Brownstein Hyatt Farber Schreck

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Welcome to *CEQA News You Can Use*, a quarterly publication of **Brownstein Hyatt Farber Schreck, LLP's Natural Resources lawyers**. This publication is intended to provide quick, useful bites of CEQA news that we hope can be a resource for your real-time business decisions. That said, it is not and cannot be construed to be legal advice. Enjoy!

1. CEQA *nearly* shut out in Sacramento in 2017

It was a tough year for new CEQA legislation. AB 890 (Medina), which would have overturned the California Supreme Court's *Tuolumne* decision by prohibiting the use of the initiative process to avoid CEQA review, passed out of the California Legislature only to be vetoed by Gov. Brown. Two bills with modest scope did make it through, however. **AB 246** extends the AB 900 litigation streamlining statute for two more years, and **SB 80** requires lead agencies to allow the public to request project notices by email. Stay tuned for an update on 2018 CEQA bills later this year.

2. Update to the CEQA Guidelines pending with the Natural Resources Agency

In late November 2017, the Governor's Office of Planning & Research (OPR) wrapped up four years of work when it conveyed a package of proposed CEQA Guidelines updates to the Natural Resources Agency for formal rulemaking. You can review the proposed changes **here**. While the most prominent change to the Guidelines implements SB 743, which established a new method to measure transportation impacts based on vehicle miles traveled (VMT) instead of level of service (LOS), the update includes revisions to the CEQA checklist, tiering, greenhouse gas and water supply analyses, exemptions, and more. The Natural Resources Agency will hold public hearings on March 14 and 15, and written comments on **its proposed changes** must be submitted by March 15.

3. When navigating administrative exhaustion, best to proceed with caution

Can forgetting to check a box on an administrative appeal form terminate your CEQA suit before it even starts? In brief, yes, said the Fourth District Court of Appeal in ***Clews Land & Livestock,***

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***LLC v. City of San Diego* (Jan. 2018)**. In Clews, the petitioners opposed the City of San Diego's land use and environmental approvals for a new school. The city uses a bifurcated approval process where a hearing officer initially decides the land use and environmental approvals for a project. The decision on the land use approvals may then be appealed to the Planning Commission, while the environmental approval may be appealed to the City Council. After the hearing officer approved the land use approvals and a mitigated negative declaration ("MND") for the project, the petitioners submitted a city form indicating they would be appealing the land use approvals to the Planning Commission. However, the petitioners failed to check a box on the form indicating they were also appealing the approval of the MND to the City Council. The court found this failure to be a complete bar and defense to the petitioners' lawsuit challenging the city's adoption of the MND for the project.

4. Project conditions do not constitute "mitigation" where a city has already determined that the project is exempt under CEQA

In ***Protect Telegraph Hill v. City & County of San Francisco* (Sept. 2017)**, the court considered whether a categorical exemption under CEQA was unlawful because the planning commission imposed conditions of approval related to traffic and pedestrian safety. The court held that the exemption was proper—a city has the authority to impose conditions through the conditional use process even though it has already determined through the CEQA process that the impacts of the project would be less than significant. Furthermore, the court rejected the appellant's claim that the unusual circumstances exception applied due to the project's "unequivocally rare" location and site constraints. The court reasoned that such a claim was not sufficient to trigger the unusual circumstances exception when the project conformed to zoning requirements for the area.

5. SANDAG's CEQA saga finally over?

It's been a long road for the San Diego Association of Governments (SANDAG) since its 2011 approval of the 2050 Regional Transportation Plan (RTP), a 40-year blueprint for transportation and development. Trial and appellate decisions took issue with the way SANDAG's EIR analyzed greenhouse gas (GHG) emissions, but the Supreme Court in ***Cleveland National Forest Foundation v. San Diego Association of Governments* (Jul. 2017)** upheld SANDAG's GHG analysis, although the court admonished that future analysis should be harmonized with California's climate protection targets. On remand, the Court of Appeal **found** a number of other deficiencies with the mitigation measures and alternatives analysis in SANDAG's plan, but because SANDAG had already approved an updated Regional Transportation Plan in 2015, its approval of the originally challenged 2011 plan was allowed to stand.

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6. Failure to prove organization was not just a litigation front proves fatal to CEQA challenge

In ***CREED-21 v. City of Wildomar* (Dec. 2017)** (*CREED*), Walmart challenged the plaintiff's standing to bring suit under CEQA by seeking discovery to determine whether CREED-21's members would be affected by the proposed project. In most cases, CEQA plaintiffs can easily show they are members in the community, but here Walmart had evidence that CREED-21 had only two members (both based in San Diego) and shared an address with its attorney. After CREED-21's attorney failed to comply with various court orders to produce a witness for a deposition, the trial court dismissed the suit and the appellate court affirmed.

7. Architectural renderings not required for project alternatives

In ***Los Angeles Conservancy v. City of W. Hollywood* (Dec. 2017)**, the petitioner argued that the EIR's analysis of an alternative that would have preserved a building potentially eligible for listing on the California Register of Historical Resources was "conclusory and insufficient" because it did not include architectural drawings. In rejecting the petitioner's argument, the court found no CEQA requirement that an EIR must include design plans for project alternatives.

This document is intended to provide you with information regarding CEQA. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact one of the attorneys listed below or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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