aside its approval of the Project and comply with the Surface Mining and Reclamation Act (SMARA) and CEQA in approving the Project. On appeal, the Court found that the SMARA causes of action, which are not discussed further in this summary, did not apply to the County's Project, nor could Petitioners show prejudice.

In approving the Project, the County relied on the "common sense" exemption and Classes 7 and 8 categorical exemptions. The "common sense" exemption applies where there is no possibility that the activity may have a significant effect on the environment. The Class 7 exemption pertains to actions by regulatory agencies for the protection of natural resources, and the Class 8 exemption covers actions by regulatory agencies for the protection of the environment. The Court held the Project fell squarely within the plain language of the Classes 7 and 8 exemptions. Ample evidence supported this finding, including studies and documentation citing the need to preserve wildlife corridors and the establishment of development standards compatible with wildlife movement.

Petitioners argued these exceptions did not apply because if local mining was prohibited, necessary building materials may need to be transported from a more distant location, increasing pollution from transportation. However, per the Court, nothing in the ordinance prohibited the extraction of minerals and such speculation was not evidence.

To defeat a categorical exemption, a project opponent must show an exception to an exemption applies. Here, Petitioners argued the unusual circumstances exception applied, requiring

Petitioners to show (1) there is a reasonable possibility that the activity will have a significant effect on the environment and (2) the effect is due to unusual circumstances. A party may establish unusual circumstances by showing the project has features, like its size or location, that distinguish it from others in the exempt class.

The Court held Petitioners failed to make such showings where Petitioners argued the Project was significantly larger than other projects in its class, but cited no supporting evidence. Petitioners also noted that the Project overlays 10,000 acres of classified mineral resources, but failed to cite to evidence that other projects in Classes 7 and 8 do not overlay similar resources; further, neither mining nor ordinances that work to preserve wildlife are unique to the County.

Petitioners claimed the Project will have a significant adverse impact because it (1) is on land zoned as mineral resource protection and is adjacent to a principal access road to an existing aggregate site; and (2) has the potential to impede or preclude extraction of or access to aggregate resources. However, the Court found these statements were speculative and that the Project does not prohibit mining or access to a permitted mine. It also held the Project made explicit what was already implicit under prior law. The County's general plan required that applications for resource development be reviewed to assure minimal disturbance to the environment and included a specific policy for the preservation of wildlife migration corridors. As such, the County was also already required to preserve wildlife migration corridors when determining whether to grant a Conditional Use permit. Thus, the Court held there was not a fair argument that there was a reasonable possibility the Project would have an adverse effect on the environment.

Click here for Downey Brand's full analysis of this opinion.

Project Proponent Counter Litigation

Jenkins et al. v. Brandt-Hawley et al. **(2022) 86 Cal.App.5th 1357**

After purchasing a home in San Anselmo in 2017, Charles and Ellen Jenkins, learned that the home would have to be rebuilt to conform to present day building code requirements. The Jenkins filed an application with the Town of San Anselmo (Town) to authorize demolition of the home and development of a new home and detached studio on the property (Project) Neighbors objected to the design of the Project based on aesthetic and privacy concerns and the Jenkins worked with the neighbors to redesign the Project.

The redesigned Project was approved by the Planning Commission on March 12, 2018. The Planning Commission found that the Project was categorically exempt from CEQA for new construction of a single-family residence; that the residence was not historically significant and no historical resource exception to the exemption applied; and that the design was compatible with the character of the neighborhood. But the neighbors remained unsatisfied and appealed the approval to the Town Council. Prior to the Town Council hearing, neighbors urged the Jenkins to prepare a historic-resource evaluation, and the Jenkins obliged. The report found that the property was not an eligible historic resource. The Town Council affirmed the Planning Commission's approval of the Project and its CEQA categorical exemption determination.

An association and an individual (Petitioners), represented by a well-known CEQA attorney (Petitioners' Attorney), filed a petition for writ of mandate challenging the Project for violations of CEQA and the Town Municipal Code. The Petitioners alleged that the Town had incorrectly concluded that the Project was categorically exempt from CEQA, arguing that the Town had adopted "mitigation measures" that foreclosed a categorical exemption. The trial court denied the petition and found that Petitioners' Attorney failed to lay out the record evidence supporting the Town's approval, as required by law under the substantial evidence standard. The trial court also rejected the Municipal Code violation claim based on an interpretation of the Code's plain language. Finally, the trial court found that the CEQA claim was barred by the exhaustion doctrine because it had not been raised in the administrative proceedings.

Petitioners' Attorney appealed the trial court's decision and sought a writ of supersedeas to stay issuance of a demolition permit. Petitioners' Attorney almost immediately withdrew the petition for writ of supersedeas following conversations with the Jenkins. Petitioners' Attorney subsequently offered to withdraw the appeal if the Jenkins agreed to waive recovery of their fees and costs; the Jenkins declined. On the day her opening brief was due, Petitioners' Attorney voluntarily dismissed the appeal.

The Jenkins filed a complaint against Petitioners' Attorney for malicious prosecution, and Petitioners' Attorney filed a special motion to strike the complaint under Code of Civil Procedure section 425.16, an anti-SLAPP (Strategic Lawsuit Against Public Participation) motion. Under Code of Civil Procedure section 425.16, a malicious prosecution claim is subject to a special motion to strike unless the court determines that the plaintiff has established that there is a probability that it will prevail on the claim. The trial court held that the Jenkins met their burden and denied Petitioners' Attorney's anti-SLAPP motion. Petitioners' Attorney appealed, and the Court of Appeal affirmed the trial court's denial.

The Court of Appeal focused its analysis on the issue of whether the Jenkins established a probability of prevailing on their claim of malicious prosecution. A malicious prosecution claim requires a showing that the prior action: (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice.

The Court of Appeal agreed with the trial court that the Jenkins had shown a probability of prevailing on their contention that the Municipal Code and CEQA claims were without probable cause. The Court found that Petitioners' Attorney's interpretation of the Municipal Code would be found unreasonable, arbitrary, and inconsistent with the rest of the statute. The Court also noted that the attorney never quoted the actual text of the code and instead provided misleading citations to the administrative record. As to the CEQA claim, the Court found that it was legally untenable because it had been waived due to failure to exhaust the specific issue in the administrative hearings. Even if the CEQA claim had not been waived, the Court found that the modifications were not CEQA mitigation measures under *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086.

Lastly, the Court found that the Jenkins showed a probability of prevailing on the malice prong. Malice is a fact specific issue and is met where "the proceedings are instituted primarily for an

improper purpose." Lack of probable cause is relevant to the issue of malice, but by itself not enough. The Court found that in addition to lacking probable cause, Petitioners' Attorney showed malice by misstating the record, showing indifference to the facts, and failing to conduct basic legal research.

At the close of the Court's opinion, it addressed three amicus briefs filed in support of Petitioners' Attorney. The Court discerned that the three briefs "suggest that CEQA-related cases should be immune or insulated from malicious prosecution cases, arguing things such as CEQA is too 'uncertain' and too 'complicated' for there ever to be a malicious prosecution claim." The Court rejected amici's contentions and opined that allowing malicious prosecutions claims "should allow for a broad degree of freedom in legitimate CEQA advocacy, while also protecting litigation defendants (such as the Jenkins) from having to fend off litigation brought without probable cause and malice."

Click here for Downey Brand's full analysis of this opinion.

EIRs

Save Our Capitol! v. Department of General Services **(2023) 87 Cal.App.5th 655**

In 2016, the Legislature authorized the Department of General Services and real party, Joint Committee on Rules of the California State Senate and Assembly (collectively, DGS), to begin planning the demolition and renovation/restructuring of the State Capitol Building Annex attached to the historic California State Capitol Building (Capitol) in Sacramento (Project). DGS was authorized to demolish the existing annex and replace it with a larger annex building, construct a visitor center, and construct a new underground parking facility. The Project utilized a "construction manager at risk" delivery method, a concept that evolves into more detail as the development process progresses; thus, the components of the Project were not fully designed when DGS released the draft EIR (DEIR) in 2019. Even though DGS later recirculated the draft EIR (RDEIR) to reflect changes to the visitor center design, more detailed designs and modifications to the Project were not evaluated until the final EIR (FEIR) was released. In the FEIR, the annex's exterior was designed to include a "glass curtain wall," and the location of the underground parking facility was changed from south of the Capitol to east of the new annex. The FEIR also further clarified the Project's impacts on trees and landscaping, and revised tree removal and transplantation estimates upwards. The FEIR determined that these modifications would not result in any new significant impacts, and that none of the modifications constituted "significant new information" requiring additional recirculation of the EIR.

Two groups, Save Our Capitol! and Save the Capitol, Save the Trees (collectively, Plaintiffs), filed separate petitions for writ of mandate alleging CEQA violations, and the trial court denied both. Plaintiffs appealed, and their appeals were consolidated.

