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September 28, 2016

California Supreme Court Sets New Deferential Standard for Supplemental CEQA Review

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In Friends of the College of San Mateo Gardens v. San Mateo Community College District*, No. S214061 (Cal. September 19, 2016), the California Supreme Court rejected the "new project" test for determining whether a changed project remains similar enough to the original project for supplemental CEQA review to be appropriate. Instead, the court created a different threshold inquiry for lead agencies, which asks whether the previous environmental document "retains any relevance" in light of changes to the project and whether "major revisions" to the previous environmental document are required. Unlike the "new project" determination, reviewed by a court de novo, the "retains relevance" inquiry gives judicial deference to the lead agency's determination.*

The "new project" versus "changed project" distinction is important because courts are deferential to lead agencies in cases challenging supplemental CEQA review (in the form of an Addendum, Supplemental Negative Declaration ("Neg Dec") or Supplemental Environmental Impact Report ("EIR")). By contrast, initial CEQA review gets a higher level of scrutiny, especially an initial Neg Dec which is reviewed under the plaintiff-favorable "fair argument" standard. Thus, the deference accorded to lead agencies in making a determination whether the "remains relevant" test is met under *Friends* could greatly impact the scrutiny that modified projects receive from the courts.

In *Friends*, the California Supreme Court considered the appropriateness of a CEQA Addendum for minor project changes to a previously approved project. Under CEQA, a project which evolves after prior approval may require either supplemental or, if the project has changed entirely, new environmental review. CEQA Section 21166 limits the circumstances under which a lead agency must undertake additional review to instances where there are substantial changes in the project, substantial changes to

the circumstances under which a project is undertaken, or new information becomes available. *See also* CEQA Guidelines Section 15162.

Supplemental review can take the form of a Subsequent EIR or Neg Dec or a Supplemental EIR or Neg Dec if new significant environmental effects or a substantial increase in the severity of previously identified significant effects will occur based on changes in the project, circumstances or new information. CEQA Guidelines Sections 15162 and 15163. If none of the conditions in CEQA Guidelines Section 15162 are met but some changes to the document are needed, an agency may proceed with an Addendum.

The project at issue in *Friends*, originally adopted with a Neg Dec, involved multiple improvements on the college campus. In the Addendum, the college proposed to demolish rather than renovate one of the existing buildings, as had been analyzed in the Neg Dec. The demolition would also remove a popular public garden and the Friends of the College of San Mateo Gardens sued. The Friends argued that eliminating the garden so greatly altered the project that it was in effect a "new project," which should have been evaluated in a new EIR or Neg Dec, and therefore subject to a higher standard of judicial review.

The court first rejected the notion that a "new project" test applies as a threshold inquiry for a lead agency using supplemental CEQA review for a modified project. In doing so, the court disagreed with *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, which held that a lead agency must first ask the threshold question "is the project a new project or the same project?" before considering whether the statutory criteria for supplemental CEQA review are met. In other words, "does the project have new or substantially more severe impacts due to project changes, changed circumstances or new information?" CEQA Section 21166. Moreover, *Lishman* held that the "new project" threshold question was a question of law, which the reviewing court must consider de novo, without deference to the lead agency.

By rejecting the "new project" test, the court agreed in part with *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, which criticized *Lishman* and found that CEQA does not impose a threshold "new project" question to determine whether a project is a new or modified project. Under *Mani Brothers*, a lead agency evaluating a changed project under CEQA proceeds directly to the question of whether the changed project, circumstances or information would trigger the statutory criteria for supplementation based on new or substantially more severe impacts, a determination which is subject to deferential judicial review.

However, despite criticizing the *Lishman* "new project" test, the Supreme Court agreed with the *Lishman* court that there is a threshold determination to be made:

> "A decision to proceed under CEQA's subsequent review provisions must thus necessarily rest on a determination — whether implicit or explicit — that the original environmental document retains some informational value."

While the court rejected the "new project" test in the "abstract," at the same time it acknowledged that the lead agency must ask the threshold question whether the CEQA review for the old project "remains relevant" and continues to have "informational value." If the project were so changed as to render the previous CEQA review "wholly irrelevant," the statutory criteria in CEQA Section 21166 for supplemental review of a previous project would not be reached.

From a practical standpoint, whether one calls it a "new project" test or a "remains relevant/informational value" test, what matters for California agencies and practitioners is that the court held that there is a threshold question to be answered in deciding whether supplemental CEQA review is appropriate: whether

the prior document remains relevant and has informational value based on project changes or whether the project has changed so much as to become a new project and render the prior review irrelevant. Either way, the supplemental review criteria in CEQA Section 21666 and CEQA Guidelines Section 15162 apply only after the lead agency determines, based on substantial evidence, that the changed project is sufficiently similar to the old project such that the prior environmental review remains relevant.

At the same time as it created a new threshold inquiry, the court departed from *Lishman* in concluding that, far from reviewing the threshold decision independently, judicial review must be highly deferential to an "extraordinary" degree:

> "We expect occasions when a court finds no substantial evidence to support an agency's decision to proceed under CEQA's subsequent review provisions will be rare, and rightly so; —a court should tread with extraordinary care before reversing an agency's determination, whether implicit or explicit, that its initial environmental document retains some relevance to the decision-making process."

The court also rejected the plaintiffs' arguments that CEQA does not authorize Supplemental Neg Decs, only Supplemental EIRs, and remanded the case for the trial court to determine whether the Addendum was in fact appropriate based on the absence of new or substantially more severe impacts, since the trial court had not reached that issue.

Because of the court's framing of the threshold question for supplemental review of a modified project, agencies and applicants would be wise to put affirmative evidence in the record demonstrating that the prior CEQA document remains relevant and has informational value to the revised project, to head off opponents who will inevitably argue that their project constitutes a case where the low bar for the threshold question is not met, requiring project environmental analysis to begin anew.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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