On appeal, Plaintiffs argued that changes to the location of the underground parking structure and the annex's exterior glass design features, that were not disclosed until the FEIR was released, rendered the EIR's project description inadequate, unstable, and vague. Plaintiffs alleged that DGS failed to meaningfully analyze whether the new annex's glass exterior was

compatible with the Capitol's historic characteristics. Noting that the issue here was primarily about how much a project may change after a draft EIR is circulated before the project description is no longer accurate, the Court analyzed the authority closest to the present case, *Southwest Regional Council of Carpenters v. City of Los Angeles* (2022) 76 Cal.App.5th 1154 (*Carpenters*).

In *Carpenters*, the court held that a mixed-use commercial/residential project that changed the composition and ratio of the residential to commercial footprint after the FEIR was released was not so different from the project alternatives in the EIR to conclude that the project definition was unstable. (See Downey Brand's coverage of *Carpenters* here.) Much like *Carpenters*, the Court here determined that changes to the Project, such as moving the location of the underground parking garage, were not the type of project description changes that would violate CEQA as it was an original project component and consistent with the Project's objectives. However, unlike the project in *Carpenters*, the Court found that the Project here concerned potential impacts to a "treasured historical resource," i.e., the Capitol, and that the Project's appearance was a critical factor in determining whether the Capitol would be impacted. Because the actual design of the "glass curtain" was not revealed until the FEIR, the Court found that the public was foreclosed from meaningfully commenting on the most controversial aspect of the Project – "its impact on historical resources." The Court concluded that DGS did not comply with CEQA when it changed the project description of the annex's exterior design in the FEIR.

Plaintiffs argued that DGS's findings that the Project would have significant and unavoidable impacts to cultural resources was legally inadequate because these findings were based on a flawed analysis of the Project's impacts to historical resources. Except with regard to the EIR's flawed historical resources analysis due to lack of public comment on the annex's exterior design, the Court found that the EIR otherwise adequately discussed the Project's impacts on the Capitol as a historical resource, and that Plaintiffs' "conclusory" statements did not show otherwise.

Without citing to a statute, CEQA guideline, or reported case law, Plaintiffs alleged that the EIR violated CEQA because it did not include an inventory or identify every plant or tree that the Project might affect. The Court rejected this argument, finding that the EIR provided an adequate explanation of the trees that would be affected by the Project. that the analysis adequately informed decision-makers and the public of the Project's impacts. In response to Plaintiffs' argument that these mitigation measures improperly relied on the formulation of a future plan and the City of Sacramento's tree ordinance to mitigate the impact to trees, the Court found that DGS's reliance on state standards and the City's tree ordinance, which required DGS to meet established performance standards, met CEQA's requirements for future mitigation plans. The Court also rejected Plaintiffs' argument that the Project would expose birds to death by striking hard surfaces, finding that substantial evidence supported the EIR's conclusion that substantial avian mortality, including to protected species, was not expected to occur.

Plaintiffs argued that the EIR's determination that the mostly-underground visitor center would not impact the view of the Capitol's west façade, as seen from the Capitol Mall, was not supported by substantial evidence because the EIR did not contain elevations or other means of evaluating the center's visual impact on the protected scenic vista. Observing that the importance

of considering aesthetic impacts to both the Capitol complex and the view of the west façade of the Capitol "cannot be overstated," the Court noted that the EIR did not include a grade view of the Capitol's west façade that included a depiction of the visitor center. Although CEQA does not expressly require visual simulations, in this instance, the Court found that the EIR's lack of visual depictions of the aboveground portions of the visitor center failed to provide decision-makers and the public with sufficient information to meaningfully consider the center's impact on the scenic vista. Dissenting only to this issue, Justice Mauro opined that it was within DGS's considerable discretion to choose the manner of EIR discussion, and that DGS provided extensive details, including a number of visual depictions, which should have allowed for meaningful consideration of the issues raised by the Project.

Plaintiffs also contended that the EIR failed to analyze light and glare from the new annex's glass exterior because the exterior design was not disclosed until the FEIR was released. The Court agreed, finding that the EIR failed to inform the public and decision-makers of meaningful information by not analyzing the light generated by the new annex and how it affected aesthetics within the Capitol complex. The Court did, however, reject Plaintiffs contentions that, due to the increase in the annex's size, the EIR failed to account for the effects of higher occupancy on vehicle trips, and the Project's long-term demand on water, electricity, sewage and solid waste disposal, noting that the EIR's detailed analysis on these subjects was adequately supported.

Due to the decision to relocate the underground parking facility from south of the Capitol to the east of the new annex in the FEIR, Plaintiffs argued that should have included an alternative that moved the visitor center to avoid impacts to the historic west lawn. The Court agreed, finding that the omission of an alternative locating the visitor center to the south lawn, given that the parking garage had moved from the south to the east and design changes had been made to the visitor center, prejudicially affected the EIR's consideration of a range of alternatives.

Finally, Plaintiffs made a number of arguments regarding the need to recirculate the EIR. For instance, instead of removing 20-30 trees as contemplated in the DEIR, the FEIR determined that the Project would affect a total of 133 trees and require the removal of 56 trees. Plaintiffs argued that no substantial evidence supported DGS's determination not to recirculate in light of this substantial increase in the impacts to the trees onsite. The Court rejected these arguments and found that this increase was merely an amplification of the information already disclosed in the previous EIR, and that DGS's determination not to recirculate was supported by substantial evidence. The Court also rejected similar recirculation arguments regarding changes to the Project's boundary, noting that Plaintiffs failed to show any evidence that the expanded boundaries would substantially increase the Project's environmental impacts, and that DGS's decision not to recirculate was supported by substantial evidence.

After the Court's opinion was filed, DGS petitioned the Court for rehearing, requesting that it be allowed to proceed with demolition while the identified defects in the EIR were corrected. The Court granted rehearing, vacated its opinion and issued a new opinion granting the requested relief. The Court found severance of demolition of the activities proper under CEQA's remedies statute (Pub. Resources Code, § 21168.9), and ordered the lower court's writ to direct only partial decertification of the EIR, allowing demolition of the existing annex to proceed.

Click here for Downey Brand's full analysis of this opinion.

***Make UC A Good Neighbor v. Regents of University of California* (2023) 88 Cal.App.5th 656**

In 2021, the Regents of the University of California (UC Regents) adopted a Long Range Development Plan (LRDP), which is a high-level planning document that plans the university's decisions on land and infrastructure development, for the University of California's Berkeley campus (UC Berkeley). Two neighborhood groups (collectively, Good Neighbor or Petitioners) challenged a hybrid programmatic and project-level EIR that analyzed the environmental impacts from both UC Berkeley's LRDP at a program level and a planned housing development at People's Park, among other specific projects, at a more detailed, project level. The trial court denied the writ petition and entered judgment in favor of the UC Regents. Good Neighbor appealed.

On February 24, 2023, the First District Court of Appeal (Court) issued a decision addressing Petitioners' arguments regarding (1) the alternatives analysis for both the LRDP and the People's Park development; (2) the EIR's noise impact analysis; and (3) the EIR's analysis of population growth and displacement of existing residents. The Court found that the EIR did not sufficiently justify the decision not to consider alternative locations for the People's Park development and should have analyzed impacts of "party noise" from student parties. The Court rejected the remainder of Good Neighbor's arguments.

The Court rejected Petitioners' argument and held that the EIR was not required to analyze LRDP alternatives that would limit student enrollment. The EIR analyzed alternatives that involved less development; strategies to reduce carbon emissions by building more housing near campus, reducing parking, and increasing remote instruction and working; and more housing for faculty and staff located on the campus itself rather than in the surrounding community. The alternatives did not include reducing the total campus population, but did consider different options for managing the campus population that could lessen or avoid impacts.

An EIR need only include alternatives necessary to permit a reasoned choice and examine in detail only those that the lead agency determines could feasibly attain most of the basic objectives of the project. When an agency limits the scope and nature of the problem that it wants to solve through the project objectives, an agency should not be required to consider alternatives that address a much bigger problem or that add difficult issues the agency has chosen not to tackle.

The LRDP deliberately separates the complex process of setting enrollment levels from development of projects. The LRDP does not set enrollment levels, require enrollment increases, or commit to any amount of enrollment or development. It *estimates* future enrollment only for the purposes of developing a land use and infrastructure plan that could meet the campus' future needs. The Court held that the EIR's alternatives were appropriately tailored to the LRDP's purpose and scope.

Petitioners argued that the EIR should have analyzed alternative locations to the People's Park development in depth. The Court held that the EIR did not sufficiently justify the decision to not

analyze an alternative location. While analysis of alternative sites is not required in all cases, the Court found that because there was evidence of potential alternative sites, the EIR should have explained the reasons for excluding consideration of the alternative sites.

The Court's decision was influenced by the historical significance of People's Park. In the 1960s, UC Berkeley acquired the parcel that eventually become People's Park to develop parking, student housing, and office space. This development was never realized due to funding constraints, and over the years the community transformed the parcel into an unofficial community gathering space. The park has historical significance because of its association with social and political activism in the City of Berkeley (City). The park is a local historical landmark and several nearby structures also have historical significance.

While the LRDP portion of the EIR analyzed other locations for housing on a program level, the project-specific analysis did not consider any alternatives to the project site in detail. Alternative locations for the housing project were rejected during the scoping process on the basis that re-siting it would have reduced the total number of beds within the LRDP, other sites were smaller, and other sites also contained historical resources. The Court found these reasons too conclusory and determined that the analysis was inadequate.

The Court also found that the EIR should have analyzed potential noise impacts from loud student parties in residential areas near the campus. The EIR did not analyze "party noise" because it determined it would be speculative to assume that the addition of students would generate substantial late night noise impacts at certain times in particular areas. But the Court found that because there was evidence in the record of student parties violating the City's noise ordinance, there was a reasonable possibility that adding more students to residential neighborhoods would make the problem worse, and the EIR should have analyzed this issue.

The UC Regents argued that, with respect to social noise, CEQA only applies to "crowd noise generated at a discrete facility that is designed to host noisy crowds," citing *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714. The Court rejected this argument, holding that the geographic area of a potential impact is not limited to discrete facilities but includes any area where direct or indirect impacts may occur.

The Court's decision was met with criticism and renewed calls for CEQA reform. The Court's recognition of "party noise" as an environmental impact sparked concerns that the precedent would allow CEQA to be used against urban housing developments. The decision also caught the attention of Governor Newsom, who, following publication of the case, issued a statement that, "[a] few wealthy Berkeley homeowners should not be able to block desperately needed student housing for years and even decades. CEQA needs to change and we are committed to working with the legislature so California can build more housing."

The UC Regents filed a petition for review on March 28, 2023. The Governor, the City of Berkeley, and several other organizations submitted amici letters urging the Court to grant review. The Supreme Court, in early May, granted the petition to consider two issues:

(1) Does the CEQA require public agencies to consider as an environmental impact the increased social noise generated by student parties that a student housing project might bring to a community?

(2) Under CEQA, when a lead agency has identified potential sites for future development and redevelopment in a programmatic planning document, is the agency required to revisit alternative locations for a proposed site-specific project within the program?

Now that California's highest court has granted review, the Supreme Court will provide guidance on the key issues presented by the case.

Click here for Downey Brand's full analysis of this opinion.

East Oakland Stadium Alliance v. City of Oakland **(2023) 89 Cal.App.5th 1226**

The Oakland Waterfront Ballpark Project (Project) proposed a 50-acre development at Howard Terminal within the Port of Oakland (Port). The Project proposed not only a new ballpark for the Oakland A's baseball team, but also 3,000 residential units, retail and commercial spaces, a performance venue, and a hotel, all with associated parking. A draft EIR was completed in February 2021, and final EIR certified by the City of Oakland (City) one year later.

East Oakland Stadium Alliance (Petitioners) filed a lawsuit challenging the EIR. The trial court rejected their claims, except with respect to the adequacy of a wind mitigation measure. Petitioners appealed the bulk of those rulings and the City cross-appealed as to the wind issue.

On appeal, Petitioners argued that the EIR's plan for safeguarding ballpark visitors from rail traffic was infeasible and ineffective. To address safety and access concerns, the EIR contained a series of mitigation measures, including construction overcrossings and a fence to accommodate a multi-use path on railroad property separating the freight line from vehicle traffic for a three-block stretch. Nonetheless, the EIR found significant and unavoidable impacts due to safety hazards. The Court found that these mitigation measures were both feasible and adequate with regard to the placement of the overcrossing and fencing, and that Petitioners had failed to exhaust administrative remedies on other mitigation that Petitioner claimed the EIR should have considered.

The Project as proposed would displace all current activities at the 50-acre Howard Terminal, and Petitioners alleged that the EIR's air quality analysis assumptions regarding parking and impacts on health due to displacement of current Howard Terminal parking residents was inadequate. The Court rejected these claims finding that the EIR's conclusions were supported by substantial evidence, and that Petitioner's health claims due to increased vehicles traffic were speculative because it was unknown where else the tenants would relocate to.

Petitioners also argued that the EIR's analysis of air quality impacts from emergency generators was insufficient because the EIR should have assumed higher maximum allowable hours of operation, based on an air district policy document presuming 100 hours of annual use in

addition to the testing and maintenance time. The Court disagreed, citing case law stating that CEQA does not require an agency to assume an unlikely worst-case scenario. While this did not allow the agency to disregard generator use merely because it would occur at unpredictable times, the Court found that the EIR acknowledged the foreseeability of power shutoffs in high fire risk areas and that its assumptions included an ample time for considering additional annual emergency generator operations.

The EIR's sole GHG mitigation measure (GHG-1) prohibited the City from approving any construction-related permit unless the Oakland A's retained a qualified air quality consultant to develop a Project-wide GHG reduction plan specifying GHG reduction measures sufficient to satisfy the City's no-net-increase threshold of significance. GHG-1 described "in detail" the contents of the required emissions reduction plan, establishing performance standards for its methodology and substantive reduction measures. Petitioners argued that this improperly deferred the mitigation.

Where it is impractical or infeasible to develop mitigation details at the time of environmental review, CEQA allows them to be deferred. However, the agency must commit itself to the mitigation, adopt adequate performance standards, and identify the types of actions that will be considered and potentially incorporated to feasibly achieve those standards. Here, the Court found GHG-1 to satisfy these requirements, finding it to be a good-faith effort to ensure no increase in GHG emissions while coping with uncertainties, and, further, that GHG-1 was markedly different from "half-hearted" mitigation found to be lacking in prior cases.

The EIR recognized that Howard Terminal had a long history of industrial use, as well as associated contamination and cleanup activities. In discussing these issues it relied on a 2019 site investigation evaluating what potential exposure and human health risks associated with the site would be absent mitigation. The associated health risk assessment (HRA) identified target cleanup levels to guide remediation. A mitigation measure required the Department of Toxic Substances Control (DTSC) to approve a completed remedial action plan (RAP) based on the HRA.

Petitioners argued that the EIR's analysis was inadequate for failure to discuss separately the impact of removing a concrete cap preventing escape of soil contaminants. However, the Court found the EIR to fully recognize the importance of the cap, and concluded that there was "no basis" for finding the EIR inadequate in this respect. The Court also rejected Petitioners argument that the EIR failed to discuss hydrocarbon oxidation products (HOPs) as the EIR noted that HOPs had been detected nearby. In response to Petitioners' argument that the EIR should have been recirculated to disclose and discuss the RAP's proposed remedial measures, the Court found that Petitioners had provided no authority to suggest that recirculation was triggered by a private party's preparation of a draft plan required by the EIR's mitigation measure. Further, the Court found that substantial evidence supported the City's decision not to recirculate, and the draft RAP added no substantive new information to the EIR, nor did it identify or disclose new or increased significant impacts.

Petitioners additionally argued that the EIR's cumulative impacts analysis improperly excluded consideration of the impact of using a portion of the Project site to expand the Port's turning

basin for large vessels, as would be permitted at the Port's election. The Court rejected these claims noting that the EIR did not consider it to be a probable future project requiring inclusion in the cumulative impact analysis.

The trial court ruled in Petitioners' favor on one issue – that the EIR improperly deferred mitigation of wind impacts. The City cross-appealed that ruling, but the Court affirmed on this as well.

A wind tunnel study had been prepared for the CEQA document, and suggested that the Project could create winds exceeding 36 mph for 100 to 150 hours annually. While a number of design and landscaping modifications that could reduce the impacts were identified, the EIR found that it could not conclude with certainty that all wind hazards would be mitigated. As such, it found the impacts to be significant and unavoidable.

Because mitigation was only required to the maximum extent feasible "without unduly restricting development potential," the Court found the measure to be too imprecise to constitute an adequate performance standard. The Court also found that the mitigation failed to identify the types of potential actions that would be included in the deferred mitigation. While the City relied on the measure's introductory language articulating a goal of reducing wind effects to the extent feasible, the Court found that the goal could not be relied upon as an alternative performance standard. Nor did it agree with the City's argument that uncertainty about whether full mitigation could be achieved made it unnecessary to adopt a performance standard. Notably, a recent case in the First Appellate District, *Yerba Buena Neighborhood Consortium v. Regents of University of California* (2023) 95 Cal.App.5th 779, distinguished the Court's opinion here, finding that the mitigation measures for wind impacts in that project's EIR were reasonably clear and objective.

Click here for Downey Brand's full analysis of this opinion.

***Preservation Action Council of San Jose v. City of San Jose* (2023) 91 Cal.App.5th 517**

The project, three high rise office towers ("Project"), is located at the City View Plaza (originally Park Center Plaza), which was one of first redevelopment sites in the City of San Jose (City). The plaza itself and four individual buildings, including the Bank of California (Bank) building built in 1971, were identified as eligible for listing on the California Register of Historic Resources and the National Register of Historic Places. The Project involves demolition of all structures at City View Plaza and construction of three 19-story office towers.

The City prepared a supplemental EIR (SEIR) for the Project that tiered from the Downtown Strategy 2040 final EIR. During the scoping process for the draft SEIR, the Bank was identified as a candidate City landmark and the project was referred to the Historic Landmarks Commission. The commission nominated the Bank for consideration as a City landmark during the circulation period of the draft SEIR. The draft SEIR analyzed the Bank as a candidate for City landmark status and as a historic resource eligible for listing on the California and National registers.

The draft SEIR identified the proposed demolition as a significant and unavoidable impact and presented pre-demolition mitigation measures, including documenting the structures, and making them available for relocation; and mitigation measures to commemorate the site. The draft SEIR also analyzed eleven project alternatives, including six historic preservation alternatives that would have preserved different combinations of the historic structures on the site, but City ultimately rejected them as infeasible. In June 2020, the city council approved the project, certified the SEIR, and did not designate the Bank as a City landmark. The City adopted a statement of overriding considerations concluding that anticipated economic, social, and other benefits of the project outweighed its significant and unavoidable impacts.

Preservation Action Council of San Jose (PAC*SJ or Petitioner) filed a petition for writ of mandamus challenging the project under CEQA. The trial court denied the petition and PAC*SJ appealed. On appeal, the two issues where (1) whether the City violated CEQA by not identifying, analyzing, and imposing compensatory mitigation for significant impacts to historic resources; and (2) whether the City adequately responded to comments requesting compensatory mitigation. The City also argued that PAC*SJ did not adequately exhaust both claims.

In response to comments on the draft SEIR that proposed compensatory mitigation measures, which are used to provide roughly equivalent substitute resources or environments to alleviate direct impacts of a project, the City responded that the measures exceeded the scope of what the City could reasonably require toward mitigation and still satisfy the proportionality and nexus requirements. Petitioner argued that the City was required to analyze proposed compensatory mitigation or make feasibility findings. The Court disagreed and held that while compensatory mitigation could theoretically be used to mitigate significant impacts to historical resources, there was no statutory or other basis here to require detailed consideration of the proposed measures.

The historical significance of the City View Plaza was its specific architectural style and its association with a historical period in the City's economic development. The draft SEIR found that no other buildings in the downtown area shared similar architectural style or historical significance. Nothing in the administrative record suggested the existence of similarly significant buildings in the downtown area that could feasibly serve as substitute resources for compensatory mitigation. The Court found that compensatory mitigation would have been infeasible given the specific architectural and historical resources impact. The City, therefore, did not abuse its discretion by briefly considering and rejecting the proposed compensatory mitigation measures.

Petitioner also argued that the final SEIR did not adequately respond to the public comments recommending compensatory mitigation, but the City countered that PAC*SJ failed to exhaust on the issue at the administrative level. The Court found that although PAC*SJ did not raise the specific issue with the City, this did not constitute a failure to exhaust because the issue of adequate mitigation generally was raised in the administrative process.

Next, the Court considered the City's response to comments proposing compensatory mitigation in the final SEIR and held that although the responses lacked detail, they were legally sufficient.

The Court found that the responses, when viewed in connection with the SEIR, adequately explained the City's reasoning for rejecting the additional mitigation measures.

Click here for Downey Brand's full analysis of this opinion.

***Olen Properties Corp. v. City of Newport Beach* (2023) 93 Cal.App.5th 270**

The City of Newport Beach's approval of a 312-unit apartment complex was challenged by a neighboring commercial development owner. To comply with CEQA, the City of Newport Beach (City) prepared an addendum to an existing environmental impact report (EIR) prepared in 2006 as part of its general plan update. Petitioner Olen Properties challenged the addendum and argued that the City was required to prepare a subsequent EIR to analyze alleged "new conditions" not addressed in the 2006 EIR. Petitioner also contended that the project was inconsistent with the City's land use policies. The Court of Appeal rejected all of the arguments advanced by Olen Properties and upheld the trial court's decision denying the petition for writ of mandate.

Petitioner alleged five changes or items of new information that it contended required preparation of a subsequent EIR: inconsistency with the City's land use policies; traffic issues; hazardous materials; the property's covenants, conditions, and restrictions; and geology/soil issues. The Court applied the deferential substantial evidence standard of review and held that none of the issues gave rise to the circumstances requiring subsequent or supplemental review under Public Resources Code section 21166.

The most noteworthy holding from the case arises from the court's discussion of traffic issues. Petitioner argued that the City erred by using the Level of Service (LOS) measure of traffic impacts in the addendum, despite California's adoption of CEQA Guidelines section 15064.3, which requires use of the Vehicle Miles Travelled (VMT) method. The City used the LOS method in the addendum because it was the measure used in the 2006 EIR. VMT and LOS measurements are incompatible and it would be difficult to compare "LOS apples with VMT oranges," as the Court states, in the addendums' analysis. The Court held that the City was not required to use the VMT method to measure traffic impacts in the addendum despite the adoption of CEQA Guidelines section 15064.3. The Court reiterated the well-settled rule, citing *Concerned Dublin Citizens* (2013) 214 Cal.App.4th 1301, 1318–1320, that subsequent changes to the guidelines are not "new information" triggering Section 21166, so long as the impacts of the project were considered in the initial EIR. Here, the traffic impacts were analyzed in the 2006 EIR, just utilizing a different, then widely acceptable, methodology. If this rule were different, and each change to the guidelines constituted "new information," Section 21166 would "require a new EIR nearly every time any change is made to a project, no matter how inconsequential" because of how often the guidelines are updated. Addendums remain the appropriate CEQA document to analyze project changes when none of the Section 21166 conditions exist. Accordingly, the Court held that the City was not required to prepare a subsequent EIR for the project or undertake a VMT study of the traffic impacts.

Click here for Downey Brand's full analysis of this opinion.

***Claremont Canyon Conservancy v. Regents of the University of California* (2023) 92 Cal.App.5th 474**

The University of California, Berkeley's Hill Campus (University) covers approximately 800 acres in the East Bay Hills, much of which is heavily forested and located in a "Very High Fire Hazard Severity Zone." Many wildfires have swept through the campus over the years, the first of which was in 1905. The University started fire management planning after the 1923 Berkeley fire, leading to periodic vegetation removal and maintenance. In 2019, the University received a Cal Fire grant for on-campus hazardous fire fuel reduction projects, two years after the Grizzly fire burned almost two dozen acres of the campus.

With the help of this grant funding, the Regents of the University of California (Regents) retained an expert wildland fire manager/fire ecologist to develop and prepare a Vegetative Fuel Management Plan (Plan), which was reviewed by the University's Fire Mitigation Committee and proposes vegetation removal projects on 121 acres largely covered in conifer and eucalyptus trees. The Plan also proposes several vegetation treatment projects, including one fuel break project and three fire hazard reduction projects. The Regents began the EIR preparation process in late 2019, in which Claremont Canyon Conservancy (Conservancy) and Hills Conservation Network (Hills) (collectively, Plaintiffs) submitted extensive comments and provided alternative proposals. The final EIR, which included the Plan as an attachment, incorporated the comments and was certified in early 2021.

Plaintiffs filed petitions for writs of mandate challenging four descriptions of the project in the EIR, along with the EIR's discussion of certain environmental impacts. The Conservancy argued the projects did not go far enough, and should have planned to remove more trees. Contrastingly, Hills argued the projects went too far and removed too many trees. The trial court consolidated the petitions and held the project descriptions were "uncertain and ambiguous" because the EIR failed to provide concrete information as to how the listed criteria would be implemented and did not identify the precise number and trees slated for removal. The trial court then issued a peremptory writ of mandate directing the Regents, in part, to vacate their EIR certification as to those projects. The Regents appealed and argued the EIR's description of the vegetation removal plan complied with CEQA and contained sufficient information to analyze the project's environmental impacts.

As described in the Court's opinion, under CEQA Guidelines section 15124 (a)-(d), an EIR must include a description of the project containing: (1) the precise location and boundaries of the proposed project shown on a detailed map; (2) a statement of the objectives sought by the proposed project, which should include the underlying purpose of the project and may discuss the project benefits; (3) a general description of the project's technical, economic, and environmental characteristics; and (4) a statement briefly describing the intended uses of the EIR. A project description must be accurate, stable, and finite, but need not include extensive detail past what is needed for an evaluation and review of the environmental impacts at issue. Much of what is included in an EIR is left to the agency preparing it, which includes some degree of forecasting. The level of specificity depends on the level of specificity in the underlying activity described in the EIR.

The University used fuel models to predict fire behavior on the Hill Campus to help develop the Plan and select locations for four discrete fuels management projects. The Plan proposes creating fuel breaks to reduce the spread of fire between canyons on the Hill Campus. The EIR provides examples of shaded and non-shaded fuel breaks and identifies objective standards for vegetation removal. The EIR identifies objective criteria for tree removal in the fire hazard reduction areas, including the consideration of tree health, structure, height, potential for failure, and flammability/fire hazard. It also lists criteria for what vegetation should be removed in the fire hazard reduction project areas, and describes the vegetation removal mechanisms in those areas. Additionally, the EIR sets out the proposed implementation of "variable density thinning" in fire hazard reduction project areas, which considers site-specific conditions and the conditions of adjacent vegetation. Under this principle, only certain vegetation, like eucalyptus, would be targeted for removal in the fire hazard reduction project areas.

The Conservancy argued the Regents erred in failing to specify the number of trees to be removed in the fire hazard reduction project areas, and the Hills found a project description to be unstable because it indicates "some trees would remain" in the fuel break, but did not assign a meaning to "some trees." The Court was unpersuaded by these arguments, finding the EIR's description of each fuel brake and fire hazard reduction project was sufficient. Building on earlier Court of Appeal cases such as *Buena Vista Water Storage District v. Kern Water Bank Authority* (2022) 76 Cal.App.5th 576, the Court explained that the EIR does not need to identify a set tree density or exact number of trees to be removed, as this was not feasible or necessary to the evaluation of environmental impacts. A "canopy of variable density" will be created by the removal of trees that are unhealthy, structurally unsound, and prone to torching. Additionally, specifying the exact number of trees to be removed is infeasible because it would require constant evaluation and consideration in the field, in part because some trees will grow, like the eucalyptus, which can reproduce at a rapid rate, and others will die during implementation of the several individual projects. Also, the topography of the Hill Campus, along with changing weather conditions, require a flexible approach.

Further, the Court made multiple statements supporting that the EIR provides sufficient information to understand the project's environmental effects. It pointed to the EIR's identification of the precise locations and boundaries of the projects on a detailed map, description of the underlying purpose of the projects and the reasoning as to why vegetation is required in the project areas, and inclusion of a description of the vegetation in each project area, lists of objective vegetation removal criteria, and summaries of the methods used to remove vegetation along with the purpose of the projects and the EIR's intended use. Such information was more than sufficient to evaluate the Project's impacts.

While an EIR's project description must meet the essential requirements set forth in CEQA Guidelines section 15124 (a)-(d), the Court reaffirmed the long-held principle that "'technical perfection,' 'scientific certainty,' and 'exhaustive analysis' are not required." As the Court emphasized, "[s]o long as the EIR provides sufficient information to analyze environmental impacts . . . a project description for large-scale vegetation removal that is subject to changing future conditions need not specify, on a highly detailed level, the number of trees removed." In this case, the Court determined that the EIR's description of the project and its basic characteristics were accurate, stable, and finite notwithstanding the lack of precise quantification

where the EIR contained the criteria to be used in determining which vegetation should be removed in various project areas. Accordingly, the Court reversed the trial court's decision and directed the trial court to deny Plaintiffs' consolidated petition for writ of mandate.

Click here for Downey Brand's full analysis of this opinion.

***Save Our Access v. City of San Diego* (2023) 92 Cal.App.5th 819**

Since the 1972 passage of Proposition D (codified as San Diego Municipal Code section 132.0505), the City of San Diego (City) has prohibited buildings taller than 30 feet from being constructed within its "Coastal Zone" – most of the area west of Interstate 5 (the area is unrelated to the Coastal Zone as defined in the Coastal Act). A vote of the electorate is required to amend the prohibition.

In 2008, the City initiated a process to update the Midway-Pacific Highway Community Plan, an area within the City's Coastal Zone, including the former San Diego International Sports Arena. In 2018, the City Council approved a Community Plan Update (CPU) for the area, and certified a program EIR for the CPU. The final CPU provided for a mixed-use development including residential, commercial, military, and industrial buildings.

In 2020, two City Councilmembers proposed a ballot measure to remove the height limit from the Midway-Pacific Highway Community Plan area. Internal City emails and a subsequent staff report concluded that the CPU's program EIR accounted for this possibility, and that no supplemental EIR would be required. Save Our Access submitted a letter to the City disagreeing with those conclusions, maintaining that the CPU did not anticipate removing the height limits. Nonetheless, in July 2020, the City passed an ordinance submitting the question of removing the height limit in this area to the voters. The City also issued a memorandum stating that the proposed amendment would not result in new significant impacts to the environment.

Save Our Access sued, arguing that the City had not adequately addressed the environmental impacts of removing the height limit. The trial court entered a judgment in favor of Save Our Access and the City appealed.

The City subsequently certified a supplemental EIR, and voters have re-approved the measure. But Save Our Access filed a second lawsuit attacking that approval, and in a footnote, the Court found that the City's subsequent actions did not moot the issues in this appeal.

The parties agreed that submission of the ballot measure to voters was a project subject to CEQA, but the City maintained that the program EIR had adequately evaluated this possibility.

The Court considered the CPU as well as the program EIR. The CPU described the Coastal Zone height limit, but did not state whether it would remain in force. The program EIR was also silent on the topic. The City acknowledged that removal of the height limit was not specifically identified in either document, but argued that because City-wide base zones allowed maximum structure heights more than 30 feet in some zoning areas, it could be inferred that the CPU anticipated there would be a later proposal to remove the height limit.

The Court disagreed, noting that this general reference to varying height limits throughout the City was inadequate to inform the public and decision makers that the height limits within the CPU area might be removed. It pointed out that the CPU land use analysis focused solely on the build-out using total dwelling unit yield. To the extent exceptions to existing zoning requirements were considered, the analysis only looked at exceedance of the proposed maximum residential densities, not height limitations. The program EIR also noted that new development would take place within the constraints of the existing urban framework and development pattern. Emails and project renderings also indicated that the development had been reviewed within the confines of the existing height limit. The Court further found that excerpts from after-the-fact emails from planning staff stating that the height limit was not considered in the EIR analysis did not constitute substantial evidence that the amendment to the height limit fell within the scope of the document.

As such, the Court found there was no substantial evidence to support the City's determination that removal of the height limit was a later activity within the scope of the previously certified program EIR under CEQA Guidelines section 15168.

Under CEQA's subsequent review doctrine, when an EIR has been certified and the project later changes, no subsequent EIR is required unless the changes would cause new or increased significant environmental impacts. (Pub. Resources Code, § 21166; CEQA Guidelines, § 15162) An agency's factual conclusion that no such impacts would occur is entitled to deference under the substantial evidence standard of review.

However, the Court did not apply the subsequent review doctrine here. Relying primarily on *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307 (*Sonoma*), the Court held that the fair argument standard, and not the deferential substantial evidence standard, applies to an agency's decision not to prepare a subsequent EIR if the initial EIR was a program EIR. Having found no substantial evidence to support that the revised project was within the scope of the prior program EIR, the Court found the fair argument standard applied, as would be the case if no prior EIR had been prepared. The Court also cited Public Resources Code section 21094, governing tiering, in support of this conclusion. Once a program EIR is certified, the agency must determine whether changes in a later project *may* cause significant impacts not previously analyzed when determining whether additional review is required. Following *Sonoma*, the Court took that to mean that the fair argument standard applies to this question.

Applying the fair argument standard, the Court noted that the program EIR's impact analysis of alteration of public views, as well as "visual effects and neighborhood character," found the impacts to be less-than-significant specifically because the CPU would take place within the constraints of the existing development pattern. The Court interpreted the statement to mean that potential development *not* within the constraints of the existing pattern *could* cause significant environmental impacts not considered in the program EIR. The Court also noted that community concerns about air circulation, bird flight paths, and heat islands echoed reasons cited for the initial implementation of the Coastal Zone Height Limit in 1972. It also relied on public concerns about traffic, air quality, water quality, and greenhouse gas emissions to find that substantial evidence supported a fair argument that a supplemental EIR would be needed.

As such, the Court upheld the trial court decision, finding that further CEQA analysis was required prior to the City approving the ballot measure.

Click here for Downey Brand's full analysis of this opinion.

Santa Rita Union School District v. City of Salinas **(2023) 94 Cal.App.5th 298**

The City of Salinas (City) issued a final programmatic environmental impact report (EIR) for the West Area Specific Plan (Specific Plan or Project). The Specific Plan covered approximately 800 acres and proposed a development including 4,340 dwelling units to accommodate up to 15,928 new residents at full build-out in 20-30 years, as well as commercial development, parks and open space, and schools. The Specific Plan area included three elementary schools, one middle school, one high school, all located within the Santa Rita Union School District (SRUSD) and the Salinas Union High School District (SUHSD) (collectively, Districts). To comply with CEQA, the City prepared the Specific Plan EIR, which provided varying levels of specificity as to various elements of the Specific Plan, depending on available information.

The EIR clarified that individual projects within the Specific Plan, including the schools, might require further discretionary approvals and environmental review. To address impacts to schools, the EIR imposed a mitigation measure requiring the payment of development impact fees before the issuance of residential building permits. The EIR concluded that: "Government Code sections 65995 and 65996 provide that school-related impacts are fully mitigated under CEQA through payment of developer-impact fees set by local school districts under Education Code section 17620…."

The Districts commented that the impact fee mitigation measure was inadequate to mitigate impacts to schools, and argued that the EIR should evaluate the possibility that new schools would never be built, requiring the Districts to accommodate the growing population in existing facilities. The City responded that it had correctly analyzed the impacts of its proposed Specific Plan, that inadequate funding is an economic or social issue not cognizable under CEQA, and that the scenario proposed by the districts was "speculative, uncertain, and vague," because a variety of factors could impact development and construction over the decades-long lifespan of the Project. The Districts submitted additional comments requesting that the EIR analyze the "no-new-schools" scenario and require the plan to be phased, but ultimately the City approved the Specific Plan and certified the final EIR.

The Districts sued the City under CEQA. The trial court ruled in favor of the Districts, finding that the EIR should have included analysis of potential offsite impacts from the Specific Plan due to petitioners' "concern" that they would not have adequate funding to build the proposed new schools, and that the City had not adequately responded to the Districts' comments in the final EIR. While the City opted to comply with the trial court's writ, the real parties in interest (landowner applicants for the Specific Plan approvals) appealed.

The Court of Appeal reversed, finding the City properly assumed in the EIR that the contemplated new schools would be built as part of the Specific Plan. The Court found that the Districts' claims about the funding amounted to no more than speculation and uncertainty, and

the EIR need not analyze "off-site impacts of ill-defined, uncertain, generalized, and speculative alternatives to new school construction, as offered by the Districts." The Court also found that a lead agency is not required to evaluate phasing of decades-long projects, as the pace of proposed development under the Specific Plan would be subject to a variety of unpredictable factors.

The Court also ruled on several procedural issues. First, it held that the City's voluntary compliance with the writ of mandate did not moot or waive the landowners' separate right to appeal, and if the appellants prevailed, City's certification of the EIR would be restored. Second, distinguishing *Meinhardt v. City of Sunnyvale* (2022) 76 Cal.App.5th 43 (under review by the California Supreme Court (Case No. S274147)), the Court held that the trial court order did not determine the final rights of the parties by specifying what relief it would order, therefore the trial court's subsequent entry of judgment, not the earlier order, triggered the deadline to appeal.

The Court also discussed the standard of review, clarifying that the omission of information from an EIR can constitute a failure to proceed in the manner required by law, reviewed de novo, only if the analysis is clearly inadequate or unsupported and the information omitted from the EIR is both required by CEQA and necessary to informed discussion. The Court found that the question of whether the EIR was required to discuss a scenario in which new schools were not built was a mixed question of law and fact.

Applying the deferential substantial evidence standard to the City's factual finding that the Districts' comments were too speculative to require further analysis, the Court reversed the trial court judgment.

Click here for Downey Brand's full analysis of this opinion.

***Tsakopoulos Investments, LLC v. County of Sacramento* (2023) 95 Cal.App.5th 280**

In 2020, the County of Sacramento (County) approved a Master Plan and certified the EIR for an 848-acre project, which included thousands of residential units, an environmental education campus, a research and development park, two elementary schools, commercial retail space, and open space. Tsakopoulos Investments, LLC (Tsakopoulos) filed a petition for a writ of mandate asserting that the County's approval of the Mather South Community Master Plan (the Master Plan or Project) violated CEQA; the trial court denied the petition.

On appeal, Tsakopoulos challenged the trial court's judgment on two grounds: (1) the climate change analysis of the EIR was based on a methodology that the Supreme Court of California in *Center for Biological Diversity v. Department of Fish &Wildlife* (2015) 62 Cal.4th 204 (*Center for Biological Diversity*) and the Fourth District Court of Appeal in *Golden Door Properties, LLC v. County of San Diego* (2018) 27 Cal.App.5th 892 (*Golden Door*) had previously rejected, and (2) the County failed to assess the impacts of construction-related GHG emissions and analyze the human health impacts of the Project's emissions.

Before reaching Tsakopoulos' CEQA challenge, the Court provided a detailed overview of the legislative and regulatory background governing GHG reductions in California, including the California Global Warming Solutions Act of 2006 (AB 32) and the California State Air

Resources Board's (CARB) 2008 Climate Change Scoping Plan (2008 Scoping Plan) prepared to implement the AB 32 goal of reducing GHG levels in the state to 1990 levels by the year 2020. In the 2008 Scoping Plan, CARB provided a target of a 29% statewide reduction in "business-as-usual" (BAU) GHG emissions, i.e., defined as the level of GHG emissions in 2020 if no reduction actions were taken.

The Court then turned to Tsakopoulos' argument and distinguished the County's GHG methodology in the Master Plan EIR from the methodologies previously rejected by the Supreme Court of California and the Fourth District Court of Appeal in the *Center for Biological Diversity* and *Golden Door*.

In *Center for Biological Diversity*, the EIR used CARB's 29% statewide emissions reduction target below BAU as a significance threshold at a project level. The Supreme Court upheld the lead agency's discretion to use the AB 32 target as a significance threshold under CEQA, but found no substantial evidence in the record to show that the statewide goal of a 29% reduction below BAU was "the same for an individual project as for the entire state population and economy."

And in *Golden Door,* the Fourth District struck down a county-wide, uniform significance threshold of 4.9 metric tons of CO_2 equivalent per person per year using statewide rather than local data, and used the same metric across all the land use sectors. The Fourth District found a lack of substantial evidence in the record to explain why it was sufficient to use a statewide efficiency metric, irrespective of the land use categories, as an appropriate threshold of significance for individual projects located exclusively within the County of San Diego.

The Court in *Tsakopoulos* held that the GHG threshold of significance in the Master Plan EIR was distinguishable from the significance thresholds invalidated in those two cases. Unlike *Center for Biological Diversity*, where the EIR simply used the statewide GHG emissions reduction target of 29% below BAU, the County here developed County-specific GHG significance thresholds using Countywide data for different sectors, namely residential, commercial, industrial, and transportation sectors. The County then set a sector-by-sector reduction threshold for use at an individual project level. Similarly, unlike *Golden Door*, using countywide and sector-specific data rather than statewide data, the Master Plan EIR developed different per capita local thresholds of significance to apply to each sector at a project level. Thus, the Master Plan EIR's GHG significance thresholds were not simply extrapolated from statewide data, without any evidence or explanation, but were supported with relevant and substantial evidence in the record.

Similarly, relying on the substantial evidence in the record, the Court held that the County had adequately analyzed the impacts of construction-related GHG emissions and the human health impacts associated with project emissions.

Click here for Downey Brand's full analysis of this opinion.

Addendums

Save Livermore Downtown v. City of Livermore **(2022) 87 Cal.App.5th 1116**

The City of Livermore (City) approved a 130-unit affordable housing project (Project) in the downtown area. Save Livermore Downtown (Petitioner) alleged that the Project design was inconsistent with the City's Downtown Specific Plan due to the Project's size, orientation, window layout, and lack of individuality and open space. Because the Project involved affordable housing, the Court applied the objective design and reasonable person standards found in the Housing Accountability Act (Gov. Code, § 65589.5) (HAA) and determined that Petitioner failed to show the Project was inconsistent with the City's Downtown Specific Plan.

Petitioner also alleged that the Project should not have been exempt from CEQA because it relied on a supplemental EIR (SEIR) that only analyzed impacts at a "programmatic level," and new soil studies and samples onsite constituted new information triggering the need to conduct further CEQA review. The Court rejected this argument and held that the SEIR was consistent with a specific plan for which an EIR has been prepared (Gov. Code, § 65457), and that the Project was therefore exempt from further environmental review because it was consistent with a previously certified specific plan EIR.

Finally, the Court found the trial court appropriately required Petitioners to post a $500,000 bond after the developer moved for one under Code of Civil Procedure section 529.2, as security for costs that may be incurred as a result of delay in carrying out the affordable housing development project. How the court deals with damages related to delay and payment from Petitioners remains to be seen.

Click here for Downey Brand's full analysis of this opinion.

Statute of Limitations

Committee to Relocate Marilyn v. City of Palm Springs **(2023) 88 Cal.App.5th 607**

In 2016, the City of Palm Springs (City) approved a plan to install "Forever Marilyn," a 26-foot-tall, 34,000-pound statue of the actress Marilyn Monroe (Statue or Project), in a public park in the City. In late 2020, the City approved a change to the proposed location of the Statue to a nearby City street, creating a vehicle-free, pedestrian-only "art walk." The terms of this plan involved the vacation of the public's vehicular access rights on the portion of the street where the Statue was to be located. After approval of the plan, the City filed an Notice of Exemption (NOE) for the Project on December 29, 2020, under CEQA's "Class 1" exemption for existing facilities. (CEQA Guidelines, § 15301.)

In January of 2021, the Committee reached out to the City to inquire whether the City still intended to close vehicular access to the street through the vacation process, and the City Attorney responded in February that the City, instead, intended to temporarily restrict vehicular access to the street because the City was unlikely to meet the statutory requirements necessary to

vacate the street. The City's Development Services Director authorized the temporary street closure in March of 2020, and the Committee filed an amended petition in April alleging that the Project would have adverse environmental impacts on traffic, aesthetics, and historical resources. The City demurred to the CEQA allegation on the grounds that it was untimely because it was not asserted within 35 days of the filing of the NOE, and the trial court sustained the demurrer without leave to amend.

On appeal, the Committee asserted that filing the NOE did not trigger the shortened 35-day statute of limitations because the City's decision after the NOE was filed, to temporarily close the street instead of vacating it, represented a substantial change to the Project that frustrated CEQA's goal of informed public participation. Primarily relying on two court decisions, *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929 and *Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 429, both of which dealt with post-approval changes to projects and lack of public notice, the Court agreed with the Committee that the City's decision not to permanently vacate the street after filing the NOE was a substantial change to the Project that reset the statute of limitations to 180 days from the time the City informed the Committee of the decision.

Although the City argued that the temporary closure was essentially the same the vacation and the revised-Project would likely have less environmental impacts as a result, the Court disagreed, finding that the type of vehicular access restrictions were materially different and that the duration of the closure "surely could have significantly different environmental impacts." Moreover, the City's failure to notify the public about the change deprived the public of the chance to evaluate the changed project and make its own decisions to challenge the Project. Applying the 180-day statute of limitations from the date that the City informed the Committee of its decision not to vacate the street, the Court held that the Committee's CEQA challenge was timely, and ordered the trial court to vacate its order sustaining the demurrer without leave to amend.

Click here for Downey Brand's full analysis of this opinion.

Procedural Issues

***City of San Clemente v. Department of Transportation* (2023) 92 Cal.App.5th 1131**

In 2006 and 2013, the Foothill/Eastern Transportation Corridor Agency (Corridor Agency) approved the extension of State Route 241 through portions of southern Orange County, which would run through conservancy land and other open space. After years of litigation with Sierra Club, National Audubon Society, Defenders of Wildlife, and Natural Resources Defense Council (collectively, Environmental Parties), among others, the Corridor Agency and Environmental Parties entered into a settlement agreement (Settlement) requiring any highway extension to take place outside of an "Avoidance Area" encompassing environmentally sensitive, undeveloped lands east of San Clemente.

Shortly thereafter, fearing the results of the Settlement would cause the Corridor Agency to re-route extension of the highway near their community, the Association began attempts to set aside

the Settlement, taking the position that the Settlement's protection of the Avoidance Area was beyond the Corridor Agency's authority. After a motioned hearing, the Court determined that the Settlement did not restrict the Corridor Agency's discretionary authority, and the Corridor Agency sought leave to file dispositive motions against the Association's claims. Also, by this time, the Corridor Agency had already decided to route the highway extension away from the Association's community, choosing a cheaper, more efficient alternative route. The Association subsequently stipulated to dismissal of their lawsuit. The Association and Environmental Parties sought to recover attorney's fees under Code of Civil Procedure Section 1021.5 (Section 1021.5), and the trial court rejected both motions but awarded costs to both the Corridor Agency and Environmental Parties as prevailing parties.

On appeal, the Association argued that the award of attorney's fees was proper as their lawsuit was the catalyst that caused the Corridor Agency to abandon its plans to extend the highway near their community. The Court disagreed, finding the trial court's determination—that the lawsuit was not a substantial factor in the Corridor Agency's decision to pick a different route—was supported by substantial evidence and, therefore, not an abuse of the trial court's discretion. Considering Section 1021.5 requires the plaintiff to have achieved their primary relief sought, the Court, further, upheld the trial court's finding that the Association's primary litigation objective was to invalidate the Settlement, not to stop a specific highway extension route. Having determined that the Association's litigation was not the catalyst for the Corridor Agency's change in plans, the Court also found that it was logical to conclude that the Association was not a prevailing party in the litigation and upheld the award of costs to Environmental Parties and the Corridor Agency.

Conversely, Environmental Parties argued on appeal that they were entitled to attorney's fees because they were successful parties whose participation was necessary in enforcing an important right benefitting the public, and that the trial court erred in misapplying an exception to awarding such fees. Under this exception to application of Section 1021.5, even if the party qualifies for the award of attorney's fees, the court need not make an award where the losing party is not the type of party upon whom private attorney general fees are meant to be imposed. Under this exception, however, when a party initiates litigation that is determined to be detrimental to a public interest, attorney's fees can be imposed. Although the Association argued that they did not seek to adversely impact public rights and were only seeking to avoid a highway extension whose route was chosen based on illegal decisions, the Court determined that the Association, in fact, sought to curtail or compromise important public rights and that Environmental Parties not only helped to secure those public rights through the Settlement but also defended them in litigation against the Association.

The Court held that Section 1021.5 does not preclude the award of attorney's fees where a litigant defends against a suit that sought to limit the government's power to protect important public rights. Because the trial court never actually addressed the threshold question of whether Environmental Parties were entitled to attorney's fees under Section 1021.5, the Court—after determining that Environmental Parties' defense resulted in the enforcement of an important right affecting the public interest that conferred a benefit on the general public—remanded to the trial court the factual determination of whether Environmental Parties' private enforcement actions were, in fact, necessary. In doing so, the Court noted that the trial court should consider

the fact that Environmental Parties were named by the Association as real parties in interest and did not seek to intervene in the litigation on their own.

Click here for Downey Brand's full analysis of this opinion.

Tulare Lake Canal Company v. Stratford Public Utility District **(2023) 92 Cal.App.5th 380**

In order to accommodate construction of a 12.5-mile, 48-inch water pipeline that Sandridge Partners, L.P. (Sandridge) planned to use for irrigating crops on different portions of its property (Project), the Stratford Public Utilities District (SPUD) gifted Sandridge a 380-foot long easement under the Tulare Lake Canal, a right-of-way owned by the petitioner, Tulare Lake Canal Company (TLCC). After Sandridge began preparing to install the pipeline through TLCC's right-of-way, TLCC filed a petition alleging SPUD had violated CEQA by failing to conduct any environmental review before granting the easement. In a separate action not discussed further, TLCC also sued Stratford for trespass.

Applying the interrelated factors test for issuing a preliminary injunction, which balances the likelihood of prevailing on the merits and the balance of harms to the parties should relief be granted, the trial court determined that, although approval of the easement was a project under CEQA and TLCC was likely to prevail on its CEQA claim, nothing in the record indicated that allowing the project to move forward would cause harm to the general public. Accordingly, the trial court denied TLCC's motion for preliminary injunction, and TLCC timely appealed.

On appeal, Sandridge argued any CEQA violation that may have occurred was trivial and would not cause any irreparable harm. After determining SPUD was a public agency under CEQA and its approval of the easement was discretionary, the Court held SPUD's failure to conduct any environmental review before approving the easement harmed the public's interest in informed decisionmaking about projects with potentially significant environmental effects. Accordingly, the trial court should have taken this harm to the public's interest into account when evaluating the relative balance of harms between parties under the interrelated factors test.

Although the Court declined to adopt a judicially-created "presumption that violation of CEQA's information disclosure provisions causes irreparable harm" so as to automatically warrant issuance of a preliminary injunction, the Court also refused to find that noncompliance with CEQA's information disclosure requirements must be accompanied by evidence of actual environmental harm in order for a preliminary injunction to issue. Instead, the Court took the middle ground, holding that an agency's failure to abide by CEQA's informational disclosure provisions is a harm to the public interest that must be considered when balancing the relative harms likely to result from a decision to grant or deny a preliminary injunction. Ultimately, the Court reversed the trial court's order denying TLCC's request for injunction and remanded to the trial court to reconsider application of the interrelated factors test, taking into account the public's interest in informed decisionmaking under CEQA.

Click here for Downey Brand's full analysis of this opinion.

***Anderson v. County of Santa Barbara* (2023) 94 Cal.App.5th 554**

The Hot Springs Trail is a popular hiking trail in Montecito near East Mountain Drive. Hikers park in a handful of spaces near the trailhead or on some adjacent public roads. In violation of state and local law, some residents installed landscaping, boulders, smaller rocks, trees, bushes, and signs in the public right of way on East Mountain Drive to prevent hikers from parking in front of their residences. These encroachments effectively narrowed portions of East Mountain Road to a single lane in some places, creating a safety hazard.

In September 2021, Santa Barbara County's Public Works Department (Department) received funding to research, plan, and implement public parking near Hot Springs Trail. As a preliminary measure, County sent notices to three property owners on East Mountain Drive requiring that they remove unpermitted encroachments from the public right of way within 60 days.

The Department filed a Notice of Exemption from CEQA because removing the encroachments would only involve the restoration of East Mountain Drive to accommodate safe use and would have no environmental impact. Local property owners (Petitioners) filed a petition for writ of mandate asking the trial court to prevent the removal of the encroachments until County complied with CEQA. They alleged that County's action would lead to additional parking, more hikers using the trail, and make it more difficult to evacuate the neighborhood in the event of a fire.

Agreeing with Petitioners, the trial court issued a preliminary injunction prohibiting the removal of encroachments by County's Road Commissioner (Road Commissioner). They found that removing encroachments was only a portion of a larger project to create substantial parking spaces and could, therefore, not address the merits of the parties' claims because County did not properly engage with CEQA's environmental review process. In addition, the trial court determined exemptions to CEQA were inapplicable because the project's location next to an Environmentally Sensitive Habitat area overlay zone presented an unusual circumstance that needed to be evaluated. Weighing the balance of harms, the trial court held that the harm caused by the potential permanent destruction of residents' encroachments outweighed County's interest in providing safe roads and parking.

The trial court also ordered a peremptory writ to void any determination made by County to create parking at the trailhead and to suspend County's efforts to enforce encroachment laws. The trial court emphasized that they would retain jurisdiction until County complied with CEQA or the Court of Appeal reversed the order.

On appeal, County argued that removing encroachments was exempt from CEQA pursuant to the guidelines made under Public Resource Code § 21083 because it only served to maintain an existing road in East Mountain Drive, it was a minor public alteration on land, and County was only trying to enforce laws that prohibited unpermitted encroachments in the roadway. In addition, they claimed that removing encroachments presented no unusual circumstances because the task was focused only on restoring the pre-existing road.

Petitioners requested that the Court of Appeal take judicial notice of the trial court's statement of decision and dismiss the appeal as moot because no live controversy existed. While they took judicial notice of the decision, the Court of Appeal declined to dismiss the appeal as moot. They found that, in addition to being within the Court of Appeal's broad discretion to address issues of public interest, the case presented a live controversy because a reversal of the preliminary injunction would impact the peremptory writ and allow County to proceed with removing encroachments.

The Court of Appeal reversed the order granting a preliminary injunction based on its analysis of two factors: (1) the likelihood that the plaintiff would prevail on the merits on trial, and (2) the interim harm that Petitioners would likely sustain if the trial court denied the injunction as compared to the harm that County would likely to suffer if the trial court issued the preliminary injunction.

The Court of Appeal found that Petitioners were unlikely to prevail on the merits. In reaching this conclusion, the Court explained that the trial court had erred in conflating the removal of encroachments with a separate, larger parking restoration project that had yet to materialize. The Court clarified that the trial court should have considered the encroachment removal independently because it had the independent utility of bringing the properties in compliance with laws prohibiting encroachments in the public right of way, and benefitted public safety. While the future parking project likely would trigger the requirements of CEQA, removing encroachments fit within an exception to CEQA because it was a minor alteration and served only to restore East Mountain Drive to its original state.

Furthermore, the Court found no unusual circumstances that would bar an exemption to CEQA. Because the project focused solely on removing encroachments, County and the Road Commissioner had already considered the setting in determining that the encroachment removal project would only involve the restoration of an existing roadway.

Finally, the Court held that the trial court erred in preventing the Road Commissioner from enforcing laws that prohibit encroachments on public right of ways because CEQA should not act as a limitation on the permissible authority of a public officer's duty to execute law for the public benefit.

Balancing the harms of both parties, the Court of Appeals held that the trial court had abused its discretion when it determined County had no legitimate interest in enforcing laws against encroachment. The Court found evidence in the record indicating that encroachments on East Mountain Drive presented safety risks, and a lack of evidence to support the conclusion that the removal of the encroachments would irreparably harm Petitioners. As further evidence, legislative statutes and ordinances adopted by the state and County prohibiting encroachments in the public right of way demonstrated that County's action would serve the public interest. Accordingly, the Court reversed the trial court's decision granting a preliminary injunction and remanded.

Other

***McCann v. City of San Diego* (2023) 94 Cal.App.5th 284 (*McCann II*)**

In *McCann v. City of San Diego* (2021) 70 Cal.App.5th 51 (*McCann I*), Margaret McCann (Petitioner), a resident of a neighborhood within a utilities undergrounding project proposed by the City of San Diego (City), challenged the need for the underground system to be supplemented with above-ground transformers housed in three-foot-tall metal boxes on the public right-of-way. Petitioner alleged the City violated CEQA on four grounds by failing to properly consider the environmental impacts of two undergrounding projects. The Court of Appeal rejected all grounds except the assertion that substantial evidence did not support the City's finding that the Projects would not have a significant environmental impact due to greenhouse gas (GHG) emissions. The Court held that because the City failed to analyze whether the mitigated negative declaration (MND Projects) were consistent with the GHG reduction measures included in the City's Climate Action Plan, substantial evidence did not support the City's finding that the Projects would not have a significant environmental effect. The judgment was reversed as to the MND Projects and the Court directed the trial court to issue a writ ordering the City to set aside the resolutions that approved the Projects.

The trial court subsequently issued a writ consistent with the Court of Appeal's order. Thereafter, the City rescinded the MND Projects' approvals and asked the trial court to discharge the writ. Petitioner filed an objection to the City's return to the writ and argued the writ should not be discharged until the City proved compliance with CEQA through the preparation of a legally sufficient environmental analysis of the MND Projects' GHG emissions. The City filed a response in which it argued it fully complied with the terms of the writ by rescinding the Project approvals. The trial court sustained Petitioner's objection and declined to discharge the writ. The City appealed, arguing the trial court exceeded its jurisdiction by failing to discharge the writ after the City fully complied with the writ's requirements along with the remedial provisions of Public Resources Code section 21168.9(a)(1). Petitioner agreed that the writ could be discharged if the City no longer intended to move forward with the Projects because CEQA does not apply to rejected or denied projects. However, Petitioner argued the City intended to re-analyze the GHG emissions and recirculate the MND, and thus, Public Resources Code section 21168.9(b) imposed a mandatory duty on the trial court to exercise continuing jurisdiction over the proceedings until the CEQA requirements were met.

Public Resources Code section 21168.9 governs the issuance of a peremptory writ of mandate and subsection (a) provides for three types of mandates that may be issued. Once a peremptory writ of mandate has been issued, subsection (b) establishes that the court "should order the agency to file a return by a certain date informing the court of the agency's action in compliance with the writ."

The Court independently interpreted the terms of the writ as a question of law, but reviewed the adequacy of the City's return under an abuse of discretion standard of review because attempting to comply with the writ was, for all practical purposes, an attempt to comply with CEQA. An abuse of discretion here is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.

The Court of Appeal held the writ issued by the trial court did not direct the City to perform any other remedial actions other than rescinding the resolutions that approved the MND Projects and halting any further activity that may have altered the environment. The Court found no abuse of discretion by the City because the City complied with the trial court's writ through its rescission of the resolutions that approved the Projects. The Court explained that voiding a project approval is a remedial mandate authorized under Section 21168.9(a)(1), which the City complied with by rescinding the MND Projects approvals. It then discussed Section 21168.9(c), which confers equitable powers on the trial court to issue orders to compel compliance with a peremptory writ of mandate. However, once an agency has fully satisfied a writ, the trial court cannot continue to have jurisdiction over the matter. Because the Court concluded the City satisfied the writ, it also concluded the trial court's failure to discharge the writ and terminate its jurisdiction constituted an abuse of discretion.

The Court then delved into a statutory interpretation exercise concerning Section 21168.9(b). McCann argued the Section authorized the trial court to retain jurisdiction until it found the City complied with CEQA. The City argued the section only confers limited continuing jurisdiction on a trial court when "the offending project or CEQA determination is *severed* and some non-offending portion of the approval is left in place." The Court found the Section 21168.9(b), as well as case law that applied the section, were clear that the trial court retains jurisdiction to enforce a peremptory writ of mandate "*until* the court has determined that the public agency has *complied with this division* [here, subsections (a)(1) and (2)]."

Petitioner expressed a concern that by discharging the writ, the trial court in effect made a finding that the City complied with CEQA, which would preclude future challenges to the adequacy of the City's environmental review of the MND Projects under the principles of res judicata. The Court of Appeal declined to conjecture about the ways res judicata may or may not affect a future hypothetical project. It reiterated that the MND Projects will not be in compliance with CEQA unless the City performs the required analysis to determine consistency with the Climate Action Plan. The Court held the City fully satisfied the writ by rescinding the MND Projects approvals and thus, the writ must be discharged.

Click here for Downey Brand's full analysis of this opinion.